Criminal Procedure: The Post-Investigative Process

CASES AND MATERIALS
Fifth Edition

2021–22 CUMULATIVE SUPPLEMENT

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CHAPTER 3 PLACE OF PROSECUTION: VENUE AND RELATED CONCEPTS

A. Venue

[1] Basic Principles

Pages 95, Note 8: Add to the end of the note the following:

Drug possession is a continuing crime, and venue is generally proper in any district in which the drugs at issue were in the defendant's possession. *See, e.g., United States v. Delgado*, 545 F.3d 1195, 1205-06 (9th Cir. 2008). But does that principle still apply if the defendant did not choose to enter the district of prosecution with the drugs? Consider the unusual facts of *State v. Brantner*, 939 N.W.2d 546 (Wis. 2020). Brantner, a resident of Kenosha County, was arrested in that county on a charge relating to a thirty-year-old homicide in Fond du Lac County. After being transported to a jail in the latter county by detectives, a search of Brantner's clothing revealed dozens of oxycodone pills that had been hidden in his boot. Could he be prosecuted for illegal possession of the pills in Fond du Lac County even though his presence there with the drugs was involuntary? Yes, ruled the Wisconsin Supreme Court, resting the decision on its view that Brantner was literally still in possession of—i.e., had "control" over—the drugs when he was in Fond du Lac County. Of course, this may be criticized as a rather artificial view of control, given that Brantner would have likely subjected himself to legal liability if he had attempted to do anything with the drugs while being transported in the custody of law enforcement officers. However, the court did imply that a different result might have been reached if the detectives had known about the drugs before the county line was crossed.

[4] Transfer of Venue

[c] Timing and Content of Transfer Motions

Pages 117: Add at the end of [c]:

Can social media evidence be used to demonstrate adverse pretrial publicity? Professor Leslie Y. Garfield Tenzer observes that some courts "arguably concluding that Facebook, Instagram, Twitter and the like are different from the traditional media, have refused to include negative social media evidence" in their evaluation of claims of community bias. *Social Media, Venue, and the Right to a Fair Trial*, 71 BAYLOR L. REV. 421, 423 (2019). Professor Tenzer, however, asserts it would be erroneous to distinguish social from traditional media in this way. Indeed, she argues, "[b]y ignoring social media bias, these courts create a constitutional threat to defendants' due process rights." *Id*.

Pages 119: Insert new paragraph after first paragraph:

Distinctive jurisdictional issues sometimes arise in cases involving a Native-American defendant. Consider, for instance, the recent Supreme Court decision in *McGirt*

v. Oklahoma, 140 S. Ct. 2452 (2020). McGirt, an enrolled member of the Seminole Nation of Oklahoma, was convicted of certain sexual offenses in Oklahoma state court. On appeal, he argued that the state court lacked jurisdiction as a result of the federal Major Crimes Act (MCA). The MCA establishes "exclusive jurisdiction" for the federal courts in cases in which "[a]ny Indian" commits certain enumerated offenses within "the Indian country." 18 U.S.C. § 1153(a). McGirt qualified as an "Indian" and his offenses were among those covered by the statute. The main question left for the Supreme Court to resolve was whether the offenses had been committed in "Indian country," a term that is statutorily defined to include "all land within the limits of any Indian reservation." 18 U.S.C. § 1151(a).

After a lengthy review of the complicated history of treaties and statutes governing the eastern portion of present-day Oklahoma, the Court concluded that Congress had indeed established this territory as a reservation in the nineteenth century and had done nothing since to change that status. Nor was the Court persuaded to rule against McGirt because of the potential unsettling of thousands of other convictions. Referring to a tradition of state prosecutions in contravention of the MCA, the Court observed, "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." Note, however, that the MCA is only a sort of default rule for jurisdiction over major crimes committed by Indians in Indian country. Congress has carved out numerous exceptions covering particular states and reservations.

CHAPTER 5 CUSTODY AND RELEASE PENDING TRIAL

H. BAIL REFORM ACT OF 1984: INTRODUCTION

p. 161: Add new note after Note 12:

13. *Reassessing the constitutionality of unaffordable bail/bonds in light of* Salerno*?* In recent years, the pretrial detention of indigent defendants who are too poor to afford even a modest bail/bond again has been challenged as a due process violation (by punishing a defendant before trial), and as in conflict with the historical rationale of bail to assure a defendant's presence at trial.

Relying on *Salerno*, two recent state supreme court decisions held that pretrial detention from unaffordable bail/bonds is the equivalent of punishment before trial unless it can be shown, by clear and convincing evidence, that the defendant presents an undue risk of flight or of conduct detrimental to public safety, and that no less restrictive condition(s) will adequately protect the public. See *In re Humphrey*, 482 P.3d 1008 (Cal. 2021), and *Valdez-Jimenez v. Eighth Judicial Dist. Court of Nev.,* 460 P.3d 976 (Nev. 2020). If adopted by other states (and by the U.S. Supreme Court), these rationales could dramatically affect the setting of bail and the pretrial incarceration of defendants.

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:

The following amendment became Rule 16.1 of the Federal Rules of Criminal Procedure.

> 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 12 TIME LIMITATIONS

C. POST-ACCUSATION DELAYS

[1] Constitutional Speedy Trial Guarantee

Pages 517: Add new note:

7. *Invocation of the Right and the Unrepresented Defendant*. In *Doggett*, the Court stated that, if the defendant had actually known of the indictment prior to his arrest, then "*Barker*'s third factor, concerning invocation of the right to a speedy trial, would be weighed heavily against him." But, even assuming knowledge, would it be fair to expect an *unrepresented* defendant to invoke the constitutional right? The Tenth Circuit confronted the question in *United States v. Nixon*, 919 F.3d 1265 (10th Cir. 2019). Nixon was indicted on federal firearms charges, but federal authorities then delayed his arraignment for almost a year while state murder charges against him played out. During that time, Nixon was aware of the federal indictment, but did not have counsel in the federal case. A few weeks after the federal prosecution resumed, Nixon, now apparently represented, moved to dismiss the indictment on speedy trial grounds. After the district court denied his motion, the Tenth Circuit affirmed. The court relied on the above-quoted language from Doggett in finding that "awareness of the federal charge weighs heavily against Mr. Nixon"—notwithstanding the lack of a lawyer to advise him about his speedy trial rights. *Id*. at 1273. The Tenth Circuit also indicated that there was no per se prejudice when the prosecutor's inaction delayed the defendant's ability to obtain a lawyer, but suggested that there might have been prejudice if there had been evidence of "(1) any steps taken by the government to continue investigating Mr. Nixon during this delay period or (2) a lost opportunity for Mr. Nixon's defense." *Id*. at 1277.

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. The trials in three of the earlier trials had ended in convictions when there were no black jurors on those 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 14 TRIAL

J. AFTER THE PROOF: MOVING TOWARD A VERDICT

[6] Unanimity

[b] Sixth Amendment

Page 653: Following the introduction, replace *Apodaca v. Oregon* and Notes 1-4, with *Ramos v. Louisiana* and revised Notes 1-4:

RAMOS v. LOUISIANA
140 S. Ct. 1390 (2020)

Justice Gorsuch announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1. . . .

[A jury found Evangelista Ramos guilty of a serious crime by a 10-2 verdict. At the time of his trial, Louisiana and Oregon were the only states permitting a conviction by a less than unanimous verdict.]

So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

. . . [C]ourts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. . . .

I

The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. Imagine a constitution that allowed a "jury trial" to mean nothing but a single person rubberstamping convictions without hearing any evidence—but simultaneously insisting that the lone juror come from a specific judicial district "previously ascertained by law." And if that's not enough, imagine a constitution that

included the same hollow guarantee *twice*—not only in the Sixth Amendment, but also in Article III. No: The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law. As Blackstone explained, no person could be found guilty of a serious crime unless "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." A "'verdict, taken from eleven, was no verdict'" at all.

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity. Another four preserved the right to a jury trial in more general terms. But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years. If the term "trial by an impartial jury" carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.

Influential, postadoption treatises confirm this understanding. For example, in 1824, Nathan Dane reported as fact that the U. S. Constitution required unanimity in criminal jury trials for serious offenses. A few years later, Justice Story explained in his Commentaries on the Constitution that "in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable." Similar statements can be found in American legal treatises throughout the 19th century.

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons." *Thompson v. Utah*, 170 U.S. 343 (1898), overruled on other grounds by *Collins v. Youngblood*, (1990). A few decades later, the Court elaborated that the Sixth Amendment affords a right to "a trial by jury as understood and applied at common law, . . . includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted." *Patton v. United States*, 281 U.S. 276

(1930), abrogated by *Williams v. Florida*, (1970). And, the Court observed, this includes a requirement "that the verdict should be unanimous." [*Id*. *See also Andres v. United States*, 333 U.S. 740 (1948).] In all, this Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years.

There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-150 (1968). This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

II
A

How, despite these seemingly straightforward principles, have Louisiana's and Oregon's laws managed to hang on for so long? It turns out that the Sixth Amendment's otherwise simple story took a strange turn in 1972. That year, the Court confronted these States' unconventional schemes for the first time—in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and a companion case*, Johnson v. Louisiana*, 406 U.S. 356 (1972). Ultimately, the Court could do no more than issue a badly fractured set of opinions. Four dissenting Justices would not have hesitated to strike down the States' laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment. But a four-Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important "function" in "contemporary society." Then, having reframed the question, the plurality wasted few words before concluding that unanimity's costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of Louisiana or Oregon.

The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of "history and precedent, . . . the Sixth Amendment requires a unanimous jury verdict to convict." But, on the other hand, he argued that the Fourteenth Amendment does not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in "dual-track" incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.

. . .

III

. . . How does the State deal with the fact this Court has said 13 times over 120 years that the Sixth Amendment *does* require unanimity? Or the fact that five Justices in *Apodaca* said the same? The best the State can offer is to suggest that all these statements came in dicta. But even supposing (without granting) that Louisiana is right and it's dicta all the way down, why would the Court now walk away from many of its own statements about the Constitution's meaning? And what about the prior 400 years of English and American cases requiring unanimity—should we dismiss all those as dicta too?

Sensibly, Louisiana doesn't dispute that the common law required unanimity. Instead, it argues that the drafting history of the Sixth Amendment reveals an intent by the framers to leave this particular feature behind. The State points to the fact that Madison's proposal for the Sixth Amendment originally read: "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ." Louisiana notes that the House of Representatives approved this text with minor modifications. Yet, the State stresses, the Senate replaced "impartial jury of freeholders of the vicinage" with "impartial jury of the State and district wherein the crime shall have been committed" and also removed the explicit references to unanimity, the right of challenge, and "other accustomed requisites." In light of these revisions, Louisiana would have us infer an intent to abandon the common law's traditional unanimity requirement.

But this snippet of drafting history could just as easily support the opposite inference. Maybe the Senate deleted the language about unanimity, the right of challenge, and "other accustomed prerequisites" because all this was so plainly included in the promise of a "trial by an impartial jury" that Senators considered the language surplusage. The truth is that we have little contemporaneous evidence shedding light on why the Senate acted as it did. So rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified. And, as we've seen, at the time of the Amendment's adoption, the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict.

. . . If the Senate's deletion of the word "unanimity" changed the meaning of the text that remains, then the same would seemingly have to follow for the other deleted words as well. So it's not just unanimity that died in the Senate, but all the "other accustomed requisites" associated with the common law jury trial right—*i.e., everything* history might have taught us about what it means to have a jury trial. Taking the State's argument from drafting history to its logical conclusion would thus leave the right to a "trial by jury" devoid of meaning. A right mentioned twice in the Constitution would be reduced to an empty promise. That can't be right.

Faced with this hard fact, Louisiana's only remaining option is to invite us to distinguish between the historic features of common law jury trials that (we think) serve "important enough" functions to migrate silently into the Sixth Amendment and those

that don't. And, on the State's account, we should conclude that unanimity isn't worthy enough to make the trip.

But to see the dangers of Louisiana's overwise approach, there's no need to look any further than *Apodaca* itself. There, four Justices, pursuing the functionalist approach Louisiana espouses, began by describing the "'essential'" benefit of a jury trial as "'the interposition . . . of the commonsense judgment of a group of laymen " between the defendant and the possibility of an "'overzealous prosecutor.'" And measured against that muddy yardstick, they quickly concluded that requiring 12 rather than 10 votes to convict offers no meaningful improvement. Meanwhile, these Justices argued, States have good and important reasons for dispensing with unanimity, such as seeking to reduce the rate of hung juries.

Who can profess confidence in a breezy cost-benefit analysis like that? Lost in the accounting are the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules in the first place. What's more, the plurality never explained why the promised benefit of abandoning unanimity—reducing the rate of hung juries—always scores as a credit, not a cost. But who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions? And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries? Or the fact that others profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations? It seems the *Apodaca* plurality never even conceived of such possibilities.

Our real objection here isn't that the *Apodaca*'s plurality's cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. And Louisiana asks us to repeat the error today, just replacing *Apodaca*'s functionalist assessment with our own updated version. All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.

IV

. . .

B

1

There's another obstacle the dissent must overcome. Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command." And the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means. To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." In this case, each factor points in the same direction.

Start with the quality of the reasoning. Whether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken; again, no Member of the Court today defends either as rightly decided. Without repeating what we've already explained in detail, it's just an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws. Instead, the plurality subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph. And, of course, five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity. Meanwhile, Justice Powell refused to follow this Court's incorporation precedents. Nine Justices (including Justice Powell) recognized this for what it was; eight called it an error.

Looking to *Apodaca*'s consistency with related decisions and recent legal developments compounds the reasons for concern. . . . While Justice Powell's dual-track theory of incorporation was already foreclosed in 1972, some at that time still argued that it might have a role to play outside the realm of criminal procedure. Since then, the Court has held otherwise. Until recently, dual-track incorporation attracted at least a measure of support in dissent. But this Court has now roundly rejected it. Nor has the plurality's rejection of the Sixth Amendment's historical unanimity requirement aged more gracefully. As we've seen, in the years since *Apodaca*, this Court has spoken inconsistently about its meaning—but nonetheless referred to the traditional unanimity requirement on at least eight occasions. In light of all this, calling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company.

[N]either Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No

one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away by a 10-to-2 verdict. Nor does anyone suggest that nonunanimous verdicts have "become part of our national culture." It would be quite surprising if they had, given that nonunanimous verdicts are insufficient to convict in 48 States and federal court.

Instead, the only reliance interests that might be asserted here fall into two categories. The first concerns the fact Louisiana and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal. The dissent claims that this fact supplies the winning argument for retaining *Apodaca* because it has generated "enormous reliance interests" and overturning the case would provoke a "crushing" "tsunami" of follow-on litigation.

The overstatement may be forgiven as intended for dramatic effect, but prior convictions in only two States are potentially affected by our judgment. Those States credibly claim that the number of nonunanimous felony convictions still on direct appeal are somewhere in the hundreds, and retrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. For example, after *Booker v. United States*, held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. . . . Our decision here promises to cause less, and certainly nothing before us supports the dissent's surmise that it will cause wildly more, disruption. . . .

Reversed.

Notes and Questions

1. In the Term after *Ramos* was decided, the Supreme Court held that *Ramos* does not apply retroactively on federal collateral review, i.e., review in the nature of habeas corpus. *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). See also discussion of retroactivity in Chapter 17.

2. Ramos'*s concurrences and dissents*. In addition to Justice Gorsuch's opinion for a five-Justice majority, four Justices wrote.

a. Justice Sotomayor concurred, joining all but Part IV-A of the Court's opinion. She concurred to emphasize that "overruling precedent here is not only warranted, but compelled"; "the interests at stake point far more clearly to that outcome than those in other recent cases"; and the racially biased origins of the Louisiana and Oregon laws uniquely matter here."

b. Justice Kavanaugh concurred to articulate his seven-factor standard for applying *stare decisis*. Various groups have become interested in his views about precedent because of the possibility that cases like *Roe v. Wade* may be in jeopardy.

c. Justice Thomas concurred in the judgment only, to express his view that all nonunanimous jury verdicts are unconstitutional and that the Privileges and Immunities Clause of the Fourteenth Amendment is the applicable provision for requiring unanimous verdicts by the states, not the Due Process Clause.

d. Justice Alito dissented, joined by Chief Justice Roberts. Justice Kagan agreed with most of the dissent. Alito's dissent disagreed sharply with the manner in which the Court's Opinion had applied *stare decisis*, lowering the bar to overrule precedent.

3. *Functionality of non-unanimous verdicts*. *Apodaca*'s plurality opinion identified several protections from non-unanimous verdicts.

a. *Effect on deliberation*. Are deliberations with non-unanimous verdicts shorter or longer than with unanimous verdicts? Apodaca's jury was out forty-one minutes, including the time it took to leave the courtroom, sit at a table, select a foreperson, vote, and return to the courtroom. Would more innocent people be convicted? More guilty people acquitted? Recall that a 10-2 verdict in favor of acquittal was constitutional under *Apodaca*. *See* Aliza Kaplan & Amy Saack*, Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1 (2016).

b. *Effect on compromises*. In a non-unanimous jury system, are more or fewer compromises likely than with a unanimous jury system? Is an initial vote of 8-4 in a nonunanimous jury system more likely to product a compromise than an initial vote of 11-1 in a unanimous system?

c. *Protection against government oppression*. How does a non-unanimous verdict protect a defendant against the government oppression that was the focus of the argument in *Duncan v. Louisiana*?

4. In *Burch v. Louisiana*, 441 U.S. 130 (1979), the Supreme Court invalidated obscenity convictions obtained by a 5-1 vote of jurors, as authorized by Louisianan law. The Court stated that "conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous." *Id*. at 138. Do you agree?

CHAPER 15 DOUBLE JEOPARDY

B. "SAME OFFENSE"

[3] Collateral Estoppel

Page 681: Add new notes:

7. *What If the Defendant Asked for Two Trials?* As we saw in Chapter 8, defendants sometimes request that charges be severed in order to avoid unfair prejudice from a joint trial. If such a severance is granted, and the defendant is acquitted in the first trial, can the constitutional collateral estoppel rule be used to block the second trial? No, the Supreme Court answered in *Currier v. Virginia*, 138 S. Ct. 2144 (2018). The Court reasoned that the defendant's consent to two trials "can overcome concerns lying at the historic core of the Double Jeopardy Clause." *Id.* at 2150.

8. *Remedy*. In *Currier, supra*, the defendant argued that even if his request for a severance lifted any categorical bar to a second trial, the government should at least be prohibited from relitigating the specific issue that was resolved in his favor in the first trial. In simplified form, the facts were as follows. Currier, a felon, was charged with being an accomplice in the theft of a safe that contained cash and guns. The safe and guns were later dredged up from a river, but the cash was missing. Based on his prior felony conviction, Currier was also charged with being a felon in possession of a firearm. The government's theory was that Currier must have at some point, even if only briefly, possessed the guns in the safe since he help to steal the safe. The theft charge was tried first, and Currier was acquitted. At the second trial, on the felon-in-possession charge, Currier argued that the government should be barred from relitigating his involvement in the theft. The government, in other words, could still try to prove that Currier possessed a firearm, but would have to do so on some other basis than his alleged complicity in the taking of the safe.

Currier's argument thus raised the question of whether the constitutional collateral estoppel doctrine can provide a sort of "half-a-loaf" remedy—the second trial can proceed, but with the government prohibited from trying to prove a specific fact or facts. However, the Supreme Court did not provide a clear answer to the question. Four justices agreed with Currier, while four justices took an all-or-nothing view of criminal collateral estoppel—either the defendant is saved from retrial entirely, or the second trial proceeds with no estoppel at all. Justice Kennedy, the odd man out, declined to take a position on this remedy question, ruling that Currier's request for two trials deprived him of any double jeopardy claim—whether that claim was framed as a request for a categorical bar on retrial or more narrowly as a request that the government be prohibited from relitigating a specific factual issue.

H. REPROSECUTION BY A SEPARATE SOVERIEGN

[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 1969. (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 in 1969 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*.

Page 734: After second full paragraph, insert:

In 2018, the Washington Supreme Court ruled that its state constitution prohibited life-without-parole sentences for *all* juvenile offenders—even those convicted of murder. *State v. Bassett*, 428 P.3d 343 (Wash. 2018). The court observed that there seemed to be a strong national trend in this direction: "As of January 2018, 20 states and the District of Columbia ha[d] abolished life without parole for juveniles." *Id.* at 352.

[4] Probation

[c] Probation Conditions

Page 737: At end of third full paragraph, insert:

See also United States v. Hall, 912 F.3d 1224 (9th Cir. 2019) (holding unconstitutionally vague a release condition prohibiting defendant from having any contact with his son except for "normal family relations"); *United States v. Eaglin*, 913 F.3d 88, 91 (2d Cir. 2019) (striking down as unreasonable release conditions on sex offender prohibiting all Internet access and possession of legal adult pornography). *But see State v. Wallmuller*,

449 P.3d 619 (Wash. 2019) (rejecting vagueness challenge to release condition prohibiting sex offender from being in "places where children congregate").

[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 is incorporated and thus limits the application of state forfeiture laws in addition to federal.

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).

Page 762: At end of note 3, insert the following:

Litigation continues over what sentences are precluded by *Graham* and *Miller*. For instance, in *Sanders v. Eckstein*, 981 F.3d 637 (7th Cir. 2020), the Seventh Circuit considered the constitutionality of a 140-year sentence that was imposed in a Wisconsin state court on a juvenile who was convicted of a series of rapes. Under state law, the defendant would first be eligible for parole consideration at age fifty-one. A state appellate court ruled that *Graham* and *Miller* provided no help to the defendant because he might be able to secure release as much as twelve years before the expiration of his life expectancy at age sixty-three. It was not entirely clear how this life expectancy was determined, but it has been presented by the defendant himself in state court. On habeas review, the Seventh Circuit held that there was nothing unreasonable in the state court's application of the relevant constitutional law. Because it had not been presented in state court, the Seventh Circuit declined to consider evidence indicating that the average life expectancy for life-sentenced juveniles is actually only 50.6 years.

Page 762: At end of first paragraph of note 4, insert the following:

But see Bowling v. Dir., Virginia Dep't of Corr., 920 F.3d 192, 197 (4th Cir. 2019) (refusing to provide relief under *Graham* and *Miller* to juvenile homicide offender who received life *with* parole sentence, but was considered for parole and denied every year from 2005 through at least 2016; "the Supreme Court has placed no explicit constraints on a sentencing court's ability to sentence a juvenile offender to life with parole").

Page 763: Insert new note 6:

6. *Is a Finding of Permanent Incorrigibility Required?* Convicted of murdering his grandfather at age fifteen, Bert Jones faced sentencing in Mississippi in the wake of *Miller v. Alabama*. The sentencing court acknowledged its discretion under *Miller* to impose a sentence less than LWOP, but sentenced Jones to life without parole anyway. On appeal, Jones argued that the sentencing court, before imposing LWOP for a juvenile offense, was first required to make a finding of "permanent incorrigibility." He drew on language from *Miller* suggesting a need to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012).

In a 6-3 decision in early 2021, the Supreme Court rejected Jones' contention. *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). In a sense, the case required the Court to clarify whether *Miller* was a purely procedural decision, or whether it also imposed a substantive limitation on the use of LWOP, i.e., a prohibition on use of the sentence on any juveniles but those who suffer from permanent incorrigibility. The *Jones* majority treated *Miller* as purely procedural: the earlier case "mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id*. at 1311 (quoting *Miller*). The dissenters, however, characterized the majority's interpretation as one that would "gut" *Miller*. *Id.* at 1328 (Sotomayor, J., dissenting). They observed that, under the majority's approach, "even if the juvenile's crime reflects unfortunate yet transient immaturity, he can be sentenced to die in prison." *Id.* (citation and internal quotation marks omitted).

D. SENTENCING PROCEDURES

[1] Data Used in Sentencing: Reports and Other Information

Page 764: At the end of [1], insert the following:

Beyond what is provided in the presentence report or by the lawyers and witnesses at the sentencing hearing, should the judge be permitted to seek out additional information for sentencing purposes independently of the parties? If so, are there are any due process constraints that the judge ought to observe? Consider the facts in *State v. Counihan*, 938 N.W.2d 530 (Wis. 2020). The defendant pled guilty to five counts of theft in connection with the improper use of a business credit card. At her sentencing hearing, the judge announced, "I pulled all files that we could find in [the county] where somebody has pled to theft in a business-type setting. There were about six or seven of them that we could find, and I have reviewed those files in detail." *Id.* at 533. The judge seemed to determine Counihan's sentence based in large part on a comparison of her case with the other similar cases. The judge concluded, "All other cases, except one, received jail time, and I don't see any reason why you shouldn't serve jail time." *Id.* at 534. On appeal, Counihan argued that the judge's reliance on the prior cases without prior notice

violated her due process rights, depriving her of a fair opportunity to review and distinguish the other cases. The Wisconsin Supreme Court nonetheless affirmed her sentence. The court acknowledged that it is generally "improper for a judge to conduct an independent investigation and to fail to give a party a chance to respond to the judge's misinformed allegations based on that investigation." *Id.* at 539 (quoting In re *Judicial Disciplinary Proceedings Against Piontek*, 927 N.W.2d 552 (Wis. 2019)). However, the supreme court distinguished such improper conduct from a sentencing court's use of its own "institutional memory." The supreme court reasoned, "The [sentencing] court's actions in this case are no different from long-tenured judges reaching back into their memories without the aid of hard-copy files. . . . When a [sentencing] court accesses its institutional memory without the aid of written material, it is not required to inform the parties of all past cases that came to mind. The use of hard[-]copy files does not occasion a different rule." *Id*. at 540.

[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 right 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*. *See, e.g., United States v. Wilson*, 939 F.3d 929 (8th Cir. 2019) (rejecting double jeopardy argument that was based on *Haymond*; defendant's supervision was revoked as a result of his possession of a firearm, which was also the basis for a separate prosecution; analogizing to *Haymond*, defendant argued unsuccessfully that revocation amounted to punishment for the "same offense" that was the subject of the new case).

CHAPTER 17 POST-CONVICTION REMEDIES

B. DIRECT APPEAL

[1] Limits on Appellate Review

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

Page 797, Add new Note 8:

8. *Unpreserved factual arguments reviewed for plain error.* In *Davis v. United States*, 140 S. Ct. 1060 (2020), the Supreme Court held that an unpreserved claim of *factual* (as opposed to *legal*) error is to be reviewed for plain error. The Court, *per curiam*, rejected the Fifth Circuit's "outlier practice" of refusing to review unpreserved factual arguments under the plain error doctrine. *Id*. at 1061-62.

[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.

C. COLLATERAL REMEDIES

[2] Habeas Corpus

[c] The Custody and Mootness Requirements

[i] Custody

page 824: Add new paragraph after second full paragraph:

In custody somewhere? A state too far? In *Alaska v. Wright*, 141 S. Ct. 1467 (2021), a former sex offender in Alaska was convicted in federal court in Tennessee for failing to register as a sex offender as required by federal law. He brought a writ of habeas corpus in Tennessee federal court, challenging his underlying Alaska state court conviction on ineffective assistance of counsel grounds. Unanimously reversing the Ninth Circuit Court of Appeals, the Supreme Court determined, *per curiam*, that Wright was no

longer "in custody" on the Alaska state court conviction merely because that conviction served as the predicate for his federal court conviction in Tennessee. Therefore, there was no basis for Wright to claim that he was in custody, for habeas corpus purposes, in Tennessee pursuant to his Alaska conviction. The Court noted that although farfetched, Wright could have sought to undo his Alaska conviction via a habeas petition in that state by arguing there that he was still somehow "in custody" in Alaska, but determined in effect that Tennessee was a state too far for him to raise his claim, on habeas corpus, of ineffective assistance of counsel in connection with his underlying Alaska conviction.

[h] Effect of Previous Proceedings and Adjudications

[i] Successive Petitions from the Same Petitioner

Page 837, Insert new paragraph after third paragraph:

Motion to alter or amend judgment. A motion "to alter or amend judgment" brought under Fed. R. Civ. P. 59(e) following denial of a habeas corpus petition is *not* deemed to be a "second or successive petition" under the stringent "gatekeeping" provisions of AEDPA. *Banister v. Davis*, 140 S. Ct. 1698 (2020).

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

page 841, note 2: Add sentence at end of third full paragraph from bottom of page:

Two per curiam decisions in 2021 also reiterate the *Harrington* "erroneous beyond any possibility of fairminded disagreement" standard for review of state court denial of ineffective assistance claims. See *Mayes v. Hines*, 141 S. Ct. 1145 (2021) (claim that trial counsel had not sufficiently pressed possible claim that another person had committed the murder); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (claim that counsel had not sufficiently investigated possible claims of mitigating circumstances at the outset of murder prosecution). Claims in both cases did not meet this stringent test.

[iii] Retroactivity: Teague

page 844: add paragraph just before [i] Procedures:

Abrogation of Teague *"watershed exception" to non-retroactivity*. *In Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) the Court refused to apply retroactively its landmark ruling from the previous term in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) [discussed in Chapter 14] that non-unanimous jury guilty verdicts are unconstitutional (i.e., a less-than-unanimous verdict is "no verdict at all") in both state and federal prosecutions. In so holding, the *Ramos* Court overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972). The *Vannoy* decision (majority opinion by Justice Kavanaugh, and a dissent by Justice Kagan, joined by Justices Breyer and Sotomayor), speaking in fairly harsh language, abrogates the *Teague* exception to the general rule of non-retroactivity for "watershed" decisions that establish new "bedrock" principles:

> Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must "be regarded as retaining no vitality."

Vannoy, 141 S. Ct. at 1560 (citing *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019)).

Justice Gorsuch's concurrence best sums up the *Teague* plurality decision, and the Court's post-*Teague* jurisprudence since 1989, as "mystifying from its inception," and defying all efforts "to bring some coherence to this area." *Id*. at 1572 (Gorsuch, J., concurring).