

Summary of Contents

Volume 1

PART I INTRODUCTION AND OVERVIEW

Chapter 1	An Overview of the Criminal Justice Process.....	1
Chapter 2	The Constitutionalization of Criminal Procedure	685

Volume 2

PART II DETECTION AND INVESTIGATION OF CRIME

Chapter 3	Arrest, Search and Seizure	1
Chapter 4	Network Surveillance	509
Chapter 5	Police “Encouragement” and the Entrapment Defense	621
Chapter 6	Interrogation and Confessions	671
Chapter 7	Identification Procedures	997

Volume 3

PART II DETECTION AND INVESTIGATION OF CRIME (CONTINUED)

Chapter 8	Grand Jury Investigation	1
Chapter 9	Scope of the Exclusionary Rules	433
Chapter 10	Administration of the Exclusionary Rules ..	571

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS

Chapter 11	The Right to Counsel	635
------------	----------------------------	-----

Volume 4

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS (CONTINUED)

Chapter 12	Pretrial Release	1
Chapter 13	The Decision Whether to Prosecute	123
Chapter 14	The Preliminary Hearing	307
Chapter 15	Grand Jury Review	421
Chapter 16	The Location of the Prosecution.....	759

Volume 5

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS (CONTINUED)

Chapter 17	The Scope of the Prosecution: Joinder and Severance.....	1
Chapter 18	Speedy Trial and Other Prompt Disposition	115

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

Chapter 19	The Accusatory Pleading.....	235
Chapter 20	Pretrial Discovery	407
Chapter 21	Pleas of Guilty	615

Volume 6

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

Chapter 22	Trial by Jury and Impartial Judge	1
Chapter 23	Fair Trial and Free Press.....	221
Chapter 24	The Criminal Trial	347
Chapter 25	Double Jeopardy	753
Chapter 26	Sentencing Procedures	861

Volume 7

PART V POST-CONVICTION REVIEW: APPEALS AND COLLATERAL REMEDIES

Chapter 27	Appeals	1
Chapter 28	Post Conviction Review: Collateral Remedies	173

Table of Cases	Tbl of Cases-1
-----------------------------	-----------------------

SUMMARY OF CONTENTS

Table of Laws and Rules.....	Tbl of L&R-1
Table of Secondary Authorities.....	Tbl of Sec Auth-1
Index.....	Index-1

Summary of Contents by Section

Volume 1

PART I INTRODUCTION AND OVERVIEW

Chapter 1 An Overview of the Criminal Justice Process

§ 1.1	The subject under inquiry.....	3
§ 1.2	Federal authority and the separate federal and state criminal justice processes.....	8
§ 1.3	Similarities and differences in the laws of fifty-two jurisdictions	120
§ 1.4	The agencies of administration and their organizational structures.....	147
§ 1.5	The cornerstone objectives of the process	188
§ 1.6	Historical development of the process	307
§ 1.7	The laws regulating the process.....	410
§ 1.8	Procedural subsets	554
§ 1.9	Deviance, discretion, and the limits of legal regulation ..	578
§ 1.10	Administrative policies and the local administrative setting.....	618
§ 1.11	Criminal justice statistics	669

Chapter 2 The Constitutionalization of Criminal Procedure

§ 2.1	The elements of constitutionalization.....	686
§ 2.2	The Fourteenth Amendment and the extension of the bill of rights guarantees to the states	704
§ 2.3	Total incorporation.....	708
§ 2.4	Fundamental fairness	744
§ 2.5	Selective incorporation	795
§ 2.6	Application of the selective incorporation doctrine.....	824
§ 2.7	The independent content of due process.....	857
§ 2.8	The preference for expansive interpretations	917
§ 2.9	Guideposts for constitutional interpretation	943
§ 2.10	Applying interpretive guideposts: the case of the privilege against self-incrimination.....	1039
§ 2.11	The non-retroactivity doctrine	1080
§ 2.12	The influence of federal constitutional rulings upon state constitutional law	1112

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
§ 3.2 Protected areas and interests	67
§ 3.3 Probable cause	117
§ 3.4 Search warrants	167
§ 3.5 Seizure and search of persons and personal effects	223
§ 3.6 Entry and search of premises	270
§ 3.7 Search and seizure of vehicles	304
§ 3.8 Stop and frisk and similar lesser intrusions	339
§ 3.9 Inspections and regulatory searches	401
§ 3.10 Consent searches	461

Chapter 4 Network Surveillance

§ 4.1 Introduction	510
§ 4.2 Postal mail	510
§ 4.3 Telephone surveillance and the Fourth Amendment	515
§ 4.4 Internet communications and the Fourth Amendment ..	522
§ 4.5 Overview of statutory protections	529
§ 4.6 The Wiretap Act	532
§ 4.7 The Pen Register Statute	589
§ 4.8 The Stored Communications Act	597
§ 4.9 Foreign intelligence surveillance	614

Chapter 5 Police “Encouragement” and the Entrapment Defense

§ 5.1 Encouragement of crime and the defense of entrapment	621
§ 5.2 Subjective versus objective test for entrapment	630
§ 5.3 Procedural considerations re entrapment defense	648
§ 5.4 Other challenges to encouragement practices	658

Chapter 6 Interrogation and Confessions

§ 6.1 Introduction and overview confessions	672
§ 6.2 The “voluntariness” test	678
§ 6.3 The prompt appearance requirement	724
§ 6.4 The right to counsel re interrogation	736
§ 6.5 The privilege against self-incrimination; <i>Miranda</i>	779
§ 6.6 <i>Miranda</i> : When interrogation is “custodial”	801
§ 6.7 <i>Miranda</i> : “Interrogation”	836
§ 6.8 <i>Miranda</i> : Required warnings	883
§ 6.9 <i>Miranda</i> : Waiver of rights	909
§ 6.10 <i>Miranda</i> : Nature of offense, interrogator, and proceedings	977

Chapter 7 Identification Procedures

§ 7.1 Introduction to identification	997
§ 7.2 The privilege against self-incrimination and identification	1003

SUMMARY OF CONTENTS BY SECTION

§ 7.3	The right to counsel and to confrontation re identification.....	1013
§ 7.4	Due process and identification: “The totality of the circumstances”.....	1038
§ 7.5	Additional possible safeguards re identification.....	1084

Volume 3

PART II DETECTION AND INVESTIGATION OF CRIME (CONTINUED)

CHAPTER 8 GRAND JURY INVESTIGATION

§ 8.1	The investigative grand jury.....	3
§ 8.2	Historical development of the grand jury	11
§ 8.3	Investigative advantages of the grand jury	23
§ 8.4	The legal structure of the investigative grand jury	43
§ 8.5	Grand jury secrecy	70
§ 8.6	The right to every man’s evidence	151
§ 8.7	Fourth Amendment challenges to subpoenas	184
§ 8.8	Challenges to misuse of the subpoena authority	211
§ 8.9	Grand jury inquiries based on illegally obtained evidence.....	271
§ 8.10	Grand jury testimony and the privilege against self-incrimination.....	279
§ 8.11	Self-incrimination immunity and compelled testimony	312
§ 8.12	Self-incrimination and the compulsory production of documents	346
§ 8.13	Application of the act-of-production doctrine.....	374
§ 8.14	The grand jury witness’ right to counsel.....	419

Chapter 9 Scope of the Exclusionary Rules

§ 9.1	Standing: the “personal rights” approach	433
§ 9.2	Standing: other possible bases	466
§ 9.3	“Fruit of the poisonous tree” theories.....	475
§ 9.4	Fruits of illegal arrests and searches.....	498
§ 9.5	Fruits of illegally obtained confessions	527
§ 9.6	Permissible use of illegally obtained evidence at trial...	548

Chapter 10 Administration of the Exclusionary Rules

§ 10.1	The pretrial motion to suppress	571
§ 10.2	Waiver or forfeiture of objection re suppression of evidence.....	582
§ 10.3	Burden of proof at suppression hearing.....	590
§ 10.4	Standard of proof at suppression hearing	603
§ 10.5	The suppression hearing.....	609
§ 10.6	The suppression hearing ruling and its effect.....	623

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS**Chapter 11 The Right to Counsel**

§ 11.1	The constitutional rights to retained and appointed counsel.....	636
§ 11.2	Scope of the indigent's right to counsel and other assistance	684
§ 11.3	Waiver of the right to counsel.....	773
§ 11.4	Choice of counsel.....	795
§ 11.5	The constitutional right to self-representation	839
§ 11.6	Counsel's control over defense strategy	895
§ 11.7	The right to effective assistance of counsel: guiding principles.....	942
§ 11.8	Ineffective assistance claims based upon state interference and other extrinsic factors	981
§ 11.9	Ineffective assistance claims based upon attorney conflicts of interest.....	1017
§ 11.10	Ineffective assistance claims based upon lawyer incompetence	1103

Volume 4**PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS
(CONTINUED)****CHAPTER 12 PRETRIAL RELEASE**

§ 12.1	Pretrial release procedures	1
§ 12.2	Constitutionality of limits on pretrial freedom.....	30
§ 12.3	Constitutionality of mandating pretrial detention.....	48
§ 12.4	Special situations re release.....	89
§ 12.5	Alternatives to arrest	112

Chapter 13 The Decision Whether to Prosecute

§ 13.1	Nature of the decision whether to prosecute	124
§ 13.2	Discretionary enforcement.....	135
§ 13.3	Challenges to and checks upon the decision not to prosecute	169
§ 13.4	Challenging the decision to prosecute: equal protection	190
§ 13.5	Other challenges to the decision to prosecute	222
§ 13.6	Challenges to the decision to forego or terminate diversion	266
§ 13.7	Challenges to the charge selection.....	283

Chapter 14 The Preliminary Hearing

§ 14.1	Functions of the preliminary hearing	307
§ 14.2	Defendant's right to a preliminary hearing	328
§ 14.3	The preliminary hearing bindover determination	356
§ 14.4	Preliminary hearing procedures	381

SUMMARY OF CONTENTS BY SECTION

Chapter 15 Grand Jury Review

§ 15.1	Defendant's right to prosecution by indictment.....	422
§ 15.2	The structure of grand jury screening	498
§ 15.3	The effectiveness of grand jury screening.....	548
§ 15.4	Indictment challenges based on grand jury composition deficiencies.....	566
§ 15.5	Indictment challenges based on evidentiary deficiencies	617
§ 15.6	Indictment challenges based on misconduct: general principles	657
§ 15.7	Indictment challenges based on misconduct: common claims	711

Chapter 16 The Location of the Prosecution

§ 16.1	Venue: general principles.....	759
§ 16.2	Applying the crime-committed formula to establish venue.....	830
§ 16.3	Change of venue	879
§ 16.4	Jurisdiction.....	906

Volume 5

**PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS
(CONTINUED)**

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

§ 17.1	Joinder and severance of offenses	1
§ 17.2	Joinder and severance of defendants.....	18
§ 17.3	Joinder and severance: procedural considerations.....	51
§ 17.4	Failure to join related offenses.....	62

Chapter 18 Speedy Trial and Other Prompt Disposition

§ 18.1	The constitutional right to speedy trial.....	115
§ 18.2	The constitutional balancing test re speedy trial	127
§ 18.3	Statutes and court rules on speedy trial.....	149
§ 18.4	Speedy trial and the imprisoned defendant	182
§ 18.5	The right to other speedy disposition	209

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

Chapter 19 The Accusatory Pleading

§ 19.1	The liberalization of pleading requirements.....	236
§ 19.2	Pleading functions.....	255
§ 19.3	Basic pleading defects.....	286
§ 19.4	Bill of particulars.....	358
§ 19.5	Amendments of the pleading.....	367
§ 19.6	Variances and pleadings	388

Chapter 20 Pretrial Discovery

§ 20.1	The expansion of discovery	408
§ 20.2	The structure of discovery law	426
§ 20.3	Defense discovery.....	457
§ 20.4	Constitutional limitations upon pretrial discovery for the prosecution.....	525
§ 20.5	Prosecution discovery provisions.....	563
§ 20.6	Sanctions for discovery violations	584

Chapter 21 Pleas of Guilty

§ 21.1	The plea negotiation system.....	616
§ 21.2	Kept, broken, rejected and nonexistent bargains	658
§ 21.3	Plea negotiation responsibilities of the attorneys and judge	820
§ 21.4	Receiving the defendant's plea	945
§ 21.5	Challenge of guilty plea by defendant.....	1036
§ 21.6	Effect of guilty plea.....	1087

Volume 6**PART IV THE ADVERSARY SYSTEM AND THE DETERMINATION OF
GUILT AND INNOCENCE (CONTINUED)****CHAPTER 22 TRIAL BY JURY AND IMPARTIAL JUDGE**

§ 22.1	The right to jury trial	2
§ 22.2	Selection of prospective jurors	53
§ 22.3	Voir dire; challenges	87
§ 22.4	Challenging the judge.....	185
§ 22.5	Challenging the prosecutor.....	204

Chapter 23 Fair Trial and Free Press

§ 23.1	Preventing prejudicial publicity.....	221
§ 23.2	Overcoming prejudicial publicity	300
§ 23.3	Conduct of the trial	339

Chapter 24 The Criminal Trial

§ 24.1	The right to a public trial.....	348
§ 24.2	Presence of the defendant	363
§ 24.3	The defendant's right of access to evidence.....	408
§ 24.4	The presentation of evidence	512
§ 24.5	Defendant's rights to remain silent and to testify	542
§ 24.6	Trial court evaluation of and comment on the evidence.	569
§ 24.7	The arguments of counsel	585
§ 24.8	Jury instructions.....	620
§ 24.9	Jury procedures.....	661
§ 24.10	Jury verdicts.....	710
§ 24.11	Post-verdict motions	735

Chapter 25 Double Jeopardy

§ 25.1	Dimensions of the guarantee.....	753
§ 25.2	Reprosecution following mistrial.....	789
§ 25.3	Reprosecution following acquittal or dismissal.....	817

SUMMARY OF CONTENTS BY SECTION

§ 25.4	Reprosecution following conviction	832
§ 25.5	Reprosecution by a different sovereign.....	850
Chapter 26 Sentencing Procedures		
§ 26.1	Legislative structuring of sentencing: sanctions	862
§ 26.2	Legislative structuring of sentencing: the allocation of sentencing authority	904
§ 26.3	The guidance of judicial sentencing discretion	928
§ 26.4	Due process: the framework for sentencing procedure ..	953
§ 26.5	Sentencing information	1038
§ 26.6	Special sentences	1060
§ 26.7	Resentencing: double jeopardy	1085
§ 26.8	Resentencing: the prohibition against vindictiveness....	1104
§ 26.9	Probation conditions.....	1116
§ 26.10	Revocation of probation.....	1142

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	2
§ 27.2	Defense appeals and the final judgment rule	9
§ 27.3	Prosecution appeals	38
§ 27.4	Review by writ.....	53
§ 27.5	The scope of appellate review	69
§ 27.6	Harmless error on appeal.....	125

Chapter 28 Post Conviction Review: Collateral Remedies

§ 28.1	Current collateral remedies and historical antecedents.	174
§ 28.2	The statutory structure and habeas policy	180
§ 28.3	Claims cognizable in habeas.....	205
§ 28.4	Claims in habeas foreclosed by state procedural defaults	235
§ 28.5	Claims in habeas foreclosed due to premature, successive, or delayed applications.....	273
§ 28.6	Constitutional interpretation on habeas review.....	312
§ 28.7	Fact-finding and evidentiary hearings in habeas	345
§ 28.8	Habeas review of capital cases under chapter 154 of the 1996 Act	365
§ 28.9	Remedies for federal prisoners	372
§ 28.10	Appeal of district court decisions in habeas.....	402
§ 28.11	State collateral remedies	405
§ 28.12	Assistance of counsel in post-conviction proceedings..	416

Table of Cases Tbl of Cases-1

Table of Laws and Rules Tbl of L&R-1

Table of Secondary Authorities Tbl of Sec Auth-1

Index Index-1

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.....	3
§ 1.1(a) Coverage	3
§ 1.1(b) Organization	5
§ 1.2 Federal authority and the separate federal and state criminal justice processes.....	8
§ 1.2(a) American federalism fifty-two jurisdictions	8
§ 1.2(b) State authority	15
§ 1.2(c) Federal legislative authority	17
§ 1.2(d) Congressional policy and the federalization of local crime	71
§ 1.2(e) Congressional policy and the limited size of the federal enforcement structure.....	89
§ 1.2(f) Executive branch priorities	95
§ 1.2(g) Cooperative programs	111
§ 1.2(h) Federal assistance programs	116
§ 1.2(i) The special significance of the federal system	117
§ 1.3 Similarities and differences in the laws of fifty-two jurisdictions	120
§ 1.3(a) Describing the laws of fifty-two jurisdictions.....	120
§ 1.3(b) The limits of mandated uniformity.....	120
§ 1.3(c) The tendency to individualize.....	125
§ 1.3(d) The tendency to emulate	131
§ 1.3(e) State reliance on the federal model	133
§ 1.3(f) State reliance on other models	138
§ 1.3(g) Patterns in state laws	144
§ 1.4 The agencies of administration and their organizational structures.....	147
§ 1.4(a) The agencies of administration.....	148
§ 1.4(b) Localism and criminal justice administration	148
§ 1.4(c) Fragmentation of enforcement agencies.....	155
§ 1.4(d) Police agencies	160
§ 1.4(e) Prosecution agencies.....	165
§ 1.4(f) Defense counsel	172
§ 1.4(g) Magistrates	180
§ 1.4(h) Trial courts of general jurisdiction.....	185
§ 1.5 The cornerstone objectives of the process	188
§ 1.5(a) Implementing the enforcement of the substantive law	189
§ 1.5(b) Discovery of the truth	214

CRIMINAL PROCEDURE

§ 1.5(c)	Adversary adjudication	219
§ 1.5(d)	Accusatorial burdens	238
§ 1.5(e)	Minimizing erroneous convictions	243
§ 1.5(f)	Minimizing the burdens of accusation and litigation	257
§ 1.5(g)	Providing lay participation	260
§ 1.5(h)	Respecting the dignity of the individual	264
§ 1.5(i)	Maintaining the appearance of fairness	267
§ 1.5(j)	Achieving equality in the application of the process	269
§ 1.5(k)	Addressing the concerns of the victim	285
§ 1.6	Historical development of the process	307
§ 1.6(a)	Introduction	307
§ 1.6(b)	The colonial period	312
§ 1.6(c)	The post-revolutionary period	329
§ 1.6(d)	The core of nineteenth century	339
§ 1.6(e)	The progressive era	364
§ 1.6(f)	The second quarter of the twentieth century	371
§ 1.6(g)	The era of liberal idealism	380
§ 1.6(h)	The post-liberalism period	390
§ 1.6(i)	The mixed developments of the twenty-first century	400
§ 1.6(j)	The future of reform	409
§ 1.7	The laws regulating the process	410
§ 1.7(a)	Varied sources of legal regulation	411
§ 1.7(b)	The federal constitution	411
§ 1.7(c)	Federal statutes and treaties	413
§ 1.7(d)	State constitutions	431
§ 1.7(e)	Statutes	432
§ 1.7(f)	General court rules	435
§ 1.7(g)	Local court rules	442
§ 1.7(h)	Common law rulings	443
§ 1.7(i)	Supervisory authority rulings	447
§ 1.7(j)	Internal administrative standards	461
§ 1.7(k)	Professional responsibility standard	468
§ 1.7(l)	Local ordinances	553
§ 1.8	Procedural subsets	554
§ 1.8(a)	Lines of division for procedural requirements	554
§ 1.8(b)	Specified offense distinctions	554
§ 1.8(c)	Misdemeanor/felony and related distinctions	557
§ 1.8(d)	Ordinance violations	562
§ 1.8(e)	Capital offenses	571
§ 1.8(f)	Agency variations and procedural distinctions	574
§ 1.8(g)	Magistrate courts not of record	577
§ 1.9	Deviance, discretion, and the limits of legal regulation ..	578
§ 1.9(a)	Law vs. practice	578
§ 1.9(b)	Deviance	582
§ 1.9(c)	The nature and range of discretion	597
§ 1.9(d)	The reasons for discretion	605
§ 1.9(e)	The challenge to discretion	611
§ 1.10	Administrative policies and the local administrative	

TABLE OF CONTENTS

setting.....	618
§ 1.10(a) Significance of administrative environment	618
§ 1.10(b) Policy differences.....	625
§ 1.10(c) Caseload pressures	628
§ 1.10(d) Administrative interactions.....	644
§ 1.10(e) The influence of the local community.....	660
§ 1.11 Criminal justice statistics	669
§ 1.11(a) Significance	669
§ 1.11(b) National statistics	672
§ 1.11(c) State statistics	678
§ 1.11(d) Federal statistics.....	682
§ 1.11(e) Funded studies.....	682
Chapter 2 The Constitutionalization of Criminal Procedure	
§ 2.1 The elements of constitutionalization.....	686
§ 2.2 The Fourteenth Amendment and the extension of the bill of rights guarantees to the states	704
§ 2.3 Total incorporation.....	708
§ 2.3(a) The rationale of total incorporation.....	709
§ 2.3(b) Rejection by the court	733
§ 2.4 Fundamental fairness	744
§ 2.4(a) The rationale of fundamental fairness	746
§ 2.4(b) The original meaning of due process	752
§ 2.4(c) The pre-Fourteenth Amendment cases.....	768
§ 2.4(d) The establishment and initial application of the fundamental fairness doctrine: from reconstruction to the 1930s	776
§ 2.4(e) Application of fundamental fairness: from the mid- 1930s to the early 1960s.....	783
§ 2.4(f) Subjectivity and fundamental fairness	790
§ 2.5 Selective incorporation	795
§ 2.5(a) Fundamental fairness and selective incorporation: similarities and differences.....	795
§ 2.5(b) The rationale of selective incorporation	800
§ 2.5(c) Prior precedent and the “absorption” of individual guarantees	801
§ 2.5(d) Selective incorporation as a means of avoiding subjectivity.....	805
§ 2.5(e) Facilitating state enforcement of due process standards.....	807
§ 2.5(f) The legitimate interests of federalism.....	808
§ 2.6 Application of the selective incorporation doctrine	824
§ 2.6(a) The decisions of the sixties.....	825
§ 2.6(b) Guarantees not yet incorporated	830
§ 2.6(c) Acceptance of selective incorporation in the post-1960s	840
§ 2.6(d) Selective incorporation and the concerns of federalism.....	850
§ 2.6(e) The retention of due process methodology.....	855
§ 2.7 The independent content of due process.....	857

§ 2.7(a)	Regulation by procedural due process after selective incorporation	857
§ 2.7(b)	The “limited” role of free-standing due process	865
§ 2.7(c)	Due process methodology.....	874
§ 2.7(d)	Substantive due process.....	905
§ 2.8	The preference for expansive interpretations	917
§ 2.8(a)	The nature of the preference	917
§ 2.8(b)	The shifting strength of the preference	925
§ 2.8(c)	The reasons for the preference.....	933
§ 2.9	Guideposts for constitutional interpretation	943
§ 2.9(a)	The role of guideposts	944
§ 2.9(b)	Stare decisis	945
§ 2.9(c)	The text	961
§ 2.9(d)	The original understanding.....	964
§ 2.9(e)	Policy analysis	980
§ 2.9(f)	Priority for truth-finding.....	981
§ 2.9(g)	The appropriateness of administratively based per se rules	989
§ 2.9(h)	The appropriateness of prophylactic rules	1006
§ 2.9(i)	Weighing the impact upon efficiency	1027
§ 2.9(j)	The special character of “clearly established law rulings”	1034
§ 2.10	Applying interpretive guideposts: the case of the privilege against self-incrimination.....	1039
§ 2.10(a)	Range of self-incrimination issues	1039
§ 2.10(b)	Basic privilege doctrines	1040
§ 2.10(c)	History of the privilege	1057
§ 2.10(d)	Policies of the privilege	1068
§ 2.11	The non-retroactivity doctrine	1080
§ 2.11(a)	The significance of retroactive application	1081
§ 2.11(b)	The <i>Linkletter</i> rationale of non-retroactive application	1085
§ 2.11(c)	Application of <i>Linkletter</i>	1086
§ 2.11(d)	Rejecting <i>Linkletter</i> : convictions not yet final.....	1092
§ 2.11(e)	Rejecting <i>Linkletter</i> : finalized convictions under the <i>Teague</i> standards	1097
§ 2.12	The influence of federal constitutional rulings upon state constitutional law	1112
§ 2.12(a)	The “new federalism” movement.....	1113
§ 2.12(b)	The mirroring presumption: scope	1133
§ 2.12(c)	The mirroring debate.....	1142
§ 2.12(d)	Judicial acceptance and rejection of mirroring	1160
§ 2.12(e)	State specific factors.....	1164

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
§ 3.1(a) Origins of the exclusionary rule	4
§ 3.1(b) Purposes of the exclusionary rule	7
§ 3.1(c) The exclusionary rule under attack	10
§ 3.1(d) The significance of underlying motivation; more on the deterrence objective and inquiry into subjective matters	24
§ 3.1(e) Constitutional vs. other violations	32
§ 3.1(f) Application of exclusionary rule in criminal proceedings	35
§ 3.1(g) Application of exclusionary rule in non-criminal proceedings	41
§ 3.1(h) The exclusionary rule and “private” or nonpolice searches	46
§ 3.1(i) The exclusionary rule and searches by foreign police	53
§ 3.1(j) Challenge of jurisdiction	56
§ 3.1(k) The “constitutional tort”	59
§ 3.1(l) Criminal prosecution; disciplinary proceedings	64
§ 3.1(m) Expungement of arrest records	64
§ 3.1(n) Injunction	65
§ 3.1(o) Self-help	66
§ 3.2 Protected areas and interests	67
§ 3.2(a) The <i>Katz</i> expectation of privacy test	68
§ 3.2(b) Plain view, smell, hearing and touch; aiding the senses	73
§ 3.2(c) Residential premises	88
§ 3.2(d) “Open fields”	96
§ 3.2(e) Business and commercial premises	98
§ 3.2(f) Vehicles	101
§ 3.2(g) Personal characteristics	103
§ 3.2(h) Abandoned effects	105
§ 3.2(i) “Mere evidence” in general and private papers in particular	108
§ 3.2(j) Surveillance of relationships and movements	110
§ 3.3 Probable cause	117
§ 3.3(a) General considerations	117
§ 3.3(b) Nature of probable cause	122
§ 3.3(c) Information from an informant	130
§ 3.3(d) Information from a victim or witness	146
§ 3.3(e) Information from or held by other police	152
§ 3.3(f) First-hand information	156
§ 3.3(g) Special problems in search cases	161
§ 3.4 Search warrants	167

§ 3.4(a)	When warrant may be utilized	167
§ 3.4(b)	The “neutral and detached magistrate” requirement	175
§ 3.4(c)	Oath or affirmation; record	178
§ 3.4(d)	Probable cause: the facially-sufficient affidavit	181
§ 3.4(e)	Particular description of place to be searched	185
§ 3.4(f)	Particular description of things to be seized	190
§ 3.4(g)	Time of execution	196
§ 3.4(h)	Entry without notice	198
§ 3.4(i)	Detention and search of persons	204
§ 3.4(j)	Scope and intensity of the search	208
§ 3.4(k)	What may be seized	215
§ 3.4(l)	Miscellaneous requirements	220
§ 3.5	Seizure and search of persons and personal effects	223
§ 3.5(a)	Arrest	223
§ 3.5(b)	Search of the person at scene of prior arrest	240
§ 3.5(c)	Search of the person during post-arrest detention ..	246
§ 3.5(d)	Other search of the person	254
§ 3.5(e)	Seizure and search of containers and other personal effects	261
§ 3.6	Entry and search of premises	270
§ 3.6(a)	Basis for entry to arrest	270
§ 3.6(b)	Entry without notice to arrest	279
§ 3.6(c)	Search before and incident to arrest	281
§ 3.6(d)	Search and exploration after arrest	284
§ 3.6(e)	Warrantless entry and search for evidence	287
§ 3.6(f)	Warrantless entry and search for other purposes ..	298
§ 3.6(g)	What may be seized	301
§ 3.7	Search and seizure of vehicles	304
§ 3.7(a)	Search incident to arrest	304
§ 3.7(b)	Search and seizure to search for evidence	309
§ 3.7(c)	Search of containers and persons within	316
§ 3.7(d)	Seizure for other purposes	322
§ 3.7(e)	Search for other purposes	327
§ 3.7(f)	Plain view, subterfuge and related matters	336
§ 3.8	Stop and frisk and similar lesser intrusions	339
§ 3.8(a)	Stop and frisk: Fourth Amendment theory	339
§ 3.8(b)	Dimensions of a permissible “stop”	342
§ 3.8(c)	Action short of a stop	357
§ 3.8(d)	Grounds for a permissible “stop”	372
§ 3.8(e)	“Frisk” for weapons	387
§ 3.8(f)	Roadblocks	394
§ 3.8(g)	Detention at the police station for investigation ...	397
§ 3.8(h)	Brief seizure of objects	399
§ 3.9	Inspections and regulatory searches	401
§ 3.9(a)	General considerations	401
§ 3.9(b)	Inspection of housing	403
§ 3.9(c)	Inspection of businesses	408
§ 3.9(d)	Welfare inspections	415
§ 3.9(e)	Inspections at fire scenes	418
§ 3.9(f)	Border searches and related activities	421

TABLE OF CONTENTS

§ 3.9(g) Vehicle use regulation.....	428
§ 3.9(h) Airport searches.....	433
§ 3.9(i) Searches directed at prisoners	438
§ 3.9(j) Searches directed at probationers and parolees	442
§ 3.9(k) Searches directed at students	449
§ 3.9(l) Searches directed at public employees	457
§ 3.10 Consent searches	461
§ 3.10(a) Nature of consent	461
§ 3.10(b) Factors bearing on validity of consent	466
§ 3.10(c) Consent by deception	478
§ 3.10(d) Third party consent: general considerations	483
§ 3.10(e) Common relationships in third party consent.....	494
§ 3.10(f) Scope of consent	502
Chapter 4 Network Surveillance	
§ 4.1 Introduction	510
§ 4.2 Postal mail.....	510
§ 4.2(a) Access to postal mail and packages	510
§ 4.2(b) Detaining mail and packages	513
§ 4.2(c) Mail covers	514
§ 4.3 Telephone surveillance and the Fourth Amendment	515
§ 4.3(a) Wiretapping and eavesdropping	515
§ 4.3(b) Exceptions to the usual rule that telephone wiretapping and eavesdropping is a search.....	517
§ 4.3(c) Numbers dialed, text messages, post-cut-through dialed digits, and cell-site data.....	518
§ 4.4 Internet communications and the Fourth Amendment..	522
§ 4.4(a) Introduction.....	522
§ 4.4(b) Non-content information.....	523
§ 4.4(c) Contents of communications	525
§ 4.4(d) The line between contents and non-content information	527
§ 4.4(e) Limits on Fourth Amendment protections in e-mail and internet communications	528
§ 4.5 Overview of statutory protections	529
§ 4.6 The Wiretap Act	532
§ 4.6(a) Wire, oral, and electronic communications	533
§ 4.6(b) Interception	538
§ 4.6(c) Overview of obtaining and executing wiretap orders	546
§ 4.6(d) Application procedure.....	550
§ 4.6(e) Contents of application	551
§ 4.6(f) Review of application	559
§ 4.6(g) Contents of order.....	560
§ 4.6(h) Minimization.....	562
§ 4.6(i) Amendment and extension.....	564
§ 4.6(j) Post-surveillance notice.....	566
§ 4.6(k) Sealing.....	568
§ 4.6(l) Statutory exceptions to liability	569
§ 4.6(m) Suppression of evidence	578
§ 4.6(n) Civil remedies	586

§ 4.6(o)	Criminal penalties	588
§ 4.7	The Pen Register Statute	589
§ 4.7(a)	Overview of the Pen Register Statute.....	589
§ 4.7(b)	Application for a Pen Register order	591
§ 4.7(c)	Dialing routing, addressing, and signaling information	592
§ 4.7(d)	Exceptions to the Pen Register statute	595
§ 4.7(e)	Remedies for violations	597
§ 4.8	The Stored Communications Act.....	597
§ 4.8(a)	Overview of the Stored Communications Act.....	597
§ 4.8(b)	Providers of electronic communication service and remote computing service.....	598
§ 4.8(c)	Rules for compelling non-content information	601
§ 4.8(d)	Rules for compelling content information	603
§ 4.8(e)	Rules for voluntary disclosure of information.....	607
§ 4.8(f)	Remedies for violations	611
§ 4.8(g)	Territorial scope and foreign government access...	612
§ 4.8(h)	Role in civil discovery	613
§ 4.9	Foreign intelligence surveillance	614
§ 4.9(a)	The Fourth Amendment.....	614
§ 4.9(b)	The Foreign Intelligence Surveillance Act and subsequent updates	616

Chapter 5 Police “Encouragement” and the Entrapment Defense

§ 5.1	Encouragement of crime and the defense of entrapment	621
§ 5.1(a)	Encouragement of criminal activity	621
§ 5.1(b)	Entrapment defense as a limit.....	622
§ 5.1(c)	Scope of the defense.....	623
§ 5.2	Subjective versus objective test for entrapment.....	630
§ 5.2(a)	The subjective approach.....	630
§ 5.2(b)	The objective approach	639
§ 5.2(c)	Objections to the subjective approach	645
§ 5.2(d)	Objections to the objective approach.....	647
§ 5.3	Procedural considerations re entrapment defense	648
§ 5.3(a)	Admissibility of evidence of defendant’s past conduct.....	649
§ 5.3(b)	Triable by court or jury.....	651
§ 5.3(c)	Inconsistent defenses	654
§ 5.3(d)	Burden of proof.....	655
§ 5.4	Other challenges to encouragement practices	658
§ 5.4(a)	Contingent fee arrangements	658
§ 5.4(b)	Inducements to those not reasonably suspected	660
§ 5.4(c)	Government “overinvolvement” in a criminal enterprise	663

Chapter 6 Interrogation and Confessions

§ 6.1	Introduction and overview confessions	672
§ 6.1(a)	The need for confessions.....	672
§ 6.1(b)	The extent of police abuse	674

TABLE OF CONTENTS

§ 6.1(c)	The Supreme Court's response.....	676
§ 6.2	The "voluntariness" test.....	678
§ 6.2(a)	The common law rule.....	678
§ 6.2(b)	Due process and the "complex of values".....	680
§ 6.2(c)	Relevant factors in the "totality of circumstances".....	686
§ 6.2(d)	Critique of the "voluntariness" test.....	722
§ 6.3	The prompt appearance requirement.....	724
§ 6.3(a)	The <i>McNabb-Mallory</i> rule.....	724
§ 6.3(b)	Reactions to the rule.....	728
§ 6.3(c)	Prompt appearance in the states.....	733
§ 6.4	The right to counsel re interrogation.....	736
§ 6.4(a)	Pre- <i>Massiah</i> developments.....	736
§ 6.4(b)	The <i>Massiah</i> case.....	738
§ 6.4(c)	The <i>Escobedo</i> case.....	740
§ 6.4(d)	The <i>Williams</i> case.....	743
§ 6.4(e)	When the right to counsel begins.....	745
§ 6.4(f)	Waiver of counsel.....	761
§ 6.4(g)	Infringement of the right.....	768
§ 6.4(h)	Critique of the right to counsel approach.....	776
§ 6.4(i)	The "repeal" of the <i>Massiah</i> rule.....	779
§ 6.5	The privilege against self-incrimination; <i>Miranda</i>	779
§ 6.5(a)	The privilege in the police station.....	779
§ 6.5(b)	The <i>Miranda</i> rules.....	783
§ 6.5(c)	The experience under <i>Miranda</i>	788
§ 6.5(d)	Critique of the <i>Miranda</i> approach.....	792
§ 6.5(e)	The "repeal" of <i>Miranda</i>	797
§ 6.6	<i>Miranda</i> : When interrogation is "custodial".....	801
§ 6.6(a)	"Custody" vs. "focus".....	801
§ 6.6(b)	Purpose of custody.....	804
§ 6.6(c)	Subjective vs. objective approach.....	807
§ 6.6(d)	Presence at station.....	815
§ 6.6(e)	Presence elsewhere.....	821
§ 6.6(f)	Other considerations.....	833
§ 6.7	<i>Miranda</i> : "Interrogation".....	836
§ 6.7(a)	The "functional equivalent" test.....	837
§ 6.7(b)	Questioning.....	844
§ 6.7(c)	Other "words or actions".....	868
§ 6.7(d)	"Volunteered" statements and follow-up questioning.....	878
§ 6.8	<i>Miranda</i> : Required warnings.....	883
§ 6.8(a)	Content.....	883
§ 6.8(b)	Time and frequency.....	894
§ 6.8(c)	Manner; proof.....	902
§ 6.8(d)	Additional admonitions.....	905
§ 6.9	<i>Miranda</i> : Waiver of rights.....	909
§ 6.9(a)	Express or implied.....	909
§ 6.9(b)	Competence of the defendant.....	913
§ 6.9(c)	Conduct of the police.....	923
§ 6.9(d)	Implied waiver.....	929
§ 6.9(e)	"Qualified" or limited waiver.....	932
§ 6.9(f)	Waiver after assertion of rights.....	936

§ 6.9(g)	Ambiguous, equivocal, limited and untimely assertions of rights	955
§ 6.10	<i>Miranda</i> : Nature of offense, interrogator, and proceedings	977
§ 6.10(a)	Questioning about minor offense	977
§ 6.10(b)	Questioning by private citizen	979
§ 6.10(c)	Questioning by non-police official	982
§ 6.10(d)	Questioning by foreign police	989
§ 6.10(e)	Proceedings at which confession offered	991
Chapter 7 Identification Procedures		
§ 7.1	Introduction to identification	997
§ 7.1(a)	The problem of misidentification	997
§ 7.1(b)	The causes of misidentification	999
§ 7.1(c)	The Supreme Court's response	1002
§ 7.2	The privilege against self-incrimination and identification	1003
§ 7.2(a)	The <i>Schmerber</i> rule	1004
§ 7.2(b)	Application to identification procedures	1006
§ 7.2(c)	Refusal to cooperate	1008
§ 7.2(d)	Change in appearance	1010
§ 7.3	The right to counsel and to confrontation re identification	1013
§ 7.3(a)	Procedures required	1013
§ 7.3(b)	Time of identification	1016
§ 7.3(c)	Nature of identification procedure	1022
§ 7.3(d)	Waiver or substitution of counsel	1028
§ 7.3(e)	Role of counsel	1031
§ 7.3(f)	Consequences of violation	1034
§ 7.3(g)	The "repeal" of the right	1037
§ 7.4	Due process and identification: "The totality of the circumstances"	1038
§ 7.4(a)	Generally	1038
§ 7.4(b)	The "unnecessarily suggestive" element	1040
§ 7.4(c)	The risk of misidentification element	1046
§ 7.4(d)	The "arranged by law enforcement" element	1052
§ 7.4(e)	Lineups	1057
§ 7.4(f)	Use of pictures	1062
§ 7.4(g)	One-man showups	1072
§ 7.4(h)	In-court identifications	1077
§ 7.4(i)	The "repeal" of the right	1083
§ 7.5	Additional possible safeguards re identification	1084
§ 7.5(a)	Jury instructions	1084
§ 7.5(b)	Expert testimony	1088
§ 7.5(c)	Improved police procedures	1092

Volume 3

PART II DETECTION AND INVESTIGATION OF CRIME (CONTINUED)

TABLE OF CONTENTS

Chapter 8 Grand Jury Investigation

§ 8.1 The investigative grand jury.....	3
§ 8.1(a) Dual functions of the traditional grand jury	3
§ 8.1(b) Special grand juries	5
§ 8.1(c) Alternative procedures.....	7
§ 8.2 Historical development of the grand jury	11
§ 8.2(a) English origins.....	12
§ 8.2(b) Developments in the United States	14
§ 8.2(c) Relevance of history.....	18
§ 8.3 Investigative advantages of the grand jury	23
§ 8.3(a) Subpoena authority and the contempt sanction	24
§ 8.3(b) Subpoena ad testificandum	28
§ 8.3(c) Subpoena duces tecum	31
§ 8.3(d) Psychological pressure.....	33
§ 8.3(e) Immunity grants	34
§ 8.3(f) Secrecy	35
§ 8.3(g) Maintaining public confidence	37
§ 8.3(h) Grand jury reports	37
§ 8.4 The legal structure of the investigative grand jury	43
§ 8.4(a) The representativeness of the grand jurors	43
§ 8.4(b) Independent investigative authority	45
§ 8.4(c) Judicial supervision	63
§ 8.5 Grand jury secrecy	70
§ 8.5(a) Underlying considerations	70
§ 8.5(b) Statutory structure	74
§ 8.5(c) Protected information	84
§ 8.5(d) Disclosure by a witness	99
§ 8.5(e) Disclosure to further criminal law enforcement.....	112
§ 8.5(f) Disclosure pursuant to a challenge to grand jury proceedings.....	123
§ 8.5(g) Disclosure to defendant pursuant to discovery rules	124
§ 8.5(h) Court ordered disclosure to third parties	128
§ 8.5(i) Remedies.....	145
§ 8.6 The right to every man's evidence	151
§ 8.6(a) The public's right and the grand jury.....	151
§ 8.6(b) Privileges and other protections	156
§ 8.6(c) Third Party Records.....	168
§ 8.7 Fourth Amendment challenges to subpoenas	184
§ 8.7(a) Applicability of the Fourth Amendment to subpoenas for documents	185
§ 8.7(b) The prohibition against overbreadth in documentary subpoenas.....	195
§ 8.7(c) Application of the Fourth Amendment to non- documentary subpoenas: <i>Dionisio</i> and <i>Mara</i>	202
§ 8.7(d) Subpoenas for identification evidence.....	205
§ 8.7(e) "Forthwith" subpoenas.....	209
§ 8.8 Challenges to misuse of the subpoena authority	211
§ 8.8(a) Improper subject of investigation	212
§ 8.8(b) Relevancy objections.....	215

CRIMINAL PROCEDURE

§ 8.8(c)	Oppressiveness objections.....	226
§ 8.8(d)	“Chilling effect” objections	229
§ 8.8(e)	Use for civil discovery	253
§ 8.8(f)	Use for post-indictment criminal discovery	258
§ 8.8(g)	Prosecution or police usurpation of the subpoena power	263
§ 8.8(h)	Harassment.....	268
§ 8.8(i)	Structural objections	270
§ 8.9	Grand jury inquiries based on illegally obtained evidence.....	271
§ 8.9(a)	The <i>Calandra</i> rule	272
§ 8.9(b)	Illegal electronic surveillance.....	275
§ 8.10	Grand jury testimony and the privilege against self-incrimination.....	279
§ 8.10(a)	The standard of potential incrimination.....	279
§ 8.10(b)	Incrimination under the laws of another sovereign.....	288
§ 8.10(c)	Compelling the target to appear.....	292
§ 8.10(d)	Advice as to rights	299
§ 8.10(e)	Waiver	308
§ 8.10(f)	Adverse consequences.....	311
§ 8.11	Self-incrimination immunity and compelled testimony	312
§ 8.11(a)	Constitutionality	312
§ 8.11(b)	Transactional vs. use/derivative-use immunity	317
§ 8.11(c)	Applying the use/derivative-use prohibition.....	322
§ 8.11(d)	Immunity procedures	334
§ 8.11(e)	Informal grants of immunity.....	339
§ 8.11(f)	Garrity immunity	344
§ 8.12	Self-incrimination and the compulsory production of documents	346
§ 8.12(a)	The <i>Boyd</i> “principle”.....	347
§ 8.12(b)	The entity exception.....	349
§ 8.12(c)	The required records exception.....	356
§ 8.12(d)	The <i>Schmerber</i> rule.....	361
§ 8.12(e)	Third-party production	363
§ 8.12(f)	Testimonial aspects of production	366
§ 8.12(g)	The remnants of <i>Boyd</i>	369
§ 8.13	Application of the act-of-production doctrine.....	374
§ 8.13(a)	Testimonial character and the foregone conclusion standard	374
§ 8.13(b)	Potential incrimination.....	394
§ 8.13(c)	Act-of-production immunity.....	402
§ 8.13(d)	Claims by entity agents.....	409
§ 8.13(e)	Non-documentary subpoenas	418
§ 8.14	The grand jury witness’ right to counsel.....	419
§ 8.14(a)	Constitutional requirements	420
§ 8.14(b)	Counsel within the grand jury room	424
§ 8.14(c)	Counsel in the anteroom.....	426
§ 8.14(d)	Multiple representation.....	427

TABLE OF CONTENTS

Chapter 9 Scope of the Exclusionary Rules

§ 9.1	Standing: the “personal rights” approach	433
§ 9.1(a)	“Personal rights” as to searches, confessions and identifications	434
§ 9.1(b)	Residential premises	440
§ 9.1(c)	Business premises	456
§ 9.1(d)	Vehicles	459
§ 9.2	Standing: other possible bases	466
§ 9.2(a)	“Automatic” standing	466
§ 9.2(b)	“Target” standing	469
§ 9.2(c)	“Derivative” standing	471
§ 9.2(d)	Abolition of standing	474
§ 9.3	“Fruit of the poisonous tree” theories	475
§ 9.3(a)	Generally	476
§ 9.3(b)	“But for” rejected	478
§ 9.3(c)	“Attenuated connection”	479
§ 9.3(d)	“Independent source”	483
§ 9.3(e)	“Inevitable discovery”	486
§ 9.4	Fruits of illegal arrests and searches	498
§ 9.4(a)	Confessions	498
§ 9.4(b)	Searches	507
§ 9.4(c)	Arrests	516
§ 9.4(d)	Identification of person	516
§ 9.4(e)	Testimony of witness	521
§ 9.4(f)	New crime	525
§ 9.5	Fruits of illegally obtained confessions	527
§ 9.5(a)	The confession as a “poisonous tree”	527
§ 9.5(b)	Searches	533
§ 9.5(c)	Confessions	539
§ 9.5(d)	Testimony of witness	545
§ 9.5(e)	New crime	547
§ 9.6	Permissible use of illegally obtained evidence at trial	548
§ 9.6(a)	Impeachment	548
§ 9.6(b)	Defense tactics which “open the door”	565
§ 9.6(c)	Prosecution for perjury or other “new” offense	567

Chapter 10 Administration of the Exclusionary Rules

§ 10.1	The pretrial motion to suppress	571
§ 10.1(a)	Contemporaneous objection or pretrial motion	571
§ 10.1(b)	Form of the motion	574
§ 10.1(c)	Pre-charge and post-trial motions distinguished ..	578
§ 10.2	Waiver or forfeiture of objection re suppression of evidence	582
§ 10.2(a)	Failure to make timely objection	582
§ 10.2(b)	Failure to renew objection	586
§ 10.2(c)	Testimony by defendant	588
§ 10.2(d)	Plea of guilty or nolo contendere	589
§ 10.3	Burden of proof at suppression hearing	590
§ 10.3(a)	Generally	590
§ 10.3(b)	Search and seizure	592
§ 10.3(c)	Confessions	599

§ 10.3(d)	Identification	601
§ 10.4	Standard of proof at suppression hearing	603
§ 10.4(a)	Generally	603
§ 10.4(b)	Confessions	604
§ 10.4(c)	Search and seizure	607
§ 10.4(d)	Identification	608
§ 10.5	The suppression hearing	609
§ 10.5(a)	The trier of fact	610
§ 10.5(b)	Presence of jury	613
§ 10.5(c)	Testimony by defendant	615
§ 10.5(d)	Evidentiary rules	617
§ 10.5(e)	Right of confrontation	618
§ 10.5(f)	Right of compulsory process	621
§ 10.6	The suppression hearing ruling and its effect	623
§ 10.6(a)	Findings	623
§ 10.6(b)	Recommendations	625
§ 10.6(c)	Reconsideration at trial	627
§ 10.6(d)	Effect of ruling in other cases	631

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS

Chapter 11 The Right to Counsel

§ 11.1	The constitutional rights to retained and appointed counsel	636
§ 11.1(a)	Sixth Amendment rights	636
§ 11.1(b)	Due process rights	649
§ 11.1(c)	Derivative rights to counsel	675
§ 11.1(d)	Equal protection and appointed counsel	676
§ 11.2	Scope of the indigent's right to counsel and other assistance	684
§ 11.2(a)	Right to appointed counsel: misdemeanor prosecutions	684
§ 11.2(b)	Right to appointed counsel: stages of the proceeding	697
§ 11.2(c)	The <i>Anders</i> rules	720
§ 11.2(d)	Transcripts	730
§ 11.2(e)	Assistance of experts	734
§ 11.2(f)	The Bounds right of access	753
§ 11.2(g)	Indigency standards	759
§ 11.2(h)	Partial contribution and recoupment	771
§ 11.3	Waiver of the right to counsel	773
§ 11.3(a)	General requirements for waiver of counsel	773
§ 11.3(b)	Waiver of counsel at trial: the necessary advice and inquiry	780
§ 11.3(c)	Forfeiture of the right to counsel	790
§ 11.4	Choice of counsel	795
§ 11.4(a)	Judicial discretion in selecting appointed counsel	795
§ 11.4(b)	Replacement of appointed counsel	800
§ 11.4(c)	Choice of retained counsel	814
§ 11.4(d)	The pro se alternative	835

TABLE OF CONTENTS

§ 11.5	The constitutional right to self-representation	839
§ 11.5(a)	The <i>Faretta</i> ruling	839
§ 11.5(b)	Notification	847
§ 11.5(c)	Requisite warnings and judicial inquiry	850
§ 11.5(d)	Grounds for denial	865
§ 11.5(e)	Subsequent challenge to ineffective representation	882
§ 11.5(f)	Standby counsel	884
§ 11.5(g)	Hybrid representation	889
§ 11.6	Counsel's control over defense strategy	895
§ 11.6(a)	"Strategic" vs. "personal" decisions	895
§ 11.6(b)	Consultation	919
§ 11.6(c)	Balancing of interests	927
§ 11.6(d)	Prejudice	937
§ 11.7	The right to effective assistance of counsel: guiding principles	942
§ 11.7(a)	The prerequisite of a constitutional right to counsel	942
§ 11.7(b)	Retained vs. appointed counsel	950
§ 11.7(c)	The adversary system touchstone	952
§ 11.7(d)	Per se vs. actual ineffectiveness	954
§ 11.7(e)	Raising an ineffectiveness claim	962
§ 11.8	Ineffective assistance claims based upon state interference and other extrinsic factors	981
§ 11.8(a)	Restrictions upon counsel's assistance	981
§ 11.8(b)	State invasions of the lawyer-client relationship ..	989
§ 11.8(c)	Conditions of representation	999
§ 11.9	Ineffective assistance claims based upon attorney conflicts of interest	1017
§ 11.9(a)	The range of possible conflicts of interest	1017
§ 11.9(b)	The trial court duty to inquire	1033
§ 11.9(c)	Waiver and disqualification	1050
§ 11.9(d)	Challenging convictions	1071
§ 11.10	Ineffective assistance claims based upon lawyer incompetence	1103
§ 11.10(a)	Guiding considerations	1103
§ 11.10(b)	The competency standard	1118
§ 11.10(c)	Applying the reasonableness standard	1130
§ 11.10(d)	The prejudice element	1188

Volume 4

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS (CONTINUED)

Chapter 12 Pretrial Release

§ 12.1	Pretrial release procedures	1
§ 12.1(a)	The Federal Bail Reform Act	2
§ 12.1(b)	State practice generally	9
§ 12.1(c)	Counsel at bail hearing	16

CRIMINAL PROCEDURE

§ 12.1(d)	Proof at bail hearing	19
§ 12.1(e)	Defendant's statements	22
§ 12.1(f)	Victim's right to be heard	23
§ 12.2	Constitutionality of limits on pretrial freedom	30
§ 12.2(a)	Amount of money bail	31
§ 12.2(b)	Poverty and pretrial release	38
§ 12.2(c)	Opportunity to prepare a defense	44
§ 12.2(d)	Nature of pretrial custody	46
§ 12.3	Constitutionality of mandating pretrial detention	48
§ 12.3(a)	Preventive detention in the federal system	48
§ 12.3(b)	Preventive detention and the state constitutions .	55
§ 12.3(c)	The Eighth Amendment ambiguity	68
§ 12.3(d)	Other constitutional objections	72
§ 12.3(e)	Detention where serious offense charged	77
§ 12.3(f)	Detention upon individual finding of dangerousness	81
§ 12.3(g)	Detention for misconduct during release	85
§ 12.4	Special situations re release	89
§ 12.4(a)	Capital cases	89
§ 12.4(b)	Juvenile cases	97
§ 12.4(c)	During trial	100
§ 12.4(d)	After conviction	100
§ 12.4(e)	During interlocutory appeal by prosecution	106
§ 12.4(f)	Probation or parole revocation	108
§ 12.4(g)	Material witnesses	108
§ 12.5	Alternatives to arrest	112
§ 12.5(a)	Summons in lieu of arrest warrant	112
§ 12.5(b)	Citation in lieu of arrest without warrant	115
Chapter 13 The Decision Whether to Prosecute		
§ 13.1	Nature of the decision whether to prosecute	124
§ 13.1(a)	In general	124
§ 13.1(b)	Evidence sufficiency	130
§ 13.1(c)	Screening out cases	132
§ 13.1(d)	Diversion	133
§ 13.1(e)	Selection of the charge	134
§ 13.2	Discretionary enforcement	135
§ 13.2(a)	The prosecutor's discretion	136
§ 13.2(b)	Police discretion	144
§ 13.2(c)	Jury and judge discretion	148
§ 13.2(d)	The "problem" of discretion	155
§ 13.2(e)	Confining the prosecutor's discretion	157
§ 13.2(f)	Structuring the prosecutor's discretion	158
§ 13.2(g)	Checking the prosecutor's discretion	163
§ 13.2(h)	Mandating the prosecutor's discretion	168
§ 13.3	Challenges to and checks upon the decision not to prosecute	169
§ 13.3(a)	Mandamus	170
§ 13.3(b)	Private prosecution; <i>qui tam</i> actions	172
§ 13.3(c)	Judicial approval of <i>nolle prosequi</i>	179
§ 13.3(d)	Grand jury	184

TABLE OF CONTENTS

§ 13.3(e) Attorney General	185
§ 13.3(f) Removal; special prosecutor	187
§ 13.4 Challenging the decision to prosecute: equal protection	190
§ 13.4(a) Discriminatory prosecution	190
§ 13.4(b) Problems of proof	194
§ 13.4(c) “Arbitrary classification”	204
§ 13.4(d) “Intentional or purposeful”	214
§ 13.4(e) Nonprosecution of others	217
§ 13.5 Other challenges to the decision to prosecute	222
§ 13.5(a) Vindictive prosecution	222
§ 13.5(b) Reneging on a promise	230
§ 13.5(c) Desuetude and lack of fair notice	237
§ 13.5(d) Federal relief from state prosecution: removal	241
§ 13.5(e) Federal relief from state prosecution: injunction and declaratory judgment	243
§ 13.5(f) Federal relief from state prosecution: habeas corpus	246
§ 13.5(g) Civil action against prosecutor	247
§ 13.5(h) Recoupment of litigation expenses	250
§ 13.6 Challenges to the decision to forego or terminate diversion	266
§ 13.6(a) The diversion process	266
§ 13.6(b) Statutory standards for diversion	270
§ 13.6(c) Decision not to divert	272
§ 13.6(d) Decision to terminate by prosecution	278
§ 13.7 Challenges to the charge selection	283
§ 13.7(a) Duplicative and overlapping statutes	283
§ 13.7(b) Discriminatory charge selection	291
§ 13.7(c) Vindictive charge selection	292
§ 13.7(d) Reneging on a promise	304
Chapter 14 The Preliminary Hearing	
§ 14.1 Functions of the preliminary hearing	307
§ 14.1(a) Screening	307
§ 14.1(b) Discovery	314
§ 14.1(c) Future impeachment	317
§ 14.1(d) The perpetuation of testimony	318
§ 14.1(e) Other functions	327
§ 14.2 Defendant’s right to a preliminary hearing	328
§ 14.2(a) The Federal Constitution	328
§ 14.2(b) The federal practice	332
§ 14.2(c) Indictment states	337
§ 14.2(d) Information states	341
§ 14.2(e) Waiver and demand	346
§ 14.2(f) Time of hearing	350
§ 14.2(g) Remedies	351
§ 14.3 The preliminary hearing bindover determination	356
§ 14.3(a) The applicable standard	356
§ 14.3(b) Assessment of credibility	368
§ 14.3(c) Consequences of a dismissal	370

§ 14.3(d)	Consequences of a bindover	376
§ 14.4	Preliminary hearing procedures	381
§ 14.4(a)	Right to counsel	381
§ 14.4(b)	Application of the rules of evidence	382
§ 14.4(c)	The defendant's right of cross-examination	392
§ 14.4(d)	The right to present defense witnesses	399
§ 14.4(e)	Challenging procedural rulings	407
Chapter 15 Grand Jury Review		
§ 15.1	Defendant's right to prosecution by indictment	422
§ 15.1(a)	The Fifth Amendment right: history	422
§ 15.1(b)	The Fifth Amendment right: scope	425
§ 15.1(c)	Fourteenth Amendment due process	449
§ 15.1(d)	Indictment jurisdictions	455
§ 15.1(e)	Limited indictment jurisdictions	478
§ 15.1(f)	Waiver in indictment and limited-indictment jurisdictions	480
§ 15.1(g)	Information states	491
§ 15.2	The structure of grand jury screening	498
§ 15.2(a)	Grand jury composition	498
§ 15.2(b)	Control over proof	500
§ 15.2(c)	The prospective defendant's testimony	510
§ 15.2(d)	Evidentiary rules	516
§ 15.2(e)	Legal advice	525
§ 15.2(f)	Quantum of proof	530
§ 15.2(g)	The indictment decision	531
§ 15.2(h)	Resubmission	535
§ 15.2(i)	Secrecy requirements	537
§ 15.2(j)	Transcription	545
§ 15.3	The effectiveness of grand jury screening	548
§ 15.3(a)	The ongoing debate	548
§ 15.3(b)	Statistics	557
§ 15.3(c)	Screening variations	561
§ 15.3(d)	Judicial responses	563
§ 15.4	Indictment challenges based on grand jury composition deficiencies	566
§ 15.4(a)	Grand jury selection procedures	566
§ 15.4(b)	Objection procedures and timing	570
§ 15.4(c)	Equal protection claims	582
§ 15.4(d)	The "fair cross-section requirement"	587
§ 15.4(e)	Constitutional challenges to the selection of the foreperson	594
§ 15.4(f)	Statutory violations	600
§ 15.4(g)	Juror bias	602
§ 15.4(h)	Preindictment publicity	609
§ 15.4(i)	Postconviction review	612
§ 15.5	Indictment challenges based on evidentiary deficiencies	617
§ 15.5(a)	The federal standard: the <i>Costello</i> rule	617
§ 15.5(b)	The federal standard: the rise and demise of "misconduct exception" to <i>Costello</i>	635

TABLE OF CONTENTS

§ 15.5(c)	State standards	652
§ 15.6	Indictment challenges based on misconduct: general principles	657
§ 15.6(a)	Prosecutorial misconduct	658
§ 15.6(b)	The federal standard; the <i>Williams</i> limits	665
§ 15.6(c)	Juror misconduct	675
§ 15.6(d)	The prejudice requirement.....	678
§ 15.6(e)	The prejudice standard of <i>Bank of Nova Scotia</i> ...	684
§ 15.6(f)	Postconviction review	697
§ 15.6(g)	Establishing misconduct	708
§ 15.7	Indictment challenges based on misconduct: common claims	711
§ 15.7(a)	The range of objections	711
§ 15.7(b)	Prejudicial comments and information.....	713
§ 15.7(c)	The prosecutor's assumption of other roles	720
§ 15.7(d)	Violation of the defendant's witness-rights	722
§ 15.7(e)	Deception in presenting evidence.....	728
§ 15.7(f)	Failure to present known exculpatory evidence...	735
§ 15.7(g)	Erroneous legal advice	747
§ 15.7(h)	Presence of unauthorized persons	752
Chapter 16 The Location of the Prosecution		
§ 16.1	Venue: general principles.....	759
§ 16.1(a)	Distinguishing venue from jurisdiction	760
§ 16.1(b)	Distinguishing vicinage	765
§ 16.1(c)	The "crime-committed" formula.....	777
§ 16.1(d)	Multi-venue offenses	785
§ 16.1(e)	Special legislation	795
§ 16.1(f)	Joinder and venue.....	806
§ 16.1(g)	Proof of venue.....	812
§ 16.1(h)	Waiver	824
§ 16.2	Applying the crime-committed formula to establish venue.....	830
§ 16.2(a)	Recurring questions	831
§ 16.2(b)	Constitutional policy	835
§ 16.2(c)	Literalism	842
§ 16.2(d)	Nature of the offense.....	849
§ 16.2(e)	Substantial contacts.....	853
§ 16.2(f)	Transportation offenses	863
§ 16.2(g)	Multiple participants.....	867
§ 16.2(h)	Enterprise offenses	876
§ 16.3	Change of venue	879
§ 16.3(a)	Variations.....	879
§ 16.3(b)	"Fair trial" venue changes on defense motion	880
§ 16.3(c)	Convenience venue changes on defense motion ...	884
§ 16.3(d)	"Fair trial" venue changes on prosecution motion	889
§ 16.3(e)	Convenience venue changes on prosecution motion	894
§ 16.3(f)	Venue changes on the court's own motion	896
§ 16.3(g)	Selection of the transfer district	897

§ 16.4	Jurisdiction.....	906
§ 16.4(a)	The concept of jurisdiction.....	906
§ 16.4(b)	Federal jurisdiction.....	907
§ 16.4(c)	State jurisdiction	915
§ 16.4(d)	Proof and waiver.....	935

Volume 5

PART III THE COMMENCEMENT OF FORMAL PROCEEDINGS (CONTINUED)

Chapter 17 The Scope of the Prosecution: Joinder and Severance

§ 17.1	Joinder and severance of offenses	1
§ 17.1(a)	Joinder: related offenses.....	2
§ 17.1(b)	Joinder: offenses of similar character	6
§ 17.1(c)	Severance: separate defenses	10
§ 17.1(d)	Severance: evidence of other crimes.....	12
§ 17.1(e)	Severance: cumulation of evidence	15
§ 17.1(f)	Severance as of right or as a more favored alternative	16
§ 17.2	Joinder and severance of defendants.....	18
§ 17.2(a)	Joinder of defendants	18
§ 17.2(b)	Severance: codefendant's confession incriminates.	23
§ 17.2(c)	Severance: codefendant's testimony would exculpate	36
§ 17.2(d)	Severance: conflicting defenses and strategies	40
§ 17.2(e)	Severance: guilt by association.....	46
§ 17.2(f)	Severance: confusion of evidence.....	48
§ 17.2(g)	Severance as of right	50
§ 17.3	Joinder and severance: procedural considerations.....	51
§ 17.3(a)	Court's authority to consolidate and sever.....	51
§ 17.3(b)	Misjoinder	53
§ 17.3(c)	Failure to prove joinder basis	56
§ 17.3(d)	Waiver or forfeiture.....	58
§ 17.3(e)	Appellate review of prejudice claim.....	61
§ 17.4	Failure to join related offenses.....	62
§ 17.4(a)	Collateral estoppel.....	62
§ 17.4(b)	Double jeopardy: same offense.....	87
§ 17.4(c)	"Same transaction" joinder.....	107

Chapter 18 Speedy Trial and Other Prompt Disposition

§ 18.1	The constitutional right to speedy trial	115
§ 18.1(a)	Generally	115
§ 18.1(b)	Interests involved.....	117
§ 18.1(c)	When right attaches.....	119
§ 18.1(d)	Waiver or forfeiture of the right	125
§ 18.1(e)	Remedy for violation.....	126
§ 18.2	The constitutional balancing test re speedy trial	127
§ 18.2(a)	The <i>Barker</i> case.....	127

TABLE OF CONTENTS

§ 18.2(b)	The length of the delay.....	128
§ 18.2(c)	Reason for delay	132
§ 18.2(d)	Defendant's responsibility to assert the right	140
§ 18.2(e)	Prejudice	143
§ 18.3	Statutes and court rules on speedy trial.....	149
§ 18.3(a)	The need	149
§ 18.3(b)	Federal Speedy Trial Act of 1974	150
§ 18.3(c)	State provisions	171
§ 18.4	Speedy trial and the imprisoned defendant	182
§ 18.4(a)	Constitutional right	183
§ 18.4(b)	Federal Speedy Trial Act of 1974.....	186
§ 18.4(c)	Interstate Agreement on Detainers.....	188
§ 18.4(d)	Uniform Mandatory Disposition of Detainers Act	205
§ 18.5	The right to other speedy disposition	209
§ 18.5(a)	Statutes of limitations.....	209
§ 18.5(b)	Unconstitutional pre-accusation delays	222
§ 18.5(c)	Post-trial delays.....	227

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

Chapter 19 The Accusatory Pleading

§ 19.1	The liberalization of pleading requirements.....	236
§ 19.1(a)	Common law technicalities	236
§ 19.1(b)	Initial attempts at reform.....	238
§ 19.1(c)	The short-form pleading movement.....	241
§ 19.1(d)	The more successful 20th century reforms.....	242
§ 19.1(e)	Twenty-first century reforms	253
§ 19.2	Pleading functions.....	255
§ 19.2(a)	Functional analysis	255
§ 19.2(b)	Double jeopardy protection.....	258
§ 19.2(c)	Providing notice	261
§ 19.2(d)	Facilitating judicial review.....	268
§ 19.2(e)	Providing a jurisdictional grounding.....	271
§ 19.2(f)	Safeguarding defendant's right to prosecution by indictment	282
§ 19.3	Basic pleading defects.....	286
§ 19.3(a)	Failure to charge an offense	286
§ 19.3(b)	Failure to allege essential elements	289
§ 19.3(c)	Factual specificity.....	322
§ 19.3(d)	Duplicity	336
§ 19.3(e)	Multiplicity	338
§ 19.3(f)	Defects in form.....	340
§ 19.3(g)	Late objections	341
§ 19.4	Bill of particulars.....	358
§ 19.4(a)	Nature of the bill	358
§ 19.4(b)	Standards for issuance.....	360
§ 19.5	Amendments of the pleading.....	367
§ 19.5(a)	Varied uses	367
§ 19.5(b)	The prejudice/different-offense standard	368

§ 19.5(c)	The form/substance distinction.....	378
§ 19.5(d)	The <i>Bain</i> rule	382
§ 19.6	Variances and pleadings	388
§ 19.6(a)	Challenging variances	389
§ 19.6(b)	The <i>Berger</i> standard.....	390
§ 19.6(c)	The constructive amendment limitation.....	396
Chapter 20 Pretrial Discovery		
§ 20.1	The expansion of discovery	408
§ 20.1(a)	The break from the common law	408
§ 20.1(b)	The discovery debate	412
§ 20.1(c)	Outcome of the discovery debate.....	421
§ 20.1(d)	The “two-way street” movement in discovery.....	424
§ 20.2	The structure of discovery law	426
§ 20.2(a)	“Common law” jurisdictions	426
§ 20.2(b)	Court rules and statutes	428
§ 20.2(c)	The operation of discovery provisions	436
§ 20.2(d)	Other discovery vehicles	442
§ 20.2(e)	Depositions	450
§ 20.3	Defense discovery.....	457
§ 20.3(a)	Prosecution possession or control.....	457
§ 20.3(b)	Written or recorded statements.....	464
§ 20.3(c)	Defendant’s statements	471
§ 20.3(d)	Codefendant’s statements	477
§ 20.3(e)	Criminal records	479
§ 20.3(f)	Scientific reports and related information	480
§ 20.3(g)	Documents and tangible objects	483
§ 20.3(h)	Witness lists.....	491
§ 20.3(i)	Witness statements.....	495
§ 20.3(j)	The work product exemption	503
§ 20.3(k)	Police reports.....	511
§ 20.3(l)	Protective orders.....	513
§ 20.3(m)	Constitutional overtones	516
§ 20.3(n)	Exculpatory-matter provisions	522
§ 20.4	Constitutional limitations upon pretrial discovery for the prosecution.....	525
§ 20.4(a)	Due process.....	525
§ 20.4(b)	Self-incrimination: the prerequisite of defendant’s personal communication.....	529
§ 20.4(c)	Self-incrimination: defendant and defense testimonial disclosures.....	537
§ 20.4(d)	Self-incrimination: the acceleration doctrine	540
§ 20.4(e)	Self-incrimination: the special case of the insanity defense	548
§ 20.4(f)	Sixth Amendment limitations	555
§ 20.4(g)	Conditional discovery.....	559
§ 20.5	Prosecution discovery provisions.....	563
§ 20.5(a)	Variations in approach.....	563
§ 20.5(b)	Alibi defense provisions.....	566
§ 20.5(c)	Insanity and related mental-capacity defenses....	569
§ 20.5(d)	Identification of defenses	574

TABLE OF CONTENTS

§ 20.5(e)	Witness lists.....	575
§ 20.5(f)	Witness statements.....	576
§ 20.5(g)	Documents and tangible objects	579
§ 20.5(h)	Scientific reports	581
§ 20.6	Sanctions for discovery violations	584
§ 20.6(a)	Range.....	584
§ 20.6(b)	Prosecution violations	586
§ 20.6(c)	Defense violations.....	604
Chapter 21 Pleas of Guilty		
§ 21.1	The plea negotiation system.....	616
§ 21.1(a)	Forms of plea bargaining	616
§ 21.1(b)	Development of plea bargaining	619
§ 21.1(c)	Administrative convenience	623
§ 21.1(d)	Accurate and fair results	625
§ 21.1(e)	The problem of disparity.....	628
§ 21.1(f)	Other attributes and consequences	637
§ 21.1(g)	Prohibiting plea bargaining	638
§ 21.1(h)	Plea bargaining and the federal sentencing guidelines	643
§ 21.2	Kept, broken, rejected and nonexistent bargains	658
§ 21.2(a)	Statutory inducements to plead guilty	658
§ 21.2(b)	Inducements by the prosecutor	665
§ 21.2(c)	Inducements by the judge	696
§ 21.2(d)	The broken bargain	704
§ 21.2(e)	Remedy for broken bargain.....	770
§ 21.2(f)	The withdrawn offer.....	796
§ 21.2(g)	The unrealized expectation	805
§ 21.2(h)	Admission of statements made during bargaining	812
§ 21.3	Plea negotiation responsibilities of the attorneys and judge	820
§ 21.3(a)	Right to counsel during plea bargaining.....	820
§ 21.3(b)	Effective assistance by defense counsel.....	828
§ 21.3(c)	The prosecutor's bargaining tactics	877
§ 21.3(d)	Judicial involvement in negotiations.....	895
§ 21.3(e)	Judicial evaluation of contemplated concessions...	909
§ 21.3(f)	Responsibilities to the victim	921
§ 21.4	Receiving the defendant's plea.....	945
§ 21.4(a)	Arraignment; pleading alternatives	945
§ 21.4(b)	Determining voluntariness of plea and competency of defendant to plead	959
§ 21.4(c)	Determining understanding of charge.....	968
§ 21.4(d)	Determining understanding of possible consequences.....	979
§ 21.4(e)	Determining understanding of rights waived.....	998
§ 21.4(f)	Determining factual basis of plea.....	1005
§ 21.4(g)	Acting on the plea bargain.....	1024
§ 21.5	Challenge of guilty plea by defendant.....	1036
§ 21.5(a)	Withdrawal of plea.....	1037
§ 21.5(b)	Other challenges to plea.....	1054

§ 21.5(c)	Significance of noncompliance with plea-receiving procedures	1057
§ 21.5(d)	Significance of compliance with plea-receiving procedures	1066
§ 21.5(e)	Effect of withdrawn or overturned plea.....	1072
§ 21.5(f)	Admissibility of withdrawn or overturned plea and related statements.....	1083
§ 21.6	Effect of guilty plea.....	1087
§ 21.6(a)	Rights waived or forfeited by plea	1087
§ 21.6(b)	Conditional pleas	1108
§ 21.6(c)	Trial on stipulated facts.....	1116

Volume 6

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

Chapter 22 Trial by Jury and Impartial Judge

§ 22.1	The right to jury trial	2
§ 22.1(a)	Generally; applicable to the states	2
§ 22.1(b)	Petty offenses	8
§ 22.1(c)	Noncriminal trials	17
§ 22.1(d)	Size of jury	19
§ 22.1(e)	Unanimity	23
§ 22.1(f)	Trial de novo	27
§ 22.1(g)	Jury nullification	29
§ 22.1(h)	Waiver of jury trial	39
§ 22.2	Selection of prospective jurors	53
§ 22.2(a)	Federal jury selection procedures	53
§ 22.2(b)	State jury selection procedures	57
§ 22.2(c)	Denial of equal protection	60
§ 22.2(d)	The “fair cross-section” requirement	64
§ 22.2(e)	Vicinage	84
§ 22.2(f)	Challenge to the array	86
§ 22.3	Voir dire; challenges	87
§ 22.3(a)	Nature of voir dire	88
§ 22.3(b)	Prosecution and defense access to information	102
§ 22.3(c)	Challenges for cause	115
§ 22.3(d)	Peremptory challenges.....	137
§ 22.3(e)	Alternate jurors	175
§ 22.3(f)	Swearing the jury; the jurors’ oath.....	182
§ 22.4	Challenging the judge.....	185
§ 22.4(a)	Right to impartial judge	185
§ 22.4(b)	Challenge for cause.....	190
§ 22.4(c)	Recusal by judge	192
§ 22.4(d)	Peremptory challenge	200
§ 22.4(e)	Substitution of judge	203
§ 22.5	Challenging the prosecutor.....	204
§ 22.5(a)	Challenge for cause.....	204
§ 22.5(b)	Prior relationship with defendant	211

TABLE OF CONTENTS

§ 22.5(c)	Prosecutor as witness	214
§ 22.5(d)	Imputed disqualification of an office.....	216
Chapter 23 Fair Trial and Free Press		
§ 23.1	Preventing prejudicial publicity.....	221
§ 23.1(a)	The problem of prejudicial publicity	221
§ 23.1(b)	Restricting public statements	224
§ 23.1(c)	Restricting the media	257
§ 23.1(d)	Closed proceedings: First Amendment right of access	265
§ 23.1(e)	Closing proceedings and placing documents under seal: restricting the First Amendment right.....	288
§ 23.2	Overcoming prejudicial publicity	300
§ 23.2(a)	Change of venue on a defense motion.....	300
§ 23.2(b)	Change of venue without a defense motion.....	317
§ 23.2(c)	Change of venire.....	319
§ 23.2(d)	Continuance.....	320
§ 23.2(e)	Severance.....	321
§ 23.2(f)	Jury selection	321
§ 23.2(g)	Admonishment or sequestration of the jury	336
§ 23.2(h)	Excusal of jurors	338
§ 23.3	Conduct of the trial	339
§ 23.3(a)	Media representatives in the courtroom	339
§ 23.3(b)	Broadcast, video and photographic coverage	341
Chapter 24 The Criminal Trial		
§ 24.1	The right to a public trial.....	348
§ 24.1(a)	Nature of the right	348
§ 24.1(b)	When closure justified.....	353
§ 24.2	Presence of the defendant	363
§ 24.2(a)	Origins and scope of the right to be present.....	363
§ 24.2(b)	Harmless error and waiver, generally.....	373
§ 24.2(c)	The disorderly defendant: forfeiture by conduct...	376
§ 24.2(d)	Forfeiture by voluntary absence	379
§ 24.2(e)	Prejudicial circumstances of presence	385
§ 24.2(f)	Video conferencing.....	398
§ 24.2(g)	Presence and understanding—Competency and interpreters	402
§ 24.3	The defendant's right of access to evidence.....	408
§ 24.3(a)	Constitutional grounding and remedies for misconduct.....	409
§ 24.3(b)	Due process duty to disclose evidence favorable to the accused	418
§ 24.3(c)	Disclosure of witness statements—Jencks Act.....	455
§ 24.3(d)	The duty to correct false evidence	462
§ 24.3(e)	The government's obligation to preserve evidence.	473
§ 24.3(f)	Defense use of subpoenas.....	484
§ 24.3(g)	Assisting the defense in obtaining evidence.....	494
§ 24.3(h)	Government interference with defense access.....	501
§ 24.3(i)	Defense witness immunity	506

§ 24.4	The presentation of evidence	512
§ 24.4(a)	Constitutional limitations on the rules of evidence	512
§ 24.4(b)	Cross-examination	520
§ 24.4(c)	Forcing a claim of privilege by a witness	521
§ 24.4(d)	Sequestration of witnesses	527
§ 24.5	Defendant's rights to remain silent and to testify	542
§ 24.5(a)	Right not to take the stand	542
§ 24.5(b)	Comment on defendant's silence	549
§ 24.5(c)	Instruction on defendant's silence	557
§ 24.5(d)	The defendant's right to testify	559
§ 24.6	Trial court evaluation of and comment on the evidence	569
§ 24.6(a)	Bench trials	569
§ 24.6(b)	Motions for directed acquittal	571
§ 24.6(c)	The sufficiency standard	578
§ 24.6(d)	New trial motion	581
§ 24.6(e)	Summary and comment on the evidence	582
§ 24.7	The arguments of counsel	585
§ 24.7(a)	Opening statements	585
§ 24.7(b)	Closing argument	589
§ 24.7(c)	Order of closing argument	591
§ 24.7(d)	The roles of the prosecutor and defense counsel	593
§ 24.7(e)	Prohibited argument	596
§ 24.7(f)	The invited response	611
§ 24.7(g)	Objections	612
§ 24.7(h)	Due process	613
§ 24.7(i)	Standard of review	615
§ 24.8	Jury instructions	620
§ 24.8(a)	Multiple stages for instructions	620
§ 24.8(b)	Requests and objections to instructions	628
§ 24.8(c)	Content of instructions	631
§ 24.8(d)	Lesser-included offenses generally	633
§ 24.8(e)	Defining the lesser-included offense	637
§ 24.8(f)	Entitlements to lesser offense charges	648
§ 24.9	Jury procedures	661
§ 24.9(a)	Sequestering the jury	661
§ 24.9(b)	Jury questions and note-taking	664
§ 24.9(c)	Items taken to the jury room	668
§ 24.9(d)	The deadlocked jury	671
§ 24.9(e)	Polling the jury	678
§ 24.9(f)	Jury misconduct	681
§ 24.9(g)	Limitations on juror testimony about misconduct	703
§ 24.10	Jury verdicts	710
§ 24.10(a)	Special verdicts and special interrogatories	710
§ 24.10(b)	Inconsistent verdicts or findings	717
§ 24.10(c)	Multi-theory verdicts	724
§ 24.10(d)	Partial verdicts	732
§ 24.11	Post-verdict motions	735
§ 24.11(a)	Judgment of acquittal	735
§ 24.11(b)	New trial	735

TABLE OF CONTENTS

§ 24.11(c)	Arrest of judgment	737
§ 24.11(d)	Newly discovered evidence	737
Chapter 25 Double Jeopardy		
§ 25.1	Dimensions of the guarantee	753
§ 25.1(a)	Introduction	754
§ 25.1(b)	Policies and history	754
§ 25.1(c)	Proceedings to which applicable	759
§ 25.1(d)	When jeopardy attaches	766
§ 25.1(e)	Termination of jeopardy	785
§ 25.1(f)	The “same offence”	787
§ 25.1(g)	Reprosecutions: an overview	787
§ 25.2	Reprosecution following mistrial	789
§ 25.2(a)	With defendant’s consent	789
§ 25.2(b)	The “goaded” mistrial motion	793
§ 25.2(c)	The “manifest necessity” standard	798
§ 25.2(d)	Manifest necessity and alternatives to a mistrial .	800
§ 25.2(e)	Manifest necessity and trial court discretion	809
§ 25.2(f)	Dismissals equivalent to mistrials	816
§ 25.3	Reprosecution following acquittal or dismissal	817
§ 25.3(a)	Dismissals vs. acquittals	817
§ 25.3(b)	The jury acquittal	821
§ 25.3(c)	Acquittal by the judge	824
§ 25.3(d)	Pre-jeopardy “acquittals”	829
§ 25.3(e)	Postconviction judgments of acquittal	831
§ 25.4	Reprosecution following conviction	832
§ 25.4(a)	The general rule	832
§ 25.4(b)	The evidence insufficiency exception	834
§ 25.4(c)	The determination of sufficiency	841
§ 25.4(d)	Conviction as implied acquittal	845
§ 25.5	Reprosecution by a different sovereign	850
§ 25.5(a)	Federal prosecution after state	850
§ 25.5(b)	State prosecution after federal	855
§ 25.5(c)	State-state and state-municipal	857
Chapter 26 Sentencing Procedures		
§ 26.1	Legislative structuring of sentencing: sanctions	862
§ 26.1(a)	Structure and procedure	862
§ 26.1(b)	Capital punishment	865
§ 26.1(c)	Incarceration	872
§ 26.1(d)	Community release	883
§ 26.1(e)	Intermediate sanctions	889
§ 26.1(f)	Financial sanctions	898
§ 26.2	Legislative structuring of sentencing: the allocation of sentencing authority	904
§ 26.2(a)	Judicial sentencing	904
§ 26.2(b)	Jury sentencing	905
§ 26.2(c)	Administrative agency decisions	913
§ 26.3	The guidance of judicial sentencing discretion	928
§ 26.3(a)	Unguided discretion	929
§ 26.3(b)	The challenge to unguided discretion	929

§ 26.3(c)	Mandatory minimum sentences.....	932
§ 26.3(d)	Presumptive sentencing.....	935
§ 26.3(e)	Sentencing guidelines	936
§ 26.3(f)	Concurrent and consecutive sentences	940
§ 26.3(g)	Appellate review	945
§ 26.4	Due process: the framework for sentencing procedure ..	953
§ 26.4(a)	Williams v. New York.....	953
§ 26.4(b)	The range of relevant information.....	957
§ 26.4(c)	Consideration of the defendant's exercise of procedural rights.....	966
§ 26.4(d)	Notice	974
§ 26.4(e)	The right to the assistance of counsel.....	983
§ 26.4(f)	Ensuring the reliability of sentencing information	987
§ 26.4(g)	The right to be heard: allocution and the right to offer rebuttal evidence.....	997
§ 26.4(h)	Burden of proof	1006
§ 26.4(i)	When sentencing factors are elements.....	1011
§ 26.5	Sentencing information	1038
§ 26.5(a)	Evidentiary standards	1038
§ 26.5(b)	The presentence report.....	1045
§ 26.5(c)	Disclosure and correction of the presentence report.....	1049
§ 26.5(d)	Victim impact statement.....	1055
§ 26.6	Special sentences	1060
§ 26.6(a)	Special sentences and special procedures.....	1060
§ 26.6(b)	Recidivist statutes	1061
§ 26.6(c)	Restitution.....	1068
§ 26.6(d)	Forfeiture	1075
§ 26.6(e)	"Dangerous" offenders	1081
§ 26.7	Resentencing: double jeopardy	1085
§ 26.7(a)	Resentencing following reconviction.....	1085
§ 26.7(b)	Resentencing and sentencing appeals	1090
§ 26.7(c)	Resentencing by the trial judge.....	1094
§ 26.7(d)	Sentencing based upon other criminal conduct ...	1102
§ 26.8	Resentencing: the prohibition against vindictiveness....	1104
§ 26.8(a)	Presumed vindictiveness: the <i>Pearce</i> ruling	1104
§ 26.8(b)	Rebutting the <i>Pearce</i> presumption.....	1107
§ 26.8(c)	Applying the <i>Pearce</i> presumption in other resentencing settings.....	1110
§ 26.9	Probation conditions.....	1116
§ 26.9(a)	General standards	1116
§ 26.9(b)	Probation conditions and constitutional rights	1119
§ 26.9(c)	Challenging conditions	1140
§ 26.10	Revocation of probation.....	1142
§ 26.10(a)	Basis for revocation	1142
§ 26.10(b)	The revocation process.....	1145
§ 26.10(c)	Proof at revocation hearing	1152
§ 26.10(d)	Decision on revocation and its consequences....	1161

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	2
§ 27.1(a)	No federal constitutional right	2
§ 27.1(b)	Constitutional protection of the statutory right of appeal	7
§ 27.2	Defense appeals and the final judgment rule	9
§ 27.2(a)	The statutory requirement of a final judgment.....	9
§ 27.2(b)	Underlying policies and statutory exceptions.....	11
§ 27.2(c)	Collateral orders	15
§ 27.2(d)	Independent proceedings.....	29
§ 27.2(e)	Grand jury proceedings	33
§ 27.3	Prosecution appeals	38
§ 27.3(a)	Constitutional constraints	38
§ 27.3(b)	The need for specific statutory authorization.....	41
§ 27.3(c)	Pretrial rulings	44
§ 27.3(d)	Post-jeopardy rulings.....	51
§ 27.4	Review by writ.....	53
§ 27.4(a)	Extraordinary writs generally	54
§ 27.4(b)	Prohibition and mandamus: traditional limits and modern extensions.....	54
§ 27.4(c)	Defense petitions	57
§ 27.4(d)	Prosecution applications.....	61
§ 27.4(e)	Third-party applications.....	66
§ 27.4(f)	Habeas corpus	68
§ 27.5	The scope of appellate review	69
§ 27.5(a)	Mootness	69
§ 27.5(b)	The concurrent sentence doctrine.....	80
§ 27.5(c)	Waiver or forfeiture of the right to appeal.....	84
§ 27.5(d)	Plain error	104
§ 27.5(e)	Standard of review.....	120
§ 27.6	Harmless error on appeal.....	125
§ 27.6(a)	Origins of harmless error review.....	125
§ 27.6(b)	Harmless error review of nonconstitutional errors	128
§ 27.6(c)	Application to constitutional violations.....	141
§ 27.6(d)	Harmless error or automatic reversal	143
§ 27.6(e)	Applying the reasonable doubt standard for constitutional errors	168

Chapter 28 Post Conviction Review: Collateral Remedies

§ 28.1	Current collateral remedies and historical antecedents.	174
§ 28.1(a)	The nature of collateral remedies	174
§ 28.1(b)	The common law writ of habeas corpus	176
§ 28.1(c)	The common law writ of coram nobis.....	179
§ 28.2	The statutory structure and habeas policy	180

§ 28.2(a)	Constitutional right or legislative grace?	180
§ 28.2(b)	Statutory structure: from the 1867 Act to the 1996 Act.....	187
§ 28.2(c)	Balancing within the statutory framework	192
§ 28.2(d)	Competing models of habeas review.....	199
§ 28.3	Claims cognizable in habeas.....	205
§ 28.3(a)	Cognizable claimants: the custody requirement...	205
§ 28.3(b)	Cognizable claims.....	215
§ 28.3(c)	The exception for Fourth Amendment claims	223
§ 28.3(d)	The opportunity for full and fair litigation.....	227
§ 28.3(e)	“Bare innocence” claims.....	230
§ 28.4	Claims in habeas foreclosed by state procedural defaults.....	235
§ 28.4(a)	Claims “defaulted” in state court-the policy debate.....	235
§ 28.4(b)	Which defaults count: the “adequate and independent state ground” standard	238
§ 28.4(c)	Excusing default: state waiver of the procedural default defense.....	243
§ 28.4(d)	Excusing default: the “cause and prejudice” standard.....	245
§ 28.4(e)	Excusing default: the “miscarriage of justice” exception	266
§ 28.5	Claims in habeas foreclosed due to premature, successive, or delayed applications.....	273
§ 28.5(a)	Exhaustion of state remedies.....	273
§ 28.5(b)	Time limits for filing petitions.....	284
§ 28.5(c)	Successive petitions: claims previously advanced .	298
§ 28.5(d)	Successive petitions: new claims	303
§ 28.5(e)	Successive petitions: court of appeals certification.....	310
§ 28.6	Constitutional interpretation on habeas review.....	312
§ 28.6(a)	The changing role of federal habeas courts	312
§ 28.6(b)	Teague: limiting the retroactive application of new rules of procedure.....	313
§ 28.6(c)	Determining when a state conviction becomes final	316
§ 28.6(d)	The “new rule” concept.....	317
§ 28.6(e)	The Teague exceptions	322
§ 28.6(f)	Review of state court rulings under § 2254(d)(1) ..	330
§ 28.6(g)	Harmless error on habeas review.....	341
§ 28.7	Fact-finding and evidentiary hearings in habeas	345
§ 28.7(a)	Presuming the correctness of state court determinations of fact	346
§ 28.7(b)	Distinguishing mixed determinations of law and fact from fact-finding	352
§ 28.7(c)	Obtaining evidentiary hearings.....	355
§ 28.7(d)	Discovery	364
§ 28.8	Habeas review of capital cases under chapter 154 of the 1996 Act	365

TABLE OF CONTENTS

§ 28.8(a)	Special standards for applicants from certain states	366
§ 28.8(b)	The opt-in requirements: electing the special standards.....	371
§ 28.9	Remedies for federal prisoners	372
§ 28.9(a)	The range of remedies.....	372
§ 28.9(b)	Limits on relief under § 2255.....	382
§ 28.9(c)	Nonconstitutional claims under § 2255.....	399
§ 28.10	Appeal of district court decisions in habeas.....	402
§ 28.11	State collateral remedies	405
§ 28.11(a)	Supreme Court “encouragement” of state remedies	405
§ 28.11(b)	Types of state remedies.....	408
§ 28.12	Assistance of counsel in post-conviction proceedings..	416
§ 28.12(a)	Petitioner access to legal assistance-constitutional requirements	416
§ 28.12(b)	Statutory entitlements to legal assistance	418
Table of Cases		Tbl of Cases-1
Table of Laws and Rules		Tbl of L&R-1
Table of Secondary Authorities		Tbl of Sec Auth-1
Index		Index-1

