Criminal Procedure: The Post-Investigative Process

CASES AND MATERIALS
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CHAPTER 10 DISCOVERY, DISCLOSURE, AND PRESERVATION

B. DISCOVERY AND DISCLOSURE: IN GENERAL

[4] Overview of Discovery and Disclosure Law

Page 327: At the end of the paragraph, add the following:

Unless Congress takes action to the contrary by December 1, 2019, the following amendment to the Federal Rules of Criminal Procedure will take effect.

> **Rule 16.1. Pretrial Discovery Conference; Request for Court Action**
>
> **(a) Discovery Conference.** No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.
>
> **(b) Request for Court Action.** After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

According to the Advisory Committee Notes, the need for an early meeting and agreement is especially important in criminal "cases involving electronically stored information or other voluminous or complex discovery." Even if the parties agree, the trial court does not have to accept their agreement.

The rule does not: (1) modify existing statutory provisions, or (2) affect current local rules or standing trial court orders for discovery timetables and procedures. The Committee does suggest consulting ESI protocols such as "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" (2012).

While the proposed rule requires no meeting in cases where the defendant is *pro se*, a trial court retains discretion to manage discovery in cases involving *pro se* defendants.

CHAPTER 11 PLEAS AND PLEA BARGAINING

E. PLEA BARGAINING: CONSTITUTIONAL ISSUES

[3] Plea Bargaining and Competent Counsel

Pages 421-422, Note 5: Replace the second sentence with the following:

If counsel fails to follow the defendant's instructions with respect to an appeal by failing to file a notice of appeal, then counsel performs in a professionally unreasonable manner (satisfying the deficient performance requirement of *Strickland*), and prejudice (the second *Strickland* requirement) is *presumed*. *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (*Strickland* presumption of prejudice "applies even when the defendant has signed an appeal waiver"); *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.").

CHAPTER 13 JURY TRIAL

F. SELECTION OF JURORS

[7] Peremptory Challenges

[f] *Batson* Step Three: Purposeful Discrimination

Page 582: Before the Notes, add the following:

In *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), the Court reversed a conviction in the defendant's sixth murder trial. Though breaking "no new legal ground," the Court held that the trial court committed clear error. The prosecutor had used peremptory challenges as a pretext for barring jurors because of their race. Three earlier trials had ended in convictions when there were no black jurors on the juries. Those convictions were reversed for *Batson* violations by the state Supreme Court. The other two trials ended in mistrials because the jury was unable to reach a verdict. Each of those juries, as well as the jury in the sixth trial, had at least one black juror.

Justice Kavanaugh's opinion for the majority identified "four critical facts" about the *voir dire* process and the use of peremptory challenges that required reversal. First, the same prosecutor in all six trials used peremptory challenges to strike forty-one of forty-two black prospective jurors in the six trials combined. Second, he used peremptory strikes against five of six black prospective jurors in the most recent trial. Third, his questioning of black and white potential jurors was "dramatically disparate." He asked black prospective jurors an average of 29 questions each, while asking the eleven white jurors who were eventually seated an average of one question each. Finally, using the approach condemned in *Miller-El*, he used a peremptory challenge to strike at least one black prospective juror who was similarly situated to white jurors who were accepted.

CHAPTER 15 DOUBLE JEOPARDY

H. REPROSECUTION BY A SEPARATE SOVEREIGN

[1] General Rule: Prosecution Permitted by Different Sovereigns

Page 711, Note 4: Replace the current Note with the following new Note 4:

4. *Doctrine reaffirmed*. The United States Supreme Court reaffirmed the separate sovereign doctrine in *Gamble v. United States*, 139 S. Ct. 1960 (2019). Gamble was first prosecuted in Alabama state court for illegal possession of a handgun. After he pled guilty to the state charge, he was indicted in federal court based on the same incident for violating a federal firearm possession law. Gamble moved to dismiss the indictment on double jeopardy grounds, but the trial court denied his motion in light of the separate sovereign doctrine. Gamble then pled guilty in federal court, preserving his right to litigate the double jeopardy issue on appeal.

In reaffirming the separate sovereign doctrine, the Court emphasized *stare decisis*. Although acknowledging that *some* of the historical sources might cast doubt on whether the separate sovereign doctrine is consistent with the original meaning of the Fifth Amendment, the Court observed, "Gamble's historical arguments must overcome *numerous* major decisions of this Court spanning *170 years*. In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling." *Id.* at ____. (emphasis in the original, internal quotation marks omitted).) In the Court's view, Gamble failed to satisfy this standard because some of the historical evidence was a "muddle," some offered only "spotty support" for Gamble's position, and some was "downright harmful." Thus, Gamble's historical arguments could not overcome the Court's preference for adhering to its well-established precedent. Nor was the Court swayed by arguments that the doctrine should be overturned in light of more recent developments, either the application of the Double Jeopardy Clause to the States fifty years earlier, or the proliferation of federal criminal laws in recent decades.

Two dissenters, Justices Ginsburg and Gorsuch, found Gamble's arguments more persuasive. However, with a fresh 7-2 endorsement by the Court, the separate sovereign doctrine now seems on a secure footing for many years to come.

CHAPTER 16 SENTENCING

B. SENTENCING OPTIONS

[1] Death Penalty

Page 731: Before the start of Section [2], add the following:

The national anti-death penalty trend continued in 2018 with *State v. Gregory*, 427 P.3d 621 (Wash. 2018), in which the Washington Supreme Court held that the state's system of capital punishment was administered in an unconstitutional manner. The court relied on statistical evidence showing racial disparities in the application of the death penalty. In particular, the defendant's expert concluded, "[Capital] sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of other variables included in the [expert's multivariate regression] model [had] been taken into account." *Id*. at 633. In light of this evidence, the court concluded that the death penalty, as administered in Washington, violated the state's constitutional ban on "cruel punishment." (The court noted that the state constitutional provision was worded somewhat differently, and sometimes interpreted more expansively, than the analogous federal ban on "cruel *and unusual*" punishment. *Id*. at 631.) The court converted all death sentences in the state to life imprisonment, *id.* at 642, but also left open the possibility that the state legislature might be able to craft a new death penalty statute that could avoid the arbitrariness and racial bias that tainted the administration of the existing law, *id.* at 636. Does this seem a realistic possibility to you? Recall Justice Blackmun's critique of the death penalty in *Callins v. Collins*.

[7] Forfeiture

Page 740: At the end of the first paragraph, insert the following:

In another, more recent forfeiture case, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Supreme Court made clear that the Excessive Fines Clause applies to the states through the Fourteenth Amendment and thus limits the application of state forfeiture laws.

C. MECHANISMS TO GUIDE OR RESTRICT THE JUDGE'S SENTENCING DISCRETION

[2] Mandatory Minimums

Page 754: At end of the carryover paragraph from page 753, insert the following:

Reflecting some of the criticisms of mandatory minimum sentences, Congress recently softened several federal minimums in the so-called First Step Act. For a summary of key changes in the law, see Jonathan Feniak, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENV. L. REV. ONLINE 166 (2019).

D. SENTENCING PROCEDURES

[3] Sentencing Factfinding and Constitutional Trial Rights

[b] Right to Jury Trial and Proof Beyond a Reasonable Doubt

[iii] Application of *Apprendi* to Mandatory Minimums

Page 778: At the end of subsection [iii], insert the following:

In *United States v. Haymond*, 139 S. Ct. 2369 (2019), five Justices invoked *Alleyne* in concluding that an unusual federal community supervision statute had been applied unconstitutionally. In the federal system, a sentence normally includes a prison component and a period of community supervision after release. If a person on community supervision violates any of the conditions of release, the person may be returned to prison for a term set by the judge within certain statutory maximums. Traditionally, a judge decides whether a violation of conditions has occurred, using the preponderance of the evidence standard. At issue in *Haymond* was the constitutionality of 18 U.S.C. § 3583(k), which mandates that a person on community supervision *must* be returned to prison for at least five years if the person is found to have committed one of several enumerated offenses, including the possession of child pornography. While on community supervision, Haymond had possessed such images, and was ordered back to prison for five years. On appeal, a majority of the Justices agreed that this process violated Haymond's rights under *Alleyne* to have a jury find the facts that trigger a mandatory minimum sentence using the beyond a reasonable doubt standard.

Suppose a person's initial prison term was already at or near the maximum, and a subsequent return to prison could push the total prison time beyond what could have been ordered on the basis of the underlying conviction alone? In such circumstances, doesn't *Apprendi* give the defendant a right to have a jury decide beyond a reasonable doubt that the conditions of supervision were violated? Statutes like § 3583(k) that mandate certain *minimum* periods of reimprisonment seem to be unusual, but if the logic of *Haymond* were extended to cover situations involved increased *maximums*, then *Haymond* might prove a far more consequential decision. The four-Justice plurality opinion in *Haymond* expressly reserved judgment on the "maximums" question in its footnote 7, but Justice Alito, writing for four dissenters, decried the "potentially revolutionary implications" of the plurality's analysis. Concurring in the judgment only, and providing the decisive fifth vote in favor of Haymond, Justice Breyer offered a narrower line of reasoning that emphasized the unique features of § 3583(k). "[I]n light of the potentially destabilizing consequences," he observed, "I would not transplant the *Apprendi* line of cases to the supervised-release context." Although five Justices seem opposed to any further extension of *Apprendi* rights in relation to community supervision, lower courts are likely to see considerable litigation in the coming years over the precise scope of *Haymond*.

CHAPTER 17 POST-CONVICTION REMEDIES

B. DIRECT APPEAL

[3] Types of Appeals by Criminal Defendant

[a] Appeals "As of Right"

[vi] Right to Counsel and Ethical Issues

Page 811, Note 2: Replace the last sentence of carryover paragraph with the following:

The "prejudice" or second prong of *Strickland* is presumed to be satisfied in such cases because the defendant would have taken an appeal had defense counsel performed as instructed. *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (*Strickland* presumption of prejudice "applies even when the defendant has signed an appeal waiver"); *Flores-Ortega*, 528 U.S. at 484.