

# Table of Contents

## Volume 1

### PART I INTRODUCTION AND OVERVIEW

#### CHAPTER 1 AN OVERVIEW OF THE CRIMINAL JUSTICE PROCESS

- 1.1 The subject under inquiry
  - 1.1(a) Coverage
- 1.2 Federal authority and the separate federal and state criminal justice processes
  - 1.2(c) Federal legislative authority
  - 1.2(d) Congressional policy and the federalization of local crime
  - 1.2(e) Congressional policy and the limited size of the federal enforcement structure
  - 1.2(f) Executive branch priorities
  - 1.2(g) Cooperative programs
  - 1.2(h) Federal assistance programs
  - 1.2(i) The special significance of the federal system
- 1.3 Similarities and differences in the laws of fifty-two jurisdictions
  - 1.3(b) The limits of mandated uniformity
  - 1.3(c) The tendency to individualize
  - 1.3(e) State reliance on the federal model
  - 1.3(f) State reliance on other models
- 1.4 The agencies of administration and their organizational structures
  - 1.4(b) Localism and criminal justice administration
  - 1.4(c) Fragmentation of enforcement agencies
  - 1.4(d) Police agencies
  - 1.4(e) Prosecution agencies
  - 1.4(f) Defense counsel
  - 1.4(g) Magistrates
  - 1.4(i) Problem-solving courts [*New*]
  - 1.4(j) Appellate courts [*New*]
- 1.5 The cornerstone objectives of the process
  - 1.5(a) Implementing the enforcement of the substantive law
  - 1.5(b) Discovery of the truth
  - 1.5(c) Adversary adjudication
  - 1.5(e) Minimizing erroneous convictions
  - 1.5(f) Minimizing the burdens of accusation and litigation
  - 1.5(g) Providing lay participation

- 1.5(h) Respecting the dignity of the individual
- 1.5(i) Maintaining the appearance of fairness
- 1.5(j) Achieving equality in the application of the process
- 1.5(k) Addressing the concerns of the victim
- 1.6 Historical development of the process
  - 1.6(e) The progressive era
  - 1.6(f) The second quarter of the twentieth century
  - 1.6(g) The era of liberal idealism
  - 1.6(h) The post-liberalism period
  - 1.6(i) The mixed developments of the twenty-first century
  - 1.6(j) The future of reform
- 1.7 The laws regulating the process
  - 1.7(e) Statutes
  - 1.7(f) General court rules
  - 1.7(i) Supervisory authority rulings
  - 1.7(j) Internal administrative standards
  - 1.7(k) Professional responsibility standard
  - 1.7(l) Local ordinances
- 1.8 Procedural subsets
  - 1.8(b) Specified offense distinctions
  - 1.8(c) Misdemeanor/felony and related distinctions
  - 1.8(d) Ordinance violations
- 1.9 Deviance, discretion, and the limits of legal regulation
  - 1.9(b) Deviance
- 1.10 Administrative policies and the local administrative setting
  - 1.10(b) Policy differences
  - 1.10(c) Caseload pressures
  - 1.10(e) The influence of the local community
- 1.11 Criminal justice statistics
  - 1.11(a) Significance
  - 1.11(b) National statistics
  - 1.11(c) State statistics
  - 1.11(c-1) State disposition tables *[New]*

## **CHAPTER 2 THE CONSTITUTIONALIZATION OF CRIMINAL PROCEDURE**

- 2.3 Total incorporation
  - 2.3(b) Rejection by the court
- 2.4 Fundamental fairness
  - 2.4(b) The original meaning of due process
  - 2.4(e) Application of fundamental fairness: from the mid-1930s to the early 1960s
- 2.6 Application of the selective incorporation doctrine
  - 2.6(b) Guarantees not yet incorporated
  - 2.6(c) Acceptance of selective incorporation in the post-1960s
  - 2.6(e) The retention of due process methodology
- 2.7 The independent content of due process

## TABLE OF CONTENTS

- 2.7(a) Regulation by procedural due process after selective incorporation
- 2.7(b) The “limited” role of free-standing due process
- 2.7(c) Due process methodology
- 2.7(d) Substantive due process
- 2.8 The preference for expansive interpretations
  - 2.8(a) The nature of the preference
  - 2.8(b) The shifting strength of the preference
  - 2.8(c) The reasons for the preference
- 2.9 Guideposts for constitutional interpretation
  - 2.9(b) Stare decisis
  - 2.9(c) The text
  - 2.9(d) The original understanding
  - 2.9(g) The appropriateness of administratively based per se rules
  - 2.9(h) The appropriateness of prophylactic rules
  - 2.9(i) Weighing the impact upon efficiency
  - 2.9(j) The special character of “clearly established law rulings”
- 2.10 Applying interpretive guideposts: the case of the privilege against self-incrimination
  - 2.10(b) Basic privilege doctrines
- 2.11 The non-retroactivity doctrine
  - 2.11(e) Rejecting *Linkletter*: finalized convictions under the *Teague* standards
- 2.12 The influence of federal constitutional rulings upon state constitutional law
  - 2.12(a) The “new federalism” movement
  - 2.12(b) The mirroring presumption: scope
  - 2.12(c) The mirroring debate
  - 2.12(d) Judicial acceptance and rejection of mirroring

## Volume 2

### PART II DETECTION AND INVESTIGATION OF CRIME

#### CHAPTER 3 ARREST, SEARCH AND SEIZURE

- 3.1 The Fourth Amendment exclusionary rule and other remedies
  - 3.1(b) Purposes of the exclusionary rule
  - 3.1(c) The exclusionary rule under attack
  - 3.1(d) The significance of underlying motivation; more on the deterrence objective and inquiry into subjective matters
  - 3.1(e) Constitutional vs. other violations
  - 3.1(f) Application of exclusionary rule in criminal proceedings
  - 3.1(h) The exclusionary rule and “private” or nonpolice searches
  - 3.1(i) The exclusionary rule and searches by foreign police
  - 3.1(j) Challenge of jurisdiction
  - 3.1(k) The “constitutional tort”
- 3.2 Protected areas and interests

- 3.2(a) The *Katz* expectation of privacy test
- 3.2(b) Plain view, smell, hearing and touch; aiding the senses
- 3.2(c) Residential premises
- 3.2(d) “Open fields”
- 3.2(e) Business and commercial premises
- 3.2(f) Vehicles
- 3.2(g) Personal characteristics
- 3.2(h) Abandoned effects
- 3.2(j) Surveillance of relationships and movements
- 3.3 Probable cause
  - 3.3(a) General considerations
  - 3.3(b) Nature of probable cause
  - 3.3(c) Information from an informant
  - 3.3(d) Information from a victim or witness
  - 3.3(e) Information from or held by other police
  - 3.3(f) First-hand information
  - 3.3(g) Special problems in search cases
- 3.4 Search warrants
  - 3.4(a) When warrant may be utilized
  - 3.4(b) The “neutral and detached magistrate” requirement
  - 3.4(c) Oath or affirmation; record
  - 3.4(d) Probable cause: the facially-sufficient affidavit
  - 3.4(e) Particular description of place to be searched
  - 3.4(f) Particular description of things to be seized
  - 3.4(g) Time of execution
  - 3.4(h) Entry without notice
  - 3.4(i) Detention and search of persons
  - 3.4(j) Scope and intensity of the search
  - 3.4(k) What may be seized
  - 3.4(l) Miscellaneous requirements
- 3.5 Seizure and search of persons and personal effects
  - 3.5(a) Arrest
  - 3.5(b) Search of the person at scene of prior arrest
  - 3.5(c) Search of the person during post-arrest detention
  - 3.5(d) Other search of the person
  - 3.5(e) Seizure and search of containers and other personal effects
- 3.6 Entry and search of premises
  - 3.6(a) Basis for entry to arrest
  - 3.6(b) Entry without notice to arrest
  - 3.6(d) Search and exploration after arrest
  - 3.6(e) Warrantless entry and search for evidence
  - 3.6(f) Warrantless entry and search for other purposes
- 3.7 Search and seizure of vehicles
  - 3.7(a) Search incident to arrest
  - 3.7(b) Search and seizure to search for evidence
  - 3.7(c) Search of containers and persons within
  - 3.7(d) Seizure for other purposes
  - 3.7(e) Search for other purposes

## TABLE OF CONTENTS

- 3.8 Stop and frisk and similar lesser intrusions
  - 3.8(a) Stop and frisk: Fourth Amendment theory
  - 3.8(b) Dimensions of a permissible “stop”
  - 3.8(c) Action short of a stop
  - 3.8(d) Grounds for a permissible “stop”
  - 3.8(e) “Frisk” for weapons
  - 3.8(h) Brief seizure of objects
- 3.9 Inspections and regulatory searches
  - 3.9(a) General considerations
  - 3.9(c) Inspection of businesses
  - 3.9(f) Border searches and related activities
  - 3.9(g) Vehicle use regulation
  - 3.9(i) Searches directed at prisoners
  - 3.9(j) Searches directed at probationers and parolees
  - 3.9(k) Searches directed at students
- 3.10 Consent searches
  - 3.10(b) Factors bearing on validity of consent
  - 3.10(c) Consent by deception
  - 3.10(d) Third party consent: general considerations
  - 3.10(e) Common relationships in third party consent
  - 3.10(f) Scope of consent

## CHAPTER 4 NETWORK SURVEILLANCE

- 4.2 Postal mail
  - 4.2(b) Detaining mail and packages
- 4.3 Telephone surveillance and the Fourth Amendment
  - 4.3(c) Numbers dialed, text messages, post-cut-through dialed digits, cell-site data, and geofencing [*Retitled*]
- 4.4 Internet communications and the Fourth Amendment
  - 4.4(b) Non-content information
  - 4.4(c) Contents of communications
  - 4.4(d) The line between contents and non-content information
  - 4.4(e) Limits on Fourth Amendment protections in e-mail and internet communications
- 4.6 The Wiretap Act
  - 4.6(a) Wire, oral, and electronic communications
  - 4.6(b) Interception
  - 4.6(c) Overview of obtaining and executing wiretap orders
  - 4.6(e) Contents of application
  - 4.6(g) Contents of order
  - 4.6(l) Statutory exceptions to liability
  - 4.6(m) Suppression of evidence
  - 4.6(n) Civil remedies
  - 4.6(o) Criminal penalties
- 4.7 The Pen Register Statute
  - 4.7(b) Application for a Pen Register order
  - 4.7(c) Dialing routing, addressing, and signaling information
- 4.8 The Stored Communications Act

- 4.8(b) Providers of electronic communication service and remote computing service
- 4.8(c) Rules for compelling non-content information
- 4.8(d) Rules for compelling content information
- 4.8(e) Rules for voluntary disclosure of information
- 4.8(f) Remedies for violations
- 4.8(g) Territorial scope and foreign government access
- 4.8(h) Role in civil discovery
- 4.8(i) Notice to subscribers or customers [*New*]
- 4.9 Foreign intelligence surveillance
  - 4.9(a) The Fourth Amendment

## **CHAPTER 5 POLICE “ENCOURAGEMENT” AND THE ENTRAPMENT DEFENSE**

- 5.1 Encouragement of crime and the defense of entrapment
  - 5.1(a) Encouragement of criminal activity
  - 5.1(b) Entrapment defense as a limit
  - 5.1(c) Scope of the defense
- 5.2 Subjective versus objective test for entrapment
  - 5.2(a) The subjective approach
  - 5.2(b) The objective approach
  - 5.2(c) Objections to the subjective approach
  - 5.2(d) Objections to the objective approach
- 5.3 Procedural considerations re entrapment defense
  - 5.3(a) Admissibility of evidence of defendant’s past conduct
  - 5.3(b) Triable by court or jury
  - 5.3(c) Inconsistent defenses
  - 5.3(d) Burden of proof
- 5.4 Other challenges to encouragement practices
  - 5.4(b) Inducements to those not reasonably suspected
  - 5.4(c) Government “overinvolvement” in a criminal enterprise

## **CHAPTER 6 INTERROGATION AND CONFESSIONS**

- 6.1 Introduction and overview confessions
  - 6.1(a) The need for confessions
  - 6.1(b) The extent of police abuse
  - 6.1(c) The Supreme Court’s response
- 6.2 The “voluntariness” test
  - 6.2(a) The common law rule
  - 6.2(b) Due process and the “complex of values”
  - 6.2(c) Relevant factors in the “totality of circumstances”
- 6.3 The prompt appearance requirement
  - 6.3(a) The *McNabb-Mallory* rule
  - 6.3(b) Reactions to the rule
  - 6.3(c) Prompt appearance in the states
- 6.4 The right to counsel re interrogation
  - 6.4(a) Pre-*Massiah* developments
  - 6.4(b) The *Massiah* case

## TABLE OF CONTENTS

- 6.4(c) The *Escobedo* case
- 6.4(d) The *Williams* case
- 6.4(e) When the right to counsel begins
- 6.4(f) Waiver of counsel
- 6.4(g) Infringement of the right
- 6.5 The privilege against self-incrimination; *Miranda*
  - 6.5(a) The privilege in the police station
  - 6.5(b) The *Miranda* rules
  - 6.5(c) The experience under *Miranda*
  - 6.5(d) Critique of the *Miranda* approach
  - 6.5(e) The “repeal” of *Miranda*
- 6.6 *Miranda*: When interrogation is “custodial”
  - 6.6(a) “Custody” vs. “focus”
  - 6.6(b) Purpose of custody
  - 6.6(c) Subjective vs. objective approach
  - 6.6(d) Presence at station
  - 6.6(e) Presence elsewhere
  - 6.6(f) Other considerations
- 6.7 *Miranda*: “Interrogation”
  - 6.7(a) The “functional equivalent” test
  - 6.7(b) Questioning
  - 6.7(c) Other “words or actions”
  - 6.7(d) “Volunteered” statements and follow-up questioning
- 6.8 *Miranda*: Required warnings
  - 6.8(a) Content
  - 6.8(b) Time and frequency
  - 6.8(c) Manner; proof
  - 6.8(d) Additional admonitions
- 6.9 *Miranda*: Waiver of rights
  - 6.9(a) Express or implied
  - 6.9(b) Competence of the defendant
  - 6.9(c) Conduct of the police
  - 6.9(d) Implied waiver
  - 6.9(e) “Qualified” or limited waiver
  - 6.9(f) Waiver after assertion of rights
  - 6.9(g) Ambiguous, equivocal, limited and untimely assertions of rights
- 6.10 *Miranda*: Nature of offense, interrogator, and proceedings
  - 6.10(b) Questioning by private citizen
  - 6.10(c) Questioning by non-police official
  - 6.10(d) Questioning by foreign police
  - 6.10(e) Proceedings at which confession offered

## CHAPTER 7 IDENTIFICATION PROCEDURES

- 7.1 Introduction to identification
  - 7.1(a) The problem of misidentification
  - 7.1(b) The causes of misidentification
  - 7.1(c) The Supreme Court’s response

- 7.2 The privilege against self-incrimination and identification
  - 7.2(a) The *Schmerber* rule
  - 7.2(b) Application to identification procedures
  - 7.2(c) Refusal to cooperate
  - 7.2(d) Change in appearance
- 7.3 The right to counsel and to confrontation re identification
  - 7.3(a) Procedures required
  - 7.3(b) Time of identification
  - 7.3(c) Nature of identification procedure
  - 7.3(d) Waiver or substitution of counsel
  - 7.3(e) Role of counsel
  - 7.3(f) Consequences of violation
- 7.4 Due process and identification: “The totality of the circumstances”
  - 7.4(a) Generally
  - 7.4(b) The “unnecessarily suggestive” element
  - 7.4(c) The risk of misidentification element
  - 7.4(d) The “arranged by law enforcement” element
  - 7.4(e) Lineups
  - 7.4(f) Use of pictures
  - 7.4(g) One-man showups
  - 7.4(h) In-court identifications
- 7.5 Additional possible safeguards re identification
  - 7.5(a) Jury instructions
  - 7.5(b) Expert testimony
  - 7.5(c) Improved police procedures

## Volume 3

### CHAPTER 8 GRAND JURY INVESTIGATION

- 8.1 The investigative grand jury
  - 8.1(a) Dual functions of the traditional grand jury
  - 8.1(b) Special grand juries
  - 8.1(c) Alternative procedures
- 8.2 Historical development of the grand jury
  - 8.2(b) Developments in the United States
- 8.3 Investigative advantages of the grand jury
  - 8.3(b) Subpoena ad testificandum
  - 8.3(c) Subpoena duces tecum
  - 8.3(d) Psychological pressure
  - 8.3(h) Grand jury reports
- 8.4 The legal structure of the investigative grand jury
  - 8.4(b) Independent investigative authority
- 8.5 Grand jury secrecy
  - 8.5(a) Underlying considerations
  - 8.5(b) Statutory structure
  - 8.5(c) Protected information

## TABLE OF CONTENTS

- 8.5(d) Disclosure by a witness
- 8.5(e) Disclosure to further criminal law enforcement
- 8.5(h) Court ordered disclosure to third parties
- 8.5(i) Remedies
- 8.6 The right to every man's evidence
  - 8.6(a) The public's right and the grand jury
  - 8.6(b) Privileges and other protections
  - 8.6(c) Third Party Records
- 8.7 Fourth Amendment challenges to subpoenas
  - 8.7(a) Applicability of the Fourth Amendment to subpoenas for documents
  - 8.7(b) The prohibition against overbreadth in documentary subpoenas
  - 8.7(d) Subpoenas for identification evidence
- 8.8 Challenges to misuse of the subpoena authority
  - 8.8(a) Improper subject of investigation
  - 8.8(b) Relevancy objections
  - 8.8(c) Oppressiveness objections
  - 8.8(d) "Chilling effect" objections
  - 8.8(e) Use for civil discovery
  - 8.8(f) Use for post-indictment criminal discovery
  - 8.8(g) Prosecution or police usurpation of the subpoena power
  - 8.8(h) Harassment
- 8.9 Grand jury inquiries based on illegally obtained evidence
  - 8.9(a) The *Calandra* rule
  - 8.9(a-1) *Calandra* and the pre-indictment suppression remedy  
[New]
- 8.10 Grand jury testimony and the privilege against self-incrimination
  - 8.10(a) The standard of potential incrimination
  - 8.10(b) Incrimination under the laws of another sovereign
  - 8.10(d) Advice as to rights
  - 8.10(e) Waiver
- 8.11 Self-incrimination immunity and compelled testimony
  - 8.11(a) Constitutionality
  - 8.11(b) Transactional vs. use/derivative-use immunity
  - 8.11(c) Applying the use/derivative-use prohibition
  - 8.11(d) Immunity procedures
  - 8.11(e) Informal grants of immunity
- 8.12 Self-incrimination and the compulsory production of documents
  - 8.12(c) The required records exception
  - 8.12(e) Third-party production
  - 8.12(g) The remnants of *Boyd*
- 8.13 Application of the act-of-production doctrine
  - 8.13(a) Testimonial character and the foregone conclusion standard
  - 8.13(d) Claims by entity agents
- 8.14 The grand jury witness' right to counsel

- 8.14(b) Counsel within the grand jury room
- 8.14(d) Multiple representation

## **CHAPTER 9 SCOPE OF THE EXCLUSIONARY RULES**

- 9.1 Standing: the “personal rights” approach
  - 9.1(a) “Personal rights” as to searches, confessions and identifications
  - 9.1(b) Residential premises
  - 9.1(c) Business premises
  - 9.1(d) Vehicles
- 9.2 Standing: other possible bases
  - 9.2(a) “Automatic” standing
  - 9.2(b) “Target” standing
  - 9.2(c) “Derivative” and “vicarious” standing *[Retitled]*
  - 9.2(d) Abolition of standing
- 9.3 “Fruit of the poisonous tree” theories
  - 9.3(a) Generally
  - 9.3(b) “But for” rejected
  - 9.3(c) “Attenuated connection”
  - 9.3(d) “Independent source”
  - 9.3(e) “Inevitable discovery”
- 9.4 Fruits of illegal arrests and searches
  - 9.4(a) Confessions
  - 9.4(b) Searches
  - 9.4(c) Arrests
  - 9.4(d) Identification of person
  - 9.4(e) Testimony of witness
  - 9.4(f) New crime
- 9.5 Fruits of illegally obtained confessions
  - 9.5(a) The confession as a “poisonous tree”
  - 9.5(b) Searches
  - 9.5(c) Confessions
- 9.6 Permissible use of illegally obtained evidence at trial
  - 9.6(a) Impeachment
  - 9.6(b) Defense tactics which “open the door”
  - 9.6(c) Prosecution for perjury or other “new” offense

## **CHAPTER 10 ADMINISTRATION OF THE EXCLUSIONARY RULES**

- 10.1 The pretrial motion to suppress
  - 10.1(a) Contemporaneous objection or pretrial motion
  - 10.1(b) Form of the motion
  - 10.1(c) Pre-charge and post-trial motions distinguished
- 10.2 Waiver or forfeiture of objection re suppression of evidence
  - 10.2(a) Failure to make timely objection
  - 10.2(b) Failure to renew objection
  - 10.2(c) Testimony by defendant
  - 10.2(d) Plea of guilty or nolo contendere

## TABLE OF CONTENTS

- 10.3 Burden of proof at suppression hearing
  - 10.3(a) Generally
  - 10.3(b) Search and seizure
  - 10.3(c) Confessions
  - 10.3(d) Identification
- 10.4 Standard of proof at suppression hearing
  - 10.4(b) Confessions
  - 10.4(c) Search and seizure
  - 10.4(d) Identification
- 10.5 The suppression hearing
  - 10.5(a) The trier of fact
  - 10.5(b) Presence of jury
  - 10.5(c) Testimony by defendant
  - 10.5(d) Evidentiary rules
  - 10.5(e) Right of confrontation
  - 10.5(f) Right of compulsory process
- 10.6 The suppression hearing ruling and its effect
  - 10.6(a) Findings
  - 10.6(b) Recommendations
  - 10.6(c) Reconsideration at trial
  - 10.6(d) Effect of ruling in other cases

## **PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS**

### **CHAPTER 11 THE RIGHT TO COUNSEL**

- 11.1 The constitutional rights to retained and appointed counsel
  - 11.1(a) Sixth Amendment rights
  - 11.1(b) Due process rights
  - 11.1(d) Equal protection and appointed counsel
- 11.2 Scope of the indigent's right to counsel and other assistance
  - 11.2(a) Right to appointed counsel: misdemeanor prosecutions
  - 11.2(b) Right to appointed counsel: stages of the proceeding
  - 11.2(c) The *Anders* rules
  - 11.2(d) Transcripts
  - 11.2(e) Assistance of experts
  - 11.2(g) Indigency standards
  - 11.2(h) Partial contribution and recoupment
- 11.3 Waiver of the right to counsel
  - 11.3(b) Waiver of counsel at trial: the necessary advice and inquiry
  - 11.3(c) Forfeiture of the right to counsel
- 11.4 Choice of counsel
  - 11.4(a) Judicial discretion in selecting appointed counsel
  - 11.4(b) Replacement of appointed counsel
  - 11.4(c) Choice of retained counsel
  - 11.4(d) The pro se alternative
- 11.5 The constitutional right to self-representation

- 11.5(a) The *Faretta* ruling
- 11.5(c) Requisite warnings and judicial inquiry
- 11.5(d) Grounds for denial
- 11.5(f) Standby counsel
- 11.5(g) Hybrid representation
- 11.6 Counsel's control over defense strategy
  - 11.6(a) "Strategic" vs. "personal" decisions
  - 11.6(b) Consultation
  - 11.6(c) Balancing of interests
  - 11.6(d) Prejudice
- 11.7 The right to effective assistance of counsel: guiding principles
  - 11.7(a) The prerequisite of a constitutional right to counsel
  - 11.7(c) The adversary system touchstone
  - 11.7(e) Raising an ineffectiveness claim
- 11.8 Ineffective assistance claims based upon state interference and other extrinsic factors
  - 11.8(a) Restrictions upon counsel's assistance
  - 11.8(b) State invasions of the lawyer-client relationship
  - 11.8(c) Conditions of representation
- 11.9 Ineffective assistance claims based upon attorney conflicts of interest
  - 11.9(a) The range of possible conflicts of interest
  - 11.9(b) The trial court duty to inquire
  - 11.9(c) Waiver and disqualification
  - 11.9(d) Challenging convictions
- 11.10 Ineffective assistance claims based upon lawyer incompetence
  - 11.10(a) Guiding considerations
  - 11.10(b) The competency standard
  - 11.10(c) Applying the reasonableness standard
  - 11.10(d) The prejudice element

## Volume 4

### CHAPTER 12 PRETRIAL RELEASE

- 12.1 Pretrial release procedures
  - 12.1(a) The Federal Bail Reform Act
  - 12.1(b) State practice generally
  - 12.1(c) Counsel at bail hearing
  - 12.1(d) Proof at bail hearing
  - 12.1(e) Defendant's statements
  - 12.1(f) Victim's right to be heard
- 12.2 Constitutionality of limits on pretrial freedom
  - 12.2(a) Amount of money bail
  - 12.2(b) Poverty and pretrial release
  - 12.2(c) Opportunity to prepare a defense
  - 12.2(d) Nature of pretrial custody
  - 12.2(e) Constitutional challenges to non-financial conditions of release *[New]*

## TABLE OF CONTENTS

- 12.3 Constitutionality of mandating pretrial detention
  - 12.3(a) Preventive detention in the federal system
  - 12.3(b) Preventive detention and the state constitutions
  - 12.3(c) The Eighth Amendment ambiguity
  - 12.3(d) Other constitutional objections
  - 12.3(e) Detention where serious offense charged
  - 12.3(f) Detention upon individual finding of dangerousness
  - 12.3(g) Detention for misconduct during release
- 12.4 Special situations re release
  - 12.4(a) Capital cases
  - 12.4(d) After conviction
  - 12.4(f) Probation or parole revocation
  - 12.4(g) Material witnesses
- 12.5 Alternatives to arrest
  - 12.5(a) Summons in lieu of warrant
  - 12.5(b) Citation in lieu of arrest without warrant

## **CHAPTER 13 THE DECISION WHETHER TO PROSECUTE**

- 13.1 Nature of the decision whether to prosecute
  - 13.1(a) In general
  - 13.1(b) Evidence sufficiency
  - 13.1(c) Screening out cases
  - 13.1(d) Diversion
  - 13.1(e) Selection of the charge
- 13.2 Discretionary enforcement
  - 13.2(a) The prosecutor's discretion
  - 13.2(b) Police discretion
  - 13.2(c) Jury and judge discretion
  - 13.2(d) The "problem" of discretion
  - 13.2(f) Structuring the prosecutor's discretion
  - 13.2(g) Checking the prosecutor's discretion
  - 13.2(h) Mandating the prosecutor's discretion
- 13.3 Challenges to and checks upon the decision not to prosecute
  - 13.3(a) Mandamus
  - 13.3(b) Private prosecution; *qui tam* actions
  - 13.3(c) Judicial approval of *nolle prosequi*
  - 13.3(d) Grand jury
  - 13.3(e) Attorney General
  - 13.3(f) Removal; special prosecutor
- 13.4 Challenging the decision to prosecute: equal protection
  - 13.4(a) Discriminatory prosecution
  - 13.4(b) Problems of proof
  - 13.4(c) "Arbitrary classification"
  - 13.4(d) "Intentional or purposeful"
  - 13.4(e) Nonprosecution of others
- 13.5 Other challenges to the decision to prosecute
  - 13.5(a) Vindictive prosecution

- 13.5(b) Reneging on a promise not to prosecute [*Retitled*]
- 13.5(c) Desuetude and lack of fair notice
- 13.5(d) Federal relief from state prosecution: removal
- 13.5(e) Federal relief from state prosecution: injunction and declaratory judgment
- 13.5(f) Federal relief from state prosecution: habeas corpus
- 13.5(g) Civil action against prosecutor
- 13.5(h) Recoupment of litigation expenses
- 13.6 Challenges to the decision to forego or terminate diversion
  - 13.6(a) The diversion process
  - 13.6(b) Statutory standards for diversion
  - 13.6(c) Decision not to divert
- 13.7 Challenges to the charge selection
  - 13.7(a) Duplicative and overlapping statutes
  - 13.7(c) Vindictive charge selection
  - 13.7(d) Reneging on a promise not to charge [*Retitled*]

## CHAPTER 14 THE PRELIMINARY HEARING

- 14.1 Functions of the preliminary hearing
  - 14.1(a) Screening
  - 14.1(b) Discovery
  - 14.1(c) Future impeachment
  - 14.1(d) The perpetuation of testimony
- 14.2 Defendant's right to a preliminary hearing
  - 14.2(a) The Federal Constitution
  - 14.2(a-1) Statutes and Court Rules [*New*]
  - 14.2(b) The federal practice
  - 14.2(c) Indictment states
  - 14.2(d) Information states
  - 14.2(e) Waiver and demand
  - 14.2(f) Time of hearing
  - 14.2(g) Remedies
- 14.3 The preliminary hearing bindover determination
  - 14.3(c) Consequences of a dismissal
  - 14.3(d) Consequences of a bindover
- 14.4 Preliminary hearing procedures
  - 14.4(b) Application of the rules of evidence
  - 14.4(c) The defendant's right of cross-examination
  - 14.4(d) The right to present defense witnesses
  - 14.4(e) Challenging procedural rulings

## CHAPTER 15 GRAND JURY REVIEW

- 15.1 Defendant's right to prosecution by indictment
  - 15.1(b) The Fifth Amendment right: scope
  - 15.1(d) Indictment jurisdictions
  - 15.1(f) Waiver in indictment and limited-indictment jurisdictions
  - 15.1(g) Information states
- 15.2 The structure of grand jury screening

## TABLE OF CONTENTS

- 15.2(b) Control over proof
- 15.2(c) The prospective defendant's testimony
- 15.2(d) Evidentiary rules
- 15.2(f) Quantum of proof
- 15.2(g) The indictment decision
- 15.2(h) Resubmission
- 15.2(j) Transcription
- 15.3 The effectiveness of grand jury screening
  - 15.3(a) The ongoing debate
  - 15.3(b) Statistics
  - 15.3(c) Screening variations
- 15.4 Indictment challenges based on grand jury composition deficiencies
  - 15.4(c) Equal protection claims
  - 15.4(f) Statutory violations
  - 15.4(g) Juror bias
  - 15.4(h) Preindictment publicity
- 15.5 Indictment challenges based on evidentiary deficiencies
  - 15.5(a) The federal standard: the *Costello* rule
  - 15.5(b) The federal standard: the rise and demise of "misconduct exception" to *Costello*
  - 15.5(c) State standards
- 15.6 Indictment challenges based on misconduct: general principles
  - 15.6(a) Prosecutorial misconduct
  - 15.6(b) The federal standard; the *Williams* limits
  - 15.6(d) The prejudice requirement
- 15.7 Indictment challenges based on misconduct: common claims
  - 15.7(b) Prejudicial comments and information
  - 15.7(d) Violation of the defendant's witness-rights
  - 15.7(e) Deception in presenting evidence
  - 15.7(g) Erroneous legal advice

## CHAPTER 16 THE LOCATION OF THE PROSECUTION

- 16.1 Venue: general principles
  - 16.1(b) Distinguishing vicinage
  - 16.1(c) The "crime-committed" formula
  - 16.1(d) Multi-venue offenses
  - 16.1(e) Special legislation
  - 16.1(g) Proof of venue
- 16.2 Applying the crime-committed formula to establish venue
  - 16.2(c) Literalism
  - 16.2(d) Nature of the offense
  - 16.2(g) Multiple participants
- 16.3 Change of venue
  - 16.3(g) Selection of the transfer district
- 16.4 Jurisdiction
  - 16.4(a) The concept of jurisdiction
  - 16.4(b) Federal jurisdiction

- 16.4(c) State jurisdiction

## Volume 5

### **CHAPTER 17 THE SCOPE OF THE PROSECUTION: JOINDER AND SEVERANCE**

- 17.1 Joinder and severance of offenses
  - 17.1(a) Joinder: related offenses
  - 17.1(b) Joinder: offenses of similar character
  - 17.1(c) Severance: separate defenses
  - 17.1(d) Severance: evidence of other crimes
  - 17.1(e) Severance: cumulation of evidence
  - 17.1(f) Severance as of right or as a more favored alternative
- 17.2 Joinder and severance of defendants
  - 17.2(a) Joinder of defendants
  - 17.2(b) Severance: codefendant's confession incriminates
  - 17.2(c) Severance: codefendant's testimony would exculpate
  - 17.2(d) Severance: conflicting defenses and strategies
  - 17.2(e) Severance: guilt by association
  - 17.2(f) Severance: confusion of evidence
- 17.3 Joinder and severance: procedural considerations
  - 17.3(a) Court's authority to consolidate and sever
  - 17.3(b) Misjoinder
  - 17.3(c) Failure to prove joinder basis
  - 17.3(d) Waiver or forfeiture
  - 17.3(e) Appellate review of prejudice claim
- 17.4 Failure to join related offenses
  - 17.4(a) Collateral estoppel
  - 17.4(b) Double jeopardy: same offense
  - 17.4(c) "Same transaction" joinder

### **CHAPTER 18 SPEEDY TRIAL AND OTHER PROMPT DISPOSITION**

- 18.1 The constitutional right to speedy trial
  - 18.1(c) When right attaches
  - 18.1(d) Waiver or forfeiture of the right
  - 18.1(e) Remedy for violation
- 18.2 The constitutional balancing test re speedy trial
  - 18.2(b) The length of the delay
  - 18.2(c) Reason for delay
  - 18.2(d) Defendant's responsibility to assert the right
  - 18.2(e) Prejudice
- 18.3 Statutes and court rules on speedy trial
  - 18.3(b) Federal Speedy Trial Act of 1974
  - 18.3(c) State provisions
- 18.4 Speedy trial and the imprisoned defendant
  - 18.4(a) Constitutional right

## TABLE OF CONTENTS

- 18.4(b) Federal Speedy Trial Act of 1974
- 18.4(c) Interstate Agreement on Detainers
- 18.4(d) Uniform Mandatory Disposition of Detainers Act
- 18.5 The right to other speedy disposition
  - 18.5(a) Statutes of limitations
  - 18.5(b) Unconstitutional pre-accusation delays
  - 18.5(c) Post-trial delays

## **PART IV THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT AND INNOCENCE**

### **CHAPTER 19 THE ACCUSATORY PLEADING**

- 19.1 The liberalization of pleading requirements
  - 19.1(d) The more successful 20th century reforms
- 19.2 Pleading functions
  - 19.2(b) Double jeopardy protection
  - 19.2(c) Providing notice
  - 19.2(e) Providing a jurisdictional grounding
  - 19.2(f) Safeguarding defendant's right to prosecution by indictment
- 19.3 Basic pleading defects
  - 19.3(a) Failure to charge an offense
  - 19.3(b) Failure to allege essential elements
  - 19.3(c) Factual specificity
  - 19.3(d) Duplicity
  - 19.3(g) Late objections
- 19.5 Amendments of the pleading
  - 19.5(b) The prejudice/different-offense standard
- 19.6 Variances and pleadings
  - 19.6(a) Challenging variances
  - 19.6(b) The *Berger* standard
  - 19.6(c) The constructive amendment limitation

### **CHAPTER 20 PRETRIAL DISCOVERY**

- 20.1 The expansion of discovery
  - 20.1(a) The break from the common law
  - 20.1(b) The discovery debate
  - 20.1(c) Outcome of the discovery debate
- 20.2 The structure of discovery law
  - 20.2(b) Court rules and statutes
  - 20.2(c) The operation of discovery provisions
  - 20.2(d) Other discovery vehicles
  - 20.2(e) Depositions
- 20.3 Defense discovery
  - 20.3(a) Prosecution possession or control
  - 20.3(d) Codefendant's statements
  - 20.3(f) Scientific reports and related information
  - 20.3(g) Documents and tangible objects

- 20.3(h) Witness lists
- 20.3(i) Witness statements
- 20.3(j) The work product exemption
- 20.3(k) Police reports
- 20.3(l) Protective orders
- 20.3(n) Exculpatory-matter provisions
- 20.4 Constitutional limitations upon pretrial discovery for the prosecution
  - 20.4(a) Due process
  - 20.4(b) Self-incrimination: the prerequisite of defendant's personal communication
  - 20.4(d) Self-incrimination: the acceleration doctrine
- 20.5 Prosecution discovery provisions
  - 20.5(c) Insanity and related mental-capacity defenses
  - 20.5(d) Identification of defenses
  - 20.5(h) Scientific reports
- 20.6 Sanctions for discovery violations
  - 20.6(a) Range
  - 20.6(b) Prosecution violations

## **CHAPTER 21 PLEAS OF GUILTY**

- 21.1 The plea negotiation system
  - 21.1(a) Forms of plea bargaining
  - 21.1(b) Development of plea bargaining
  - 21.1(d) Accurate and fair results
  - 21.1(e) The problem of disparity
  - 21.1(f) Other attributes and consequences
  - 21.1(g) Prohibiting plea bargaining
  - 21.1(h) Plea bargaining and the federal sentencing guidelines
- 21.2 Kept, broken, rejected and nonexistent bargains
  - 21.2(a) Statutory inducements to plead guilty
  - 21.2(b) Inducements by the prosecutor
  - 21.2(c) Inducements by the judge
  - 21.2(d) The broken bargain
  - 21.2(e) Remedy for broken bargain
  - 21.2(f) The withdrawn offer
  - 21.2(g) The unrealized expectation
  - 21.2(h) Admission of statements made during bargaining
- 21.3 Plea negotiation responsibilities of the attorneys and judge
  - 21.3(a) Right to counsel during plea bargaining
  - 21.3(b) Effective assistance by defense counsel
  - 21.3(c) The prosecutor's bargaining tactics
  - 21.3(d) Judicial involvement in negotiations
  - 21.3(e) Judicial evaluation of contemplated concessions
  - 21.3(f) Responsibilities to the victim
- 21.4 Receiving the defendant's plea
  - 21.4(a) Arraignment and guilty plea proceedings; pleading alternatives [*Retitled*]

## TABLE OF CONTENTS

- 21.4(b) Determining voluntariness of plea and competency of defendant to plead
- 21.4(c) Determining understanding of charge
- 21.4(d) Determining understanding of possible consequences
- 21.4(e) Determining understanding of rights waived
- 21.4(f) Determining factual basis of plea
- 21.4(g) Acting on the plea bargain
- 21.5 Challenge of guilty plea by defendant
  - 21.5(a) Withdrawal of plea
  - 21.5(b) Other challenges to plea
  - 21.5(c) Significance of noncompliance with plea-receiving procedures
  - 21.5(d) Significance of compliance with plea-receiving procedures
  - 21.5(e) Effect of withdrawn or overturned plea
  - 21.5(f) Admissibility of withdrawn or overturned plea and related statements
- 21.6 Effect of guilty plea
  - 21.6(a) Rights waived or forfeited by plea
  - 21.6(b) Conditional pleas
  - 21.6(c) Trial on stipulated facts

## Volume 7

### **PART V POST-CONVICTION REVIEW: APPEALS AND COLLATERAL REMEDIES**

#### **CHAPTER 27 APPEALS**

- 27.1 Constitutional protection of the defendant's right to appeal
  - 27.1(a) No federal constitutional right
  - 27.1(b) Constitutional protection of the statutory right of appeal
- 27.2 Defense appeals and the final judgment rule
  - 27.2(a) The statutory requirement of a final judgment
  - 27.2(b) Underlying policies and statutory exceptions
  - 27.2(c) Collateral orders
  - 27.2(d) Independent proceedings
  - 27.2(e) Grand jury proceedings
- 27.3 Prosecution appeals
  - 27.3(a) Constitutional constraints
  - 27.3(b) The need for specific statutory authorization
  - 27.3(c) Pretrial rulings
  - 27.3(d) Post-jeopardy rulings
- 27.4 Review by writ
  - 27.4(b) Prohibition and mandamus: traditional limits and modern extensions
  - 27.4(c) Defense petitions
  - 27.4(d) Prosecution applications
  - 27.4(e) Third-party applications

- 27.5 The scope of appellate review
  - 27.5(a) Mootness
  - 27.5(b) The concurrent sentence doctrine
  - 27.5(c) Waiver or forfeiture of the right to appeal
  - 27.5(d) Plain error
  - 27.5(e) Standard of review
- 27.6 Harmless error on appeal
  - 27.6(a) Origins of harmless error review
  - 27.6(b) Harmless error review of nonconstitutional errors
  - 27.6(c) Application to constitutional violations
  - 27.6(d) Harmless error or automatic reversal
  - 27.6(e) Applying the reasonable doubt standard for constitutional errors

**CHAPTER 28 POST CONVICTION REVIEW:  
COLLATERAL REMEDIES**

- 28.2 The statutory structure and habeas policy
  - 28.2(a) Constitutional right or legislative grace?
  - 28.2(b) Statutory structure: from the 1867 Act to the 1996 Act
  - 28.2(c) Balancing within the statutory framework
- 28.3 Claims cognizable in habeas
  - 28.3(a) Cognizable claimants: the custody requirement
  - 28.3(b) Cognizable claims
  - 28.3(c) The exception for Fourth Amendment claims
  - 28.3(d) The opportunity for full and fair litigation
  - 28.3(e) “Freestanding,” “Stand-alone,” or “bare” innocence claims  
*[Retitled]*
- 28.4 Claims in habeas foreclosed by state procedural defaults
  - 28.4(a) Claims “defaulted” in state court—the policy debate
  - 28.4(b) Which defaults count: the “adequate and independent state ground” standard
  - 28.4(c) Excusing default: state waiver of the procedural default defense
  - 28.4(d) Excusing default: the “cause and prejudice” standard
  - 28.4(e) Excusing default: the “miscarriage of justice” exception
- 28.5 Claims in habeas foreclosed due to premature, successive, or delayed applications
  - 28.5(a) Exhaustion of state remedies
  - 28.5(b) Time limits for filing petitions
  - 28.5(c) Successive petitions: claims previously advanced
  - 28.5(d) Successive petitions: new claims
  - 28.5(e) Successive petitions: court of appeals certification
- 28.6 Constitutional interpretation on habeas review
  - 28.6(a) The changing role of federal habeas courts
  - 28.6(b) Teague: limiting the retroactive application of new rules of procedure
  - 28.6(c) Determining when a state conviction becomes final
  - 28.6(d) The “new rule” concept

TABLE OF CONTENTS

- 28.6(e) The Teague exceptions
- 28.6(f) Review of state court rulings under § 2254(d)(1)
- 28.6(g) Harmless error on habeas review
- 28.7 Fact-finding and evidentiary hearings in habeas
  - 28.7(a) Presuming the correctness of state court determinations of fact
  - 28.7(c) Obtaining evidentiary hearings
  - 28.7(d) Discovery
- 28.8 Habeas review of capital cases under chapter 154 of the 1996 Act
  - 28.8(b) The opt-in requirements: electing the special standards
- 28.9 Remedies for federal prisoners
  - 28.9(a) The range of remedies
  - 28.9(b) Limits on relief under § 2255
  - 28.9(c) Nonconstitutional claims under § 2255
- 28.10 Appeal of district court decisions in habeas
- 28.11 State collateral remedies
  - 28.11(a) Supreme Court “encouragement” of state remedies
  - 28.11(b) Types of state remedies
- 28.12 Assistance of counsel in post-conviction proceedings
  - 28.12(a) Petitioner access to legal assistance-constitutional requirements
  - 28.12(b) Statutory entitlements to legal assistance

**Table of Cases**

**Table of Laws and Rules**

**Table of Table of Secondary Authorities**

**Index**

# Table of Contents

## PART IV THE ADVERSARY SYSTEM AND THE DETERMINATION OF GUILT AND INNOCENCE (CONTINUED)

### Chapter 22 Trial by Jury, Impartial Judge, and Unconflicted Prosecutor

§ 22.1	The right to jury trial.....	2
§ 22.1(a)	Generally; applicable to the states.....	2
§ 22.1(b)	Petty offenses .....	9
§ 22.1(c)	Noncriminal trials .....	21
§ 22.1(d)	Size of jury .....	24
§ 22.1(e)	Unanimity .....	30
§ 22.1(f)	Trial de novo .....	36
§ 22.1(g)	Jury nullification .....	39
§ 22.1(h)	Waiver of jury for trial .....	54
§ 22.2	Selection of prospective jurors .....	78
§ 22.2(a)	Federal jury selection procedures .....	79
§ 22.2(b)	State jury selection procedures .....	83
§ 22.2(c)	Denial of equal protection .....	89
§ 22.2(d)	The “fair cross-section” requirement .....	93
§ 22.2(e)	Vicinage .....	117
§ 22.2(f)	Raising challenges to the venire or list .....	120
§ 22.3	Voir Dire; Challenges .....	125
§ 22.3(a)	Nature of voir dire .....	125
§ 22.3(b)	Prosecution and defense access to information ....	142
§ 22.3(c)	Challenges for cause .....	160
§ 22.3(d)	Peremptory challenges.....	190
§ 22.3(e)	Alternate jurors .....	240
§ 22.3(f)	Swearing the jury; the jurors’ oath.....	250
§ 22.4	Challenging the judge .....	253
§ 22.4(a)	Right to impartial judge .....	253
§ 22.4(b)	Challenge for cause, disqualification.....	263
§ 22.4(c)	Recusal by judge .....	265
§ 22.4(d)	Peremptory challenge .....	276
§ 22.4(e)	Substitution of judge .....	280
§ 22.5	Challenging the prosecutor for conflict of interest.....	291
§ 22.5(a)	Challenge for cause.....	291
§ 22.5(b)	Prior relationship with defendant .....	299
§ 22.5(c)	Prosecutor as witness .....	303
§ 22.5(d)	Imputed disqualification of an office.....	306

### Chapter 23 Media Coverage, High-Profile Cases, and Process Responses

§ 23.1	Media coverage and high-profile cases.....	314
§ 23.1(a)	The potential impact of media coverage .....	314
§ 23.1(b)	The media element in high-profile cases.....	316

§ 23.1(c)	Media expansion and high-profile cases .....	319
§ 23.1(d)	First amendment and other media protections ....	322
§ 23.1(e)	Media coverage harms in high-profile cases.....	328
§ 23.1(f)	Process responses .....	335
§ 23.2	Restricting Media Content .....	339
§ 23.2(a)	Media prior restraints .....	339
§ 23.2(b)	Statutory prohibitions of media content.....	347
§ 23.2(c)	Contempt authority and media content .....	353
§ 23.3	Restricting Participant Media Statements .....	358
§ 23.3(a)	<i>Sheppard v. Maxwell</i> .....	358
§ 23.3(b)	Professional responsibility restrictions for prosecutors and defense counsel .....	364
§ 23.3(c)	Attorney gag orders .....	398
§ 23.3(d)	Defendant and witness gag orders to prevent prejudicial publicity .....	421
§ 23.3(e)	Discovery protective orders.....	428
§ 23.3(f)	Defendant gag orders to prevent harassment and intimidation .....	432
§ 23.4	Denying Media (and Public) Access .....	437
§ 23.4(a)	First Amendment right of access to judicial proceedings.....	438
§ 23.4(b)	First Amendment right of access to judicial records .....	451
§ 23.4(c)	Common law right of access to judicial records ...	461
§ 23.4(d)	Closing proceedings and placing documents under seal: restricting the First Amendment and common law rights .....	464
§ 23.4(e)	Protecting cooperating defendants.....	481
§ 23.5	Overcoming prejudicial publicity .....	493
§ 23.5(a)	Change of venue on a defense motion .....	493
§ 23.5(b)	Change of venue without a defense motion.....	515
§ 23.5(c)	Change of venire.....	516
§ 23.5(d)	Continuance.....	517
§ 23.5(e)	Severance.....	519
§ 23.5(f)	Jury selection .....	519
§ 23.5(g)	Admonishment or sequestration of the jury .....	536
§ 23.5(h)	Excusal of jurors .....	539
§ 23.6	Conduct of the trial .....	539
§ 23.6(a)	Media representatives in the courtroom .....	539
§ 23.6(b)	Broadcast, video and photographic coverage .....	541
<b>Chapter 24 The Criminal Trial</b>		
§ 24.1	The right to a public trial .....	552
§ 24.1(a)	Nature and scope of the right .....	553
§ 24.1(b)	When closure justified.....	563
§ 24.2	The right to be present, competency, and interpreters.	583
§ 24.2(a)	Origins and scope of the right to be present.....	583
§ 24.2(b)	Harmless error and waiver, generally.....	600
§ 24.2(c)	The disorderly defendant: forfeiture by conduct ..	605
§ 24.2(d)	Forfeiture by voluntary absence .....	612

TABLE OF CONTENTS

§ 24.2(e)	Restraints and other prejudicial circumstances of presence .....	619
§ 24.2(f)	Defendant’s participation via video conferencing .	639
§ 24.2(g)	Competency .....	649
§ 24.2(h)	Interpreters .....	659
§ 24.3	The defendant’s right of access to evidence .....	667
§ 24.3(a)	Constitutional grounding and remedies for misconduct.....	667
§ 24.3(b)	Due process duty to disclose evidence favorable to the accused .....	681
§ 24.3(c)	Disclosure of witness statements—Jencks Act and related court rules .....	724
§ 24.3(d)	The duty to correct false evidence .....	736
§ 24.3(e)	The government’s obligation to preserve evidence.	751
§ 24.3(f)	Defense use of subpoenas.....	765
§ 24.3(g)	Access to informer identity, lineups, testing, and crime scene .....	810
§ 24.3(h)	Government interference with defense access to testimony .....	822
§ 24.3(i)	Defense witness immunity .....	828
§ 24.4	The presentation of evidence.....	834
§ 24.4(a)	Constitutional limitations on the rules of evidence, generally.....	834
§ 24.4(b)	Confrontation—Limits on cross examination, remote testimony.....	839
§ 24.4(c)	Forcing a claim of privilege by a witness .....	860
§ 24.4(d)	Sequestration of witnesses .....	867
§ 24.5	Defendant’s rights to remain silent and to testify.....	884
§ 24.5(a)	Right not to take the stand.....	884
§ 24.5(b)	Comment on defendant’s silence .....	892
§ 24.5(c)	Instruction on defendant’s silence .....	901
§ 24.5(d)	The defendant’s right to testify .....	905
§ 24.6	Trial court evaluation of and comment on the evidence .....	920
§ 24.6(a)	Bench trials .....	920
§ 24.6(b)	Motions for judgment of acquittal .....	924
§ 24.6(c)	The sufficiency standard .....	938
§ 24.6(d)	Summary and comment on the evidence.....	943
§ 24.7	The arguments of counsel .....	946
§ 24.7(a)	Opening statements .....	946
§ 24.7(b)	Closing argument .....	952
§ 24.7(c)	Order of closing argument.....	958
§ 24.7(d)	The roles of the prosecutor and defense counsel...	960
§ 24.7(e)	Prohibited argument .....	961
§ 24.7(f)	The invited response .....	980
§ 24.7(g)	Objections .....	982
§ 24.7(h)	Due process—Supreme Court precedent.....	983
§ 24.7(i)	Appellate review and remedies.....	985
§ 24.8	Jury instructions .....	991
§ 24.8(a)	Multiple stages for instructions .....	992
§ 24.8(b)	Requests and objections to instructions.....	1000

§ 24.8(c)	Content of instructions .....	1005
§ 24.8(d)	Lesser-included offenses generally and acquittal- first instructions .....	1008
§ 24.8(e)	Defining the lesser-included offense .....	1015
§ 24.8(f)	Entitlements to lesser offense charges .....	1027
§ 24.8(g)	Instructions on affirmative defenses .....	1042
§ 24.9	Jury procedures .....	1046
§ 24.9(a)	Sequestering the jury .....	1046
§ 24.9(b)	Jury questions and note-taking .....	1050
§ 24.9(c)	Items taken to the jury room .....	1056
§ 24.9(d)	The deadlocked jury .....	1061
§ 24.9(e)	Polling the jury .....	1069
§ 24.9(f)	Jury misconduct .....	1075
§ 24.9(g)	Limitations on juror testimony about misconduct .....	1100
§ 24.10	Jury verdicts .....	1112
§ 24.10(a)	Special verdicts and special interrogatories .....	1112
§ 24.10(b)	Inconsistent verdicts or findings .....	1121
§ 24.10(c)	Multi-theory verdicts .....	1132
§ 24.10(d)	Partial verdicts .....	1144
§ 24.11	Post-verdict motions .....	1146
§ 24.11(a)	Judgment of acquittal .....	1147
§ 24.11(b)	New trial based on procedural error .....	1151
§ 24.11(c)	Arrest of judgment .....	1154
§ 24.11(d)	Newly discovered evidence .....	1155
§ 24.11(e)	New trial motion based on weight of evidence ...	1174
<b>Chapter 25 Double Jeopardy</b>		
§ 25.1	Dimensions of the guarantee .....	1179
§ 25.1(a)	Introduction .....	1180
§ 25.1(b)	Policies and history .....	1180
§ 25.1(c)	Proceedings to which applicable .....	1185
§ 25.1(d)	When jeopardy attaches .....	1196
§ 25.1(e)	Termination of jeopardy .....	1219
§ 25.1(f)	The “same offence” .....	1221
§ 25.1(g)	Reprosecutions: an overview .....	1222
§ 25.2	Reprosecution following mistrial .....	1224
§ 25.2(a)	With defendant’s consent .....	1224
§ 25.2(b)	The “goaded” mistrial motion .....	1229
§ 25.2(c)	The “manifest necessity” standard .....	1236
§ 25.2(d)	Manifest necessity and alternatives to a mistrial .	1238
§ 25.2(e)	Manifest necessity and trial court discretion .....	1250
§ 25.2(f)	Dismissals equivalent to mistrials .....	1257
§ 25.3	Reprosecution following acquittal or dismissal .....	1258
§ 25.3(a)	Dismissals vs. acquittals .....	1258
§ 25.3(b)	The jury acquittal .....	1262
§ 25.3(c)	Acquittal by the judge .....	1267
§ 25.3(d)	Pre-jeopardy “acquittals” .....	1273
§ 25.3(e)	Postconviction judgments of acquittal .....	1274
§ 25.4	Reprosecution following conviction .....	1276
§ 25.4(a)	The general rule .....	1276

TABLE OF CONTENTS

§ 25.4(b)	The evidence insufficiency exception .....	1278
§ 25.4(c)	Reviewing court’s determination of sufficiency....	1289
§ 25.4(d)	Conviction as implied acquittal .....	1295
§ 25.5	Reprosecution by a different sovereign .....	1299
§ 25.5(a)	Federal prosecution after state, tribal, or territorial prosecution.....	1300
§ 25.5(b)	State prosecution after federal .....	1307
§ 25.5(c)	State-state and state-municipal.....	1310
<b>Chapter 26 Sentencing Procedures</b>		
§ 26.1	Legislative structuring of sentencing: sanctions .....	1314
§ 26.1(a)	Introduction and Overview.....	1314
§ 26.1(b)	Capital punishment .....	1318
§ 26.1(c)	Incarceration.....	1326
§ 26.1(d)	Community release—Probation.....	1346
§ 26.1(e)	Intermediate sanctions .....	1358
§ 26.1(f)	Financial sanctions.....	1371
§ 26.2	Legislative structuring of sentencing: the allocation of sentencing authority .....	1388
§ 26.2(a)	Multiple sentencing decisionmakers .....	1388
§ 26.2(b)	Jury sentencing .....	1390
§ 26.2(c)	Administrative agency decisions .....	1400
§ 26.3	The guidance of judicial sentencing discretion.....	1422
§ 26.3(a)	Judicial sentencing discretion, generally.....	1422
§ 26.3(b)	The challenge to unguided discretion .....	1423
§ 26.3(c)	Mandatory minimum sentences.....	1426
§ 26.3(d)	Presumptive sentencing.....	1429
§ 26.3(e)	Sentencing guidelines .....	1430
§ 26.3(f)	Concurrent and consecutive sentences .....	1436
§ 26.3(g)	Appellate review .....	1442
§ 26.3(h)	“Second look” and other post-sentence reductions by the trial judge.....	1452
§ 26.4	Due process: the framework for sentencing procedure .....	1454
§ 26.4(a)	Williams v. New York .....	1455
§ 26.4(b)	Information limits generally; unconvicted conduct; equal protection.....	1459
§ 26.4(c)	Consideration of the defendant’s exercise of procedural rights.....	1474
§ 26.4(d)	Disclosure of basis for and specifics of sentence ...	1487
§ 26.4(e)	The right to the assistance of counsel.....	1501
§ 26.4(f)	Ensuring the reliability of sentencing information .....	1506
§ 26.4(g)	The right to be heard: allocution and the right to offer evidence.....	1520
§ 26.4(h)	Burden of proof.....	1531
§ 26.4(i)	When sentencing factors are elements.....	1538
§ 26.5	Sentencing information .....	1591
§ 26.5(a)	Evidentiary standards .....	1591
§ 26.5(b)	The presentence report.....	1602
§ 26.5(c)	Disclosure and correction of the presentence report.....	1608

§ 26.5(d)	Victim impact statement.....	1615
§ 26.6	Special sentences.....	1621
§ 26.6(a)	Special sentences and special procedures.....	1621
§ 26.6(b)	Recidivist statutes.....	1622
§ 26.6(c)	Restitution.....	1631
§ 26.6(d)	Forfeiture.....	1647
§ 26.6(e)	“Dangerous” offenders; “Sexually Violent Predator” commitment.....	1657
§ 26.7	Resentencing: double jeopardy.....	1665
§ 26.7(a)	Resentencing following reconviction.....	1665
§ 26.7(b)	Resentencing and sentencing appeals.....	1669
§ 26.7(c)	Resentencing by the trial judge.....	1675
§ 26.7(d)	Sentencing based upon other criminal conduct....	1688
§ 26.7(e)	Credit for prior punishment.....	1690
§ 26.8	Resentencing: the prohibition against vindictiveness ..	1697
§ 26.8(a)	Presumed vindictiveness: the <i>Pearce</i> ruling.....	1697
§ 26.8(b)	Rebutting the <i>Pearce</i> presumption.....	1701
§ 26.8(c)	Applying the <i>Pearce</i> presumption in other resentencing settings.....	1705
§ 26.9	Probation conditions.....	1711
§ 26.9(a)	General standards.....	1711
§ 26.9(b)	Probation conditions and constitutional rights....	1724
§ 26.9(c)	Challenging conditions.....	1752
§ 26.10	Revocation of probation.....	1756
§ 26.10(a)	Basis for revocation.....	1756
§ 26.10(b)	Initiation, notice, timing, and necessity of preliminary and revocation hearings.....	1761
§ 26.10(c)	Rights to impartial adjudicator, to counsel, to be present and offer evidence.....	1772
§ 26.10(d)	Disclosure, admissibility, and burden of proof at revocation hearing.....	1778
§ 26.10(e)	Decision on revocation and its consequences.....	1789

**Correlation Table**