# Contents

## A (Very) Short Preface and Request

### A. Sources

### B. An Overview — The Importance of Discretion

## Acknowledgments

## Chapter 1 Introduction

### A. Sources

### B. An Overview — The Importance of Discretion

## Chapter 2 Early Decisions About the Newly Arrested Defendant

### A. The Probable Cause Hearing and the Initial Appearance

### B. Bail

#### 1. The Mechanics of Bail

- a. Bail Before the 1960s
- b. Bail Reform in the 1960s and Later
- c. Determining Bail
- d. Determining the Conditions of Release

#### 2. The Procedures of Bail

#### 3. Preventive Detention — Security of the Community as a Criterion of Bail

- a. The "Capital" Exception to Bail
- b. Non-Capital Felonies
- c. Preventive Detention — Locking the Barn While the Horse Is Still There

### C. Pre-Trial Diversion

### Examples/Explanations

## Chapter 3 Charging Decisions

### A. Introduction

### B. The Decision to Prosecute

#### 1. The Public Prosecutor

#### 2. The Basic Decision — Whether to Charge

#### 3. Deciding Not to Prosecute

- a. The Victim Without a Remedy
- b. Agreeing Not to Prosecute — Waiver of Civil Claims

#### 4. WHAT to Charge

---

*Note: The content is a rough layout and does not reflect the actual formatting of the document.*
C. Attacking the Decision to Prosecute — The Defendant
   Without an Immediate Remedy  41
   1. Generally  41
   2. “Selective Enforcement”  41
      a. Discriminatory Impact  43
      b. Discriminatory Intent  44
      c. Prosecutorial “Defenses” to Selective Enforcement  45
   3. Vindictive Prosecution  46
D. Deciding Not to Decide — Pre-Charge or Pre-Trial Options  47

Examples/Explanations  48

Chapter 4 The Grand Jury: Gathering Information
   and Overseeing the Prosecutor’s Charging  55
   A. Introduction  55
   B. The Grand Jury as an Investigative Body  57
      1. Subpoena Power  57
      2. Secrecy of Grand Jury Proceedings  58
      3. Conferring Immunity
         a. Judicially Authorized Immunity  59
         b. “Pocket” Immunity  60
      4. “Runaway” Investigative Grand Juries  60
      5. Evidence in the Grand Jury
         a. Rules of Evidence  61
         b. Exculpatory Evidence  62
      6. Inapplicability of the Sixth Amendment  63
   C. The Grand Jury as a Screening Device  63
      1. Presentments  64
      2. Indictments  64
   D. Reform? or Abolish?  68
Examples/Explanations  70

Chapter 5 Alternatives to the Grand Jury:
   Informations and Preliminary Hearings  77
   A. “Information”  77
   B. Preliminary Hearing  78
Examples/Explanations  80

Chapter 6 Evidence Disclosure (Discovery)  83
   Overview  84
   A. “Brady” Evidence — The Constitutional Minimum  84
      1. Defining “Materiality”  87
      2. Aggregating the Nondisclosed Evidence  88
      3. Did the “Government” Suppress the Evidence?  89
      4. Did the Government “Supress” the Evidence?  91
Chapter 8  The Jury  
A. Overview  
1. Jury — Size and Unanimity  
2. Jury Nullification  
B. Selecting a Jury  
1. Determining the “District”  
2. Determining the “Pool”  
3. Constructing the Wheel  
4. Composing the Wheel  
   a. The Cross-Section Requirement  
   b. What Is the “Community”?  
   c. Defining “Cognizable Groups”  
   d. Equal Protection versus the Sixth Amendment  
   e. Measuring Disproportionate Representation  
   f. State Response to a Prima Facie Case of Discrimination  
5. The Venire — From Potential Service to Juror  
   a. Voir Dire — Establishing Information for Challenges  
   b. Voir Dire and Juror Privacy  
   c. Challenges for Cause  
      i. Pre-Trial Publicity as a Ground for Cause  
   d. Peremptory Challenges  
      i. Step One — The Prima Facie Case  
      ii. Step Two — The Neutral Explanation  
      iii. Step Three — Assessing the Claim  
      iv. Step Four — Remedy  
   e. Abolish Peremptories?  
6. A Quick Summary  
Examples/Explanations  
C. The Passive Jury — And Jury Reform  
D. The Jury — Alternate Jurors  
E. Impeaching Jury Verdicts  
1. Hearing the Evidence  
   a. The “External” versus “Internal” Dichotomy  
   b. Inside versus Outside the Jury  
2. Prejudice to the Defendant  
Examples/Explanations
Chapter 9  Double Jeopardy  205
A. The General Issue  205
   1. The Purpose of Double Jeopardy  205
   2. When Does Jeopardy Begin?  207
   3. When Is a Defendant “Acquitted”?  208
   4. Double Jeopardy and Sentencing  211
B. The “Same Offense” Doctrine  211
   1. “Punishment” for “Offenses”  211
   2. The “Same Offense” — An Overview  212
   3. The “Same Elements” Test — Blockburger v. United States  212
   4. The “Same Conduct” and the “Same Evidence” Tests  214
C. “Multiplicity”  215
   1. Collateral Estoppel (Issue Preclusion)  216
D. Multiple Punishments  217
E. Joinder and Severance — The “Kissing Cousins” of Double Jeopardy  219
Examples/Explanations  222
F. Hung Juries, Mistrials, and Manifest Necessity  230
   1. Mistrials  230
      a. Hung Juries  231
      b. Trial Errors  231
G. Successful Appeals: Double Jeopardy and Vindictiveness  235
H. The Dual Sovereignty Doctrine  236
Examples/Explanations  239

Chapter 10  Speedy Trial  247
A. Introduction  247
   1. Pre-Indictment Delay  248
   2. Post-Indictment Delay  249
      a. What Constitutes “Speedy”?  249
      b. The Barker Test  250
         i. The Length of the Delay  250
         ii. The Reasons for the Delay  251
         iii. The Defendant’s Assertion of His Right  252
         iv. The Prejudice to the Defendant  252
   3. Delay in Sentencing  253
Examples/Explanations  253

Chapter 11  Assistance of Counsel  257
A. The Right to Counsel  257
B. The Right to Counsel  258
   1. The Right to Counsel — To What Does It Apply?  259
Contents

a. What Is a “Criminal Prosecution”? 259
b. What Constitutes Part of a “Criminal Prosecution”? 259
C. The Right to Appointed Counsel 263
  1. Gideon and Argersinger 263
  2. The Right to Appointed Counsel — Systems of Providing Counsel 264
D. The Right to Effective Counsel 269
  1. The “Three Prongs” of Ineffectiveness 270
     a. State Interference 270
     b. Conflict of Interest 271
        i. Waiving Conflict 274
     c. Effectiveness of Representation — Strickland v. Washington 275
        i. The Standard of Performance 276
        ii. Demonstrating Prejudice 276
  2. Is Death Different? 285
  3. The Right to Effective Assistance — Expert Witnesses 289
  4. Raising the Right to Effective Counsel 290
  5. The Right to Effective Assistance — Limits 291
  6. Frivolous Appeals 291
E. Defendant Autonomy 292
  1. Self-Representation 292
  2. The Larger Question 296
Examples/Explanations 298

Chapter 12 Sentencing 309

A. The Importance of Sentencing Law — An Introduction 309
  1. “Multiple Discretions” 309
  2. Types of Punishments 310
  3. Indeterminate and Determinate Sentencing Structures 311
     a. Indeterminate Systems 311
     b. Determinate Systems 312
B. Theories of Punishment and Sentencing 313
  1. Utilitarian Theories of Punishment 313
  2. Retribution as a Theory of Punishment 314
  3. Proportionality 314
C. A Short History of Sentencing in the United States 315
D. Procedures at Sentencing 318
  1. Rules of Evidence 318
  2. Confidentiality of Information 319
  3. Burden of Proof 319
  4. Non-Jury Proceedings 320
  5. Nonreview of Sentences 320
E. A Revolution in Sentencing — Structured Sentencing 321
Chapter 13  Appeals and Collateral Attack  359

A. A General Overview of Review  359
   1. Why Allow Review at All?  360
   2. What Is the “Scope of Review”?  361
   3. What Remedy? Retroactivity and Finality; Herein
      of Legal Realism and Other Relevant Irrelevancies  361

B. Appeals  364
   1. Plain Error — The “Contemporaneous Objection’’
      Rule  364
   2. “Harmless” Error  366
      a. Non-constitutional Mistakes  366
      b. Constitutional Errors  367

F. Undoing the Revolution? Or Reframing It? Blakely, Booker,
   and the Future of Sentencing (Structured and
   Unstructured) in the United States  339
   1. Third Caveat — And an Apology  339
   2. Blakely and Booker — Undoing the Federal Guidelines  340
   3. Blakely (and Booker) in the States  343
   4. Final Thoughts  345

G. Sentencing and Death  347
Examples/Explanations  350
## Contents

Examples/Explanations 370  
C. Collateral Attack 373  
1. State Collateral Review 373  
2. Federal Habeas Corpus 377  
   a. A (Very) Short History of the “Great Writ” of Habeas Corpus 377  
      i. Generally 377  
      ii. Federal Habeas and the States — Federalism versus Fairness 378  
   b. Federal Habeas Corpus — Common Law and AEDPA 380  
      i. Timelines 381  
      ii. Exhaustion of Remedies 382  
      iii. Procedural Default 384  
         (a) Overcoming Procedural Default — Cause 385  
         (b) Overcoming Procedural Default — Prejudice 388  
         (c) The Merits of the Claim 388  
            (i) Pure Legal Issues 388  
               a) Pre-AEDPA 388  
               b) AEDPA 389  
            (ii) “Issues of Fact” or “Mixed Questions of Fact and Law” 392  
      iv. A Short Assessment 394  
      v. Federal Habeas Corpus — Successive Petitions 395  
3. Original Supreme Court Jurisdiction 396  
4. Actual Innocence 397  
   a. Innocence Commissions 397  
   b. Actual Innocence in the Courts 398  
Examples/Explanations 399  

## Chapter 14 Non-Criminal Remedies for Unacceptable Lawyering 411  
A. Defining — And Understanding — “Misconduct” 412  
   1. Abuse of the Grand Jury 413  
   2. Investigative Issues 413  
   3. Plea Bargaining Tactics 414  
   4. Discovery Violations 414  
   5. Trial Problems 415  
   6. Post Conviction (In) Action 416  
B. Alternative Remedies 416  
   1. Internal Supervision 416  
   2. Oversight By Attorneys 417  
   3. Oversight by Courts 418  
   4. Appellate Oversight — Naming Names 419  
   5. Disciplinary Sanctions 420