UNDERSTANDING CRIMINAL PROCEDURE

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PREFACE

This Supplement includes all relevant United States Supreme Court decisions handed down since the most recent editions of *Understanding Criminal Procedure* (Vol. 1, 6th ed.; Vol. 2, 4th ed.) went to press. It also includes selected citations to recently published literature in the field and, where pertinent, to state and lower federal court decisions.

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Volume 1

CHAPTER 1 (Vol. 1)
INTRODUCTION TO CRIMINAL PROCEDURE

§1.04 STUDYING CONSTITUTIONAL LAW CASES

Page 19, at the end of the text, add:

The Supreme Court entered another era of uncertainty in February of 2016, when Justice Scalia suddenly passed away in the middle of the 2015 term. Political gridlock between President Obama and the Republicans who controlled Congress meant that no new justice was immediately appointed, with likely no action until a new President (and Senate) take office in January of 2017. This means that for perhaps a year, the Court will consist of only eight members.

Although Justice Scalia was popularly known as a "conservative" Justice, his originalist judicial philosophy occasionally led him to a pro-civil-libertarian stance on some criminal procedure issues. Nevertheless, his absence from the Court leaves only three Justices—Alito, Thomas, and Roberts—who consistently vote for the pro-government side.

CHAPTER 2 (Vol. 1)

OVERARCHING POLICY ISSUES IN CRIMINAL PROCEDURE

§ 2.07 FORMULATING THE RULES OF CRIMINAL PROCEDURE: SOME OVERARCHING CONTROVERSIES

Page 35, second full paragraph, line 7, add new footnote 73.1

The quoted language . . . of the arrestee.[73.1]

[73.1] See also Missouri v. McNeely, 133 S. Ct. 1552, 1559 & 1559 n.3 (2013) (stating that "[t]o determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances"; and "the general exigency exception [to the warrant requirement], which asks whether an emergency existed that justified a warrantless search, naturally calls for case-specific inquiry").

CHAPTER 6 (Vol. 1)

FOURTH AMENDMENT TERMINOLOGY: "SEARCH

§ 6.09 USE OF DOGS AND OTHER "LIMITED" INVESTIGATIVE TECHNIQUES TO DISCOVER CONTRABAND

Page 94, after line two, add the following new text:

You will notice that the Court applied reasonable-expectation-of-privacy analysis in *Place* and *Caballes*. However, as noted earlier (p. 71 of the main text), and more fully explained in Section 6.10[D] of the text, the Supreme Court now (since 2012) applies both *Katz*-ian reasonable-expectation-of-privacy doctrine *and* pre-*Katz* trespass analysis in determining whether police activity constitutes a Fourth Amendment search. If the activity is a "search" under *either* approach, it triggers Fourth Amendment scrutiny. This dual approach is seen in the Supreme Court's recent treatment, in *Florida v. Jardines*,[118.1] of a "dog sniff" outside a person's home.

In *Jardines*, the police responded to an unverified tip that marijuana was being grown in the Jardines home by approaching the front porch with a dog trained to detect the scent of marijuana, cocaine, heroin, and several other drugs. The dog's behavioral changes alerted his handler to the presence of illegal narcotics inside the home.

Did this use of the dog constitute a "search," although the use of trained dogs in *Place* and *Caballes* did not? Justice Scalia, writing for a five-justice majority, held that this police activity *did* constitute a search, but he reached this conclusion on "trespass" rather than expectation-of-privacy grounds. Applying pre-*Katz* language and reasoning, Justice Scalia held that the police conduct constituted a physical intrusion of a constitutionally protected area. The front porch was within the "curtilage"[118.2] of the house. According to the Court, "when it comes to the Fourth Amendment, the home is first among equals. At the 'very core' stands 'the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.' " And, the Court reasoned, that right "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity."

But, how was this an "intrusion"? People — neighbors, mail carriers, Girl Scout cookie-sellers, trick-or-treaters, peddlers, and even police — come to the front doors of homes all the time. Are *they* trespassing? Justice Scalia stated that such people ordinarily have an implicit license to come to the door, "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Here, however, "introducing a trained police dog to explore the areas around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*."

Justice Kagan, joined by Justices Ginsburg and Sotomayor, while joining the Scalia opinion, wrote a concurring opinion. They stated that the same result would apply using reasonable-expectation-of-privacy analysis. Justice Kagan asked us to hypothesize a stranger

coming to our front door carrying "super-high-powered binoculars," not knocking but instead using the binoculars to peer through the window "into your home's furthest corners. . . . In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one." To the concurring justices, this conduct is not only a trespass but an invasion of our reasonable expectations of privacy. For the concurring justices, therefore, *Place* and *Caballes* do not apply here because this was Jardines' home and not luggage in a public airport or a car on a public road.[118.3]

Justice Alito, writing for the Chief Justice, and Justices Kennedy and Breyer, dissented. He reasoned that dogs have been domesticated for "about 12,000 years," were "ubiquitous" in this country and Britain at the time of the adoption of the Fourth Amendment, and "their acute sense of smell has been used in law enforcement for centuries. Yet the Court has been unable to find a single case . . . that supports the rule on which its decision is based." Alito observed that the police activity took only "a minute or two" and occurred on the front porch, not in the backyard or in an another presumably forbidden area. According to the dissenters, trespass analysis is not based on whether the person knocks at the door (mail carriers frequently don't) or whether the person on the front porch is, for example, a tolerable or intolerable peddler ("Girl Scouts selling cookies versus adults selling aluminum siding").

As for the concurring opinion's privacy analysis, Justice Alito stated that "I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand."

118.1 133 S. Ct. 1409 (2013).

118.2 See § 6.06[B], *supra*, for the definition of "curtilage."

[118.3] A few years after *Jardines* was decided, the Seventh Circuit adopted Justice Kagan's reasoning and held that using drug sniffing dogs at the door of an apartment building is a "search" under *Jardines*. This was true even though under Seventh Circuit law the defendant had no reasonable expectation of privacy in the hallway of his apartment building (the circuits are split on how *Katz* applies to the common areas of an apartment building, but the Seventh Circuit's is the majority view). Nonetheless, the defendant had the right to preclude "persons in the hallway snooping into his apartment using sensitive devices not available to the general public." United States v. Whitaker 820 F.3d 849 (7th Cir. 2016).

§ 6.10 TECHNOLOGICAL INFORMATION GATHERING

Page 103, add to footnote 160:

160 . . . *See also* Commonwealth v. Rousseau, 465 Mass. 372, 990 N.E.2d 543 (Mass. 2013) (under the state constitution, even where the police have not trespassed on the defendant's property, holding that "a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government, targeted at his movements, without judicial oversight and a

showing of probable cause").

Page 104, add new footnote 160.1:

… and its purpose (the nature of the crimes being investigated.[160.1]

[160.1] The lower courts have struggled to define the scope of *Jones*' plurality decision in cases in where the government engaged in long-term monitoring of public places. In one case, the government installed a camera on a public utility pole near the suspect's house and monitored the suspect's home continuously for ten weeks; the Sixth Circuit held that this was a search. United States v. Houston, 813 F.3d 282 (2016). In a nearly identical case, however, a district court held that it was *not* a search when the government used a similar camera to monitor the suspect's front lawn for six weeks. United States v. Vargas, CR-13-6025-EFS (E.D. Wash. 2014).

Page 104 at the end of the Chapter, add the following new text:

[F] Cell Phone Information

A related question arises when the government tracks a suspect's location using the suspect's cell phone signal. One common method the government uses to locate an individual to obtain "historical cell cite information" from the suspect's cell phone service provider. This is essentially a record of which cell phone towers were used by the suspect's telephone when the cell phone was in use. The government can use this information to triangulate the suspect's position at specific times in the past; for example, the location information could show that the suspect was near the scene of the crime at the time the crime occurred.[161]

Although the Supreme Court has not yet ruled on this issue, lower courts have so far held that individuals do not have a reasonable expectation of privacy in the location information that their cell phones send to their service providers.[162] Courts base this conclusion on three principles. First, the suspect is voluntarily sharing the location information with a third party — the cell phone service provider—and so under the third party doctrine of *Smith v. Maryland*,[163] the suspect has no reasonable privacy interest in the information. Second, the location information is not "content" information, which is given broad protection, but merely "address" information, which receives almost no protection. And finally, courts distinguish these cases from the GPS cases like *Jones* because the location information obtained by this method is much less precise — generally only telling the government the suspect's location within a mile-long area. Thus, the government is unlikely to learn the kind of intimate details about the suspect's life that concerned the *Jones* plurality.[164]

These decisions are not without controversy. The idea that the suspect is "voluntarily" sharing his location information with a third party seems to ignore the realities of the modern world, in which the vast majority of Americans use a cell phone. The courts' argument implies that if we "choose" to use a cell phone (essentially a modern-day necessity), then we are conceding that the government gets to track all of our movements throughout the day. And although current

historical cell site information is imprecise, the government will soon be able to refine this technique to locate the cell phone user with much greater precision. This could mean the government could track our location while we are inside our homes or other private property, which runs contrary to decisions such as *Kyllo v. United States*[165] and *United States v. Karo*[166] which create a clear public place/private place distinction.

Notwithstanding these concerns, lower courts have nearly unanimously held that historical cell site information is not protected by the Fourth Amendment. However, other government uses of cell phone information may require a warrant. For example, sometimes the government is seeking "prospective" location information—essentially real-time information about a suspect's location. Or the government may ask the service provider to "ping" the suspect's cell phone, thus forcing the cell phone to reveal its location even if the suspect is not using it at the time. Some courts have held that these actions are "searches" which require a warrant.[167] And finally, the government can use a tool called an IMSI catcher or "Stingray" device which imitates a cell phone tower and can thus intercept all of the data sent by the suspect's phone (as well as all the other phones in the area). Stingrays can be used to obtain the identification information from a telephone, or even the content of the messages being sent. So far, courts have held that the government does not need a warrant if it uses a Stingray to obtain a cell phone's identification information, the Department of Justice has instructed all of its agents to obtain a warrant before using these devices.

[161] *See generally* Kyle Malone, *The Fourth Amendment and the Stored Communications Act: Why the Warrantless Gathering of Historical Cell Site Location Information Poses No Threat to Privacy*, 39 PEPP. L. REV. 701 (2013).

[162] *See, e.g.*, In re Application of U.S. for an Order Directing Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F.3d 304 , 313 (3d Cir. 2010); In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600 , 612-13 (5th Cir. 2013); United States v. Davis, 785 F.3d 498 , 511 (11th Cir. 2015) (en banc); United States v. Carpenter, 819 F.3d 380 (6th Cir. 2016); Taylor v. State, 2016 BL 127001, *4 (Nev. 2016).

[163] *See* subsection [B], *supra* (explaining that a defendant does not have a reasonable expectation of privacy in the phone numbers that he dials, because he knows the telephone company keeps a record of those numbers).

[164] This does not mean that this information is completely unprotected; under the Stored Communication Act, the government must show "specific and articulable facts" before obtaining information stored by third parties. *See* 18 U.S.C. § 2703(d).

[165] 533 U.S. 27. *See* subsection [D], *supra*.

[166] 468 U.S. 705. *See* subsection [C], *supra.*

[167] *See* In Re Application for Historical Cell Cite Information, 509 F. Supp. 2d 64, 75 (D. MA. 2007)

CHAPTER 8 (Vol. 1)

FOURTH AMENDMENT: "PROBABLE CAUSE"

§ 8.05 THE *GATES* "TOTALITY OF THE CIRCUMSTANCES" TEST

Page 131, end of the second paragraph, add new footnote 68.1:

According to *Gates*, . . . developed under *Aguilar*.[68.1]

68.1 See also Florida v. Harris, 133 S. Ct. 1050, 1055-1056 (2013) ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.").

CHAPTER 9 (Vol. 1)

ARRESTS

§ 9.05 ARREST WARRANTS: CONSTITUTIONAL LAW

Page 152, at the end of subsection [C], add new footnote 50.1:

However, it observed . . . is extremely minor."[50.1]

[50.1] In *Welsh*, although the police claimed exigent circumstances, the police did not enter the home after "hot pursuit" (i.e., immediate or continuous pursuit from the scene of the crime) of Welsh. That fact may be significant. Recently, in a case involving hot pursuit of a misdemeanant to his home, the Supreme Court observed that *Welsh* "did not lay down a categorical rule for all cases involving minor offenses, saying only that a warrant is 'usually' required [in such cases]." Stanton v. Sims, 134 S. Ct. 1, 6 (2013) (*per curiam*). *Stanton* further observed (without announcing any new rule) that "despite our emphasis in *Welsh* on the fact that the crime at issue [there] was minor . . . nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit*."

CHAPTER 10 (Vol. 1)

SEARCH WARRANTS: IN GENERAL

§ 10.01 THE CONSTITUTIONAL ROLE OF SEARCH WARRANTS: THE DEBATE

Page 157, add to footnote 1:

[1] . . . Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609 (2012).

Page 157, add to footnote 5:

[5] . . . *See also* Bar-Gill & Friedman, Note 1 (Supp.), *supra*, at 1614 (contending that search warrants "should be required any time obtaining a warrant is feasible or, in other words, any time exigent circumstances are not present"; applying social science literature to defend the proposition that such a bright-light rule would have positive results in deterring constitutional violations).

Page 163, add to footnote 48:

[48] . . . *E.g.*, Fernandez v. California, 134 S. Ct. 1126, 1139 (2014) (Ginsburg, J., dissenting) (stating that the "Court has . . . declared warrantless searches, in the main, '*per se* unreasonable'"; and stating that "[i]f this main rule is to remain hardy, . . . exceptions to the warrant requirement must be 'few in number and carefully delineated'").

Page 163, add to footnote 49:

[49] . . . *See also* Riley v. California, 134 S. Ct. 2473, 2482 (2014); Fernandez v. California, 134 S. Ct. 1126, 1132 (opinion by Justice Alito). Indeed, in *Fernandez*, the fact that the police very likely had probable cause to conduct the search and a warrant was readily available, was deemed "beside the point."

§ 10.02 THE WARRANT APPLICATION PROCESS

Page 165, add to footnote 58:

[58] . . . Indeed, "[w]ell over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." Missouri v. McNeely, 133 S. Ct. 1552, 1562 (2013). Thus, as the Court recently stated, "technological advances . . . have . . . made the process of obtaining a warrant . . . more efficient." Riley v. California, 134 S. Ct. 2473, 2493 (2014).

§ 10.04 EXECUTION OF SEARCH WARRANTS

Page 176, at the end of the first full paragraph, add the following new text:

. . . This right of detention "does not require law enforcement to have particular suspicion than an individual [seized under the rule] is involved in criminal activity or poses a specific danger to the officers."[110.1] The right of seizure is automatic. On the other hand, because the right of detention is automatic and can result in a relatively lengthy detention while a search is conducted, the *Summers* rule is limited to the detention of occupants of the residence and ones discovered "immediately outside a residence at the moment the police officers executed the search warrant. . . . Once an individual has left the immediate vicinity of the premises to be searched, detentions must be justified by some other rationale" than the *Summers* rule.[110.2]

[110.1] Bailey v. United States, 133 S. Ct. 1031, 1037-1038 (2013).

[110.2] *Id.* at 1042, 1043. In *Bailey*, *B* left the residence that the police had a warrant to search, but he was not detained until he was about a mile away from the residence. Because this detention was beyond "any reasonable understanding" of the term "immediate vicinity" of the premises, his seizure fell outside the scope of *Summers*.

CHAPTER 11 (Vol. 1.)

WARRANTLESS SEARCHES: EXIGENT CIRCUMSTANCES

§ 11.02 INTRUSIONS INSIDE THE HUMAN BODY

Page 181, end of second paragraph, add new footnote 10.1:

In short, an . . . the warrant requirement.[10.1]

[10.1] The Supreme Court recently made clear that the right of the police to conduct a warrantless blood test in a drunk-driving investigation is not automatic. That is, the fact that there is a natural dissipation of alcohol in the bloodstream — and, thus, that there is an inevitable gradual destruction of evidence in the bloodstream — does not justify a categorical right of the police to dispense with the warrant requirement. Missouri v. McNeeley, 133 S. Ct. 1552 (2013). In *McNeeley*, the trial court ruled that, based on the facts of that case, "there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant." The Court, per Justice Sotomayor, concluded that because a blood test involves "a compelled physical intrusion beneath [a person's] skin and into his veins," courts should conduct a "finely tuned approach" to the warrant issue by looking to the totality of the circumstances. The Court agreed that a "significant delay in testing will negatively affect the probative value of . . . [blood test] results" and, therefore, there are circumstances when securing a warrant will be impractical, but it determined that each case should be decided on its own facts.

Similarly, a state cannot pass a law that makes it a crime for a suspected drunk driver to refuse a blood test. Birchfield v. North Dakota, 136 S. Ct. 1241 (2016). Because breath tests are far less intrusive and provide police with essentially the same information as a blood test, police cannot conduct a blood test on a suspected drunk driver unless they obtain a warrant or prove that securing a warrant would be impractical in the specific case at hand.

Page 182, at the end of the section, add the following new text:

On the other hand, when the intrusion is nonsurgical it may more easily be found to be reasonable. In *Maryland v. King*,[11.1] the Court approved a process of taking a "buccal swab," which "involves wiping a small piece of filer paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells," from *all* arrestees booked on "serious offenses" in order to obtain a DNA identification.

[11.1] 133 S. Ct. 1958 (2013) (discussed more fully § 12.02, *infra* this supplement).

CHAPTER 12 (Vol. 1)

SEARCHES INCIDENT TO LAWFUL ARRESTS

§ 12.01 WARRANT EXCEPTION: IN GENERAL

Page 186, add to footnote 11:

[11] . . . Police authority to conduct a SILA does *not*, however, extend to searches of data on cell phones discovered as part of a search. Riley v. California, 134 S. Ct. 2473 (2014) (discussed more fully § 12.06, *infra* this supplement). Instead, "officers must generally secure a warrant before conducting such a search." *Id.* at *22.

§ 12.02 WARRANT EXCEPTION IN GREATER DETAIL

Page 191, add to footnote 28:

[28] . . . The right to open containers does not, however, include the right to review data on cell phones. *See* Riley v. California, 134 S. Ct. 2473 (2014) (discussed more fully § 12.06, *infra* this supplement).

Page 191, add to footnote 31:

[31]. . . . Given the high level of intrusion involved in a blood test, states are prohibited from passing laws which criminalize a suspect's refusal to take a blood test. Birchfield v. North Dakota, 136 S. Ct. 1241 (2016).

Page 191, add the following text to the end of the second paragraph of subsection [C][1]:

However, police may conduct a warrantless breath test for alcohol under the search incident to arrest doctrine, since the level of intrusion for a breathalyzer test is slight, and the need for an effective and immediate test for blood alcohol level is significant. In fact, states may pass laws which impose criminal penalties on a motorist who is suspected of drunk driving and refuses to take a breathalyzer test.[31.1]

[31.1] Birchfield v. North Dakota, 136 S. Ct. 1241 (2016).

Page 193: add the following new text after subsection [3]:

[4] DNA Swabs: *Maryland v. King*[40.1]

In *Maryland v. King*, the Court held that the police may take and analyze a DNA sample from an arrestee as part of a standard booking procedure, provided the arrest was for a "serious offense" supported by probable cause. In *King*, *K* was arrested and charged with first-degree assault

for menacing a group of people with a shotgun. On the day of his arrest, as part of processing *K* for detention, the police used a "cheek swab" to take a DNA sample from *K*, pursuant to the state's DNA collection statute, which authorized collection of DNA samples from anyone charged with a crime of violence. After *K*'s arraignment, his DNA was uploaded to a database, and it was discovered that his DNA tied him to an unsolved rape case from six years earlier. *K* was subsequently convicted for that rape and sentenced to life in prison without the possibility of parole.

In considering the constitutionality of taking and using *K*'s DNA, every member of the Court agreed that the cheek swab procedure constituted a "search" for the purposes of the Fourth Amendment, but the agreement ended there.

Justice Kennedy, writing for a 5-4 majority, placed the scrutiny of the search's constitutionality "within the category of cases this Court has analyzed by reference to the proposition that the 'touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.'"**40.2** Accordingly, the majority weighed the "legitimate government interest" served by taking a DNA sample from arrestees charged with serious crimes against the resulting intrusion on privacy. The Court highlighted identification, broadly understood, as a "critical" governmental interest. The Court cited a number of values of DNA identification: unambiguous knowledge of who the arrestee is, knowledge of the arrestee's criminal history (to assess his dangerousness and likelihood of flight), and, "in the interests of justice," determination of whether the arrestee is "the perpetrator of some [other] heinous crime." For these purposes, the Court described DNA identification as a contemporary analogue of fingerprinting, one that is already "superior . . . in many ways." Balanced against this "substantial interest," the Court found the intrusion of the swabbing procedure "minimal," particularly given the diminished expectation of privacy of an individual "arrested on probable cause for a dangerous offense," and the statutory limitation of the use of the DNA sample to identification purposes. So, the majority held, the Fourth Amendment permits the procedure.

Justice Scalia, writing for the four dissenters, described an ironclad rule: "[t]he Fourth Amendment forbids searching a person for evidence of a crime" without individualized suspicion. When the Court has allowed searches without suspicion, the dissent noted, it has always required a motive at least formally separate from investigation of a crime. Because the dissenters found it "obvious that no such noninvestigative motive" was present — in other words, that the whole point of the DNA swab was to investigate whether *K* had committed some other crime for which he was not yet under suspicion — the dissenters would rule the "search" of *K* for DNA a violation of the Fourth Amendment.

King's impact beyond the immediate context of DNA testing of arrestees is uncertain. As the dissent points out at great length, the purpose of such programs is quite plainly to determine whether arrestees committed other crimes, and the Court had previously limited reasonableness balancing without individualized suspicion to searches, ostensibly conducted for *non*-criminal law purposes, usually called "special needs" searches.**40.3** If suspicionless searches for criminal investigation are now authorized whenever "reasonable," the expansion of state power would be

substantial. On the other hand, and perhaps for this reason, the majority insisted on the "identification" rationale for the search — perhaps as distinct from criminal investigation — and placed great weight on those searched being arrestees, who are already subject to searches with only paper-thin non-criminal justifications, such as searches "incident to arrest," discussed in this Chapter, and "inventory searches."[40.4] So perhaps the power to take DNA samples will be limited to this specific context.

Even if so, that context itself is substantial: according to the Court, twenty-eight states and the Federal Government already have statutes similarly authorizing DNA searches of arrestees in certain circumstances, and, as the dissent points out, there is little in the opinion to suggest that the law could not be expanded to cover most arrestees. In 2011, there were more than half a million arrests for violent crimes in the United States, and a total of more than twelve million arrests for non-traffic offenses.[40.5] Apart from this broad scope, a troubling aspect of gathering evidence from arrestees without suspicion is the very strong evidence that, at least in some contexts, African-Americans are arrested disproportionately to their rate of offending relative to whites. The impact of such discrimination would be multiplied by the enhanced investigation of arrestees.

[40.1] 133 S. Ct. 1958 (2013).

[40.2] *Id.* at 1970 (quoting *Samson v. California*, 547 U.S. 843 (2006)).
[40.3] These searches and their constitutional history are discussed in Chapter 18 of the text, *infra*.

[40.4] *See* § 15.02 of the text, *infra*.

[40.5] *Crime in the United States, 2011* 1 (U.S. Dep't of Justice 2012), available at: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested.

Page 204, at the end of § 12.05, add the following new text:

§ 12.06 *RILEY v. CALIFORNIA*: THE CELL PHONE CASE

Times change, and the questions and controversy concerning the scope of police authority under the SILA exception change with them. In *Riley v. California*,[80] the Court faced the following question: May the police, under the SILA exception, conduct a warrantless search of digital information on a cell phone seized from an individual who has been arrested? The Court's unanimous answer was no.

Riley covered two different cases. In the first case, *R* was stopped for driving with expired registration tags and then arrested for firearm possession on the basis of guns the police found in the car *R* was driving. *R* was searched incident to his arrest, and the police removed his "smart phone" from his pants pocket. The police later discovered photos on *R*'s phone showing *R* in front of a car the police suspected had been involved in a recent shooting. *R* was subsequently charged,

convicted and sentenced to fifteen years to life in prison in connection with those shootings, in part on the basis of the evidence from his cell phone.

In the second case, the police observed *W* making a drug sale from a car. *W* was arrested and, at the police station, the police took two cell phones from *W*'s person. They used photo and contact information on the phone (a particular number was labeled "my house") to locate *W's* residence. On the basis of this information, the police obtained a search warrant for the residence. As a result of the subsequent search of the apartment, *W* was charged and convicted on three possession counts related to drugs and firearms and was sentenced to more than twenty years in prison.

Chief Justice Roberts, writing for eight members of the Court, began by reviewing the "search incident to arrest trilogy" of *Chimel*,[81] *Robinson*,[82] and *Gant*,[83] and noted that "a mechanical application of *Robinson* might well support the warrantless searches here." That "mechanical" reasoning would be: (i) the cell phones were properly taken from the arrestee's person under the SILA exception; (ii) police inspection of the contents of the cell phones was permissible because the SILA exception allows searching the inside of objects seized incident to arrest (such as the cigarette package in *Robinson*); and (iii) under *Robinson*, there is no case-by-case consideration of whether the underlying justifications for the SILA exception apply.

Yet, the Court rejected this path. Chief Justice Roberts wrote that while the "categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales have much force with respect to digital content on cell phones." Relying on *Gant* (which similarly departed from *Robinson*'s automatic rule, although over Chief Justice Roberts' dissent), the *Riley* Court described the issue before it as whether applying the SILA "doctrine to this particular category of effects would 'untether the rule from the justifications underlying the *Chimel* exception.'"[84] Conducting that analysis, the Chief Justice dryly noted that once "an officer has secured a phone . . . data on the phone can endanger no one," and he was similarly dismissive of claims that searching a cell phone might be necessary to prevent the destruction of evidence.

While finding the *Chimel* government interests inapplicable in the cell phone context, the Court importantly — probably crucially — also described a difference in the arrestee's privacy interest. The Court noted that it may make sense to conclude, in the context of "physical items," "that inspecting the contents of an arrestee's pockets" does not intrude much on privacy "beyond the arrest itself." But not so with cell phones. The government's assertion that searching the contents of a cell phone is indistinguishable from a search of physical items, Chief Justice Roberts wrote, "is like saying a ride on horseback is materially indistinguishable from a flight to the moon." The scope and volume of personal information stored on cell phones, the Court explained, "would typically expose to the government far *more* than the most exhaustive search of a house."[85]

The Court's decision in *Riley* provides a very clear rule, while simultaneously opening new questions. The clear rule: the police may not justify a search of the contents of a cell phone under the SILA exception; to view such data either a warrant must be obtained or a different warrant exception must apply. As to the questions, an immediate and perhaps continuing one will be the

scope of police authority to search other technological devices under the SILA doctrine — tablets, e-readers, activity trackers, digital recorders and more, including all the new devices to come. More broadly, will the Court's unanimous willingness to eschew "mechanical application" of existing Fourth Amendment tests in the face of new technologies expand beyond the SILA exception? For example, will a *Riley*, technology-is-different approach apply in deciding what constitutes a search (where the Court is already struggling)?[86] Will it matter to the application of the "plain view" exception [87] in the context of massive data aggregations? The Court will have ample opportunity to consider *Riley*'s implications in these and other contexts.

[80] 134 S. Ct. 2473 (2014).

[81] Discussed in § 12.03, *supra*.

[82] Discussed in § 12.04, *supra*.

[83] Discussed in § 12.05[C], *supra*.

[84] 134 S. Ct. at 2485 (quoting *Gant*, 556 U.S. 332, 343 (2009).

[85] *Id.* at 2490 (emphasis in original).

[86] *See* § 6.10, *supra*.

[87] *See* Chapter 14, *infra*.

CHAPTER 15 (Vol. 1)

SEARCHES INCIDENT TO LAWFUL ARRESTS

§ 15.02 ARREST INVENTORIES

Page 243, at the end of the first paragraph, add new footnote 29.1:

Neither a search . . . an arrest inventory.[29.1]

[29.1] Relying on a different justification from the inventory decisions, the Court has also approved obtaining a DNA sample by swabbing the inside of an arrestee's cheek as part of the routine booking procedure for those charged with "serious offenses." *See* Maryland v. King, 133 S. Ct. 1958 (2013) (discussed more fully § 12.02, *supra* this supplement).

CHAPTER 16 (Vol. 1)

CONSENT SEARCHES

§ 16.02 CONSENT SEARCHES: GENERAL PRINCIPLES

Page 248, add to footnote 24:

[24] . . . *See also* Fernandez v. California, 134 S. Ct. 1126 (2014) (in which the Court states the "ultimate touchstone of the Fourth Amendment is 'reasonableness,' " and consent searches "occupy one of [the] categories" of permissible warrantless searches; "[i]t would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search"; and, even if the police could obtain a warrant, this would be a "needless inconvenience [to] everyone involved").

§ 16.05 THIRD-PARTY CONSENT

Page 256, add to footnote 67:

[67] . . . In *Fernandez v. California*, 134 S. Ct. 1126 (2014), Justice Scalia stated in a concurring opinion that he believes that *Randolph* was wrongly decided.

Page 257, line 6, add new footnote 68.1:

As the preceding . . . shared social-expectation standard.[68.1]

[68.1] Is there a *third* way to analyze these cases? In light of the Supreme Court's recent resuscitation of the pre-*Katz* trespass doctrine, see§ 6.10[E] of the Text, Justice Scalia recently observed in dictum that the argument "that the search of [a person's] shared apartment violated the Fourth Amendment because he had a right under property law to exclude the police," is an argument that cannot "be . . . easily dismissed." Fernandez v. California, 134 S. Ct. 1126, 1137 (2014) (concurring opinion).

Page 257, at the end of the first sentence in the second to last paragraph on the page, add new footnote 69.1:

The line drawn . . . thin and formalistic.[69.1]

[69.1] Indeed, in *Fernandez v. California*, 134 S. Ct. 1126 (2014), the Supreme Court, 6-3, repeatedly described *Randolph* as a "narrow exception" to "our cases [that] firmly establish that police officers may search jointly occupied premises if one of the occupants consents." In *Fernandez*, *F* was arrested in an apartment he shared with *R*. At that time, he stated that "[y]ou don't have any right to come in here. I know my rights." After removing *F* and taking him to the police station for booking, an officer returned to the premises and requested and received consent

from *R* to search the premises. The Court described this as a "very different situation," and noted that Justice Souter's opinion "went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present. Again and again, the opinion of the [*Randolph*] Court stressed this controlling factor."

Justice Alito, speaking for the Court, stated that *R*'s prior objection "cannot be squared with the 'widely shared social expectations' or 'customary social usage' [approach] upon which the *Randolph* holding was based." He considered it "obvious that the calculus . . . would likely be quite different if the objecting tenant was not standing at the door . . . (and especially when it is known that the objector will not return during course of the visit)." This was a proposition that Justice Ginsburg, joined by Justices Kagan and Sotomayor, questioned. Quoting a Seventh Circuit dissent, she stated: "'Only in a Hobbesian world,' . . . 'would one person's social obligations to another be limited to what the other[, because of his presence,] is . . . able to enforce.'" Moreover, she observed, even if sharing premises "entail[s] the prospect of visits by unwanted social callers while the objecting resident [is] gone, that unwelcome visitor's license would hardly include free rein to rummage through the dwelling in search of evidence and contraband."

§ 16.06 "APPARENT AUTHORITY"

Page 260, at the end of the third to last paragraph, add footnote 75.1:

In effect, therefore . . . the Fourth Amendment.[75.1]

[75.1] What if a police officer acts on the basis of a reasonable mistake of *law*? Does this satisfy the Fourth Amendment? See § 17.03 (Supp.), *infra*.

CHAPTER 17 (Vol. 1)

TERRY v. OHIO: THE "REASONABLENESS" BALANCING STANDARD IN CRIMINAL INVESTIGATIONS

§ 17.02 *TERRY v. OHIO*: THE OPINION

Page 265, add to footnote 22:

[22] . . . Although *Caballes* holds that the police may conduct investigations that go beyond the initial purpose of a seizure, the Court in that case *did* warn that a traffic stop may become "unlawful if it is prolonged beyond the time reasonably required to complete the [traffic stop] mission." In *Caballes*, the dog sniff did not extend the length of the traffic stop. But, in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the facts were different. A routine traffic stop of a car containing two persons lasted 22 or 23 minutes, which was the time required for the officer to question the driver about the reason why he had veered onto the highway shoulder, to gather the driver's license, registration and proof of insurance and conduct a records check, and to receive the passenger's license for a similar records check. Only after the officer returned the documents and issued a warning ticket to the driver — and thus the purpose for the stop was completed — did he call for an officer to come with a trained dog to sniff the vehicle for drugs. (The officer lacked reasonable suspicion that the car contained narcotics.) This extended the time of the seizure by about eight minutes.

The Court, 6-3 per Justice Ginsburg, held that the dog sniff violated the Fourth Amendment because, per *Caballes*, it prolonged the stop beyond the time reasonably required to complete the traffic stop's initial mission. Justice Ginsburg explained that "[t]he critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff 'prolongs' — i.e., adds time to — 'the stop.'"

§ 17.03 "REASONABLE SUSPICION"

Page 268, at the end of the second paragraph, add the following new text and footnotes:

Indeed, "reasonable suspicion," like "probable cause" can be based on an officer's reasonable mistake of fact[33.1] or law.[33.2]

[33.1] Illinois v. Rodriguez, 497 U.S. 177 (1990) ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by [the police] . . . is not they always be correct, but that they always be reasonable."). See also § 16.06 (Treatise), *supra*. More recently, the Court has noted that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials . . . . We have recognized that searches and seizures based on mistakes of fact can be reasonable." Heien v. North Carolina, 135 S. Ct. 530, 536 (2014).

[33.2] Heien v. North Carolina, 135 S. Ct. 530 (2014). In *Heien*, a police officer observed that only one of a vehicle's brake lights was working, so he pulled the driver over. While issuing a warning ticket, he became suspicion of the conduct of the driver and passenger and their answer to questions. Therefore, the officer sought and obtained consent to search the vehicle, where cocaine was discovered. Heien sought to suppress evidence of the cocaine on the ground that his seizure — the stop of the vehicle — was unconstitutional. As it turned out, the applicable state code provision only required drivers to be equipped with one brake light. Thus, the officer did not have legal grounds to pull the vehicle over. Nonetheless, the Supreme Court, 8-1, held that, just as a search or seizure by a police officer can be reasonable based on an erroneous, but reasonable mistake of fact, "reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion [or probable cause]."

Page 272, at the end of subsection [B], add new footnote 48.1:

The Court, again . . . carriage of a gun."[48.1]

[48.1] The Court recently decided another case involving hearsay. In *Navarette v. California*, 134 S. Ct. 1683 (2014), the police stopped a vehicle exclusively on the basis of an anonymous 911 call from a driver who claimed that she had been driven off the road by a truck minutes earlier. She described the vehicle and provided a license plate number. Police officers spotted the vehicle approximately fifteen minutes later. They followed the vehicle for about five minutes, but observed nothing unusual. Nonetheless, they stopped the vehicle. When they did they smelled marijuana. A subsequent search revealed thirty pounds of marijuana.

The Court, 5-4, upheld the stop, although it stated that, as with *White*, it was a "close case." Justice Thomas, writing for the majority, held that although an anonymous tip alone rarely justifies a stop, "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop.'" Here, Justice Thomas pointed out that the caller obviously had first-hand knowledge, and despite her anonymity, the Court found indicia of reliability: the "sort of contemporaneous report [as occurred here] has long been treated as especially reliable," because it tends to negate the likelihood of conscious misrepresentation; a "'statement relating to a startling event' — such as getting run off the road" — is treated as reliable; and furthermore, use of the 911 system enhances the caller's reliability because there are features today that "allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Based, therefore, on the 911 call, the Court concluded that the police had reasonable suspicion that the driver was driving while intoxicated.

Justice Scalia wrote a stinging dissent, criticizing virtually every aspect of the majority analysis. Among his arguments: "the peculiar fact that the accusation was anonymous" ("When does a victim complain to the police about an arguably criminal act . . . without giving his identity, so that he can accuse and testify when the culprit is caught?"); the fact that the report was not so immediate as to justify the majority's assumption of reliability; and, according to amicus briefs, it

is often not possible to identify an anonymous 911 caller and, even if it were true, "it proves absolutely nothing unless the anonymous caller was *aware* of that fact." Beyond this, Justice Scalia stated that the claim that she was driven off the road hardly provides reasonable suspicion that a driver was intoxicated ― there are too many other possible explanations ― especially since the police observed the driver for five minutes and observed no signs of intoxication. According to the dissent,

> [t]he Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that s single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police.
>
> Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference . . . After today's opinion all of us on the road . . . are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving.

§ 17.05 GROUNDS FOR "*TERRY* STOPS"

Page 284, end of the first paragraph of subsection [A], add new footnote 96.1:

However, a seizure . . . crime-investigating session.[96.1]

[96.1] The Supreme Court has not been called upon to determine precisely when a seizure to investigate a completed offense (felony only?) is justified. Justice Thomas, writing for the Court was recently able to avoid reaching that issue in *Navarette v. California*, 134 S. Ct. 1683 (2014), stating only that "we need not address under what circumstances a stop is justified by the need to investigate completed criminal activity." The four dissenters, per Justice Scalia, observed that "[t]he circumstances that may justify a stop under *Terry v. Ohio*, to investigate past criminal activity are far from clear (citing *Hensley*)."

CHAPTER 18 (Vol. 1)

MORE "REASONABLENESS" BALANCING: SEARCHES AND SEIZURES PRIMARILY CONDUCTED FOR NON-CRIMINAL LAW PURPOSES

§ 18.01 OVERVIEW

Page 293, add to footnote 3:

[3] . . . *See also* Maryland v. King, 133 S. Ct. 1958 (2013), discussed more fully § 12.02, *supra* this supplement (approving "searching" for a DNA sample by swabbing the inside of an arrestee's cheek as part of the routine booking procedure for those charged with "serious offenses").

§ 18.02 ADMINISTRATIVE SEARCHES

Page 295, at the end of the second paragraph add the following new text:

This means that the legislature cannot pass a statute that requires businesses to submit to searches without allowing the business an opportunity for "individualized preclearance review" by a court.[12.1]

[12.1] *See* City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015).

Add to footnote 14:

Hotels are not considered "closely regulated" businesses. City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015).

CHAPTER 20 (Vol. 1)

FOURTH AMENDMENT: EXCLUSIONARY RULE

§ 20.07 "FRUIT OF THE POISONOUS TREE" DOCTRINE

Page 382, immediately before subsection [c], add a new subsection:

[iii] Valid Arrest Warrant

The Court has held that the presence of an arrest warrant for the defendant is a strong indicator that any subsequent search incident to the arrest will be valid, regardless of whether the police officer engaged in illegal activity prior to the discovery of the arrest warrant. In *Utah v. Strieff*,[221.1] a police officer stopped the defendant without reasonable suspicion — that is, he conducted an illegal *Terry* stop. During the stop he conducted a routine warrant check on the defendant and found that the defendant had a valid outstanding warrant for a traffic offense. The officer then arrested the defendant, searched him pursuant to that arrest, and recovered methamphetamine and drug paraphernalia. The Supreme Court upheld the search, holding that the officer's "arrest of Strieff thus was a ministerial act that was completely compelled by the pre-existing warrant. And once [the officer] was authorized to arrest Strieff, it was undisputably lawful to search Strieff as an incident of his arrest to protect [the officer's] safety."[221.2]

The *Strieff* decision was seen as yet another heavy blow against the exclusionary rule, since the officer's initial stop had been so clearly illegal. Writing in dissent, Justice Sotomayor argued that the case would allow police to illegally stop anyone on the street, check for warrants, and then conduct a search if the person ended up having a warrant.[221.3] Since there are nearly 8 million outstanding arrest warrants in this country, Justice Sotomayor argued that the case will legitimize (and provide an incentive for) indiscriminant police searches, a practice which will likely have a disproportionate impact on people of color.[221.4] The majority responded to the dissent's concerns by noting that such a "dragnet" approach would expose the police to civil liability, and would not trigger the attenuation doctrine because of the flagrancy of the violation (see subsection [c] below).[221.5]

[221.1] ___ U.S. ___ (2016).
[221.2] *Id.* at *7.
[221.3] *Id.* at *1 (Sotomayor, J., dissenting).
[221.4] *Id.* at *12 (Sotomayor, J., dissenting).
[221.5] *Id.* at *10.

Page 382, at the end of subsection [c], add:

In *Utah v. Strieff*, the Court clarified that stopping a suspect without reasonable suspicion is not a "flagrant" violation as long as the officer has a "legitimate" suspicion — in *Strieff*, the suspicion was based on the fact that the suspect had just emerged from a house where drugs were

being sold.[223.1] This contrasts with the "flagrantly" illegal conduct of a police officer on a "fishing expedition" who stops a suspect without any legitimate suspicion in the mere "hope that something would turn up."[223.2]

[223.1] *Strieff*, ___ U.S. at *9
[223.2] *Id.*

CHAPTER 23 (Vol. 1)

INTERROGATION LAW: PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

§ 23.04 THE FIFTH AMENDMENT PRIVILEGE: THE ELEMENTS

Page 420, at the end of the second sentence of the section, add new footnote 66.1:

The protection of . . . against himself" element."[66.1]

[66.1] To this list a fifth requirement must sometimes be added: the defendant must invoke the privilege at the time of the questioning. *See* Salinas v. Texas, 133 S. Ct. 2174 (2013). In *Salinas*, *S* had voluntarily accompanied the police to the station for questioning and, during a one-hour interview (without arrest or *Miranda* warnings), fell silent when asked whether the shells recovered at the scene of a murder would match *S*'s shotgun. When this silence was used against *S* at his subsequent trial, *S* objected on Fifth Amendment grounds. In a plurality opinion, the Court held that *S*'s Fifth Amendment claim should fail "because he did not expressly invoke the privilege against self-incrimination in response to the officer's question." *Id.* at 2178. The plurality and the dissent in *Salinas* both recognized that there are exceptions to this invocation requirement, and that interrogation involving *Miranda* warnings is one such exception (*Miranda* is fully explained in Chapter 24, *infra*), but the plurality found that express invocation *is* required in the context of voluntary, noncustodial police questioning.

CHAPTER 24 (Vol. 1)

INTERROGATION LAW: *MIRANDA v. ARIZONA*

§ 24.01 *MIRANDA*: A BRIEF OVERVIEW AND SOME REFLECTIONS

Page 435, add to footnote 1:

[1] . . . *See also* Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012). This article, written by the so-called "father of *Miranda*," will prove useful at *every* stage of your study of *Miranda*.

§ 24.10 WAIVER OF *MIRANDA* RIGHTS

Page 473, add new footnote 175.1:

"… nor, critically, will simply remaining silent invoke that right."[175.1]

[175.1] Note that some states will give legal weight to ambiguous invocations of the right to remain silent. *See, e.g.*, State v. Aguirre, 301 Kan. 950 (2015) (defendant's statement: "This is — I guess where I, I'm going to take my rights" was sufficient to invoke *Miranda*.)

CHAPTER 25 (Vol. 1)

INTERROGATION LAW: SIXTH AMENDMENT RIGHT TO COUNSEL

§ 25.06 WAIVER OF THE RIGHT TO COUNSEL

Page 510, add to footnote 106:

[106] . . . *Contra under state constitution,* State v. Bevel, 745 S.E.2d 257 (W.Va. 2013) (retaining the rule of *Michigan v. Jackson* under the state constitution).

CHAPTER 26 (Vol. 1)

EYEWITNESS IDENTIFICATION PROCEDURES

§ 26.01 EYEWITNESS IDENTIFICATION: THE PROBLEM AND POTENTIAL SAFEGUARDS

Page 524, add to footnote 32:

[32] . . . *See also* Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014) (abrogating prior law and holding that, where a trial witness has not participated before trial in an identification procedure, an in-court identification is deemed unnecessarily suggestive and, therefore, inadmissible unless there is good reason for its admission).

CHAPTER 28 (Vol. 1)

THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 28.01 OVERVIEW: THE IMPORTANCE OF DEFENSE LAWYERS IN THE ADVERSARY SYSTEM

Page 547, add to footnote 2:

[2] This is *not* to say that the presence of defense counsel**,** even highly competent defense counsel, can *guarantee* that a trial will be fair and reliable. *See generally* Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE. L. REV. 1049 (2013) (warning against such an assumption).

§ 28.03 THE RIGHT TO COUNSEL: AT TRIAL

Page 558, at the end of the first sentence of the second full paragraph, add new footnote 59.1:

In *Nichols*, the . . . subsequent *counseled* conviction.[59.1]

[59.1]. . . *See also* United States v. Bryant, 2016 U.S. LEXIS 3775. *B* had been convicted of misdemeanors and sentenced to imprisonment for less than one year in multiple tribal-court proceedings. Although *B* was indigent and was not appointed counsel, there was no constitutional violation for the simple reason that the Sixth Amendment does not apply in tribal-court proceedings. In *Bryant*, these tribal court convictions were used as the predicate crimes for a federal charge against *B* of committing domestic assault with two previous convictions. The Court held that this use of *B*'s uncounseled misdemeanor convictions did not violate the Sixth Amendment because those convictions were valid when obtained in tribal court.

§ 28.06 THE RIGHT TO REPRESENTATION BY ONE'S PREFERRED ATTORNEY

Page 576, at the beginning of subsection [B] add the following new text:

Certain statutes allow the government to seize a defendant's assets prior to trial if the assets were related to illegal activity[151.1] or in order to ensure the defendant will have the necessary funds to pay fines or restitution if convicted of the crime.[151.2] Defendants have challenged these seizures under the Sixth Amendment, arguing that if their assets are frozen, they will not be able to hire a lawyer to defend themselves. In a series of cases, the Supreme Court has set out a clear dividing line: the government may legally seize any assets which are "tainted;" such as contraband, property obtained as a result of the crime, or property that is somehow traceable to the crime. However, the government may not seize "untainted" assets that are not connected to criminal activity, because that would undermine the defendant's "Sixth Amendment right to be represented by a . . . qualified attorney whom that defendant can afford to hire."[151.4]

[151.1] *See, e.g.,* 21 U.S.C. § 853 (2005).

[151.2] *See, e.g.,* §1345(a)(2).

[151.3] *Caplin & Drysdale*, 491 U.S 617, 624 (1989).

[151.4] Luis v. United States, 136 S. Ct. 1083, 1089 (2016) (plurality opinion).

Page 578, at the end of subsection [B] add the following new text:

In contrast, the Court has held that the seizure of *untainted* assets does violate the defendant's Sixth Amendment rights. In *Luis v. United States*,[160.1] *L* was charged with obtaining over $45 million in a health care fraud scheme. The government sought a pre-trial order to seize not just the $45 million that were the proceeds of the crime, but also *L*'s remaining $2 million in assets, which were unrelated to the crime. The government argued that it was important to seize the assets in order to preserve them to pay for the restitution and fines that *L* would have to pay if convicted. *L* argued that he had a Sixth Amendment right to use his untainted assets to pay for his attorney.

In a four-Justice plurality decision,[160.2] the Court sided with the *L* and distinguished *Caplin & Drysdale* and *Monsanto*. First, the Court noted that the tainted assets in the previous cases had never legally been the property of the defendant; they always belonged to the victims of the crime. In contrast, the $2 million of untainted assets in *Luis* were legally the property of the defendant; thus, the government had far less authority to freeze those assets. Second, the Court pointed out that in many cases the tainted assets (which may legally be seized) could be used to pay restitution and fines. And finally, the Court was concerned that allowing the government to seize untainted assets would "unleash a principle of constitutional law that would have no obvious stopping place."[160.3] Congress could create ever broader pre-trial asset seizure laws, thus rendering a large percentage of criminal defendants indigent and forcing them to use "publicly paid counsel, including overworked and underpaid public defenders."[160.4]

Writing for a two-Justice dissent, Justice Kennedy argued that the plurality decision would reward criminals "who hurry to spend, conceal or launder stolen property"[160.5] and ultimately harm victims who would be left without restitution. Justice Kennedy would have broadly interpreted *Caplin & Drysdale* and *Monsanto* to mean that a defendant has no Sixth Amendment rights in any assets that are forfeitable to the government under law. Justice Kagan echoed this concern in her own dissent, noting that the plurality's decision draws an "irrational" line between "[t]he thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets" and the thief "who spends those two pots of money in reverse order."[160.6]

[160.1] 136 S. Ct. 1083 (2016).

[160.2] Justice Thomas added a fifth vote to the holding with his concurrence.

[160.3] *Id.* at 1086.

[160.4] *Id.*

[160.5] *Id.* at 1103 (Kennedy, J., dissenting).

[160.6] *Id.* at 1113 (Kagan, J., dissenting).

§ 28.08 EFFECTIVE ASSISTANCE OF COUNSEL: GENERAL PRINCIPLES

Page 586, add to footnote 203:

[203] *See also* Hinton v. Alabama, 134 S. Ct. 1081 (2014) (per curiam) (finding inadequate performance in a death penalty case and describing the attorney's "failure to perform basic research" on "a point of law that is fundamental to his case . . . a quintessential example of unreasonable performance"). *But see* Maryland v. Kulbicki, 136 S. Ct. 2 (2015) (per curiam) (summarily reversing a lower court finding of ineffective assistance which had been based on failure to uncover a report that could possibly have been used to undermine expert testimony).

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Volume 2

CHAPTER 1 (Vol. 2)

INTRODUCTION TO CRIMINAL PROCEDURE

§ 1.03 STAGES OF A CRIMINAL PROSECUTION

Page 12, add to footnote 53:

[53] *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); NANCY J. KING ET AL., HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007).

CHAPTER 3 (Vol. 2)

INCORPORATION OF THE BILL OF RIGHTS

§ 3.01 INCORPORATION: OVERVIEW

Page 34, add to footnote 4:

[4]. . . . In *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court was asked to overrule its earlier decisions and hold that the Privileges and Immunities Clause incorporates the Bill of Rights. Both the four-justice plurality and three of the justices in dissent expressly declined the invitation, thereby reaffirming that the question of rights protection "by the Fourteenth Amendment against state infringement . . . [are] analyzed under the Due Process Clause of that Amendment and not under the Privileges and Immunities Clause." *Id.* at 3030-31; *see also id.* at 3089 (Stevens, J., dissenting); *id.* at 3132 (Breyer, J., dissenting). Only Justice Thomas advocated using the Privileges and Immunities Clause for this purpose. *See id.* at 3059 (Thomas, J., concurring).

§ 3.04 WHICH THEORY HAS "WON" THE DEBATE?

Page 40, after the last full paragraph, add the following new text:

The Court recently had a return foray into the incorporation issue in *McDonald v. City of Chicago*,[32.1] in which the Court had to decide whether the individual right to bear arms for the purpose of self-defense, a right it had first recognized two years earlier, applied to the states. While the case did not produce a majority opinion regarding incorporation through the Due Process Clause, the conclusion that selective incorporation "won" the methodological debate was reaffirmed. The four justice plurality concluded that the right was "fundamental to our scheme of ordered liberty" and applies to the states in the same manner it applies to the federal government. (A fifth justice, Justice Thomas, also found the Second Amendment fully incorporated, but under the Privileges and Immunities Clause, rather than the Due Process Clause). The three dissenting justices who addressed the incorporation question, while reaching a different conclusion on the ultimate question, also seemed to follow a selective incorporation analysis. While the Court was fractured on the proper methodology even under due-process-selective-incorporation, as usual the right at issue was incorporated and incorporated "bag and baggage."

[32.1] 130 S. Ct. 3020 (2010).

CHAPTER 4 (Vol. 2)

THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 4.02 WHEN THE RIGHT TO COUNSEL APPLIES

Page 44, at the end of the first paragraph, add the following new text:

In emphasizing that whether the right to counsel has attached and whether a particular pretrial event constitutes a critical stage constitute two distinct questions, the Court has recently summarized its definition of "critical stage" in previous cases as those "proceedings between an individual and agents of the State . . . that amount to trial like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary."[7.1]

[7.1] Rothgery v. Gillespie County, 554 U.S. 191 (2008).

Page 44, at the end of the first sentence of the last paragraph of § 4.02, add the following new text:

The Court has also held that the right to counsel "extends to the consideration of plea offers that lapse or are rejected,"[10.1] as well as to guilty pleas.[10.2]

[10.1]. . . . Missouri v. Frye, 132 S. Ct. 1399 (2012).

[10.2] . . . . Padilla v. Kentucky, 559 U.S. 356 (2010).

§ 4.03 THE RIGHT TO COUNSEL: AT TRIAL

Page 54, at the end of the first paragraph, add new footnote 52.1:

[52.1] . . . . *See also* Turner v. Rogers, 131 S. Ct. 2507 (2011) (analyzing under the Due Process Clause a claim of a right to counsel in the context of a civil contempt proceeding for failure to pay child support that resulted in 12 months' imprisonment and concluding that an indigent is "not automatically" entitled to counsel in that context).

Page 54, at the end of the first sentence of the second full paragraph, add new footnote 52.2:

In *Nichols*, the . . . subsequent *counseled* conviction.[52.2]

[52.2] . . . . *See also* United States v. Bryant, 2016 U.S. LEXIS 3775. *B* had been convicted of misdemeanors and sentenced to imprisonment for less than one year in multiple tribal-court proceedings. Although *B* was indigent and was not appointed counsel, there was no constitutional violation for the simple reason that the Sixth Amendment does not apply in tribal-court proceedings. In *Bryant*, these tribal court convictions were used as the predicate crimes for a

federal charge against *B* of committing domestic assault with two previous convictions. The Court held that this use of *B*'s uncounseled misdemeanor convictions did not violate the Sixth Amendment because those convictions were valid when obtained in tribal court.

Page 54, add to footnote 53:

[53] . . . . *See also* State v. Kelly, 999 So.2d 1029 (Fla. 2008).

Page 57, add to footnote 68:

[68] . . . . *See also* State v. Young, 172 P.3d 138 (N.M. 2007) (staying death penalty prosecution on the ground that $165,000 in compensation for two defense attorneys in extremely complex capital case was so inadequate as to trigger presumption that no lawyer could provide effective assistance).

§ 4.04 THE RIGHT TO COUNSEL: ON APPEAL

Page 61, add to footnote 82

[82] . . . . *But see* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006) (noting that Alabama is now the only "active" death penalty state that does not provide counsel to indigent Death Row inmates before they file their state habeas petitions and arguing that this and other developments have undercut *Giarratano* to the point that it should be overruled).

§ 4.05 THE RIGHT OF SELF-REPRESENTATION

Page 63, add to footnote 89:

[89] . . . . *See generally* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

Page 63, at the end of subheading [A], add new footnote 89.1:

[A] The Defense: Who is in Charge?[89.1]

[89.1] *See generally* Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1235-46 (2006).

Page 64, add to footnote 94:

[94] . . . . *See also* Gonzalez v. United States, 553 U.S. 242 (2008).

Page 66, following the first sentence of the second full paragraph, add the following new text:

(Indeed, a recent empirical study found, in a limited sample, that "*pro se* felony defendants in state courts are convicted at rates equivalent to, or lower than, the conviction rates of represented felony defendants,"[99.1] though this may be as much an indictment of the quality of appointed counsel as an endorsement of the quality of pro se representation).

[99.1] Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

Page 66: add to footnote 103:

[103]. . . . *contra under the state constitution*, State v. Rafay, 222 P.3d 86 (Wash. 2009).

Page 67, at the end of the first full paragraph, add the following new text:

Subsequently, in *Indiana v. Edwards*,[105.1] the Court limited *Faretta* but expressly declined to overrule it.

[105.1] 554 U.S. 164 (2008) (discussed in detail, *infra*, this supplement).

Page 67, at the end of the last paragraph, add the following new text:

Nor is *Faretta* terribly popular with defense attorneys. In the words of one defender-turned-law-professor, the attorney is left "feeling as though one is being required to stand by and watch as a client steps in front of an oncoming bus."[108.1]

[108.1] Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 434 n.46 (2007).

Page 68, at the end of the first full paragraph, add the following new text:

The bottom line, according to a recent sampling of state and federal data, is that between 0.3% and 0.5% of felony defendants end up representing themselves at the time their case is resolved.[110.1]

[110.1] *See* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447 (2007).

Page 68, at the end of the second full paragraph, add the following new text:

The Court has recently added an important layer of inquiry to the question whether a defendant is competent to represent himself. In *Godinez v. Moran*,[113.1] the Court rejected the notion that the Constitution requires a higher standard of competence to waive counsel and plead guilty than is required for a defendant to be brought to trial. So, under *Godinez*, a unitary standard

governed both mental competence to be tried and mental competence to represent oneself. In *Indiana v. Edwards*,[113.2] however, the Court established that this is not necessarily the case.

In *Edwards*, *E*, who suffered from schizophrenia, faced attempted murder and other charges arising from an incident in which he tried to steal a pair of shoes from a department store and, when he was discovered, fired a gun at a security officer and hit a bystander. Because of his mental illness, *E* was initially held incompetent to stand trial and was committed to a state hospital. About five years later, *E*, while still suffering from schizophrenia, had recovered to the point that the trial court concluded he was competent to stand trial. Under *Godinez*, this meant that *E* would have been competent to waive counsel and plead guilty, but that was not what *E* wanted to do. Instead, *E* wished to proceed to trial representing himself. The trial court found him *incompetent* to do so. *E* was represented at his trial by appointed counsel and convicted of attempted murder.

In *Edwards*, the Court held that the Constitution allowed the state to "insist[] that the defendant proceed to trial with counsel" and thereby potentially to deny *E* the right to represent himself. The Court distinguished *Godinez* on the grounds that the defendant in that case had not wished to represent himself *at a trial* and that the state had acquiesced in the defendant's waiver of counsel. The *Edwards* Court further reasoned that mental illness that might not prevent a defendant from helping his lawyer could nonetheless render him "unable to carry out the basic tasks needed to present his own defense without the help of counsel." Moreover, the Court added, the spectacle of a defendant who lacks such capacity representing himself at trial will not advance the dignity interest that underlies the *Faretta* right and would risk eliminating both the appearance and the reality of a fair trial.

Edwards's holding — that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves" — is highly significant. Yet, like many such decisions, it raises a host of further questions. First, what level of mental incompetence is needed to deny the right to self-representation? As the dissenters complained, the Court expressly refused to give any answer or even expressly to determine whether *E* was properly denied the right to represent himself. Definition of that standard will have to await future cases. Other fresh questions will be whether, when a state *can* deny self-representation at trial, the Court will conclude that it *must* deny self-representation, and whether *Edwards*' distinction from *Godinez* will extend to the guilty plea context: *Godinez* held that a state may *allow* a minimally competent defendant to plead guilty *pro se*, but *Edwards* throws open the possibility that a state could refuse such permission, absent a showing of greater competence. Finally, on a practical level, the question arises whether trial courts will take *Edwards* as an invitation to severely circumscribe *Faretta* by frequently finding defendants incompetent to represent themselves, and/or whether trial courts will be more inclined to find defendants competent to stand trial, knowing that they may do so without simultaneously risking the ordeal of a trial with a *pro se* defendant.

[113.1] 509 U.S. 389 (1993).

[113.2] 554 U.S. 164 (2008).

§ 4.06 THE RIGHT TO REPRESENTATION BY ONE'S PREFERRED ATTORNEY

Page 70, add to footnote 124:

[124] . . . . *See also* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (stating that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.").

Page 71, at end of subsection [A], add the following new text:

Finally, the Court has "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, . . . the demands of its calendar," and the need to ensure that trials are conducted "within the ethical standards of the profession."[129.1] Notwithstanding these limitations, however, the right to counsel of choice is the "root meaning"[129.2] of the Sixth Amendment guarantee and, unlike the right to effective assistance of counsel, if it is denied, "[n]o additional showing of prejudice is required to make the violation 'complete.'"[129.3]

[129.1] *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006). See also, *Luis v. United States*, 136 S. Ct. 1083 (2016) (describing the right as "fundamental").

[129.2] *Id.* at 147-48.

[129.3] *Id.* at 146.

Page 72, at end of subsection [B], add the following new text:

In *Luis v. United States*,[138.1] however, the Court limited *Caplin* and *Monsanto* to "tainted" assets, e.g., "a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime."[138.2] In *Luis*, the government sought to freeze the defendant's "legitimate untainted" assets prior to trial in order to assure that funds would be available to pay for restitution and other criminal penalties. Although, as in *Caplin* and *Monsanto*, the assets would be forfeitable upon conviction, the plurality (and Justice Thomas providing the fifth vote in a separate concurrence) concluded that the distinction between tainted and untainted assets makes all the difference for Sixth Amendment purposes. In the case of "innocent" assets, according to Justice Breyer's controlling opinion, the fundamental Sixth Amendment right to be represented "by an otherwise qualified attorney whom that defendant can afford to hire" outweighs the government's interest in obtaining criminal forfeiture and "the victims' interest in securing restitution."[138.3] The dissenting justices argued that the distinction made little sense, given that money is fungible, and that the decision would "reward criminals who hurry to spend . . . stolen property by assuring them that they may use their own funds to pay for an attorney after they have dissipated the proceeds of their crime."[138.4]

[138.1] 136 S. Ct. 1083 (2016).

[138.2] *Id*. at 1090 (plurality opinion).

[138.3] *Id*. at 1093.

[138.4] *Id*. at 1103 (Kennedy, J., dissenting).

§ 4.08 EFFECTIVE ASSISTANCE OF COUNSEL: GENERAL PRINCIPLES

Page 75, add to footnote 158:

[158] . . . *But see* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (arguing that — because of the length of time direct appeals typically take — providing appellate counsel with a means to raise ineffective assistance of counsel in the trial court *prior* to adjudication of the appeal would more effectively enforce the right to effective assistance).

Page 77: At the end of the first paragraph, add new footnote 171.1:

According to the . . . a criminal defendant."[171.1]

[171.1] The Court recently quoted this language from *Strickland* in expressly reaffirming this holding, adding that the objective-standard-of-reasonableness "standard is necessarily a general one." *See* Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam).

Page 80, at the end of subsection [i] add the following new text:

A dismal chance of success can also supply a sufficient tactical reason for counsel not to act. In *Knowles v. Mirzayance*,[174.1] *M* initially pled both not guilty and not guilty by reason of insanity. Under the governing state procedure, *M* would be tried in a bifurcated proceeding that addressed guilt in phase one and insanity in phase two, before the same jury. In phase one, *M*'s counsel offered evidence that *M* was insane to show he lacked the "premeditation and deliberation" the state required for the first-degree murder charge. When the insanity evidence apparently failed to convince the jury during the guilt phase (*M* was convicted of first-degree murder), *M*'s counsel advised *M* to withdraw his insanity plea, and *M* did so before phase two commenced. *M* subsequently argued that the advice to withdraw the insanity plea constituted ineffective assistance, and lower courts agreed on the ground that *M* had "nothing to lose" by attempting the plea and "nothing to gain" by dropping it. In unanimously rejecting *M*'s claim, the Supreme Court concluded that, having carefully and reasonably determined that the insanity defense was almost certain to lose, *M*'s counsel could decide to recommend dropping the claim; doing so did not show deficient performance. In the Court's view, the claim's weakness, though not so great as to make the claim frivolous, provided reason enough to drop it.

[174.1] 556 U.S.111 (2009).

Page 81: At the end of subsection [ii], add the following new text:

In its 2009-10 term, the Roberts Court exhibited an intense interest in ineffective assistance of counsel claims in the death penalty context, deciding five cases and ruling twice for petitioners under sentence of death[177.1] and three times for the state.[177.2] The cases arose in different procedural contexts which meant different standards of review, and the decisions were highly fact-specific making generalizations particularly difficult. Nonetheless, this sudden activity is somewhat remarkable by previous standards and several aspects are worthy of note.

First, four of the five decisions were per curiam opinions written on the basis of the petitions for certiorari without full briefing or oral argument, and each of them changed the result of the lower court. This suggests that the current Court considers the correct outcome in such cases in this particular area so important that it is willing to engage in error correction — in both directions — even when the governing legal principles are well-settled.

Second, the Court's willingness to find ineffective assistance of counsel in at least some cases has continued after Justice O'Connor's retirement, though perhaps to a lesser degree. Indeed, in one unanimous per curiam opinion in which the Court found deficient attorney performance,[177.3] the Court in reaching its conclusion relied in part on *Rompilla v. Beard*,[177.4] a 5-4 decision that stands as the high-water mark for the Court's willingness to find deficient performance.

Third, claims that counsel's performance was inadequate under *Strickland* because of a failure to investigate have the most success at the Supreme Court level. That was the core of the claim in the three cases discussed in the Text — *Williams*, *Wiggins*, and *Rompilla* — and the core of the claim in the two cases the defendant won in the 2009-10 term as well as the grounds for only dissent in the cases the defendant lost.[177.5]

[177.1] Porter v. McCollum, 558 U.S. 30 (2009) (per curiam); Jefferson v. Upton, 560 U.S. 284 (2010) (per curiam).

[177.2] Wood v. Allen, 558 U.S. 290 (2010); Bobby v. Van Hook, 558 U.S. 4 (2009) (per curiam); Wong v. Belmontes, 558 U.S. 15 (2009) (per curiam).

[177.3] *McCollum*, 558 U.S. at 39-40.

[177.4] 545 U.S. 374 (2005).

[177.5] *Allen*, 558 U.S. at 305-09 (Stevens, J., dissenting). *See also* Hinton v. Alabama, 134 S. Ct. 1081 (2014) (per curiam) (finding inadequate performance in a death penalty case and describing the attorney's "failure to perform basic research" on "a point of law that is fundamental to his case . . . a quintessential example of unreasonable performance"). *But see* Maryland v.

Kulbicki, 136 S. Ct. 2 (2015) (per curiam) (summarily reversing a lower court finding of ineffective assistance which had been based on failure to uncover a report that could possibly have been used to undermine expert testimony).

Page 82: at the end of subsection [2], add the following new text:

Finally, in the context of a guilty plea, the Court has held that misadvice or even failure to advise a noncitizen client of the risk of deportation when a guilty plea creates such a risk is constitutionally deficient representation.[179.1]

[179.1] Padilla v. Kentucky, 559 U.S. 356 (2010). *See also* § 9.02, *infra* this Supplement (discussing *Padilla*).

Page 84, add to footnote 190:

[190] . . . *But see* Schriro v. Landrigan, 550 U.S. 465 (2007). In *Landrigan*, *L* was attempting to overturn his death sentence on ineffective assistance of counsel grounds, specifically counsel's failure to conduct further investigation into mitigating circumstances. In rejecting *L*'s effort to obtain an evidentiary hearing regarding his claim, a five-justice majority of the Court (including Justice Alito who replaced Justice O'Connor), upheld a lower court's finding that certain mitigating evidence — evidence *L* argued his counsel would have discovered and should have used — was so weak that counsel's failure to discover and offer it could not amount to prejudice. Thus, the Court's more rigorous application of the *Strickland* test described in the text may prove to have been temporary, since it "was attributable in large part to movement over time by Justice Sandra Day O'Connor." Albert W. Alschuler, *Celebrating Great Lawyering*, 4 OHIO ST. J. CRIM. L. 223, 224 (2006).

Page 84, at the end of the third full paragraph, add new footnote 190.1:

Rompilla v. Beard . . . of these cases.[190.1]

[190.1] Indeed, according to one commentator, application of the *Strickland* standard with the vigor shown in *Rompilla* would assure victory in the post-conviction appeals in so many capital cases that it "might come close to abolishing the death penalty in many states." Albert W. Alschuler, *Celebrating Great Lawyering*, 4 OHIO ST. J. CRIM. L. 223, 225 (2006).

Page 85: at the end of the first paragraph of section [c][i], add new footnote 190.2:

[190.2] . . . Where ineffective assistance of counsel leads a defendant to reject a favorable plea bargain, the Court has held that the defendant's subsequent conviction through a constitutionally reliable guilty plea, *Missouri v. Frye*, 132 S. Ct. 1399 (2012), or a trial, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), does *not* eliminate the prejudice from the ineffective assistance if the outcome for the defendant is less favorable.

CHAPTER 6 (Vol. 2)

CHARGING DECISIONS

§ 6.05 PRELIMINARY HEARINGS

Page 126, at the end of the last paragraph, add new footnote 76.1:

Having the witness . . . cross-examine the witness.[76.1]

[76.1] Lower courts have reached different conclusions as to whether the Supreme Court's new Confrontation Clause analysis set out in *Crawford v. Washington*, 541 U.S. 36 (2004) (discussed in detail in § 11.02, *infra* (text and this supplement)), now forbids the introduction at trial of testimony from preliminary hearings. *Compare, e.g.*, State v. Stuart, 695 N.W.2d 259 (Wis. 2005) (preliminary hearing testimony barred under *Crawford*), *with* State v. Stano, 159 P.3d 931 (Kan. 2007) (preliminary hearing testimony not barred).

§ 6.06 GRAND JURIES

Page 127, add to footnote 77:

[77] . . . *See generally* John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341 (2005); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398 (2006); Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265 (2006).

§ 6.07 JOINDER AND SEVERANCE: OFFENSES

Page 133, add to footnote 123:

[123] . . . *See generally* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349 (2006).

§ 6.08 JOINDER AND SEVERANCE: DEFENDANTS

Page 138, add to footnote 151:

[151] . . . *See generally* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349 (2006).

CHAPTER 7 (Vol. 2)

DISCOVERY

§ 7.01 CONSTITUTIONAL DISCOVERY RIGHTS OF THE DEFENDANT: OVERVIEW

Page 143, add to footnote 1:

[1] . . . . *See generally* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence? in* Criminal Procedure Stories (Carol S. Steiker ed. 2006); Symposium: *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943-2256 (2010).

§ 7.02 ELEMENTS OF THE *BRADY* RULE

Page 147, add to footnote 25:

[25] . . . . *See also* Smith v. Cain, 132 S. Ct. 627, 630 (2012) ("reasonable probability does not mean that the defendant would more likely than not have received a different verdict," but "only that the likelihood of a different result is great enough to undermine confidence in the outcome") (internal quotation omitted).

Page 148: at the end of the first full paragraph, add the following new text:

Applying the "reasonable probability" standard to the particular facts of actual cases has proven so challenging that the Court repeatedly, over the objection of dissents, has chosen to review whether lower courts have properly applied it, even though the Court does "not normally consider questions" of mere misapplication of facts under such a "well-established legal principle[]."[25.1]

[25.1] Wetzel v. Lambert, 132 S. Ct. 1195, 1200 (2012) (Breyer, J., dissenting). *See also* Smith v. Cain, 132 S. Ct. 627, 640 (2012) (Thomas, J., dissenting); Kyles v. Whitley, 514 U.S. 419, 460 (Scalia, J., dissenting).

Page 149, add to footnote 33:

[33] . . . . *See, e.g.*, Cone v. Bell, 556 U.S. 449, 470 n.15 (2009).

Page 149, add to footnote 35:

[35] . . . . *See also* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) (citing ethical standards in this regard).

CHAPTER 8 (Vol. 2)

SPEEDY TRIAL

§ 8.02 CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

Page 167, before the last sentence of subsection [b] add the following new text:

Attribution of defense counsel delays to the defendant is the general rule, whether counsel is retained or appointed.[30.1]

[30.1] Vermont v. Brillon, 556 U.S. 81, 91 (2009).

§ 8.03 STATUTORY SPEEDY TRIAL RIGHTS

Page 171, add to footnote 54:

[54] . . . . Although the federal statute provides many grounds for exclusion, it does *not* permit the defendant to "prospectively waive the application of the Act." Zedner v. United States, 547 U.S. 489, 503 (2006). In other words, a defendant's pretrial consent to unlimited delay does not, by itself, provide a basis for tolling the speedy trial clock.

CHAPTER 9 (Vol. 2)

PLEA BARGAINING AND GUILTY PLEAS

§ 9.02 VALIDITY OF A GUILTY PLEA: CONSTITUTIONAL PRINCIPLES

Page 183: add to footnote 50:

[50]. . . . *See also* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009).

Page 186: before the last paragraph of subsection [C], add the following new text:

The Supreme Court has recently held, however, that deficiency *will* be found for inadequate advice about the possibility of deportation. In *Padilla v. Kentucky*,[67.1] *P*, a lawful permanent resident in the United States for more than 40 years, was charged with transporting a large amount of marijuana, a crime for which conviction would make *P* deportable. *P*'s attorney, however, wrongly told *P* that *P* "did not have to worry about immigration status since he had been in the country so long." Relying on this advice, *P* pleaded guilty, making his deportation "virtually mandatory." In considering *P*'s claim of ineffective assistance of counsel, the Court (expressly setting aside the question whether deportation was a "direct" or "collateral" consequence) found the attorney's advice deficient under the Sixth Amendment. Not limiting its holding to affirmatively incorrect advice, the Court decreed that when, as in *P*'s case, "the deportation consequence is truly clear" counsel has an affirmative Sixth Amendment duty to inform a noncitizen client of that consequence. Even when "the law is not succinct and straightforward," counsel must at least "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."

[67.1] 559 U.S. 356 (2010). *See generally* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011).

§ 9.05 PLEA BARGAINING: GENERAL PRINCIPLES

Page 197: add the following new text at the end of subsection [D]:

[E] Ineffective Assistance of Counsel in Plea Negotiations

[1] Applicability of *Strickland*

The Court held in *Hill v. Lockhart*[122.1] and reaffirmed in *Padilla v. Kentucky*[122.2] that the *Strickland* test applies to a defendant's guilty plea, but what about plea offers that the defendant does *not* accept? Does *Strickland* apply to counsel's conduct in the negotiation and consideration of offers that are not accepted? In *Missouri v. Frye*[122.3] and *Lafler v. Cooper*[122.4] the Court squarely

faced this issue and, in 5-4 decisions authored by Justice Kennedy, held that such negotiation and consideration represent a critical stage of the prosecution and, therefore, that *Strickland* applies.

In *Frye*, *F* was charged with driving with a revoked license. Because *F* had three previous convictions for that offense, the state charged him with a felony punishable by up to four years in prison. The prosecutor sent a letter to *F*'s counsel offering to reduce the charge to a misdemeanor with a recommendation of 90 days in jail, setting an expiration date on the offer six weeks hence. *F*'s attorney did not tell *F* about the offer, the offer expired, and *F* subsequently pleaded guilty without a plea agreement and was sentenced to three years in prison.

In *Lafler*, *C* was charged with assault with intent to murder *M* and three other charges. The prosecution offered a plea bargain in which it would dismiss two of the charges and recommend a sentence of roughly four to seven years. *C* admitted his guilt to the trial court and expressed a willingness to accept the offer. *C* ultimately rejected the offer, however, "after his attorney convinced him that the prosecution would be unable to establish his intent to murder [*M*] because she had been shot below the waist." *C* was tried, convicted, and received a mandatory minimum sentence of roughly fifteen-and-a-half to thirty years.

There were several reasons for thinking the Court might distinguish these cases from its earlier cases that involved advice concerning pleas that were accepted. First, in *Hill* and *Padilla* the defendants were convicted on the basis of guilty pleas for which they alleged receiving incompetent advice. Here, in contrast, the attorney incompetence involved representation *preceding* any plea; *F* and *C* received competent representation at the actual proceedings in which they were convicted. The dissenters argued that this meant that the convictions of *F* and *C* were reliable and the result of a fair adjudication. Second, the negotiation context makes it much harder for the prosecution or the trial court to make sure nothing is amiss, in contrast to the plea context, in which the court can establish that proper advice has been given. Third, because there is no right to a plea offer in the first place, the state argued that *Strickland* should not apply to consideration of a plea offer that happens to be made.

While noting that these points were "neither illogical nor without some persuasive force," the Court found that the bad representation *F* and *C* received during failed plea negotiations should be scrutinized under *Strickland*: "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel."[122.5] The "simple reality" that the overwhelming majority of convictions are the result of guilty pleas, the Court concluded, means that "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Because "the negotiation of a plea bargain . . . is almost always the critical point for a defendant," the Sixth Amendment and *Strickland*'s two-prong test of deficiency and prejudice apply.

This was a notable recognition by the Court of the contemporary reality of the criminal justice system, particularly as the Court incorporated that reality into its constitutional

interpretation. It is all the more notable because of the thorny additional questions, discussed below, raised by application of *Strickland* to plea negotiations.

[2] Deficiency

Having established in *Missouri v. Frye* that a defendant is entitled to effective representation during plea negotiations, the Court next noted that defining counsel's responsibilities presents "a difficult question." For the most part, the Court left answers to that question for the future. For *Frye*, the Court held that, as a general rule, "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[122.6] For *Lafler*, all the parties conceded that the attorney's absurd advice that *C* could not be convicted because of where *M* was wounded constituted deficient performance, so the Court found it "unnecessary . . . to explore the issue."[122.7] As a result, what constitutes representation "below an objective standard or reasonableness" in the plea negotiation context, beyond failing to let the defendant know about good offers, is largely left for future cases.

Justice Scalia's dissent in *Frye* (joined by Chief Justice Roberts and Justices Thomas and Alito) did not contest that defense counsel's action was unreasonable, but highlighted some of the overwhelming difficulties the dissenters see in determining deficiency in the future. "It will not do," Justice Scalia wrote, "simply to announce that they will be solved in the sweet by-and-by."[122.8]

[3] Prejudice

How does the second prong of *Strickland*, the requirement of a "reasonable probability that the result would have been different," apply in the context of incompetent representation surrounding a plea offer that has lapsed or been rejected? According to the Court in *Frye*, defendants must show a "reasonable probability" of three things. First, that "they would have accepted the earlier plea offer" with effective counsel. Second, that "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." (This second requirement presented a challenge for *F* because, after the offer was conveyed to *F*'s counsel but before *F* would have had an opportunity to enter his plea, *F* was arrested *again* for driving with a revoked license). Third, "that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

[4] Remedy

A final but serious challenge in applying *Strickland* to plea negotiations is determining the appropriate remedy when both deficient performance and prejudice are established, an issue the Court addressed in *Lafler v. Cooper*. Where a defendant has pleaded guilty while receiving incompetent representation during the guilty plea, as in *Padilla v. Kentucky*, the remedy seems clear: "an opportunity to withdraw the plea and proceed to trial."[122.9] The remedy is less obvious where (i) the defendant's injury is a lost opportunity for a better offer, and (ii) the defendant was convicted by a trial (*Lafler*) or a plea (*Frye*) at which the defendant received competent representation.

In *Lafler* the Court addressed the remedy question by distinguishing two situations. In the first, the defendant's conviction at trial and the plea bargain the defendant would have accepted are for the same charges, and the judge is in a position to give the same sentence post-trial as post-plea. In the second, the plea the defendant would have accepted is to lesser or fewer charges than his trial conviction, or the trial conviction in some other way narrows the lawful sentences the judge can impose. In the first case, *Lafler* holds that the appropriate remedy is resentencing. In the second case the appropriate remedy is to order the prosecution to reoffer the plea proposal.

Importantly, however, in either case the defendant is not automatically placed back in the position he would have been in with competent representation during the original negotiations. Instead, the Court said in *Lafler*, "the court may exercise discretion" in determining what sentence to give within a range between the plea offer and the sentence after trial and, in the case where the counts of conviction differ, "whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." This discretionary remedy, the Court explained, was necessary to "'neutralize the taint' of a constitutional violation" without giving the defendant a windfall or needlessly squandering resources the state invested in the prosecution.

The Court gave little guidance in *Lafler* as to how courts are to exercise their discretion on the continuum between the plea-offer sentence and the post-trial sentence, noting that "[p]rinciples elaborated over time" will give more guidance. Two factors the Court did note that may be considered are whether the defendant expressed willingness to accept responsibility for the crime (presumably, at the defendant's post-trial sentencing) and, at least possibly, "information concerning the crime that was discovered *after* the plea offer was made."[122.10] In addition the "baseline" of the position both sides were in at the time of the original offer "can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a second trial."

As to the *Frye* situation, where there has been no trial because the defendant accepted a plea bargain less favorable than the one the defendant would have pleaded to with competent counsel, the Court said even less, though it seems likely that trial courts will have some considerable discretion there as well.

The dissenters took the Court to task for its "unheard-of"[122.11] and "opaque"[122.12] remedy. Justice Alito encapsulated the sentiment by saying that if there has been a Sixth Amendment violation, "the only logical remedy is the give the defendant the benefit of the favorable deal."[122.13] The dissenters argued that the Court's unwillingness to require this remedy — instead giving lower courts discretion — evidenced the error in its Sixth Amendment analysis.

[122.1] 474 U.S. 52 (1985). *See* § 9.02[C][5], *supra*.

[122.2] 559 U.S. 356 (2010).

[122.3] 132 S. Ct. 1399 (2012).

[122.4] 132 S. Ct. 1376 (2012)

[122.5] *Frye*, 132 S. Ct. at 1407.

[122.6] *Id.* at 1408.

[122.7] *Lafler*, 132 S. Ct. at 1376
[122.8] *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting)

[122.9] *Padilla*, 559 U.S. at 373.

[122.10] *Lafler*, 132 S. Ct. at 1389 (emphasis added).

[122.11] *Id.* at 1396 (Scalia, J., dissenting)

[122.11] *Id.* at 1398 (Alito, J., dissenting)

[122.12] *Id.*

§ 9.06 PLEA BARGAINING: POLICY DEBATE

Page 199, add to footnote 133:

[133] . . . . *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599 (2005).

§ 9.07 PLEA BARGAINING: BROKEN DEALS AND WITHDRAWN OFFERS

Page 205, at the end of subsection [1], add new footnote 158.1:

In other words, . . . not intelligently made.[158.1]

[158.1] The Court has recently backed away from this explanation for the constitutional dimensions of a plea agreement breach, noting that "a breach does not cause the guilty plea, when entered, to have been unknowing or involuntary" and "disavow[ing]" contrary statements in *Mabry v. Johnson* discussed in the Text. *See* Puckett v. United States, 556 U.S. 129, 138 (2009). *Puckett* contains *no* suggestion, however, that government breach of a plea agreement will not continue to be considered a violation of the Due Process Clause.

CHAPTER 10 (Vol. 2)

THE RIGHT TO TRIAL BY JURY

§ 10.02 WHEN THE RIGHT TO TRIAL BY JURY APPLIES

Page 216, at the end of subheading C, add new footnote 52.1:

[C] Special Issue: Jury Waivers and Bench Trials[52.1]

[52.1] *See generally* Andrew D. Leipold, *Why are Federal Judges So Acquittal Prone?* 83 WASH. U. L.Q. 151 (2005).

§ 10.06 PEREMPTORY CHALLENGES

Page 225, add to footnote 129:

[129] . . . . *See also* Rivera v. Illinois, 556 U.S. 148, 157 (2009).

Page 231, add to footnote 159:

[159] . . . . The Court has also found that the prosecution's proffered reasons for a strike "shifting over time, suggest[] that those reasons may be pretextual" as do contradictions by the record of "otherwise legitimate" proffered explanations. *See* Foster v. Chatman, 2016 U.S. LEXIS 3486, **23-33.

Page 231, add to footnote 160:

[160] . . . *See also* Foster v. Chatman, 2016 U.S. LEXIS 3486, **41; Snyder v. Louisiana, 552 U.S. 472, 482-86 (2008) (finding the implausibility of a prosecutor's explanation for striking a black juror reinforced by the prosecutor's acceptance of white jurors to whom the explanation would seem equally applicable).

Page 231, at the end of the last full paragraph, add the following new text:

Nonetheless, if the prosecutor's explanation is deemed pretextual, it "gives rise to an inference of discriminatory intent"[163.1] that will make it difficult for the prosecution to survive the *Batson* challenge.

[163.1] Snyder v. Louisiana, 552 U.S. 472, 484-86 (2008).

CHAPTER 11 (Vol. 2)

CONFRONTATION CLAUSE

§ 11.02 OUT-OF-COURT STATEMENTS BARRED BY THE CONFRONTATION CLAUSE

Page 241, add to footnote 31:

[31] . . . . *See generally* Randolph N. Jonakait, *"Witness" in the Confrontation Clause:* Crawford v. Washington*, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155 (2006); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271 (2006); Symposium: *Crawford and Beyond: Revisited in Dialogue*, 15 J.L. & POL'Y 333-904 (2007).

Page 243, at the end of subsection [2], add the following new text:

The Court has now held, in *Giles v. California*,[37.1] that the doctrine of "forfeiture by wrongdoing" constitutes another exception to *Crawford*. Under this rule, the Sixth Amendment does not bar the admission of testimonial hearsay when the witness whose out-of-court statement the prosecution wishes to introduce is unavailable because of conduct by the defendant "*designed* to prevent the witness from testifying."[37.2] The doctrine is of particular relevance in domestic violence cases, where the defendant is frequently alleged to have prevented the victim from testifying. On its face, the requirement that the defendant must have acted with the *purpose* of keeping the witness from testifying seems to make forfeiture by wrongdoing a fairly narrow exception. However, Justice Souter joined by Justice Ginsburg, who together were necessary votes for the Court's 6-3 decision, wrote in a concurring opinion that the requisite purpose "would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help."[37.3] If lower courts accept this invitation to infer the necessary intent from the presence of an ongoing abusive relationship, then the exception may not prove narrow after all.

[37.1] 544 U.S. 353 (2008).

[37.2] *Id.* at 359 (emphasis in original).

[37.3] *Id.* at 380 (Souter, J., concurring).

Page 244, add to footnote 41:

[41] . . . The statements that business records will not be considered "testimonial" is limited to the (usual) circumstance in which the business record was *not* created "for the purpose of establishing or proving some fact at trial." Melendez-Diaz v. Massachusetts,557 U.S. 305, 329 (2009). The Court has indicated that a record prepared for use at trial would be subject to *Crawford* exclusion even if they constituted "business records" for hearsay purposes. *See id.*

Page 244, at the end of subsection [1], add the following new text:

In the decade since *Crawford* was decided, the Court has struggled with defining and applying "testimonial," an issue it has now faced directly in at least seven subsequent cases. The primary focus has been on two classes of cases: (i) out-of-court witness statements and (ii) forensic reports created as part of a criminal investigation. As described in the next two subsections, the Court has developed a "primary purpose test" that the Court initially used to expand *Crawford*'s reach in both areas, but then, as Court personnel changed and challenging fact-patterns arose, the Court instead has used to signal a narrower view of Confrontation Clause protection.

[a] Expansion then Contraction of "Testimonial" with Regard to Witness Statements: *Davis* and *Hammon*, *Bryant,* and *Clark*

The Court's first post-*Crawford* step in defining "testimonial" came in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*.[41.1] In *Davis*, *D* was convicted of violating a domestic no-contact order as a result of an incident in which *D* hit *M*. *M* did not testify at *D*'s trial, so for the necessary proof that it was *D* who had hit *M*, the state used the recording of *M*'s exchange with a 911 operator, in which *M* told the operator—in response to specific questions from the operator—that *D* was the person who was "jumpin' on her again" and "usin' his fists." In *Hammon, H* was convicted of domestic battery. The police, "responding to a 'reported domestic disturbance,'" arrived at the home of *H* and *A* and found them in separate areas of the property. The police questioned *H* and *A* separately, and *A* made oral and written statements indicating that *H* had hit her in the chest and shoved her head into some broken glass. *A* did not testify at *H*'s trial. Instead, the state was allowed to have the police officer testify as to *A*'s description of the battery. Both *D* and *H* challenged the use of the hearsay statements against them on Confrontation Clause grounds. This would be a valid claim under *Crawford, if* the statements were testimonial.

Justice Scalia's opinion for eight members of the Court offered the following holding to govern both cases:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Under this standard, which would become known as the "primary purpose test," the Court concluded (unanimously) that *H* had a valid Confrontation Clause claim, but (with one dissent) that *D* did not.

In determining that the statements made in the 911 call were primarily "to enable police assistance to meet an ongoing emergency," the Court cited the facts that: (i) *M* was describing events as they were happening, rather than describing past events; (ii) *M* was facing an ongoing

emergency when she made her statements; (iii) the statements elicited from *M* were necessary to resolve the emergency, rather than simply to learn about what had already happened; and (iv) the statements — provided frantically over the phone in a dangerous environment — were made informally, rather than resulting from the more formal questioning that might occur at the station house.

In contrast, the Court found that the statements at issue in *H*'s case "were not much different from the statements . . . found to be testimonial in *Crawford*." In the view of any objective observer, the statements resulted from deliberate police questioning about past criminal activity, with the purpose of investigating a possible crime. That the statements did not follow *Miranda* warnings and were not tape-recorded, while rendering them less formal than the statement in *Crawford*, did not remove them from the "testimonial" category. According to the Court, "[i]t imports sufficient formality, in our view, that lies to such officers are criminal offenses."

The Court's decision in the *Melendez-Diaz* case, discussed in the next subsection, suggested that the Court's enthusiasm for the *Crawford* decision might be waning, in part due to a change in personnel, and indeed the Court's subsequent decision in *Michigan v. Bryant*[41.2] appeared for several reasons to weaken the barrier the *Crawford* decision had erected to the admission of out-of-court statements.

In *Bryant*, police found *C* in a gas station parking lot bleeding to death. In response to police questioning about what had happened, *C* said that *B* had shot him outside of *B*'s house and that *C* had then driven away to the gas station. At *B*'s trial for the murder of *C*, *C*'s statements to the police were admitted, and *B* was convicted. In the Supreme Court, the question was whether *C*'s statements were testimonial. In an opinion joined by the four justices who tried to restrict *Crawford* in the *Melendez-Diaz* case, Justice Sotomayor (who had subsequently replaced Justice Souter, a *Crawford* enthusiast) concluded that *C*'s statements were *not* testimonial and hence were properly admitted.

In terms of the applicable legal standard, Justice Sotomayor's opinion used the basic distinction described in *Davis*: "When . . . the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause."[41.3] The opinion's conclusion that the primary purpose here was to respond to an ongoing emergency emphasized that an "armed shooter" of unknown motive and location was on the loose (the emergency), that given his condition and requests for medical help, *C*'s purpose did not seem to be to prove past events for a criminal prosecution, and furthermore that the questions the police asked "were the exact type of questions necessary to allow the police to" assess the danger to all concerned.

Justice Scalia's dissent described the conclusion that "five officers conduct[ed] successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose . . . is so transparently false that professing to believe it demeans this institution."

Justice Ginsburg's separate dissent reached the same conclusion, albeit with more moderate language.

At a minimum, then, *Bryant*, appears to provide a clear roadmap for courts to find statements admissible under the Confrontation Clause in many violent crime cases where the "perpetrator on the loose" can count as an ongoing emergency. Beyond that category, the *Bryant* opinion contained two potentially significant signals of a *Crawford* narrowing. First, the Court went out of its way to note that "ongoing emergencies" are only one possible nontestimonial purpose of a statement, and that the Confrontation Clause will *only* apply "when a statement is . . . procured with a primary purpose of creating an out-of-court substitute for trial testimony," a relatively narrow framing of the definition of testimonial. Second, the Court stated that in determining the "primary purpose," "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." The reference to hearsay reliability exceptions amounted to waiving a red flag in front of Justice Scalia, who thought *Crawford* had banished such considerations. Justice Scalia's dissent accused the Court of potentially intending "to resurrect" the reliability focused analysis of *Ohio v. Roberts*, "without ever explicitly overruling *Crawford*."

The trend continued in *Ohio v. Clark*.**41.4** In *Clark*, school teachers suspected that a three-year old child in their charge was a victim of child abuse, based on his visible injuries. They asked him what had happened, and who had done this to him, and the child's answers were used at the subsequent prosecution of his mother's boyfriend for assault and domestic violence. Applying the "primary purpose test," the state supreme court found the boy's statements to be testimonial, and hence barred under the Confrontation Clause, on the grounds that the primary purpose of the child's statements was to gather evidence rather than to respond to an ongoing emergency.

The Supreme Court reversed, concluding that the boy's statements were not testimonial. The six-justice majority opinion was written by Justice Alito, who has consistently shown a distaste for *Crawford*. In applying the primary purpose test to the boy's statements, the Court noted the teachers' immediate concern in questioning was "to protect a vulnerable child," that the questioning took place in an informal setting, and that it was "extremely unlikely" that a three-year old could intend his statements to be a substitute for in court testimony. Therefore, "the Sixth Amendment did not prohibit the State from introducing [the child's] statements at trial."

Once again, the Court's opinion included language that would seem to weaken *Crawford*. For example, the Court stated that "the primary purpose test is a necessary, but not always sufficient, condition" for Confrontation Clause protection, implying that even some statements that would be testimonial under the "primary purpose test" may not barred by the Confrontation Clause. Furthermore, in discussing that test, the Court repeated the *Bryant* dictum that hearsay rules "designed to identify some statements as reliable" will be relevant to the analysis. Finally, *Clark* was the Court's first *Crawford* case in which a statement was made to someone other than law enforcement officials, and, although the Court held that the "primary purpose test" applied in this context as well, it noted that "such statements are much less likely to be testimonial." As a result, it seems that statements made other than to law enforcement will rarely be barred by the Confrontation Clause.

Justice Scalia saw in the majority opinion "distortion[s]" intended to help "smuggle longstanding hearsay exceptions back into the Confrontation Clause," and hence concurred separately in the result, joined only by Justice Ginsburg.

[b] Expansion and Contraction of "Testimonial" With Regard to Forensic Reports: *Melendez-Diaz, Bullington* and *Williams*

In *Melendez-Diaz v. Massachusetts*,[41.5] the Court, in a 5-4 decision authored by Justice Scalia, extended the application of *Crawford*'s "testimonial" rule to forensic tests. In *Melendez-Diaz*, *M* was charged with cocaine distribution. To prove that the substance that *M* was alleged to have been distributing was cocaine, the prosecution submitted "certificates of analysis" from the state laboratory that stated that the substance the police had seized was cocaine. The lab analysts had sworn to the contents of the certificates before a notary public but did not appear at *M*'s trial.

Describing the sworn affidavits as the "core class of testimonial statements," the Court held that their admission at *M*'s trial violated his rights under the Confrontation Clause. The Court noted that, "not only were the affidavits 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'"[41.6] use at trial was their very purpose. Therefore, the Court concluded, *Crawford* applied. Thus, by a slim majority, the Court continued on the course set in *Crawford*, applying its rule that "testimonial" statements are subject to exclusion under the Confrontation Clause to a new category of evidence — forensic tests.

Justice Kennedy wrote a strongly worded dissent, joined by the Chief Justice and Justices Alito and Breyer, accusing the Court of developing "a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause."[41.7] Without contesting that the affidavits fell within the definition of "testimonial" from earlier cases, the dissenters argued that the analysts who made the affidavits should not be considered witnesses for Confrontation Clause purposes. In the dissenters' view, *Crawford* and *Davis* dealt with "conventional witnesses" who had "personal knowledge of some aspect of the defendant's guilt." According to the dissenters the Court should have done "the sensible thing and limited its holding to witnesses as so defined" and *not* included individuals who "in fact, witnessed nothing to give them personal knowledge of the defendant's guilt."

The majority and dissenting opinions disagreed about whether the decision followed or abandoned historical practice, provided a valuable mechanism for testing the validity of forensic evidence, would cause a major disruption of criminal trials, and even which of these concerns should be relevant to the decision. Notably, Justice Souter, whose departure from the Court was imminent at the time *Melendez-Diaz* was decided, provided the crucial fifth vote for the continued expansion of *Crawford*'s reach.

The Court next examined the treatment under *Crawford* of forensic laboratory reports that it covered in *Melendez-Diaz* in *Bullcoming v. New Mexico*.[41.8] In *Melendez-Diaz*, the forensic

report was an expert certification that a substance was cocaine. In *Bullcoming*, the forensic report was an expert certification of *B*'s blood alcohol level in a blood sample taken from *B*. As in *Melendez-Diaz*, the expert, *C*, who conducted the test and made the certified statement in the report did not testify. The lower court in *Bullington*, in ruling against the defendant, sought to distinguish *Melendez-Diaz* by arguing that the certifying expert *C* "was a mere scrivener" who simply transcribed the results from the testing machine and by the fact that the report was introduced through an expert witness, *R*, who was familiar with all the processes used to create such reports, though *R* had neither observed nor reviewed the analysis in this particular case.

By a 5-4 vote, the Court reaffirmed *Melendez-Diaz*, the controlling precedent, and ruled that admission of the report violated the Confrontation Clause. The four *Melendez-Diaz* dissenters continued their objection to the path *Crawford* had taken, but apparently could not convince either of the new Justices, Sotomayor or Kagan, to join them. So *Bullcoming* left the law essentially unchanged.

Nonetheless, while *Melendez-Diaz* survived, Justice Sotomayor's concurrence expressed a distinct lack of enthusiasm, which is particularly important since her vote was necessary for the majority. Justice Sotomayor noted that the facts in *Bullington* were "materially indistinguishable" from *Melendez-Diaz*, but noted four circumstances not presented in *Bullington* that might lead to a different result with an expert report: (i) if the report had a second primary purpose, such as providing medical treatment; (ii) if the expert who testified were the tester's supervisor or had some other "personal, albeit limited, connection to the scientific test at issue; (iii) if the expert gave an independent opinion about testimonial reports not in evidence (for example if *R* had testified as to *R*'s opinion about *B*'s blood alcohol level based on what *R* read in *C*'s report); and (iv) if the state had introduced only machine generated results.[41.9]

The turmoil worsened in *Williams v. Illinois*.[41.10] In *Williams*, a hearsay forensic report survived the Supreme Court's *Crawford* scrutiny for the first time. Because the Court's 4-1-4 decision provided nothing resembling a common rationale for the result, however, *Williams* provides very little guidance about the meaning of testimonial in forensic-test cases.

In *Williams*, *W* was accused of rape and *L*, an expert witness, testified that a DNA profile produced by an outside company, from a vaginal swab taken from the rape victim, matched the DNA profile produced by the police lab from a sample of *W*'s blood. The hearsay in question was the forensic report from the outside company. Although the report was not itself admitted into evidence, *L* testified that *W*'s DNA matched the DNA on the vaginal swabs on the basis of the report, even though *L* had no connection with the production of that report, and no witness connected with the company or the creation of the report testified. These facts presented the third of the four possible distinctions Justice Sotomayor noted in her *Bullington* concurrence: the expert gave an independent opinion about a report not in evidence.[41.11]

Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor (the dissenters as it turned out), found the case indistinguishable from *Melendez-Diaz* and *Bullington* and concluded,

therefore, that the report was testimonial and that *L*'s testimony should have been excluded on Confrontation Clause grounds.

Four other justices, in a plurality opinion by Justice Alito, concluded that the report was not testimonial because it "was not prepared for the primary purpose of accusing a targeted individual,"[41.11] and hence did not have a primary purpose of accusing an individual or of creating evidence for use at trial. The vaginal swabs had been sent to the outside lab *before W* was identified as a suspect, albeit nine months after the rape; it was a search for a match to the DNA profile in the report that led the police to *W*. The forensic tests in *Melendez-Diaz* and *Bullington* were created *after* the defendant had been identified by the police, Justice Alito noted, which he concluded was a key element in distinguishing a primary purpose of either accusing an individual or preparing evidence (testimonial) from a primary purpose of "catch[ing] a dangerous rapist who was still at large"[41.13] (not testimonial).

Finally, Justice Thomas, in a solo opinion in support of the judgment, concluded that the report was not testimonial because it lacked the "indicia of solemnity"[41.14] that characterize the kind of statements that Justice Thomas continues to think are the only type of statement regulated by the Confrontation Clause. Unlike the report in *Melendez-Diaz*, which was notarized, or the report in *Bullcoming*, that included a signed "Certificate of Analyst" affirming its veracity, the report *L*'s testimony relied on, Justice Thomas pointed out, did not include a statement asserting its own accuracy or carry the signature of the individual who conducted the test.

Because five justices (the dissenters plus Justice Thomas) expressly rejected the plurality's "targeted-individual" test, and eight justices rejected Justice Thomas' "solemnity" test in *Hammon*, and no other justice endorsed it in *Williams*, each definition of testimonial relied on in *Williams* seemed to be rejected by a majority of the justices. As Justice Kagan wrote at the conclusion of her dissent, "[w]hat comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings is — to be frank — who knows what."[41.15]

The net effect, however, seems to be at least that a forensic report that (i) is created before a single individual is targeted for the related crime, and (ii) lacks "indicia of solemnity," is not testimonial for *Crawford* purposes, and therefore is not covered by the Confrontation Clause. It can also be said that further developments are sure to come.

[41.1] 547 U.S. 813 (2006).

[41.2] 131 S. Ct. 1143 (2011).

[41.3] *Id.* at 1155.

[41.4] 135 S. Ct. ___, 2015 U.S. LEXIS 4060.

[41.5] 557 U.S. 305 (2009).

41.6 *Id.* at 321.

41.7 *Id.* at 334 (Kennedy, J., dissenting).

41.8 131 S. Ct. 2705 (2011).

41.9 131 S. Ct. at 2721-23 (Sotomayor, J., concurring in part).

41.10 132 S. Ct. 2221 (2012).

41.11 Four justices concluded that, in these circumstances, the contents of the report were not hearsay because they were not offered for the truth of the matter asserted, in which case the Confrontation Clause would clearly not apply. Five justices rejected this view, however, so the outcome ultimately turned on whether the report was "testimonial." Notably, Justice Sotomayor was in the group of five rejecting the possible distinction she had raised in *Bullington*.

41.12 132 S. Ct. at 2243 (plurality opinion).

41.13 *Id.*

41.14 *Id.* at 2259 (Thomas J., concurring in the judgment).

41.15 *Id.* at 2277 (Kagan, J., dissenting).

Page 244, at the end of subheading [2], add new footnote 41.9:

[2] The Confrontation Clause and "Non-Testimonial" Hearsay[41.15]

41.15 *See generally* Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require That* Roberts *Had to Die*, 15 J.L. & POL'Y 685 (2007).

Page 245, at the end of the first paragraph, add the following new text:

In the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*,[42.1] the Court resolved the question technically left open in *Crawford* by deciding that the Confrontation Clause applies *only* to testimonial hearsay, thereby shoveling the final clump of dirt onto the grave of *Ohio v. Roberts*. According to the Court, the testimonial "limitation [is] so clearly reflected in the text of the constitutional provision [that it] must fairly be said to mark out not merely its 'core,' but its perimeter." Subsequently the Court stated even more directly that "[u]nder *Crawford* . . . the Confrontation Clause has no application" to *nontestimonial* out-of-court statements.[42.2] Thus, the only potential remaining constitutional backup to the hearsay rules would be the Due Process Clauses of the Fifth and Fourteenth Amendments. Perhaps not coincidentally, in its next case in

this line, *Michigan v. Bryant*,[42.3] which appeared to narrow the definition of testimonial and hence the protection of the Confrontation Clause, the Court for the first time in its *Crawford* jurisprudence expressly recognized the possible role of the Due Process Clauses in barring the admission of hearsay. In its most recent *Crawford* case, *Ohio v. Clark*,[42.4] three Justices noted at oral argument that, while the out-of-court statement at issue did not appear to be testimonial, the possibility of exclusion of the out-of-court statement could be considered under the Due Process Clause — according to Justice Kennedy, possibly by the lower court on remand.[42.5]

[42.1] 547 U.S. 813 (2006).

[42.2] Whorton v. Bockting, 549 U.S. 406, 420 (2007).

[42.3] 131 S. Ct. 1143 (2011), discussed in §11.02[C][1][a] above in this Supplement.

[42.4] 135 S. Ct. ___, 2015 U.S. LEXIS 4060, discussed in §11.02[C][1][a] above in this Supplement.

[42.5] Transcript of Oral Argument at 7-8 (Kennedy, J.), 49 (Breyer, J.), 50 (Sotomayor, J.).

CHAPTER 12 (Vol. 2)

THE PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION: ISSUES IN ADJUDICATION

§ 12.07 REFERENCE AT TRIAL TO THE DEFENDANT'S SILENCE

Page 280, add to footnote 166:

[166] *See generally* Lissa Griffin, *Is Silence Sacred? The Vulnerability of* Griffin v. California *in a Terrorist World,* 15 WM. & MARY BILL RTS. J. 927 (2007).

Page 282, add to footnote 178:

[178] . . . The Court has not definitively settled the question whether the rule against drawing an inference from silence covers all other issues at sentencing, for example whether a jury could consider silence as indicating a defendant's lack of remorse at a death penalty sentencing hearing. *See* White v. Woodall, 134 S. Ct. 1697, 1704 (2014).

Page 283, add to footnote 182:

[182] . . . *Contra on state common law and statutory grounds,* State v. Muhammad, 868 A.2d 302 (N.J. 2005) (barring use of a defendant's silence "at or near" the time of his arrest).

Page 283, at the end of the second paragraph, add the following new text:

Indeed, in *Salinas v. Texas*,[184.1] the Court held that, at least where the defendant did not invoke the privilege at the time of his prearrest silence, the prosecution may use his silence as part of its case in chief.[184.2]

[184.1] 133 S. Ct. 2174 (2013).

[184.2] In *Salinas*, *S* had voluntarily accompanied the police to the station for questioning and during a one-hour interview (without arrest or *Miranda* warnings) fell silent when asked whether the shells recovered at the scene of a murder would match *S*'s shotgun. *S* did not testify at his subsequent murder trial, but the prosecution brought out this silence and argued to the jury that an innocent person would have said "What are you talking about? I didn't do that. I wasn't there," but that *S* "wouldn't answer that question." In a plurality opinion, the Court held that *S*'s Fifth Amendment claim should fail "because he did not expressly invoke the privilege against self-incrimination in response to the officer's question." *Id.* at 2178. The Court did not decide whether this affirmative use of silence by the prosecution would have been barred if *S* had asserted the privilege, an issue, the Court noted, that has divided lower courts.

CHAPTER 13 (Vol. 2)

BURDEN OF PROOF AND VERDICT ISSUES

§ 13.01 BURDEN OF PROOF

Page 287, add to footnote 17:

[17] . . . *See, e.g.*, Dixon v. United States, 548 U.S. 1 (2006).

Page 287, at the end of the first sentence of the second full paragraph, add new footnote 17.1:

"As to whether . . . of legislative intent."[17.1]

[17.1] *See, e.g.*, Dixon v. United States, 548 U.S. 1, 14 (2006) (placing the burden of proof for the affirmative defense of duress on the defendant on the basis of what the Congress enacting the substantive offense "would have expected federal courts" to do).

§ 13.03 MULTI-THEORY VERDICTS: ELEMENTS VS. MEANS

Page 291, add to footnote 40:

[40] . . . . *See generally* Peter Westen & Eric Ow, *Reaching Agreement on When Jurors Must Agree*, 10 NEW CRIM. L. REV. 153 (2007).

§ 13.04 INCONSISTENT VERDICTS

Page 293, add to footnote 51:

[51] . . . . If the inconsistency is between a verdict and a failure to reach a verdict — for example, between an acquittal and a hung jury — the verdict will trump the nonverdict. *See* Yeager v. United States, 557 U.S. 110 (2009). In this example, the acquittal would stand and could also serve to bar, on double jeopardy grounds, retrial on the counts the jury could not resolve. *See* § 15.01, *infra*.

Page 293, add to footnote 52:

[52] . . . *But see* Price v. State, 949 A.2d 619 (Md. 2008) (barring inconsistent verdicts on state common law grounds).

Page 294, add to footnote 58:

[58] . . . *But see* Turner v. State, 655 S.E.2d 589 (Ga. 2008) (finding exception to rule allowing inconsistent verdicts where appellate record "makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges").

§ 13.05 DEADLOCKED JURIES

Page 294, add to footnote 59:

[59] . . . *See generally* George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893 (2007).

CHAPTER 14 (Vol. 2)

DOUBLE JEOPARDY

§ 14.01 GENERAL PRINCIPLES

Page 301: add to footnote 5:

[5]. . . To be clear, however, once the jury *has* been empaneled and sworn a person *is* in jeopardy. *See, e.g.*, Martinez v. Illinois, 134 S. Ct. 2070 (2014) (per curiam).

Page 306, after the end of the first full paragraph add the following new text:

The test for whether two governments count as a single sovereign is whether "those entities draw their power from the same ultimate source."[27.1] This historical test, the Court has noted, is quite distinct from commonly used indicia of sovereignty, such as each government's autonomy or degree of self-governance.[27.2] Applying this test, the Court has concluded that Indian tribes are separate sovereigns from the United States for double jeopardy purposes, but that both Puerto Rico and U.S. territories are not.

[27.1] Puerto Rico v. Sanchez Valle, 2016 U.S. LEXIS 3373, **15.

[27.2] *Id.* at **14.

Page 306, at the end of the first sentence of the second full paragraph of the text, add new footnote 27.3:

The dual sovereignty doctrine is controversial.[27.3]

[27.3] Indeed, two justices have called for "fresh examination in an appropriate case" of the question whether the dual sovereignty's exception to double jeopardy should continue to be the law. *See* Puerto Rico v. Sanchez Valle, 2016 U.S. LEXIS 3373, **32 (Ginsburg, J. concurring) (joined by Thomas, J.).

§ 14.02 REPROSECUTION AFTER A MISTRIAL

Page 311: add to footnote 68:

[68]. . . *See also* Renico v. Lett, 559 U.S. 766 (2010) (deadlocked jury is "classic example" of manifest necessity).

§ 14.03 REPROSECUTION AFTER AN ACQUITTAL

Page 319: add to footnote 108:

[108]. . . *See also* Martinez v. Illinois, 134 S. Ct. 2070 (2014) (per curiam).

§ 14.05 REPROSECUTION AFTER A CONVICTION

Page 327, at the end of the first full paragraph, add new footnote 157.1:

In such circumstances, . . . he was impliedly acquitted.[157.1]

[157.1] The Supreme Court has recently underscored, however, that there must be adequate "finality" for the implied acquittal doctrine to apply, a finality that may be lacking in the mistrial context. *See* Blueford v. Arkansas, 132 S. Ct. 2044 (2012). In *Blueford*, *B* was charged with capital murder, but the jury was also provided with the possibility of the lesser-included offenses of first-degree murder, manslaughter and negligent homicide. The jurors were instructed to consider capital murder first and to consider first-degree murder only if they unanimously agreed that there was reasonable doubt as to *B*'s guilt of capital murder, to consider manslaughter only if they reached that same conclusion about first-degree murder, and so forth. After the jury deliberated for several hours, the foreperson informed the trial court that they were "unanimous against" capital murder and first-degree murder but were deadlocked on manslaughter. The trial court sent the jury back to deliberate further. A half-hour later, however, the foreperson reported that the jurors had not reached a verdict, and the trial court declared a mistrial.

In a 5-4 decision, the Supreme Court held that the Double Jeopardy Clause did not prevent the state from retrying *B* on the capital murder charge. Even though the jury was not to consider manslaughter unless they agreed on acquittal of the more serious charges, and the foreperson had reported the jury's unanimous agreement against conviction on the more serious charges, the Court concluded that this report "was not a final resolution of anything." *Id.* at 2050. When it resumed deliberations on manslaughter, the Court noted, the jury could have reconsidered its position on the more serious charges. These continued deliberations deprived the agreement reported by the foreperson "of the finality necessary to constitute an acquittal on the murder offenses." *Id.* at 2051.

§ 14.07 MULTIPLE PROSECUTIONS OF THE "SAME OFFENSE"

Page 335, add to footnote 189:

[189] . . . *See also* State v. Thompson, 2008 Tenn. Crim. App. LEXIS 79 (describing four-factor test that goes beyond *Blockburger* to determine double jeopardy under state constitution).

§ 14.09 COLLATERAL ESTOPPEL

Page 342, before the start of the last paragraph of subsection [A] add the following new text:

Provided there is an appropriate acquittal, this doctrine can preclude retrial on charges that resulted in a hung jury. In *Yeager v. United States*,[212.1] the jury acquitted *Y* on charges of fraud but could not reach a unanimous verdict on charges of insider trading. The Supreme Court held that, so long as an issue "necessarily decided" by the fraud acquittals would prevent conviction on the insider trading charges, *Y* could not be retried on the insider trading allegations. *Yeager* arguably extended *Ashe*. First, the results of *Y*'s first trial contained an inconsistency; given the acquittal on the fraud counts, the jury seemingly should have acquitted on the insider trading charges as well, rather than failing to agree on a verdict. Second, the normal rule is that a hung jury (present in *Yeager*, but not *Ashe*) does not terminate jeopardy. In *Yeager* the Supreme Court rejected both of these distinctions on the grounds that the failure to reach a verdict was a nonevent and thus did not change the result from *Ashe*, where the precluded charges had not even been brought to trial.

[212.1] 557 U.S. 110 (2009).

CHAPTER 15 (Vol. 2)

SENTENCING

§ 15.01 OVERVIEW

Page 359, at the end of the penultimate sentence of subsection [2], add new footnote 96.1:

Moreover, *Brady* itself . . . capital sentencing proceeding.[96.1]

[96.1] *See also* Cone v. Bell, 556 U.S. 449, 470 n.15(2009) (holding *Brady* applicable to capital sentencing proceedings).

§ 15.02 CONSTITUTIONAL LIMITS ON SENTENCING PROCEDURES

Page 358, add the following new text after subsection [C][4]:

[5] Speedy Trial

The Sixth Amendment right to a speedy trial, which "attaches" when a defendant is arrested or formally charged,[88.1] "detaches upon conviction."[88.2] Thus, there is no Sixth Amendment right to a "speedy sentencing," as sentencing of course takes place after conviction. In reaching this conclusion, the Court emphasized that the speedy trial right is "a measure protecting the presumptively innocent,"[88.3] so that it loses force once a conviction eliminates that presumption. In reaching this conclusion, however, the Court noted two potentially important limiting principles. First, the Court specifically left open the possibility that the Speedy Trial Clause might apply at sentencing when "facts the could increase the prescribed sentencing range" are to be determined as part of the sentencing proceeding.[88.4] In such sentencing proceedings, which fall under the *Apprendi* doctrine, different constitutional rules apply.[88.5] Second, the Court noted that a defendant retains the right to due process at sentencing, which gives the defendant a potential remedy for "exorbitant delay."[88.6] The Court left for another day, however, examination of how such a due process claim would work.

[88.1] *See* Text § 8.02[B], *supra*.

[88.2] Betterman v. Montana, 136 S. Ct. 1609, *1613 (2016).

[88.3] *Id.* at *1614.

[88.4] *Id.* at *1613 n.2.

[88.5] *See* Text § 15.04, *infra*.

[88.6] 136 S. Ct. at 1617.

Page 359, add to footnote 101:

[101] . . . *See also* White v. Woodall, 134 S. Ct. 1697 (2014). *But see* State v. Burgess, 943 A.2d 727 (N.H. 2008) (concluding that inferring lack of remorse from silence at sentencing violated state constitution on the grounds that expressing remorse requires admitting incriminating facts of charges).

§ 15.03 THE FEDERAL SENTENCING GUIDELINES

Page 361, add to footnote 117:

[117] . . . *See also* Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System after Booker*, 43 HOUS. L. REV. 279, 319 (2006) (conducting empirical review of federal sentences in first year after *Booker* and concluding that the effects of the shift to advisory guidelines "have been strikingly modest — so far"). According to the Supreme Court, by 2011, in more than 80% of cases since 2007, district courts have imposed within guidelines sentences absent a government motion for departure. *See* Peugh v. United States, 133 S. Ct. 2072 (2013).

§ 15.04 CONSTITUTIONAL LIMITS ON GUIDELINES SYSTEMS: *APPRENDI* AND ITS PROGENY

Page 366, add to footnote 150:

[150] . . . *See generally* Jonathan F. Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297; Symposium, *The Booker Project: The Future of Federal Sentencing*, 43 HOUS. L. REV. 269-414 (2006).

Page 366, add to footnote 153:

[153] . . . The rule that determination of a fact that increases the maximum potential sentence must be left to the jury applies to sentences of criminal fines in the same way as it applies to sentences of imprisonment. *See* Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).

Page 369, add to footnote 167:

[167] . . . The Supreme Court subsequently reaffirmed *Ring*, holding that requiring judicial fact finding to authorize a death sentence violates the Sixth Amendment, even when a jury has made an "advisory" finding of the same fact. *See* Hurst v. Florida, 136 S. Ct. 616 (2016).

Page 373, add to footnote 179:

[179] . . . The Supreme Court has affirmed that it is constitutional for the courts of appeals to use a presumption that a sentence within the Guidelines is reasonable, although it did not require them to do so. *See* Rita v. United States, 551 U.S. 338 (2007).

Page 373, add the following new text at the end of subsection [2]:

[3] The Meaning of *Booker*

[a] Overview

The result in *Booker* presents an obvious and profound tension regarding the permissible force of the Guidelines. Indeed, of the nine justices, only Justice Ginsburg approved of both halves of the Court's decision. On the one hand, *Booker* holds that, as a mandatory determiner for sentences, the Guidelines set the "statutory maximum" for purposes of the *Apprendi* rule; when the Guidelines are used this way, judicial fact-finding can be unconstitutional. On the other hand, *Booker requires* judges "to consider the Guidelines," and appellate courts to examine the Guidelines when determining whether sentences imposed by trial courts should be affirmed as "reasonable"or reversed as "unreasonable"; when the Guidelines are used this way, judicial fact-finding is wholly legal. In short, the Guidelines can have some legal force, but not too much.

So the question remained: How much is too much? The Court's initial decisions following *Booker*, described below, indicate that the Sentencing Guidelines remain as important as "the starting point and the initial benchmark" for all federal sentences, but have little actual force to control district court sentencing.

[b] *Rita v. United States*

Rita v. United States[182.1] was the Court's first major decision addressing the force of the Guidelines after *Booker*. In *Rita*, *R* faced an applicable Guidelines sentencing range of 33-to-41 months imprisonment. At his sentencing hearing, *R* argued for a lower sentence, but the district court decided to impose a sentence "at the bottom of the Guidelines range," to wit, 33 months. Under *Booker*, *R*'s sentence was subject to appellate review for reasonableness. The court of appeals held that, since 33 months was within the Guidelines range, *R*'s sentence was "presumptively reasonable" and rejected *R*'s arguments for a lower sentence. The Supreme Court held that it was permissible for the court of appeals to use this "presumption of reasonableness" in rejecting *R*'s appeal.

Writing for six members of the Court, Justice Breyer explained that the presumption only comes into play after "*both* the sentencing judge and the Sentencing Commission [through the Guidelines] . . . have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." Therefore, the appellate court, which in conducting its reasonableness review "merely asks

whether the trial court abused its discretion," may employ a presumption of reasonableness to within-Guidelines sentences. Such a presumption, Justice Breyer noted, applies only on *appellate* review, and the appellate presumption has no "independent legal effect." Importantly, the Court instructed that a judge doing the actual sentencing should *not* apply a presumption in favor of a within-Guidelines sentence and that "reasonableness review" should ask only whether the sentencing court abused its discretion.

In dissent, Justice Souter argued that by allowing a presumption of reasonableness on appeal to a within-Guidelines sentence, the Court risked giving "substantial gravitational pull" to the Guidelines and was approving a system in which district judges will "replicat[e] the unconstitutional system by imposing appeal-proof sentences within the Guidelines ranges determined by facts found by them alone." Justice Breyer's opinion for the Court agreed that the appellate presumption may indeed "encourage sentencing judges to impose Guidelines sentences," but found that possibility did "not provide cause for holding the presumption unlawful."

Justice Stevens wrote a concurring opinion joined by Justice Ginsburg. This opinion seemed likely to prove particularly important because Stevens and Ginsburg provided the critical votes from the *Apprendi* block of justices needed to make Justice Breyer's opinion the opinion of the Court. Justice Stevens' opinion emphasized heavily that "appellate judges must . . . always defer to the sentencing judge's individualized sentencing determination." According to Justice Stevens, district courts may consider such matters "as age, education, mental or emotional condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service," even though such matters are *not* usually considered under the Guidelines, and an appellate court must review such consideration under the deferential abuse-of-discretion standard.

[c] *Gall v. United States* and *Kimbrough v. United States*

The signals from Justice Stevens in *Rita* that reasonableness review under *Booker* would leave the Guidelines with little legal force proved accurate. The next term, in *Gall v. United States*[182.2] and *Kimbrough v. United States*,[182.3] the Court examined two cases in which the district judge had imposed a sentence far below the Guidelines range. In both cases, the Court concluded that the district judges had not abused their discretion and that the appellate courts had been wrong to disturb the sentences.

In *Gall*, *G* had participated in a drug distribution conspiracy while in college. *G* withdrew from the conspiracy, stopped taking and selling drugs, graduated college and gained steady employment. Three and a half years after he withdrew from the conspiracy, *G* was indicted for his role in the drug distribution enterprise. *G* plead guilty, and the Guidelines recommended a sentence of at least 30 months in prison. The district judge, however, sentenced *G* to probation for a three-year term. The judge explained that *G*'s withdrawal from the conspiracy, his post-offense conduct, and his youth at the time of the offense made a sentence of probation appropriate. The court of appeals reversed on the ground that a sentence outside the Guidelines must be supported by a justification proportional to the gap between the Guidelines sentence and the sentence

imposed. By this standard, the appellate court concluded, *G*'s sentence of probation had to be supported by "extraordinary circumstances."

Justice Stevens, now writing for a 7-2 majority of the Court, firmly rejected the appellate court's approach. Justice Stevens noted that because "the Guidelines are not mandatory," the range of possible sentences is "significantly broadened," and "the Guidelines are only one of the factors to consider when imposing sentence." Justice Stevens concluded that although the appellate court plainly disagreed with the sentencing judge's application of the factors to be used in determining a sentence under federal law,[182.4] the sentencing judge's decision was more than reasonable enough to survive abuse-of-discretion review. "Most importantly," the Court noted, the appellate court's "exceptional circumstances" requirement and other "heightened standard[s] of review to sentences outside the Guidelines range" are inconsistent with the abuse-of-discretion standard and should not be used.

In *Kimbrough*, argued and decided on the same day as *Gall*, Justice Ginsburg's opinion for the same seven-justice majority further underscored the power of district judges to sentence outside the Guidelines range. *K* plead guilty to distributing crack cocaine, charges that subjected him to a minimum prison term of 15 years. The Guidelines range for *K* was 19 to 22.5 years. That Guidelines outcome resulted from the controversial "100-to-1 ratio" that treats one gram of crack cocaine as the equivalent of 100 grams of powder cocaine. Citing the case as an example of the "disproportionate and unjust effect" of the crack cocaine guidelines, the district judge imposed the statutory minimum sentence of 15 years. The court of appeals reversed on the ground that a sentence outside the Guidelines range that was "based on disagreement with the sentencing disparity for crack and powder cocaine offenses" was per se unreasonable. The government tried to bolster this argument in the Supreme Court by noting that the 100-to-1 ratio had originated in a statute, that Congress had rejected previous attempts to modify the 100-to-1 ratio reflected in the Guidelines, and that allowing district judges to disagree with the ratio would introduce gross disparity between defendants, depending on the views of their particular district judge on the question.

The Court had little difficulty rejecting these arguments, particularly because the Sentencing Commission — the body charged with writing and updating the Guidelines — has agreed that "the crack/powder disparity is at odds" with the statutory factors to be considered at sentencing. Yet the first line of the Court's concluding paragraph is telling: "The ultimate question in [*K*'s] case is 'whether the sentence was reasonable — i.e., whether the District Judge abused his discretion in determining that" the purposes of sentencing "justified a substantial deviation from the Guidelines." Once again, no such abuse was found.

In sum then, a district judge who takes the proper procedural steps in making the Guidelines calculation and then considering the purposes of sentencing will not have his sentence reversed easily. Less certain is how district judges will exercise this power. Under *Rita*, the Guidelines effectively provide district judges with a safe harbor for their sentences, and both the majority and dissent in *Rita* acknowledge that this could well encourage within-Guidelines sentences. At the same time, the shield provided by the abuse-of-discretion standard and the encouragement

provided by *Gall* and *Kimbrough* suggest that a district judge of a mind to give a sentence above or below the Guidelines will get the leeway to do so. The significance of *Booker* may depend, over time, on which of these paths district judges choose.[182.5]

[182.1] 551 U.S. 338 (2007).

[182.2] 552 U.S. 38 (2007).

[182.3] 552 U.S. 85 (2007).

[182.4] These are found in 18 U.S.C. § 3553(a) and are covered in the text at p. 373 n.178.

[182.5] To date, "district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *See* Peugh v. United States, 133 S. Ct. 2072, 2084 (2013) (finding sentencing guidelines retain sufficient force so that a retrospective increase in the guidelines range applied to a defendant constitutes an *ex post facto* violation).

Page 374, in the first sentence of the last paragraph of subsection [E], add new footnote 186.1:

Since *Harris* was . . . left the Court,[186.1]

[186.1] Four members of the Court have now changed since *Harris* was decided. Chief Justice Rehnquist and Justice O'Connor were dissenters from the *Apprendi* line of cases, many of which were decided 5-4. From the decisions since Chief Justice Roberts and Justice Alito replaced them, it does not appear that the change in personnel will make a significant difference in this area, though Justice Alito appears to harbor much of the retired justices' hostility to *Apprendi* and its progeny — more so than Chief Justice Roberts. First, in *Cunningham v. California*, 549 U.S. 270 (2007), Justice Alito authored a dissent (joined by *Apprendi*-dissenters Kennedy and Breyer) that would have upheld California's sentencing system and thereby significantly limited the impact of *Blakely* in the states; Chief Justice Roberts joined the five *Apprendi* justices in applying *Blakely* and finding California's sentencing system unconstitutional. Then, in *Rita v. United States*, 551 U.S. 338 (2007), a case about the meaning of *Booker*, Roberts and Alito both joined the majority opinion of Justice Breyer (a leader among the *Apprendi* dissenters) and did not join any of the three separate opinions written by members of the "*Apprendi* block." Finally, in in *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), (discussed above in this supplement), Justice Alito authored lone dissents that would have given more force to the Sentencing Guidelines post-*Apprendi*, while Justice Roberts joined the majority opinions.

Subsequently, Justices Souter and Stevens (two critical members of the *Apprendi* majority and the *Harris* dissent) retired and were replaced by Justices Sotomayor and Kagan. These newest Justices have proved more accepting of the *Apprendi* precedent than its strongest detractors (Justices Breyer, Kennedy and Alito), *see* Alleyne v. United States, 133 S. Ct. 2151 (2013); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).

Page 374: at the end of the last sentence of subsection [E], add the following new text:

In *Alleyne v. United States*,[186.2] the Court finally resolved *Harris*'s uncertain future by overruling *Harris* and applying *Apprendi* to mandatory minimum sentences. As a result, a fact that increases either the maximum *or* the minimum penalty for a crime now is considered an "element" of the offense for *Apprendi* purposes and must be submitted to the jury. *Alleyne* and *Harris* offered identical relevant facts — a defendant convicted and sentenced to seven years' imprisonment under (the same) federal statute that provided a five-year mandatory minimum sentence that became a seven-year mandatory minimum under the statute because of a fact found by the sentencing judge but not the jury.

Justice Thomas wrote the 5-4 opinion for the Court in *Alleyne*, which closely tracked the dissenting arguments in *Harris*, interpreting *Apprendi* to mean that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are the "elements" that must be proven to a jury beyond a reasonable doubt and determining that "a fact triggering a mandatory minimum alters the prescribed range." Justice Breyer — who reached this same conclusion in *Harris* but chose at that time to refuse to accept *Apprendi* rather than endorse the consequences for mandatory minimums he understood it to dictate—now provided the crucial fifth vote for the controlling portion of the Court's opinion in *Alleyne*. While Justice Breyer noted in his concurrence that he continued to disagree with *Apprendi*, he concluded that since "*Apprendi* has now defined the relevant legal regime for an additional decade" since *Harris*, "the law should no longer tolerate the anomaly that the *Apprendi*/*Harris* distinction creates."

The four dissenters in *Alleyne*, in turn, urged the same reasoning as the plurality opinion in *Harris*: A defendant sentenced under a mandatory minimum could have received that same sentence without the finding by the judge (*i.e.*, the judge *could* have sentenced Alleyne to seven years without finding the fact that meant the judge *had* to do so). In contrast, *Apprendi*'s attention to statutory maximums is directed at facts that allow a defendant to receive a sentence that *could not* be imposed without the factual finding. Therefore, the dissent urged, *Apprendi*'s Sixth Amendment principles, are not applicable.

[186.2] 133 S. Ct. 2151 (2013).

Page 375, at the end of the last paragraph of the section, add new footnote 190.1:

When the Court . . . to the scales.[190.1]

[190.1] The Court has continued its practice of noting the prior conviction exception without deciding its continuing vitality, more recently without the disparaging asides. *See, e.g.*, Alleyne v. United States, 133 S. Ct. 2151 (2013); Southern Union Co. v. United States, 132 S. Ct. 2344 (2012); Oregon v. Ice, 555 U.S. 160, 163 (2009).

Two justices have weighed in on the future of *Almendarez-Torres*' prior conviction exception in the context of a denial of certiorari. In *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006), *R*'s appeal raised the question whether the Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but the Court declined to hear the case. In his dissent from denial of certiorari, Justice Thomas noted that "it has long been clear that a majority of this Court now rejects" the prior-conviction exception of *Almendarez-Torres*. Therefore, according to Justice Thomas, "[t]here is no good reason to allow" it to continue.

Yet Justice Stevens, one of the *Almendarez-Torres* dissenters, wrote a statement *supporting* the denial of certiorari. According to Justice Stevens, although *Almendarez-Torres* was "wrongly decided, that is not a sufficient reason for revisiting the issue." In his view, "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history" will seldom create a serious risk of prejudice. Coupling this conclusion with the "countless judges in countless cases" that have relied on *Almendarez-Torres*, Justice Stevens concluded that "[t]he doctrine of *stare decisis* provides a sufficient basis" for declining to revisit *Almendarez-Torres*. This reasoning, together with the solitary nature of Justice Thomas' dissent, and the Court's subsequent years of inaction despite changes in personnel plainly suggest that *Almendarez-Torres* will continue to survive.

CHAPTER 16 (Vol. 2)

APPEALS

§ 16.03 PLAIN ERROR

Page 383, add to footnote 33:

[33] . . . *See generally* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006).

Page 383, add to footnote 35:

[35] . . . *See also* Puckett v. United States, 556 U.S. 129, 134 (2009).

Page 385, following the first word of the fourth line of the last full paragraph, add new footnote 49.1:

Although the substance . . . of demonstrating prejudice,[49.1]

[49.1] Once the defendant has demonstrated error and that the error is plain, some states depart from this approach and place the burden on the prosecution to show an absence of prejudice. *See, e.g.*, State v. Ramey, 721 N.W.2d 294 (Minn. 2006) (placing burden on prejudice issue on prosecution when error involves prosecutorial misconduct).

Page 385: add to footnote 53:

[53]. . . *See also* United States v. Marcus, 130 S. Ct. 2159, 2164-65 (2010).

§ 16.04 HARMLESS ERROR

Page 387, at the end of the fifth sentence of the first full paragraph, add new footnote 66.1:

If the error . . . never be harmless).[66.1]

[66.1] In the context of non-constitutional errors, "[h]armless-error review . . . presumptively applies to '*all* errors where a proper objection is made.'" Zedner v. United States, 547 U.S. 489, 507 (2006) (quoting Neder v. United States, 527 U.S. 1, 7 (1999)) (emphasis in original). However, the Court has held that certain circumstances can lead to a finding of an "implied repeal" of the harmless error rule. *Zedner*, 547 U.S. at 507 (finding that certain violations of the Speedy Trial Act are not subject to harmless-error analysis given the Act's "unequivocal" language, *e.g.*, that an "'indictment *shall be dismissed*'" if the trial does not begin within the prescribed period) (quoting 18 U.S.C. § 3162(a)) (emphasis added by Court).

Page 389, add at the end of footnote 78:

[78] . . . . *See also* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

Page 390, at the end of the first paragraph, add the following new text:

; unconstitutionally sentencing on the basis of a "sentencing factor" not proven to the jury beyond a reasonable doubt (*Apprendi* error);[95.1] and *ex post facto* violation by retrospective use of enhanced sentencing guidelines.[95.2]

[95.1] *See* Washington v. Recuenco, 548 U.S. 212 (2006). *Contra under state law*, Smart v. State, 146 P.3d 15 (Alaska App. 2006) (state law requires retroactive application of proof-beyond-a-reasonable-doubt requirement of *Apprendi*/*Blakely* in state court collateral proceeding); State v. Recuenco, 180 P.3d 1276 (Wash. 2008) (holding on remand from U.S. Supreme Court that error U.S. Supreme Court held harmless as a matter of federal constitutional law could not be harmless as a matter of state law).

[95.2] *See* Peugh v. United States, 133 S. Ct. 2072, 2078 n.8 (2013).

Page 390, at the end of the last full paragraph, add the following new text:

Most recently — without suggesting that these are the only possible criteria — the Court has identified three separate grounds it has used for determining that a constitutional error is structural:[97.1] (i) the error renders the proceeding fundamentally unfair; (ii) "the difficulty of assessing the effect of the error; and (iii) "the irrelevance of harmlessness" of the error (such as in the case of denial of the right to proceed *pro se* which, in fact, may often help the defendant).

[97.1] *See* United States v. Gonzalez-Lopez, 548 U.S. 489, 149 n.4 (2006).

Page 391, add to footnote 108:

[108] . . . The Court has also held that certain (non-constitutional) violations of the Speedy Trial Act are also not subject to harmless-error review. *See* Zedner v. United States, 547 U.S. 489 (2006).

Page 391, add the following new text to the end of the last sentence of the first full paragraph:

; and the denial of the right to counsel of choice.[109.1]

[109.1] *See* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

Page 393, at the end of the first full paragraph, add the following new text:

The first of these reasons turned out to be superfluous as the Supreme Court subsequently held that federal courts should apply the *Brecht*/*Kotteakos* standard "whether or not the state

appellate court recognized the error and reviewed it for harmlessness under the [*Chapman* standard]."[119.1]

[119.1] *See* Fry v. Pliler, 551 U.S. 112 (2007).

§ 16.05 RETROACTIVITY

Page 396, at the end of the first paragraph, add new footnote 134.1:

Thus, even a . . . appealing his conviction.[134.1]

[134.1] In the particular example in the text — a new Confrontation Clause restriction on the use of hearsay — the Court adopted this second approach. *See* Whorton v. Bockting, 549 U.S. 406 (2007).

Page 399, at the end of the first paragraph, add the following new text:

Even if a rule applies retroactively, it may or may not help the defendant who invokes it, depending on the nature of the relief the defendant seeks. According to a recent decision of the Court, remedy is "a separate, analytically distinct issue"[149.1] from retroactivity. In that case, the Court held that although a new rule applied retroactively to a defendant, meaning his claim of a Fourth Amendment violation was valid, he was not entitled to the exclusionary remedy that future victims of the same violation would receive because the exclusionary rule's rationale of deterring improper conduct did not apply in this retroactive context.[149.2]

[149.1] Davis v. United States, 131 S. Ct. 2419, 2431(2011).

[149.2] *See id.* at 2422-34. The *Davis* case is discussed more fully in Vol. 1, § 20.06, *supra*, this Supplement.

Page 399, add to footnote 150:

[150] . . . *Contra, under state law*, Smart v. State, 146 P.3d 15 (Alaska Ct. App. 2006) (holding that, in state court collateral attacks on convictions, state law provides for broader retroactive application of federal constitutional decisions than that authorized by *Teague*); State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) (same); Colwell v. State, 59 P.3d 463 (Nev. 2002) (same); Cowell v. Leapley, 458 N.W.2d 514 (S.D. 1990) (same). Reviewing the propriety of such state court departures from federal retroactivity law, the Supreme Court held that states are indeed free to create "*state* law to govern retroactivity in state postconviction proceedings" that gives "broader retroactive effect to . . . [the] Court's new rules of criminal procedure." Danforth v. Minnesota, 554 U.S. 264, 288-90 (2008).

Page 400, add to footnote 168:

[168] . . . *See also* Whorton v. Bockting, 549 U.S. 421 (2007) (holding that new rule of *Crawford v. Washington*, 541 U.S. 36 (2004), "while certainly important, is not in the same category with *Gideon*" and does not apply retroactively).

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