Criminal Procedure

NINTH EDITION

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The Ninth Edition to our book is brand new, current with United States Supreme Court rulings as of early 2019. In addition, there have been relatively few Supreme Court rulings affecting these materials in the 2019 term of the Court. As a consequence, this supplement is limited.

Chapter 1

INTRODUCTION

§ 1.01 OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

[H] Trial

[Page 11 – Last paragraph before Section [I], add:]

In Ramos v. Louisiana, 590 U.S. __ (Apr. 20, 2020), the Court rejected the conclusions in Apodaca v. Oregon, 406 U.S. 404 (1971) and Johnson v. Louisiana, 406 U.S. 356 (1971), and held that the Fourteenth Amendment incorporates the Sixth Amendment right to a jury trial against the states and requires a unanimous verdict of guilt in all criminal trials. Although 48 states and the federal court system already required a unanimous jury verdict of guilt, Louisiana and Oregon did not based on the *Apodaca* and *Johnson* precedents. *Ramos* makes clear that the practices in Oregon and Louisiana are unconstitutional.

Chapter 2

THE FOURTH AMENDMENT AND THE DEPRIVATION OF LIBERTY

§ 2.02 THE SLIDING SCALE OF SUSPICION

[D] REASONABLE SUSPICION

[Page 63: Notes and Questions, add after Note (4):]

(5) In Kansas v. Glover, 589 U.S. __ (Apr. 4, 2020), a majority of the Court held that an officer acted reasonably and with reasonable suspicion when he initiated a traffic stop of a driver after running a car tag and learning that the driver's license was revoked. The Court found it reasonable, in the absence of contrary information, to believe that the person driving was the owner of the car with the revoked license. In reaching this conclusion, the Court noted, "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence and obviously less than is necessary for probable cause." Id. (internal citations omitted).

[Page 85: At the end of the Navarette case, add a Note:]

Note:

In United States v. McCants, 920 F. 3d 169 (3d Cir. 2019), the Third Circuit Court of Appeals cited *Navarette* when holding that reasonable suspicion was created by a 911 call from an anonymous caller reporting: "This guy is out here beating up his girlfriend. He's about to kill her." The caller also provided a description of where – "on Grove Street in East Orange" . . . "Grove and, and, and like Williams" and a description of the suspect: "He's wearing a red hat, with braids and he's beating her up really bad right now I wanna break – I wanna break it up but, I don't wanna do nothing." Finally, the caller said "I think he has a gun." Police arrived within one minute and saw a male fitting the description provided by the caller.

[F] The Scope of the Frisk

[Page 97: Notes and Questions, add between Notes (1) and (2):]

In United States v. Johnson, __ F. 3d __, 2019 WL 1615283 (11th Cir. 2019), the court held that an officer acted reasonably and did not exceed the scope of a *Terry* frisk when he patted the defendant's clothing and "felt something nylon covering 'a small, round, hard object' that he immediately recognized as ammunition" before reaching in to remove the bullet from the defendant's pocket.

[G] The Duration of the Detention

[Page 106: Notes and Questions, add at the end of Note (1):]

See also United States v. Rodriguez, 762 Fed. Appx. 938 (11th Cir. 2019) (noting that there is no rigid time limit on a *Terry* stop and that some stops between 30 and 75 minutes are "not beyond the pale of reasonableness.").

§ 2.03 ARREST

[C] The Method of Accomplishing the Arrest

[Page 131: Between Notes (2) and (3) add:]

In Watson v. Burton, 764 Fed. Appx. 539 (6th Cir. 2019), the court held that officers violated the Fourth Amendment and the principles established in *Payton* when they grabbed the defendant by the arm and pulled him from inside his home in an open doorway to outside the home. The court noted that "the police crossed the threshold of [the defendant's] home and seized him by physical touching."

Chapter 3

§ 3.01 The Constitutional Choice: Trespass versus Privacy

[Page 157: add to the end of the Notes:]

(3) In Taylor v. City of Saginaw, 922 F. 3d 328 (6th Cir. 2019), the Sixth Circuit applied the reasoning in *Jones* and held that police conduct a search subject to the Fourth Amendment reasonableness requirement when they mark tires of parked cars to track how long they remain parked in the same location. "In accordance with *Jones*, the threshold question is whether chalking constitutes common-law trespass upon a constitutionally protected area. . . . There has been a trespass in this case because the City made intentional physical contact with Taylor's vehicle."

Chapter 4

The Right to Counsel

§ 4.02 Joint Representation

[Page 493 – Add to Note (3):]

If the defendant is required to demonstrate harm from the joint representation, she must show "a reasonable likelihood that…counsel's performance would have been different had there been no conflict of interest." *United States v. Grayson Enterprises, Inc*., 950 F. 3d 386, 398 (7th Cir. 2020).

§ 4.03 The Right to a *Pro Se* Defense

[Page 508 – Add to Note (4):]

In *United States v. Hansen*, 929 F. 3d 1238, 1250 (10th Cir. 2019), the court wrote

> that a knowing and intelligent waiver can only be made with the defendant's ''apprehension'' of:
>
> > the nature of the charges, the statutory offenses included within them, the range of allowable
> >
> > punishments thereunder, possible defenses to the charges and
> >
> > circumstances in mitigation thereof, and *all other facts essential to a broad understanding*
> >
> > *of the whole matter*.

The court reversed the defendant's conviction, finding that

> the district court here failed to engage in a sufficiently thorough colloquy with Mr. Hansen that would properly warn
>
> him under the circumstances of this case that—if he proceeded pro se—he would be
>
> obliged to adhere to federal procedural and evidentiary rules….

Id. at 1256.

§ 4.04 When the Right Applies

[Page 554 – Add to Note (6):]

The defendant in *Commonwealth v. German*, 134 N.E. 3d 542 (Mass. 2019) was arrested for a robbery. He was standing in front of a wall on a public street with police officers; the two victims of the crime were brought to him and before the officer could ask them anything, they simultaneously identified the defendant as the robber. The defendant argued that the identification was improper because it was so suggestive. The court wrote that a showup identification conducted in the immediate aftermath of a crime is "disfavored as inherently suggestive." Alone, however, it is not sufficient to render it inadmissible in evidence. Here the identification was allowed, with the appeals court focusing on the time involved, the location, the spontaneous statements of the witnesses, and the instructions given at trial.

See also, *People v. Sammons*, 2020 WL 1330364 *6, *12 (Mich.) where the court wrote this:

> Due process protects criminal defendants against "the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable.
>
> The inherently suggestive nature of showups has long been beyond debate. Showups have been called "the most grossly suggestive identification procedure now or ever used by the police." In this case, all we need to observe in order to conclude that the procedure was suggestive is that defendant was shown singly to the witness. The prosecution argues that the showup was not suggestive because defendant was wearing his street clothes and was not handcuffed or restrained. To be sure, the showup would have been more suggestive if defendant had been shackled in a striped jumpsuit, but noting other ways the showup could have been more suggestive does not help us determine whether this showup was suggestive…..we do not believe that the prosecution has met its burden to show that the indicia of reliability in this case "are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances….

The court in *United States v. Muhanad Mahmoud Al-Farekh*, 956 F. 3d 99, 110 (2nd Cir. 2020) wrote this:

> In reviewing Al-Farekh's due process challenge to the admission of Murad's identification, we must first ask whether the identification procedures employed overseas were "unduly suggestive of the suspect's guilt." In conducting this threshold inquiry, we must "examine the procedures employed in light of the particular facts of the case and the totality of the surrounding circumstances." If the procedures were not unduly suggestive, "the trial identification testimony" is generally admissible without further inquiry into the reliability of the [out-of-court,] pretrial identification." That is so because, where there is no possible taint of suggestiveness in the identification procedures, "any question as to the reliability of the witness's identifications goes to the weight of the evidence, not its admissibility."

Is this a correct statement of the law?

The trial lawyer in *United States v. Nolan*, 956 F. 3d 71 (2nd Cir. 2020) initially moved to exclude the eyewitness testimony of the four victims but then decided instead to impeach the victims' testimony at trial. The appeals court found ineffective assistance of counsel [*see* § 4.05 *infra*] for the abandonment of the pretrial motion to exclude. In assessing the ineffective assistance claim, the court discussed its view of eyewitness testimony.

> A growing body of scientific research, moreover, has clarified and expanded what factors a court should examine in determining whether to exclude eyewitness identification testimony. As this Court has observed, this "literature indicates that certain circumstances surrounding a crime — including the perpetrator's wearing a disguise, the presence of a weapon, the stress of the situation, the cross-racial nature of the crime, the passage of time

> between observation and identification, and the witness's exposure to [the] defendant through multiple identification procedures — may impair the ability of a witness ... to accurately process what she observed."

Id. at 80.

§ 4.05 Ineffective Assistance of Counsel

[*Incompetent Counsel,* Page 625—add to Comment:]

See also, *Urquhart v. State*, 203 A. 3d 719, 731-32 (2019) where the court found a Sixth Amendment violation because the defendant's public defender

> "went from one trial into another trial into another trial'' over Urquhart's entire pretrial period—requiring different public defenders to represent Urquhart in his place at the pretrial hearings, including the final case review. In addition… Urquhart's counsel did not meet with him for almost four months before trial. Lastly, and most significantly, Urquhart's repeated requests for help were effectively pushed aside by his trial counsel and the court.

In *Stermer v. Warren*, ___F. 3d___ (6th Cir. 2020) the prosecutor repeatedly called the defendant a liar, in quite strident terms.

> In his closing argument, the prosecutor argued that the circumstantial evidence, when viewed as a whole, supported Stermer's guilt. He took a particular focus on Stermer's statements to the insurance investigators, suggesting that she lied to them in order to cover up her role in the fire and her husband's death. Before describing these statements, the prosecutor said the following:
>
> I'm going to be talking about statements that Linda Stermer made. What I want to caution you on is as we look at this, we know she is a liar. There is no question but that she's a liar and will lie when it suits her, okay. Even if we didn't know that, we have to take a cautious view of a statement by someone who is accused of a very serious crime. Might they not say things that they perceive are going to be favorable to them? But we know that she's a liar and in looking at some of those statements, the tendency and what I want you folks not to do is to adopt them as fact because if you do, they are going to be very difficult to reconcile maybe with other parts of it. So as you're looking at the evidence, keep in mind anything she says is suspect. She's a liar. And we'll see not only the direct lies that she told, but we'll align our common sense to other things that she said to see if it makes sense and if it indicates that she's a liar.
>
> [Later] the prosecutor summarized his thinking: "But why are we getting multiple inconsistent versions? Okay. I think that's the question we have to be asking and I think the answer is because we're dealing with a liar who has things to hide….You don't go back and forth telling different stories depending on who you are talking to. And that's another indication of her inability to tell the truth."

> After discussing the remaining circumstantial evidence against Stermer, the prosecutor ended his closing argument as follows:
>
> [S]he has told lie after lie after lie. . . . Is there anything that we've heard other than from a liar, and even then not a real good story, that would lead us to believe that, to believe that there is reason to believe that Todd Stermer caused this? I would suggest that there is nothing. I would suggest that we are dealing with a diabolical, scheming, manipulative liar and a murderer. Any statement of any consequence that she has made is suspect, either shown to be directly a lie, or common sense tells us that it doesn't make any sense. I would ask you to return a verdict of guilty.

Defense counsel never objected to these statements. Ineffective assistance of counsel? Yes, found the majority.

> "It is patently improper for a prosecutor either to comment on the credibility of a witness or to express a personal belief that a particular witness is lying." Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. [W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones."
>
> The failure to object to prosecutorial misconduct can amount to ineffective assistance of counsel under *Strickland*. This is because "when a prosecutor does act unfairly, there is little a defendant can do other than rely on his or her attorney to lodge an appropriate and timely objection. A failure to make such an objection can have devastating consequences for an individual defendant."
>
> [T]here is no way that the attorney's failure to object "might be considered sound trial strategy."
>
> In this case, trial counsel stood by while the prosecutor repeatedly branded Stermer a liar, misrepresented her statements, bolstered the credibility of other witnesses, and called her a "diabolical, scheming, manipulative liar and a murderer." While "any single failure to object usually cannot be said to have been error," here defense counsel "so consistently fail[ed] to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice."

The dissenter disagreed:

> Prosecutors should not gratuitously cast aspersions on a defendant's character, it is true. But that's not what happened. The prosecutor's statements about Stermer's honesty were brief, few, and peripheral to his central arguments. He stated that Stermer told "lie after lie after lie." He said that "she's a liar and will lie when it suits her." And he stated that those "accused of a very serious crime" might "say things that they perceive are going to be favorable to them." These statements look nothing like the pattern of "pronounced

> and persistent [misconduct], with a probable cumulative effect upon the jury" necessary to constitute a violation redressable by habeas. And the record supported each statement.
>
> What of the prosecutor's statement that she was a "diabolical, scheming, manipulative liar and a murderer"? Harsh, no doubt. Unnecessary too. A good lawyer knows that it is better to let the jurors draw these conclusions for themselves rather than to push and prod the jurors into drawing them. But given the "context of the entire trial," this one descent into impolitic and needless language did not clearly violate any Supreme Court decision or rule.

[*Incompetent Counsel,* Page 627—add to capital punishment cases:]

The most recent decision of the United States Supreme Court to deal with ineffective assistance of counsel in a capital case is *Andrus v. Texas*, __ U.S. __ (June 15, 2020). In a per curiam decision, the Court laid out its reasoning for sending the matter back to the state court.

To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." And to establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

It is unquestioned that under prevailing professional norms at the time of [Andrus'] trial, counsel had an "obligation to conduct a thorough investigation of the defendant's background." Counsel in a death-penalty case has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Here, the habeas record reveals that Andrus' counsel fell short of his obligation in multiple ways: First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

Chapter 5

Confessions and Other Incriminating Statements

§ 5.01 The Due Process Approach

[Page 642—add to Note (2):]

As noted in the text, "promises and threats, both explicit and implicit, pose difficult problems. *See Budhani v. State*, 830 S.E. 2d 195 (Ga. 2019) where the investigating officer told the defendant that no additional charges would be brought against him if he made a confession. The statement should have been held inadmissible, as "promises made by law enforcement to bring no additional charges …constitute[] an impermissible hope of benefit." *Id*. at 206.

[Page 657—add to Note (1):]

The defendant in *State v. Vasquez-Santiago*, 456 P. 3d 270 (Or. App. 2019) had a very low IQ. The majority emphasized this in finding the confession involuntary.

> It is true that lower levels of intellectual functioning by a defendant do not, automatically of themselves, prohibit the state from meeting its burden to prove voluntariness…. However, it is well established that the personal characteristics of a defendant must be considered in assessing the totality of the circumstances surrounding voluntariness. Characteristics, like age, education, and intelligence, "are relevant only if police, in fact, exert coercion and only insofar as those circumstances render a suspect less able to resist that coercion"….[Also] defendant was, in fact, under the belief that his infant son was in custody and under the subjective belief that his cooperation would lead to his son's release. That is, regardless of how a father of average intellectual functioning would have responded to the possibility of an infant being in police custody, this particular defendant, with an IQ of 53, understood the circumstances to involve urgency, including urgency over the child being breast fed by his mother.

Id. at 281. The dissenters sharply disagreed:

> Here, assuming that defendant has below-average intelligence, it is notable that the majority never identifies exactly *how* that affected his conduct. That conduct supports the trial court's finding that defendant was not impeded; rather, he entered the interrogation room with a view to securing the best deal that he could get, and the interrogation was essentially a negotiation. By giving decisive weight to defendant's IQ score in the face of evidence about how he actually conducted himself, the majority departs from how we have treated defendants' personal characteristics in past cases. We have looked beyond general assertions regarding a defendant's level of mental competence and evaluated the record for indications of actual impairment in the interactions between the defendant and the police.

Id. at 292.

[Page 662—add to Problem B, "Deceitful Interrogation":]

The state supreme court in *Tigue v. Commonwealth*, 2018 WL 7814537 *17 (Ky.) did not give precise direction as to expert testimony regarding false confessions. "Our conclusion is not a statement that false-confession expert testimony is always admissible. The more accurate statement of our holding here is that false-confession expert testimony is not always inadmissible."

§ 5.03 The Self-Incrimination Approach

[Page 753—add to Note (3):]

> "[T]he initial step [on the custody question] is to ascertain whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' " We have previously identified a nonexhaustive number of circumstances that are relevant to this aspect of our custody analysis, including "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." In conducting this analysis, we must keep in mind that a finding of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."
>
> This inquiry into "whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last." Once we complete the freedom-of-movement step, we must still ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."

United States v. Melo, 954 F. 3d 334, 340 (1st. Cir. 2020).

[Page 755—add to Problem F, "Custodial Interrogation":]

As discussed in the *Perkins* case, the United States Supreme Court has consistently held that "conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." This led the California court of appeals to find no error in *People v. Valencia*, 2019 WL 6869128 where the undercover officer was placed in a cell with the defendant soon after the arrest, and after the defendant had invoked his *Miranda* rights. The state supreme court denied the petition for review. 2020 WL 2105590. Justice Liu dissented from the denial:

> Because Valencia confessed to a man he believed was not with the government, there is no reason to assume coercion. Ploys to mislead suspects or to lull them into a false sense of security are not within *Miranda*'s concerns....I find dubious the claim that it is lawful for the police to continue questioning a suspect who has invoked *Miranda* rights and remains in custody so long as the police disguise the interrogation. A suspect who has invoked *Miranda* rights has made a choice not to speak with the police. It is one thing if the suspect then chooses to make incriminating statements to someone who is not acting at the behest

> of the police. But it is difficult to see how the use of deceptive schemes by the police to continue questioning the suspect can be compatible with " '[p]reserv[ing] the integrity of an accused's choice to communicate with police only through counsel.' "
>
> ....The fact that the suspect's statements are elicited not by formal interrogation but by a police-concocted scheme of trickery or deceit does not support an inference that the suspect has waived his previously asserted *Miranda* rights. Such deliberate disregard for the exercise of constitutional rights is hard to square with "the respect a government - state or federal - must accord to the dignity and integrity of its citizens, " which *Miranda* understood to be "the constitutional foundation underlying the privilege" against self-incrimination....It is a hard lesson of history that public cynicism and distrust of legal institutions take root when constitutional rights are honored in theory but violated in practice. The right to cut off questioning and seek assistance of counsel is deeply embedded in the consciousness of our citizenry as a fundamental protection against the formidable power of the police. It trivializes this protection to say it can be defeated by a simple ruse. The time is ripe for the Legislature to address this issue in light of this court's reluctance to intervene.

[Page 770—add to Note (6):]

For a striking opinion involving the police having another person approach the defendant, *see*, *State ex rel. A.A.*, 222 A.3d 681 (N.J. 2020). There, the fifteen-year-old defendant was arrested for aggravated assault. His mother was allowed to go back to the holding cell and speak to her son in an open area. Officers allowed this because they wanted to make sure that the minor defendant understood his right to have a parent present, as required under New Jersey law. The officers did not explain to the mother that they would be listening to the conversation with her son and that anything her son said could be used against him. Also, they did not tell the defendant his rights in front of his mother before the two began to speak. The New Jersey Supreme Court ruled that the defendant's incriminating statements were not admissible.

> Under the circumstances, it was hardly a surprise that A.A. and his mother spoke about the crime for which A.A. had been arrested. The police should have known it was reasonably likely that A.A.'s mother would elicit incriminating responses from him. Although we find no evidence of bad faith on the part of the police, their words and actions set in motion A.A.'s incriminating statements to his mother. Under *Innis*, therefore, A.A. was subjected to the "functional equivalent" of express questioning while in custody. His statements, obtained without the benefit of any *Miranda* warnings, are thus inadmissible.

Id. at 691.

From *Shelly v. State*, 261 So. 3d 1, 16-17 (Fla. 2018), this conversation took place after the defendant make clear he wished to remain silent and wanted a lawyer:

> [Detective Consalo]: You, you know your rights, you know you might not want to say—if you want to talk to us a little bit longer then you need to say I want to talk to you a little bit longer—

[Shelly]: No.
[Detective Consalo]: —and I'll sit there and talk to you. Okay?
[Shelly]: Y'all fixing to book me for nothing. What y'all booking me ah—like for? *Okay, no more talk.*
[Detective Consalo]: Ah—that's up to you. You said, you, you—
[Shelly]: (Unintelligible.)
[Detective Consalo]: —(Unintelligible).
[Shelly]: *No, I'm alright. I'm alright.*
[Detective Consalo]: You, you said that you—
[Shelly]: *No more talking*.
[Detective Consalo]: —wanted your attorney, so no more talking.
[Shelly]: *Yea*.
[Detective Consalo]: If you want to talk I will be more than happy and I'm gonna shoot straight with you. I've known your family for a long time. I've played softball with your, your, your uncle a many, many times, great—
[Shelly]: Sir, and—
[Detective Consalo]: —softball player.
[Shelly]: —guess what? That's who picked me up man.
[Detective Consalo]: I—I'm—
[Shelly]: Alright, you want—I'll tal—I'll talk to you.
[Detective Consalo]: You want to talk?
[Shelly]: I'll talk to you. I'll talk to you.
[Detective Consalo]: And you are reinitiating contact with us, correct—
[Shelly]: I'll talk to you.
[Detective Consalo]: —at your request?
[Shelly]: (Unintelligible.)
[Detective Consalo]: Okay.
[Shelly]: *I don't want to talk man*.
[Detective Consalo]: Yes, or no?
[Shelly]: If you gonna lock me up, lock me up.
[Detective Consalo]: Alright, so—
[Shelly]: I know I ain't do it.
[Detective Consalo]: —yes or no? You tell me if you want to talk. That's up to you.
[Shelly]: Cause it ain't getting nowhere I told y'all who picked me up.
[Detective Consalo]: I, I will tell you what your momma said, and I'll tell you what your grandma said. Okay? If you want to talk to me, but I—

Interrogation? Yes, said the court.

> Detective Consalo wholly ignored Shelly's invocations of his rights and immediately proceeded to attempt to coax him into continuing with the interrogation. Detective Consalo failed to cease interrogating Shelly after Shelly unequivocally invoked his right to silence. ... Detective Consalo's actions can be likened to the proverbial carrot-and-stick—using reward and punishment to induce Shelly to acquiesce to continued interrogation. There can be no doubt these statements induced Shelly to continue engaging with Detective Consalo, even though he had clearly previously invoked his right to silence numerous

> times….When, as in this case, a detective persists in attempting to coax a suspect to continue the interrogation after the suspect has unequivocally invoked his right to silence, the detective is not asking harmless clarifying questions; he is violating the suspect's *Miranda* rights.

[Page 783—add to Note (1):]

Litigation continues as to whether comments by defendants are sufficiently clear to invoke protections. Consider these cases:

- *Lee v. State*, 832 S.E. 2d 851 (Ga. 2019): "Can I just wait until I get a lawyer", ambiguous.
- *Subdiaz-Osorio v. Humphreys*, 947 F. 3d 434 (7th Cir. 2020): "How can I do to get an attorney here….", ambiguous
- *People v. Frederickson*, 457 P. 3d 1 (Cal. 2020): "Hey, when am I going to get a chance to call my lawyer? It's getting late, and he's probably going to go to bed pretty soon", ambiguous.

In contrast to *Davis*, the Connecticut Supreme Court held that, under the state constitution, if the statement by the defendant is ambiguous, interrogation must cease. *State v. Purcell*, 203 A. 3d 542, 546, 567 (Conn. 2019).

> It is well settled that the federal constitution sets the floor, not the ceiling, on individual rights….Recognizing that the promise that dwell within *Miranda* can only be achieved by honoring the premises upon
> which it rests, we determine that there are compelling reasons to conclude that *Davis*' standard does not adequately safeguard *Miranda*'s right to the advice of counsel during a custodial interrogation. We therefore hold that, consistent with our precedent and the majority rule that governed prior to *Davis*, our state constitution requires that, ''if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel.''

Chapter 7

§ 7.02 THE RIGHT TO TRIAL BY JURY

[Page 946, add to the end of the Note, at the end of the page:]

In Ramos v. Louisiana, 590 U.S. __ (Apr. 20, 2020), a majority of the Court held that the Sixth Amendment applies to the states, through incorporation, "by way of the Fourteenth Amendment," and requires a unanimous jury of guilt in all serious criminal cases, undermining prior decisions of the Court. "[I]f the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." Id.