

# UNDERSTANDING CRIMINAL PROCEDURE

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UNDERSTANDING  
CRIMINAL PROCEDURE  
Volume 1: Investigation  
Fifth Edition  
Volume 2: Adjudication  
Fourth Edition  
2011 Supplement

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by

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ISBN: 978-1-4224-9479-0

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MATTHEW  BENDER

# PREFACE

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This Supplement includes all relevant United States Supreme Court decisions handed down since the most recent editions of *Understanding Criminal Procedure* (Vol. I 5th ed.; Vol. II 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.

Joshua Dressler  
Alan C. Michaels  
Columbus, Ohio  
July 2011



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# VOLUME 1

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## Chapter 1 (Vol. 1)

### INTRODUCTION TO CRIMINAL PROCEDURE

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#### § 1.04 STUDYING CONSTITUTIONAL LAW CASES

**Page 19: at the end of the final paragraph, add the following new text:**

At the end of the 2009 term, Justice Stevens retired, and President Obama named Solicitor General Elena Kagan to replace him. On August 7, 2010, after Senate confirmation, Kagan was sworn in as the 112th justice, and fourth woman, to serve on the United States Supreme Court. It is the first time that three female justices are sitting on the Court simultaneously. It is also the first time not a single member of the Court is identified as Protestant. With Kagan's confirmation, nearly half the Court is composed of justices appointed within the previous five years. In the long run, this change in personnel and personality will surely have a significant impact.



## Chapter 2 (Vol. 1)

# OVERARCHING POLICY ISSUES IN CRIMINAL PROCEDURE

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

Page 37: add to footnote 89:

<sup>89</sup> . . . . See also *Ashcroft v. Al-Kidd*, 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4021, at \*1 (“Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer”).



## Chapter 3 (Vol. 1)

# INCORPORATION OF THE BILL OF RIGHTS

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### § 3.01 INCORPORATION: OVERVIEW

**Page 42: add to footnote 4:**

<sup>4</sup>. . . 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 questions 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 47: 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*,<sup>32.1</sup> 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.”

<sup>32.1</sup> 130 S. Ct. 3020 (2010).



## Chapter 6 (Vol. 1)

### FOURTH AMENDMENT TERMINOLOGY: “SEARCH”

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#### § 6.05 SURVEILLANCE OF CONVERSATIONS BY “FALSE FRIENDS”

Page 83: add to footnote 86:

<sup>86</sup> . . . *contra under the state constitution*, State v. Allen, 241 P.3d 1045 (Mont. 2010) (warrantless recording of cell phone conversations is unconstitutional even if one of the participants to the conversation consents).

#### § 6.08 DOG SNIFFS AND OTHER “LIMITED” INVESTIGATIVE TECHNIQUES

Page 91: add to footnote 111:

<sup>111</sup> . . . *contra under the state constitution*, People v. Devone, 931 N.E.2d 70 (N.Y. 2010) (dog sniff of an automobile is a “search”; however, because people possess a lesser expectation of a privacy in the contents of their automobile than in a home, law enforcement officers need only have the low standard of “founded suspicion” that criminality is afoot in order to conduct the dog-sniff search of a car).

#### § 6.09 TECHNOLOGICAL INFORMATION GATHERING

Page 94: before the last paragraph of subsection [A], add the following new text:

In the context of technological devices provided by employers, however, the Court recently noted in *City of Ontario v. Quon*<sup>120.1</sup> that it “must proceed with care when considering the whole concept of privacy expectations in communications. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” The Court contrasted the days of *Katz*, when justices could rely on their own knowledge and experience “to conclude that there is a reasonable expectation of privacy in a telephone booth,” with the current “[r]apid changes in the dynamics of communication and information transmission” that cause difficulty in “predicting how . . . privacy expectations will be shaped . . . or the degree to which society will be prepared to recognize those expectations as reasonable.” Although this cautionary language related to an issue (whether an employee had a reasonable expectation of privacy in the content of his text messages on an employer-provided pager) that the Court concluded it need not resolve in any event, the fact that every member of the Court other than Justice Scalia joined this cautionary dictum suggests a substantial level of circumspect humility in this area among the justices.

<sup>120.1</sup> 130 S. Ct. 2619 (2010).



## Chapter 8 (Vol. 1)

### SEARCH WARRANTS: IN GENERAL

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#### § 8.02 PROBABLE CAUSE: GENERAL PRINCIPLES

**Page 121: at the end of the first full paragraph, add the following new text:**

Indeed, in *Ashcroft v. Al-Kidd*,<sup>35.1</sup> the Court was faced with an allegation that the government had arrested *A* on a material witness warrant (which can be obtained to detain a witness on a finding of less than probable cause) as a pretext for its true reason, suspicion (short of probable cause) that *A* had ties to terrorist organizations. In holding that there was no constitutional violation, the Court relied on its usual objective perspective in the Fourth Amendment context: so long as the material witness warrant was adequately supported and valid (apart from the pretext claim), “concerns about improper motives and pretext do not justify subjective inquiries” into the government’s motives.

<sup>35.1</sup> 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4021, at \*14.



## Chapter 10 (Vol. 1)

### SEARCH WARRANTS: IN GENERAL

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#### § 10.01 THE CONSTITUTIONAL ROLE OF SEARCH WARRANTS: THE DEBATE

**Page 163: in the second full paragraph, add new footnote 47.1:**

“Warrant requirement” language . . . in dissenting opinions.<sup>47.1</sup>

<sup>47.1</sup> Sometimes, however, a majority opinion — perhaps when the author wants to muster additional votes — will still express a softened version of the “warrant requirement.” For example, in *Kentucky v. King*, 131 S. Ct. 1849, 1886 (2011), Justice Alito, writing for all of the Court except Justice Ginsburg, stated that “[a]lthough the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured.” Later, Justice Alito stated that “the warrant requirement is subject to certain reasonable exceptions.”



## Chapter 11 (Vol. 1)

# WARRANTLESS SEARCHES: EXIGENT CIRCUMSTANCES

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### § 11.01 EXIGENCY EXCEPTION: EXPLAINED

**Page 180: add the following new text, immediately before Section 11.02:**

It should also be noted that the exigency exception to the warrant requirement does *not* apply if the police “create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.”<sup>4.1</sup> Thus, if a police officer comes to a home in *non-exigent* circumstances and demands, in violation of the Fourth Amendment, that the occupants allow her to enter without a warrant, she cannot then claim an exigency (for example, after her unlawful demand for admittance, she hears an occupant inside apparently destroying criminal evidence) justifies a warrantless entry. On the other hand, if the officer — with probable cause to search, but without a warrant — arrives at the scene, knocks, announces her identity to the occupants, and requests that the door be opened, all of which is in conformity with the Fourth Amendment,<sup>4.2</sup> the police may enter without a warrant if the knock-and-announce triggers the threat of imminent destruction of evidence. This is so, even if the police could have sought a warrant before arriving at the scene.<sup>4.3</sup>

<sup>4.1</sup> *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011); *see also id.* at 1858 n.4 (“There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted.”).

<sup>4.2</sup> *See* § 10.04[C], *supra*.

<sup>4.3</sup> *Kentucky v. King*, 131 S. Ct. at 1860 (2011).

### § 11.04 ENTRY AND SEARCH OF A HOME

**Page 182: add to footnote 12:**

<sup>12</sup> . . . *See also* *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)). In turn, this language was quoted in *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

**Page 183: add the following new text at the end of the page:**

A recent case, *Kentucky v. King*,<sup>16.1</sup> may make it somewhat easier for the police to justify warrantless home entries on exigency grounds. In *King*, the police smelled recently burnt marijuana emanating from an apartment door. Seemingly, this gave the police probable cause to search the premises for drugs. Rather than seek a warrant, however, the officers knocked loudly on the door and announced their presence (“This is the police” or “Police, police, police”) at which point they “could hear people inside moving” and “[i]t sounded as [though] things were being moved inside the apartment,” all of which “led the officers to believe that

drug-related evidence was about to be destroyed.” Based on the sounds, the police entered without a warrant. The Court, 8-1, held that the entry was constitutional.

It should be noted that the Supreme Court of Kentucky assumed *arguendo*, as did the United States Supreme Court, that exigent circumstances existed on these facts. One could certainly question that assumption. Does hearing people inside moving, and sounds that might be “things being moved inside the apartment” provide ample grounds to believe that destruction of drug-related evidence was imminent? If so, the exigency doctrine may turn out to be a paper-thin exception. But, beyond that, here the basis for the warrantless entry — an exigency — did not exist until the police chose to knock loudly on the door and announce their presence rather than to seek a warrant. To the *King* Court, however, as long as the exigency is not the result of the police “engaging or threatening to engage in conduct that violates the Fourth Amendment,”<sup>16.2</sup> the police may enter without a warrant.

To Justice Ginsburg, the sole dissenter, this ruling “arms the police with a way routinely to dishonor the Fourth Amendment warrant requirement in drug cases.” She objects that, under *King*, “police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant.” Ginsburg would only permit use of the exigency warrant exception if the exigency exists “when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.”

<sup>16.1</sup> 131 S. Ct. 1849 (2011).

<sup>16.2</sup> See § 11.01 (Supp.), *supra*.

## Chapter 13 (Vol. 1)

# SEARCHES OF CARS AND CONTAINERS THEREIN

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### § 13.01 AUTOMOBILE SEARCH WARRANT EXCEPTION: GENERAL RULES

Page 208: add to footnote 6:

<sup>6</sup> *Contra under the state constitution*, State v. Tibbles, 236 P.3d 885 (Wash. 2010) (the fact that a car is stopped on the highway and is inherently mobile, does not by itself justify a warrantless car search, even if there is probable cause for the search).



## Chapter 16 (Vol. 1)

### CONSENT SEARCHES

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#### § 16.06 “APPARENT AUTHORITY”

**Page 262: add to footnote 73:**

<sup>73</sup> *Contra under the state constitution, Commonwealth v. Porter P., 923 N.E.2d 36 (Mass. 2010) (holding that, although Massachusetts also recognizes an “apparent authority” doctrine, it applies more narrowly than the federal constitutional doctrine; specifically, at least when the police seek to rely on consent of a landlord or other non-resident third party to search a home, they must see a written document purporting to give the consenting party authority to permit the search; in the absence of such a document, a claim of apparent authority in such circumstances fails as a matter of law).*



## Chapter 18 (Vol. 1)

# MORE “REASONABLENESS” BALANCING: SEARCHES AND SEIZURES PRIMARILY CONDUCTED FOR NON-CRIMINAL LAW PURPOSES

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### § 18.04 AUTOMOBILE INSPECTIONS AND CHECKPOINTS

**Page 310:** at the end of the first full paragraph, add the following new text:

In *Ashcroft v. Al-Kidd*,<sup>45.1</sup> the Court emphasized that this last element “the absence of individualized suspicion” was the critical component that made a subjective inquiry appropriate, in the *Edmond* context, “not the absence of probable cause.”

<sup>45.1</sup> 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4021, at \*16.

### § 18.05 “SPECIAL NEEDS” SEARCHES AND SEIZURES

**Page 315:** at the end of subsection [2], add the following new text:

In its most recent decision regarding searches directed at public employees, *City of Ontario v. Quon*,<sup>59.1</sup> the Court left open whether the appropriate test was that endorsed by the plurality opinion in *O'Connor*, described in this section of the Text, or the test offered by Justice Scalia in his *O'Connor* concurrence. Under the Scalia approach, the offices of government employees would be covered by the Fourth Amendment, but determinations of reasonableness would recognize that government searches “to retrieve work-related materials or to investigate violations of workplace rules — searches of the sort that are regarded as reasonable and normal in the private-employer context — do not violate the Fourth Amendment.”

<sup>59.1</sup> 130 S. Ct. 2619 (2010).

**Page 316:** at the end of footnote 61, add the following:

<sup>61</sup> . . . Iowa is the first state to reject *Sampson*, albeit on narrow grounds, applying its state constitution. *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010) (a police officer, aware that *O* was a parolee, conducted a suspicionless search of *O*'s hotel room; held, that a parolee retains state search-and-seizure protection in a general criminal investigation; however, it reserved the issue of whether *Sampson* might apply in a “special needs” search by a parole officer, conducting ordinary monitoring of a parolee).



## Chapter 20 (Vol. 1)

### FOURTH AMENDMENT: EXCLUSIONARY RULE

#### § 20.02 RATIONALE OF THE EXCLUSIONARY RULE

Page 352: add to footnote 30:

<sup>30</sup> . . . Most recently, however, in *Davis v. United States*, 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4560, six Justices joined the majority opinion’s statement that “the [exclusionary] rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.” *Id.* at \*14.

#### § 20.03 IS THE EXCLUSIONARY RULE CONSTITUTIONALLY REQUIRED?

Page 352: add to footnote 37:

<sup>37</sup> . . . In *Davis v. United States*, 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4560, the Court reiterated the view that exclusion is not a constitutional right and applies only where it will achieve appreciable deterrence, this time in an opinion joined by six Justices, the *Herring* five plus Justice Kagan.

#### § 20.05 WHEN THE EXCLUSIONARY RULE DOES NOT APPLY: IN GENERAL

Page 369: add to footnote 138:

<sup>138</sup> . . . *But see* *State v. Cable*, 51 So.3d 434 (Fla. 2010) (holding that, notwithstanding *Hudson*, violations of the knock-and-announce rule in Florida require suppression of the evidence seized under the state’s knock-and-announce statute; although the statute is silent as to the proper remedy for its violation, the court stated that the statute “would be undermined if the exclusionary rule did not apply to its violation”).

#### § 20.06 WHEN THE EXCLUSIONARY RULE DOES NOT APPLY: POLICE CULPABILITY FACTOR

Page 381: at the end of subsection [B][2][c], add the following new text:

##### [3] Reliance on Binding Circuit Precedent

The Court found a further application for the good-faith exception, and hence further narrowed the exclusionary rule, in *Davis v. United States*.<sup>174.1</sup> While the actual holding of *Davis* is relatively narrow, it holds the potential for a vast expansion of the good faith exception. In *Davis*, *D* was a passenger in a car subjected to “a routine traffic stop” that led to *D*’s arrest (for giving a false name to the police) and the driver’s arrest for driving while intoxicated. *D* and the driver were handcuffed and placed in the back of patrol cars, at which point the police

searched their car and found a gun in the pocket of *D*'s coat. *D* was subsequently charged for possession of the gun, and when his motion to suppress the gun failed, he was convicted.

The proper disposition of *D*'s suppression motion turned on the rules governing automobile searches incident to a lawful arrest.<sup>174.2</sup> At the time of *D*'s arrest, most jurisdictions understood Supreme Court precedent to authorize substantially contemporaneous searches of the passenger compartment of a car incident to the arrest of a recent occupant, even if the arrestee was no longer in the car and was in police control. Indeed, federal court of appeals precedent in the circuit in which *D* was charged had expressly approved automobile searches in circumstances such as *D*'s. While *D*'s case was on appeal, however, the Supreme Court in *Arizona v. Gant*<sup>174.3</sup> narrowed the automobile search doctrine and made clear that searches in circumstances such as *D*'s violated the Fourth Amendment.

Because *D*'s case was still on direct appeal, the *Gant* decision applied and meant that the search which discovered his gun violated the Fourth Amendment. The question before the Supreme Court, however, was whether it therefore had to be suppressed, given that the search was “conducted in objectively reasonable reliance on binding appellate precedent.” A 7-2 majority of the Court concluded that the exclusionary rule did not apply in such circumstances. The Court repeated its point of emphasis in other good-faith exception cases: the sole purpose of the exclusionary rule is to deter future violations. Since the police in this case were following governing precedent “to the letter,” the Court concluded that “[a]bout all that exclusion would deter in this case is conscientious police work,” and therefore the exclusionary rule should not apply.

Justice Sotomayor's separate concurrence emphasized that the police were relying on binding appellate precedent, so that the case “does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”<sup>174.4</sup> As the dissenters noted, however, the potential reach of the decision goes well-beyond the relatively narrow circumstance of police reliance on binding appellate precedent. The police frequently engage in conduct in the belief that it complies with the Constitution but which, it turns out, is not permitted by the Fourth Amendment. Therefore, the dissent warned, “if the Court means what it now says, . . . [that] it would apply the exclusionary rule only where a Fourth Amendment violation was ‘deliberate, reckless, or grossly negligent,’ then the ‘good faith’ exception will swallow the exclusionary rule.”<sup>174.5</sup> Whether the Court will in fact extend the good faith exception to that degree remains to be seen.<sup>174.6</sup>

<sup>174.1</sup> 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4560.

<sup>174.2</sup> See § 12.05, *supra*.

<sup>174.3</sup> 129 S. Ct. 2710 (2009). See § 12.05[C], *supra*.

<sup>174.4</sup> 2011 U.S. LEXIS 4650 at \*37 (Sotomayor, J., concurring in the judgment).

<sup>174.5</sup> *Id.* at \*51 (Breyer, J., dissenting).

<sup>174.6</sup> See § 20.06[C], *infra*.

**Page 382: at the end of subsection [C], add the following new text:**

The next word from the Supreme Court came in *Davis v. United States*,<sup>175.1</sup> discussed in the immediately preceding subsection of this Supplement, a case much like *Herring* in many ways. As in *Herring*, *Davis* extended the good faith exception into a new category of cases. As in *Herring*, that category (reasonable reliance by

the police on binding appellate court precedent) was not shocking and by itself was fairly narrow. Indeed, because the reliance was on a “mistake” by a court rather than by another part of the police force, *Davis* was arguably less of an extension than *Herring*. Also as in *Herring*, however, the Court described the exclusionary rule as applying only in cases of gross negligence (or worse) by the police, a standard which, if applied across all cases, would sharply restrict application of the exclusionary rule.

<sup>175.1</sup> 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4560.



## Chapter 21 (Vol. 1)

### INTERROGATION LAW: OVERVIEW

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#### § 21.01 REFLECTIONS ON MODERN INTERROGATION LAW

**Page 393: add to footnote 6:**

<sup>6</sup> . . . Some false confessions appear highly reliable, thereby increasing the likelihood of improper conviction. For example, one recent study of false confessions (confessions of persons later proven with DNA evidence to be innocent) reports that police officers with some frequency intentionally or accidentally introduce important facts about the case into the interrogation. The suspect, because of youthfulness, mental disability, or simply the strain of a long interrogation will ultimately confess, repeating the facts the officer told the suspect about the crime. The factually-detailed confession will appear to be reliable — after all, how would a person know how the crime was committed if was innocent? — but only because the police fed the facts to the suspect who later repeated them back to the interrogators. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010) (examining the substance of false confessions, including what was said and how the statements were then litigated, to shed light on the phenomenon of “confession contamination”).



## Chapter 24 (Vol. 1)

### INTERROGATION LAW: *MIRANDA v. ARIZONA*

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#### § 24.07 MEANING OF *MIRANDA*: “CUSTODY”

**Page 468: add to footnote 114:**

<sup>114</sup> . . . In *J.D.B. v. North Carolina*, 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4557, however, the Court considered *de novo* whether a minor child’s age is relevant to the “*Miranda* custody” analysis and concluded, in a 5-4 decision, that because “children will often feel bound to submit to police questioning when an adult in the same circumstance would feel free to leave,” a child’s age is a part of the “objective circumstances” to be considered in making the custody determination. In other words, “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer,” then the question becomes how a reasonable person of the child’s age in the suspect’s position would have understood his situation.

The majority offered two responses to the dissenting judges’ worry that this result might turn the objective test into a subjective one in which many of the suspect’s personal characteristics must be considered. First, the Court contended that a child’s age is a special case because it has an “objectively discernable relationship to a reasonable person’s understanding of his freedom of action.” In short, “a reasonable child . . . will sometimes feel pressured to submit when a reasonable adult would feel free to go.” The Court contrasted the trait of prior interaction with the police, which could make a person feel more free to leave or less so. Second, the Court argued that considering age does not involve “a determination of how youth ‘subjectively affects the mindset’ of any particular child,” so that accounting for age does not require looking into the mind of the particular child, as would, for example, “consideration of whether a particular suspect is ‘unusually meek or compliant.’”

**Page 470: at the end of the second full paragraph, add new footnote 123.1**

“Therefore, *Miranda* warnings were required.<sup>123.1</sup>

<sup>123.1</sup> See also *J.D.B. v. North Carolina*, 131 S. Ct. \_\_\_, 2011 LEXIS 4557 (recognizing that a child may be considered “in custody” for *Miranda* purposes when questioned in a school conference room).

#### § 24.10 WAIVER OF *MIRANDA* RIGHT

**Page 477: at the end of subsection [A][2], add the following new text:**

Indeed, most recently, in *Berghuis v. Thompkins*,<sup>152.1</sup> discussed in detail in subsection [5] of this Supplement, the Court expanded the circumstances in which an implied waiver can be found, and did so to a degree one would never anticipate from *Miranda*’s language about “heavy burdens” and waivers *not* being presumed. The Court now says that “[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”<sup>152.2</sup>

152.1 130 S. Ct. 2250 (2010).

152.2 *Id.* at 2262.

**Page 481: at the end of subsection [A], add the following new text:**

**[5] *Berghuis v. Thompkins*: Warned Statement as Presumed Implied Waiver**

In *Berghuis v. Thompkins*,<sup>169.1</sup> the Court's journey of easing the process of finding *Miranda* waivers reached its apogee. In *Thompkins*, *T* was interrogated by two police detectives for about three hours while seated in a hard chair in a room measuring about eight feet by ten feet. At the start of the interrogation, Detective *H* gave *T* a form that included a version of the *Miranda* warnings and noted that “[y]ou have the right to decide at any time before or during questioning to use your right to remain silent . . . .” At *H*'s request, *T* read the final warning out loud. *H* then read the rest of the form to *T* and asked *T* to sign the form “to demonstrate that he understood his rights.” *T* refused. The interrogation then proceeded. *T* did not say he wanted to remain silent, or that he did not want to talk to the police, or that he wanted a lawyer. In fact, he barely said anything, remaining largely silent during the three hours of questioning, except for “a few limited verbal responses, . . . such as ‘yeah,’ ‘no,’ or ‘I don’t know.’” After about two hours and 45 minutes, *H* asked *T* if he believed in God; *T* said yes “as his eyes ‘welled up with tears.’” *H* asked if *T* prayed to God; *T* said yes. *H* asked whether *T* prayed to God “to forgive you for shooting that boy down?” *T* “answered ‘Yes’ and looked away.” This exchange was introduced at *T*'s trial for first-degree murder, and *T* was convicted and sentenced to life without parole.

In a 5-4 decision written by Justice Kennedy, the Court concluded that *T*'s statements were properly admitted on an implied waiver theory. While noting the language in the *Miranda* opinion indicating “that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement,” the Court stated that the “course of decisions since *Miranda*” and the use of the warnings “in the whole course of law enforcement, demonstrate[] that waivers can be established” without the “formal or express statements of waiver that would be expected” in other contexts.

So what does it take to establish waiver? Not much. “The main purpose of *Miranda*” the Court explained, “is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel.” So the prosecution must show that the accused was given the *Miranda* warnings and that they were understood. Here, the provision of the written warnings and the demonstration, by reading aloud, that *T* could read and understand English “was more than enough evidence . . . to conclude that [*T*] understood his *Miranda* rights.” Therefore, the “knowing” requirement for waiver was met. Since the warning said he could assert his rights “at any time,” the fact that hours of questioning passed between the warnings and the statement was, the Court concluded, beside the point. As for the voluntariness requirement, “there [was] no evidence that [*T*’s] statement was coerced,” so that requirement was met as well. Three hours of interrogation seated in a straight-backed chair was not “inherently coercive,” and *T* was not “threatened or injured.” Finally, *T*'s answer “yes” that he prayed to God for forgiveness was “a ‘course of conduct indicating’ waiver” of the right to remain silent.

The Court concluded with a neat summary of its current rule for waiver in this context: “A suspect who has received and understood the *Miranda* warnings, and

has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.” Thus, without repudiating the statement in *Miranda* that “a valid waiver will not be presumed simply . . . from the fact that a confession was in fact eventually obtained,” the Court has made clear that in most circumstances the confession will, in fact, constitute a waiver.

<sup>169.1</sup> 130 S. Ct. 2250 (2010).

**Page 481: delete the first paragraph of subsection [2] and replace it with the following:**

## [2] Right to Remain Silent

~~The *Miranda* opinion states that, once warnings are given, if the suspect “indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” Is the required cessation, however, permanent?~~

The *Miranda* opinion states that, once warnings are given, if the suspect “indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” At the outset, it is important to recognize the distinction between the question whether a defendant has *waived* his rights (discussed in the preceding subsection) and the question whether a defendant has *invoked* his rights (discussed below). “[I]f a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights,” the interrogation can continue until the suspect invokes one of the rights, even if the suspect has not yet waived the rights.<sup>169.2</sup> In other words, “after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights.”<sup>169.3</sup> Because an eventual statement will be presumed to constitute an implicit waiver, the separate question whether the rights were invoked prior to the statement has particular importance.

Recently, however, the Court has backed away from the “indicates in any manner” standard for invoking the right to remain silent. Following a precedent regarding invocation of the *Miranda* right to counsel,<sup>169.4</sup> the Court held in *Berghuis v. Thompkins*,<sup>169.5</sup> that “an accused who wants to invoke his or her right to remain silent . . . [must] do so unambiguously.” An ambiguous or equivocal act will not invoke the right nor, critically, will simply remaining silent invoke the right. If the right is invoked, however, for example by stating “I don’t want to talk to you,” then *Miranda*’s requirement that interrogation must cease comes into play.

That cessation, however, is not necessarily permanent.

<sup>169.2</sup> See *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

<sup>169.3</sup> *Id.* at 2264.

<sup>169.4</sup> This precedent, *Davis v. United States*, 512 U.S. 452 (1994), is discussed at § 24.10[B][3][b][i] of the Text.

<sup>169.5</sup> 130 S. Ct. 2250, 2260 (2010).



## Chapter 26 (Vol. 1)

### EYEWITNESS IDENTIFICATION PROCEDURES

#### § 26.01 EYEWITNESS IDENTIFICATION: THE PROBLEM AND POTENTIAL SAFEGUARDS

Page 527: add to footnote 1:

<sup>1</sup> . . . Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 Marquette L. Rev. 639 (2009).



## Chapter 28 (Vol. 1)

# THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

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### § 28.03 THE RIGHT TO COUNSEL: AT TRIAL

**Page 564:** at the end of the first paragraph, add new footnote 56.1:

<sup>56.1</sup> . . . . See also *Turner v. Rogers*, 131 S. Ct. \_\_\_\_, 2011 U.S. LEXIS 4566 (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).

### § 28.05 THE RIGHT OF SELF-REPRESENTATION

**Page 577:** add to footnote 114:

<sup>114</sup> . . . . *contra under the state constitution*, *State v. Rafay*, 222 P.3d 86 (Wash. 2009).

### § 28.08 EFFECTIVE ASSISTANCE OF COUNSEL: GENERAL PRINCIPLES

**Page 589:** at the end of the first paragraph, add new footnote 190.1:

According to the . . . a criminal defendant."<sup>190.1</sup>

<sup>190.1</sup> 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*, 130 S. Ct. 13, 16 (2009) (per curiam).

**Page 593:** At the end of subsection [ii], add the following new text:

In its 2009-10 term, the Roberts Court exhibited an intense interest in ineffective assistance of counsel claims in the death penalty context, deciding five cases and ruling twice for petitioners under sentence of death<sup>199.1</sup> and three times for the state.<sup>199.2</sup> 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,<sup>199.3</sup> the Court in reaching its conclusion

relied in part on *Rompilla v. Beard*,<sup>199.4</sup> 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 2009-2010 term, as well as the grounds for the only dissent in the cases the defendant lost.<sup>199.5</sup>

**199.1** *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (per curiam).

**199.2** *Wood v. Allen*, 130 S. Ct. 841 (2009); *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam); *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam).

**199.3** *McCollum*, 130 S. Ct. at 447.

**199.4** 545 U.S. 374 (2005).

**199.5** *Allen*, 130 S. Ct. at 851-54 (Stevens, J., dissenting).

**Page 593: at the end of subsection [2], delete footnote 202 and 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.<sup>179.1</sup>

**179.1** *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). *See also* 2 Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure* § 9.02 (5th ed. 2011) (discussing *Padilla*).

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## Chapter 1 (Vol. 2)

### INTRODUCTION TO CRIMINAL PROCEDURE

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#### § 1.03 STAGES OF A CRIMINAL PROSECUTION

**Page 12: add to footnote 53:**

<sup>53</sup> 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

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### § 3.01 INCORPORATION: OVERVIEW

**Page 34: add to footnote 4:**

<sup>4</sup>. . . 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*,<sup>32.1</sup> 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.”

<sup>32.1</sup> 130 S. Ct. 3020 (2010).



## Chapter 4 (Vol. 2)

# THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

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### § 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.”<sup>7.1</sup>

<sup>7.1</sup> Rothgery v. Gillespie County, 554 U.S. 191 (2008).

### § 4.03 THE RIGHT TO COUNSEL: AT TRIAL

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

<sup>52.1</sup> . . . . See also Turner v. Rogers, 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4566 (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:

<sup>53</sup> . . . . See also State v. Kelly, 999 So.2d 1029 (Fla. 2008).

**Page 57:** add to footnote 68:

<sup>68</sup> . . . . 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

<sup>82</sup> . . . . 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:

<sup>89</sup> . . . . 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?<sup>89.1</sup>

<sup>89.1</sup> 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:

<sup>94</sup> . . . . 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,”<sup>99.1</sup> though this may be as much an indictment of the quality of appointed counsel as an endorsement of the quality of *pro se* representation).

<sup>99.1</sup> 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:

<sup>103</sup> . . . . *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*,<sup>105.1</sup> the Court limited *Faretta* but expressly declined to overrule it.

<sup>105.1</sup> 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.”<sup>108.1</sup>

<sup>108.1</sup> 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.<sup>110.1</sup>

<sup>110.1</sup> 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*,<sup>113.1</sup> 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*,<sup>113.2</sup> 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.

<sup>113.1</sup> 509 U.S. 389 (1993).

<sup>113.2</sup> 554 U.S. 164 (2008).

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

**Page 70: add to footnote 124:**

<sup>124</sup> . . . *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.”<sup>129.1</sup> Notwithstanding these limitations, however, the right to counsel of choice is the “root meaning”<sup>129.2</sup> 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.’”<sup>129.3</sup>

<sup>129.1</sup> *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006).

<sup>129.2</sup> *Id.* at 147-48.

<sup>129.3</sup> *Id.* at 146.

## § 4.08 EFFECTIVE ASSISTANCE OF COUNSEL: GENERAL PRINCIPLES

**Page 75: add to footnote 158:**

<sup>158</sup> . . . *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.”<sup>171.1</sup>

<sup>171.1</sup> 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, 130 S. Ct. 13, 16 (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*,<sup>174.1</sup> *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.

<sup>174.1</sup> 129 S. Ct. 1411 (2009).

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

In its 2009-10 term, the Roberts Court exhibited an intense interest in ineffective assistance of counsel claims in the death penalty context, deciding five cases and ruling twice for petitioners under sentence of death<sup>177.1</sup> and three times for the state.<sup>177.2</sup> 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,<sup>177.3</sup> the Court in reaching its conclusion relied in part on *Rompilla v. Beard*,<sup>177.4</sup> 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.<sup>177.5</sup>

<sup>177.1</sup> *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (per curiam).

<sup>177.2</sup> *Wood v. Allen*, 130 S. Ct. 841 (2009); *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam); *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam).

<sup>177.3</sup> *McCollum*, 130 S. Ct. at 447.

<sup>177.4</sup> 545 U.S. 374 (2005).

<sup>177.5</sup> *Allen*, 130 S. Ct. at 851-54 (Stevens, J., dissenting).

**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.<sup>179.1</sup>

<sup>179.1</sup> Padilla v. Kentucky, 130 S. Ct. 1473 (2010). See also § 9.02, *infra* this Supplement (discussing *Padilla*).

**Page 84: add to footnote 190**

<sup>190</sup> . . . *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.<sup>190.1</sup>

<sup>190.1</sup> 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).

## Chapter 6 (Vol. 2)

### CHARGING DECISIONS

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#### § 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.<sup>76.1</sup>

<sup>76.1</sup> 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:**

<sup>77</sup> . . . . 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:**

<sup>123</sup> . . . . 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:**

<sup>151</sup> . . . . 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

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#### § 7.01 CONSTITUTIONAL DISCOVERY RIGHTS OF THE DEFENDANT: OVERVIEW

**Page 143: add to footnote 1:**

<sup>1</sup> . . . . 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 149: add to footnote 33:**

<sup>33</sup> . . . . See, e.g., *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009).

**Page 149: add to footnote 35:**

<sup>35</sup> . . . . See also *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (citing ethical standards in this regard).



## Chapter 8 (Vol. 2)

### SPEEDY TRIAL

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#### § 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.<sup>30.1</sup>

<sup>30.1</sup> Vermont v. Brillon, 129 S. Ct. 1283, 1291 (2009).

#### § 8.03 STATUTORY SPEEDY TRIAL RIGHTS

**Page 171:** add to footnote 54:

<sup>54</sup> . . . 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

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#### § 9.02 VALIDITY OF A GUILTY PLEA: CONSTITUTIONAL PRINCIPLES

**Page 183: add to footnote 50:**

<sup>50</sup>. . . . 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*,<sup>67.1</sup> *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.”

<sup>67.1</sup> 130 S. Ct. 1473 (2010).

#### § 9.06 PLEA BARGAINING: POLICY DEBATE

**Page 199: add to footnote 133:**

<sup>133</sup>. . . . 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.<sup>158.1</sup>

<sup>158.1</sup> 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, 129 S. Ct. 1423, 1430 (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

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#### § 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**<sup>52.1</sup>

<sup>52.1</sup> 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:

<sup>129</sup> . . . See also *Rivera v. Illinois*, 129 S. Ct. 1446, 1453 (2009).

**Page 231:** add to footnote 160:

<sup>160</sup> . . . 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"<sup>163.1</sup> that will make it difficult for the prosecution to survive the *Batson* challenge.

<sup>163.1</sup> *Snyder v. Louisiana*, 552 U.S. 472, 484-86 (2008).



## Chapter 11 (Vol. 2)

### CONFRONTATION CLAUSE

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

**Page 241: add to footnote 31:**

<sup>31</sup> . . . . See generally Randolph N. Jonakait, “Witness” in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process, 79 Temp. L. Rev. 155 (2006); Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271 (2006); Symposium: *Crawford and Beyond: Revisited in Dialogue*, 15 J.L. & Pol’y 333-904 (2007).

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

The Court has now held, in *Giles v. California*,<sup>37.1</sup> 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.”<sup>37.2</sup> 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 defendant 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.”<sup>37.3</sup> 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.

<sup>37.1</sup> 544 U.S. 353 (2008).

<sup>37.2</sup> *Id.* at 359 (emphasis in original).

<sup>37.3</sup> *Id.* at 380 (Souter, J., concurring).

**Page 244: add to footnote 41:**

<sup>41</sup> . . . . 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*, 129 S. Ct. 2527, 2539-40 (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:

**[a] Expansion of “Testimonial”: *Davis, Hammon, and Melendez-Diaz***

The Court’s first post-*Crawford* step in defining “testimonial” came in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*.<sup>41.1</sup> 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, 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.”

In *Melendez-Diaz v. Massachusetts*,<sup>41.2</sup> the Court, in a 5-4 decision authored by Justice Scalia, extended the application of *Crawford*'s “testimonial” rule to scientific 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,’ ”<sup>41.3</sup> 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.”<sup>41.4</sup> 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. Whether his replacement will also do so is uncertain; the Court's split on this question is not completely along traditional liberal/conservative lines.

### **[b] Contraction of “Testimonial”?: *Bryant* and *Bullington***

The narrow majority for the decision in *Melendez-Diaz*, discussed in the previous 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*<sup>41.5</sup> 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."<sup>41.6</sup> 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*."

In *Bullcoming v. New Mexico*,<sup>41.7</sup> the Court returned to the treatment under *Crawford* of forensic laboratory reports that it covered two terms earlier in *Melendez-Diaz*. 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.<sup>41.8</sup>

<sup>41.1</sup> 547 U.S. 813 (2006).

<sup>41.2</sup> 129 S. Ct. 2527 (2009).

<sup>41.3</sup> *Id.* at 2532.

<sup>41.4</sup> *Id.* at 2543-44 (Kennedy, J., dissenting).

<sup>41.5</sup> 131 S. Ct. 1143 (2011).

<sup>41.6</sup> *Id.* at 1155.

<sup>41.7</sup> 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4790.

<sup>41.8</sup> 2011 U.S. LEXIS 4790, at \*45-\*48.

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

**[2] The Confrontation Clause and "Non-Testimonial" Hearsay<sup>41.9</sup>**

<sup>41.9</sup> 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*,<sup>42.1</sup> 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.<sup>42.2</sup> 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 recent decision in *Michigan v. Bryant*,<sup>42.3</sup> appearing 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.

**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 immediately above in this Supplement.

**42.4** *Id.* at 1162 n.13.

## Chapter 12 (Vol. 2)

# THE PRIVILEGE AGAINST COMPELLED SELF- INCRIMINATION: ISSUES IN ADJUDICATION

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### § 12.07 REFERENCE AT TRIAL TO THE DEFENDANT'S SILENCE

**Page 280: add to footnote 166:**

<sup>166</sup> 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 283: add to footnote 182:**

<sup>182</sup> . . . . *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).



## Chapter 13 (Vol. 2)

# BURDEN OF PROOF AND VERDICT ISSUES

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### § 13.01 BURDEN OF PROOF

**Page 287: add to footnote 17:**

<sup>17</sup> . . . . *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.”<sup>17.1</sup>

<sup>17.1</sup> *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:**

<sup>40</sup> . . . . *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:**

<sup>51</sup> . . . . 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, 129 S. Ct. 2360 (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:**

<sup>52</sup> . . . . *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:**

<sup>58</sup> . . . . *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:**

<sup>59</sup> . . . . 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

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#### § 14.02 REPROSECUTION AFTER A MISTRIAL

**Page 311: add to footnote 68:**

<sup>68</sup> . . . . *See also* Renico v. Lett, 130 S. Ct. 1855 (2010) (deadlocked jury is “classic example” of manifest necessity).

#### § 14.07 MULTIPLE PROSECUTIONS OF THE “SAME OFFENSE”

**Page 335: add to footnote 189:**

<sup>189</sup> . . . . *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*,<sup>212.1</sup> 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.

<sup>212.1</sup> 129 S. Ct. 2360 (2009).



## Chapter 15 (Vol. 2)

### SENTENCING

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#### § 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.<sup>96.1</sup>

<sup>96.1</sup> See also *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (holding *Brady* applicable to capital sentencing proceedings).

#### § 15.02 CONSTITUTIONAL LIMITS ON SENTENCING PROCEDURES

**Page 359: add to footnote 101:**

<sup>101</sup> . . . *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:**

<sup>117</sup> . . . *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”).

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

**Page 366: add to footnote 150:**

<sup>150</sup> . . . *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 373: add to footnote 179:**

<sup>179</sup> . . . 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*<sup>182.1</sup> 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*<sup>182.2</sup> and *Kimbrough v. United States*,<sup>182.3</sup> 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,<sup>182.4</sup> 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.

**182.1** 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.

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

Since *Harris* was . . . left the Court,<sup>186.1</sup>

**186.1** 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 *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.

**Page 374: at the end of the last sentence of subsection [E], add new footnote 186.2:**

Thus, the long-term . . . remains very uncertain.<sup>186.2</sup>

<sup>186.2</sup> In *United States v. O'Brien*, 130 S. Ct. 2169 (2010), the Court side-stepped an opportunity to reconsider *McMillan/Harris* by finding as a matter of statutory interpretation that a provision in a federal criminal statute that raised the minimum authorized sentence upon a particular factual finding was an element rather than a sentencing factor. Concurring Justices Stevens and Thomas would have overruled *Harris*, but the other seven Justices were scrupulously silent on its continued vitality.

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

When the Court . . . to the scales.<sup>190.1</sup>

<sup>190.1</sup> 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, may suggest that *Almendarez-Torres* will continue to survive.



## Chapter 16 (Vol. 2)

### APPEALS

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#### § 16.03 PLAIN ERROR

**Page 383: add to footnote 33:**

<sup>33</sup> . . . . See generally Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922 (2006).

**Page 383: add to footnote 35:**

<sup>35</sup> . . . . See also *Puckett v. United States*, 129 S. Ct. 1423, 1428 (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,<sup>49.1</sup>

<sup>49.1</sup> 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:**

<sup>53</sup> . . . . 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).<sup>66.1</sup>

<sup>66.1</sup> 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:**

<sup>78</sup> . . . . 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:**

; and unconstitutionally sentencing on the basis of a “sentencing factor” not proven to the jury beyond a reasonable doubt (*Apprendi* error).<sup>95.1</sup>

<sup>95.1</sup> 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).

**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:<sup>97.1</sup> (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).

<sup>97.1</sup> See *United States v. Gonzalez-Lopez*, 548 U.S. 489, 149 n.4 (2006).

**Page 391: add to footnote 108:**

<sup>108</sup> . . . . 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.<sup>109.1</sup>

<sup>109.1</sup> 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].”<sup>119.1</sup>

<sup>119.1</sup> 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.<sup>134.1</sup>

<sup>134.1</sup> 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”<sup>149.1</sup> 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.<sup>149.2</sup>

<sup>149.1</sup> *Davis v. United States*, 131 S. Ct. \_\_\_, 2011 U.S. LEXIS 4560, at \*25.

**149.2** See *id.* at \*25-\*36. The *Davis* case is discussed more fully in Vol. 1, § 20.06, *supra*, this Supplement.

**Page 399: add to footnote 150:**

<sup>150</sup> . . . *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:**

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



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