Criminal Procedure:

The Post-Investigative Process

CASES AND MATERIALS

Fourth Edition

2018-19 CUMULATIVE SUPPLEMENT

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*Professors Adelman and Abramson note with deep sorrow the death of the original co-author of this book, Professor Neil P. Cohen, on May 8, 2017. The upcoming Fifth Edition of this book, planned for publication in 2019, will be dedicated to the memory of our dear friend and esteemed colleague.

We are also honored and pleased that Professor Michael O'Hear of Marquette University Law School and Professor Wayne Logan of Florida State University College of Law, both accomplished scholars and authors, have joined our team for writing of the Fifth Edition and future Supplements.

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CHAPTER 4 THE FIRST HEARING: THE INITIAL APPEARANCE

B. PROCEDURES

Page 96: ***The following amendment to Federal Rule 5(d) became effective on December 1, 2014***.

Rule 5. Initial Appearance

* * *

(d) Procedure in a Felony Case.

(1) ***Advice***. If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * *

(D) any right to a preliminary hearing;

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

CHAPTER 7 THE GRAND JURY

B. SELECTION OF GRAND JURORS

Page 187: ***The following amendment to Federal Rule 6(e) went into effect on December 1, 2014.***

Rule 6. The Grand Jury

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

* * *

> (D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.
>
> * * *

D. THE FIFTH AMENDMENT: SELF-INCRIMINATION

[6] Act of Production Doctrine

Page 241: Add sentence before the final sentence in Note 1:

Although Justice O'Connor's concurrence in *Doe I* pronounced the Court's 1886 *Boyd* decision dead, the Supreme Court may have breathed some new life into *Boyd* in *Riley v. California*, 134 S. Ct. 2473 (2014), at least in the context of the Fourth Amendment prohibition against unreasonable search and seizure. *Riley* held unconstitutional a warrantless post-arrest search of cell phone data, and acknowledged *Boyd*'s concern for protecting "the privacies of life" from excessive governmental intrusion.

CHAPTER 9 MOTION PRACTICE IN CRIMINAL CASES

[F] PROCEDURE

Pages 318-319: ***The following amendment to Federal Rule 12(b) became effective on December 1, 2014.***

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions

(1) ***In General.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion**.**

(2) ***Motions That May Be Made at Any Time*****.** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial*****.** The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline*. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline*. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion. Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]

* * *

[H] ETHICAL FACETS OF MOTION PRACTICE

Page 333: Add, at end of last paragraph of Note 2:

See also *Hinton v. Alabama*, 134 S. Ct. 108 (2014) (counsel's failure to move for additional funds to replace inadequate expert for indigent client held to be deficient performance under first prong of *Strickland*; remanded for determination of prejudice under *Strickland* second prong).

CHAPTER 10 DISCOVERY, DISCLOSURE, AND PRESERVATION

[C] DISCOVERY AND DISCLOSURE: CONSTITUTIONAL ISSUES

[1] Discovery by the Defendant

Page 349: Add Note 3A at the top of the page after the carryover text of Note 3:

3A. *Failure to satisfy the materiality standard.* In *Turner v. United States*, 137 S.Ct. 1885 (2017), the prosecution's theory was that a large group had murdered the victim but no defendant rebutted the prosecution's group attack theory. After their convictions became final, defendants claimed that the prosecution had withheld evidence at trial that was material to their guilt. The evidence included the identity of a lone man seen running into the alley after the murder and stopping near the victim's body. The Supreme Court held that the withheld evidence was not material, citing *Agurs* by looking at the withheld evidence "in the context of the entire record." Because virtually every witness at trial agreed that a group killed the victim, it was not reasonably probable that the withheld evidence could have led to a different result at trial.

Page 357: Replace the paragraph after the indented quotation with the following:

131 S. Ct. at 1370, 1385. Most recently, in *Wearry v. Cain*, 136 S. Ct. 1002 (2016), the prosecutor's failure to disclose witness statements casting doubt on the credibility of the state's main witness violated Due Process, because those statements were sufficient to undermine confidence in the verdict.

If cases presenting blatant *Brady* violations continue to come before the Supreme Court, might the Court in the light of the sentiments and holdings of *Cain*, *Thompson*, and *Wearry*, be receptive in future cases to imposing stronger disclosure requirements on prosecutors, or stronger remedies for willful *Brady* violations?

CHAPTER 11 PLEAS AND PLEA BARGAINING

D. PLEA BARGAINING POLICY CONSIDERATIONS PRO AND CON; NECESSARY EVIL, NECESSARY GOOD, OR JUST PLAIN EVIL?

[8] Plea Bargaining Seen as Furthering Justice

Page 451: Add paragraph, before the final paragraph:

For an interesting refutation of plea bargaining criticisms, especially the notion that it coerces unacceptable numbers of innocent defendants to plead guilty, *see* Michael Young, *In Defense of Plea-Bargaining's Possible Morality*, 40 OHIO N. L. REV. 251 (2013). Based on data from the Innocence Project (see Ch. 18 discussion of Actual Innocence), the rate of "innocent conviction" is no worse for defendants who plead guilty than for those convicted after a jury trial, i.e., there is no "innocence problem" inherent in plea bargaining, compared with jury trials.

* * *

E. PLEA BARGAINING: CONSTITUTIONAL ISSUES

[3] Plea Bargaining and Competent Counsel

Page 459: Add the following paragraph at the end of Note 1:

As a native of South Korea, the defendant had lived in the United States for thirty-five years as a lawful permanent resident. After being indicted for drug possession, his attorney repeatedly assured him that he would not face deportation if he pled guilty. However, his guilty plea made him subject to mandatory deportation under the federal Immigration and Nationality Act. In his motion to vacate the conviction, the defendant claimed that his attorney had provided ineffective assistance. Both attorney and client testified at a hearing on the motion that deportation was the determinative issue in defendant's decision to plead guilty. The defendant stated that he would have rejected any plea leading to deportation in favor of going to trial. Following *Lockhart*, the Court held that the defendant had established a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. The bad advice violated the defendant's Sixth Amendment right to effective assistance. *Lee v. United States,* 137 S.Ct. 1958 (2017).

* * *

H. BREACH OF PLEA AGREEMENT

[1] Remedies for Breach of Plea Agreement

[b] Breach by Government

[ii] Specific Performance

Page 512: At the end of the second paragraph, add the following:

However, in order to obtain specific performance through federal habeas corpus relief, a state prisoner must prove that the state court error was so serious that the state ruling went beyond fairminded disagreement. See *Kernan v. Cuero*, 138 S. Ct. 4 (2017) in Chapter 18.C., *infra*.

* * *

J. FINALITY

[3] Post-Conviction Review

Page 521: At the end of the paragraph labeled "Jurisdiction exception.", add:

In addition, *Class v. United States*, 138 S.Ct. 798 (2018), relied upon *Broce* in holding 6-3 that a guilty plea does not *per se* prevent a defendant from challenging the constitutionality of the statute of conviction on direct appeal.

CHAPTER 13 TIME LIMITATIONS

B. PRE-CHARGE DELAYS

[2] Statutes of Limitation

[c] Procedural Issues

Page 550: Add the following at the end of the paragraph:

A defendant cannot raise the statute of limitations as a defense for the first time on appeal. *Mussachio v. United States*, 136 S. Ct. 709 (2016).

* * *

D. POST-CONVICTION DELAYS

[1] Delay Between Conviction and Beginning of Service of Sentence

Page 588: Replace the second paragraph with the following:

The right to a speedy trial attaches until the charges are resolved, or until the defendant is convicted after a guilty plea or a trial. At that time, the presumption of innocence no longer shields the defendant from post-conviction sentencing delays, and there is no Sixth Amendment right to speedy sentencing. *Betterman v. Montana*, 136 S. Ct. 1609 (2016). However, a defendant does retain a diminished due process liberty interest in a fair sentencing process.

CHAPTER 15 TRIAL

A. PUBLIC TRIAL

[5] Remedy for Violation of Right

Page 634: Add the following before the first subsection:

The remedy for violation of the right to a public trial depends on when the objection is raised. If an objection is made at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." If instead, the defendant raises the issue later in an ineffective assistance claim, the defendant must show either a reasonable probability of a different outcome or that the violation was so serious as to render the trial fundamentally unfair. In *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), the defendant was unable to prove either.

B. JUDGE: DISQUALIFICATION/RECUSAL

[1] Right to Impartial Judge

Page 642: Add after first paragraph in subsection:

Under the Due Process Clause, recusal is based on an objective standard. *Williams v. Pennsylvania*, 136 S. Ct. 1188 (2016). Recusal is required "when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerated.'" *Id*. (requiring recusal when a Justice of the Pennsylvania Supreme Court, considering a post-conviction petition in a capital case, had been the district attorney who personally approved seeking the death penalty at the trial level). In *Rippo v. Baker*, 137 S.Ct. 905 (2017), a convicted state defendant sought state post-conviction relief, claiming that the state trial judge could not impartially try his case because the judge himself was a suspect in a federal criminal investigation. The Court held that the state court failed to use the standard required for years by case precedent: "considering all circumstances, whether the risk of bias was too high to be constitutionally tolerable."

* * *

H. DEFENDANT'S ACCESS TO EVIDENCE AND COMPULSORY PROCESS

[2] Subpoena Process

Page 677: Add to Note 8, line 4 at the end of the parenthetical:

; *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017) (state of Alabama failed to provide an indigent defendant with access to a mental health expert to assist in the evaluation, preparation, and presentation of a defense).

* * *

J. JURY TRIAL

[2] Issues Tried by Jury

[b] Capital Cases

Page 708: Add at end of subsection:

This also means the jury, unless waived, must find the aggravating circumstances established by law as a prerequisite to the imposition of the death penalty. *Hurst v. Florida*, 136 S. Ct. 616 (2016) (rejecting Florida law that permitted an advisory jury but did not require that this jury make factual findings about aggravating circumstances that are required for the death penalty).

[6] Selection of Jurors

[g] Peremptory Challenges

[vi] *Batson* Step Three: Purposeful Discrimination

Page 783: Add at end of first paragraph of Note 2:

But see Foster v. Chatman, 136 S. Ct. 1737 (2016) (reversing conviction because prosecutor in capital case used peremptory challenges to exclude all four black jurors; Court gave detailed analysis of impermissible reasons for exclusion of each juror and rejected race neutral reasons).

[13] Verdict

[f] Impeachment of Jury Verdict

[ii] The Problem of Proof

Page 843: Replace second paragraph of Note 2 with the following:

2. With regard to claims of racial or ethnic bias during jury deliberations, *see, Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017). There, the Supreme Court held that "where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the [general] no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869.

K. MOTIONS AFTER GUILTY VERDICT

[3] Motion in Arrest of Judgment

Page 849: *The following amendment to Federal Rule 34(a) went into effect on December 1, 2014*.

Rule 34. Arresting Judgment

(a) *In General*. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense.

CHAPTER 16 DOUBLE JEOPARDY

B. "SAME OFFENSE"

[3] Collateral Estoppel

Page 862: Add at the end of Note 7:

See also, Bravo-Fernandez v. United States, 137 S.Ct. 352 (2016) (the issue preclusion component of the double jeopardy clause does not bar retrial after a jury has returned "irreconcilably inconsistent verdicts of conviction and acquittal" and the convictions are "later vacated for legal error unrelated to the inconsistency." Significantly, the Court noted that the inconsistent verdicts in this particular case (conviction on federal bribery charges, but acquittal on related conspiracy and federal Travel Act charges) "shroud in mystery what the jury necessarily decided." *Id.* at 366.

Page 862: After Note 8, add Note 9:

9. *Does Justice Kennedy's departure endanger* Ashe*?* The Supreme Court confronted a complicated and unusual double jeopardy problem in *Currier v. Virginia*, 2018 WL 3073763. Garrison reported that a safe containing guns and money had been stolen from his home. Police later found the abandoned safe with the guns still inside, but the money gone. Further investigation uncovered evidence that pointed to Currier as the likely culprit. The state charged him with breaking and entering and theft. Additionally, since Currier had a prior felony conviction, the state also charged him with being a felon in possession of a firearm, premised on his temporary possession of the guns in the stolen safe. Currier requested that the felon in possession charge be severed from the other two charges for purposes of trial. (Can you see why?) His request was granted. The breaking and entering and theft charges were tried first, ending with Currier's acquittal. He then asserted that the Double Jeopardy Clause barred his trial on the remaining charge. Invoking *Ashe*, he argued that the first jury had necessarily ruled in his favor on the issue of whether he had been the one who took the safe; if he had not taken the safe, he claimed, there was no basis for another jury to decide that he had possessed any firearms. However, the judge overruled his objection, and the second jury convicted him.

In a 5-4 decision, the Supreme Court affirmed, ruling that Currier's consent to a severance precluded him from objecting to the second trial. Justice Anthony Kennedy was part of the narrow majority, but he declined to join a portion of the lead opinion that expressed sharp criticism of the *Ashe* collateral estoppel doctrine, reviving textualist and originalist arguments against it. Although the four justices who joined the lead opinion did not go so far as to call for overruling *Ashe*, they did endorse a "guarded" approach to its application. If Justice Kennedy's replacement shares their views, then we might expect narrowing interpretations of *Ashe* to follow, and perhaps even a full reconsideration of whether *Ashe* should remain good law.

* * *

E. REPROSECUTION FOLLOWING DISMISSAL OR ACQUITTAL

[2] Acquittal by Judge

Page 877: Add after the second paragraph in the subsection:

For example, in *Martinez v. Illinois*, 134 S. Ct. 2070 (2014), defendant's trial was set to begin. When the court swore in the jury, jeopardy had attached. The court then invited the State to present its first witness, but the State declined to present any evidence because its two witnesses had not appeared. Martinez then moved for a directed verdict of acquittal, and the trial court granted it. After the Illinois appellate courts allowed the State to try the defendant, the United States Supreme Court unanimously reversed. The Court held that an acquittal is a termination of the proceedings in favor of the defendant, on the merits. When an acquittal occurs after jeopardy has attached, it forever bars the retrial of the defendant for the same offense, as well as a prosecutorial appeal of the acquittal.

* * *

H. REPROSECUTION BY A SEPARATE SOVEREIGN

[1] General Rule: Prosecution Permitted by Different Sovereigns

Page 889: Add at end of subsection before Notes:

While analysis of the separate sovereign doctrine hinges on what entities are considered separate and which are not, in *Commonwealth of Puerto Rico v. Sanchez Vallee,* 136 S. Ct. 1863 (2016), the Supreme Court definitively provided a definition to use in assessing what makes a sovereign separate from another. *Sanchez* involved a gun sale that was prosecuted by both Puerto Rican and federal law enforcement agencies. The defendants pled guilty to the federal charges and argued that the separate sovereign doctrine barred prosecution by Puerto Rico for exactly the same gun sale.

The Supreme Court in *Sanchez* directly faced the issue of the definition of "sovereign" for Double Jeopardy purposes. Rejecting "common indicia of sovereignty," such as the extent of control that one prosecuting authority wields over another or the extent to which an entity may enact its own criminal law, the Court adopted an historical test that focused on whether the two entities "draw their authority to punish the offender from distinct sources of power." "If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions. Conversely, if those entitles draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not." *Id.*

Applying this historical test, the Court held that Puerto Rico and the federal government are not separate sovereigns. Even though Puerto Rico enjoys a new kind of political entity and has a degree of self-rule, it is nevertheless "closely associated" with the United States and derived its authority to prosecute crime through a delegation by Congress.

CHAPTER 17 SENTENCING

A. INTRODUCTION

[2] General Features

[g] Mandatory Sentence

Page 901: Add paragraph at end of subsection:

Consideration of mandatory minimum sentence when sentencing for other related charges. In *Dean v. United States,* 137 S.Ct. 1170 (2017), the Supreme Court unanimously ruled that a sentencing judge may properly take account of the effect of a mandatory minimum sentence (here, a 30-year mandatory minimum sentence for a second conviction of using a firearm in furtherance of a crime of violence, which must be imposed *in addition to* any sentence to be served for the predicate crime) in determining what is a fair and appropriate sentence for the predicate crime (here, armed robbery of drug dealers). The Court applied what it termed the "parsimony principle," drawn from both federal statutory and case law (*see, e.g., Kimbrough v. United States,* 552 U.S. 85 (2007), discussed later in this chapter in connection with the U.S. Sentencing Guidelines), an overarching requirement that any sentence should be "sufficient, but not greater than necessary" to accomplish the goals of sentencing. The Court determined that the sentencing judge had properly applied the parsimony principle under the circumstances presented here, to the total *combined* effect of *both* Dean's mandatory sentence and his non-mandatory sentence. In effect, the Court upheld the discretion of the sentencing judge to adjust the sentence for Dean's predicate crime significantly downward in order to compensate for the severity of his mandatory minimum 30-year add-on sentence, in order to avoid a longer-than-necessary combined sentence for both crimes.

* * *

D. SENTENCING OPTIONS

[7] Forfeiture

Page 917: Add paragraph after the final full paragraph:

No "joint and several" forfeiture liability between co-conspirators. In *Honeycutt v. United States*, 137 S.Ct. 1626 (2017), two brothers were convicted of selling a chemical used to manufacture methamphetamine. One brother (Tony) owned the store that sold the chemical, and a forfeiture order against him based on the store's profits from the illegal sales was not contested. The other brother (Terry), however, had no ownership interest in the store and was merely an employee responsible for managing sales and inventory. The Supreme Court unanimously overturned the forfeiture order against Terry, holding that the general federal forfeiture statute, 21 U.S.C. § 853(a)(1), is limited to property the defendant himself actually acquired as the result of the crime. Therefore, Terry could not be held liable for forfeiture of a portion of the store's profits. The Court rejected the application of the general conspiracy rule that all co-conspirators are equally liable, because the applicable forfeiture statute did not provide for joint and several liability.

Page 919: Add after the carryover paragraph:

Statutory pretrial seizures of property ensure that a criminal defendant's assets are available to be forfeited if he or she is convicted. Such seizures are constitutional, as long as there is probable cause to believe both that the defendant has committed an offense that can lead to forfeiture and that the assets result from the allegedly criminal conduct. *United States v. Monsanto*, 491 U.S. 600 (1989). A grand jury's determination of probable cause cannot be reviewed by a judge. *Kaley v. United States*, 134 S. Ct. 1090 (2014).

[8] Restitution

Page 919: Add paragraph before the final paragraph:

Restitution as a separate, and separately appealable, order. In *Dolan v. United States*, 560 U.S. 605 (2010), and again in *Manrique v. United States*, 137 S.Ct. 1266 (2017), the Supreme Court held that an order of restitution, if entered (as is often the case) at a later time than the underlying judgment of conviction, is a separate order from the judgment of conviction. Therefore, *Manrique* held that a notice of appeal of the conviction does not "spring forward" and suffice to appeal the later restitution order. Because there are two separately appealable judgments under such circumstances, a defendant or prosecutor who wishes to appeal the later restitution order must file a separate notice of appeal, or risk having the forfeiture appeal dismissed. See Chapter 18, more generally, regarding appellate procedure and notice of appeal.

* * *

E. PROCEDURES

[6] Appellate review

[b] Review in Guideline Systems

Page 917: Add paragraph at end of last paragraph:

In light of *Booker*'s treatment of the Guidelines as advisory, the Supreme Court held in *Beckles v. United States*, 137 S.Ct. 886 (2017), that the Federal Sentencing Guidelines are not subject to a Due Process void-for-vagueness challenge. Per Justice Thomas, the Court reasoned that the Guidelines now merely provide a framework for guiding sentencing decisions, but do not actually "constrain" the exercise of sentencing discretion. Under this analysis, sentencing schemes that provide no guidance or constraints *at all* on sentencing discretion, beyond simply setting statutory maximum penalties for offenses (as was the case under federal pre-Guidelines practice and is still the case in non-guideline states), are not subject to vagueness challenges. Justice Sotomayor, concurring only in the result, vigorously disagreed with this analysis; in her view, the Guidelines drive the result in virtually each and every federal sentencing decision and its provisions should be subject to void-for-vagueness scrutiny in the same way as penal statutes.

Page 935: At end of first full paragraph, add:

See also *Chavez-Meza v. United States*, 138 S.Ct. 1959 (2018) (judge's explanation for sentencing decision was "adequate," because the record as a whole showed that the judge had a "reasoned basis" for reducing the defendant's sentence to the middle instead of to the bottom of the revised range).

Page 935: At the beginning of the second full paragraph, change the first line as follows:

This rather remarkable line of cases, from *Booker* to *Chavez-Meza* --- treating the

* * *

G. DEATH PENALTY

[3] Persons Who May Not Be Executed: Juveniles, The Mentally Retarded, The Insane

[a] Under Eighteen Years Old

Page 961: Add sentence at end of final paragraph of Note:

In *Montgomery v. Louisiana*, 136 S .Ct. 718 (2016), the Supreme Court, applying principles of retroactivity from *Teague v. Lane*, 490 U.S. 1031 (1989), and related cases (discussed in Chapter 18), held *Miller*'s rule prohibiting mandatory life-without-parole sentences for juvenile offenders to be fully retroactive.

[b] Insane and Intellectually Disabled

Page 961: Add after the first paragraph in the subsection:

While *Atkins* prohibited execution of mentally disabled individuals who cannot comprehend fully the consequences of their actions, the Court did not set a national standard on how to define "mentally retarded" and how states should apply *Atkins*. Following that decision, Florida was one of ten states adopting a standard based on an IQ score to determine mental competency to be executed. In *Hall v. Florida*, 134 S. Ct. 1986 (2014), defendant Hall had scored below the cutoff of 70 before the *Atkins* decision, but after *Atkins* he scored above 70 multiple times. The Court held that a court cannot use a fixed IQ score as the measure of incapacity. The defendant must be allowed to offer clinical evidence of intellectual deficit, including the inability to learn basic skills and adapt how to react to changing circumstances.

In *Moore v. Texas*, 137 S.Ct. 1039 (2017), the Court replaced the term "mentally retarded" with the most recent (and less pejorative) medical diagnostic term "intellectually disabled." The Court cautioned, as it had in *Hall*, that the decision regarding intellectual disability must at least be informed by current diagnostic standards in the medical community. In this case, the Court vacated a state court denial of habeas corpus on the ground that the test for intellectual disability used by the state court was based on "nonclinical factors" that were "untied to any acknowledged [scientific] sources." Accordingly, the Court's 5-3 majority found that the factors relied upon by the state court "creat[e] an unacceptable risk that persons with intellectual disability will be executed," and remanded the case for further proceedings.

[4] Aggravating Circumstances

Page 963: Add sentence at end of first full paragraph:

In *Lynch v. Arizona,* 136 S. Ct. 1818 (2016), the Court, applying *Simmons*' Due Process analysis, held that defense counsel had been wrongly precluded from arguing to a capital jury that life without parole was the only alternative to the death penalty allowed under Arizona law.

Page 963: Add sentence at end of next to last paragraph:

The Supreme Court reaffirmed this limitation in *Bosse v. Oklahoma*, 137 S.Ct. 1 (2016) (*Payne* did not set out to overrule prior case law prohibiting victim impact testimony from characterizing the crime, the defendant, or the appropriate sentence; the sentencing judge erroneously allowed murder victim's surviving family members to recommend a sentence of death, contrary to *Payne*).

[5] Mitigating Circumstances

Page 964: Add sentence at end of third paragraph:

The Eighth Amendment does not require a capital sentencing court to instruct the jury during the sentencing phase that mitigating circumstances need not be proved by the defendant beyond a reasonable doubt. *Kansas v. Carr*, 136 U.S. 633 (2016).

[7] Roles of Judge and Jury

Page 965: Add paragraph at end of first paragraph of subsection:

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court reiterated its holding in *Ring*, based on *Apprendi*, that the Sixth Amendment requires that a jury, not a judge, find each fact necessary to impose a sentence of death. A mere recommendation of the jury that the defendant be sentenced to death, such as had been permitted under Florida law, is not enough. Expressly overruling its own decision in *Spaziano v. Florida*, 468 U.S. 447 (1984), the *Hurst* Court determined that Florida's capital sentencing scheme violates the Sixth Amendment. Query: Wasn't the "handwriting on the wall" from the 2002 *Ring* decision? Why did the Florida legislature not revise its death penalty sentencing scheme subsequent to *Ring*, instead requiring further litigation years later that led to the clearly foreseeable result in *Hurst*?

* * *

H. ETHICAL ISSUES IN SENTENCING

[1] Defense Counsel

Page 970: Add at the end of the first full paragraph:

For example, arguing against the death penalty, defense counsel introduced evidence showing that his client was liable to be a future danger because of his race. Counsel's defective performance prejudiced the defendant and constituted ineffective assistance of counsel. *Buck v. Davis*, 137 S.Ct. 759 (2017).

CHAPTER 18 POST-CONVICTION REMEDIES

B. DIRECT APPEAL

[1] Limits on Appellate Review

[b] Failure to Raise Issue at Trial and Plain Error

Page 982: Add new note after Note 6:

7. *Plain error applied to erroneous sentence calculation under U.S. Sentencing Guidelines.* In *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the defendant pleaded guilty to being unlawfully present in the United States after having been deported following an aggravated felony conviction. The sentencing court, unbeknownst to itself or to the prosecution or the defense, miscalculated the applicable sentencing range under the United States Sentencing Guidelines, and sentenced the defendant to 77 months imprisonment under a higher range than the correctly applicable one. The defendant first noticed the error during appeal to the Fifth Circuit, which refused to consider this newly raised issue. The Supreme Court applied *Olano*'s four-part analysis and determined that the defendant had not relinquished or abandoned the "unnoticed error," and remanded for resentencing, even though the defendant's 77 month sentence fell within *both* the original incorrectly applied range and the correct range.

Two years later, the Court applied *Molina-Martinez* in *Rosales- Mireles v. United States*, 138 S.Ct. 1897 (2018) by holding that a miscalculation of the correct guideline range at the time of sentencing calls for a court of appeals under Fed.Rule Crim. P. 52(b) to vacate the defendant's sentence under the plain error doctrine.

[c] Harmless Error and Automatic Reversal

Page 984: After the third paragraph, labeled "Automatic reversal." add a new paragraph:

In *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), the Court in a 6-3 decision took the unusual step of ordering a new trial based on a structural error. During trial, defense counsel admitted to the jury that the defendant had committed the murders for which he was charged, based on the strategy that the admission was the best way to avoid the death penalty. That admission violated both the defendant's express instructions not to admit to the crimes, and the defendant's Sixth Amendment right to choose the objective of his defense. The latter violation was a structural error.

Page 985: Add a new paragraph before the first full paragraph:

In two 2015 decisions, the Supreme Court held that counsel's brief absence from trial and pre-trial proceedings does not necessarily require automatic reversal. In *Davis v. Ayala*, 135 S. Ct. 2187 (2015), the Court held that any Sixth Amendment right-to-counsel violation resulting from the prosecution's *ex parte* proffer (i.e., without defense counsel present) of race-neutral reasons for its peremptory challenges striking all seven Hispanic and African-American prospective jurors during *voir dire* was harmless error, not requiring automatic reversal.

In *Woods v. Donald*, 135 S. Ct. 1372 (2015), the Court, *per curiam*, held that on habeas corpus

review subject to the provisions of the Anti-Terrorism and Effective Death Penalty Act (discussed later in this chapter), the defendant's claim of ineffective assistance of counsel, stemming from counsel's brief absence from the courtroom during a witness's testimony about his client's co-defendants, is not a structural error requiring automatic reversal but instead is subject to harmless error review. Do you agree that the underlying claim in *Ayala*, that a right-to-counsel error during *voir dire* resulting in a *Batson* violation, should be subject to harmless error analysis? *See Arizona v. Fulminante*, 499 U.S. 299 (1991) (*Batson* errors require automatic reversal).

[3] Types of Appeals by Criminal Defendant

[a] Appeals "As of Right"

[vi] Right to Counsel and Ethical Issues

Page 995: Add a new paragraph after third paragraph of Note 2:

As elaborated in *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015), *Strickland*-based claims of deficient representation are evaluated according to the law prevailing "as of the time of counsel's conduct," *Strickland* at 690, not in the light of later changes in the law. Therefore, the Court in held in *Kulbicki* that counsel in a 1995 murder trial was not deficient, under the first prong of *Strickland*, in failing to challenge the scientific validity of a method of bullet analysis which was generally accepted and admissible at the time of trial, but which the Maryland courts 11 years later, in 2006, invalidated and held inadmissible. The Court in *Kulbicki* re-emphasized that the Sixth Amendment right to counsel requires "reasonable competence," but not "perfect advocacy," 136 S. Ct. at 5, citing *Yarborough v. Gentry*, 540 U.S. 1 (2003).

* * *

C. COLLATERAL REMEDIES

[2] Habeas Corpus

[d] In Violation of Federal Law

[ii] Actual Innocence: *Herrera*

Page 1011: Add new paragraph after the last full paragraph:

Is there a constitutional right to post-conviction DNA testing or to law enforcement DNA data bases in furtherance of a claim of innocence? In Jason Kreag, *Letting Innocence Suffer: The Need For Access To The Law Enforcement Database*, 36 CARDOZO L. REV. 805 (2015), the author argues that convicted defendants retain a due process liberty interest to access evidence that can establish their innocence. Just as prosecutors and police disagree about convicted defendants' requests for DNA testing, they differ about requests for access federal and state DNA databases in order to possibly match crime scene DNA evidence to an unknown "real culprit" via search of law enforcement data bases (contrasting case histories discussed by author). Should courts recognize such a right?

[f] Related Doctrines Dealing with Failure to Exhaust State Remedies

[iii] Procedural Default: Fundamental Miscarriage of Justice

Page 1019: The following replaces the last six plus lines of the paragraph of the subsection:

The factual innocence exception applies not only to a defendant who is factually innocent of the substantive charge but also to a defendant sentenced to death, claiming that an error in capital sentencing resulted in a death sentence when the defendant was actually innocent of the death penalty, *i.e.*, no reasonable juror would find him eligible for the death penalty (though the conviction was upheld). *Sawyer v. Whitley*, 505 U.S. 333 (1992). If the defendant fails to make this showing, the exception does not apply. *Jenkins v. Hutton*, 137 S.Ct. 1769 (2017).

[iv] Independent and Adequate State Grounds

p. 1020: Add paragraph at end of subsection:

Most recent independent and adequate state ground decisions. See, *Johnson v. Lee*, 136 S. Ct. 1802 (2016)(California rule consistent with rules in other states, barring *state* collateral review of "procedurally defaulted" claim presented for first time on state habeas petition which could have been raised on direct appeal, held independent and adequate ground to bar *federal* habeas review of same claim); *Kansas v. Carr*, 136 S. Ct. 633 (2016) (state supreme court determination based on the Eighth Amendment, that capital defendant was entitled to jury instruction that he need not prove mitigating circumstances beyond a reasonable doubt, held *not* to rest on independent state grounds, and therefore review (and eventual reversal) by U.S. Supreme Court was not precluded).

[g] Effect of Previous Proceedings and Adjudications

[ii] Prior Adjudications of the Same Issue in Other Cases

Page 1025: In the first full paragraph, before the last sentence, add:

A habeas court must "look through" the unexplained state denial to determine why habeas relief was denied. *Wilson v. Sellers*, 138 S.Ct. 1188 (2018).

Page 1025: Change period at end of Note 1 to semicolon, and add:

Kernan v. Hinajosa, 136 S. Ct. 1603, 1606 (2016) (reversing Ninth Circuit for failure to review inmate's *ex post facto* based habeas petition, challenging new state law that denied good-time sentence credits to gang members, through "AEDPA's deferential lens."); *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1729 (2017) (reversing Fourth Circuit for failure to afford adequate deference to state court ruling that Virginia's statutory scheme of "geriatric release" satisfies the requirement of *Graham v. Florida* (discussed in Chapter 17) that juvenile offenders may not be sentenced to life imprisonment without hope of parole or some form of release; state court ruling held "not objectively unreasonable" in light of current Supreme Court case law).

Page 1026: Add sentence after citation to *Burt v. Titlow*:

See also *Woods v. Etherton*, 136 S. Ct. 1149 (2016) (claim of ineffective assistance of both trial and appellate counsel, based on their alleged failure to raise hearsay objections to testimony regarding anonymous tip that led to arrest and conviction for possession of cocaine with intent to deliver, rejected under the *Harrington/Burt* standard of "doubly deferential" review; reaffirming that habeas relief is to be denied unless "no fair minded jurist could disagree" that counsel had been ineffective.)

In two more recent applications of *Richter*, the Court denied habeas relief because the error was not sufficiently serious. *Kernan v. Cuero*, 138 S. Ct. 4 (2017), held that, when a state court's failure to order specific performance of a plea agreement does not violate federal law, habeas corpus relief is unavailable. *Dunn v. Madison*, 138 S.Ct. 9 (2017) similarly held that state court determinations about a prisoner's competency to be executed were not "so lacking in justification" to be an error beyond any possibility for fair minded disagreement.

Page 1026: Substitute the following for the last paragraph:

Overturned if unreasonable. A state court's decision applying federal law must be *both* erroneous and unreasonable. "Unreasonable application" of established federal law means that a state court either identified the correct legal rule but unreasonably applied it to the facts of the case, or unreasonably extended the legal principle to a new context that should not apply. Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* Supreme Court precedent; it does not require state courts to *extend* that precedent or enable federal courts to treat the failure to do so as error. *White v. Woodall*, 134 S. Ct. 1697 (2014) (trial court refused to instruct the jury not to draw any adverse inference from his decision not to testify during the penalty phase).

Page 1026: Add new paragraph at end of Note 2:

In an extremely rare result on post-AEDPA habeas review, a 5-4 majority of the Supreme Court in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), held that a trial judge's rejection, without hearing, of a murder defendant's claim that he was "intellectually disabled" and therefore could not be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002) (discussed in Ch. 17), was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under AEDPA. The majority found that the trial judge erred in denying the defense the opportunity to establish his claimed disability under *Atkins*. This decision stands in dramatic contrast to numerous post-AEDPA habeas decisions finding that the state court determinations at issue were *not* the result of either unreasonable determinations of fact or unreasonable applications of clearly established Supreme Court case law.

[iii] Retroactivity: *Teague*

p. 1028: At end of first full paragraph, add the following:

In contrast, however, in *Montgomery v.* Louisiana, 136 S. Ct. 718 (2016), the Supreme Court read *Teague* as requiring courts to give retroactive effect to new *substantive rules* of constitutional law" — a proposition that had not previously been clearly settled:

> The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. . . . Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose.

136 S. Ct. at 729. The Court in *Montgomery* went on to hold that its decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (discussed in Chapter 17), forbidding the mandatory imposition of life-without-parole sentences on juvenile homicide offenders, announced a substantive rule of constitutional law which must be given retroactive effect.

Similarly, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court determined (over a vigorous dissent from Justice Thomas) that its decision in *Johnson v. United States*, 135 S. Ct. 2251 (2015) (definition of prior "violent felony" in the residual clause of the Armed Career Criminal Act of 1984 held unconstitutionally vague in violation of due process), announced a substantive rule that is to be applied retroactively on collateral review. Query: in your view, do the *Montgomery* and *Welch* decisions flow directly and ineluctably from *Teague*, or do they signify an expansion of *Teague*'s general rule, subject only to "extremely narrow" exceptions, of non-retroactivity?

[h] Procedures

[i] Statute of Limitations

Page 1031: Change period at end of Note 2 to a semicolon, and add:

; and *Christeson v. Roper*, 135 S. Ct. 891 (2015) (*per curiam*, but with two Justices dissenting) (statute of limitations for filing federal habeas was equitably tolled when the defendant's trial counsel missed a deadline for filing a habeas petition and the trial court later denied a motion to appoint substitute counsel to proceed with the habeas claim; trial counsel abandoned his client, had a conflict of interest, and could not have been expected to argue own incompetence).

[ix] Discovery

Page 1034: At the end of the carryover paragraph, add:

For example, in *Ayestas v. Davis*, 138 S.Ct. 1080 (2018), the Court unanimously held that the denial of government funds to assist the petitioner in developing claims of ineffective assistance of trial and initial habeas counsel may be erroneous when the funding has a credible chance of enabling the petitioner to overcome "procedural default."

[xi] Appeal

Page 1034: At the end of the first paragraph, add the following:

For example, in *Tharpe v. Sellers*, 138 S.Ct. 545 (2018), the Court held that the appellate court had wrongly denied a certificate of appealability. "Jurists of reason" could debate whether the murder defendant had shown that the state court's factual determination that the particular juror's presence on the jury did not prejudice his trial was wrong.