

UNDERSTANDING CRIMINAL PROCEDURE

Volume 2: Adjudication

Fourth Edition

UNDERSTANDING CRIMINAL PROCEDURE

Volume 2: Adjudication

Fourth Edition

JOSHUA DRESSLER

*Frank R. Strong Chair in Law
Michael E. Moritz College of Law
The Ohio State University*

ALAN C. MICHAELS

*Edwin M. Cooperman Designated Professor of Law
Michael E. Moritz College of Law
The Ohio State University*



CAROLINA ACADEMIC PRESS

Durham, North Carolina

ISBN: 978-1-63044-246-0

Library of Congress Cataloging-in-Publication Data

Understanding criminal procedure / Joshua Dressler, Alan C. Michaels. — 4th ed.
p. cm.

ISBN 0-8205-6999-2 (soft cover)

1. Criminal procedure — United States. I. Michaels, Alan C. II. Title.

KF9619.D74 2006

345.73'05 — dc22

2005030461

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2015 Carolina Academic Press, LLC

All Rights Reserved

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work.

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.caplax.com

Printed in the United States of America

DEDICATION

To Dottie: You Make Life Possible

— J.D.

To Heather, Tyler & Sharon: For Your Constant Support and Inspiration

— A.C.M.

PREFACE

The fourth edition of UNDERSTANDING CRIMINAL PROCEDURE is new in many respects. Most significantly, it has been enlarged to two volumes. The first volume is intended for use in criminal procedure courses focusing primarily or exclusively on police investigatory process. Such courses are variously titled: *Criminal Procedure I*; *Criminal Procedure: Investigation*; *Criminal Procedure: Police Practices*; *Constitutional Criminal Procedure*; etc. Because some such courses also cover the defendant's right to counsel at trial and appeal, the first volume includes a chapter on this non-police-practice issue. (The latter chapter is also included in Volume Two.)

The second volume of UNDERSTANDING CRIMINAL PROCEDURE covers the criminal process after the police investigation ends, and the adjudicative process commences. This book is useful in criminal procedure courses (variously entitled *Criminal Procedure II*; *Criminal Procedure: Adjudication*; etc.) that follow the criminal process through the various stages of adjudication, commencing with pretrial issues — such as counsel, charging, pretrial release and discovery — and continuing with the trial itself and then post-conviction proceedings: sentencing and appeals.

UNDERSTANDING CRIMINAL PROCEDURE is primarily designed for law students. We have written the Text so that students can use it with confidence that it will assist them in course preparation, and professors can recommend or assign the volumes to students with confidence that they will improve classroom dialogue. Based on comments we have received in the past from students and professors alike, we feel comfortable in predicting that this new, expanded edition of UNDERSTANDING CRIMINAL PROCEDURE will serve the needs of students and professors even better. Also, based on the experience of prior editions, including citations to this Text in scholarly literature and judicial opinions, we are confident that the two volumes will prove useful to scholars, practicing lawyers, and courts.

The Text covers the most important United States Supreme Court cases in the field. Where pertinent, the Federal Rules of Criminal Procedure, federal statutes, and lower federal and state court cases are considered. The broad overarching policy issues of criminal procedure are laid out; and some of the hottest debates in the field are considered in depth and, we think, objectively.

Readers should find the Text user-friendly. Students who want a thorough grasp of a topic can and should read the relevant chapter in its entirety. However, each chapter is divided into subsections, so that readers with more refined research needs can find answers to their questions efficiently. We also include citations to important scholarship, both classic and recent, into which readers may delve more deeply regarding specific topics. And, because so many of the topics interrelate, cross-referencing footnotes are included, so that readers can easily move from one part of the Text to another, if necessary.

Gender policy of the Text. Obviously, women as well as men fill all the roles in the criminal justice system: lawyer, judge, police officer, legislator, criminal suspect, and victim. Accordingly, in even-numbered chapters, we use the male pronoun to describe hypothetical and generic parties in the criminal justice system; in odd-numbered chapters, women get equal time. Based on comments we have received about the policy, most readers like the approach or, at worst, find it only temporarily distracting.

Acknowledgments. Many persons helped make these volumes possible. We can name only a few here. Professors Lee Lamborn and the late Joseph Grano read and commented on every page of every chapter of the manuscript for the first edition. Professor George Thomas did the same with the second edition. Many people commented on drafts of chapters of the third edition. The text is much better because of their generous assistance. Mistakes and omissions are the result of our stubborn refusal to listen to advice.

For this fourth edition, we are also grateful for the research assistance of a great bunch of law students at The Ohio State University's Moritz College of Law: Ian Best ('06), Courtney Cook ('07); Jennifer Dutcher ('06); Joshua Maggard ('06); Nicole VanderDoes ('05); and Leigh Anne Williams ('07).

We thank our families for their love and support.

Joshua Dressler
Alan C. Michaels
May, 2006

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION TO CRIMINAL PROCEDURE

§ 1.01	The Relationship of “Criminal Law” to “Criminal Procedure” . . .	1
§ 1.02	Sources of Procedural Law	2
[A]	Formal Sources	2
[B]	Informal Sources: A Taste of Reality	4
§ 1.03	Stages of a Criminal Prosecution	5
[A]	In General	5
[B]	Investigatory Stage	5
[1]	Search and Seizure	6
[2]	Interrogation	6
[3]	Identification Procedures	6
[4]	Arrest	7
[C]	Adjudicatory Stage	7
[1]	Issuance of a Complaint	7
[2]	Probable Cause (<i>Gerstein</i>) Hearing	7
[3]	First Appearance Before the Magistrate	8
[4]	Preliminary Hearings and Grand Jury Proceedings	9
[5]	Arraignment	10
[6]	Pretrial Motions	10
[7]	Trial	11
[8]	Sentencing and Post-Trial Proceedings	11
[a]	Sentencing	11
[b]	Appeal	12
[c]	Collateral Attack of a Conviction: Habeas Corpus	12

CHAPTER 2 OVERARCHING POLICY ISSUES IN CRIMINAL PROCEDURE

§ 2.01	Norms of the Criminal Process	15
§ 2.02	Alternative Models of Criminal Justice	17
[A]	Overview	17
[B]	Crime Control Model of Criminal Justice	18
[C]	Due Process Model of Criminal Justice	19
§ 2.03	The Role of “Truth” in the Criminal Justice System	20
§ 2.04	Accusatorial versus Inquisitorial Systems of Justice	23
§ 2.05	Race, Gender, and Economic Class in the Law	26
§ 2.06	Who Should Devise the Rules of Criminal Procedure?	28
§ 2.07	Formulating Rules of Criminal Procedure: Bright-Line Rules versus Case-by-Case Adjudication	29

CHAPTER 3 INCORPORATION OF THE BILL OF RIGHTS

§ 3.01	Incorporation: Overview	33
[A]	Nature of the Issue	33
[B]	Importance of the Debate	34
§ 3.02	Incorporation Theories	35
[A]	Full Incorporation	35
[B]	Fundamental Rights	35
[C]	Full-Incorporation-Plus	36
[D]	Selective Incorporation	36
§ 3.03	The Incorporation Debate	37
[A]	Overview of the Debate	37
[B]	What Did the Framers Intend?	38
[C]	Textual Claims: What Does “Due Process” Mean?	38
[D]	Which Doctrine Is More Libertarian?	39
[E]	Which Theory Is Structurally Preferable?	39
§ 3.04	Which Theory Has “Won” the Debate?	40

CHAPTER 4 THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 4.01	Overview: The Importance of Defense Lawyers in the Adversary System	43
§ 4.02	When the Right to Counsel Applies	43
§ 4.03	The Right to Counsel: At Trial	44
[A]	The Right to Employ Counsel	44
[B]	Indigents: The Right to Appointed Counsel	45
[1]	Overview	45
[2]	The Road to <i>Gideon</i>	46
[a]	<i>Powell v. Alabama</i>	46
[b]	<i>Johnson v. Zerbst</i>	47
[c]	<i>Betts v. Brady</i>	47
[3]	<i>Gideon v. Wainwright</i>	48
[4]	Post- <i>Gideon</i> Law: The Misdemeanor Cases	50
[a]	<i>Argersinger v. Hamlin</i>	50
[b]	<i>Scott v. Illinois</i>	51
[c]	<i>Alabama v. Shelton</i>	53
[d]	Two More Cases: <i>Nichols</i> and <i>Gagnon</i>	54
[5]	Implementing the Right to Appointed Counsel	55
§ 4.04	The Right to Counsel: On Appeal	57
[A]	Inapplicability of the Sixth Amendment	57
[B]	First Appeal (as of Right)	58
[1]	In General	58
[2]	Special Problem: Frivolous Appeals	59
[C]	Subsequent (Discretionary) Appeals	60

[D] First (Discretionary) Appeal After a Guilty Plea	62
§ 4.05 The Right of Self-Representation	63
[A] The Defense: Who Is in Charge?	63
[B] <i>Faretta v. California</i>	64
[1] Recognition of the Right	64
[2] Reflections on <i>Faretta</i>	65
[C] Procedural Issues	68
[1] Making the Choice of Self-Representation	68
[2] Timeliness of the Request	68
[3] Hybrid Representation	68
[4] Standby Counsel	69
[5] Legal Significance of Poor Self-Representation	69
[6] Legal Effect of an Erroneous Denial of the Right	70
§ 4.06 The Right to Representation by One's Preferred Attorney	70
[A] In General	70
[B] Special Problem: Seizing Lawyers' Fees	71
§ 4.07 Interference With the Right to Counsel	73
§ 4.08 Effective Assistance of Counsel: General Principles	74
[A] Nature of the Issue	74
[B] "Ineffective Assistance": The <i>Strickland</i> Test	75
[1] Overview	75
[2] The First Prong: Deficiency of Representation	77
[a] The Standard	77
[b] Deficiency: Supreme Court Case Law	79
[i] Failure to Perform Ordinary Tasks —	
Not Unreasonable	79
[ii] Failure to Perform Ordinary Tasks —	
Held Unreasonable	80
[iii] Ignorance of Relevant Law	81
[3] The Second Prong: Prejudice	82
[a] The Standard	82
[b] Prejudice: Supreme Court Case Law	84
[c] Prejudice: Special Problems	85
[i] The Factually Guilty Defendant	85
[ii] The Sleeping Lawyer	87
§ 4.09 Effective Assistance of Counsel: Conflicts of Interest	88
[A] Nature of the Issue	88
[B] Pretrial Procedures to Avoid Conflicts	88
[C] Post-Trial Proof of a Conflict	89
[D] Waiver of the Right to Conflict-Free Representation	90
§ 4.10 Effective Assistance: The Role of Ethical Canons	91

CHAPTER 5

PRETRIAL RELEASE AND PRETRIAL DETENTION

§ 5.01 Pretrial Release: Procedural Context and Overview	95
--	----

§ 5.02	Pretrial Release: Interests at Stake	97
[A]	The Community's Interest	97
[B]	The Arrestee's Interest	98
§ 5.03	Pretrial Release: Eighth Amendment	99
§ 5.04	Pretrial Release: Statutory Law	100
[A]	Pre-Reform	100
[B]	Federal Bail Reform Act of 1966 and Other Reforms	101
[C]	Further Reform: The Alternative of Detention	102
§ 5.05	Preventive Detention	103
[A]	Federal Bail Reform Act of 1984	103
[1]	Overview	103
[2]	Impact of the 1984 Act	104
[3]	The 1984 Act: Procedures	104
[B]	The Policy Debate	106
[1]	Criticisms	106
[2]	Defenses	107
[C]	The Constitutional Debate: <i>U.S. v. Salerno</i>	108
[1]	The Holding	108
[2]	Due Process	108
[a]	Substantive	108
[b]	Procedural	110
[3]	Eighth Amendment	110
[4]	Dissenting Opinions	111

CHAPTER 6 CHARGING DECISIONS

§ 6.01	The Scope and Exercise of Prosecutorial Discretion	113
[A]	The Scope of Discretion	113
[B]	The Exercise of Prosecutorial Discretion	115
[1]	Factors Influencing Charging Decisions	115
[2]	Channeling the Exercise of Discretion	116
§ 6.02	Prosecutorial Discretion: The Policy Debate	117
[A]	Criticisms of Prosecutorial Discretion	117
[B]	Defenses of Prosecutorial Discretion	118
§ 6.03	Constitutional Limits on Prosecutorial Discretion	119
[A]	Selective Prosecution	119
[B]	Vindictive Prosecution	121
[1]	Overview	121
[2]	<i>Blackledge v. Perry</i>	122
[3]	Limitations on the Vindictiveness Presumption: <i>United States v. Goodwin</i>	122
§ 6.04	Felony Charging Procedures: Overview	124
§ 6.05	Preliminary Hearings	124
[A]	Preliminary Hearing Procedures	124
[B]	Functions of the Preliminary Hearing	126

§ 6.06	Grand Juries	127
[A]	Overview	127
[B]	The Screening Function	127
[1]	Constitutional Requirement	127
[2]	Procedures	127
[3]	Grand Jury Screening: The Policy Debate	130
[C]	The Investigatory Function	131
§ 6.07	Joinder and Severance: Offenses	133
[A]	Overview	133
[1]	Terminology	133
[2]	The Parties' Interests	134
[a]	The Prosecution	134
[b]	The Defense	135
[B]	Joinder Rules	135
[C]	Severance Rules	136
[D]	Multiplicity and Duplicity	137
§ 6.08	Joinder and Severance: Defendants	138
[A]	Overview	138
[B]	The Federal Rules	139
[1]	Joinder	139
[2]	Severance	140

CHAPTER 7 DISCOVERY

§ 7.01	Constitutional Discovery Rights of the Defendant: Overview	143
§ 7.02	Elements of the <i>Brady</i> Rule	144
[A]	Nature of the Evidence	144
[B]	Suppression of the Evidence by the State	145
[C]	Prejudice — The Materiality Standard	145
[1]	<i>Agurs</i>	146
[2]	<i>Bagley</i>	147
[3]	Implications of a Materiality Standard	148
§ 7.03	<i>Brady</i> and Plea Bargains	149
§ 7.04	The State's Duty to Preserve Evidence	150
§ 7.05	Statutory Discovery by the Defense: Overview	152
§ 7.06	What the Defense May Discover	153
[A]	Statements by Defendant and Co-defendants	153
[B]	Physical Evidence	154
[C]	Witness Information	154
[D]	The Defendant's Criminal Record	155
[E]	Scientific Tests and Examinations	155
[F]	" <i>Brady</i> Material"	155
§ 7.07	Discovery by the Defense — Policy Considerations	156
§ 7.08	Discovery by the Prosecution	157
[A]	Discovery by the Prosecution — Constitutional Issues	157

[1] Self-Incrimination	158
[2] Due Process	159
[3] Compulsory Process	159
[B] Rules Governing Discovery by the Prosecution	160
[1] Significance of Defense Discovery Request	160
[2] What the Prosecution Can Discover	161

CHAPTER 8 SPEEDY TRIAL

§ 8.01 Defendant's Right to a Speedy Disposition: Overview	163
§ 8.02 Constitutional Right to a Speedy Trial	165
[A] Overview	165
[B] When the Right Attaches	165
[C] Determining Speedy Trial Right Violations: <i>Barker v. Wingo</i> ...	166
[1] Overview	166
[2] The <i>Barker</i> Factors	167
[a] Length of the Delay	167
[b] Reason for the Delay	167
[c] Defendant's Assertion of the Right	168
[d] Prejudice	168
[3] Application of the <i>Barker</i> Test	168
[D] Remedy	169
§ 8.03 Statutory Speedy Trial Rights	170
[A] Time Limits	171
[B] Tolling Provisions	171
[C] Remedy	171
§ 8.04 Unconstitutional Preaccusation Delay	172
§ 8.05 Statutes of Limitation	173
[A] Overview	173
[B] Justifications	174

CHAPTER 9 PLEA BARGAINING AND GUILTY PLEAS

§ 9.01 Guilty Pleas: Overview	175
[A] Procedural Context	175
[B] Constitutional and Policy Context	176
§ 9.02 Validity of a Guilty Plea: Constitutional Principles	177
[A] Overview	177
[B] Voluntariness of the Plea	178
[C] Knowing (Intelligent) Nature of the Plea	181
[1] In General	181
[2] Nature of the Charges	181
[3] Penal Consequences of the Plea	182
[4] Nature of the Rights Being Waived	183

[5] Incorrect or Incomplete Legal Advice: How It Affects the Intelligence of the Plea	185
[D] Factual Basis of the Plea: <i>Alford</i> Pleas	186
§ 9.03 Obtaining a Valid Guilty Plea: Federal Procedures	187
[A] Ensuring Voluntariness	187
[B] Ensuring An Intelligent Plea	188
[C] Determining the Factual Basis of the Plea	189
§ 9.04 Effect of a Guilty Plea on Prior Constitutional Claims	189
[A] General Rule	189
[B] Exceptions to the General Rule	190
[C] Conditional Pleas	192
§ 9.05 Plea Bargaining: General Principles	192
[A] Overview	192
[B] Types of Plea Agreements	193
[C] Federal Plea Agreement Procedures	193
[D] Judicial Participation In Plea Negotiations	195
§ 9.06 Plea Bargaining: Policy Debate	197
[A] Is Plea Bargaining Inevitable?	197
[B] Is Plea Bargaining Good in Principle?	199
[1] In Support of Plea Bargaining	199
[2] In Opposition to Plea Bargaining	200
[a] Overview: Serving the Interests of the Powerful?	200
[b] Sentencing Differential	201
[c] Prosecutorial Overcharging	201
[d] Inadequate Representation	202
[e] Conviction of the Innocent	203
§ 9.07 Plea Bargaining: Broken Deals and Withdrawn Offers	204
[A] Broken Deals	204
[1] Consequences of Breach	204
[2] Definition of Breach	204
[B] Withdrawn Offers	206

CHAPTER 10

THE RIGHT TO TRIAL BY JURY

§ 10.01 Overview	207
§ 10.02 When the Right to Trial by Jury Applies	209
[A] What Crimes the Right Applies To	209
[1] Offenses with Defined Penalties	209
[a] The Rule	209
[b] Comparison to Right to Counsel	210
[2] Offenses without Defined Penalties: Contempt	211
[3] Aggregation of Multiple Offenses	212
[B] What Issues the Right Applies To: Juries and Sentencing	213
[1] The <i>Apprendi</i> Rule	213
[2] Prior Convictions	214

[3] Mandatory Minimum Sentences	215
[C] Special Issue: Jury Waivers and Bench Trials	216
§ 10.03 Jury Size	217
§ 10.04 Fair Cross-Section Requirement	219
§ 10.05 Voir Dire and Challenges for Cause	223
§ 10.06 Peremptory Challenges	225
[A] Overview	225
[B] The Road to <i>Batson</i>	227
[C] <i>Batson v. Kentucky</i>	229
[1] The <i>Batson</i> Decision	229
[2] The <i>Batson</i> Framework	230
[3] Extensions of <i>Batson</i>	232
[a] African-American Juror/White Defendant	232
[b] Race Based Use of Peremptories by the Defendant	232
[c] Peremptory Strikes Based on Gender	233
[d] Peremptory Strikes Based on Religion or Other Factors	233
[4] Evaluating <i>Batson</i>	234
[a] <i>Batson</i> Claims in Practice	234
[b] <i>Batson</i> Goes Too Far	235
[c] <i>Batson</i> Does Not Go Far Enough	236

CHAPTER 11 CONFRONTATION CLAUSE

§ 11.01 Overview	237
§ 11.02 Out-of-Court Statements Barred by the Confrontation Clause	239
[A] Background	239
[1] Hearsay Rules and Confrontation	239
[2] <i>Ohio v. Roberts</i>	240
[B] <i>Crawford v. Washington</i>	241
[1] The Decision	241
[2] The <i>Crawford</i> Exception: Unavailability and Prior Cross-Examination	243
[C] <i>Crawford</i> and the Future	243
[1] The Meaning of “Testimonial”	243
[2] The Confrontation Clause and “Non-testimonial” Hearsay	244
§ 11.03 The Confrontation Clause and the Manner of Testimony: Child Witnesses	245
[A] Overview	245
[B] <i>Coy v. Iowa</i>	246
[C] <i>Maryland v. Craig</i>	246
[D] <i>Craig</i> and <i>Crawford</i>	247

§ 11.04 Special Rule: <i>Bruton</i> and the Statements of Codefendants	248
[A] The Issue	248
[B] <i>Bruton v. United States</i>	249
[C] <i>Richardson v. Marsh</i>	249
[D] <i>Gray v. Maryland</i>	251

CHAPTER 12

THE PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION: ISSUES IN ADJUDICATION

§ 12.01 Fifth Amendment Self-Incrimination Clause: Overview	255
§ 12.02 The Origins of the Privilege Against Self-Incrimination	256
§ 12.03 Is the Privilege a Good Idea?: The Controversy	258
[A] In General	258
[B] The Modern Debate	260
[1] The “Cruel Trilemma” Thesis	260
[2] Compelled Self-Accusation as a Moral Wrong	261
[3] The Privilege as a Critical Component of the Adversary System	262
[4] Protection of the Innocent	263
§ 12.04 The Fifth Amendment Privilege: The Elements	265
[A] “No Person”	265
[B] “Shall Be <i>Compelled</i> ”	266
[C] “In Any Criminal Case”	267
[D] “To Be a Witness Against Himself”	268
[1] What Makes a Person a “Witness”	268
[a] “Testimonial or Communicative” Evidence: The Rule . . .	268
[b] Application of the Rule	269
[c] A Closer Look at the Rule: <i>Pennsylvania v. Muniz</i>	270
[2] Seriousness of the Threat of Incrimination	271
§ 12.05 Invoking and Overcoming the Privilege	273
[A] Invoking the Privilege	273
[B] Overcoming the Privilege: Grants of Immunity	273
§ 12.06 Documents and the Privilege Against Self-Incrimination	276
[A] The Content of Documents	276
[1] Overview	276
[2] Required-Records Doctrine	277
[B] The Act-of-Production Doctrine	278
[1] In General	278
[2] <i>United States v. Hubbell</i>	279
§ 12.07 Reference at Trial to the Defendant’s Silence	280
[A] <i>Griffin v. California</i>	281
[B] Scope of the <i>Griffin</i> Rule	282
[C] Prearrest Silence	283

CHAPTER 13 BURDEN OF PROOF AND VERDICT ISSUES

§ 13.01 Burden of Proof	285
[A] Meaning of “Beyond a Reasonable Doubt”	285
[B] What the Burden Applies To	287
§ 13.02 Unanimous and Nonunanimous Verdicts	288
[A] Overview	288
[B] Twelve-Member Juries: <i>Apodaca v. Oregon</i> and <i>Johnson v. Louisiana</i>	288
[1] Unanimity and the Right to a Trial by Jury	289
[2] Unanimity and Proof Beyond a Reasonable Doubt	289
[C] Six-Member Juries: <i>Burch v. Louisiana</i>	290
§ 13.03 Multi-Theory Verdicts: Elements vs. Means	291
§ 13.04 Inconsistent Verdicts	293
§ 13.05 Deadlocked Juries	294
§ 13.06 Jury Nullification	296
[A] The Issue	296
[B] The Debate	297
[C] The Law	298
[D] Race-Based Nullification	299

CHAPTER 14 DOUBLE JEOPARDY

§ 14.01 General Principles	301
[A] Constitutional Text	301
[1] In General	301
[2] “In Jeopardy”	301
[3] “Of Life or Limb”	302
[a] Generally	302
[b] Civil versus Criminal Proceedings and Penalties	302
[B] “Dual Sovereignty” Doctrine	305
[C] Guarantees of the Double Jeopardy Clause	307
[D] Values Underlying the Double Jeopardy Clause	308
§ 14.02 Reprosecution After a Mistrial	309
[A] General Principles	309
[B] Mistrials Over the Defendant’s Objection	310
[1] The “Manifest Necessity” Standard	310
[2] “Manifest Necessity”: The Case Law	310
[a] The Early Cases	310
[b] The Temporary “Radical Transformation”	311
[c] The Supreme Court Turns Direction Again	312
[3] Making Sense of the Case Law	315
[C] Mistrials With the Defendant’s Consent	315
[1] General Rule	315

[2] Exception: Intent to Provoke a Mistrial Motion	316
§ 14.03 Reprosecution After an Acquittal	318
[A] Rule	318
[1] In General	318
[2] Appealing an Acquittal	319
[B] Should the Rule Be Modified?	320
§ 14.04 Reprosecution After a Dismissal	322
[A] Nature of a “Dismissal”	322
[B] General Rules	323
[1] Dismissal on the Defendant’s Motion	323
[2] Dismissal Without the Defendant’s Consent	323
§ 14.05 Reprosecution After a Conviction	324
[A] General Rule	324
[B] When Reprosecution Is Barred	325
[1] Insufficiency of the Evidence	325
[a] The <i>Burks</i> Principle	325
[b] When <i>Burks</i> Does Not Apply	325
[2] Prosecutorial Misconduct	326
[C] Special Problem: Convictions With Implied Acquittals	327
[1] Verdict Acquittal	327
[2] Sentence “Acquittal”	327
§ 14.06 Government Appeals of Criminal Sentences	329
§ 14.07 Multiple Prosecutions of the “Same Offense”	330
[A] An Overview to the Problems Ahead	330
[B] “Same Offense”: The <i>Blockburger</i> Rule	332
[C] “Same Offense”: Beyond <i>Blockburger</i>	333
[1] <i>Harris v. Oklahoma</i> : A Minor Variation on the <i>Blockburger</i> Theme	333
[2] <i>Grady v. Corbin</i> : A Broad (but Temporary) Addition to <i>Blockburger</i>	334
[3] <i>United States v. Dixon</i> : Back to <i>Harris</i> ?	335
[D] Exceptions to the General Rule	337
§ 14.08 Excessive or Multiple Punishments for the “Same Offense” . . .	339
[A] Excessive Punishment	339
[1] In General	339
[2] Credit for Time Served	339
[B] Multiple Punishments	340
[1] In General	340
[2] Sentence Enhancement for Uncharged Criminal Conduct	341
§ 14.09 Collateral Estoppel	341
[A] Nature of the Doctrine	341
[B] Limits on Application of the Doctrine	343

CHAPTER 15 SENTENCING

§ 15.01 Overview	345
[A] The Subject of Sentencing	345
[B] The Purposes of Punishment	345
[1] The Role of the Purposes of Punishment	345
[2] Retribution	346
[3] Deterrence	347
[4] Incapacitation	348
[5] Rehabilitation	349
[6] Mixed Theories of Punishment	350
[C] Types of Sentences	350
[1] In General	350
[2] Indeterminate vs. Determinate Sentences	351
[3] Mandatory vs. Discretionary Sentences	352
§ 15.02 Constitutional Limits on Sentencing Procedures	353
[A] Overview	353
[B] <i>Williams v. New York</i>	354
[C] Trial Rights Held <i>Inapplicable</i> at Sentencing	355
[1] Burden of Proof Beyond a Reasonable Doubt	355
[2] Confrontation	355
[3] Double Jeopardy	356
[4] Jury	358
[D] Trial Rights Held <i>Applicable</i> at Sentencing	358
[1] Counsel	358
[2] Disclosure of Exculpatory Evidence	359
[3] Privilege Against Self-Incrimination	359
§ 15.03 The Federal Sentencing Guidelines	360
[A] The Sentencing Guidelines: A Brief History	360
[B] How the Guidelines Work	361
[C] Criticisms of the Sentencing Guidelines	363
[1] Real-Offense Sentencing	364
[2] Prosecutorial Control	364
[3] Sentence Severity	365
[4] Racial Disparity	365
§ 15.04 Constitutional Limits on Guidelines Systems: <i>Apprendi</i> and Its Progeny	366
[A] Overview	366
[B] <i>Apprendi v. New Jersey</i>	368
[C] <i>Blakely v. Washington</i>	370
[D] <i>United States v. Booker</i>	371
[1] Issue 1: Constitutionality of the Federal Sentencing Guidelines	371
[2] Issue 2: Remedy for the Constitutional Problem	372
[E] <i>Apprendi</i> and Mandatory Minimums	373

[F] The Prior-Conviction Exception	374
§ 15.05 Judicial Vindictiveness	375
[A] The <i>Pearce</i> Principle	375
[B] The Supreme Court Narrows the Vindictiveness Rules	376
[1] <i>Pearce</i> Becomes a Rebuttable Presumption	376
[2] When Does the Presumption Apply?	377
[3] How May the Presumption Be Rebutted?	378

CHAPTER 16 APPEALS

§ 16.01 In General	379
§ 16.02 Proof of Guilt	381
[A] Sufficiency of the Evidence	381
[B] Weight of the Evidence	382
§ 16.03 Plain Error	383
[A] Background to the Plain Error Exception	383
[B] Elements of the Plain Error Exception	384
§ 16.04 Harmless Error	386
[A] Overview	386
[B] Non-Constitutional Errors	388
[C] Constitutional Errors	389
[1] Direct Appeals	389
[a] “Structural Error” v. “Trial Error”	389
[b] Constitutional Trial Errors: Standard of Harmlessness	392
[2] Collateral Appeals (Habeas Corpus Proceedings)	392
[D] Criticisms of Harmless-Error Doctrine	393
§ 16.05 Retroactivity	395
[A] Explanation of the Issue	395
[B] Common Law of Retroactivity	396
[C] The <i>Linkletter</i> Doctrine	397
[D] Abandonment of <i>Linkletter</i>	398
[1] In General	398
[2] Current Retroactivity Law	398
[a] Cases Not Yet Final: Direct Review	398
[b] Cases Already Final: Collateral Review	399
[i] General Rule	399
[ii] Meaning of “New Rule”	401

Index	I-1
Table of Criminal Rules	FRC-1
Table of Evidence Rules	FRE-1
Table of Statutes	TS-1
Table of Cases	TC-1

