2021 SUPPLEMENT TO

CRIMINAL PROCEDURE

PRINCIPLES, POLICIES AND PERSPECTIVES

Seventh Edition

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PREFACE

Because of Covid-19, the years 2020 and 2021 have been hard ones for everyone. We hope you and your loved ones are well and vaccinated!

This 2021 Update Memo contains summaries of the important criminal procedure cases decided by the United States Supreme Court and lower courts since publication of the Seventh Edition of the casebook in early 2020.

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.

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CHAPTER 1

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). 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.

The concern about reliance on *Apodaca* was whether prisoners could use *Ramos* to vacate convictions in federal habeas corpus actions. For the answer to that question, see Chapter 19 (this Supplement).

CHAPTER 4

THE SUBSTANCE OF THE FOURTH AMENDMENT

D. WARRANT CLAUSE: WHEN ARE WARRANTS REQUIRED?

1. EXIGENT CIRCUMSTANCES

Page 249, add at the end of Note 4:

The Supreme Court's statement in *Stanton v. Sims* (casebook, top of page 250) that "nothing in the opinion establishes that the [level of] seriousness of the crime is equally important *in cases of hot pursuit*" led some observers and courts to believe that the Supreme Court was suggesting that hot pursuit *by itself* constitutes exigent circumstances justifying a warrantless search, even if the offense in question is a minor one. In Lange v. California, 594 U.S. ___, 141 S.Ct. ___ (2021), however, the Court rejected such a categorical approach. As Justice Kagan, writing for herself and Justices Breyer, Sotomayor, Gorsuch, Kavanaugh, and Barrett, put it: "[t]he question presented here is whether the pursuit of a fleeing misdemeanor suspect always—or more legally put, categorically—qualifies as an exigent circumstance. We hold it does not." Justices Kavanaugh and Thomas wrote separate opinions concurring in part with Justice Kagan's opinion. Chief Justice Roberts, joined by Justice Alito, concurred in the judgment.

In *Lange*, *L* drove by a California highway patrol officer listening to loud music with his window open and honking his horn. The officer followed *L* and later turned on his overhead lights to signal *L* to pull over. As it happened, *L* was a hundred feet from his home—the Court noted it constituted a four-second drive—so instead of pulling over he continued into his driveway and garage. The officer followed *L* into the garage to interrogate him. When the officer observed signs of intoxication, he put *L* through a field sobriety test, which indicated that his blood-alcohol content was well above the legal limit. At that point, *L* was arrested for driving under the influence of alcohol. *L* moved to exclude the evidence of his intoxication on the ground that the officer's warrantless entry of the garage, which was within the curtilage of the home, violated the Fourth Amendment.

So, where is the "hot pursuit"? The State argued that the moment the officer signaled for *L* to pull over and *L* did not do so, the officer had probable cause to arrest *L* for the misdemeanor offense of failing to comply with a police signal (a violation of California's Vehicle Code), and that the four seconds that *L* drove his vehicle after that (into the garage) constituted the "hot pursuit"! Indeed, the lower courts *and* the Supreme Court treated this as a hot pursuit case. And the California courts held that hot pursuit *by itself* constitutes an exigent circumstance that justifies a warrantless search, even if the search involves an entry of the curtilage of the home to make an arrest for a very minor crime (refusing to pull over). Not so, said Justice Kagan. Rejecting the categorical approach, she wrote:

> The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled. * * *
>
> Our cases have generally applied the exigent-circumstances exception on a "case-by- case basis." The exception "requires a court to examine whether an emergency justified a warrantless search in each particular case." That approach reflects the nature of emergencies. Whether a "now or never situation" actually exists—whether an officer has "no time to secure a warrant"—depends upon facts on the ground. So the issue, we have thought, is most naturally considered by "look[ing] to the totality of circumstances" confronting the officer as he decides to make a warrantless entry.

Noting that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (*Payton v. New York,* casebook, p. 216), the Supreme Court in *Lange* stated that "we are not eager—more the reverse—to print a new permission slip for entering the home without a warrant."

That said, although the Court rejected a *per se* categorical permission slip for "hot pursuit" misdemeanor cases, Justice Kagan noted that "[a] great many misdemeanor pursuits involve exigences allowing warrantless entry." The decision, however, must be based on the specific facts of the case.

> That approach will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself.

Because the lower courts applied the categorical approach, the Supreme Court "remanded the case for further proceedings not inconsistent with this opinion."

Page 250, add at the end of Note 5:

This "community caretaking function," particularly as it applies to warrantless entry of a person's home, is one with which the Supreme Court continues to wrestle, and which will require further elucidation.

It is one thing for officers to observe an altercation taking place in a residence, as in *Brighton City, Utah*, which may supply the basis for a warrantless entry. But what if, as Justice Kavanaugh hypothesized in Caniglia v. Strom, 593 U.S. ___, 141 S.Ct. 1596, ___ L.Ed.2d ___ (2021), "a woman calls a healthcare hotline of 911 and says that she is contemplating suicide, that she has firearms in her home, and that she might as well die." If the police respond to the home, knock, and receive no response, may they enter without a

warrant? Or, what about so-called "red flag" laws that some states have enacted, which authorize the police to confiscate weapons pursuant to court order to prevent their use by mentally ill persons? Are those laws constitutional if they permit the police to enter a home without consent or a warrant?

Or consider a hypothetical Chief Justice Roberts posed at oral arguments in *Caniglia*: Neighbors of an elderly woman call the police to express their concern that the woman had planned to come to their house for dinner and she was now two hours late. They tell the police they called her home and received no response. May the police come to the elderly woman's home, knock, and if they hear and see nothing, enter without a warrant?

In *Caniglia*, the facts were much simpler. During an argument with his wife at their home, *C* retrieved a firearm and told her to kill him "and get it over with." She declined and left their house. The next morning she called home and received no reply, so she called police who came to the residence where they encountered *C* outside, on the porch. The officers determined that *C* posed a risk to himself or others and called for an ambulance to take *C* for psychiatric evaluation, to which *C* agreed as long as the police promised not to confiscate his weapons. Nonetheless, once *C* was taken away, "[g]uided by [*C*]'s wife—whom they allegedly misinformed about his wishes—[they] entered the home and took two handguns."

The Supreme Court, per Justice Thomas, unanimously held that there is no "standalone [community caretaking] doctrine that justifies warrantless searches and seizures in the home." The Court stated that a "law enforcement officer may enter private property without a warrant when certain exigent circumstance exist, including the need to 'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.' " However, Justice Thomas wrote that "recognition that police officers perform many civic tasks in modern society * * * [is] not an open-ended license to perform them anywhere."

Although Justice Thomas's opinion was unanimous, four members of the Court wrote concurring opinions to clarify their views. The Chief Justice, with whom Justice Breyer joined, noted that *Brigham City* (also a unanimous opinion) held that "the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." And he wrote, "[n]othing in today's opinion is to the contrary."

Justice Alito, in his concurrence, stated his view that "[w]hile there is no overarching 'community caretaking' doctrine, it does not follow that all searches and seizures conducted for non-law enforcement purposes must be analyzed under precisely the same Fourth Amendment rules developed in criminal cases." He observed that "[o]ur current precedents do not address situations like" the elderly-woman and "red flag" examples noted above. He suggested that "[p]erhaps States should institute procedures for the issuance of such [community caretaking] warrants, but in the meantime, courts may be required to grapple with the basic Fourth Amendment question of reasonableness."

Finally, Justice Kavanaugh concurred. He observed that the facts in *Caniglia* "[do] not require us to explore all the contours of the exigent circumstance doctrine as applied to emergency-aid situations * * *." But he felt there were some clear "heartland emergency-aid situations." In the hypothetical he posed regarding the suicidal woman who called the hotline, he wrote: "May the officers enter the home [after they knock and receive no response]? Of

course." And as for the Chief Justice "elderly man" example, Justice Kavanaugh answer is, as well, "of course."

Justice Kavanaugh wrote: "To be sure, courts, police departments, and police officers alike must take care that officers' actions in those kinds of cases are reasonable under the circumstances." However, in the hypothetical cases discussed "and others as well, such as cases involving unattended young children inside a home," warrantless entries are, in his view, constitutional.

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

1. THE *TERRY* DOCTRINE

c. Drawing Lines: Seizures Versus Non-Seizure Encounters

Page 429, add new Note 4:

4. Consider these facts in Torres v. Madrid, 592 U.S. ___, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021):

> At dawn on July 15, 2014, four New Mexico State Police officers arrived at an apartment complex in Albuquerque to execute an arrest warrant for a woman accused of white collar crimes, but also "suspected of having been involved in drug trafficking, murder, and other violent crimes." * * *
>
> The officers observed Torres standing with another person near a Toyota FJ Cruiser in the parking lot of the complex. Officer Williamson concluded that neither Torres nor her companion was the target of the warrant. As the officers approached the vehicle, the companion departed, and Torres—at the time experiencing methamphetamine withdrawal—got into the driver's seat. The officers attempted to speak with her, but she did not notice their presence until one of them tried to open the door of her car.
>
> Although the officers wore tactical vests marked with police identification, Torres saw only that they had guns. She thought the officers were carjackers trying to steal her car, and she hit the gas to escape them. Neither Officer Madrid nor Officer Williamson, according to Torres, stood in the path of the vehicle, but both fired their service pistols to stop her. All told, the two officers fired 13 shots at Torres, striking her twice in the back and temporarily paralyzing her left arm.
>
> Steering with her right arm, Torres accelerated through the fusillade of bullets, exited the apartment complex, drove a short distance, and stopped in a parking lot. After asking a bystander to report an attempted carjacking, Torres stole a Kia Soul that happened to be idling nearby and drove 75 miles to Grants, New Mexico. The good news for Torres was that the hospital in Grants was able to airlift her to another hospital where she could receive

> appropriate care. The bad news was that the hospital was back in Albuquerque, where the police arrested her the next day. She pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle.
>
> Torres later sought damages from Officers Madrid and Williamson under 42 U.S.C. § 1983, which provides a cause of action for the deprivation of constitutional rights by persons acting under color of state law. She claimed that the officers applied excessive force, making the shooting an unreasonable seizure under the Fourth Amendment.

Based on this presentation of the facts, was Torres seized even though she drove 75 miles after being struck by the officers' bullets? What does *Hodari D.* suggest? Look back over the opinion for an answer.

Chief Justice Roberts in an opinion joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh, answered the question in the affirmative: Torres was seized. The Chief Justice wrote:

> The question before us is whether the application of physical force is a seizure if the force, despite hitting its target, fails to stop the person.
>
> We largely covered this ground in [*Hodari D.*]. * * * As Justice Scalia explained for himself and six other Members of the Court, the common law treated "the mere grasping or application of physical force with lawful authority" as an arrest, "whether or not it succeeded in subduing the arrestee." * * * Put another way, an officer's application of physical force to the body of a person " 'for the purpose of arresting him' " was itself an arrest—not an attempted arrest—even if the person did not yield.

Yes, Justice Scalia did say that in *Hodari D.* However, in dissent, Justice Gorsuch, with whom Justices Thomas and Alito joined, observed:

> Under the doctrine of *stare decisis*, we normally afford prior holdings of this Court considerable respect. But, in the course of issuing their holdings, judges sometimes include a "witty opening paragraph, the background information on how the law developed," or "digressions speculating on how similar hypothetical cases might be resolved." B. Garner et al., The Law of Judicial Precedent 44 (2016). Such asides are dicta. The label is hardly an epithet: "Dicta may afford litigants the benefit of a fuller understanding of the court's decisional path or related areas of concern." Dicta can also "be a source of advice to successors." But whatever utility it may have, dicta cannot bind future courts.

Not so fast, Chief Justice Roberts responded:

> * * * We need not decide whether *Hodari D.*, which principally concerned a show of authority, controls the outcome of this case as a matter of stare decisis, because we independently reach the same conclusions. * * *

The common law rule identified in *Hodari D.*—that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently (and accurately) proclaim that "[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit." The slightest application of force could satisfy this rule. * * * The touching of the person—frequently called a laying of hands—was enough.

Early American courts adopted this mere-touch rule from England, just as they embraced other common law principles of search and seizure. * * *

This case, of course, does not involve "laying hands," but instead a shooting. Neither the parties nor the United States as amicus curiae suggests that the officers' use of bullets to restrain Torres alters the analysis in any way. And we are aware of no common law authority addressing an arrest under such circumstances, or indeed any case involving an application of force from a distance. * * *

* * * [W]e see no basis for drawing an artificial line between grasping with a hand and other means of applying physical force to effect an arrest. The dissent (though not the officers) argues that the common law limited arrests by force to the literal placement of hands on the suspect, because no court published an opinion discussing a suspect who continued to flee after being hit with a bullet or some other weapon. This objection calls to mind the unavailing defense of the person who "persistently denied that he had laid hands upon a priest, for he had only cudgelled and kicked him." The required "corporal seising or touching the defendant's body" can be as readily accomplished by a bullet as by the end of a finger. 3 Blackstone 288.

We will not carve out this greater intrusion on personal security from the mere-touch rule just because founding-era courts did not confront apprehension by firearm. * * * [T]he Fourth Amendment preserves personal security with respect to methods of apprehension old and new.

We stress, however, that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. A seizure requires the use of force with intent to restrain. Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule. In this opinion, we consider only force used to apprehend. * * *

Moreover, the appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context. Only an objective test "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the

objective intent to restrain. A tap on the shoulder to get one's attention will rarely exhibit such an intent.

Nor does the seizure depend on the subjective perceptions of the seized person. Here, for example, Torres claims to have perceived the officers' actions as an attempted carjacking. But the conduct of the officers—ordering Torres to stop and then shooting to restrain her movement—satisfies the objective test for a seizure, regardless whether Torres comprehended the governmental character of their actions.

The rule we announce today is narrow. In addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any "continuing arrest during the period of fugitivity." The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial. But brief seizures are seizures all the same.

Justice Gorsuch sharply criticized the majority opinion, describing it as "mistaken," "novel," and even "schizophrenic." Schizophrenic? He explained:

[The majority] accepts that a seizure of the inanimate objects mentioned in the Fourth Amendment (houses, papers, and effects) requires possession [of the object]. And when it comes to persons, the majority agrees (as *Hodari D.* held) that a seizure in response to a "show of authority" takes place if and when the suspect submits to an officer's possession. The majority insists that a different rule should apply only in cases where an officer "touches" the suspect. Here—and here alone—possession is not required. So, under the majority's logic, we are quite literally asked to believe the officers in this case "seized" Ms. Torres's person, but not her car, when they shot both and both continued speeding down the highway.

The majority's need to resort to such a schizophrenic reading of the word "seizure" should be a signal that something has gone seriously wrong. The Fourth Amendment's Search and Seizure Clause uses the word "seizures" once in connection with four objects (persons, houses, papers, and effects). The text thus suggests parity, not disparity, in meaning. It is close to canon that when a provision uses the same word multiple times, courts must give it the same meaning each time. And it is canonical that courts cannot give a single word different meanings depending on the happenstance of "which object it is modifying." To "[a]scrib[e] various meanings" to a single word, we have observed, is to "render meaning so malleable" that written laws risk "becom[ing] susceptible to individuated interpretation." The majority's conclusion that a single use of the word "seizures" bears two different meanings at the same time—indeed, in this very case—is truly novel. And when it comes to construing the Constitution, that kind of innovation is no virtue.

The dissenters also cast doubt on the majority's analysis of common law case law, concluding with this observation:

> The common law offers a vast legal library. Like any other, it must be used thoughtfully. We have no business wandering about and randomly grabbing volumes off the shelf, plucking out passages we like, scratching out bits we don't, all before pasting our own new pastiche into the U. S. Reports. That does not respect legal history; it rewrites it.

The dissenters also criticized the majority opinion because, they say, the rule announced by the majority will result in more questions than answers:

> Imagine that, with an objective intent to detain a suspect, officers deploy pepper spray that enters a suspect's lungs as he sprints away. Does the application of the pepper spray count [as a seizure of the person]? Suppose that, intending to capture a fleeing suspect, officers detonate flash-bang grenades that are so loud they damage the suspect's eardrum, even though he manages to run off. Or imagine an officer shines a laser into a suspect's eyes to get him to stop, but the suspect is able to drive away with now-damaged retinas. Are these "touchings"? What about an officer's bullet that shatters the driver's windshield, a piece of which cuts her as she speeds away? Maybe the officer didn't touch the suspect, but he set in motion a series of events that yielded a touching. Does that count?

The Chief Justice responded summarily to these hypotheticals: "We do not accept the dissent's invitation to opine on matters not presented here."

d. Reasonable Suspicion

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. He 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, 206 L.Ed.2d 412 (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 of 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

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 greatly 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 13

PREPARING FOR ADJUDICATION

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C. PRETRIAL MOTION PRACTICE

2. MOTIONS TO CHANGE VENUE

Page 935, replace last paragraph of Note 6 with the following:

Dzhokhar Tsarnaev, the man charged with multiple crimes stemming from the Boston Marathon Bombing in 2013, also sought a change of venue for his trial. Judge George O'Toole denied the motion, maintaining that he could empanel a fair and impartial jury, and the First Circuit turned down an emergency request for a writ of mandamus to overturn that decision. In re Tsarnaev, 780 F.3d 14 (1st Cir. 2015). A federal jury in Boston ultimately voted to convict Tsarnaev and sentence him to death in 2015. The change of venue issue became a centerpiece of his direct appeal, with Tsarnaev's defense lawyers characterizing it as "the first fundamental error" in his case. Alanna Durkin Richer, *Feds Urge Court to Reject Boston Marathon Bomber Appeal,* U.S. News & World Report, June 27, 2019.

On appeal, the First Circuit reversed Tsarnaev's death sentence and vacated two of his many convictions but *not* because of the change of venue decision. Rather, the First Circuit determined that Judge O'Toole had failed to adequately probe into potential juror bias during *voir dire* and erred in excluding possible mitigating evidence. United States v. Tsarnaev, 968 F.3d 24 (1st Cir. 2020). In March 2021, the United States Supreme Court agreed to review the case.

CHAPTER 16

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. 1390, 206 L.Ed.2d 583, 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.

The Court answered the *Teague* question the following term, presumably with the "benefit" of briefing and "adversarial presentation." In Edwards v. Vannoy, 593 U.S. ___, 141 S.Ct. ___, ___ L.Ed.2d ___ (2021), Thedrick Edwards was convicted of multiple crimes in Louisiana in 2007, all of them via non-unanimous jury verdicts. He lost his direct appeal in state court. A federal judge rejected his subsequent federal habeas corpus petition, and the Fifth Circuit denied him a Certificate of Appealability. While Edwards was petitioning for a writ of certiorari from the Supreme Court to review the habeas denial, the Court issued *Ramos*. This put Edwards in the ideal spot to seek clarification about whether that holding applied retroactively to defendants trying to overturn their convictions via collateral review, and the Court granted certiorari. In a 6 to 3 decision, the Supreme Court rejected Edwards' arguments and declared that *Ramos* would not apply retroactively. For a more elaborate discussion of how *Edwards* fits within the *Teague* jurisprudence, see Chapter 18 (Supplement).

An interesting side issue not addressed in *Ramos* concerned whether a nonunanimous *not*-guilty verdict would suffice for an acquittal. That is the practice in Oregon and is even enshrined in the state constitution. Or. Const. Art. I, Sec. 11. The Oregon Supreme Court resolved that issue in 2021, holding that in the aftermath of *Ramos*, state law now requires a unanimous guilty verdict for all charges but permits a not-guilty verdict for votes of 11-1 or 10-2 in favor of acquittal. State v. Ross, 367 Or. 560, 481 P.3d 1286 (2021). Closer votes would signify that the jury has deadlocked and result in a mistrial under Oregon law.

2. JURY SELECTION

b. Voir Dire

Page 1207, please add at the end of Note 4:

In 2018, Washington became the first state in the nation to implement a court rule designed to directly target implicit bias in jury selection. A party may now object to a peremptory challenge if an "objective observer" would view race or ethnicity as a contributing factor in the use of that challenge. An objective observer is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington state." Wash.Ct.Gen.R. 37.

Anecdotal reports suggest that, since the enactment of the rule, some Washington prosecutors have become more hesitant to use peremptory challenges to strike jurors of color.

See Annie Sloan, Note, "*What to Do About Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Cal. L. Rev. 233, 257 (2020). Other states are considering similar approaches. *See* Beth Schwartzapfel, A *Growing Number of State Courts Are Confronting Unconscious Racism in Jury Selection*, Marshall Project, May 11, 2020.

E. JURY DECISION-MAKING

Page 1368, insert new Note 4:

4. *Problem*: Federal prosecutors presented evidence that the defendant had committed fraud. During deliberations, Juror 1 indicated that "the Holy Spirit told" him the defendant was not guilty on all counts. Another juror told the judge about this comment, and the judge proceeded to question Juror 1 about the statement. Had he prayed to the Holy Spirit for guidance and wisdom in order to reach a verdict grounded in the evidence? Or did he believe that the Holy Spirit had "told" him to reach a particular verdict regardless of the evidence? Based on this inquiry, the judge concluded that the juror, best of intentions notwithstanding, was determined to arrive at a verdict based on his "perceived divine revelation" rather than the actual evidence. The judge removed him from the jury, and the remaining jurors rendered a guilty verdict. Should the conviction be reversed on appeal due to the removal of Juror 1? United States v. Brown, 947 F.3d 655 (11th Cir. 2020).

CHAPTER 17

SENTENCING

C. FEDERAL SENTENCING GUIDELINES

Page 1386, Note 2, add at the end of the Note:

Another particularly egregious example of sentencing disparities is found in the 1986 Anti-Drug Abuse Act, which set out penalties for possession of illegal drugs with intent to distribute. 21 U.S.C. § 841 (1986). The Act created a 100:1 disparity in punishment of possession with intent to distribute crack cocaine compared to the powdered version. Why the disparity? As has been observed, the "legislative history offers no explanation for the selection of the 100:1 ratio instead of 1,000,000:1 or 10:1—save that 100:1 was the highest ratio proposed." David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283, 1287 (1995). Worse still, this disparity had a racially discriminatory impact on the Black population. See Terry v. United States, 593 U.S. __, 141 S.Ct. ___, ___, n.1, 2021 WL 2405145 (2021) (Sotomayor, J., concurring in part and concurring in the judgment); James Forman, Jr., Locking Up Our Own (2017). The disparity remained until passage of the Fair Sentencing Act in 2010, reducing the disparity to 18:1. And what is the rationale for 18:1? How did *this* sausage get made?

CHAPTER 19

THE SUBSTANCE OF THE FOURTH AMENDMENT

B. FEDERAL HABEAS CORPUS

3. Retroactivity

Page 1540, add new Note 5A:

5A. *Watershed rules as unicorns?* In 2020, *Ramos v. Louisiana* (Chapters 1 and 16, this Supplement) held that the Sixth Amendment as incorporated through the Fourteenth Amendment required unanimous jury verdicts in criminal cases. The Court acknowledged, but did not resolve, the retroactivity issue that would arise in federal habeas corpus cases in Louisiana and Oregon, the two states that prior to *Ramos* permitted non-unanimous criminal verdicts.

The Court decided the habeas corpus retroactivity issue in Edwards v. Vannoy, 593 U.S. ___, 141 S.Ct. 1547, ___ L.Ed.2d ___ (2021). Following the framework laid out in *Teague*, the Court first had to decide whether *Ramos* was a new rule. As courts had followed Apodaca v. Oregon, 406 US 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), for almost fifty years before *Ramos* overruled it, the Court held that "*Ramos* plainly announced a new rule for purposes of this Court's retroactivity doctrine. And new rules of criminal procedure ordinarily do not apply retroactively on federal collateral review."

But of course that is only the first step. The *Teague* Court left open the possibility that new "watershed rules" could be applied in federal collateral review, though *Teague* said it was "unlikely" that additional watershed rules would "emerge." And as Justice Gorsuch archly commented for the *Edwards* Court, "in the 32 years since *Teague*, as we will explain, the Court has *never* found that any new procedural rule actually satisfies that purported exception." *Ramos* is no watershed exception either, the Court held. The argument that history required a twelve-person jury fails because *Crawford v. Washington* (Chapter 16, casebook) was based on the historical right to confront witnesses, and it was not given retroactive effect. The argument that the jury trial right is uniquely important fails because *Duncan v. Louisiana* (Chapter 1, casebook) required juries in non-petty criminal cases, and it was not given retroactive effect. The argument that requiring unanimity helps minimize racial discrimination in jury verdicts fails because *Batson v. Kentucky* (Chapter 16, casebook) sought to mitigate racial discrimination in jury verdicts, and it was not given retroactive effect.

Then the Court sounded the death knell for watershed exceptions:

> If landmark and historic criminal procedure decisions—including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this

> point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception.

Though technically only dicta, the *Edwards* Court sent a very clear signal to future potential litigants:

> Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must "be regarded as retaining no vitality."

Justice Kagan, joined by Justice Breyer and Justice Sotomayor, dissented. To the dissent, the cases the majority relied on to reject Ramos's watershed claim are all distinguishable. Moreover, the *Ramos* opinion itself stressed the fundamental role of jury unanimity. She wrote:

> The majority cannot (and indeed does not) deny, given all *Ramos* said, that the jury unanimity requirement fits to a tee *Teague*'s description of a watershed procedural rule. Nor can the majority explain its result by relying on precedent. Although flaunting decisions since *Teague* that held rules non-retroactive, the majority comes up with none comparable to this case. Search high and low the settled law of retroactivity, and the majority still has no reason to deny *Ramos* watershed status. * * *
>
> The majority argues in reply that the jury unanimity rule is not so fundamental because * * *. Well, no, scratch that. Actually, the majority doesn't contest anything I've said about the foundations and functions of the unanimity requirement. Nor could the majority reasonably do so. For everything I've said about the unanimity rule comes straight out of *Ramos*'s majority and concurring opinions. Just check the citations: I've added barely a word to what those opinions (often with soaring rhetoric) proclaim. Start with history. The ancient foundations of the unanimous jury rule? Check. The inclusion of that rule in the Sixth Amendment's original meaning? Check. Now go to function. The fundamental (or bedrock or central) role of the unanimous jury in the American system of criminal justice? Check. The way unanimity figures in ensuring fairness in criminal trials and protecting against wrongful guilty verdicts? Check. The link between those purposes and safeguarding the jury system from (past and present) racial prejudice? Check. In sum: As to every feature of the unanimity rule conceivably relevant to watershed status, *Ramos* has already given the answer—check, check, check—and today's majority can say nothing to the contrary. * * *
>
> So the majority is left to overrule *Teague*'s holding on watershed rules.

Thus, the only watershed exception is the *Gideon v. Wainwright* right to counsel (Chapter 14, casebook) from 1963. Future watershed exceptions, it turns out, were unicorns in *Teague*'s dreams.