CRIMINAL PROCEDURE

STUDENT EDITION

Sixth Edition

2023 Pocket Part for use in 2023–2024

Wayne R. LaFave
David C. Baum Professor of Law Emeritus and
Center for Advanced Study Professor Emeritus
University of Illinois

Jerold H. Israel
Alene and Allan F. Smith Professor of Law Emeritus,
University of Michigan
and Ed Rood Eminent Scholar Emeritus,
University of Florida, Levin College of Law

Nancy J. King
Lee S. & Charles A. Speir Professor of Law,
Vanderbilt University

Orin S. Kerr
William G. Simon Professor of Law,
University of California, Berkeley

Andrew D. Leipold
Edwin M. Adams Professor
University of Illinois College of Law

HORNBOOK SERIES®

WEST ACADEMIC PUBLISHING

860 Blue Gentian Road, Suite 350
Eagan, MN 55121
1-877-888-1330

Printed in the United States of America

ISBN: 979-8-88786-010-7

Preface

This pocket part covers the United States Supreme Court cases decided since publication of the Main Volume through the end of the October 2022 Term (i.e., June 2023).

Following the 2020 pocket part, Wayne LaFave retired, and subsequent updates for his chapters have been the responsibility of the remaining co-authors.

JEROLD H. ISRAEL
NANCY J. KING
ORIN S. KERR
ANDREW D. LEIPOLD

July 2023

Table of Contents

CRIMINAL PROCEDURE

STUDENT EDITION

Sixth Edition

2023 Pocket Part for use in 2023–2024

Part 1

INTRODUCTION AND OVERVIEW

Chapter 1

AN INTRODUCTION TO THE "CRIMINAL JUSTICE PROCESS"

§ 1.6 Sources of Legal Regulation

(New text, p. 46, line 19, after "Procedure")

Relying on these three cases, *United States v. Tsarnaev*[30.1] added that "lower courts cannot create prophylactic supervisory rules that circumvent or supplement legal standards set out in decisions of this court."[30.2] As the Supreme Court had repeatedly held that trial courts have "broad discretion" in determining what questions to ask prospective jurors, a court of appeals "could not supplant the district court's broad discretion" as was done here, when the First Circuit "prescribed a specific line of questioning" to be pursued in all high profile cases.[30.3]

[30.1] ___ U.S. ___, 142 S.Ct. 1024, 212 L.Ed.2d 140 (2022).

[30.2] The opinions in *Tsarnaev* held open the possibility of a challenge to the very existence of lower court supervisory authority. The Court was divided 6–3 on overturning a First Circuit ruling, with only the majority reaching the merits of the jury selection issue, where the First Circuit had relied upon a supervisory authority ruling. A footnote in the majority opinion acknowledged that "some jurists have questioned this Court's supervisory authority * * * and others have questioned whether courts of appeals enjoy the same power." However, "the Government [here] does not challenge the general existence of the Court of Appeals supervisory power." Justice Barrett, in a concurring opinion (joined by Justice Gorsuch), noted "skepticism that the courts of appeals possess such supervisory power in the first place." Justice Breyer's dissent (not joined in this part by Justices Sotomayor and Kagan) responded that "our precedents clearly recognize the existence of such a power" in the courts of appeals. That was "not surprising," he added, as "a degree of authority for the courts of appeals, closer to the fray, to issue at least some supervisory rules facilitates the flexibility needed in our geographically dispersed multi-circuit system."

[30.3] See the discussion in § 23.2(f) at note 43.1.

Chapter 2

THE CONSTITUTIONALIZATION OF CRIMINAL PROCEDURE

§ 2.6 Application of Selective Incorporation

(New text, p. 78, line 28, after "juries")

This anomalous result was overturned in 2020, when *Ramos v. Louisiana*[28.1] held that the incorporated Sixth Amendment required a unanimous verdict and that requirement therefore applied to both state and federal juries.

[28.1] Ramos v. Louisiana, ___ U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (discussed in § 22.1(e) at note 37).

(New footnote 30.1, p. 79, line 19, between "fines," " and "and (3)")

[30.1] The subsequent ruling in Timbs v. Indiana, ___ U.S. ___, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019), concluded that the excessive fines prohibition is an "incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause." Justice Thomas, rejecting the use of due process to "encompass a substantive right," argued that incorporation here should be based on the "privileges and immunities clause." Justice Gorsuch, concurring, noted that "as an original matter, the appropriate vehicle for incorporation may well be "[the privileges and immunities clause] * * * but nothing in this case turns on that question."

§ 2.9 Guideposts for Interpretation

(Add to footnote 122, p. 117)

Consider also Vega v. Tekoh, 597 U.S. ___, 142 S.Ct. 2095, 213 L.Ed.2d 479 (2022), discussed in § 9.5(b). The Court majority there stressed that *Dickinson*, although establishing the constitutional grounding for *Miranda*, recognized that it was a prophylactic rule, and did not "equate a violation of the *Miranda* rules with an outright Fifth Amendment violation." As such, the remedy that followed was tied to *Miranda*'s prophylactic purpose. Accordingly, that remedy did not go beyond suppression at trial to include an authority to sue a police officer for damages under § 1983. That authority "would have little additional deterrence value and permitting such claims would cause many problems."

Part 2

DETECTION AND INVESTIGATION OF CRIME

Chapter 3

ARREST, SEARCH AND SEIZURE

§ 3.1 The Exclusionary Rule and Other Remedies

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

[101.1] In Manuel v. City of Joliet, 580 U.S. 357, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017), the Court concluded: "The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause."

Sometimes an arrest is challenged instead on First Amendment grounds, as where it is alleged that the plaintiff was arrested in retaliation for his speech. See, e.g., Nieves v. Bartlett, ___ U.S. ___, 139 S.Ct. 1715, 204 L.Ed.2d 1 (2019) (holding that the plaintiff in such a case must show not only that the officer acted with retaliatory motive and that plaintiff was injured, but also that the motive was a "but for" cause of the injury, which "as a general matter" requires the plaintiff to plead and prove absence of probable cause, but "the no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been").

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

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

[109.1] Lozman v. City of Riviera Beach, ___ U.S. ___, 138 S.Ct. 1945, 201 L.Ed.2d 342 (2018), emphasizing that Lozman did not sue the individual officer but only the city, that the suit alleged a "premeditated plan," which "can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer," and that Lozman's speech, grounded in the right to petition, ranked "high in the hierarchy of First Amendment values."

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

Recent decisions on the scope of *Bivens* have shown significant skepticism about the doctrine on the ground that Congress, not the courts, should craft civil remedies for violations. The Court's most recent decision, *Egbert v. Boule*,[111.1] holds that a *Bivens* remedy is not available if there is "*any* rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed." As Justice Gorsuch points out in a concurrence, this approach renders the *Bivens* remedy so uncertain that it may amount to no remedy at all. The future of *Bivens* at the Supreme Court presently remains uncertain.

[111.1] ___ U.S. ___, 142 S.Ct. 1793 (2022).

§ 3.2 Protected Areas and Interests

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

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

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

[215.1] ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

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

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

[215.2] 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

[215.3] 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976).

§ 3.3 Probable Cause

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

Illustrative is *District of Columbia v. Wesby*,[292.1] where D.C. police, responding to complaints of a loud, late-night party at a home, ultimately arrested the 21 partygoers for unlawful entry (defined as requiring they

knew or should have known they entered without the owner's permission). In the partygoers' civil suit claiming violation of their Fourth Amendment rights, the lower court held probable cause was lacking, given that each of the partygoers had "claimed that someone had invited them to the house." The Supreme Court, concluding otherwise, asserted that the lower court had erred because it improperly "viewed each fact in isolation, rather than as a factor in the totality of the circumstances." Assessing "the plausibility of the explanation itself" in light of "all the surrounding circumstances," the Supreme Court concluded there *was* probable cause, given "the condition of the house" (vacant for months with no sign of habitation), "the partygoers' conduct" (strip club in the living room, sexual intercourse in the bedroom), and the "partygoers' reaction to the officers" ("scattering and hiding," giving "vague and implausible responses").

[292.1] District of Columbia v. Wesby, ___ U.S. ___, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018).

§ 3.5 Seizure and Search of Persons and Personal Effects

(New text, p. 240, last line after "test")

That last comment in *Birchfield* was relevant in *Mitchell v. Wisconsin,*[445.1] where the issue was "what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test." The plurality opinion, noting the added difficulties in dealing with the unconscious driver himself and with the other problems in such circumstances, e.g., "attending to other injured drivers or passengers and preventing further accidents," concluded that "when the driver is unconscious, the general rule is that a warrant is not needed." But, the Court added, it did "not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if the police had not been seeking BAC information and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." A concurrence objected to adoption of "a difficult-to-administer rule" that will "burden both officers and courts who must attempt to apply it," and thus preferred a "per se" exigent circumstances rule in all such cases. The dissenting Justices, on the other hand, objected to use of a rebuttable "presumption of exigent circumstances," in contrast to the usual rule that it is for the prosecution to establish the exigent circumstances exception on a case-by-case basis.

[445.1] ___ U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019).

§ 3.6 Entry and Search of Premises

(New text, p. 250, line 12, after "offenses")

The Supreme Court returned to the relationship between minor crimes, exigent circumstances, and hot pursuit in *Lange v. California.*[482.1] Mr. Lange was driving near his home when the police turned on their overhead lights,

signaling him to stop. Lange instead pulled into his driveway and then into the garage attached to his house. A police officer followed on foot into the garage and questioned Lange, eventually arresting him for driving under the influence.

The California courts held that the officer's "hot pursuit" of Lange into his garage (which the Court treated as part of the house) was categorically permissible as an exigent circumstance. But the Supreme Court disagreed. When a person is only suspected of committing a misdemeanor, said the Court, flight alone "does not always supply the exigency that this Court has demanded for a warrantless home entry." In such cases, a court must look at the totality of the circumstances, including not only the fact of flight, but also the seriousness of the alleged crime, the nature of the flight, the risk of evidence destruction, and the risk to the officer or others to determine whether the entry was reasonable.

Justice Kagan's opinion for the Court in *Lange* was narrow; it emphasized that was simply rejecting a categorical rule that it was always reasonable for the police to follow a suspect into a home regardless of the crime charged. It also acknowledged that even under a case-by-case approach for misdemeanors, on the facts "many, if not most, cases [will] allow a warrantless home entry." In his opinion concurring in the judgment, Chief Justice Roberts claimed that in prior cases the Court had "repeatedly and consistently reaffirmed that hot pursuit is itself an exigent circumstance," and warned that the Court's case-by-case approach for suspected misdemeanors would be difficult for officers in the field to administer.

[482.1] ___ U.S. ___, 141 S.Ct. 2011, 210 L.Ed.2d 486 (2021).

(New text, p. 260, line 4, after "circumstances")

The Court has also rejected the notion that there is a freestanding "community caretaking exception" to the warrant requirement that allows the police to enter homes. Although this exception has been recognized in some settings for automobile searches, the enhanced Fourth Amendment protection for homes requires a more particularized justification.[524.1]

[524.1] Caniglia v. Strom, ___ U.S. ___, 141 S.Ct. 1596, 209 L.Ed.2d 604 (2021). See also § 3.7(e) (discussing community caretaking searches of automobiles).

§ 3.7 Search and Seizure of Vehicles

[554] Regarding the broader issue of whether the *Carney* automobile exception applies to a search of a vehicle parked within the curtilage of a dwelling, the Court in Collins v. Virginia, ___ U.S. ___, 138 S.Ct. 1663, 201 L.Ed.2d 9 (2018), answered in the negative, reasoning that this this exception extends no further than the vehicle itself, and thus did not justify physical entry of the curtilage to conduct a search under a tarp covering a motorcycle, in light of Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409, 183 L.Ed.2d 495 (2013) (holding that the "implied license" to enter the curtilage does not extend to police activity having the "purpose" to "conduct a search"). Because both *Jardines* and *Collins* were search cases and not seizure cases, it may be less than certain what the result would be if the cycle had not been covered, so that the officer had probable cause to seize it before entering the curtilage for the sole purpose of making a seizure, but it may be significant that the Court said that the reasoning underlying existing

limits on "warrantless entry into the home," such as that "under the plain-view doctrine, 'any valid warrantless seizure of incriminating evidence' requires that the officer 'have a lawful right of access to the object itself,' applies equally well in this context."

§ 3.8 Stop and Frisk and Similar Lesser Intrusions

(New text, p. 278, line 5 after "waist")

One important question raised by the language in *Terry* quoted above is whether, when the Court stated the reasonable suspicion test in terms of what the officer concluded "in light of his experience," this requires special knowledge unique to police officers. That question was not specifically addressed by the Court until over fifty years later in *Kansas v. Glover*.[607.1] In *Glover*, the majority answered in the negative the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license." To this, a dissenting Justice objected that "to presume that unlicensed drivers routinely continue driving" after license suspension, labeled by the majority as a "common sense" conclusion, did not suffice, as the *Terry* "reasonable suspicion inquiry does not accommodate the average person's intuition," but instead only "permits reliance on a particular type of common sense—that of the reasonable officer, developed through her experience in law enforcement." The Court responded:

> Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite. * * * The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis. * * *
>
> The dissent's rule would also impose on police the burden of pointing to specific training materials or field experiences justifying reasonable suspicion for the myriad infractions in municipal criminal codes. And by removing common sense as a source of evidence, the dissent would considerably narrow the daylight between the showing required for probable cause and the "less stringent" showing required for reasonable suspicion. Finally, it would impermissibly tie a traffic stop's validity to the officer's length of service.

[607.1] Kansas v. Glover, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412 (2020).

(New text, p. 288, line 4, after "authority' ")

The amount of force applied by the police does not have to be much to constitute a seizure—a "mere touch" can be enough. But the physical contact must be made "with intent to restrain," with intent in this setting being an

objective standard. Thus, an officer's tap on the shoulder to get a person's attention is unlikely on its own to convert a voluntary encounter into a seizure, although a restraining hand to prevent a person from leaving the encounter may do so.

The application of force constitutes a seizure even if the suspect refuses to submit and flees. In *Torres v. Madrid*,[642.1] the police shot a woman who was fleeing in her car, and despite her wounds, she continued her escape. She later sued, claiming that the police had used excessive force, but the lower courts found no seizure had occurred because the police never gained control over the woman. The Supreme Court disagreed, holding that "the application of physical force the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." The Court noted, however, that "a seizure is a single act, and not a continuous fact," that a seizure by force in the absence of submission "lasts only as long as the application of force," and that therefore the suspect in *Torres* had only been seized "for the instant that the bullets struck her."

Torres was a civil case, but it has obvious implications for defendants seeking to exclude evidence in their criminal case. *Hodari D* makes it clear that if a fleeing suspect discards evidence *before* he is improperly seized the evidence is admissible against him. A suspect who is first improperly seized and then escapes, however, may argue that, although he or she was not seized at the time the evidence was abandoned, the decision to discard was the fruit of the Fourth Amendment violation.[642.2]

642.1 Torres v. Madrid, ___ U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021).

642.2 See § 9.4 (discussing fruits of illegal arrests).

§ 3.10 Consent Searches

(New text, p. 332, 8 lines from bottom, after "*Birchfield*")

(or, for that matter, in the subsequent decision in *Mitchell v. Wisconsin*[807.1])

807.1 Discussed at note 445.1 supra. The plurality opinion emphasized that the Court's prior decisions on the subject "have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." The dissent, agreeing on that point, "would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires."

Chapter 4

NETWORK SURVEILLANCE

§ 4.3 Telephone Surveillance and the Fourth Amendment

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

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

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

[10.1] ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

[10.2] Id. at 2217.

[10.3] Id. at 2219.

[10.4] Id.

§ 4.4 Internet Communications and the Fourth Amendment

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

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

[11.1] ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

§ 4.6 The Wiretap Act

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

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

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

[109.1] ___ U.S. ___, 138 S.Ct. 1491, 200 L.Ed.2d 842 (2018).

[109.2] Id. at 1499–500.

§ 4.8 The Stored Communications Act

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

(g) International Issues

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

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

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

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

[172.2] 18 U.S.C. § 2702(b)(9).

[172.3] 18 U.S.C. § 2523(b)(1).

[172.4] 18 U.S.C. § 2713.

[172.5] 18 U.S.C. § 2703(h)(2)(A).

[172.6] 18 U.S.C. § 2703(h)(2)(B).

Chapter 5

POLICE "ENCOURAGEMENT" AND THE ENTRAPMENT DEFENSE

§ 5.1 Encouragement of Crime and the Defense of Entrapment

(Add text as new paragraphs, p. 392, line 3, after "inducement")

Occasionally defendants raise a claim of "sentencing entrapment," which occurs when a defendant is predisposed to commit a lesser crime but is entrapped by the government into committing a crime that carries a more severe punishment.[4.1] Thus, for example, a defendant may claim sentencing entrapment where he was ready and willing to buy a small amount of drugs but the government unfairly persuaded him to buy a larger amount, and the greater drug weight led to a longer prison term. Although successful claims for sentencing entrapment are rare, and not all jurisdictions recognize the claim, in some courts if the defendant can show a lack of predisposition for the more serious offense he or she may be eligible for a lower sentence.

The entrapment defense discussed in this Chapter also should be distinguished from the doctrine of "entrapment by estoppel." This defense rests on a claim that the defendant reasonably relied on information provided by the government about the legality of his conduct, information that turned out to be incorrect. Thus, if defendant is told by a police officer that he is permitted to demonstrate within a certain distance from the courthouse, and then later is arrested for demonstrating in compliance with that information, reasonable reliance on the police officer's word would provide a defense.[4.2] Entrapment by estoppel, and the closely related "public authority" defense recognized by Federal Rule of Criminal Procedure 12.3, rest on similar notions of protecting defendants who might not otherwise have broken the law, and are grounded in due process.

[4.1] See, e.g., United States v. Cortes, 757 F.3d 850, 860 (9th Cir. 2014). See also § 26.4(b).

[4.2] See Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

Chapter 6

INTERROGATION AND CONFESSIONS

§ 6.3 The Prompt Appearance Requirement

(Add text as new paragraph, p. 421, line 8, after "teeth")

So after *Corley*, the rule in federal court is straightforward: if the confession was obtained within six hours of arrest, *McNabb-Mallory* does not bar its admission. If, however, the confession occurred before presentment and beyond the six-hour window, the court must decide whether delaying that long was unreasonable or unnecessary, and if it was, the confession will be suppressed.[51.1]

[51.1] Id. at 322.

§ 6.5 The Privilege Against Self-Incrimination; *Miranda*

(Add the following to page 436 at the end of footnote 121)

The Court would later find that even when a statement taken in violation of *Miranda* was admitted at trial, the defendant has no civil remedy under 42 U.S.C. § 1983. Vega v. Tekoh, 597 U.S. ___, 142 S.Ct. 2095, 213 L.Ed.2d 479 (2022), discussed in § 9.5(b).

(Add the following to page 441 at the end of footnote 131)

See also the discussion in § 9.5(b), in the text at note 144.1.

Chapter 7

IDENTIFICATION PROCEDURES

§ 7.3 The Right to Counsel and to Confrontation

(New text, p. 505, 4 lines from bottom, after "indigent")

Note, however, that to the extent courts follow the *Miranda* reasoning on this topic, the requirement of an "express" waiver of rights has likely been modified, and an implied waiver may be sufficient.[45.1]

[45.1] See Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), discussed in § 6.9(d).

§ 7.5 Additional Possible Safeguards

(New footnote 87.1, p. 520, last line, after "used")

[87.1] See, e.g., 725 Ill. Cons. Stat. 5/107A–2, which, among other things, requires either an independent administrator to conduct the lineup, or an administrator who does not know the identity of the suspected perpetrator; requires that the witness be told that the perpetrator may or may not be in the lineup and that the witness should not feel compelled to make an identification; and requires that the lineup and the eyewitness be video- and audio-taped unless the witness objects. The Illinois statute leaves it to individual police departments to decide whether to conduct sequential or simultaneous lineups.

Chapter 8

GRAND JURY INVESTIGATION

§ 8.7 Fourth Amendment Challenges to Subpoenas

(On p. 555, add the following new paragraph at the end of § 8.7(a))

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

[20.1] ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

[20.2] See the discussions in § 3.2 at note 215.1 and § 4.3 at note 10.1.

[20.3] See the text at note 16 supra, and the discussion of Smith v. Maryland in § 4.3(c) at note 10.

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

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

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

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

Chapter 9

SCOPE OF THE EXCLUSIONARY RULES

§ 9.1 Standing: The "Personal Rights" Approach

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

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

[50.1] ___ U.S. ___, 138 S.Ct. 1518, 200 L.Ed.2d 805 (2018).

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

§ 9.5 Fruits of Illegally Obtained Confessions

(Add text on the fifth line of the first full paragraph, p. 655, after "trial." Then begin a new paragraph with "Then")

Any remaining doubts about whether *Miranda* violations had less of an effect than core Fifth Amendment violations were then removed in *Vega v.*

Tekoh,[144.1] where the Court found that even when the unwarned statement *is* admitted against the maker in a criminal trial, the defendant has no civil remedy for the violation under 42 U.S.C. § 1983.[144.2] The Court acknowledged that the *Miranda* requirements are "constitutionally based," but said they remain "prophylactic" rules that are designed to protect the privilege against self-incrimination; the warnings are not themselves required by the Constitution, and thus a *Miranda* violation does not itself violate the Fifth Amendment. The majority also concluded that expanding *Miranda* to provide for civil remedies would do little to deter police from future violations, but would impose substantial systemic costs. As a result, when a defendant's *Miranda* rights are violated, "except in unusual circumstances, the exclusion of [the] unwarned statements should be a complete and sufficient remedy."

144.1 Vega v. Tekoh, 597 U.S. ___, 142 S.Ct. 2095 (2022).

144.2 Section 1983 provides a cause of action against any person acting under color of state law who deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws."

Chapter 10

ADMINISTRATION OF THE EXCLUSIONARY RULES

§ 10.2 Waiver or Forfeiture of Objection

(New text, p. 669, 3 lines from bottom, after "forfeiture")

The difference between waiver and forfeiture can be significant: if a court of appeals treats an unpreserved issue as waived, it will not consider the issue on the merits at all. If the issue is forfeited, however, the court may reach the merits but will subject the claim to plain error review.[2.1]

[2.1] See § 27.5(d).

Part 3

THE COMMENCEMENT OF FORMAL PROCEEDINGS

Chapter 11

THE RIGHT TO COUNSEL

§ 11.6 Counsel's Control over Defense Strategy

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

The McCoy *follow-up. McCoy v. Louisiana*[98.1] subsequently answered the issue left open in *Nixon*. The 6–3 majority opinion stated: "We hold that a defendant has a right to insist that counsel refrain from admitting guilt, even where counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Here, unlike *Nixon*, the defendant clearly opposed counsel's strategy (which was inconsistent with defendant's testimony that "he was out of state when the killings occurred and that corrupt police killed the victims when a drug deal went wrong"). Indeed, upon learning of counsel's intended strategy (which reflected counsel's view that the evidence establishing that defendant had been the shooter, including the victims' 911 call, was "overwhelming"), defendant brought his opposition to the attention of trial court in the course of seeking to discharge counsel (which was not allowed because the trial was set to start two days later). The defense counsel, advised by the trial court to make his own decision "as to what you're going to proceed with," then followed that strategy of "confessing guilt" at trial.

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

As noted in the dissent,[98.2] the reach of the *McCoy* ruling arguably is not limited to prohibiting a full admission of "guilt." The opinion did stress that counsel had told the jury that "my client committed three murders" and "on that issue, * * * he 'took the burden off the prosecutor.' " However, it also

---

98.1 ___ U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018).

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

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

(Replace text, p. 750, 2 lines from bottom, between "Nixon *and*" and "The traditional")

the need for consultation.

(Replace text, p. 751, line 32, between "defendant]" and "and its discussion")

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

(New footnote 106.1, p. 756, at the end of the 2nd full paragraph, after "result")

[106.1] As discussed in the new text for § 21.3 at fn. 113.1, Garza v. Idaho, ___ U.S. ___, 139 S.Ct. 738, 203 L.Ed.2d 77 (2019), concluded that presumed prejudice based on this analysis applied even though the scope of the lost appellate review would have been limited as a result of the defendant having entered a plea agreement that included an appeal waiver.

(Replace text, p. 756, line 37, between "result" and the start of the next paragraph, "*Denial-of-right-analysis*")

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

proceed pro se and the violation of the right to counsel of choice, both previously held to require automatic reversal.[107]

[107] See McKaskle v. Wiggins, discussed in § 11.5 at note 91 and § 27.6 at note 126; United States v. Gonzalez-Lopez, discussed in note 44 of § 2.7, § 11.4 at note 80, and § 27.6 at note 127.

§ 11.10 Ineffective Assistance Claims Based upon Lawyer Incompetence

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

Recognizing that lower court division, the Court in *Weaver v. Massachusetts*[192.1] granted certiorari to address the question of whether ineffective performance resulting in a "structural error" (thereby deemed per se prejudicial on appellate review) required reversal without a *Strickland* showing of prejudice. The opinion of the Court, however, answered that question only as to one specific type of structural error. The trial court in *Weaver*, facing a venire pool that exceeded the courtroom's seating capacity, excluded from the courtroom all members of the public, except for prospective jurors, during the two days of jury selection. Believing that the exclusion was constitutionally acceptable, counsel failed to object (notwithstanding the complaints of defendant's mother and minister, who were among those excluded). Since the public trial claim had been forfeited by lack of an objection, it was not raised on direct appeal. Instead it served as the grounding for an IAC claim, presented in a new trial motion filed five years after conviction. The state courts reviewing that challenge agreed that the total exclusion of the public, without judicial findings, violated defendant's right to a public trial. They also agreed that counsel's failure to object constituted ineffective assistance under *Strickland*'s performance prong, but they held that defendant had not established prejudice under *Strickland*'s prejudice prong. In this connection, the Massachusetts Supreme Judicial Court acknowledged that a public trial violation constituted structural error under Supreme Court precedent and therefore would require automatic reversal if reviewed on appeal following the rejection of a proper challenge at trial. The Supreme Court then granted review limited to the prejudice issue, and a majority (7–2) agreed that *Strickland*'s prejudice requirement applied.

The majority opinion (for six justices) initially discussed both the variations in the nature of structural errors and the differences between the appellate setting in which the structural error doctrine normally applied and the collateral attack setting of an IAC claim based on counsel's failure to challenge a structural error. With respect to the variations, the Court stressed that structural errors were placed in that category for at three (sometimes overlapping) reasons. Constitutional violations were characterized as structural because: (1) the error's effects are too difficult to

[192.1] 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017), also discussed in § 24.1, following note 5.1.

measure; (2) the errors effect on the outcome is irrelevant because the right is designed to protect an interest other than the defendant's interest in a reliable outcome (e.g., the defendant's right to proceed pro se); or (3) the error "always results in fundamental unfairness (e.g., the denial of the right to counsel)."

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

A concurring opinion argued that the special setting of IAC claims justified requiring the showing of prejudice under *Strickland* for all claims except those that fall within the "narrow class" of errors that justify presuming prejudice under *Cronic*.[192.2] The majority opinion, however, took note of defendant's argument that *Strickland*'s description of the IAC standard as concentrating on "the fundamental fairness of the inquiry" necessarily required relief where counsel was ineffective in failing to present a structural error that rendered the trial "fundamentally unfair." "For analytical purposes," it noted "the Court will assume that petitioner's interpretation of *Strickland* is the correct one." That position, however, would only benefit the petitioner if the structural error here was an error placed in the structural classification because it always produces "fundamental unfairness."

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

Weaver leaves open the possibility that for some structural errors, meeting the *Strickland* prejudice standard will not be necessary. In

[192.2] See the discussion at note 201 infra.

describing the class of errors that were deemed structural because they "always result in fundamental unfairness," the Court cited several examples, including the failure to charge the jury on reasonable doubt, a biased judge, and racial discrimination in the selection of the grand and petit jurors. The Court added: "This opinion does not address whether the result [automatic reversal in the appellate setting] should be any different if * * * [such] errors were raised instead in an ineffective-assistance claim on collateral attack."

Chapter 12

PRETRIAL RELEASE

§ 12.2 Constitutionality of Limits on Pretrial Freedom

(Add new text as new paragraph, p. 820, line 7, after "restraint")

Some lower courts have struck down the routine incarceration of indigent arrestees unable to pay money bail when no prompt and individualized hearing on the adequacy of alternative non-financial conditions of release is available. Courts have explained that this practice results in an absolute deprivation of liberty that requires intermediate scrutiny under the Equal Protection Clause.[39.1]

[39.1] E.g., *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir.2018).

(Add new text as new paragraph, p. 822, line 24, after "reasonable")

In *Kingsley v. Hendrickson*,[43.1] the Court clarified that *"Bell's* focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated." Rather, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." Applying *Bell*, the Court has upheld policies banning contact visits with pretrial detainees[43.2] and mandating suspicionless strip searches of anyone arrested for a minor offense before commitment to a jail's general population.[43.3]

[43.1] 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015) (holding a pretrial detainee's due process rights are violated by the objectively unreasonable use of force).

[43.2] Block v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984).

[43.3] Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012).

Chapter 16

THE LOCATION OF THE PROSECUTION

§ 16.1 Venue: General Principles

(New footnote 1.1, p. 993, 8 lines from the bottom, after "offenses")

[1.1] Several of the characteristics of the Sixth Amendment Clause discussed above were acknowledged in Smith v. United States, 590 U.S. ___, 143 S.Ct. 1594, 214 L.Ed.2d ___ (2023), discussed at note 5.3 infra. The Court there described the Sixth Amendment Clause as the "Vicinage Clause," though noting that it "departs in some respects from the common law [vicinage right]—most notably by providing new specifications about the place where a crime may be tried." The "coverage of this Clause," it noted, "reinforces the coverage of the Venue Clause," but "differs from the Venue Clause in two ways: it concerns jury composition, not the place where a trial may be held, and it narrows the place where trial is permissible by specifying that a jury must be drawn from the State *and district* wherein the crime shall have been committed (emphasis added)."

(Add new text as a new paragraph, p. 1003, line 21, after "state")

On appeal following a conviction, the prosecution's failure to establish proper venue is deemed a "structural error," thereby requiring automatic reversal of the conviction (i.e., harmless error analysis is inapplicable).[5.1] A finding of a constitutional error ordinarily does not preclude a retrial following the conviction reversal (the speedy trial violation being an exception),[5.2] but in *Smith v. United States*,[5.3] the defense contended that the unique qualities of a violation of the Venue Clause—the "defendant * * * [having] undergone the hardship of an initial trial in a distant and improper place"—justified the unique remedy of precluding a retrial.[5.4] Rejecting that claim, a unanimous Supreme Court concluded that the hardship that flowed from an improperly located trial "was insufficient to justify a departure from the general retrial rule," which viewed the hardship of a flawed initial trial as an inadequate basis for precluding a retrial. The hardship of an improperly located trial, as measured by "lost time, emotional burden, and expense," was not necessarily greater than the hardship of a "flawed initial trial" in a proper location. Moreover, the Court noted, "the defendant's argument exaggerates the connection between the venue right and the hardship of a trial in an improper venue," as the venue clause does not require "the most convenient trial venue" ("presumably where he lives"), but the state in which the crime was committed, which "may be far from his residence." So too, with the Vicinage Clause tied to the place of the crime,

[5.1] See § 27.6(b) (first paragraph) as to statutory venue violations, and § 27.6(d), following note 125, as to a constitutional violation.

[5.2] See § 25.4(a).

[5.3] 599 U.S. ___, 143 S.Ct. 1594, 214 L.Ed.2d ___ (2023).

[5.4] As discussed at note 5.5 infra, defendant also relied on the hardship stemming from the violation of the Vicinage Clause. As for the defendant's claim that a reversal of a conviction based upon a venue violation should be viewed as an appellate court "acquittal" under the Double Jeopardy Clause, see note 96.1 of § 25.4.

where the improperly located trial was to a jury and the Vicinage Clause thereby violated, the hardship imposed by that violation did not add to the hardship imposed by the Venue Clause violation, and similarly did not justify a departure from the general retrial rule.[5.5]

[5.5] The Court further noted that the "vicinage right is only one aspect of the jury rights protected by the Sixth Amendment, and we have repeatedly acknowledged that retrials are the appropriate remedy for violations of other jury trial rights." It also examined "the history underlying the [two] clauses," and concluded that this history, including the treatment of the vicinage right at common law, "cannot justify an exception to the retrial rule."

Chapter 17

THE SCOPE OF THE PROSECUTION: JOINDER AND SEVERANCE

§ 17.2 Joinder and Severance of Defendants

(Add new text, p. 1033, line 22, new para after "the defendant")

In *Samia v. United States*,[26.1] the Court distinguished *Gray* and upheld as satisfying *Bruton's* rule a redaction that substituted for defendant's name the "neutral" words "other person," instead of "deleted" or an obvious blank. The Court reasoned that "it would not have been feasible to further modify [the codefendant's] confession to make it appear, as in *Richardson*, that he had acted alone." A different result, the Court suggested, would have the "practical consequence" of either foregoing use of the confession or mandating severance whenever the prosecution wants to introduce the confession of a nontestifying codefendant in a joint trial," a price "too high" to pay.

[26.1] Samia v. United States, ___ U.S. ___, 143 S.Ct. 2004, ___ L.Ed.2d ___ (2023).

§ 17.4 Failure to Join Related Offenses

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

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

[50] ___ U.S. ___, 138 S.Ct. 2144, 201 L.Ed.2d 650 (2018).

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

imply consent to the manner in which it was conducted—his argument must be rejected.[50.2]

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

Part 4

THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT AND INNOCENCE

Chapter 21

PLEAS OF GUILTY

§ 21.1 The Plea Negotiation System

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

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

In *Hughes*, the defendant, indicted on drug and gun charges, negotiated a Type-(C) plea agreement with the prosecutor which stipulated that he would receive a sentence of 180 months (but did not refer to any particular Guidelines range). At the sentencing hearing following Hughes' guilty plea, the district court accepted the plea agreement and sentenced Hughes to a term of 180 months. The court calculated his Guidelines range as 188–235 months and determined that his sentence was in accordance with the Guidelines and other factors the court was required to take into account. Soon thereafter, however, the Sentencing Commission adopted, and made retroactive, an amendment that had the effect of reducing Hughes' sentencing range to 151–188 months. But his motion for a reduced sentence under the above-quoted statutory provision was denied, and that ruling was affirmed on appeal; both courts concluded Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range. But the majority in *Hughes* held, with respect to the above-cited statute, that a "district court imposes a sentence that is 'based on' a Guidelines range if the range was a basis for the court's exercise of discretion in imposing a sentence," which will be the case in "the typical sentencing case," given that the applicable statutory provision[20.2] "requires a district court to calculate and consider a defendant's Guidelines range in every case." The *Hughes* majority cautioned, however, that "the Guidelines are advisory only, and so not every sentence will be consistent with the relevant Guidelines range," as illustrated by the companion case to *Hughes*, *Koons v. United States*,[21] where "the Court today holds that five defendants' sentences were not 'based on' subsequently lowered Guidelines ranges because in that case the Guidelines and the record make clear that the sentencing judge 'discarded' their sentencing ranges 'in favor of mandatory minimums and substantial-assistance factors.' " The three *Hughes*

20.1 ___ U.S. ___, 138 S.Ct. 1765, 201 L.Ed.2d 72 (2018).

20.2 18 U.S.C.A. § 3553(a).

21 ___ U.S. ___, 138 S.Ct. 1783, 201 L.Ed.2d 93 (2018).

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

§ 21.2 Kept, Broken, Rejected, and Nonexistent Bargains

(New footnote 56.1, p. 1216, line 11, after "ambiguity")

[56.1] Garza v. Idaho, ___ U.S. ___, 139 S.Ct. 738, 203 L.Ed.2d 77 (2019) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts.").

(Replace text, p. 1222, line 3, between beginning of paragraph and "This")

Because the Court has not required specific performance as a constitutional matter, federal courts finding a *Santobello* violation when considering a state prisoner's claim on habeas review ordinarily allow the state court to decide which remedy is more appropriate.[69.1] On direct review, however, courts often opt for the remedy of specific performance.

[69.1] Kernan v. Cuero, 583 U.S. 1, 138 S.Ct. 4, 199 L.Ed.2d 236 (2017) (per curiam) (*Santobello* did not clearly establish that specific performance is constitutionally required).

§ 21.3 Plea Negotiation Responsibilities of the Attorneys and Judge

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

As for the prejudice prong of *Strickland*, the Court in *Padilla* left that for "the Kentucky court to consider in the first instance," but the Court later addressed it in this context in *Lee v. United States*.[103.1] As the Court described the case, Lee, "indicted on one count of possessing ecstasy with intent to distribute," "feared that a criminal conviction might affect his status as a lawful permanent resident" but was assured by his attorney "there was nothing to worry about," so Lee, "who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial," only to later learn that his "attorney was wrong" and his conviction meant he "was subject to mandatory deportation." The district court, in rejecting Lee's effort to overturn his guilty plea, emphasized that "[i]n light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sentence and subsequent deportation" had he gone to trial. The court of appeals affirmed, relying on the proposition that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." The Government asked the Supreme Court to, "like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense

[103.1] Lee v. United States, 582 U.S. 357, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017).

cannot show prejudice from the denial of his right to trial." A majority of the Court rejected that proposition outright as grounded in "two errors," for (1) "categorical rules are ill suited to an inquiry that we have emphasized demand a 'case-by-case examination' of the 'totality of the evidence,' " and (2), "more fundamentally, . . . the inquiry we prescribed in *Hill v. Lockhart*,"[103.2] namely, that the defendant must show that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial, "may not turn solely on the likelihood of conviction after trial."

The Supreme Court then proceeded to rule in Lee's favor, but did so based "upon the unusual circumstances of this case," thus suggesting that many defendants making such prejudice claims will rightly be denied relief. It appears that the most important of those circumstances are the fact that prior to his guilty plea Lee "asked his attorney repeatedly whether there was any risk of deportation from the proceedings," and that at the time of the plea colloquy the defendant's remarks made it clear that he would not have entered a guilty plea had he known of the deportation consequence. Indeed, the Court issued this stern warning: "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Next, the Court emphasized that there was "no reason to doubt the paramount importance Lee place on avoiding deportation," for at the time of his guilty plea he "had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents," while on the other hand "there is no indication that he had any ties to South Korea," as "he had never returned there since leaving as a child." Finally, the Court stressed that it was *not* the case "that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial," given that for him deportation was the "determinative issue," he had "strong connections to this country and no other," and "the consequences of taking a chance at trial were not markedly harsher than pleading," for "[b]alanced against holding on to some chance of avoiding deportation was a year or two more of prison time."

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

(New text, p. 1237, line 19, after "earlier")

This latter issue reached the Supreme Court in *Garza v. Idaho*,[113.1] where Garza signed two plea agreements, each containing an appeal waiver, but after sentencing indicated he wished to appeal. His counsel said appeal would be "problematical" given his appeal waiver and did not file notice of appeal. First noting that "no appeal waiver serves as an absolute bar to all appellate claims" and that filing a notice of appeal "does not necessarily breach a plea agreement, given the possibility that the defendant will end

[113.1] Garza v. Idaho, ___ U.S. ___, 139 S.Ct. 738, 203 L.Ed.2d 77 (2019).

up raising claims beyond the waiver's scope," the majority concluded the instant case was like *Flores-Ortega*, as (i) both cases involved "a lawyer who forfeited an appellate proceeding by failing to file a notice of appeal," and (ii) while the *Flores-Ortega* defendant pled guilty rather than signing an appeal waiver," that was only "a difference of degree, not kind," as a guilty plea itself reduces the scope of a potentially appealable issues." Thus the defendant "gets a new opportunity to appeal," which "does no more than restore the status quo that existed before counsel's deficient performance forfeited the appeal, and it allows an appellate court to consider the appeal as that court otherwise would have done—on direct review, and assisted by counsel's briefing." The three dissenters, in response, claimed that to prevail, defendant had to "show deficient performance and prejudice," neither of which was present in the instant case: (i) had counsel "reflexively filed an appeal and triggered resentencing, Garza might have faced life in prison, especially in light of the trial court's concern that the agreed-upon sentence (from which it could not deviate under Rule 11) might have been too lenient"; and (ii) "Garza knowingly and voluntarily bargained away his right to appeal in exchange for a lower sentence," and thus an resulting prejudice "cannot be attributable to his counsel."

§ 21.6 Effect of Guilty Plea

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

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

[193.1] 583 U.S. ___, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018).

drafters specifically stated it "has no application" to the "kinds of constitutional objections" that may be raised under the "*Menna-Blackledge* doctrine."[193.2]

[193.2] The three dissenters objected that the *Menna-Blackledge* doctrine "is vacuous, has no sound foundation, and produces nothing but confusion."

Chapter 22

TRIAL BY JURY AND IMPARTIAL JUDGE

§ 22.1 The Right to Jury Trial

(Replace contents of (e), beginning on p. 1284, line 15, with the following)

It was not until 2020 that the Court declared that the Sixth Amendment required both state and federal verdicts of guilt to be unanimous in felony cases. Nearly fifty years earlier, in *Apodaca v. Oregon*,[34] the Supreme Court had upheld state felony convictions by jury votes of 11–1 and 10–2. Four justices concluded unanimity was not part of the jury right in the Sixth Amendment; another four concluded it was and bound the states. As in *Williams,* the *Apodaca* plurality rejecting a Sixth Amendment right to unanimity explained "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," and concluded that unanimity "does not materially contribute to the exercise of this commonsense judgment." It also rejected the contention, raised without success in the companion case of *Johnson v. Louisiana*,[35] that unanimity was required to effectuate the rights to proof beyond a reasonable doubt and jury panels that reflect a cross section of the community. Justice Powell, who supplied the critical fifth vote in *Apodaca*, recognized the Sixth Amendment required unanimity, but believed that requirement had not been incorporated against the states by the Fourteenth Amendment's Due Process Clause.[36]

The Court abandoned *Apodaca* in *Ramos v. Louisiana,*[37] holding that a unanimous verdict was required to convict a defendant of a serious offense under the Sixth Amendment, and that right had been incorporated against the states. The Court noted Louisiana adopted its 1898 law permitting nonunanimous verdicts to undermine African-American participation on juries, and that a similar law in Oregon, the only other state to allow nonunanimous felony verdicts, was also an effort to dilute the influence of racial, ethnic, and religious minorities on jury decisions. Justice Gorsuch's opinion for the Court in *Ramos* rejected both the "dual track" theory of incorporation maintained by Justice Powell in *Apodaca,* and the

---

[34] 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

[35] 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972).

[36] The Court later refused to expand Apodaca to authorize verdicts of 5–1 for misdemeanors punishable by more than six months. Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979).

[37] ___ U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020).

"functionalist" approach of the *Apodaca* plurality. This he termed "cost-benefit analysis," inconsistent with the ancient guarantee of a unanimous jury verdict and the original meaning of the Sixth Amendment. The three justices who dissented in *Ramos* objected that many landmark criminal procedure decisions used similar reasoning, including Justice White's opinion for the Court in *Williams*.

§ 22.3 Voir Dire; Challenges

(New text, p. 1301, line 17, after "evidence")

The Court has phrased the standard this way: "A trial court protects the defendant's Sixth Amendment right by ensuring that jurors have 'no bias or prejudice that would prevent them from returning a verdict according to the law and evidence.' "[96.1]

[96.1] United States v. Tsarnaev, ___ U.S. ___, 142 S.Ct. 1024, 1034, 212 L.Ed.2d 140 (2022).

(New text, p. 1306, line 24, after "discrimination")

Justice Thomas has criticized the *Powers* rationale as relying on unsupportable assumptions about the interests of defendants and jurors, and observed that the "Court has never explained 'why a violation of a third party's right to serve on a jury should be grounds for reversal when other violations of third-party rights, such as obtaining evidence against the defendant in violation of another person's Fourth or Fifth Amendment rights, are not.' "[116.1]

[116.1] Flowers v. Mississippi, ___ U.S. ___, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019).

[126] Flowers v. Mississippi, ___ U.S. ___, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019) (overturning for *Batson* error conviction and death sentence after sixth trial);

(New paragraph, p. 1308, line 31, after "acceptable")

Summarizing the evidence that defendants may present to prove that a prosecutor was "motivated in substantial part by discriminatory intent," the Court in *Flowers v. Mississippi*,[126.1] listed the following: "[1] statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case; [2] evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case; [3] side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case; [4] a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing; [5] relevant history of the State's peremptory strikes in past cases; [and 6] other relevant circumstances that bear upon the issue of racial discrimination."

[126.1] ___ U.S. ___, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019).

§ 22.4 Challenging the Judge

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

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

[135.1] Rippo v. Baker, 580 U.S. 285, 137 S.Ct. 905, 197 L.Ed.2d 167 (2017) (per curiam).

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

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

[147.1] See § 24.6(c).

Chapter 23

FAIR TRIAL AND FREE PRESS

§ 23.2 Overcoming Prejudicial Publicity

(New text, p. 1344, at the end of the 2nd full paragraph, after "case")

Post-*Skilling*, the Supreme Court provided further direction on content questions in *United States v. Tsarnaev*,[43.1] another high-profile federal prosecution (for the Boston Marathon bombings, producing 17 capital offenses). The trial court, taking account of the massive pretrial publicity, agreed to utilize a 100 item questionnaire to be sent to 1,372 prospective jurors before jury selection began. The judge included various questions proposed by the defense relating to that publicity,[43.2] but rejected a proposed question that "asked each prospective juror to list the facts that he had learned about the case from the media and other sources." The trial judge characterized that question as "unfocused" and "too unguided," and expressed "concern that it would 'cause trouble' by producing 'unmanageable data' of minimal value that would come to dominate the entire *voir dire*." The refusal to include the content question was one of two defense claims before the Supreme Court, but only the (6–3) majority found it necessary to rule on that claim.

The First Circuit had concluded that the trial erred in light of its reading of an earlier supervisory authority ruling as requiring district courts, in high profile cases, to allow content questioning as to all prospective jurors. For reasons discussed in § 1.7(f),[43.3] the Court concluded that appellate court supervisory authority could not be utilized to impose such a rule. The issue on appellate review was whether the district court had abused its discretion. Moreover, that discretion was exceptionally broad because a "trial judge's appraisal of jury selection," including "deciding what questions to ask prospective jurors," is "ordinarily influenced by a host of factors impossible to fully capture on the record." That discretion, the Court noted, "does not vanish when a case garners public attention. Indeed, when pretrial publicity is at issue, primary reliance on the trial judge makes especially good sense" as "the judge sits in the locale where the publicity is said to have had its effect."

43.1 ___ U.S. ___, 142 S.Ct. 1024, 212 L.Ed.2d 140 (2022).

43.2 The Court noted in this connection: "Several questions * * * probed whether media coverage might have biased a prospective juror. One question asked if the prospective juror had 'formed an opinion' about the case because of what he had 'seen or read in the news media.' Others asked about the source, amount, and timing of the person's media consumption. Still another asked whether the prospective juror had commented or posted online about the bombings."

43.3 See § 1.6(f) at note 30.1.

In this case, the Court concluded, the district court's decision to reject the content question "was reasonable and well within its discretion." The district court "recognized the significant pretrial publicity, * * * and reasonably concluded that the proposed media-content question was 'unfocused,' risked producing 'unmanageable data,' and would at best shed light on 'preconceptions' that other questions already probed." The district court also was appropriately "concerned that a media-content question had 'the wrong emphasis,' focusing on what a juror knew before coming to court, rather than on potential bias."

The above reasoning arguably presents a grounding that almost always accepts a district court's decision not to permit content questioning, provided the court has allowed other avenues of exploring the potential impact of publicity. However, the Court went on to note that, if there was "any doubt" as to the district court's decision, "the rest of the jury selection process dispels it." The Court here cited the subsequent three weeks of individualized *voir dire* of 256 prospective jurors, where "both parties had the opportunity to ask additional questions and probe for bias." That included the defense attorneys "ask[ing] several prospective jurors what they had heard, read or seen about the case in the media." The process also included "emphatic and clear instructions on the sworn duty * * * to decide the issues only on evidence provided in open court."

Chapter 24

THE CRIMINAL TRIAL

§ 24.1 The Right to a Public Trial

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

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

[5.1] 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

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

when the error is properly raised in the trial court

[6] Weaver v. Massachusetts, 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). See also

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

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

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

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

§ 24.3 The Defendant's Right of Access to Evidence

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

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

§ 24.4 The Presentation of Evidence

[90] Hemphill v. New York, ___ U.S. ___, 142 S.Ct. 681, 211 L.Ed.2d 534 (2022) (error to admit testimonial hearsay "simply because the judge deemed [defendant's] presentation to have created a misleading impression," that required correction, noting that consideration of whether evidence is "unreliable, incredible, or otherwise misleading" is an inquiry "antithetical to the Confrontation Clause").

§ 24.9 Jury Procedures

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

The Court in 2017 recognized one exception to this general principle. It held in *Peña-Rodriguez v. Colorado,*[200.1] that the defendant was denied his constitutional right to an impartial jury by a state rule that barred introduction of juror affidavits reporting a juror's anti-Mexican statements during deliberations. The Court explained that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." This requirement does not arise unless "there is a showing" that one or more jurors made a statement that "exhibit[ed] overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" and "tend[ed] to show that racial animus was a significant motivating factor in the juror's vote to convict."

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

[200.1] 580 U.S. 206, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017).

§ 24.10 Jury Verdicts

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

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

[206.1] 580 U.S. 5, 137 S.Ct. 352, 196 L.Ed.2d 242 (2016). The Court explained that where a trial yields two verdicts that are incompatible, a defendant cannot meet the burden of demonstrating that the jury necessarily resolved an issue in his favor. It distinguished the situation in Yeager v. United States, 557 U.S. 110, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009), discussed in §§ 17.4 & 25.2, where an acquittal barred retrial after a hung jury. In that case, the only actual verdict delivered was an acquittal.

§ 24.11 Post-Verdict Motions

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

every state

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

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

Chapter 25

DOUBLE JEOPARDY

§ 25.1 Dimensions of the Guarantee

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

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

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

§ 25.4 Reprosecution Following Conviction

(New text, p. 1473, line 37, between "conduct," and "or an error" add)

improper venue,[96.1]

[96.1] Smith v. United States, ___ U.S. ___, 143 S.Ct. 1594, ___ L.Ed.2d ___ (2023) (finding of improper venue "does not resolve 'the bottom-line question of "criminal culpability." ' ").

§ 25.5 Reprosecution by a Different Sovereign

(New footnote 109.1, p. 1478, line 6, after "respect")

[109.1] Denezpi v. United States, ___ U.S. ___, 142 S.Ct. 1838, 213 L.Ed.2d 141 (2022) (assault ordinance enacted by tribe and federal sexual assault statute enacted by Congress were not the same offense under the Double Jeopardy Clause, even though federal officials prosecuted both).

(New text, p. 1478, line 12, after "Congress")

The Court, voting 7:2, rejected a direct challenge to the validity of the dual sovereignty doctrine in *Gamble v. United States*.[111.1] Unlike Justice Gorsuch, who dissented on this point, the Court found that there was not sufficient evidence of contrary original intent "to break a chain of precedent linking dozens of cases over 170 years." It also rejected the argument made by Justice Ginsburg in dissent that incorporation of the Double Jeopardy Clause against the states under the Fourteenth Amendment had undercut the separate sovereigns doctrine, just as incorporation of the Fourth Amendment had undermined the "silver platter doctrine."[111.2] The Court found unpersuasive, too, the argument of both dissenters that under the

[111.1] ___ U.S. ___, 139 S.Ct. 1960, 204 L.Ed.2d 322 (2019).

Constitution, it is the people who are sovereign, and that the Fifth Amendment protects a defendant from being prosecuted by two different parts of the government for the same offense.

[111.2] See § 3.1 at note 57 (discussing abolition of this rule which had allowed federal prosecutors to introduce evidence obtained by state authorities using means that the Fourth Amendment denied to federal authorities).

Chapter 26

SENTENCING PROCEDURES

§ 26.1 Legislative Structuring of Sentencing: Sanctions

[11] United States v. Tsarnaev, ___ U.S. ___, 142 S.Ct. 1024, 212 L.Ed.2d 140 (2022) (no abuse of discretion to exclude evidence of crimes by person who defendant claimed was responsible for the charged crime, when admission of the evidence risked a confusing mini-trial).

[17] Moore v. Texas, 581 U.S. 1, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017) (invalidating improper state court application of *Hall*).

§ 26.4 Due Process: The Framework for Sentencing Procedure

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

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

[61.1] 580 U.S. 206, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017), also discussed in § 24.9.

[61.2] 580 U.S. 100, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017), also discussed in § 28.5.

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

Increasing a sentence because of the exercise of Fourth Amendment rights, too, may be off limits. After the Court held that a motorist cannot be prosecuted for refusing to submit to an illegal warrantless blood test,[71.1] lower courts extended this holding to bar enhanced criminal penalties for refusing warrantless blood tests.

[71.1] Birchfield v. North Dakota, 579 U.S. 438, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

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

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

[84.1] 581 U.S. 128, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

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

[84.2] E.g., Chavez-Meza v. United States, ___ U.S. ___, 138 S.Ct. 1959, 201 L.Ed.2d 359 (2018) (discussing explanation requirements in federal sentencing).

In addition to contesting the adequacy of notice regarding their own sentences, defendants have also challenged sentencing provisions on void-for-vagueness grounds. The Court has invalidated on this due-process ground laws that fix the permissible sentences for criminal offenses, such as the statute in *Johnson v. United States*[84.3] that raise the minimum and maximum sentence for a defendant with prior convictions for crimes involving "conduct that presents a serious potential risk of physical injury to another." But in *Beckles v. United States*,[84.4] the Court held that because the advisory United States Sentencing Guidelines "merely guide the district courts' discretion," a guideline provision with the same wording as the statute in *Johnson* was not subject to a vagueness challenge. A system of unfettered discretion is not unconstitutionally vague, the Court explained, as all of the notice required is provided by the applicable statutory range. The *Beckles* Court also distinguished Eighth Amendment challenges to vague sentencing factors in capital cases, noting "our approach to vagueness under the Due Process Clause is not interchangeable with 'the rationale of our cases construing and applying the Eighth Amendment.' "

[84.3] 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

[84.4] 580 U.S. 256, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017). The Court noted also that "our holding today also does not render "sentencing procedure[s]" entirely "immune from scrutiny under the due process clause," and cited Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) (holding that due process is violated when a court relies on "extensively and materially false" evidence to impose a sentence on an uncounseled defendant).

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

Excessive delay between conviction and sentence may also raise concerns about the reliability of sentencing information, as well as other concerns. The Court in *Betterman v. Montana,*[99.1] held that the Speedy Trial Clause of the Sixth Amendment does not regulate the time period between conviction and sentence. Instead, the primary safeguard here is legislative, and the "more pliable standard" of due process "serves as a backstop against exorbitant delay."

[99.1] 578 U.S. 437, 136 S.Ct. 1609, 194 L.Ed.2d 723 (2016), discussed in § 18.5.

(New text, p. 1525, line 29, after "punishment")

Applying Apprendi—*revocation proceedings.* In *United States v. Haymond*,[135.1] the Court invalidated as violating *Alleyne* a federal statute mandating that a judge revoke supervised release and impose a minimum sentence of five years' incarceration after finding by a preponderance that the defendant committed certain enumerated offenses while on release. The range of punishment authorized for a violation of the conditions of supervised release by the conviction alone, without the finding, that is, the sentence range available to the judge at Haymond's initial sentencing, was 0–10 years of incarceration followed by up to a life term of supervised release. With the finding at revocation the sentencing range became at least 5 years of incarceration up to life. The Court split 4–1–4. The ruling emphasized the increased mandatory minimum sentence at revocation, with the four justices of the plurality, plus Justice Breyer in his tie-breaking concurrence, siding with Haymond. The plurality argued that by mandating the higher sentence of at least five years' incarceration upon the finding of a violation, the statute violated *Alleyne.* The four dissenters argued that the plurality opinion was "not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications." Indeed, the rationale of the plurality opinion is broad enough to affect many state and federal provisions regulating the revocation of probation, parole, and supervised release. But the narrow reasoning of Justice Breyer's controlling concurring opinion may have constrained the decision's impact. He said that he "would not transplant the *Apprendi* line of cases to the supervised-release context," and instead noted three aspects of the statute that persuaded him it was "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach": [1] it "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute," [2] "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long," and [3] mandates "imprisonment of 'not less than 5 years' upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.' "

[135.1] ___ U.S. ___, 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019).

§ 26.6 Special Sentences

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

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

[153.1] 581 U.S. 128, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

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

The Fourteenth Amendment incorporated the Excessive Fines Clause of the Eighth Amendment against the states, held the Court in *Timbs v. Indiana*,[161.1] and regulates state as well as federal civil in rem forfeitures when they are at least partially punitive.

The Court in *Nelson v. Colorado*,[161.2] held that once a defendant is acquitted, due process requires the government to "refund fees, court costs, and restitution exacted from the defendant" because of the conviction, but did not consider whether forfeited property must also be returned. To the extent that forfeiture is a form of financial punishment for the commission of a crime, then *Nelson*'s reasoning should mandate the return of forfeited assets once a defendant is acquitted. As the Court in *Nelson* concluded, after acquittal the government "may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions."

[161.1] ___ U.S. ___, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019).

[161.2] 581 U.S. 128, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

Chapter 27

APPEALS

§ 27.1 Constitutional Protection of the Defendant's Right to Appeal

(Replace text, p. 1548, between "trial de novo)" and "significance" 5 lines from the bottom of the page)

or discretionary review in an appellate court, but very few misdemeanor judgments receive any review at all. At least for felonies, the

§ 27.3 Prosecution Appeals

(Add text, p. 1560, line 30, after "Clause")

Compared to defendants, prosecutors tend to be more selective about what cases are appealed, and research shows that the appeals they do file succeed at higher rates.

§ 27.5 The Scope of Appellate Review

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

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

[47.1] ___ U.S. ___, 138 S.Ct. 1532, 200 L.Ed.2d 792 (2018).

(New text, p. 1571, line 1, before "An appeal")

The Court in *Garza v. Idaho*[53.1] noted that "no appeal waiver serves as an absolute bar to all appellate claims," and that "defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary."

[53.1] ___ U.S. ___, 139 S.Ct 738, 203 L.Ed.2d 77 (2019), discussed in § 21.3(b).

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

Forfeiture of the right to appeal—claims inherently waived by guilty plea. As noted in § 21.6, defendants who plead guilty relinquish many

claims, unless the right to appeal the claim is reserved as part of a conditional plea. Appellate claims lost by pleading guilty include those raising "the constitutionality of case-related government conduct that takes place before the plea is entered," or "any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty,' " explained the Court in *Class v. United States*.[66.1]

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

(Add to footnote 67, p. 1575)

[67] Davis v. United States, ___ U.S. ___, 140 S.Ct. 1060, 206 L.Ed.2d 371 (2020) (per curiam) (neither Rule 52 nor case law shields factual errors, or any category of errors, from plain-error review);

(New footnote 72.1, p. 1575, line 32, after "law")

[72.1] See Greer v. United States, ___ U.S. ___, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021) (rejecting "futility" exception to plain error review).

(New text, p. 1576, line 27, after "occurred")

And for an error at trial, said the Court in *Greer v. United States*,[74.1] the defendant must show that "but for" the error, "there is a reasonable probably that a jury would have acquitted him." In conducting plain-error review, a reviewing court "can examine relevant and reliable information from the entire record"—not just the record from the particular proceeding where the error occurred.[74.2]

[74.1] ___ U.S. ___, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021).

[74.2] Id.

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

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

[75.1] 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

exempt from harmless error review because of the "difficulty of assessing the effect of the error," and because it protects interests other than the defendant's interest in avoiding "unjust conviction," namely, interests of "the public at large, and the press." It also emphasized that the failure to raise the error at trial deprives the trial court "of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure." To be sure, there is also support in *Weaver* for presuming prejudice from public trial violations under the plain-error test. Of the Court's reasons for requiring a defendant to show prejudice, three pertained to collateral rather than direct review. Compared to error raised on direct appeal, finality is at greater risk when an error is raised on collateral review, ordering retrial at that later time creates a higher risk that witnesses' memories and other evidence would be lost, and instructions from reviewing courts to trial courts may be less effective.

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

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

[77.1] 583 U.S. ___, 138 S.Ct. 1897, 201 L.Ed.2d 376 (2018).

§ 27.6 Harmless Error

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

counsel's admission of a client's guilt during his capital trial over the client's express objection,[127.1]

[127.1] McCoy v. Louisiana, ___ U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018), reasoning that the admission "blocks the defendant's right to make the fundamental choices about his own defense" and its effects "would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt."

[128] Weaver v. Massachusetts, 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017) ("This Court . . . has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, though the Court has yet to label those errors structural in express terms.") See

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

In *Weaver v. Massachussetts*,[158.1] the Court again reiterated the "three broad rationales" it had recognized for exempting an error from harmless error review: (1) the error's effects are too difficult to measure; (2) the error's effects are irrelevant because the right is designed to protects an interest other than the defendant's interest in a reliable outcome; or (3) the error "always results in fundamental unfairness." As examples of this last category, the *Weaver* Court noted *Gideon* and *Sullivan*. In these cases, the Court explained, "the resulting trial is always a fundamentally unfair one," and it "would be futile for the government to try to show harmlessness." In *Greer v. United States,*[158.2] the Court stated that unlike structural defects, which "affect the 'entire conduct of the [proceeding] from beginning to end,' " "discrete defects in the criminal process—such as the omission of a single element from jury instructions or the omission of a required warning from a Rule 11 plea colloquy—are not structural because they do not '*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' "

[158.1] 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

[158.2] ___ U.S. ___, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021).

Chapter 28

POST CONVICTION REVIEW: COLLATERAL REMEDIES

§ 28.2 The Statutory Structure and Habeas Policy

(New footnote 5.1, page 1599, line 28, after "years")

[5.1] See, e.g., Brown v. Davenport, ___ U.S. ___, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022).

§ 28.3 Cognizable Claims

(New text, p. 1611, line 30, after "proceedings")

Nearly eight decades later, in an opinion joined by all but three justices, the Court suggested a very different view. *Brown v. Allen* was a departure from the writ's traditional function, wrote the Court in *Brown v. Davenport.*[51.5] The *Davenport* Court's view of the historic scope of habeas review generated protests from the dissenters who argued that "our decision in *Brown [v. Allen]* built on decades and decades of history," when it "catalogue[d]" principles that were already "long established."

[51.5] Brown v. Davenport, ___ U.S. ___, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022).

(On p. 1614, replace subheading for § 28.3(e) with the following new subheading)

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

§ 28.4 Claims Foreclosed by State Procedural Defaults

(New text, p. 1617, line 26, between "review." and "A")

In rare instances, a state court's "unforeseeable" interpretation of state law will be inadequate to bar federal review, if it lacks " 'fair or substantial support in prior state law."[70.1]

[70.1] Cruz v. Arizona, ___ U.S. ___, 143 S.Ct. 650, 214 L.Ed.2d. 391 (2023) (holding application of postconviction rule "was so novel and unfounded that it does not constitute an adequate state procedural ground").

(On p. 1620, add the following new text to the beginning of the first paragraph under § 28.4(d))

To establish cause "the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's

procedural rule.' " A factor is "external to the defense if it 'cannot fairly be attributed to the prisoner.' "[87.1]

[87.1] Davila v. Davis, 582 U.S. 521, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017).

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

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

[91] 582 U.S. 521, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017).

(New text, p. 1623, line 6, after "appeals" as new paragraph)

The Court later clarified in *Shinn v. Ramirez,*[93.1] that any new evidence on which the petitioner relies to establish cause under *Martinez* cannot be considered by the federal district court in assessing the merits of that claim. Declared the Court, "when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied." Addressing the concern that this result "renders many *Martinez* hearings a nullity, because there is no point in developing a record for cause and prejudice if a federal court cannot later consider that evidence on the merits," the Court stated, "While we agree that any such *Martinez* hearing would serve no purpose, that is a reason to dispense with *Martinez* hearings altogether, not to set § 2254(e)(2) aside."

[93.1] Shinn v. Ramirez, ___ U.S. ___, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022). See § 28.7(c) discussing § 2254(e)(2).

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

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

[100.1] 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

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

When evaluating a defaulted claim challenging instructions during the penalty phase, *Sawyer* requires a court to ask "whether a properly instructed jury could have recommended death," not "whether the alleged error might have affected the jury's verdict."[106.1]

[106.1] Jenkins v. Hutton, 582 U.S. 280, 137 S.Ct. 1769, 198 L.Ed.2d 415 (2017) (per curiam).

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

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

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

[157.1] 581 U.S. 100, 137 S.Ct 759, 780, 197 L.Ed.2d 1 (2017).

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

Unlike a Rule 60(b) motion, which "attacks an already completed judgment," the Court explained in *Banister v. Davis,*[157.2] a Rule 59(e) motion is a "one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention," "a limited continuation of the original proceeding," and does not count as a second or successive habeas application.[157.3]

157.2 ___ U.S. ___, 140 S.Ct. 1698, 207 L.Ed.2d 58 (2020).

157.3 See also Kemp v. United States, ___ U.S. ___, 142 S.Ct. 1856, 213 L.Ed.2d 90 (2022) (noting Rule 59(e) motions must be filed within 28 days and Rule 60(b)(6) motions must be filed "within a reasonable time," but for motions under Rule 60(b)(1), like Kemp's, that reasonable time may not exceed one year).

§ 28.6 Constitutional Interpretation on Habeas Review

168 Buck v. Davis, 580 U.S. 100, 137 S.Ct 759, 197 L.Ed.2d 1 (2017) (ignoring waived *Teague* claim, noting "a State's failure to raise a *Teague* argument at the petition stage is particularly 'significant' in deciding whether such an exercise of discretion is appropriate").

(New footnote 183.1, p. 1640, line 30, after "2254(d)(1)")

183.1 See also Brown v. Davenport, ___ U.S. ___, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) (federal court may not "use an AEDPA case as an opportunity to pass on the wisdom of extending old precedents in new ways").

185 See also Welch v. United States, 578 U.S. 120, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) (applying retroactively ruling that held a federal sentencing provision was unconstitutionally vague).

(New text, p. 1641, line 12, after "rule")

But *Montgomery*'s authority on this point was undermined in *Jones v. Mississippi*.[190.1] Although purporting not to disturb *Montgomery*'s holding that an earlier decision barring mandatory life without parole sentences for juvenile offenders applies retroactively on collateral review, the Court stated cryptically in *Jones*: "[T]o the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents that both pre-date and postdate *Montgomery*, those retroactivity precedents—and not *Montgomery*—must guide the determination of whether [other rules] are substantive."

190.1 ___ U.S. ___, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021).

(New text, p. 1642, line 26, after "proceeding")

After 32 years without finding a single additional rule that qualifies as a "watershed rule[ ] of criminal procedure" that is necessary to prevent "an impermissibly large risk of an inaccurate conviction" and that alters "our understanding of the bedrock procedural elements essential to the fairness of a proceeding," the Court abandoned this exception in *Edwards v.*

Vannoy.[198.1] "Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts," the Court stated, and "no reliance interests can be affected by forthrightly acknowledging reality." After *Edwards,* no new procedural rule will apply retroactively on federal collateral review.

[198.1] ___ U.S. ___, 141 S.Ct. 1547, 209 L.Ed.2d 651 (2021).

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

Held the Court in *Wilson v. Sellers*,[201.1] "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale," and "presume that the unexplained decision adopted the same reasoning." A state may rebut the presumption by showing that the unexplained decision "most likely did rely on different grounds than the lower state court's decision such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." A "discretionary denial of leave to appeal does not typically entail an 'adjudication' of the underlying claim's 'merits.' " "Instead, it usually represents 'a decision . . .not to hear the appeal—not to decide at all.' "[201.2]

[201.1] ___ U.S. ___, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018).

[201.2] Brown v. Davenport, ___ U.S. ___, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) (quoting Green v. Fisher, 565 U.S. 34, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011)).

(Replace text, p. 1647, lines 6 through 21, between "the Court" and footnote 223)

initially declined to require the petitioner to establish a constitutional error was prejudicial under the *Brecht* standard.

(Replace text and add paragraph break, p. 1647, line 21, between footnote 223 and "the merits")

In later decisions, however, the Court has made it clear that the burden of showing prejudice under *Brecht* is on the petitioner.[223.1]

Once a state court reaches

[223.1] See Brown v. Davenport, ___ U.S. ___, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) ("Rather than require the prosecution to prove that a constitutional trial error is harmless, *Brecht* held that a state prisoner seeking to challenge his conviction in collateral federal proceedings must show that the error had a " 'substantial and injurious effect or influence' " on the outcome of his trial."); Davis v. Ayala, 576 U.S. 257, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015) (quoting *Brecht,* stating that habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice' ").

(New text, p. 1647, line 25, after footnote 224)

The Court in *Brown v. Davenport*[224.1] held that to obtain relief for a claim rejected on the merits in state court, a petitioner must establish not only "grave doubt" about whether the trial error affected the verdict's outcome (*Brecht*'s burden), but also that the state court's decision was contrary to or an unreasonable application of *Chapman*'s harmless error standard, under § 2254(d).

[224.1] See Brown v. Davenport, ___ U.S. ___, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022).

§ 28.7 Review of Factfinding and Evidentiary Hearings

(New text, p. 1652, at end of chapter)

Twenty five years later, the Court in *Shoop v. Twyford*[244.1] emphasized the limits on discovery in a § 2254 proceeding. It held that a federal court may not order a state to transport a habeas petitioner for medical testing if the petitioner had not first shown that the evidence sought would be admissible in the § 2254 proceeding. Because a federal court "may *never* needlessly prolong a habeas case, particularly given the essential need to promote the finality of state convictions," it "must, before facilitating the development of new evidence," "determine at the outset whether the new evidence sought could be lawfully considered."

[244.1] Shoop v. Twyford, ___ U.S. ___, 142 S.Ct. 2037, 213 L.Ed.2d. 318 (2022) (emphasis in original).

Table of Cases