

CRIMINAL PROCESS

CASES, COMMENT, QUESTIONS

SEVENTH EDITION

LLOYD L. WEINREB

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by

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PREFACE

The objective of this book is to provide a model of criminal process in this country by a close examination of federal law and practice. In its major premises federal criminal process is representative of criminal process in the states. Details and nomenclature vary widely, but the problems and their solution are in general remarkably uniform. The influence of federal law on the states and the dispersion of federal law make it apt as a model; the peculiar features of federal crime are softened by cases in the District of Columbia where all crime is federal.

Because the subject of study is criminal process generally and not federal criminal procedure, some issues, such as the problems created by the relationships of the states to each other and to the federal government, are largely disregarded. The broad outline of much of criminal process is a constitutional matter, and much of the material here concerns constitutional decisions of the Supreme Court and other courts. Again, the focus is the nature of the process established by such decisions, not the ways of constitutional adjudication. Except as they bear on criminal process, discussions in the opinions of precedent, jurisdictional matters, and constitutional law generally are omitted.

While it seems to me that investigation and prosecution of crime are separable for purposes of study from the rest of criminal process, I would not have that taken as an indication that I think the rest is less important. In particular, the law's disregard of what happens to a person after he is convicted of a crime compared with its close attention to the methods by which he is convicted seems to me greatly mistaken. At two points, in Chapter 8 on Bail and the section Nature of the Penalty in Chapter 15 on Sentence and Judgment, I have included a small suggestion of the issues about jails and prisons.

For the most part, the process studied here is concerned with serious crimes. If numbers of individuals (or crimes) alone are considered, the emphasis should be on minor crime, and what has been called the "low-level" criminal process. The number of misdemeanors, of which the largest part involve drunkenness and related offenses, vastly exceeds the number of felonies. Certainly we should not allow the process in these cases to remain below the level of our vision; in almost every respect, low-level criminal process is a challenge to the principles we profess and should make us wary of accepting our professions of principle without skepticism. It is composed

too little of our aspirations, however, and too much of failings that we all acknowledge as failings to be useful as a model of the criminal process.

Notes have been numbered consecutively through the book to 653. Footnotes are numbered consecutively in each chapter. I have generally omitted footnotes in reproduced materials. Those which appear are renumbered but are in the original materials unless the footnote number is enclosed in brackets. In Supreme Court cases, separate opinions of Justices that are not reproduced are indicated in a footnote at the end, along with the votes of the Justices who did not join one of the reproduced opinions. I have corrected obvious typographical and similar errors and have made a few other small changes in reproduced materials not affecting their sense.

Experience with previous editions suggests that I should make the following comment. It is generally not my assumption that students will go to the reports to read the opinions in the large number of cases that are described briefly or are cited following questions in the notes. Such notes are intended primarily to provide factual variations on themes presented in the main cases and materials, as problems for discussion or reflection. Usually, resort to the opinions will provide authority for some result but not otherwise add substantially to the material in the book.

Preparing this seventh edition, I am impressed by how well the general conception for the book has stood up over the past 35 years. The "revolution in criminal procedure" that was supposed to have taken place in the decade of the '60s is now well in the past and, if there was indeed a revolution, there has since been something of a counter-revolution. For all that, it is remarkable how little the broad contours of criminal process have changed. In any case, it seems to me now, as it did then, that if one's primary interest is criminal process—the procedures by which crimes are investigated and criminals prosecuted—there is no better course than to follow the process from beginning to end and to pick up constitutional and statutory issues and so forth where and as they arise in the process. So also, it still seems to me that it is useful for students to see the forms by which various investigative steps and procedural matters are carried out, even if the forms have little content of their own. And it seems to me now, as then, that the issues of professional ethics and strategy that confront lawyers for the prosecution or defense should be integrated into material that sets forth the relevant law.

I am grateful to the American Bar Association for permission to reproduce the excerpt from the ABA Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) that appears on p. 746; the excerpts from the ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993) that appear on pp. 1004, 1014, and 1017; the excerpts from the Model Rules of Professional Conduct (2004) that appear on pp. 1005 and 1025; and the excerpt from the ABA Standards for Criminal Justice, The Function of the Trial Judge (3d ed. 2000) that appears on p. 1027.

Police forms were provided by the Boston Police Department. Some of the police forms were prepared for the Boston Police Department by Comnetix Computer Systems, Inc. Robert Layfield, Director of Police Sales for

Comnetix, kindly allowed me to use sample forms on which his name and picture appear for demonstration purposes. Forms used in the federal courts were provided by the Office of the Clerk of the United States District Court for the District of Massachusetts.

Lawrence Heftman, while a student at Harvard Law School, gave me substantial research and editorial assistance for this edition. Melinda Eakin was responsible for copy editing and for preparation of the manuscript in all its stages; her assistance was invaluable. As in the past, I am grateful to Raymond S. Andrews ("Sherwood") who did the illustrations.

LLOYD L. WEINREB

June 2004

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TABLE OF CASES

Principal cases are in bold type. Non-principal cases are in roman type. References are to Pages.

- Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), 1218
- Abbati, State v., 99 N.J. 418, 493 A.2d 513 (N.J.1985), 1209
- Abdul-Saboor, United States v., 85 F.3d 664 (D.C.Cir.1996), 212
- Abe A., Matter of, 452 N.Y.S.2d 6, 437 N.E.2d 265 (N.Y.1982), 362
- Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), 54, 210, 292
- Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), 809, 1165, 1184
- Accardo, United States v., 298 F.2d 133 (7th Cir.1962), 644
- Adamo, United States v., 742 F.2d 927 (6th Cir.1984), 682
- Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), 914, 915
- Adams v. Williams**, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), **113**
- Adams, United States v., 252 F.3d 276 (3rd Cir.2001), 1115
- Adams, United States v., 870 F.2d 1140 (6th Cir.1989), 640
- Agapito, United States v., 620 F.2d 324 (2nd Cir.1980), 341
- Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925), 210
- Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), 190
- Agurs, United States v.**, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), **943**, 951, 994
- Aiken v. United States, 282 F.2d 215 (4th Cir.1960), 740
- Ajmal, United States v., 67 F.3d 12 (2nd Cir.1995), 1000
- Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), 550, 976
- Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945), 899
- Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), 548
- Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), 748, 1142
- Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), 116, 117
- Albarado, United States v., 495 F.2d 799 (2nd Cir.1974), 291
- Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), 1217
- Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927), 78, 532
- Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), 687
- Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), 321, 325
- Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972), 900
- Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), 971
- Allard v. Helgemoe, 572 F.2d 1 (1st Cir.1978), 708
- Allen v. Eicher, 295 F.Supp. 1184 (D.Md. 1969), 88
- Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986), 367
- Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), 1086, 1087
- Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), 290
- Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), 1082
- Alston v. Manson, 791 F.2d 255 (2nd Cir. 1986), 900
- Alston, State v., 88 N.J. 211, 440 A.2d 1311 (N.J.1981), 278
- Alvarez, United States v., 812 F.2d 668 (11th Cir.1987), 308
- Alvarez-Machain, United States v., 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), 76, 78
- Alvarez-Sanchez, United States v., 511 U.S. 350, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994), 83
- Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988), 1243
- Aman, United States v., 624 F.2d 911 (9th Cir.1980), 354
- Amaya, United States v., 111 F.3d 386 (5th Cir.1997), 736
- Ames v. New York State Div. of Parole, 772 F.2d 13 (2nd Cir.1985), 708
- Ammidown, United States v., 497 F.2d 615 (D.C.Cir.1973), 657, 742
- Amon, United States v., 669 F.2d 1351 (10th Cir.1981), 631

- Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), 1165
- Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), 482
- Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), 87
- Anderson v. Harless, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982), 1226
- Anderson v. Mullin, 327 F.3d 1148 (10th Cir. 2003), 1196
- Anderson v. State, 297 So.2d 871 (Fla.App. 2 Dist.1974), 1016
- Anderson, United States v., 739 F.2d 1254 (7th Cir.1984), 363
- Anderson, United States v., 523 F.2d 1192 (5th Cir.1975), 408
- Anderson, United States v., 328 U.S. 699, 66 S.Ct. 1213, 90 L.Ed. 1529 (1946), 787
- Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), 196, 251, 493
- Andrews, United States v., 22 F.3d 1328 (5th Cir.1994), 241
- Andrews, United States v., 633 F.2d 449 (6th Cir.1980), 639
- Anonymous Nos. 6 and 7 v. Baker, 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed.2d 1234 (1959), 678
- Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993), 90
- Anty, United States v., 203 F.3d 305 (4th Cir.2000), 965
- Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), 896
- Apodaca v. People, 712 P.2d 467 (Colo.1985), 970
- Appeal of (see name of party)**
- Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), 1082
- Apton v. Wilson, 506 F.2d 83 (D.C.Cir.1974), 92
- Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993), 1153
- Archibald, United States v., 734 F.2d 938 (2nd Cir.1984), 382
- Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), 548
- Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), 34, 150
- Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), 1173, 1174
- Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), 201, 237
- Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987), 437
- Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), 443, 473, 1228
- Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), 1193
- Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), 1207
- Arizona v. Youngblood**, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), **954**, 958
- Arkansas v. Sullivan, 532 U.S. 769, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001), 41
- Armstrong, United States v., 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), 634, 635, 845
- Armstrong v. United States, 367 F.2d 821 (7th Cir.1966), 1206
- Arthur, United States v., 949 F.2d 211 (6th Cir.1991), 975
- Artis v. Commonwealth, 213 Va. 220, 191 S.E.2d 190 (Va.1972), 1027
- Arvizu, United States v., 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), 41
- Ash, United States v., 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973), 385
- Ashe v. Swenson**, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), **1210**, 1214, 1216
- Ashford, United States v., 924 F.2d 1416 (7th Cir.1991), 814
- Ashley v. Texas, 319 F.2d 80 (5th Cir.1963), 960
- Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), 1156
- Attson, United States v., 900 F.2d 1427 (9th Cir.1990), 246
- Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001), 43
- Augenblick, United States v., 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969), 1002
- Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), 1148
- Ayala v. Speckard, 131 F.3d 62 (2nd Cir. 1997), 1061
- Bacon v. United States, 449 F.2d 933 (9th Cir.1971), 965
- Badger v. Cardwell, 587 F.2d 968 (9th Cir. 1978), 889
- Baggett, United States v., 251 F.3d 1087 (6th Cir.2001), 1066, 1180
- Baggot, United States v., 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983), 695
- Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986), 950
- Bagley, United States v., 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), 950, 994
- Bagnell, United States v., 679 F.2d 826 (11th Cir.1982), 787
- Bailey, United States v., 34 F.3d 683 (8th Cir.1994), 1214
- Bailey, United States v., 691 F.2d 1009 (11th Cir.1982), 80
- Bailey, United States v., 262 F.Supp. 331 (D.Kan.1967), 839
- Bailleaux, United States v., 685 F.2d 1105 (9th Cir.1982), 838
- Bain, Ex parte, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), 676

- Bajakajian, *United States v.*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), 1148
- Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), 88
- Baker v. *United States*, 401 F.2d 958 (D.C.Cir.1968), 775
- Baldwin v. *New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), 895
- Baldwin, *United States v.*, 621 F.2d 251 (6th Cir.1980), 308
- Baldwin, *United States v.*, 607 F.2d 1295 (9th Cir.1979), 920
- Ball v. *United States*, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), 1217
- Ballew v. *Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), 896
- Balsys, *United States v.*, 524 U.S. 666, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998), 510
- Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990), 494
- Bank of Nova Scotia v. *United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), 672, 1176
- Banks v. Dretke, — U.S. —, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), 950
- Banks, *United States v.*, — U.S. —, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003), 71
- Banks, *United States v.*, 942 F.2d 1576 (11th Cir.1991), 511
- Banmiller, *United States ex rel. Wilkins v.*, 205 F.Supp. 123 (E.D.Pa.1962), 1050
- Barbara, *People v.*, 400 Mich. 352, 255 N.W.2d 171 (Mich.1977), 368
- Barbee v. *Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir.1964), 953
- Barber, *United States v.*, 557 F.2d 628 (8th Cir.1977), 82
- Barclay v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), 1154
- Barefoot v. *Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), 1155, 1158
- Barfield v. *Alabama*, 552 F.2d 1114 (5th Cir. 1977), 461
- Barker v. Wingo**, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), **799**, 807, 808, 808
- Barletta, *United States v.*, 644 F.2d 50 (1st Cir.1981), 759
- Barlin, *United States v.*, 686 F.2d 81 (2nd Cir.1982), 118, 195
- Barnard v. *Henderson*, 514 F.2d 744 (5th Cir.1975), 846, 966
- Barnes v. *United States*, 373 F.2d 517 (5th Cir.1967), 301
- Barnes, *United States v.*, 159 F.3d 4 (1st Cir.1998), 824
- Barnes, *United States v.*, 604 F.2d 121 (2nd Cir.1979), 923
- Barnes, *United States v.*, 486 F.2d 776 (8th Cir.1973), 999
- Barnett v. *United States*, 384 F.2d 848 (5th Cir.1967), 83
- Barrentine, *United States v.*, 591 F.2d 1069 (5th Cir.1979), 831
- Barrick, *People v.*, 187 Cal.Rptr. 716, 654 P.2d 1243 (Cal.1982), 969
- Barry v. *Bergen County Probation Dept.*, 128 F.3d 152 (3rd Cir.1997), 1247
- Bartel, *United States v.*, 19 F.3d 1105 (6th Cir.1994), 509
- Bartkus v. *Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), 1218
- Bartlett v. *United States*, 354 F.2d 745 (8th Cir.1966), 669
- Bartlett, *United States v.*, 794 F.2d 1285 (8th Cir.1986), 816
- Bartram, *State v.*, 925 S.W.2d 227 (Tenn. 1996), 168
- Bass, *United States v.*, 573 F.2d 258 (5th Cir.1978), 619
- Bass, *United States v.*, 536 U.S. 862, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002), 635
- Basurto, *United States v.*, 497 F.2d 781 (9th Cir.1974), 681, 682, 687
- Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), **905**, 911, 912
- Bayko, *United States v.*, 774 F.2d 516 (1st Cir.1985), 618
- B.C. v. *Plumas Unified School Dist.*, 192 F.3d 1260 (9th Cir.1999), 118
- Beale, *United States v.*, 445 F.2d 977 (5th Cir.1971), 71
- Bearden v. *Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), 1160
- Beasley, *United States v.*, 576 F.2d 626 (5th Cir.1978), 1003
- Beavers v. *Haubert*, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905), 796
- Becht, *United States v.*, 267 F.3d 767 (8th Cir.2001), 966
- Beck v. *Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), 1086, 1154, 1155
- Beck v. Ohio**, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), **34**, 42, 188
- Beck v. *Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), 536, 919
- Becker, *United States v.*, 485 F.2d 51 (6th Cir.1973), 212
- Beckwith v. *United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), 462
- Behrens, *United States v.*, 375 U.S. 162, 84 S.Ct. 295, 11 L.Ed.2d 224 (1963), 1115
- Beightol v. *Kunowski*, 486 F.2d 293 (3rd Cir. 1973), 385, 395
- Bell v. *Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), 1033
- Bell v. *Maryland*, 378 U.S. 226, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964), 1227
- Bell v. *United States*, 254 F.2d 82 (D.C.Cir. 1958), 37
- Bell v. *United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), 1160
- Bell v. Wolfish**, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), **600**, 616, 617
- Bell, *State v.*, 60 Haw. 241, 589 P.2d 517 (Hawai'i 1978), 688

- Bell, United States v., 457 F.2d 1231 (5th Cir.1972), 33
- Bellamy v. Cogdell, 974 F.2d 302 (2nd Cir. 1992), 1046
- Beltran, United States v., 917 F.2d 641 (1st Cir.1990), 243
- Benavides, United States v., 596 F.2d 137 (5th Cir.1979), 883
- Benchimol, United States v., 471 U.S. 453, 105 S.Ct. 2103, 85 L.Ed.2d 462 (1985), 739
- Bender, People v., 452 Mich. 594, 551 N.W.2d 71 (Mich.1996), 454
- Benjamin v. City of Montgomery, 785 F.2d 959 (11th Cir.1986), 501
- Benn, United States v., 476 F.2d 1127 (D.C.Cir.1972), 846
- Bennett v. Lockhart, 39 F.3d 848 (8th Cir. 1994), 816
- Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), 1179
- Benton v. United States, 188 F.2d 625 (D.C.Cir.1951), 1107
- Bentvena, United States v., 288 F.2d 442 (2nd Cir.1961), 600
- Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), 473
- Bernal, United States v., 861 F.2d 434 (5th Cir.1988), 711
- Bernette, People v., 30 Ill.2d 359, 197 N.E.2d 436 (Ill.1964), 914
- Berra v. United States, 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013 (1956), 652, 1085
- Berrios, United States v., 501 F.2d 1207 (2nd Cir.1974), 627
- Best v. United States, 184 F.2d 131 (1st Cir.1950), 924
- Bethancourt, United States v., 692 F.Supp. 1427 (D.D.C.1988), 1110
- Biehunik v. Felicetta, 441 F.2d 228 (2nd Cir. 1971), 395
- Bierey, United States v., 588 F.2d 620 (8th Cir.1978), 376
- Biggs, United States v., 70 F.3d 913 (6th Cir.1995), 218
- Bilick v. Dudley, 356 F.Supp. 945 (S.D.N.Y. 1973), 99
- Biller v. Lopes, 834 F.2d 41 (2nd Cir.1987), 969
- Bilsky, United States v., 664 F.2d 613 (6th Cir.1981), 826
- Bishop, United States v., 959 F.2d 820 (9th Cir.1992), 912
- Biswell, United States v., 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), 174
- Bitter v. United States, 389 U.S. 15, 88 S.Ct. 6, 19 L.Ed.2d 15 (1967), 600
- Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), 95, 147
- Black, United States v., 767 F.2d 1334 (9th Cir.1985), 256, 852
- Black, United States v., 675 F.2d 129 (7th Cir.1982), 117
- Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), 711, 713, 724
- Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), 713, 714, 1143
- Blackwell, United States v., 694 F.2d 1325 (D.C.Cir.1982), 975
- Blanton v. City of North Las Vegas, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989), 895
- Blauner, United States v., 337 F.Supp. 1394 (S.D.N.Y.1971), 752
- Block v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984), 616
- Block, United States v., 590 F.2d 535 (4th Cir.1978), 168
- Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), 410, 1217
- Blodgett, In re, 502 U.S. 236, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992), 1158
- Blok, United States v., 188 F.2d 1019 (D.C.Cir.1951), 164
- Blood, Commonwealth v., 400 Mass. 61, 507 N.E.2d 1029 (Mass.1987), 321
- Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), 1154
- Boland, State v., 115 Wash.2d 571, 800 P.2d 1112 (Wash.1990), 297
- Bomongo, United States v., 580 F.2d 173 (5th Cir.1978), 302
- Bonanno, United States v., 487 F.2d 654 (2nd Cir.1973), 320
- Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000), 118
- Bonds, United States v., 829 F.2d 1072 (11th Cir.1987), 118
- Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), 640, 724
- Boruff, United States v., 870 F.2d 316 (5th Cir.1989), 278
- Borys, United States v., 766 F.2d 304 (7th Cir.1985), 117
- Boss v. Pierce, 263 F.3d 734 (7th Cir.2001), 960
- Bostick v. United States, 400 F.2d 449 (5th Cir.1968), 831
- Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), 983
- Bourque, United States v., 541 F.2d 290 (1st Cir.1976), 627
- Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), 1228, 1246
- Bowe, State v., 881 P.2d 538 (Hawai'i 1994), 403
- Bowe, United States v., 360 F.2d 1 (2nd Cir. 1966), 902
- Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985), 900
- Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986), 943, 950
- Bowles v. United States, 439 F.2d 536 (D.C.Cir.1970), 973, 974

- Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951), 848
- Boyd v. Henderson, 555 F.2d 56 (2nd Cir. 1977), 376
- Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), 146, 510
- Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), 1154
- Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), 706
- Bradford v. Michigan, 394 U.S. 1022, 89 S.Ct. 1638, 23 L.Ed.2d 48 (1969), 484
- Bradford, United States v., 237 F.3d 1306 (11th Cir.2001), 883
- Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), 950, 951, 953
- Brady v. United States**, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), **717**, 724, 738
- Brady, United States v., 579 F.2d 1121 (9th Cir.1978), 902
- Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), 511
- Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), 1087
- Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), 493
- Braver v. Horowitz, 535 F.2d 830 (3rd Cir. 1976), 95
- Braxton, United States v., 112 F.3d 777 (4th Cir.1997), 403
- Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), 1226
- Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975), 1218
- Breinig, United States v., 70 F.3d 850 (6th Cir.1995), 777
- Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), 353
- Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), 408, 409, 410
- Bridges, State v., 925 P.2d 357 (Hawai'i 1996), 74
- Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977), 92
- Briggs, United States v., 514 F.2d 794 (5th Cir.1975), 661
- Brigham, United States v., 343 F.3d 490 (5th Cir.2003), 125
- Brignoni-Ponce, United States v., 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), 140
- Brimage, United States v., 115 F.3d 73 (1st Cir.1997), 958
- Brimah, United States v., 214 F.3d 854 (7th Cir.2000), 1130
- Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), 42, 190
- Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), 94
- Brisendine, People v., 119 Cal.Rptr. 315, 531 P.2d 1099 (Cal.1975), 217
- Broce, United States v., 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), 713
- Brock v. North Carolina, 344 U.S. 424, 73 S.Ct. 349, 97 L.Ed. 456 (1953), 1208
- Brodie v. United States, 295 F.2d 157 (D.C.Cir.1961), 1106
- Brogna, In re, 589 F.2d 24 (1st Cir.1978), 511
- Brooks v. Beto, 366 F.2d 1 (5th Cir.1966), 900
- Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972), 1000
- Brooks, United States v., 966 F.2d 1500 (D.C.Cir.1992), 953
- Brown v. Beto, 468 F.2d 1284 (5th Cir.1972), 458, 469
- Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), 80
- Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), 1181, 1217
- Brown v. Texas**, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), **122**
- Brown v. United States, 411 F.2d 716 (D.C.Cir.1969), 1027
- Brown v. Wainwright, 785 F.2d 1457 (11th Cir.1986), 951
- Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982), 1057
- Brown, United States v., 218 F.3d 415 (5th Cir.2000), 1062
- Brown, United States v., 920 F.2d 1212 (5th Cir.1991), 363
- Brown, United States v., 770 F.2d 241 (1st Cir.1985), 826
- Brown, United States v., 551 F.2d 639 (5th Cir.1977), 410
- Brown, United States v., 456 F.2d 1112 (5th Cir.1972), 1116
- Bruce v. United States, 379 F.2d 113 (D.C.Cir.1967), 716
- Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), 776, 777, 1175
- Bryan v. Jones, 530 F.2d 1210 (5th Cir.1976), 93
- Bryan v. State, 571 A.2d 170 (Del.Supr.1990), 454
- Bryan, United States v., 868 F.2d 1032 (9th Cir.1989), 845
- Buchanan v. Angelone, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), 1154
- Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), 366, 915
- Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), 92
- Buckley v. United States, 382 F.2d 611 (10th Cir.1967), 1168
- Buckner, United States v., 717 F.2d 297 (6th Cir.1983), 51
- Budge, United States v., 359 F.2d 732 (7th Cir.1966), 787
- Buettner-Janusch, United States v., 646 F.2d 759 (2nd Cir.1981), 165
- Bufalino, United States v.**, 285 F.2d 408 (2nd Cir.1960), **641**

- Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), 1193, 1194, 1228
- Bunkley v. Florida, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003), 1224
- Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), 896
- Burch, United States v., 873 F.2d 765 (5th Cir.1989), 1124
- Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002), 196
- Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921), 300, 301
- Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001), 1046
- Burge v. United States, 342 F.2d 408 (9th Cir.1965), 165
- Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), 1034
- Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir.1987), 808
- Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), 1195, 1196
- Burnette, United States v., 698 F.2d 1038 (9th Cir.1983), 213
- Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), 91
- Burns v. United States, 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991), 1116
- Bursey v. United States, 466 F.2d 1059 (9th Cir.1972), 511
- Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991), 924
- Bush, United States v., 47 F.3d 511 (2nd Cir.1995), 1000
- Busic, United States v.**, 549 F.2d 252 (2nd Cir.1977), **789**
- Busk, United States v., 693 F.2d 28 (3rd Cir.1982), 191
- Butler v. McKellar, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), 1228
- Butler v. United States, 414 A.2d 844 (D.C. 1980), 1026
- Butler, United States v., 167 F.Supp. 102 (E.D.Va.1957), 1045
- Butterworth v. Smith, 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990), 669
- Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (N.M.1981), 688
- Byers, United States v., 740 F.2d 1104 (D.C.Cir.1984), 366
- Byrd, United States v., 765 F.2d 1524 (11th Cir.1985), 509
- Caba, United States v., 955 F.2d 182 (2nd Cir.1992), 430
- Cabey, United States ex rel. v. Mazurkiewicz, 431 F.2d 839 (3rd Cir.1970), 166, 168
- Caceres, United States v., 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979), 320
- Cain v. Smith, 686 F.2d 374 (6th Cir.1982), 808
- Calandra, United States v., 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), 151, 681
- Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), 1225
- Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), 1155
- Calhoun v. United States, 172 F.2d 457 (5th Cir.1949), 165
- California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), 235
- California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), 461
- California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), 1155, 1156
- California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971), 513
- California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), 236
- California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), 342
- California v. Green**, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), **976**
- California v. Greenwood**, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), **292**, 297
- California v. Hodari D.**, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), **58**, 61, 117
- California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), 430
- California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), 1155
- California v. Roy, 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996), 1226
- California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), 952
- Calloway, United States v., 505 F.2d 311 (D.C.Cir.1974), 808
- Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), 876
- Campbell v. Louisiana, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), 659
- Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985), 731
- Campbell v. McGruder, 580 F.2d 521 (D.C.Cir.1978), 617
- Campbell v. United States, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963), 1002
- Campbell, United States v., 732 F.2d 1017 (1st Cir.1984), 364
- Campbell, United States v., 581 F.2d 22 (2nd Cir.1978), 50
- Canada, United States v., 527 F.2d 1374 (9th Cir.1975), 165
- Cannon, United States v., 903 F.2d 849 (1st Cir.1990), 971
- Canon, State v., 241 Wis.2d 164, 622 N.W.2d 270 (Wis.2001), 1214
- Canton, Ohio, City of v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), 89
- Capaldo, United States v., 402 F.2d 821 (2nd Cir.1968), 678
- Caplin & Drysdale v. United States, 491 U.S. 617, 109 S.Ct. 2667, 105 L.Ed.2d 528 (1989), 550

- Capozzi, *United States v.*, 883 F.2d 608 (8th Cir.1989), 973
- Cappetta v. Wainwright, 406 F.2d 1238 (5th Cir.1969), 1248
- Capra, *People v.*, 269 N.Y.S.2d 451, 216 N.E.2d 610 (N.Y.1966), 287
- Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), 1248
- Carbone, *United States v.*, 793 F.2d 559 (3rd Cir.1986), 591, 592
- Cardillo v. Zyla, 486 F.2d 473 (1st Cir.1973), 1214
- Cardwell, *United States v.*, 680 F.2d 75 (9th Cir.1982), 196
- Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989), 1083
- Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), 1226
- Carey, United States ex rel. v. Rundle**, 409 F.2d 1210 (3rd Cir.1969), 828
- Carlisle v. *United States*, 517 U.S. 416, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996), 1066
- Carlo v. *United States*, 286 F.2d 841 (2nd Cir.1961), 22
- Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), 565
- Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), 902
- Carr, *United States v.*, 80 F.3d 413 (10th Cir.1996), 729
- Carradine, *People v.*, 52 Ill.2d 231, 287 N.E.2d 670 (Ill.1972), 965
- Carrasquillo, *United States v.*, 667 F.2d 382 (3rd Cir.1981), 824
- Carriger, *United States v.*, 541 F.2d 545 (6th Cir.1976), 270
- Carrión, United States v.**, 488 F.2d 12 (1st Cir.1973), 890
- Carroll v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), 42, 210, 215
- Carswell, *People v.*, 149 Cal.App.2d 395, 308 P.2d 852 (Cal.App. 1 Dist.1957), 169
- Carter v. District of Columbia, 795 F.2d 116 (D.C.Cir.1986), 89
- Carter v. Estelle, 691 F.2d 777 (5th Cir.1982), 1195
- Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), 961, 1245
- Carter v. *United States*, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000), 1085
- Carter, *United States v.*, 14 F.3d 1150 (6th Cir.1994), 264
- Carter, *United States v.*, 884 F.2d 368 (8th Cir.1989), 462
- Casallas, *United States v.*, 59 F.3d 1173 (11th Cir.1995), 736
- Case v. Nebraska, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965), 1249
- Caserino, *People v.*, 265 N.Y.S.2d 644, 212 N.E.2d 884 (N.Y.1965), 463
- Casias, *United States v.*, 306 F.Supp. 166 (D.Colo.1969), 494
- Caspari v. Bohlen, 510 U.S. 383, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), 1228
- Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950), 682, 899, 900
- Cassese, *United States v.*, 622 F.2d 26 (2nd Cir.1979), 856
- Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), 900
- Castro, *United States v.*, 166 F.3d 728 (5th Cir.1999), 41
- Castro, *United States v.*, 129 F.3d 752 (5th Cir.1997), 241
- Castro, *United States v.*, 129 F.3d 226 (1st Cir.1997), 511
- Cataldo, *United States v.*, 433 F.2d 38 (2nd Cir.1970), 165
- Catlett, *United States v.*, 584 F.2d 864 (8th Cir.1978), 631
- Catton, *United States v.*, 130 F.3d 805 (7th Cir.1997), 1208
- Caulk v. Municipal Court for City of Wilmington, 243 A.2d 707 (Del.Supr.1968), 19
- Ceballos, *United States v.*, 654 F.2d 177 (2nd Cir.1981), 117
- Ceccolini, *United States v.*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978), 80, 81
- Cervantes-Pacheco, *United States v.*, 800 F.2d 452 (5th Cir.1986), 309
- Chadwick, *United States v.*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), 211, 212, 213, 215, 235, 244
- Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), 1143
- Chaidez, *United States v.*, 919 F.2d 1193 (7th Cir.1990), 117
- Chamberlain, *United States v.*, 163 F.3d 499 (8th Cir.1998), 462
- Chambers v. Maroney**, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), 42, 215, 228, 234, 235, 244
- Chambers v. Mississippi**, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), 983, 991, 992
- Chambers, *United States v.*, 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763 (1934), 1227
- Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), 1062
- Chanthasouxat, *United States v.*, 342 F.3d 1271 (11th Cir.2003), 39
- Chapel, *United States v.*, 55 F.3d 1416 (9th Cir.1995), 362
- Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), 1170, 1173, 1175, 1226
- Chapman v. *United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), 164
- Chapman, *People v.*, 194 Ill.2d 186, 252 Ill. Dec. 474, 743 N.E.2d 48 (Ill.2000), 454
- Charles, *United States v.*, 738 F.2d 686 (5th Cir.1984), 461
- Charmer Industries, Inc., *United States v.*, 711 F.2d 1164 (2nd Cir.1983), 1140
- Chavarria, *United States v.*, 443 F.2d 904 (9th Cir.1971), 478
- Chavez v. Martinez, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), 432

- Cherry, United States v., 759 F.2d 1196 (5th Cir.1985), 148
- Chimel v. California**, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), 43, 150, **205**, 210, 211, 212, 213, 214, 215
- Chin Doong Art, United States v.**, 193 F.Supp. 820 (E.D.N.Y.1961), **756**
- Chitty, United States v., 760 F.2d 425 (2nd Cir.1985), 973
- Choate, United States v., 576 F.2d 165 (9th Cir.1978), 350
- Ciambrone, United States v., 601 F.2d 616 (2nd Cir.1979), 687
- Cicenia v. La Gay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958), 838
- Cichos v. Indiana, 385 U.S. 76, 87 S.Ct. 271, 17 L.Ed.2d 175 (1966), 1189, 1191
- City of (see name of city)**
- Ciucci v. Illinois, 356 U.S. 571, 78 S.Ct. 839, 2 L.Ed.2d 983 (1958), 1215, 1216
- Clark v. Murphy, 331 F.3d 1062 (9th Cir. 2003), 442
- Clarke v. Burke, 440 F.2d 853 (7th Cir.1971), 959
- Clarke v. Neil, 427 F.2d 1322 (6th Cir.1970), 257
- Clauser, United States ex rel. v. McCevers, 731 F.2d 423 (7th Cir.1984), 1207
- Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), 1154
- Cleveland, People v., 106 Cal.Rptr.2d 313, 21 P.3d 1225 (Cal.2001), 1089
- Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967), 838
- Clyburn, United States v., 24 F.3d 613 (4th Cir.1994), 15
- Clyne, People v., 189 Colo. 412, 541 P.2d 71 (Colo.1975), 217
- Cobb, United States v., 449 F.2d 1145 (D.C.Cir.1971), 460
- Cohen v. United States, 378 F.2d 751 (9th Cir.1967), 350
- Cohen, United States v., 796 F.2d 20 (2nd Cir.1986), 292
- Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), 1153
- Coker, United States v., 298 F.Supp.2d 184 (D.Mass.2003), 410
- Coleman v. Alabama**, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), **545**, 564
- Coleman v. Burnett**, 477 F.2d 1187 (D.C.Cir.1973), **555**, 564
- Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985), 85, 88
- Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), 920
- Coleman v. Singletary, 30 F.3d 1420 (11th Cir.1994), 442
- Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), 1244, 1245
- Coleman v. United States, 357 F.2d 563 (D.C.Cir.1965), 1161
- Coley, United States v., 441 F.2d 1299 (5th Cir.1971), 540
- Collins v. Beto, 348 F.2d 823 (5th Cir.1965), 80
- Collins, United States v., 462 F.2d 792 (2nd Cir.1972), 83
- Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), 241
- Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), 403, 441, 478
- Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987), 453
- Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), 1143
- Commonwealth v. _____ (see opposing party)**
- Commonwealth of (see name of Commonwealth)**
- Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir.1973), 501
- Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977), 18
- Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987), 442
- Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), 1083, 1174
- Conroy, United States v., 589 F.2d 1258 (5th Cir.1979), 291
- Contreras, United States v., 776 F.2d 51 (2nd Cir.1985), 536
- Cook v. United States, 379 F.2d 966 (5th Cir.1967), 1098
- Cook v. United States, 354 F.2d 529 (9th Cir.1965), 929
- Cook, United States v., 442 F.2d 723 (D.C.Cir.1970), 568
- Cool v. United States, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972), 1083
- Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), 15, 19, 254, 256
- Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996), 1085
- Cooper, United States v., 983 F.2d 928 (9th Cir.1993), 958
- Copeland v. United States, 343 F.2d 287 (D.C.Cir.1964), 80
- Coppa (In re U.S.), United States v., 267 F.3d 132 (2nd Cir.2001), 951
- Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), 724
- Corngold v. United States, 367 F.2d 1 (9th Cir.1966), 169, 302
- Coronado, United States v., 554 F.2d 166 (5th Cir.1977), 708
- Cortez v. United States, 337 F.2d 699 (9th Cir.1964), 729
- Cortez, United States v., 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), 141
- Cortina, United States v., 630 F.2d 1207 (7th Cir.1980), 204
- Costello v. United States, 324 F.2d 260 (9th Cir.1963), 30
- Costello v. United States**, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), 536, **679**, 681

- Cotton, United States v., 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), 676
- Couch, United States v., 688 F.2d 599 (9th Cir.1982), 355
- Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), 502
- County of (see name of county)**
- Cowan, United States v., 524 F.2d 504 (5th Cir.1975), 656, 657
- Cox, United States v., 923 F.2d 519 (7th Cir.1991), 715
- Cox, United States v., 428 F.2d 683 (7th Cir.1970), 287
- Cox, United States v., 342 F.2d 167 (5th Cir.1965), 621, 689
- Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), 994
- Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), 993
- Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), 982
- Crawford, United States v., 581 F.2d 489 (5th Cir.1978), 778
- Crews, United States v., 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), 81
- Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978), 1179
- Crivens v. Roth, 172 F.3d 991 (7th Cir.1999), 950
- Cronic, United States v.**, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), 833, **1028**, 1033
- Crosby v. United States, 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993), 882
- Cross v. United States, 392 F.2d 360 (8th Cir.1968), 832
- Cross v. United States, 347 F.2d 327 (8th Cir.1965), 1077
- Cross v. United States, 335 F.2d 987 (D.C.Cir.1964), 775
- Crouch, United States v., 84 F.3d 1497 (5th Cir.1996), 816
- Crouch, United States v., 478 F.Supp. 867 (E.D.Cal.1979), 363
- Crowder, United States v., 141 F.3d 1202 (D.C.Cir.1998), 965
- Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), 777
- Cruz Pagan, United States v., 537 F.2d 554 (1st Cir.1976), 270
- Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), 169
- Cupp v. Murphy**, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), **219**
- Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), 1083
- Curbelo, United States v., 343 F.3d 273 (4th Cir.2003), 899
- Curcio, United States v., 712 F.2d 1532 (2nd Cir.1983), 713
- Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), 1129
- Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), 1033, 1046
- Cyzewski, United States v., 484 F.2d 509 (5th Cir.1973), 290
- Dalia v. United States, 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979), 314
- Dall, United States v., 608 F.2d 910 (1st Cir.1979), 265
- Daniels v. Allen, 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953), 1224
- Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), 915, 1076
- Darwin, United States v., 757 F.2d 1193 (11th Cir.1985), 411
- Davidoff, United States v., 845 F.2d 1151 (2nd Cir.1988), 767
- Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (Colo.1972), 96
- Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), 992
- Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), 915
- Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), 391, 514
- Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), 442, 443
- Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), 1225
- Davis v. United States**, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), **759**, 763
- Davis, People v., 20 Cal.App.3d 890, 98 Cal. Rptr. 71 (Cal.App. 2 Dist.1971), 853
- Davis, United States v., 285 F.3d 378 (5th Cir.2002), 1057
- Davis, United States v., 239 F.3d 283 (2nd Cir.2001), 752, 1034
- Davis, United States v., 174 F.3d 941 (8th Cir.1999), 532
- Davis, United States v., 749 F.2d 292 (5th Cir.1985), 308
- Davis, United States v., 604 F.2d 474 (7th Cir.1979), 548
- Dawn, United States v., 897 F.2d 1444 (8th Cir.1990), 912
- Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992), 1156
- Dayton, United States v., 604 F.2d 931 (5th Cir.1979), 708
- Dearing, United States v., 9 F.3d 1428 (9th Cir.1993), 169
- De Bour, People v., 386 N.Y.S.2d 375, 352 N.E.2d 562 (N.Y.1976), 121
- De Diego, United States v., 511 F.2d 818 (D.C.Cir.1975), 509
- DeFalco, United States v., 644 F.2d 132 (3rd Cir.1979), 1036
- de la Fuente, United States v., 548 F.2d 528 (5th Cir.1977), 244, 877
- Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985), 993
- Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), 141

- Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), 993, 1175
- Delbridge v. United States, 262 F.2d 710 (D.C.Cir.1958), 1105
- Delker, United States v., 757 F.2d 1390 (3rd Cir.1985), 591, 592
- Dellinger, United States v., 472 F.2d 340 (7th Cir.1972), 925
- Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), 776
- Denham, People v., 41 Ill.2d 1, 241 N.E.2d 415 (Ill.1968), 484
- Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), 94
- Dennis v. United States**, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), **690**, 693, 694
- Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), 916
- DeRosa, United States v., 548 F.2d 464 (3rd Cir.1977), 930
- Derrick, United States v., 519 F.2d 1 (6th Cir.1975), 737, 738
- DeSantis, United States v., 870 F.2d 536 (9th Cir.1989), 477, 478
- DeVile v. Whitley, 21 F.3d 654 (5th Cir. 1994), 707
- Diaz, United States v., 811 F.2d 1412 (11th Cir.1987), 619
- Diaz-Munoz, United States v., 632 F.2d 1330 (5th Cir.1980), 778
- DiCesare v. Chernenko, 303 F.2d 423 (4th Cir.1962), 564
- Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), 429, 483
- Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), 797
- DiFrancesco, United States v., 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), 1193
- Diggs, United States v., 544 F.2d 116 (3rd Cir.1976), 164
- DiGiangiemo, United States ex rel. v. Regan, 528 F.2d 1262 (2nd Cir.1975), 1216
- DiJames, United States v., 731 F.2d 758 (11th Cir.1984), 787
- Dildy, United States v., 39 F.R.D. 340 (D.D.C. 1966), 846
- Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), 807
- Dinitz, United States v., 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), 1208
- Dioguardi, United States v., 492 F.2d 70 (2nd Cir.1974), 1093
- Dionisio, United States v.**, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), **386**, 390, 679
- Di Pasquale, United States v., 864 F.2d 271 (3rd Cir.1988), 911
- DiPietro, United States v., 936 F.2d 6 (1st Cir.1991), 1208
- Dipp, United States v., 581 F.2d 1323 (9th Cir.1978), 1214
- Di Re, United States v., 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), 73, 74, 135
- Disbrow, People v., 127 Cal.Rptr. 360, 545 P.2d 272 (Cal.1976), 482
- District of Columbia v. John R. Thompson Co., 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953), 641
- Dixon v. District of Columbia, 394 F.2d 966 (D.C.Cir.1968), 640
- Dixon, United States v., 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), 1217
- Dockery, United States v., 955 F.2d 50 (D.C.Cir.1992), 775
- Doe v. United States, 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988), 494
- Doe, United States v., 732 F.2d 229 (1st Cir.1984), 99
- Doe, United States v., 730 F.2d 1529 (D.C.Cir.1984), 99
- Doe, United States v., 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984), 493
- Doe, United States v., 655 F.2d 920 (9th Cir.1980), 1116
- Doe, United States v., 460 F.2d 328 (1st Cir.1972), 511
- Doe, United States v., 405 F.2d 436 (2nd Cir.1968), 364
- Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), 808
- Dohm, United States v., 618 F.2d 1169 (5th Cir.1980), 566
- Dolan, United States v., 570 F.2d 1177 (3rd Cir.1978), 1035
- Domenech, United States v., 476 F.2d 1229 (2nd Cir.1973), 972
- Domenica v. United States, 292 F.2d 483 (1st Cir.1961), 739
- Dominguez, United States v., 783 F.2d 702 (7th Cir.1986), 590, 591
- Dommer v. Hatcher, 427 F.Supp. 1040 (N.D.Ind.1975), 85
- Donovan, United States v., 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977), 340
- Dortch, United States v., 199 F.3d 193 (5th Cir.1999), 474
- Doss, United States v., 563 F.2d 265 (6th Cir.1977), 462
- Dougherty, United States v., 473 F.2d 1113 (D.C.Cir.1972), 1096
- Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), 1165
- Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979), 693, 694
- Doward, United States v., 41 F.3d 789 (1st Cir.1994), 214
- Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), 300, 342
- Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), 1215, 1217
- Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir.1985), 712, 740