

2020 SUPPLEMENT TO  
**CRIMINAL PROCEDURE**  
PRINCIPLES, POLICIES  
AND PERSPECTIVES

**Seventh Edition**



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# PREFACE

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Because of Covid-19, the year 2020 has been a hard one for everyone. We hope you and your loved ones are well.

One incidental effect of the pandemic is that the United States Supreme Court delayed oral arguments until next Term in a number of cases that might have shown up in our annual 2020 Supplement to the casebook. That said, there were a few significant cases deserving of your attention. We did not feel a published Supplement was necessary this year, however. Therefore, what follows is our Update Memo, which contains summaries of the important criminal procedure cases decided by the Supreme Court in its shortened 2019-2020 term.

**Please note:** selected federal statutes, which previously were included as an appendix to the annual Supplement, are now found in an appendix to the casebook itself. Also, the Federal Rules of Criminal Procedure no longer are included as an appendix to the Supplement. Instead, the relevant Rules are included within the text of the casebook itself.

May the next twelve months be safer for everyone.

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# CHAPTER 1

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## THE CRIMINAL PROCESS: FAILURES, CHOICES, AND LEGITIMACY

### C. THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT: THE INCORPORATION STORY

**Page 59, add a new paragraph at end of Note 4:**

The jury trial right applied differently to the states until 2020. The Court overruled *Apodaca* in *Ramos v. Louisiana*, 590 U.S. \_\_\_, 140 S.Ct. \_\_\_, \_\_\_ L.Ed.2d \_\_\_, 2020 WL 1906545 (2020). Justice Gorsuch wrote the majority opinion. Justice Alito, joined by Chief Justice Roberts and Justice Kagan, dissented on the ground that while *Apodaca* might have been wrongly decided, it had been the law, and had been relied on by Louisiana and Oregon, for almost half a century. The majority was unimpressed:

In the final accounting, the dissent's *stare decisis* arguments round to zero. We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time. \* \* \* On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. \* \* \* In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others [decided in reliance on *Apodaca*]. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.

## CHAPTER 4

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### THE SUBSTANCE OF THE FOURTH AMENDMENT

#### E. REASONABLENESS CLAUSE: THE DIMINISHING ROLES OF WARRANTS AND PROBABLE CAUSE

##### 1. THE *TERRY* DOCTRINE

Page 439, add new Note 5A:

5A. *Another investigatory stop of an automobile.* Consider these undisputed facts: *O*, a Kansas officer on a routine patrol, observed a pickup truck on the highway. *O* ran the vehicle's license plate through the Kansas Department of Revenue's file service. *O* discovered that the registered owner was Charles Glover, Jr., and that he had a revoked driver's license. Although *O* did not observe the driver at that time, and *O* had not observed any traffic infractions, he initiated a traffic stop based on *O*'s assumption that the driver was Glover. Do these facts support a claim that *O* had reasonable suspicion that the unidentified driver was, in fact, Charles Glover, Jr.?

The Supreme Court, 8-1, answered the question in the affirmative. *Kansas v. Glover*, 589 U.S. \_\_\_, 140 S.Ct. 1183, \_\_\_ L.Ed.2d \_\_\_ (2020). The sole dissenter was Justice Sotomayor. Justice Thomas, writing for the majority, repeated much of what prior case law has taught. First, although a mere “hunch” does not constitute reasonable suspicion, “the level of suspicion that the standard requires is considerably less than proof of wrongdoing by preponderance of the evidence, and obviously less than is necessary for probable cause.” (Quoting *Navarette*, Note 5.) Second, the standard “depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.”

According to the majority, the fact that the registered owner of a vehicle is not always the driver of the vehicle did not render *O*'s assumption that the driver was Glover unreasonable. “The reasonable suspicion inquiry ‘falls considerably short of 51% accuracy,’ for, as we have explained, ‘[t]o be reasonable is not to be perfect.’” Although “common sense” itself justified the officer's inference that the driver was Glover, the Court also cited a study that 75% of drivers with suspended or revoked licenses continue to drive. It also observed that Kansas's “license-revocation scheme covers drivers who have already demonstrated a disregard for the law [and thus might drive on a revoked license] or are categorically unfit to drive.” It was this latter fact that proved crucial to Justices Kagan and Ginsburg, who concurred in the opinion. In the absence of any facts “to call that inference into question,” they said, the stop was constitutional.

Justice Sotomayor dissented. She believed that the reasonableness of an officer's suspicion should be based on common sense derived from his "experiences in law enforcement," which was not the case here. Also, she was concerned that "reasonable suspicion" should be based on "specific and articulable facts" related to the individual under suspicion rather than on general probabilities.

## CHAPTER 5

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# REMEDIES FOR FOURTH AMENDMENT VIOLATIONS

## B. EXCLUSIONARY RULE

### 3. THE EXCLUSIONARY RULE IS NARROWED (AND ON LIFE SUPPORT?)

Page 556, add new Note 4:

4. *Civil actions against federal officers.* As noted in *Hudson*, a federal statute, 42 U.S.C. § 1983, authorizes civil damages suits for violations of the Federal Constitution against persons acting under “color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia.” In short, this statute permits a person to sue a state or local official in federal court for violations of the Constitution. However, as the last Note discusses, the “qualified immunity” doctrine limits the effectiveness of this remedy.

What if a person wishes to sue a *federal* agent for the violation of the Constitution? There is no comparable federal statute authorizing such suits. As mentioned in *Hudson*, however, the Supreme Court held in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that even in the absence of a federal statute, persons may pursue claims for damages against federal officers for conduct violative of the Constitution.

In recent years, however, the Supreme Court has, in the words of Justice Alito, “made clear in many \* \* \* cases \* \* \* [that] the Constitution’s separation of powers requires us to exercise caution before extending *Bivens* to a new ‘context’ \* \* \*.” *Hernandez v. Mesa*, 589 U.S. \_\_\_, 140 S.Ct. 735, 206 L.Ed.2d 29 (2020). In *Hernandez*, a 15-year-old Mexican citizen, along with friends, was running back and forth in a concrete dry culvert that separates El Paso, Texas from Ciudad Juarez, Mexico. As he was doing this, a Border patrol agent shot and killed Hernandez. As it turned out, when the bullet struck the youth he was on the Mexican side of the border. The Customs and Border Patrol investigated the incident, apologized to the family of the dead youth, but held that there had been no violation of Patrol policy. The Mexican government then sought to have the agent extradited to Mexico to face criminal charges, but United States refused the request. As a final effort, the family sought to bring a civil action in federal court under *Bivens*.

The Supreme Court held, 5-4, that a cross-border shooting was a new “context” that did not justify “enlarging” the scope of *Bivens*. It felt that civil actions in such circumstances could have a negative effect on foreign relations and national security. In the absence of a federal statute authorizing civil suits in such circumstances, the *Bivens* rule does not apply.

Justices Thomas, joined by Justice Gorsuch, concurred but went further, stating that “the time has come to consider discarding the *Bivens* doctrine altogether,” thus barring (absent legislative action) civil damage suits as a remedy for constitutional violations by federal officers.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. Ginsburg wrote that the action here “arises in a setting kin to *Bivens*”:

The only salient difference here: the fortuity that the bullet happened to strike Hernandez on the Mexican side of the embankment. But Hernandez’s location at the precise moment the bullet landed should not matter one whit. After all, “the purpose of *Bivens* is to deter the *officer*.”

The dissenters pointed out that the result of the majority’s ruling is that the family has no redress and the deterrent impact is lost. Ginsburg concluded, “I resist the conclusion that ‘nothing’ is the answer required in this case.”

# CHAPTER 16

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## THE TRIAL PROCESS

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### A. RIGHT TO TRIAL BY IMPARTIAL JURY

#### 1. TRIAL-BY-JURY: NATURE OF THE CONSTITUTIONAL RIGHT

Page 1191, insert at the end of Note 10 in place of the last paragraph:

In 2019, the Supreme Court decided to revisit its holdings in *Apodaca* and *Johnson*, agreeing to hear a case from Louisiana in which a nonunanimous jury voted 10-2 to convict Evangelisto Ramos of second-degree murder in 2016 (prior to the amendment to the state constitution that installed a unanimity requirement).

The Court made plain that the Sixth Amendment right to trial by jury is both incorporated to the states through the Fourteenth Amendment and requires unanimous jury verdicts. *Ramos v. Louisiana*, 590 U.S. \_\_ 140 S.Ct. \_\_, \_\_ L.Ed.2d \_\_, 2020 WL 1906545 (2020). The opinion sparked significant commentary, in part, because some scholars perceived its departure from *stare decisis* as a harbinger for how the Roberts Court might handle past holdings when grappling anew with incendiary social issues, such as the right to abortion.

Justice Gorsuch, writing for five justices, cited *Duncan v. Louisiana* [casebook, p. 50, 1178] in explaining that the Sixth Amendment “right to a trial by an impartial jury” is incorporated to states via the Fourteenth Amendment. In addition, the Court maintained that “[t]he text and structure of the Constitution clearly suggest that the term ‘trial by an impartial jury’ carried with it *some* meaning about the content and requirements of a jury trial.” As to the precise content and requirements of that term, the Court went on to proclaim:

Wherever we might look to determine what the term “trial by an impartial jury” meant at the time of the Sixth Amendment’s adoption—whether it’s the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

What about the nearly half-century old precedent to the contrary? The Court discounted the precedential value of *Apodaca* (and its “badly fractured” decisions) by emphasizing that Justice Powell, who supplied the crucial fifth vote in that case, agreed that the Sixth Amendment required juror unanimity but put forth a controversial theory of incorporation to justify deferring to the states. Advancing a “dual-track” theory of incorporation, Justice Powell argued that the Fourteenth Amendment did not make the right to a jury trial applicable *in full* to the states, but rather gave the states some leeway in interpreting its meaning. [For more on incorporation, see pp. 46-60 of the casebook].

The Court expanded upon its vision of *stare decisis*:

Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided \* \* \* Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as ‘an inexorable command.’

Writing now for a plurality of three justices, Gorsuch concluded that the dual-track vision of incorporation was one that “a majority of the Court has already rejected (and

continues to reject).” Accordingly, Gorsuch insisted that “to accept *that* reasoning as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.”

With respect to the practical effect of his opinion, Gorsuch minimized concerns that a shift away from *Apodaca* could trigger a “tsunami” of follow-on litigation.” First, he noted that the decision would primarily affect cases currently on direct appeal in two states (Louisiana and Oregon), a relatively small number somewhere “in the hundreds.”

Second, although he acknowledged that some defendants who had exhausted their appeals could try to capitalize on the decision by raising it in collateral review, he observed that

[u]nder *Teague v. Lane* [casebook, p. 1531], newly recognized rules of criminal procedure do not normally apply in collateral review. \* \* \* Nor is the *Teague* question even before us. Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation.