## CONTENTS

Preface xix  
Acknowledgments xxi  
The Constitution of the United States xxiii

### CHAPTER 1

**INTRODUCTION TO CRIMINAL PROCEDURE** 1

A. The Participants in the Criminal Justice System 1  
1. Defendants 2  
2. Defense Counsel 2  
3. Prosecutors 2  
4. Victims 3  
5. Police and Other Law Enforcement Officers 3  
6. Magistrates and Judges 4  
7. Jurors 4  
8. Corrections Officials 4  
9. Public 5  
10. Media 5

B. Stages of the Criminal Justice Process 5  
1. Step 1: Pre-Arrest Investigation 6  
2. Step 2: Arrest 6  
3. Step 3: Filing the Complaint 7  
4. Step 4: Gerstein Review 7  
5. Step 5: First Appearance/Arraignment on Complaint 7  
6. Step 6: Grand Jury or Preliminary Hearing 7  
7. Step 7: Arraignment on Indictment or Information 8  
8. Step 8: Discovery 9  
9. Step 9: Pretrial Motions 9  
10. Step 10: Plea Bargaining and Guilty Pleas 9  
11. Step 11: Trial 10  
12. Step 12: Sentencing 11  
13. Step 13: Appeals and Habeas Corpus 11

C. The Purpose of Procedural Rules 12  
   Powell v. Alabama 12  
   Patterson v. Former Chicago Police Lt. Jon Burge 16

D. Key Provisions of the Bill of Rights 19

E. The Application of the Bill of Rights to the States 20  
2. The Debate over Incorporation 22
3. The Current Law as to What’s Incorporated
   * Duncan v. Louisiana *
   24
4. The Content of Incorporated Rights
   27
F. Retroactivity
   28

### CHAPTER 2

**INITIATING PROSECUTION**

| A. The Charging Decision                     | 32 |
| People v. Robert Denny                       | 34 |
| Inmate Convicted of Indecent Exposure        | 35 |
| Mandatory 55-Year Sentence “Extreme”?        | 35 |
| Inmates of Attica Correctional Facility v. Rockefeller | 36 |
| B. Limits on Prosecutorial Discretion        | 37 |
| 1. Statutory and Administrative Limits       | 38 |
| 2. Ethical Limits                            | 39 |
| Lawyer Disbarred over Lacrosse Rape Case     | 40 |
| 3. Constitutional Limits                     | 41 |
| a. Selective or Discriminatory Enforcement  | 42 |
| Wayte v. United States                       | 42 |
| United States v. Armstrong                   | 45 |
| b. Vindictive Prosecution                    | 49 |
| Blackledge v. Perry                          | 50 |
| C. Formal Charging Mechanisms                | 52 |
| 1. The Grand Jury                            | 52 |
| a. Operation of the Grand Jury              | 54 |
| b. Screening Function of the Grand Jury      | 55 |
| Costello v. United States                    | 55 |
| United States v. Williams                    | 57 |
| c. Grand Jury Reform                        | 61 |
| 2. Preliminary Hearing                       | 61 |
| D. Severance and Joinder                     | 63 |
| 1. Federal Rules of Criminal Procedure 8 and 14 | 63 |
| 2. Irreconcilable Conflicts and *Bruton* Problems | 64 |
| a. Conflicting Defenses                      | 64 |
| Zafiro v. United States                      | 64 |
| b. *Bruton* Problems                        | 67 |
| Bruton v. United States                      | 67 |
| Richardson v. Marsh                          | 70 |
| Gray v. Maryland                             | 72 |
| E. Amendments and Variances                  | 75 |

### CHAPTER 3

**BAIL AND PRETRIAL RELEASE**

| A. Introduction                              | 77 |
| B. Preventive Detention                      | 79 |
CHAPTER 4

DISCOVERY

A. Introduction 101
B. Statutory and Rule Discovery: A Two-Way Street 104
   Williams v. Florida 105
C. Constitutional Discovery: A One-Way Street 108
   Brady v. Maryland 108
   Giglio v. United States 109
   United States v. Bagley 111
   Kyles v. Whitley 120
   Banks v. Dretke 129
D. Discovery for Guilty Pleas 131
E. Duty to Preserve Evidence 132
   Arizona v. Youngblood 133
F. Final Note 136

CHAPTER 5

PLEA BARGAINING AND GUILTY PLEAS

A. Introduction 139
B. Plea Bargaining 140
   1. History of Plea Bargaining 140
   2. The Pros and Cons of Plea Bargaining 141
      a. Support for Plea Bargaining 141
      b. Criticisms of Plea Bargaining 141
      c. Evaluating a Plea Bargain 143
   3. Bans on Plea Bargaining 144
   4. The Legality of Plea Bargaining 144
      Brady v. United States 144
   5. Effective Assistance of Counsel for Plea Bargaining 152
      Missouri v. Frye 153
      Lafler v. Cooper 157
C. Guilty Pleas 161
   Boykin v. Alabama 161
   Henderson v. Morgan 162
CHAPTER 6

SPEEDY TRIAL RIGHTS

A. Introduction

B. Why Speedy Trial Rights Matter
   - Right to a Speedy Trial? Justice Delayed
   - State Loses Appeal in Child-Rape Case
   - Judge Dismisses Molestation Case—Again
   1. Impact on the Defendant
   2. Impact on the Prosecution and Witnesses
   3. Impact on the Public

C. Due Process and Speedy Trial Rights
   1. Pre-Charging Delay, Due Process Rights, and Statutes of Limitations
      - United States v. Marion
      - Federal Statutes of Limitation
      - United States v. Lovasco
   2. Post-Charging Delay and Speedy Trial Rights
      a. Statutory Protections
      b. Constitutional Protection
         - Barker v. Wingo
         - Doggett v. United States
         - Vermont v. Brillon
      c. Other Speedy Trial Rules and Laws

D. Remedies for Speedy Trial Violations

E. Speedy Trial Rights and Sentencing
   - Betterman v. Montana

CHAPTER 7

RIGHT TO COUNSEL

A. Introduction

B. Appointment of Counsel
   - Gideon v. Wainwright

C. When the Right to Counsel Applies
   - Argersinger v. Hamlin

D. Standard for “Effective Assistance” of Counsel
   - Strickland v. Washington
CHAPTER 8

TRIAL

A. Trial by Jury
   1. Role of the Jury
      \textit{Duncan v. Louisiana} 256
   2. When Is There a Right to a Jury Trial? 260
   3. Composition of the Jury
      a. Number of Jurors
         \textit{Williams v. Florida} 261
         \textit{Ballew v. Georgia} 265
      b. Unanimity
         \textit{Apodaca v. Oregon} 269
   B. Jury Composition and Selection 273
      1. Selecting the Jury Venire
         \textit{Taylor v. Louisiana} 273
      2. Selecting the Petit Jury
         \textit{Batson v. Kentucky} 279
      3. Applying Batson
         a. Standing to Raise Batson Challenges 290
         b. Batson Challenges in Civil Cases 291
         c. Discriminatory Use of Peremptory Challenges by the Defense 291
         d. Batson Challenges to Other Types of Discrimination 293
         e. The Mechanics of Bringing Batson Challenges 295
            \textit{Snyder v. Louisiana} 296
            \textit{Rivera v. Illinois} 300
   C. Pretrial Publicity and the Right to a Fair Trial 303
      1. When Does Pretrial Publicity Interfere with a Defendant’s Right to a Fair Trial?
         \textit{Irvin v. Dowd} 303
         \textit{Skilling v. United States} 307
      2. Remedies for Prejudicial Pretrial Publicity
         a. Closure of Courtrooms 313
         b. Other Remedies 315
            \textit{Sheppard v. Maxwell} 316
<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>c. Ethical Limitations on Lawyers’ Extrajudicial Comments</td>
<td>320</td>
</tr>
<tr>
<td>Gentle v. State Bar of Nevada</td>
<td>321</td>
</tr>
<tr>
<td>United States v. Cutler</td>
<td>323</td>
</tr>
<tr>
<td>d. Prior Restraints</td>
<td>326</td>
</tr>
<tr>
<td>Nebraska Press Association v. Stuart</td>
<td>326</td>
</tr>
<tr>
<td>3. Cameras in the Courtroom</td>
<td>332</td>
</tr>
<tr>
<td>Chandler v. Florida</td>
<td>332</td>
</tr>
<tr>
<td>D. Trial Rights: Due Process, Right of Confrontation, and Privilege</td>
<td>337</td>
</tr>
<tr>
<td>Against Self-Incrimination</td>
<td></td>
</tr>
<tr>
<td>1. Right of Confrontation</td>
<td>338</td>
</tr>
<tr>
<td>a. Right to Be Present at Trial</td>
<td>338</td>
</tr>
<tr>
<td>Illinois v. Allen</td>
<td>338</td>
</tr>
<tr>
<td>Deck v. Missouri</td>
<td>340</td>
</tr>
<tr>
<td>b. Right to Confront Witnesses</td>
<td>342</td>
</tr>
<tr>
<td>Maryland v. Craig</td>
<td>343</td>
</tr>
<tr>
<td>Crawford v. Washington</td>
<td>346</td>
</tr>
<tr>
<td>Michigan v. Bryant</td>
<td>350</td>
</tr>
<tr>
<td>Ohio v. Clark</td>
<td>355</td>
</tr>
<tr>
<td>2. Privilege Against Self-Incrimination and Improper Closing</td>
<td>362</td>
</tr>
<tr>
<td>Arguments</td>
<td></td>
</tr>
<tr>
<td>Griffin v. California</td>
<td>362</td>
</tr>
<tr>
<td>Darden v. Wainwright</td>
<td>365</td>
</tr>
<tr>
<td>E. Defendant’s Right to Present a Defense</td>
<td>367</td>
</tr>
<tr>
<td>Chambers v. Mississippi</td>
<td>368</td>
</tr>
<tr>
<td>Holmes v. South Carolina</td>
<td>371</td>
</tr>
<tr>
<td>F. Role of the Jury and Proof Beyond a Reasonable Doubt</td>
<td>374</td>
</tr>
<tr>
<td>In re Winship</td>
<td>374</td>
</tr>
</tbody>
</table>

**CHAPTER 9**

**SENTENCING**

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>379</td>
</tr>
<tr>
<td>B. Indeterminate Versus Determinate Sentencing</td>
<td>381</td>
</tr>
<tr>
<td>1. Indeterminate Sentencing</td>
<td>381</td>
</tr>
<tr>
<td>2. Determinate Sentencing</td>
<td>382</td>
</tr>
<tr>
<td>3. Mandatory Minimum Sentences</td>
<td>384</td>
</tr>
<tr>
<td>4. Apprendi and Its Progeny</td>
<td>385</td>
</tr>
<tr>
<td>Apprendi v. New Jersey</td>
<td>385</td>
</tr>
<tr>
<td>Blakely v. Washington</td>
<td>392</td>
</tr>
<tr>
<td>United States v. Booker</td>
<td>401</td>
</tr>
<tr>
<td>C. Eighth Amendment: When Does a Sentence Constitute Cruel and Unusual Punishment?</td>
<td>407</td>
</tr>
<tr>
<td>1. Determining When a Sentence Is Proportional</td>
<td>407</td>
</tr>
<tr>
<td>Solem v. Helm</td>
<td>407</td>
</tr>
<tr>
<td>2. Proportionality and Three Strikes Laws</td>
<td>414</td>
</tr>
<tr>
<td>Ewing v. California</td>
<td>414</td>
</tr>
</tbody>
</table>
CHAPTER 10

DOUBLE JEOPARDY 497

A. Introduction 498
United States v. Scott 498

B. The Basics 501
1. What Is a Criminal Offense?
Hudson v. United States 501
2. What Is the “Same Offense”? 
Blockburger v. United States 505
3. When Does Jeopardy Attach? 507

C. No Retrial Following Conviction or Acquittal 507
1. No Retrial After Acquittal 508
Burks v. United States 508
2. No Retrial After Conviction 511

D. Exceptions to the Double Jeopardy Rule 512
1. Retrial After Mistrials 512
   a. Retrial After Mistrial for Hung Jury
      United States v. Sanford 512
   b. Retrials After Other Mistrials
      Oregon v. Kennedy 518
2. Dual Sovereignty 522
   Bartkus v. Illinois 523
CHAPTER 11

HABEAS CORPUS

A. Introduction 535
B. The Issues That Must Be Addressed in Order for a Federal Court to Grant Habeas Corpus Relief 538
   1. Is the Petition Time Barred? 539
      Holland v. Florida 541
      McQuiggin v. Perkins 549
   2. Is It a First or a Successive Habeas Corpus Petition? 556
      Tyler v. Cain 558
      Magwood v. Patterson 564
   3. Has There Been Exhaustion of All of the Claims Raised in the Habeas Petition? 571
      Rose v. Lundy 574
   4. Does the Petition Rely on Existing Rules or Seek Recognition of a New Rule of Constitutional Law? 582
      Teague v. Lane 582
   5. Is It an Issue That Can Be Raised on Habeas Corpus? 591
      Stone v. Powell 591
   6. Has There Been a Procedural Default, and If So, Is There Either Cause and Prejudice or an Adequate Showing of Actual Innocence? 605
      Wainwright v. Sykes 606
      Maples v. Thomas 616
      Herrera v. Collins 625
      House v. Bell 637
   7. May the Federal Court Hold an Evidentiary Hearing? 652
      Cullen v. Pinholster 652
   8. May the Federal Court Grant the Habeas Corpus Petition? 661
C. Statutes and Rules Governing Habeas Corpus 665
D. Habeas Corpus and the War on Terrorism 668
   Rasul v. Bush 668
   Boumediene v. Bush 675