

TABLE OF CONTENTS

Preface	xxiii
Casebook Correlation Chart	xxv
Capsule Summary	C-1

Chapter 1

CONSTITUTIONAL CRIMINAL PROCEDURE GENERALLY

I. INTRODUCTION	1
II. STATE PROCEDURES AND THE FEDERAL CONSTITUTION	2
A. Nature of the Bill of Rights	2
B. Applicability of Bill of Rights to states	2
C. Pre-1960s use of fundamental fairness doctrine	3
D. Bill of Rights applies only to governmental conduct	4
E. Raising of constitutional claims in federal court	5
F. Independent state grounds	6
III. STEPS IN A CRIMINAL PROCEEDING	7
<i>Quiz Yourself on</i> CONSTITUTIONAL CRIMINAL PROCEDURE GENERALLY (ENTIRE CHAPTER)	9
<i>Exam Tips on</i> CONSTITUTIONAL CRIMINAL PROCEDURE GENERALLY	11

Chapter 2

ARREST; PROBABLE CAUSE; SEARCH WARRANTS

I. GENERAL PRINCIPLES	13
A. Fourth Amendment	13
B. Applicable to both searches and arrests	14
C. Two clauses of Fourth Amendment	14
II. THE "REASONABLE EXPECTATION OF PRIVACY"; THE INTERESTS THAT ARE PROTECTED BY THE FOURTH AMENDMENT	15
A. Generally	15
B. Pre-Katz "protected places" approach	15

C. <i>Katz</i> and the “reasonable expectation of privacy” doctrine	16
D. Digital databases of personal information	17
E. The property-based “trespass” approach to searches	18
F. Third party’s prior knowledge limits privacy interest	26
G. “Yes/no” test for contraband	26
H. Trash and other abandoned property	27
I. Jail cells	29
J. Social guests	29
K. Searches of passengers in, or non-owner drivers of, a vehicle	30
L. Foreign nationals and foreign territories	32
 III. THE “THIRD-PARTY” DOCTRINE: VOLUNTARY DISCLOSURE TO OTHERS AS VOIDING THE EXPECTATION OF PRIVACY	 33
A. Transfer to third person	33
B. Two key Supreme Court cases	33
1. Bank records (<i>U.S. v. Miller</i>)	33
2. Outbound telephone numbers called by D (<i>Smith v. Maryland</i>)	34
C. Modern digital databases and the third-party doctrine (<i>Carpenter v. U.S.</i>)	34
D. <i>Carpenter</i> ’s significance	41
E. <i>Carpenter</i> ’s multi-factor test and how it applies	42
1. When does the person have an REP in her personal data	42
2. Relevance of <i>Carpenter</i>	43
3. The <i>Carpenter</i> multi-factor test	43
4. Data gathered by government without a third party’s participation	45
5. Applying the multi-factor test to various information- gathering techniques	45
6. CSLI and other location-monitoring techniques	46
7. Electronic databases of non-location information	48
8. Does not apply to the contents of emails	48
 IV. THE “PLAIN VIEW” DOCTRINE	 49
A. Plain view doctrine, generally	49
B. Use of mechanical devices, generally	50
C. Mechanical devices “not in general public use”	52
D. Contorted positions	55
E. Aerial observation	55
F. Use of other senses	56
1. “Plain touch”	56
2. “Plain odor”	56
G. Plain view where police on defendant’s property	58
 V. PROBABLE CAUSE GENERALLY	 59
A. Applicability of probable cause	59
B. Basic requirements for probable cause	60
C. No admissibility limitation	60

D. Only evidence heard by magistrate used	61
E. Facts as reasonably believed by police	61
F. Required degree of probability	61
VI. PARTICULAR INFORMATION ESTABLISHING PROBABLE CAUSE ..	63
A. Evidence from officer's own observation	63
B. Information from informants	63
C. Suspect's criminal reputation	66
D. Information from non-criminal sources	66
VII. SEARCH WARRANTS — ISSUANCE AND EXECUTION	68
A. Who may issue	68
B. Affidavit	69
C. <i>Ex parte</i> nature of warrant	69
D. Requirement of particular description	69
E. What may be seized	71
F. Warrants against non-suspects	72
G. Execution of warrants	73
1. Period within which warrant must be executed	73
2. Time of day	73
3. Entry without notice vs. "knock and announce"	73
4. Where no response from inhabitants	75
5. Search of persons on premises	76
6. Restricted area of search	77
7. Seizure of unnamed items	77
8. Intrusions into body	78
H. "Good faith" exception	79
VIII. ARREST WARRANTS	79
<i>Quiz Yourself on</i>	
ARREST; PROBABLE CAUSE; SEARCH WARRANTS (ENTIRE CHAPTER)	80
<i>Exam Tips on</i>	
ARREST; PROBABLE CAUSE; SEARCH WARRANTS.....	93

Chapter 3

WARRANTLESS ARRESTS AND SEARCHES

I. INTRODUCTION	99
A. Necessity for warrants generally	99
1. Stops and inspections	100
II. WARRANTLESS ARRESTS	100
A. Constitutional requirement	100
B. Statutory requirements	103

C. Post-arrest probable cause hearing	104
D. Use of deadly force to make arrest	104
III. SEARCH INCIDENT TO ARREST	105
A. Pre-1969 law on search incident to arrest	105
B. <i>Chimel</i>	105
C. Distance and time limits on search under <i>Chimel</i>	106
D. Automobile searches incident to arrest	107
E. Protective sweeps	111
F. Contemporaneity of search	112
G. Legality of arrest	114
H. Application to minor crimes	114
I. Search of items carried on person of arrestee	115
1. Items that are not suspected of being weapons or evidence	115
2. Cellphones and their digital contents	116
J. Breath and blood tests incident to arrest	122
K. Arrest on probable cause but in violation of state law	126
L. Subterfuge arrests	126
M. Right of police to accompany arrestee	127
IV. EXIGENT CIRCUMSTANCES	127
A. Exigent circumstances generally	127
B. Destruction of evidence	127
1. Blood alcohol concentration (BAC) test	128
2. Easily-destroyed contraband	129
3. The "police-created exigency" exception	129
C. Need for fast action	131
D. Hot pursuit	132
E. Entry to arrest non-resident	132
F. Search of scene of murder	133
V. THE "PLAIN VIEW" DOCTRINE AND SEIZURES OF EVIDENCE	134
A. General applicability	134
B. Requirements for doctrine	134
C. No requirement of inadvertence	135
VI. THE "AUTOMOBILE EXCEPTION" TO THE REQUIREMENT OF A SEARCH WARRANT	135
A. Relation of car searches to other kinds of searches	135
B. The "automobile exception" to the warrant requirement – generally ..	136
C. Search at station after arrest	138
D. Search at place where vehicle is stopped	138
E. Search of vehicle parked in the curtilage portion of a driveway	139
F. Use of pretext to make stop	142

G. Traffic tickets	142
H. Extended to closed containers	143
I. Probable cause for container only	144
J. Search for Vehicle Identification Number	145
K. Impoundment search where no probable cause	145
L. Actions directed at passengers	146
M. Traffic stop followed by ticket	146
VII. CONSENT SEARCHES GENERALLY	147
A. Consent generally	147
B. <i>Schneckloth</i>	147
C. Importance of probable cause	148
D. Claims of authority to search	148
E. Other kinds of deception	150
F. Physical scope of search	150
VIII. CONSENT BY THIRD PERSONS	150
A. Importance of problem	150
B. Joint authority	151
C. Other theories	153
D. Husbands, wives, and lovers	153
E. Parents and children	154
F. Landlords, tenants, and co-tenants	154
G. Employers and employees	155
H. Ignorance of consentor	155
IX. "STOP-AND-FRISK" AND OTHER BRIEF DETENTION	155
A. Nature of "stop-and-frisk"	155
B. <i>Terry</i>	155
C. <i>Adams</i>	158
D. Degree of probability required for stop	159
1. Vague suspicion not sufficient	160
2. Modest degree of suspicion	160
3. Flight as a cause for suspicion	161
4. Tip from informant	161
E. What constitutes a "stop"	163
F. "Stop" vs. arrest	165
1. Reasonableness of detention	165
2. No more intrusive than necessary	165
3. Emphasis on "reasonableness"	165
4. Demand for identification	166
5. On-scene fingerprinting	166
6. Alimentary canal smugglers	167
G. Frisk permissible under <i>Terry</i>	167
1. Limited purpose of frisk	167

2. Reason to fear danger	168
H. Search of automobile	168
I. Brief detention at the station	170
J. Detention during search	170
K. Investigation of completed crime	172
L. Detention of property	173
M. Extensions of <i>Terry</i>	174
X. REGULATORY AND OTHER "SPECIAL NEEDS" SEARCHES	174
A. Focus of this section	174
B. Health and safety inspections of physical premises	175
C. Immigration searches	179
D. Protection of borders	180
E. Traffic stops for general criminal investigation	181
F. Discretionary stops to verify driver information	183
G. Sobriety checkpoints on highways	184
H. Summary on regulatory traffic stops and checkpoints	184
I. Capturing the DNA of arrested persons	184
J. Supervision of parolees and probationers	191
K. Pre-trial detainees may be searched	191
L. Searches in schools	192
M. Office of government employee	194
<i>Quiz Yourself on</i>	
WARRANTLESS ARRESTS AND SEARCHES (ENTIRE CHAPTER)	194
<i>Exam Tips on</i>	
WARRANTLESS ARRESTS AND SEARCHES	211

Chapter 4

ELECTRONIC SURVEILLANCE AND SECRET AGENTS

I. HISTORICAL BACKGROUND	221
A. <i>Olmstead</i>	221
B. Eavesdropping	222
II. FOURTH AMENDMENT PROTECTION OF <i>KATZ</i>	222
A. <i>Katz</i>	222
B. The reliance test	223
C. Participant monitoring	223
III. THE FEDERAL WIRETAPPING AND STORED-COMMUNICATIONS STATUTES	223
A. Two statutes covered	223

B. Title III of the Crime Control Act	223
C. Operation of Title III	223
D. Covert entry allowed	225
E. Consenting party exception	225
F. Title III in practice	225
G. Foreign threats	226
H. The Stored Communications Act (SCA)	226
IV. THE USE OF SECRET AGENTS	230
A. Problem generally	230
B. Pre-Katz view of "bugged agents"	230
C. Pre-Katz use of "unbugged agents"	230
D. Reaffirmation after <i>Katz</i>	231
E. Title III	232
F. Right to counsel	232
V. ENTRAPMENT	232
A. Meaning of entrapment	232
B. Constitutional basis for entrapment defense	233
<i>Quiz Yourself on</i>	
ELECTRONIC SURVEILLANCE AND SECRET AGENTS	
(ENTIRE CHAPTER).....	233
<i>Exam Tips on</i>	
ELECTRONIC SURVEILLANCE AND SECRET AGENTS	234

Chapter 5

CONFESSIONS AND POLICE INTERROGATION

I. INTRODUCTION	237
II. PRE-MIRANDA CONFESSION CASES	239
A. <i>Brown v. Mississippi</i>	239
B. The "voluntariness" test	239
C. Criticism of the voluntariness test	240
D. Pre-Miranda rules for federal prosecutions	241
III. ESCOBEDO AND THE RIGHT TO COUNSEL	241
A. Pre-Escobedo cases	241
B. <i>Escobedo</i>	242
IV. MIRANDA GENERALLY	243
A. Impact of <i>Miranda</i>	243
B. General setting of <i>Miranda</i>	243

C. Holding of <i>Miranda</i>	243
D. Custodial questioning only	243
E. May be exercised at any time	244
F. Waiver	244
G. Right to counsel	244
H. Inadmissibility	244
I. Fifth Amendment basis for <i>Miranda</i>	245
J. Congress did not successfully substitute for the <i>Miranda</i> warnings (<i>Dickerson</i>)	246
V. WHAT IS A “CUSTODIAL” INTERROGATION	248
A. Language of <i>Miranda</i>	248
B. “Focus of investigation” test abandoned	248
C. Objective “reasonable suspect” test	249
D. Place of interrogation	251
E. Purpose of interrogation	253
VI. MINOR CRIMES	254
A. No “minor crimes” exemption	254
VII. WHAT CONSTITUTES INTERROGATION	254
A. Volunteered statements	254
B. Identification questions	257
C. Emergency questions	257
D. Questions by non-police	257
VIII. THE “PUBLIC SAFETY” EXCEPTION	258
IX. WARNINGS REQUIRED UNDER <i>MIRANDA</i>	261
A. Adequacy of warnings	261
B. Where police think suspect aware of rights	263
X. WAIVERS AND INVOCATIONS OF <i>MIRANDA</i> RIGHTS	264
A. Waivers and invocations	264
B. Special waiver and invocation issues	264
1. Two different rights	264
2. Determining whether a waiver occurred	264
3. Invocation must be “clear and unequivocal”	270
4. Waiver after successful invocation of the right	272
5. Summary of waiver differences as between counsel and silence	280
XI. THE <i>MIRANDA</i> RIGHTS OF GRAND JURY WITNESSES	281
XII. OTHER ADMISSIBILITY ISSUES RELATING TO <i>MIRANDA</i>	282
A. <i>Wong Sun</i> and <i>Miranda</i>	282
B. Admissibility for impeachment	282

C. Use of defendant's silence	283
<i>Quiz Yourself on</i>	
CONFESSIONS AND POLICE INTERROGATION (ENTIRE CHAPTER) ..	288
<i>Exam Tips on</i>	
CONFESSIONS AND POLICE INTERROGATION.....	296

Chapter 6

LINEUPS AND OTHER PRE-TRIAL IDENTIFICATION PROCEDURES

I. IDENTIFICATION PROCEDURES GENERALLY	301
II. LIMITATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION	302
III. THE RIGHT TO COUNSEL	303
A. The <i>Wade-Gilbert</i> rule	303
B. <i>Wade-Gilbert</i> rule reaffirmed in <i>Moore</i>	305
C. Meaning of the right to counsel	306
D. Waiver	306
E. Substitute counsel	306
F. Crime Control Act	306
IV. EXCEPTIONS TO THE RIGHT TO COUNSEL	307
A. Pre-indictment identifications	307
B. Photographic identifications	307
C. Scientific methods	308
V. DUE PROCESS LIMITATIONS	308
A. <i>Stovall</i>	308
B. Suggestive identification admissible if reliable	309
C. Use of photos	309
D. Further leniency in <i>Brathwaite</i>	310
E. Present uncertainty of due process doctrine	311
<i>Quiz Yourself on</i>	
LINEUPS & OTHER PRE-TRIAL ID PROCEDURES (ENTIRE CHAPTER).	312
<i>Exam Tips on</i>	
LINEUPS & OTHER PRE-TRIAL ID PROCEDURES.....	316

Chapter 7

THE EXCLUSIONARY RULE

I. PURPOSE AND FUNCTION OF EXCLUSIONARY RULE	319
---	-----

A. Function	319
B. Other remedies	320
C. Theory behind exclusionary rule	320
D. Basis for rule	321
E. Future of rule	321
F. Topics to be covered	321
II. STANDING TO ASSERT THE EXCLUSIONARY RULE	321
A. General standing issue	321
B. Confession cases	323
C. Search and seizure cases	323
D. Wiretaps	327
III. DERIVATIVE EVIDENCE GENERALLY, AND THE “INDEPENDENT SOURCE” AND “INEVITABLE DISCOVERY” EXCEPTIONS	328
A. Derivative evidence generally	328
B. <i>Silverthorne</i>	328
C. “Fruits of the poisonous tree” doctrine	328
D. Approach used in our discussion	328
E. Independent source exception	329
F. The “inevitable discovery” exception	331
IV. “PURGING THE TAIN” OF POLICE ILLEGALITY — THE SIGNIFICANCE OF SUBSEQUENT INDEPENDENT EVENTS ...	334
A. The “purged taint” exception in general	334
B. <i>Wong Sun</i>	334
C. Standards for determining if intervening events “have purged the taint”	335
D. Particular scenarios	339
E. Illegality leading the police to focus on a particular suspect	340
F. Leads to different crime	340
G. Leads to witnesses	341
H. Confessions as tainted fruit	341
I. Second confession as fruit of the first	342
J. Confession as a “poisonous tree”	346
V. COLLATERAL USE EXCEPTIONS	348
A. Collateral use exceptions generally	348
B. Impeachment at trial	348
C. Grand jury testimony	350
D. Other contexts	351
VI. OTHER EXCEPTIONS — THE “GOOD FAITH WARRANT” AND “KNOCK-AND-ANNOUNCE VIOLATION” EXCEPTIONS	352
A. Exceptions generally	352

B. The “good faith warrant” exception	352
C. Exception for “knock-and-announce” violations	360
<i>Quiz Yourself on</i>	
THE EXCLUSIONARY RULE (ENTIRE CHAPTER)	361
<i>Exam Tips on</i>	
THE EXCLUSIONARY RULE	371

Chapter 8

THE RIGHT TO COUNSEL

I. INTRODUCTION	377
II. RIGHT TO RETAINED COUNSEL OF ONE’S CHOICE	378
III. THE INDIGENT’S RIGHT TO APPOINTED COUNSEL	379
A. <i>Powell</i> and capital crimes	379
B. <i>Betts v. Brady</i>	379
C. <i>Gideon</i>	380
D. Equal protection	380
E. The concept of indigence	382
IV. PROCEEDINGS IN WHICH THE RIGHT TO COUNSEL APPLIES ...	382
A. Misdemeanors	382
1. Rationale	383
2. Jail sentence possible but not imposed	383
3. Use to increase sentence for later crime	383
4. Suspended sentence	384
B. Quasi-criminal proceedings	384
V. STAGES AT WHICH RIGHT TO COUNSEL ATTACHES	384
A. Problem generally	384
B. Police investigation	384
C. Initial appearance	385
D. Preliminary hearing	385
E. Indictment	386
F. Arraignment	386
G. Plea-bargaining	386
H. Sentencing a “critical stage”	387
I. Psychiatric examination a “critical stage”	387
J. Appeals	388
K. Collateral proceedings	388
VI. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL	388
A. Effectiveness of counsel generally	388
B. Standard for judging effectiveness	388

C. Advice as to plea-bargaining	389
D. Insufficient time to prepare	397
E. Right of consultation	397
F. No right to "meaningful relationship"	398
G. No right to have lawyer present perjured testimony	398
H. Death penalty cases	398
I. Conflict in multiple representation	399
J. Expert assistance	400
K. Fees and transcripts	401
L. Secret agents	401
VII. THE CLIENT'S RIGHT TO CONTROL THE DEFENSE	405
A. The right generally	405
B. Rights reserved to lawyer	405
C. Decisions that belong solely to the client	406
D. Conceding the client's guilt as a Sixth Amendment violation (<i>McCoy</i>) ..	407
E. No obligation to argue all issues (<i>Jones v. Barnes</i>)	409
VIII. WAIVER OF THE RIGHT TO COUNSEL	409
A. Standards	409
B. Waiver after pre-trial appointment of counsel	412
C. Entry of plea	413
D. Right to conduct one's own defense	413
<i>Quiz Yourself on</i>	
THE RIGHT TO COUNSEL (ENTIRE CHAPTER).....	414
<i>Exam Tips on</i>	
THE RIGHT TO COUNSEL	420

Chapter 9

FORMAL PROCEEDINGS

I. GRAND JURY PROCEEDINGS	425
A. Grand jury indictment generally	425
B. Nature of grand jury proceedings	426
C. Use of evidence	426
D. The privilege against self-incrimination, and immunity	427
E. Witness' right to counsel	428
II. BAIL AND PREVENTIVE DETENTION	428
III. PLEA BARGAINING	430
A. Plea bargains generally	430
B. Threats and promises by prosecutor	431
C. Sixth Amendment right to counsel	433

D. Receiving of plea	433
E. Withdrawal of plea by defendant	434
F. Rights waived by plea	435
IV. RIGHT TO SPEEDY TRIAL	436
V. PRE-TRIAL MOTIONS TO SUPPRESS EVIDENCE	437
VI. PRE-TRIAL DISCOVERY	438
VII. THE RIGHT TO A JURY TRIAL	441
A. The right generally	441
B. Issues to which the right applies	443
1. No jury right as to sentencing	443
2. Fact increases maximum punishment	443
3. Sentencing guidelines	444
C. Waiver	451
D. Size and unanimity of the jury	451
E. Selection of jurors	451
VIII. THE TRIAL	455
A. Trial procedure generally	455
B. Defendant's right to be present	457
C. Defendant's Confrontation Clause rights	457
1. Compulsory process	457
2. D's right to cross-examine witnesses against him	458
3. D1's confession used against D2	458
D. Defendant's right to remain silent	460
IX. DOUBLE JEOPARDY	461
A. The guarantee generally	461
B. Proceedings to which guarantee attaches	461
C. When jeopardy attaches	462
D. Reprosecution after mistrial	462
E. Reprosecution after acquittal	464
F. Reprosecution after conviction	464
G. Reprosecution by different sovereign	465
H. Overlapping offenses	466
I. Use of prior conviction under "persistent offender" laws	467
<i>Exam Tips on</i> <i>FORMAL PROCEEDINGS</i>	468
ESSAY EXAM QUESTIONS AND ANSWERS	471
TABLE OF CASES	481
SUBJECT MATTER INDEX	487