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by

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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, 7th 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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TABLE OF CONTENTS (Vol. 1)

TABLE OF CONTENTS (Vol. 2)

Volume 1

CHAPTER 6 (Vol. 1)

FOURTH AMENDMENT TERMINOLOGY: "SEARCH"

§ 6.10 Technological Information Gathering

Page 101, replace the final paragraph with the following text:

The third party doctrine is still good law today, but its continued validity is under attack, and it is almost uniformly condemned by legal scholars.160 More importantly, the doctrine was significantly limited by the Supreme Court in *Carpenter v. United States.*160.1 In *Carpenter*, the police were investigating a series of robberies which took place over a four month period. The police had reason to believe *C* might be involved, so they contacted *C*'s cell phone providers and asked for his cell site location information. Cell site location information is routinely generated by every cell phone. Even when cell phones are not in use, they are continuously "pinging" nearby cell phone towers so that the wireless network knows which cell tower is best able to make a connection with the phone. The result is that cell phone companies have data about the location of every cell phone on their network for nearly every minute of the day. The government argued that it did not need a warrant, since *C* knowingly shared this information with his cell phone provider, and so under *Smith* and *Miller*, he had forfeited any reasonable expectation of privacy in this information.

The Supreme Court disagreed and held that the government had conducted a Fourth Amendment search when it obtained the cell site location information from the cell phone carrier. The Court noted that "[t]here is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today." In other words, it is possible to maintain a reasonable expectation of privacy in information that you share with a third party; as long as the information is sufficiently private, you maintain Fourth Amendment rights in the information. Furthermore, the Court pointed out that the concept of "voluntary exposure" of the information does not really apply in the cell phone location context—in modern life, one does not really "choose" to own a cell phone, and in owning a cell phone, you automatically broadcast your location to your cell phone provider without taking any affirmative actions. Thus, "in no meaningful sense does the user voluntarily assume the risk" of turning over the information.

The ramifications of *Carpenter* are as yet unclear. The Court stated that the holding was "narrow," and explicitly stated that *Smith* and *Carpenter* are still good law. But in the modern world, we share a large amount of information with third party companies, and much of that information is similar to the location information in *Carpenter* in legally relevant ways: it is relatively personal, and it is "automatically" shared without any affirmative act on our part. For

160 *See, e.g.,* 1 Wayne R. LeFave, Search and Seizure: A Treatise on the Fourth Amendment §2.7(c) at 747 (4th ed. 2004) (describing the doctrine as "dead wrong;" Christopher Slobogin, Privacy at Risk: The New Government Surveillance and the Fourth Amendment 151-64 (2007). *But see* Orin Kerr, *The Case for the Third Party Doctrine*, 107 Mich. L. Rev. 561 (2007) (arguing in favor of the doctrine).

160.1 585 U.S. ___ (2018).

example, we share information about our purchases with our credit card company; we share information about our internet searches with our search engines; and we store vast amounts of data in the cloud, which is maintained on third party servers. Under *Carpenter*, we may retain a reasonable expectation of privacy in all of that information.

Page 103-5, replace all of § 6.10[E] with the following:

[D] Massive Data Collection and the Mosaic Theory

Under *Knotts*, the Court established that a person does not have any reasonable expectation of privacy in information that they knowingly expose to the public. But *Knotts* only involved tracking a car for one trip. A few decades later, police were using more sophisticated surveillance methods to track people's public movements for weeks at a time. The first time the Court evaluated this type of surveillance was in *United States v. Jones*, in which the police attached a GPS device to the defendant's car and constantly tracked his movements for twenty-eight days. As we saw in Section 6.03[E], above, the majority opinion of *Jones* did not apply the reasonable expectation of privacy test. Instead the Court revived the old "trespass" test and held that the government conducted a search because it trespassed on the defendant's property when it attached a GPS device to the car. But the *Jones* case did include a four-Justice concurrence which found that under the *Katz* doctrine, continuous monitoring of a person's public movements over twenty eight days did violate a person's reasonable expectation of privacy. The Court expanded on this concurrence a few years later in *United States v. Carpenter*.

As explained in Section 6.10[B], in *Carpenter* the police suspected that *C* was involved in a series of armed robberies, and without 0btaining a warrant they subpoenaed *C's* cell phone location records, which revealed *C*'s location for nearly every minute over a four month period. The location information demonstrated that *C* was at or near the locations of a number of the robberies when they were being committed, and this evidence helped to convict *C* of the robberies. *C* appealed the case, arguing that the police conducted a search under the Fourth Amendment when they obtained his cell phone location records. The Supreme Court agreed, holding that *C* had a reasonable expectation of privacy in his location over an extended period of time.

The Court had no problem distinguishing the extensive surveillance at issue in *Carpenter* with the one-off surveillance that they approved in *Knotts*. The Court gave four reasons why the *Carpenter* surveillance infringed on *C*'s reasonable expectation of privacy. First, in the past individuals could assume that the police would not follow their public movements for such a long period of time because it would be too costly and difficult; thus people could reasonably expect

that the police would not follow them continuously for extended periods of time. New technology now makes this type of surveillance cheap and feasible, but, in accordance with the *Kyllo* decision, the type of surveillance technology used by the government should not alter whether the information the government gathers is protected by the Fourth Amendment. Second, extensive location surveillance provides an "all-encompassing record" of the cell phone owner's whereabouts, providing not just information of his location but also his "familial, political, professional, religious, and sexual associations." Third, individuals carry cell phones into private spaces, and thus precise location information would reveal the owner's location inside residences and other private buildings. Finally, cell phone companies store this location information for up to five years, giving the police the ability to go back in time and track someone's location years before they even knew that he was a suspect.

The Court refused to set an exact amount of time at which location tracking becomes a Fourth Amendment search, although it did state that one week of cell phone location information was long enough to meet the standard.

In holding that *C* had a reasonable expectation of privacy in this information, the Court was applying what is known as the "mosaic theory." Just as a mosaic is made up of individual meaningless points which resolve themselves into a meaningful picture when combined together, the mosaic theory holds that aggregating many public pieces of information could result in a "mosaic" which reveals private information. Thus, even if a person does not have a reasonable expectation of privacy in an individual piece of information (such as one trip along a public road), a person could have a reasonable expectation of privacy in all of his trips along public roads over an extended period of time. By aggregating all of these individual trips, the police are able to spot patterns and potentially deduce intimate information about the suspect that they would not be able to deduce after monitoring one trip. As Justice Alito argued in his *Jones* concurrence: "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." However, "the use of longer term GPS monitoring in investigations of most offenses impinges on [reasonable] expectations of privacy."165.1

The mosaic theory is somewhat controversial. On the one hand, *Carpenter* is correct in stating that modern technology has allowed the police to conduct surveillance of public places in a scale vastly different than what could have been envisioned when *Katz* and *Knotts* were decided. Thus, courts did not have to worry about regulating massive amounts of data collection, because "[t]raditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken.'165.2 Conducting continuous surveillance for a month or even a week using pre-21st century technology would have required "a large team of agents, multiple vehicles, and perhaps aerial assistance."165.3 But that is no longer the case. GPS devices and cell phone towers make continuous, long-term monitoring relatively

165.1 United States v. Jones, 132 S.Ct. 945, 964 (Alito, J., concurring). *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 Aa 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).

165.2 Jones v. United States, (Alito, J., concurring).

165.3 *Id.* (Alito, J., concurring).

inexpensive, and in the absence of legislative action, courts must decide whether to allow constant surveillance of this kind or subject it to the *Katz* test.

The problem is not limited to GPS tracking. Constant video surveillance of a person's property can also create privacy concerns which may lead to the application of the mosaic doctrine.165.4 And the rise of "big data analytics"—the ability to gather and process mass quantities of data to learn new information—has altered the way that law enforcement conducts investigations. The government can track our internet search history, learn whom we are calling on our phones, and subpoena all of our credit card charges. The government can also easily track years of our social networking communications, since that is information we have knowingly exposed to the public.165.5 As we saw in Section 6.10[B], the third party doctrine may no longer apply to this information, but the information still will not get Fourth Amendment protection unless the courts apply the mosaic doctrine and hold that we have a reasonable expectation of privacy in the information as a whole. If this type of surveillance is unregulated by the Fourth Amendment, law enforcement will be able to discover significant amounts of private information about us without implicating the Fourth Amendment. The mosaic theory is a mechanism by which courts can take a more holistic and less formalist view of the government's actions and examine what the government is *really* learning about us when it collects and processes massive amounts of data.

On the other hand, the mosaic theory has attracted widespread criticism from courts and commentators.165.6 Critics note that the theory is doctrinally suspect: it asserts that multiple number of "non-searches" can somehow be added together to become a search, which is akin to saying that multiplying zero by a large enough number results in a nonzero number. It is also problematic to implement: at what point do large amounts of public information suddenly become private? *Carpenter* held that seven days of continuous location information triggered Fourth Amendment protection—what about five days? Or three days?165.7 Also, widespread adoption of the mosaic theory will force courts to answer a number of novel questions:165.8 does the theory apply when law enforcement gathers the information, or only when it processes the information in certain ways that reveal private information? Do courts aggregate information that is obtained by different officers, or even different agencies? Should courts apply different standards for aggregated location information than they do for telephone metadata or social media posts? The mosaic theory has the potential to further complicate an already complex area of Fourth Amendment law.

Page 107-8, delete all of § 6.10[F].

165.4 *See* United States v. Vargas (No. No. CR-13-6025-EFS; W.D. Wash. Dec 15, 2014) (six weeks of continuous video surveillance of the defendant's front lawn from a camera on a nearby utility pole is a Fourth Amendment search); *Contra* United States v. Houston, 813 F.3d 282 (6th Cir. 2016).

165.5 *See* Monu Bedi, *Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory*, 94 B. U. L. Rev. 1809 (2014).

165.6 *See, e.g.,* Orin Kerr, *The Mosaic Theory and the Fourth Amendment*, 111 Mich. L. Rev. 311 (2012).

165.7 Lower courts have also struggled to define the scope of *Jones*' plurality decision in cases 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 not a search. United States v. Houston, 813 F.3d 282 (2016). In a nearly identical case, however, a district court held that it *was* 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).

165.8 Kerr, *supra* note **Error! Bookmark not defined.**, at 334-336.

CHAPTER 11 (Vol. 1)

WARRANTLESS SEARCHES: EXIGENT CIRCUMSTANCES

§ 11.02 Intrusions Inside the Human Body

Pages 183, after the second sentence in footnote 11, add the following text to the footnote:

Although *McNeely* clearly stated that there was no *per se* exigency for blood tests in drunk-driving cases, Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019) seemed to move the Court ever closer to holding that under some circumstances, a *per se* exigency can exist. In *Mitchell,* driver M was arrested for drunk driving, but then lapsed into unconsciousness by the time he reached the police station. Police then took him to the hospital for treatment and obtained a blood sample from him without his consent and without a warrant. The Court upheld the blood test under the exigency exception, and came close to holding that such circumstances would always result in an exigency: "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may *almost always* order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.* at 2539 (emphasis added). The only exception would be if the defendant can show that his blood would not otherwise be drawn at the hospital, and that police were unreasonable in the judgment that a warrant was not feasible. *Id.*

CHAPTER 12 (Vol. 1)

SEARCHES INCIDENT TO LAWFUL ARREST

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

Page 208, at the end of the subsection, add the following text:

One area in which *Riley* may have an impact beyond searches incident to a lawful arrest

CHAPTER 12 (Vol. 1)

SEARCHES INCIDENT TO LAWFUL ARREST

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

Page 208, at the end of the subsection, add the following text:

One area in which *Riley* may have an impact beyond searches incident to a lawful arrest is in the context of searches at the international border. As noted in Section 18.03[A], law enforcement officers traditionally have substantial powers to search any property carried by someone who crosses the border, without any need to show individualized suspicion. However, in the wake of *Riley*, some circuit courts are taking *Riley*'s broad language regarding the enhanced privacy interests in cell phones and requiring law enforcement to show at least reasonable suspicion before border agents can search a cell phone or any other personal electronic device. As of now, the circuits are split on this question, but it is one example of the effect *Riley* may have on other areas of Fourth Amendment law.

CHAPTER 13 (Vol. 1)

SEARCHES OF CARS AND CONTAINERS THEREIN

§ 13.04 *CALIFORNIA V. CARNEY*: THE MOBILITY AND LESSER-EXPECTATION-OF-PRIVACY RATIONALES AT WORK

Page 219, inside the second full paragraph, after ("assuming probable cause for the search)," delete the rest of the paragraph and add the following text:

The only exception is when the vehicle is located inside the curtilage of the defendant's home.47.1 In *Collins v. Virginia*,47.2 the police had probable cause to believe that C had possession of a stolen motorcycle. When a police officer arrived at the house where C was staying, the officer saw a white tarp covering a motorcycle-shaped object in the driveway. The officer, who did not have a warrant, walked up the driveway (into the curtilage of the home) and pulled off the tarp, revealing the stolen motorcycle. The Supreme Court ruled that the officer had conducted an unconstitutional search by removing the tarp. The automobile exception did not apply because "the scope of the automobile exception extends no further than the automobile itself," and the justifications for the automobile exception are not sufficient to allow an officer "to enter a home or its curtilage to access a vehicle without a warrant."

47.1 *See* § 6.06, *supra*, for a discussion of curtilage.
47.2 2018 WL 2402551 (2018).

CHAPTER 17 (Vol. 1)

TERRY V. OHIO

§ 17.03 "REASONABLE SUSPICION"

Page 272, at the end of subsection [1], add the following paragraph:

Police officers are also permitted to rely on their own "common sense" in determining whether reasonable suspicion exists. In *Kansas v. Glover*,43.1 a police officer saw the *G* driving, ran the license plates of his car, and determined that the owner of the truck had a suspended driver's license. The officer pulled the car over based solely on this information, along with the common sense inference that the driver of a car is usually the owner of the car. *G* argued that the police could only rely on inferences derive from their specialized training or experience, but the Court disagreed, holding that police may also rely upon "factual inferences based on the commonly held knowledge they have acquired in their everyday lives."43.2 However, the officer still must have specific and articulable facts—such as the suspended license—before conducting the *Terry* stop or the traffic stop.

43.1 Kansas v. Glover, 140 S.Ct. 1183 (2020).
43.2 *Id.* at 1189-90.

CHAPTER 18 (Vol. 1)

MORE "REASONABLENESS" BALANCING

§ 18.03 INTERNATIONAL BORDER SEARCHES AND SEIZURES

Page 297, before the first full paragraph, add the following text:

A new exception to this rule may be developing for cell phones and personal computers. As we saw in Section 12.06, the Supreme Court in *Riley v. California* recognized that cell phones are different in kind from other kinds of property, since the scope and volume of personal information stored on a cell phone is vastly different than what is found in any traditional bag or container, and is in many ways more private than the interior of a person's home.22.1 Thus, *Riley* held that the search incident to lawful arrest exception does not apply to cell phones. Some circuit courts have used the broad language in *Riley* to impose a reasonable suspicion requirement for searches of cell phones and other personal electronic devices at the border. According to the Fourth Circuit, in the wake of *Riley* "a forensic search of a digital phone must be treated as a nonroutine border search, requiring some form of individualized suspicion.22.2 Even before *Riley*, the Ninth Circuit had already imposed such a rule for electronic devices at the border, for substantially the same reasons as the Supreme Court cited in *Riley.*22.3 However, not all circuit courts agree,22.4 and this is a circuit split that may need to be resolved by the Supreme Court.

22.1 Riley v. California, 134 S.Ct. 2473 (2014).
22.2 United States v. Kolsuz 890 F.3d 133 (2018).
22.3 United States v. Cotterman, 709 F.3d 952 (2013) (en banc).
22.4 *See, e.g.,* United States v. Touset, 890 F.3d 1227 (2018).

CHAPTER 19 (Vol. 1)

FOURTH AMENDMENT STANDING

§ 19.04 STANDING TO CONTEST A SEARCH: *RAKAS V. ILLINOIS*

Page 332, after the end of the second full paragraph, add the following text:

A non-owner driver will always have standing to challenge the search of the car, unless his possession of the car is a crime. In *Byrd v. United States*,55.1 *B*'s girlfriend rented a car and then allowed *B* to drive it in violation of the rental car agreement. Even though *B* was breaching the contract with the car rental company by driving the car, the Supreme Court unanimously held that he had standing to challenge the subsequent search of the car. The Court noted that a person who **stole** a car from its rightful owner would not have Fourth Amendment standing in the car, and noted that if *B* had intentionally defrauded the rental car company by having his girlfriend rent it under false pretenses, he may have no greater reasonable expectation of privacy than a car thief. But absent any evidence that *B* was committing a crime by possessing the car, a mere violation of the rental car contract was not sufficient to defeat the defendant's reasonable expectation of privacy in the car.

55.1 138 S.Ct. 1518 (2018).

CHAPTER 28 (Vol. 1)

THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 28.05: THE DEFENSE: WHO IS IN CHARGE?

Page 547, at the end of footnote 100, add the following text to the end of the footnote:

The Court reaffirmed the defendant's right to control his decision to plead guilty in McCoy v. Louisiana, 138 S.Ct. 1500 (2018), noting that "If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." *Id.* at 1509.

§ 28.08: EFFECTIVE ASSISTANCE OF COUNSEL: GENERAL PRINCIPLES

Page 567, just before the final paragraph, add the following text:

Later cases have added a few more circumstances in which prejudice to the defendant can be presumed. If counsel "fails to subject the prosecution's case to meaningful adversarial testing," the court will presume prejudice to the defendant.221.1 Similarly, if the attorney's deficient performance "denies the defendant of an appeal that he otherwise would have been taken," prejudice is presumed.222.2 The clearest example of this is when a defendant specifically instructs the lawyer to file a notice of appeal, and the attorney disregards those instructions. This is *per se* prejudice even if the defendant has signed an appeal waiver as part of his plea negotiation, which would cut off nearly all possible appellate claims.222.3

221.1 United States v. Cronic, 466 U.S. 648, 659 (1984).
222.2 Roe v. Flores-Ortega, 528 U.S. 470 (2000).
222.3 Garza. Idaho, 139 S.Ct. 738, 742 (2019).

TABLE OF CASES

[References are to Sections in Volume 1]

B

C

F

G

K

M

T

INDEX

[References are to Sections in Volume 1]

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, 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).

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

[129.3] *Id.* at 146.

§ 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 death177.1 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").

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 160:

[160] . . . . *See also* 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 Confrotation 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" Hearsay41.15

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).

§ 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 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 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 Goverment'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 then 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).

TABLE OF CASES

[References are to Sections in Volume 2]

A

B

C

D

F

G

H

I

J

K

L

M

N

O

P

R

S

T

V

W

Y

Z

TABLE OF STATUTES

[References are to Sections in Volume 2]

INDEX

[References are to Sections in Volume 2]

A

B

C

D

G

H

I

J

P

R

S

V