

Criminal Procedure

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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*, 140 S. Ct. 1390 (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.

§ 1.04 THE CONSTITUTION AND PRIVATE ACTION

[Page 21 – after the final paragraph, add:]

Until recently, it was unclear what role Tribal police officers were permitted to play in Fourth Amendment searches and seizures of non-Indians on a reservation. In *United States v. Cooley*, 2021 WL 2194835 (Jun. 1, 2021), the Court held that an officer of the Crow Police Department was authorized to seize the driver of a truck parked on a public right-of-way within a reservation. The officer could also subject the driver to a pat-down search, and search the truck he was in, based on a reasonable belief that the driver was violating state or federal law. In an unanimous opinion, the Court emphasized a Tribe's authority to exercise power over "non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.*" *Id.* (emphasis in original).

Chapter 2

THE FOURTH AMENDMENT AND THE DEPRIVATION OF LIBERTY

§ 2.01 THE SEIZURE REQUIREMENT

[Page 27: Notes and Questions, add after Note (1):]

After Hodari D. In *Torres v. Madrid*, 141 S. Ct. 989 (2021), the Court resolved any question remaining about the “break away” suspect. There, state police intended to execute an arrest warrant at an apartment complex and spotted a woman (not the target of the warrant) outside the building. When they approached her to ask some questions, she got into an SUV and began to drive away. An officer tried to open her car door, and she accelerated, believing the officers were car jackers. Police shot at her SUV as she drove away, and struck her in the back with two of the thirteen bullets fired. The issue in *Torres* was whether the woman was seized when she was struck by bullets (the application of physical force) but failed to stop. Citing *Hodari D.*, the Court held that she was seized and that police seize a person when they use force with an intent to restrain. The Court was satisfied that the officers applied physical force when they shot Torres and that they did so to stop her from driving away. But, the Court made clear that not every physical touching is a seizure. The majority, for example, distinguished a situation when police apply “accidental force” to a suspect. And, the majority explained that whether police intend to restrain is to be evaluated by an objective, not subjective, standard. “[T]he appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely prove the subjective motivations of police officers in the Fourth Amendment context.” Finally, the Court clarified that “a seizure by force—absent submission—lasts only as long as the application of force.” Thus, Torres was seized “for the instant that the bullets struck her[,]” but the seizure did not continue as Torres drove away.

§ 2.02 THE SLIDING SCALE OF SUSPICION

[D] REASONABLE SUSPICION

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

(5) In *Kansas v. Glover*, 140 S. Ct. 1183 (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*, 921 F.3d 991 (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.”

§ 3.03 Special Considerations

[C] Technological Devices

[3] *Global Positioning Systems and Cell-Site Location Information*

[Page 286: Add between Notes 1 and 2:]

After *Carpenter*, the Seventh Circuit in *United States v. Hammond*, __ F.3d __ (2021 WL 1608789 (7th Cir. 2021), held that law enforcement officers do not engaged in a search protected by the Fourth Amendment when they obtain CSLI in real-time. The court in *Hammond* described *Carpenter* as a “narrow” decision that had distinguished real-time tracking of cell phone data.

In a case of first impression, the Fifth Circuit Court of Appeals also distinguished the decision in *Carpenter* when deciding whether the records of a Bitcoin transaction were protected by Fourth Amendment privacy. In *United States v. Gratkowski*, 964 F.3d 307 (5th Cir. 2020), the defendant paid a child-pornography website in Bitcoin, a virtual currency. To use Bitcoin, the user transfers the currency either through Bitcoin’s specialized software or, as the defendant did, using a virtual currency exchange. The defendant, citing *Carpenter*, argued that he had a Fourth Amendment privacy interest in the records of his Bitcoin transaction on Coinbase, the virtual currency exchange he used to pay the website. The Fifth Circuit rejected that argument, finding the situation “more analogous to the bank records in *Miller* and telephone call logs in *Smith* than to CSLI in *Carpenter*.” Id. at 311.

§ 3.04 Warrantless Searches

[H] Vehicles

[2] *The Inventory Rationale*

[Page 431: Add between Notes 1 and 2:]

In *Caniglia v. Strom*, 593 U.S. __ (2021), the Court distinguished *Cady v. Dombroski* from cases involving a “caretaking” search and seizure of a home. In *Caniglia*, police without a warrant or valid consent entered a home to find and seize guns to ensure that one of the residents, whom they believed to be suicidal, would not later access the guns. The Court emphasized the constitutional difference between a lawfully impounded vehicle and a home. The majority opinion, authored by

Justice Thomas, emphasized: “What is reasonable for vehicles is different from what is reasonable for homes.”

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). In *United States v. Pacheco-Romero*, 374 F. Supp. 2d 1326 (N.D. Ga. 2019), two lawyers sought to jointly represent the six defendants in a drug conspiracy prosecution. The court noted that while “a defendant may waive conflict—free representation . . . courts are not bound to accept the waiver.” This judge did not accept the waiver.

If the defendants choose to go to trial, a serious potential conflict of interest remains with joint representation. Should any defendant elect to testify in his own defense, his testimony could prove to be harmful to the other defendants, and Lee and Bennett “would be faced with the prospect of examining or cross-examining a witness whom he represents and whose interest lies in direct conflict with his other client.” Lee and Bennett, who are associated in law practice, have represented all of the defendants since the case initiated with the filing of a criminal complaint, and because there is an irrebutable presumption that they received confidential communications from the defendants during the course of that representation, Lee and Bennett have “divided loyalties that prevent [them] from effectively representing the defendant[s].”

Id. at 1329.

§ 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. The court in *United States v. Owen*, 963 F.3d 1040, 1049 (11th Cir. 2020), set out the eight factors it considers in determining “whether a defendant’s waiver of his right to counsel was knowing and voluntary”

(1) the defendant’s age, educational background, and physical and mental health; (2) the extent of the defendant’s contact with lawyers prior to trial; (3) the defendant’s knowledge of the nature of the charges, possible defenses, and penalties; (4) the defendant’s understanding of rules of procedure, evidence, and courtroom decorum; (5) the defendant’s experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which that counsel aided the defendant; (7) mistreatment or coercion of the defendant; and (8) whether the defendant was trying to manipulate the events of the trial.

§ 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. Expressing great concerns as to misidentification, the New Mexico Supreme Court adopted a “per se exclusionary rule”:

If a witness makes an identification of a defendant as a result of a police identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification, the identification and any subsequent identification by the same witness must be suppressed.

State v. Martinez, 478 P.3d 880, 905 (N. Mex. 2020).

§ 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.

Compare with *State v. Covington*, ___ So. 3d ___, 2020 WL 7301278 (La. 2020), where the chief public defender moved to withdraw from current appointments and to decline future appointments due to the under funding of the public defender's office that led to the elimination of attorney and support staff positions. The Louisiana Supreme Court rejected the systemic challenge to the public defender system. “The question of whether assistance of counsel has been constitutionally ineffective cannot be answered without a detailed examination of the specific facts and circumstances of the representation provided by counsel to the individual defendant.” The dissenting judge sharply disagreed:

[In more than 27 years] the State has still not come up with a sustainable way to pay for an effective system of indigent defenders. Louisiana again has the distinction of having the highest incarceration rate of any state in the country. Louisiana Public Defender Board caseload numbers show that our desire to prosecute increasing numbers of our poorest citizens for all manner of social ills has far outpaced our willingness to pay for each to have a lawyer who can give them individualized attention.

In *Stermer v. Warren*, 959 F.3d 704 (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 624—add to discussion of *Strickland v. Washington*:]

The court in *United States v. Rosemond*, 958 F.3d 111, 121 (2nd Cir. 2020), made clear the heavy burden on defendants asserting ineffective assistance of counsel claims:

Courts reviewing ineffective assistance of counsel claims are “highly deferential,” and must “strongly presume[]” that counsel “made all significant decisions in the exercise of reasonable professional judgment.” This presumption is overcome only if “counsel failed to act reasonably considering all of the circumstances.” When analyzing whether an attorney’s performance was objectively reasonable, courts must avoid “the distorting effects of hindsight” and consider the lawyer’s perspective at the time the decision was made. If the attorney made a strategic choice after thoughtful consideration, that decision will be “virtually unchallengeable.”

[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*, 140 S. Ct. 1875 (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.

[Appeals: The *Anders* Rule, Page 634—Add to Note (1):]

Appointed counsel raised only claims of non-reversible error on appeal. Held, this violated the *Anders* requirement.

“The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client. . . .” In other words, counsel’s decision to raise non-reversible error outside the context of *Anders* in this case deprives appellant of his right to be heard by the filing of a pro se response raising “any points that he chooses,” and it deprives this Court the opportunity to conduct an independent review of the record.”

Allison v. State, 609 S.W.3d 624, 628 (Tx. App. 2020).

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*, 600 S.W. 3d 140 (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 734—Add to Note (1):]

In *State v. Kent*, 475 P.3d 1211, 1216 (Idaho 2020), the police officer was questioning the defendant. All parties agreed that at this point the defendant was not in custody. The officer began reading the *Miranda* rights, at which point the defendant interrupted the officer and said he would not answer any questions. The officer continued to read the rights and, after the warnings were read, the defendant made an incriminating statement. The trial judge suppressed the statement: “Where *Miranda* warnings are read to an individual unnecessarily and the defendant invokes the right to remain silent, an officer may not ignore that invocation.” The Idaho Supreme Court reversed, holding that “the specific restrictions regarding questioning a suspect created by *Miranda* are limited to custodial interrogations.” Do you agree?

[Page 734—Add to Note (2):]

The court in *United States v. Ferguson*, 970 F.3d 895, 901, identified the six factors it considers in making a determination as to custody:

(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of questioning.

The defendant and his seven-year-old son were in a shopping mall. Police officers took physical custody of the son and led him inside a large store, out of the defendant’s sight. No threats were made to the father or the son. While the son was away from him, the father made incriminating statements in response to police questions. Was he in custody at that time? Yes, found the court in *United States v. Mora-Alcaraz*, 986 F.3d 1151, 1157 (9th Cir. 2021):

The police were well aware that a father would not walk away from a public place and leave his young son with strangers. No physical restraint of Mora-

Alcaraz was necessary so long as the police kept him separated from his son. He could not leave.

[A] reasonable person in Mora-Alcaraz's position would not have felt free to end the questioning and leave the mall. . . .

[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. The courts carefully scrutinize the precise words spoken. Consider these cases:

- *State v. Pouliot*, ___ A. 3d ___, 2021 WL 117585 (N.H. 2021): “no comment”, ambiguous.
- *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*, 140 S. Ct. 1390, 1390 (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.”