2022 Supplement to

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PART A: THE FOURTH AMENDMENT: SEARCH AND SEIZURE LAW

Chapter 2. The Exclusionary Rule and Other Remedies for Fourth Amendment Violations

2.05 Should the Rule Be Abolished? Other Remedies for Constitutional Violations

(a) Damages

(1) Federal Officers: Bivens Actions

Page 45. Add to note 136.

However, because of concern about expanding liability to "new contexts" that Congress did not anticipate, a *Bivens* claim will not be heard in connection with cross-border shootings; *Hernandez v. Mesa*, ___ U.S. ___, 140 S.Ct. 735 (2020); against border control agents, *Egbert v. Boule*, ___ U.S. ___, 142 S.Ct. 1793 (2022); or in connection First Amendment retaliation claims. Id.

(2) State Officers: § 1983

Page 51. After first full paragraph add:

While an intentional or reckless violation of clearly established constitutional standards usually triggers §1983 liability, in *Vega v. Tekoh*[175.1] the Supreme Court held that a violation of *Miranda v. Arizona* is not a derivation of the "right, privileges, or immunities secured by either the Constitution or the laws of the United States." Writing for six members of the Court, Justice Alito pointed out that, while *Miranda* was based on the Fifth Amendment's prohibition on "compelling" self-incriminating testimony, the Court's cases since that decision have made clear that "a *Miranda* violation is not the same as a violation of the Fifth Amendment."[175.2] Rather *Miranda* is a judge-created "prophylactic" rule that provides protection beyond that required by the Fifth Amendment, because it can lead to exclusion of confessions that were not compelled but rather merely obtained in the absence of warnings about the right to remain silent. Thus, while the *Miranda* rules are "constitutionally based" and have "constitutional underpinnings" their infringement does not create § 1983 liability. Nor may a suit based on *Miranda* be brought under § 1983's language referring to the "the laws of the United States" because, Justice Alito reasoned, *Miranda's* prophylactic purpose is already being served by exclusion and because lawsuits would create numerous judicial costs.

175.1 ___ U.S. ___, 142 S.Ct. 2095 (2022).

175.2 The key case on this topic is *Dickerson v. United States*, 530 U.S. 428 (2000), discussed in § 16.02(e)(1). See also § 16.05 for examples of the Court's unwillingness to give *Miranda* full constitutional effect.

Chapter 3. The Law of Arrest

3.04 The Arrest Warrant Requirement

(d) Hot Pursuit: The Exception to the Warrant Requirement

Page 88. Replace first sentence with:

The Supreme Court's decision in *Lange v. California*[108.1] is not to the contrary. There, a unanimous Court considered a warrantless entry by an officer who had followed Lange's car to his driveway on suspicion that he was drunk and then administered sobriety tests in Lange's garage that confirmed that fact. In contrast to *Welsh*, the pursuit of the defendant was "hot," a fact that the state argued should automatically justify the warrantless entry. But the Court, in an opinion written by Justice Kagan, refused to adopt a categorical rule, stating that "[i]n misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry." At the same time, Justice Kagan's examples of cases supporting that view all involved what she called "non-emergency situations" where the police could obtain a warrant without fear of hindering "a compelling law enforcement need." Justice Kavanaugh's construal of the holding in *Lange* makes evident the narrowness of the holding in *Lange*: "The Court holds that an officer may make a warrantless entry into a home when pursing a fleeing misdemeanant if an exigent circumstance is also present—for example, when there is a risk of escape, destruction of evidence, or harm to others." The case was remanded for consideration under this rule.

A separate concern about construing *Welsh* and *Lange* as invitations to calibrate the warrant requirement based on the nature of the crime is that they could be interpreted to permit warrantless non-exigent entries in "serious" cases.

108.1 ___ U.S. ___, 141 S.Ct. 2011 (2021).

3.05 Executing an Arrest

(b) The Use of Deadly Force

Page 91. Replace third sentence of second full paragraph with:

In a 6-3 opinion, the Supreme Court first held that using deadly force against someone is a Fourth Amendment seizure.[127.1] Then, construing "all necessary means" in the Tennessee statute to include deadly force, the Court held that, under the Fourth Amendment's reasonableness requirement, such means cannot be used to effect an arrest unless (1) it is necessary to prevent escape and (2) the suspect either threatens the officer with a weapon or there is probable cause to believe the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm.

127.1 The Court later held that, to be a seizure, the force need not kill or even effectively restrain the person as long as it "touches" the person and there is an *intent* to restrain. *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989 (2021). However, if there is no physical touching there probably is no seizure. See, e.g., *Reed v. Clough*, 694 F.App'x 716 (11th Cir. 2017).

Chapter 8. Hot Pursuit

8.02 When Hot Pursuit Justifies Entry

(d) Type of Crime

Page 192. To end of carryover paragraph add:

In *California v. Lange*,[14.1] the Court reaffirmed *Welsh* and arguably went further by holding that even truly hot pursuit does not necessarily justify a warrantless entry in misdemeanor cases.

14.1 ___ U.S. ___, 141 S.Ct. 2011 (2021), discussed in § 3.04(d).

Chapter 9. Evanescent Evidence and Endangered Persons

9.03 Houses, Papers and Effects

Page 203. Replace second and third full paragraphs with:

The types of warrantless searches mentioned in *Chadwick* and *Mincey* and addressed in *Stuart* have sometimes been discussed under the "caretaker exception" rubric.[28] As described by the First Circuit in *Caniglia v. Strom*,[29] the caretaker exception permits warrantless entries and searches because "a police officer—over and above his weighty responsibilities for enforcing the criminal law—must act as a master of all emergencies, who is 'expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.'" However, when the *Caniglia* case got to the Supreme Court, a unanimous panel emphasized that the caretaker function is not "infinite," at least to the extent it authorizes warrantless entry of homes.[30] While recognizing that one of its earlier cases, *Cady v. Dombrowski*,[31] had alluded to a community caretaker exception to the warrant requirement when police are engaged in something other crime-fighting, the Court noted that *Cady* had involved a warrantless search of a disabled car and had "repeatedly stressed" that there is "a constitutional difference" between houses and cars. Rebuking the First Circuit for extrapolating from *Cady* "a freestanding community-caretaking exception that applies to both cars and homes," the Court, per Justice Thomas, admonished: "What is reasonable for vehicles is different from what is reasonable for homes."

There were three concurring opinions, each agreeing with the result but carefully laying out what the majority opinion did *not* prohibit. Chief Justice Roberts, joined by Justice Breyer, provided a reminder that earlier decisions had allowed warrantless home entries to prevent violence, restore order, and render first aid. Similarly, Justice Alito suggested that the Fourth Amendment would not be violated by warrantless entries of residences when an occupant presents an imminent risk of suicide or is otherwise in "urgent need of medical attention and cannot summon help." Finally, Justice Kavanaugh rehearsed the cases in which the Court had allowed warrantless entries to fight a fire and investigate its cause, to prevent imminent destruction of evidence, and to handle a number of other "exigent circumstances."

The Court concluded that the warrantless entry in *Caniglia* fit none of these scenarios because it was not necessary to prevent imminent harm to anyone nor a response to some other emergency. The day before the search Edward Caniglia had placed a handgun on his dining room table and asked his wife to "shoot me and get it over with." Rather than obliging, his wife left the home and spent the night at a hotel. The next morning, when she was unable to reach her husband by phone, she called the police and accompanied them to the house, where Edward was sitting on the porch. After some dialogue, the police convinced Edward to go to the hospital for a psychiatric evaluation and arranged for an ambulance to take him there. Only then, after Edward was gone, did the police go in to get the guns. Since they did so without a warrant, the Court said, the Fourth Amendment was violated.

Caniglia sends a clear signal that warrantless entries that do not involve looking for evidence of crime under one of the other recognized warrant exceptions should be narrowly confined to dealing

with imminent threats. But the types of threats that qualify still need further delineation.[31.1] As to the continued scope of the caretaker exception outside of the home, it should be noted that *Cady*—the Court case that introduced the caretaker notion—involved seizure of evidence from a lawfully impounded car, a search that today would presumably be analyzed under the Court's inventory search doctrine.[31.2] So a freestanding "caretaker exception" that is not focused on imminent threats may not be recognized outside the home either.

28. Mary E. Naumann, The Community Caretaker Doctrine: Still Another Fourth Amendment Exception, 26 Am. Crim. L. Rev. 325 (1999)

29. *Caniglia v. Strom*, 953 F.3d 112, 124 (1st Cir. 2020).

30. ___ U.S. ___, 141 S.Ct. 1596 (2021).

31. 413 U.S. 433 (1973).

31.1 See *Sanders v. United States*, 141 S.Ct. 1646 (2021), which involved a domestic violence situation and which the Court remanded in light of *Caniglia*.

31.2 See § 13.07(a). In *Cady*, the police happened upon items covered with blood in the course of conducting a search of the car following a "standard procedure" that was not a pretext to look for evidence.

Chapter 11. Stop and Frisk

11.02 The Definition of "Seizure"

(a) Of the Person

Page 219. Add note 19.1 after sixth sentence in third full paragraph:

19.1 However, the Court has held that if police hit a person with a bullet, intending to restrain them, the person is seized even if they manage to escape at that time. *Torres v. Madrid*, ___ U.S. ___ ,141 S.Ct. 989 (2021).

11.03 Permissible Grounds for Stops and Other Seizures

(a) *Terry* Stops and the Reasonable Suspicion Standard

Page 226. After first full paragraph add:

Along the same lines is the Court's decision in *Kansas v. Glover*,[48.1] where police stopped the defendant for driving with a revoked license. The defendant argued that the officer could not have known that he, as opposed to someone else, was driving the car. He also contended that any inferences drawn by the officer were not based on the type of law enforcement experience emphasized in *Cortez* and *Arvizu*, nor were they "individualized" observations of Glover but rather based solely on the probability that a vehicle belonging to Glover was being driven by him. But six members of the Court concluded that because the officer's computer check indicated the car belonged to Glover and that Glover had a revoked license, he had reasonable suspicion. Justice Thomas, writing for the majority, emphasized that reasonable suspicion is a common-sense decision that necessarily relies on probabilities. But he also noted that "[e]mpirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians," and added that "[t]he reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." Two other members of the Court, Justices Kagan and Ginsburg, agreed with the result, but only because the officer knew that, in Kansas, a revoked license almost always means the driver has committed "serious or repeated driving offenses." Justice Sotomayor, in dissent, was particularly bothered by the use of statistics in place of observed misconduct: "If courts do not scrutinize officer observation or expertise in the reasonable-suspicion analysis, then seizures may be made on large-scale data alone—data that say nothing about the individual save for the class to which he belongs."

48.1 ___ U.S. ___, 140 S.Ct. 1183 (2020).

PART E. THE PRETRIAL PROCESS

Chapter 20. Initial Custodial Decisions: Pretrial Detention and Release

20.03 Bail and Other Pretrial Release Conditions

(c) Constitutional Criteria for Pretrial Release

(4) Non-Citizenship

Page 489. To end of second full paragraph add note 81.1:

81.1 For other decisions that give the government wide leeway to detain undocumented immigrants, see *Nielson v. Preap*, ___ U.S. ___ , 139 S.Ct. 954 (2019); *Johnson v. Guzman Chavez*, ___ U.S. ___, 141 S.Ct. 2271 (2021); *Johnson v. Arteaga-Martinez*, ___ U.S. ___, 142 U.S. 1827 (2022).

PART F. ADJUDICATION OF GUILT

Chapter 27. The Right to an Impartial Jury and Judge

27.02 The Scope of the Right to Jury Trial

(e) Voting Requirements

Page 652 Replace last three paragraphs with:

In both *Johnson* and *Apodaca*, the justices were split 4-4 as to whether jury unanimity is required, leaving Justice Powell as the swing vote. Although Justice Powell agreed that the Sixth Amendment mandates unanimity in federal jury trials, he concluded that unanimity is not a fundamental aspect of the right to jury trial applicable to the states. Because his opinion was the narrowest rationale justifying a position supported by five justices, the result of *Apodaca* was that unanimity is required only at the federal level.

Almost five decades later the Supreme Court reversed *Apodaca*. In *Ramos v. Louisiana*[42] it held that jury unanimity is required in both federal and state courts, thus invalidating the practice in the two states, Louisiana and Oregon, that still permitted non-unanimous verdicts (in both states, 10-2 votes sufficed). Justice Gorsuch's opinion for the Court did not engage in the "functionalist" analysis that permeated *Apodaca* but rather focused on the simple fact that jury unanimity had been ensconced in the common law for 400 years before the Sixth Amendment was ratified. He also emphasized that, in both Louisiana and Oregon, the decision to allow non-unanimous verdicts grew out of Jim Crow era efforts to minimize the impact of granting Black people the right to serve on juries. To the three-member dissent's argument that stare decisis demanded a different result, Justice Gorsuch pointed out that "neither Louisiana nor Oregon claims anything like the prospective economic, regulatory or social disruption litigants seeking to preserve precedent usually invoke."[42.1]

42. ___ U.S. ___, 140 S.Ct. 1390 (2020).

42.1 The disruption was minimized further by the Court's subsequent decision denying retroactive effect to *Ramos*. See § 27.06(c)(2).

27.04 Voir Dire

(b) Voir Dire Questioning

(3) Questions about Other Matters

Page 667. After last paragraph add:

In *United States v. Tsarsnaev*,[110.1] individualized questioning was permitted, but the trial judge prohibited the defense from asking about the content and extent of each juror's exposure to media coverage of the Boston Marathon bombings with which the defendant was charged. Citing *Mu'Min*, the Supreme Court emphasized that district courts have "broad discretion in . . . deciding what questions to ask prospective jurors." It then concluded that, contrary to the First Circuit's conclusion in the case, the trial court did not abuse its discretion when it decided that these questions wrongly focused on what jurors knew before coming to court rather than on their potential bias.

110.1 ___ U.S. ___, 142 S.Ct. 1024 (2022).

Chapter 28. Adversarial Rights: Openness, Confrontation, and Compulsory Process

28.04 The Right to Live Testimony: When Hearsay is Permitted

(b) When Testimonial Evidence is Admissible

(4) Non-Hearsay Use

Page 723. After second full paragraph add:

In contrast, testimonial statements that are meant to contradict a defendant's theory of the case cannot be smuggled in as impeachment if they are introduced to prove the truth of the matter asserted. In *Hemphill v New York*,[112.1] the defense's theory was that a third party named Morris committed the murder with which the defendant was charged, and it introduced evidence showing that bullets consistent with the murder weapon had been found on Morris's nightstand, as well as bullets for a .357 revolver. The trial judge, concerned that this evidence might mislead the jury, allowed the prosecution to introduce Morris' guilty plea allocution on weapon possession charges, which indicated that he pleaded guilty solely to possessing the .357 revolver bullets. Eight members of the Court held that introduction of the allocution violated the Confrontation Clause because it was testimonial and Morris was not available to be cross-examined about the circumstances of the bargain that led to it.

At the same time, the Court indicated that sometimes testimonial statements introduced to prove the truth of the matter asserted might be admissible to impeach in circumstances constituting waiver of the right of confrontation. For instance, if a defendant introduced only part of a third party-statement, the prosecution might want to introduce the other part under a "rule of completeness." The Court suggested that, even if testimonial, this evidence would be admissible, on the theory that a defense decision to introduce part of a statement waives the right of confrontation with respect to the other part.

112.1 ___ U.S. ___, 142 S.Ct. 681 (2022).

Chapter 29. Appeals

29.06 Retroactivity

(c) Cases on Habeas Review

(2) Exceptions to Non-Retroactivity of New Rules

Page 772. After the second full paragraph add:

In *Edwards v. Vannoy*,[190.1] the Court refused to give retroactive effect to its decision in *Ramos v. Louisian*a[190.2] requiring that jury verdicts be unanimous. In dissent, Justice Kagan, joined by two others, noted that *Ramos* had called the unanimity requirement "essential" and "fundamental," and concluded that "[i]f a rule, so understood, is not watershed, then nothing is." Justice Kavanaugh's majority opinion confirmed that view. He wrote that, in light of the Court's precedent since *Teague*, "no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts."

190.1 ___ U.S. ___, 141 S.Ct. 1457 (2021).

190.2 ___ U.S. ___ ,140 S.Ct. 1390 (2020), discussed in § 27.02(e), this supplement.

Chapter 30. Double Jeopardy

30.06 The Dual Sovereignty Doctrine

(a) Federal-State/Tribe Prosecutions

Page 815. After first full paragraph add:

Forty years later, the Court reaffirmed the dual sovereignty doctrine yet again, this time in a case involving a defendant tried in both state and federal court for the crime of possessing a weapon while an ex-felon. In a 7-2 decision, the Court's opinion in *Gamble v. United States*[190.1] focused on the language of the Double Jeopardy Clause more closely than it had in previous cases. It concluded that the Clause's prohibition of being tried twice for the "same offense" did not bar separate prosecutions for offenses defined by the laws of separate sovereigns, in particular those sovereigns protected by the Constitution's emphasis on federalism.[190.2] This latter point, Justice Gorsuch contended in dissent, "turns the point of our federal experiment on its head. When the 'ONE WHOLE' people of the United States [language found in the Federalist Papers] assigned different aspects of their sovereign power to the federal and state governments, they sought not to *multiply* governmental power but to *limit* it."

190.1 ___ U.S. ___ , 139 S.Ct. 1960 (2019).

190.2 The dual sovereignty doctrine holds even if both prosecutions for the offenses of two sovereigns are brought by the same governmental entity (in this case, federal prosecutors bringing both federal and tribal claims). *Denezpi v. United States*, ___ U.S. ___, 142 S.Ct. 1848 (2022).

PART G. THE ROLE OF THE DEFENSE LAWYER

Chapter 32. Effective Assistance of Counsel

32.04 Application of the Standard

(c) Attorney Errors: Relevant Considerations

(2) Existence of a Reasonable Explanation

Page 871. Add to note 87:

See also *Titus v. Andrus*, ___ U.S. ___ , 140 S.Ct. 1875 (2020).

PART H. THE RELATIONSHP BETWEEN THE FEDERAL AND STATE COURTS

Chapter 33. Federal Habeas Corpus: The Closing Door

33.02 The Substantive Scope of the Writ

(f) Harmless Error

Page 904. After the second full paragraph add:

The Court reaffirmed that view in *Brown v. Davenport*.[100.1] There it held that, even though error that is harmless under *Brecht* will usually mean a state court was "reasonable" in considering it harmless and thus also bar relief under AEDPA, both inquiries must be made. The Court then proceeded to demonstrate how the inquiries might come out differently. The Sixth Circuit had held that the trial judge's allowance of three sets of shackles on Davenport during his jury trial was not harmless under *Brecht*. But the Supreme Court held that, even if that conclusion was correct, the state court had reasonably concluded that the trial court's action was harmless error.

100.1 ___ U.S. ___ , 142 S.Ct. 1510 (2022).

33.04 Other Procedural Hurdles

(b) Successive Petitions

(2) Raising a Different Claim

Page 933. To end of first full paragraph add note 259.1.

259.1 The Court has also held that a motion to amend or alter a judgement on appeal under Federal Rule of Civil Procedure 59(e) is not a successive petition. *Bannister v. Davis*, ___ U.S. ___ , 140 S.Ct. 1692 (2020).

(c) The Custody Requirement

Page 935. To end of first full paragraph add note 270.1.

270.1 Compare *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), where the Court held that an immigrant who has been denied asylum was not in custody because he was not asking for release from custody or impending custody.

33.05 Independent Factfinding

(c) Evidentiary Hearings

Page 942. To end of carryover paragraph add:

Even if the need for additional evidence arises because of inadequate lawyering at the state post-conviction level, an evidentiary hearing may not be conducted. That result is required, the Court explained in *Shinn v. Ramirez*,[312.1] because "state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner." The petitioner argued that, because the state post-conviction process was the only proceeding at which evidence of ineffective counsel could be adduced, the reasoning in *Martinez v. Ryan*[312.2]—which excused procedural default on ineffective trial assistance claims when the default occurs at the only state post-conviction at which such claims can be made—should apply here as well. But the Court replied that the rule in *Martinez* was judge-created,

whereas the rule governing evidentiary hearings comes from a congressional statute (AEDPA), which the Court was powerless to change.

312.1 ___ U.S. ___, 142 S.Ct. 1718 (2022).

312.2 566 U.S.1, 132 S.Ct. 1309 (2012), discussed in § 33.03(d)(3).