

Contents

Preface to the Fourth Edition	xix
1 An Overview of the Criminal Justice Process in the United States	1
1.1 The Pretrial Process	1
1.1.1 Investigation	1
1.1.2 Arrest	3
1.1.3 Initial Appearance	3
1.1.4 Preliminary Hearing	4
1.1.5 Grand Jury	4
1.1.6 Arraignment	6
1.1.7 Motions	6
1.2 The Trial	8
1.3 Post-Trial	11
1.3.1 Motions	11
1.3.2 Sentencing	11
1.3.3 Appeal	12
1.3.4 Habeas Corpus	13
1.3.5 Parole	13
1.3.6 Executive Clemency	14
1.3.7 Clemency and Parole in the Military Justice System	14
1.4 The Role of the U.S. Supreme Court: The Incorporation Doctrine	14
1.4.1 The Form; Impact	14
1.4.2 Criminal Procedure Rights Incorporated	15
1.4.3 Criminal Procedure Rights Not Incorporated	16

CONTENTS

1.5 State Constitutional Law	16
References	17
2 The Exclusion of Evidence: Its Reach, Its Limits	19
2.1 The Exclusionary Rule	19
2.1.1 Background and History	19
2.1.2 The Rule Today	22
2.1.3 The Good-Faith Exception	22
2.1.4 Instances Where the Exclusionary Rule Does Not Apply	25
2.2 Standing	27
2.2.1 The Approaches	27
2.2.2 The Current Doctrine	28
2.2.3 Guests, Visitors, and Associates	28
2.2.4 The Impact	29
2.3 Fruit of the Poisonous Tree	30
2.3.1 The Doctrine	30
2.3.2 “Tangible” Evidence	32
2.3.3 Defendant’s Own Statements	32
2.3.4 Third-Party Witnesses	33
2.3.5 Identification Testimony	34
2.3.6 Fifth Amendment Violations	34
2.3.7 Limitations on the Doctrine	35
2.3.8 The Presence of the Accused as the Fruit of the Poisonous Tree	37
2.3.9 The Connection between Standing and Fruit of the Poisonous Tree	37
2.4 Enforcement of the Exclusionary Rule: Motion to Suppress	38
2.5 Waiver and Consent	39
2.5.1 The Principles	39
2.5.2 Consent Searches	39
2.5.3 Privilege against Self-Incrimination	42
2.5.4 Jury Trial	44
2.5.5 Right to Counsel	45

2.5.6 Waiver of an Appealable Issue	46
2.6 Harmless Error	47
2.6.1 The Doctrine	47
2.6.2 Application	47
2.6.3 Nonconstitutional Errors	48
2.6.4 Constitutional Errors	48
References	50
3 The Fourth Amendment: Searches and Seizures	53
3.1 Arrests: Definition and Application	53
3.2 Probable Cause Requirement for Arrest	55
3.2.1 The <i>Terry</i> Stop	57
3.2.2 “Stop and Identify”	58
3.2.3 Immigration Detentions	60
3.2.4 Detention at Premises of Lawful Search	60
3.2.5 Automobile Stops	61
3.2.6 Station House Questioning, Fingerprinting, and the Taking of DNA	62
3.2.7 Border Detentions	62
3.2.8 Grand Jury Subpoena	64
3.3 The Warrant Requirement	64
3.3.1 The Arrest Warrant	64
3.3.2 Exigent Circumstances	65
3.3.3 Other “Private Areas” for Which a Warrant Is Required	67
3.4 Seizure of Property and Persons	67
3.5 Searches Pursuant to Warrants	70
3.5.1 Challenging the Probable Cause Determination in a Warrant	70
3.5.2 The Particular Description in the Warrant	71
3.5.3 “Neutral and Detached” Magistrate	72
3.5.4 Execution of the Warrant	73
3.5.5 Search and Detention during the Execution of a Warrant	74

CONTENTS

3.5.6 Military Law Variations	75
3.5.7 Exceptions to the Search Warrant Mandate	77
3.6 Public School Searches	87
3.7 Administrative Searches	90
3.8 Items Held Out to the Public	92
3.9 Electronic Surveillance: The Basic Doctrine	95
3.9.1 Warrant Mandate for Electronic Surveillance	95
3.9.2 Statutory Requirements	96
3.9.3 Equipment Installation	97
3.9.4 Pen Registers	97
3.9.5 “Uninvited Ear” Exception	97
3.9.6 The Wired Informer	98
3.9.7 Video and Tracking Surveillance	100
3.10 Due Process Violations: A Limited Principle	100
References	101
4 Incriminating Statements	105
4.1 The Privilege against Self-Incrimination	105
4.2 The Basis for the Privilege	107
4.3 Asserting the Privilege	109
4.3.1 Timing	109
4.3.2 Scope	111
4.3.3 Documents	114
4.3.4 Compulsion	115
4.3.5 Immunity	115
4.4 Due Process Approach to Reviewing Confessions	118
4.4.1 Voluntariness Test	119
4.4.2 <i>McNabb/Mallory</i> Test	120
4.4.3 Harmless Error	121
4.4.4 State Action	122
4.4.5 Totality of the Circumstances Test	122
4.4.6 Force	123
4.4.7 Deception	123
4.4.8 False Friends	124

4.5 Application of the Right to Counsel: Pretrial Statements	124
4.5.1 Sixth Amendment	125
4.5.2 Stage of the Proceedings	125
4.5.3 Role of Counsel	125
4.5.4 Waiving Counsel	126
4.5.5 Offense Specific	127
4.6 <i>Miranda v. Arizona</i>	127
4.6.1 The Holding	128
4.6.2 The Requirement of Custody	129
4.6.3 Interrogation: The “Functional Equivalence” Test	130
4.6.4 The Warnings	131
4.6.5 Waivers	132
4.6.6 Resumption of Interrogation	134
4.6.7 Impeachment	136
4.6.8 Public Safety Exception	136
4.6.9 No Penalty for Silence or Election Not to Testify	137
4.6.10 Fruit of the Poisonous Tree	138
4.6.11 Standing	139
4.6.12 Congressional Mandate	139
4.7 The Right Against Self-Incrimination in the Military Setting	140
References	143
5 Other Limitations on the Investigation Process: Entrapment, Due Process	147
5.1 Introduction	147
5.2 Entrapment	148
5.2.1 The Two Tests	148
5.2.2 Not Constitutionally Based	149
5.2.3 The Subjective Test: Elements	149
5.2.4 The Subjective Test: Inducement	150
5.2.5 The Subjective Test: Predisposition	151
5.2.6 Entrapment as a Matter of Law	153

CONTENTS

5.3 The Objective Test	157
5.3.1 The Objective Test: Elements	158
5.3.2 The Objective Test: Proof Requirements	158
5.4 Due Process	159
5.4.1 The Criminal Search Setting: The Standard of “Shocks the Conscience”	160
5.4.2 The Entrapment Context	160
References	163
6 The Right to Counsel	165
6.1 Constitutional Basis: The Sixth Amendment	165
6.2 <i>Gideon v. Wainwright</i> : The Holding	168
6.2.1 Determining Indigency	168
6.2.2 The Actual Imprisonment Standard	170
6.2.3 The Stage of the Process: When the Right Applies	172
6.2.4 Appeals	174
6.2.5 Assistance in Addition to Counsel	177
6.3 The Practice Issues	179
6.3.1 Waiver	179
6.3.2 The Right to a Pro Se Defense	180
6.3.3 Assistance with Self-Representation	180
6.3.4 Ineffective Assistance of Counsel	182
6.3.5 State Interference	185
6.3.6 Joint Representation	186
6.3.7 Attorney Incompetence	187
6.4 Contrasting Scope of the Fifth and Sixth Amendments	189
References	194
7 Identification	197
7.1 The Fifth Amendment	197
7.1.1 Limited Use of Self-Incrimination Claim in Identification	198
7.1.2 Application of the Doctrine	198

7.1.3 Refusal to Cooperate in Identification Procedures	200
7.2 The Sixth Amendment Right to Counsel and Confrontation	201
7.2.1 Stage of the Proceeding	201
7.2.2 Nature of the Proceeding	202
7.2.3 Remedy for Violations of the Right to Counsel	203
7.3 Due Process	204
7.3.1 The Test: Reliability	204
7.3.2 Factors Used for Determining Reliability	206
7.4 Expert Testimony	207
7.5 Identification as Fruit of an Illegal Search or Seizure	208
References	209
8 Pretrial Matters	211
8.1 The Stages	211
8.2 The Bail Hearing	211
8.2.1 Constitutional Basis	211
8.2.2 Excessive Bail	211
8.2.3 Preventative Detention	212
8.3 The Preliminary Examination	213
8.4 The Indictment	215
8.4.1 Constitutional and Statutory Basis	215
8.4.2 The Grand Jury	216
8.4.3 Challenging an Indictment	218
8.5 Information	220
8.6 Charge Sheet	220
8.7 Selective Prosecution	221
8.8 Discovery	221
8.8.1 Constitutional Requirements	221
8.8.2 Discovery Mandated by Statutes and Rules of Court	222
8.8.3 Disclosure of Informant's Identity	223
8.8.4 Discovery from the Defense	224

CONTENTS

8.9 Venue	225
8.9.1 Constitutional Basis	225
8.9.2 The Broad Venue Rules	226
8.9.3 Transfer of Venue	226
8.9.4 Change of Venue Based on Pretrial Publicity	227
8.10 Guilty Pleas	228
8.10.1 Nolo Contendere	229
8.10.2 Constitutional Requirements	229
8.10.3 Voluntariness	230
8.10.4 Knowledge	231
8.10.5 Competency Standard	232
8.10.6 Factual Basis	232
8.10.7 Negotiated or Bargained Pleas	233
8.10.8 Impact	233
8.10.9 Remedies	234
8.10.10 Attack on Guilty Pleas after Sentencing	235
8.11 Right to a Speedy Trial	235
8.11.1 When the Right Applies	236
8.11.2 Constitutional Standard	236
8.11.3 Length of Delay	237
8.11.4 Reason for Delay	237
8.11.5 Prejudice to the Defendant	238
8.11.6 Defendant's Assertion or Nonassertion of the Right	239
8.11.7 Application of Constitutional Standard	239
8.11.8 Statutory Mandates	239
8.11.9 Preaccusation Delay	241
8.12 Competency to Stand Trial	241
8.12.1 Competency and Insanity Distinguished	241
8.12.2 Constitutional Basis	242
8.12.3 Procedures	242
8.12.4 Impact of Finding	243
8.12.5 Incompetency at Time of Execution	243
References	243

9 The Trial	247
9.1 The Judge	247
9.1.1 Neutrality	247
9.1.2 Challenge for Removal	248
9.1.3 Self-Disqualification	249
9.2 The Jury	250
9.2.1 Impartiality	250
9.2.2 Challenges for Cause	250
9.2.3 Peremptory Challenges	251
9.2.4 Entitlement to a Jury Trial	252
9.2.5 Waiver of Right	252
9.2.6 Size	253
9.2.7 Unanimity	254
9.2.8 Capital Punishment Prosecutions	255
9.2.9 Inconsistent Verdicts	256
9.3 Multiple-Defendant Trials	256
9.3.1 Joinder and Severance Generally	256
9.3.2 Joinder of Charges	256
9.3.3 Joinder of Parties	256
9.3.4 Severance	257
9.3.5 Spillover	257
9.3.6 Antagonistic Defenses	258
9.3.7 Codendant Confessions	259
9.4 Public Trials	259
9.4.1 Closure of Proceedings	260
9.4.2 Judicial Findings	261
9.4.3 Televising Trials	261
9.5 Right to Confront Witnesses	261
9.5.1 Defendant's Right to Be Present	261
9.5.2 Personal Confrontation of Witnesses	263
9.5.3 Cross-Examination	265
9.5.4 Compulsory Process	267
9.6 Presumption of Innocence	268
References	270

CONTENTS

10 Sentencing	275
10.1 Common Practices	275
1.1.1 Discretion	275
10.1.2 Sentencing Guidelines	276
10.1.3 Jury Participation	277
10.1.4 Sentencing Considerations	279
10.1.5 Sentencing Options	280
10.2 Procedures	280
10.2.1 Right to a Lawyer	280
10.2.2 Confrontation	282
10.2.3 Evidence Rules Eased	283
10.2.4 Limited Review on Appeal	284
10.2.5 Resentencing	284
10.3 Eighth Amendment Limitations	285
10.4 Capital Cases	286
References	290
11 Post Conviction	295
11.1 Appeal	295
11.1.1 Usual Process	296
11.1.2 Constitutional Requirements	297
11.2 Collateral Procedures	299
11.3 Habeas Corpus	300
11.3.1 A Civil Action with No Right to Counsel	302
11.3.2 Custody	302
11.3.3 The Antiterrorism and Effective Death Penalty Act of 1996	303
11.3.4 Exhaustion Mandate	305
11.3.5 Special Fourth Amendment Rule	308
11.4 Retroactivity	308
References	310

12 Double Jeopardy and Ex Post Facto	313
12.1 The Constitutional Basis	313
12.2 The Same Offense	314
12.2.1 The <i>Blockburger</i> Test	315
12.2.2 Multiple Victims	316
12.2.3 Chronologically Distinct Actions	316
12.3 Procedures	317
12.3.1 When Jeopardy Attaches	317
12.3.2 Mistrials	318
12.3.3 Appeals	320
12.4 The Dual Sovereignty Doctrine	322
12.5 Collateral Estoppel	323
12.6 Ex Post Facto	325
12.6.1 The Constitutional Basis	325
References	326
Table of Cases	329
Index	373

<http://www.pbookshop.com>