2014 SUPPLEMENT TO THIRTEENTH EDITIONS

MODERN CRIMINAL PROCEDURE

BASIC CRIMINAL PROCEDURE

ADVANCED CRIMINAL PROCEDURE

Yale Kamisar
Wayne R. LaFave
Jerold H. Israel
Nancy J. King
Orin S. Kerr
Eve Brensike Primus

WEST ACADEMIC PUBLISHING

AMERICAN CASEBOOK SERIES®

2014 SUPPLEMENT TO THIRTEENTH EDITIONS

MODERN CRIMINAL PROCEDURE
BASIC CRIMINAL PROCEDURE
AND
ADVANCED CRIMINAL PROCEDURE

■ ■ ■

by

Yale Kamisar
Clarence Darrow Distinguished University Professor Emeritus of Law, University of Michigan
Professor Emeritus of Law, University of San Diego

Wayne R. LaFave
David C. Baum Professor Emeritus of Law and Center for Advanced Study Professor Emeritus, University of Illinois

Jerold H. Israel
Ed Rood Eminent Scholar Emeritus, University of Florida, Fredric G. Levin College of Law
Alene and Allan F. Smith Professor Emeritus, University of Michigan

Nancy J. King
Lee S. & Charles A. Speth Professor of Law
Vanderbilt University Law School

Orin S. Kerr
Fred C. Stevenson Research Professor of Law
The George Washington University Law School

Eve Brensike Primus
Professor of Law
University of Michigan

AMERICAN CASEBOOK SERIES®

WEST ACADEMIC PUBLISHING

Mat #41648364

444 Cedar Street, Suite 700
St. Paul, MN 55101
1-877-888-1330

Printed in the United States of America

ISBN: 978-1-62810-085-3

PREFACE

This Supplement contains all significant cases decided by the United States Supreme Court in the 2013–14 Term. It also includes some lower court cases and some citations to, or extracts from, recent academic commentary.

YALE KAMISAR
WAYNE R. LAFAVE
JEROLD H. ISRAEL
NANCY J. KING
ORIN S. KERR
EVE BRENSIKE PRIMUS

July 2014

TABLE OF CASES

The principal cases are in bold type.

2014 SUPPLEMENT TO THIRTEENTH EDITIONS

MODERN CRIMINAL PROCEDURE
BASIC CRIMINAL PROCEDURE
AND
ADVANCED CRIMINAL PROCEDURE

TABLE OF CONTENTS

Part 1

Introduction

CHAPTER 3

SOME GENERAL REFLECTIONS ON CRIMINAL PROCEDURE AND ITS ADMINISTRATION

■ ■ ■

13th ed., p. 63; after extract from Brandon Garrett's book, add:

Consider, too, Samuel R. Gross & Michael Shaffer, Report by the National Registry of Exonerations,[a] *Exonerations in the United States, 1989–2012,* pp. 3–4 (2012) (http://www.exonerationregistry.org) (analyzing 873 exonerations).

"The most important conclusion of this Report is that there are far more false convictions than exonerations. That should come as no surprise. The essential fact about false convictions is that they are generally invisible: if we could spot them, they'd never happen in the first place. Why would anyone suppose that the small number of miscarriages of justice that we learn about years later—like the handful of fossils of early hominids that we have discovered—is anything more than an insignificant fraction of the total?

"In any event, the exonerations we know about tell us something about the ones we have missed. Eighty-three percent of the exonerations in the Registry were in rape and homicide cases, which together constitute about 2% of felony convictions, but the problems that cause false convictions are hardly limited to rape and murder. For example, in 47 of the exonerations the defendants were convicted of robbery compared to 203 convictions for rape, even though there is every reason to believe that there are many more false convictions for robbery than for rape. For both rape and robbery, the false convictions we know about are overwhelmingly caused by mistaken eyewitness identifications—a problem that is almost entirely restricted to crimes committed by strangers—and arrests for robberies by strangers are at least several times more common than arrests for rapes by strangers. Why so comparatively few robbery exonerations? Because DNA evidence is the factual basis for the vast majority of rape exonerations, but DNA is hardly ever useful in proving the innocence of robbery defendants.

[a] The National Registry of Exonerations is a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law.

"Even among rape and murder cases, only a small minority of false convictions end in exoneration. A quarter of murder exonerees were sentenced to death (101/409), and nearly half of all homicide and sexual assault exonerees were sentenced to death or life imprisonment (345/721). But overall, very few convicted murderers are sentenced to death, and the great majority of rape defendants plead guilty and receive sentences of several years in prison.

"Why do so few rape and murder convictions with comparatively light sentences show up among the exonerations? Most innocent defendants with short sentences probably never try to clear their names. They serve their time and do what they can to put the past behind them. If they do seek justice, they are unlikely to find help. The Center on Wrongful Convictions, for example, tells prisoners who ask for assistance that unless they have at least 10 years *remaining* on their sentences, the Center will not be able to help them because it is overloaded with cases where the stakes are much higher."

CHAPTER 4

THE RIGHT TO COUNSEL

■ ■ ■

SECTION 1. THE RIGHT TO APPOINTED COUNSEL AND RELATED PROBLEMS

A. THE RIGHT TO APPOINTED COUNSEL IN CRIMINAL PROCEEDINGS

13th ed., p. 78; in Note 5, replace the citation to James M. Anderson and Paul Heaton's working paper with the following citation:

James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L.J. 154 (2012).

13th ed., p. 78; after Note 5, add:

5A. ***Gideon Vouchers.*** Indigent defendants in Comal County, Texas will soon be able to use government vouchers to choose their own attorneys from a list of qualified attorneys. While some believe that *Gideon* vouchers can improve the quality of indigent defense representation, others fear that it will only give an advantage to savvy criminals. For a discussion of the pilot project, see Adam Liptak, *Need-Blind Justice*, N.Y. Times (Jan. 4, 2014). For a discussion of the theory behind *Gideon* vouchers, see Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 Am. Crim. L. Rev. 73 (1993).

13th ed., p. 78; at the end of the first paragraph of Note 6, add:

For additional reflections on *Gideon* fifty years later, see articles in the following symposia: *The Gideon Effect: Rights, Justice, and Lawyers Fifty Years After Gideon v. Wainwright*, 122 Yale L.J. 2106 et seq. (2013); *Gideon at 50: Reassessing the Right to Counsel*, 70 Wash. & Lee L. Rev. 835 et seq. (2013); 25 Fed. Sent'g Rep. 87 et seq. (2012).

13th ed., p. 83; after Note 6, add:

For an argument that courts often use the seemingly-expansive nature of the right to counsel announced in *Gideon* to justify limiting or diluting other

criminal procedure rights, see Justin F. Marceau, *Gideon's Shadow*, 122 Yale L.J. 2482 (2013).

13th ed., p. 85; after Note 8, add:

9. *Shrinking Gideon.* Consider Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 Wash. & Lee L. Rev. 1287, 1290 (2013):

"*Gideon*'s problems are deep, structural ones. We have been spreading resources too thin, in the process slighting the core cases such as capital and other serious felonies that are the most complex and need the most time and money. A perfunctory chat with a lawyer is little better than no lawyer at all.

"[W]e must shrink the universe of cases covered by *Gideon* to preserve its core. That would mean excluding nonjury misdemeanors and perhaps probationary sentences from its ambit, for example, and thinking harder up front about which cases need to be charged and pursued as felonies.

"Especially in bench trials, there are other ways to simplify cases to make lawyers less necessary. In particular, civil procedure could learn from inquisitorial systems, in which judicial officers are more active and the parties and their lawyers need do less. Magistrates could lead investigations, discovery, and witness examinations, relying less on the parties to proactively frame and pursue their claims. Inquisitorial procedure sounds like a strange transplant from civil-law countries. But it already has parallels in administrative systems for claiming government benefits, in which claimants commonly pursue their claims without lawyers.

"There may also be ways to loosen the bar's stranglehold so that paralegals, social workers, and others can automate delivery of legal services for routine cases. That change would resemble what we see in health care, as nurse practitioners and physician assistants are providing care in routine medical cases.

"In short, *Gideon* can work in the real world only if lawyers drop their grandest ambitions for lawyerizing the world and instead step back to make lawyers less necessary in the first place. The goal should be to concentrate lawyers' efforts on providing quality legal services in the highest-stakes cases where they are needed most. Quality and support matter more than quantity alone."

See also Donald A. Dripps, *Up From Gideon*, 45 Tex. Tech. L. Rev. 113 (2012) (proposing a number of reforms including (1) exempting some self-representing felony defendants, like their misdemeanor counterparts, from sentences of incarceration if convicted; (2) giving counsel for indigent defendants discretion to decline unpromising appeals; (3) permitting lay representation of juvenile and misdemeanor defendants; and (4) recognizing indigent defense as a separate career track from the general practice of law).