Table of Contents

Preface xxiii Acknowledgments xxv



INTRODUCTION TO CRIMINAL PROCEDURE 1

Cł	Chapter One: The Criminal Justice Process	
A.	The Difference Between Substantive Criminal Law and Criminal Procedure	4
		_
	1. How Substantive Criminal Law Differs from Criminal Procedure	4
	2. Overlap Between Substantive Criminal Law and Criminal Procedure	5
В.	The Difference Between Investigative and Adjudicative Criminal Procedure	7
C.	The Life of a Criminal Case	8
	1. The Investigatory Phase	8
	a. Step 1. How an Investigation Begins	8
	b. Step 2. Law Enforcement's Investigative Practices (How Law Enforcement Goes About Investigating the Commission of a Crime)	9
	2. The Adjudicatory Phase	10
	a. Step 3. The Filing of a Complaint	11
	b. Step 4. The Probable Cause (Gerstein) Hearing	11
	c. Step 5. Information or Grand Jury Indictment	12
	d. Step 6. Arraignment	13
	e. Step 7. Pretrial Motions	14
	f. Step 8. Plea Bargaining	14
	g. Step 9. The Trial	15
	h. Step 10. Sentencing	16
	i. Step 11. Postconviction Relief	17
D.	Competing Values in Criminal Procedure	19
E.	Race, Gender, and Economic Class in Criminal Procedure	22

XII	Table of Contents
	Table of Colletts

1. Race	22	
2. Gender	24	
3. Economic Class	25	
Chapter Summary	26	
Chapter Two: Sources of the Law	31	
A. The U.S. Constitution	32	
1. The Bill of Rights	32	
2. The Incorporation Debate	35	
3. The Supreme Court's Expansive Interpretation of Individual Guarantees	36	
4. Free-Standing Due Process Protections	37	
B. State Constitutions	39	
C. Statutory Regulations in Criminal Procedure	41	
D. Court's Supervisory Authority	42	
Chapter Summary	44	
Applying the Rules	45	
Criminal Procedure in Practice		
Chapter Three: Triggering the Fourth Amendment:	E 47	
Searches, Seizures, and Other Prerequisites	49	
A. Defining a Search and Seizure	51	
1. Searches Under the Fourth Amendment	51	
 a. Defining a "Search" Exclusively as a "Trespass" (the Pre-1967 Analysis) 	51	
 b. Defining a "Search" Based on a "Reasonable Expectation of Privacy (the Post-1967 Analysis) 	53	
Katz v. United States	54	
 Applying Fourth Amendment Search Analysis to Specific Investigative Techniques 	66	
2. The Fourth Amendment and Emerging Technology	83	
a. Sense-Enhancing Technology	84	

85

b. Thermal Imaging Devices

Table of Contents	xiii

	c. Ground Tracking Devices	87
	3. The Third-Party Doctrine (from Conventional Business Records to	
	Modern Technologies)	90
	a. Bank Records	91
	b. Pen Registers	91
	c. The "Mosaic Theory" and the Third-Party Doctrine in the Digital Age	93
	Carpenter v. United States	97
	4 Applying the Third-Party Doctrine to Internet Surveillance	110
	a. Internet Search History and Email to/from Addresses	110
	b. Searching the Content of Emails Stored on Third-Party Servers	112
	c. Statutory Protections Regulating Digital Surveillance	113
	5. (Property) Seizures Under the Fourth Amendment	119
	United States v. Karo	120
В.	Which "People" Are Protected by the Fourth Amendment?	125
C.	The State Action Requirement	127
	1. Private Parties	128
	2. Non-Law Enforcement Government Employees	129
D.	Standing	130
	Rakas v. Illinois	132
	1. Nonowner Driver's Standing to Challenge the Search of a Car	140
	2. Standing to Challenge a Search of Another Person's House	141
	3. Standing to Contest a Search When Claiming a Possessory Interest in the Item Seized	144
	4. Standing to Challenge a Fourth Amendment Seizure	145
	5. Standing and the Right Against Self-Incrimination	146
Ch	apter Summary	148
Аp	plying the Rules	151
Cri	iminal Procedure in Practice	156
Cł	napter Four: Probable Cause and Warrants	161
Α.	Probable Cause	162
	1. Defining Probable Cause	162
	a. Probable Cause Is Required at the Time of the Search or Seizure (With or Without a Warrant)	163
	b. Probable Cause Can Grow Stale	164
	c. Probable Cause to Arrest and to Search Require the Same Quantum of Evidence	166
	d. The Individualized Nature of Probable Cause	167

e. Probable Cause Is Examined from an Objective Point of View	168
f. Pretextual Stops and Objective Probable Cause	169
g. Probable Cause as a Percentage	171
2. Proving Probable Cause	173
a. Types of Information Used to Establish Probable Cause	173
b. How Courts Make Probable Cause Determinations (from <i>Aguilar-Spinelli</i> to the <i>Gates</i> Totality of the Circumstances Test)	175
Illinois v. Gates	179
c. Challenging Probable Cause	189
B. Warrants	197
1. The Elements of a Valid Search Warrant	198
Lo-Ji Sales, Inc. v. New York	199
a. The Particularity Requirement in More Detail	203
b. The "Neutral and Detached" Magistrate Further Defined	207
John E. Taylor—Using Suppression Hearing Testimony to Prove Good Faith Under United States v. Leon	209
2. Executing the Search Warrant	212
a. Scope of the Search	212
b. Means of Entry (The Knock-and-Announce Rule)	214
 Searching and Seizing Persons During Execution of a Search Warrant 	217
3. Arrest Warrants	220
a. The Remedy for Failure to Obtain an Arrest Warrant	220
b. Arrests in Public Places	220
c. Arrests in the Home	223
Payton v. New York	224
Chapter Summary	235
Applying the Rules	239
Criminal Procedure in Practice	242
Chapter Five: Warrantless Searches and Seizures	247
A. The Warrant Requirement and "Reasonableness" as the "Touchstone" of Fourth Amendment Analysis	247
B. Warrant Exceptions	249
1. Exigent Circumstances	249
a. General Principles	250
b. Exigent Circumstances Categorized	252
Kentucky v. King	263

3/1	

Tob	۱.	~£	Contents
ıan	ΙР	nτ	Dination. I

	2. Search Incident to Lawful Arrest (SILA)	274
	a. The Rule and Its Twin Rationales	275
	b. When SILA Applies	276
	c. The Right to Search Incident to a Lawful Arrest Is Automatic	278
	d. The Permissible Scope of a Search Incident to Arrest	279
	Riley v. California	283
	e. Applying SILA to Automobiles	291
	Arizona v. Gant	29 5
	3. Consent	308
	a. Rationale for the Consent Exception	308
	b. Elements of a Valid Consent to Search	309
	4. Automobiles	323
	a. Justifying the Automobile Exception	324
	b. Searching Containers Within a Vehicle	327
	c. Does the Automobile Exception Extend to the Search of Persons in Cars?	330
	d. Where the Automobile Exception Applies (the Scene of the Se	earch) 330
	5. Plain View	333
	a. The Elements of the Plain View Doctrine	334
	b. Inadvertent Discovery Not Required	338
	c. Extending the Plain View Doctrine to Other Senses	339
	5. "Special Needs" Searches	341
	a. Types of Special Needs Searches and Seizures	343
	City of Indianapolis v. Edmond	357
	7. Stop and Frisks (the Case of <i>Terry v. Ohio</i>)	383
	Terry v. Ohio	384
	a. Three Levels of Police-Citizen Encounters	396
Ch	oter Summary	430
Аp	ying the Rules	432
Cri	inal Procedure in Practice	435
CI	pter Six: The Exclusionary Rule	437
A.	he Exclusionary Rule as a General Remedy for Constitutional	
_	Violations	438
В.	he Fourth Amendment Exclusionary Rule	438
	1. The Historic Evolution of the Exclusionary Rule	439
	2. The Exclusionary Rule's Underlying Rationale	441

C.	The "Fruit of the Poisonous Tree" Doctrine	442
	Wong Sun v. United States	444
D.	Limiting the Exclusionary Rule	456
	1. Exceptions to the Fruit of the Poisonous Tree Doctrine	457
	a. The Independent Source Doctrine	457
	b. Inevitable Discovery	461
	Nix v. Williams (Williams II)	462
	c. The Attenuation Doctrine	472
	2. Exceptions to the Exclusionary Rule	476
	a. The Non-Criminal Proceeding Exception	476
	b. The Impeachment Exception	479
	c. The Good Faith Exception	481
	Davis v. United States	486
E.	Is the Exclusionary Rule Constitutionally Required?	497
F.	Should the Exclusionary Rule Be Abolished?	498
	1. The Exclusionary Rule Should Be Abolished	499
	2. The Exclusionary Rule Should Be Preserved	500
	3. What Are Your Views of the Exclusionary Rule?	502
Ch	apter Summary	504
Аp	plying the Rules	505
Cri	iminal Procedure in Practice	510
Cł	napter Seven: Police Interrogations and Confessions	513
A.	Due Process: The Fifth and Fourteenth Amendment Voluntariness	
	Requirement	514
	1. Due Process Rationales for Excluding Involuntary Confessions	515
	2. The Totality of the Circumstances Test	516
	 a. Use of Violence, Threats of Violence, and Deprivation of Bodily Needs 	518
	b. Psychological Manipulation	521
	Spano v. New York	523
	3. The State Action Requirement	535
	Colorado v. Connelly	537
	4. Involuntary Confessions and the Exclusionary Rule	546
В.	Police Interrogations and Fifth Amendment Right Against	
	Self-Incrimination (The Miranda Doctrine)	547
	1. Establishing <i>Miranda</i>	547
	Miranda v. Arizona	549

	Table of	Contents
	a. The <i>Miranda</i> Rules(s)	565
	b. <i>Miranda</i> Is Triggered by Custodial Interrogation	566
	c. Miranda's Aftermath	567
	d. <i>Miranda</i> Is Constitutionally Based	568
	2. Applying <i>Miranda</i>	570
	a. Custody	570
	b. Interrogation	579
	Rhode Island v. Innis	<i>579</i>
	c. Waiver of <i>Miranda</i> Rights	594
	Berghuis v. Thompkins	602
	d. Invocation	613
	3. Scope of <i>Miranda</i> 's Exclusionary Rule	624
	a. Impeachment Using Statements Taken in Violation of Miranda	624
	b. Impeachment Using Post-Miranda Silence	625
	c. Miranda and the Fruit of the Poisonous Tree Doctrine	626
C.	The Sixth Amendment Right to Counsel	630
	1. The <i>Massiah</i> Case: The Sixth Amendment Right to Counsel Rule During Police Interrogations	631
	2. When the Right to Counsel Is Triggered (Formal Adversarial Proceedings)	632
	3. Deliberate Elicitation	632
	Brewer v. Williams (Williams I)	633
	4. Difference Between Deliberate Elicitation Standard and Interrogation	641
	a. Does Deliberate Elicitation Require Intent?	641
	b. Creating a Situation Likely to Induce Incriminating Statements	641
	c. Knowing Exploitation of an Opportunity to Confront the Accused Without Counsel Present	642
	d. The Passive Jail House Plant	643
	5. Waiver and Invocation of the Right to Counsel	646
	a. <i>Montejo v. Louisiana</i> and Its Possible Implications	647
	6. The Sixth Amendment Is Offense Specific	651
	7. The Scope of the Sixth Amendment Exclusionary Rule	653
	a. Impeachment Evidence	653

b. Poisoned Fruit of a Sixth Amendment Violation

c. Midstream Warnings and the Sixth Amendment

8. Comparing the Miranda and the Sixth Amendment Right to Counsel

xvii

654

654

655

xviii Table of Contents

Chapter Summary	657
Applying the Rules	661
Criminal Procedure in Practice	667
Chapter Eight: Eyewitness Identification	
A. Types of Eyewitness Identifications	672
1. Live In-Court Identification	672
2. The Show-Up	673
3. The Lineup	673
4. Photo Array	674
B. Constitutional Protections	675
1. The Sixth Amendment Right to Counsel	675
a. Post-indictment Corporeal Identification Procedures	677
United States v. Wade	678
b. Pre-indictment Corporeal Identification Procedures	689
c. Noncorporeal Identification Procedures	691
2. Due Process	692
a. Unnecessarily Suggestive	693
Stovall v. Denno	694
b. Likelihood of Mistaken Identification	699
Manson v. Brathwaite	700
C. The Fallibility of Eyewitness Identifications and Reform Measures Combating the Problem	712
The Fallibility of Eyewitness Identifications	712
a. Estimator Variables	713
b. System Variables	714
2. Proposed Reforms	715
a. State v. Henderson: A Model of Reform	715
Chapter Summary	718
Applying the Rules	720
Criminal Procedure in Practice	723

Table of Cases 727 Index 735