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CRITICAL PROCEDURE

A Contemporary Approach

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Chapter 2

Fourteenth Amendment Due Process

B. Retroactivity

On p. 37, before the Executive Summary, add the following new Point for Discussion:

Points for Discussion

In *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), the Court held that jury verdicts must be unanimous. In *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021), the Court held that *Ramos* would not be retroactively applied to those seeking collateral review of prior convictions that were based on non-unanimous verdicts. The Court rejected the idea that there is an exception for "watershed rules" to the rule that new constitutional rules of criminal procedure ordinarily do not apply retroactively on federal collateral review. The Court stated: "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."

Chapter 3

The Right to Counsel

On p. 122, before the Points for Discussion, insert the following:

Hypo: Counsel Introduces Inadmissible Evidence

Defense counsel introduced evidence of defendant's post-traumatic stress disorder (PTSD), even though evidence of PTSD was not admissible to negate intent for malice murder and voluntary manslaughter, or to assist in proving self-defense, the offenses and the defense at issue in defendant's criminal trial. Counsel argued that evidence of PTSD was useful to explain defendant's conduct. But counsel admitted that the defense introduced "as much [mental health evidence] as we could get in not calling it PTSD ... hoping to seek from the jury some – some – not nullification, but reduction of punishment." Defendant was nonetheless convicted. Was defense counsel constitutionally ineffective for doing this? What do you think? *See Bates v. State*, 313 Ga. 57, 867 S.E.2d 140 (2022).

Ferguson v. City of Charleston

141 S.Ct. 2405 (2021).

Per Curiam.

In November 1996, Reeves and some friends decided to "go out looking for some robberies." The group's initial target was a drug dealer in a nearby town, but their car broke down and left them stranded on the side of the road. A few hours later, however, Johnson happened to drive by in his truck and offered to tow the disabled vehicle to Reeves' house. After they arrived, Reeves, who was riding in the bed of the truck, stuck a shotgun through the rear window of the cab and shot Johnson in the neck. As Johnson sat slumped in the driver's seat "bleeding heavily and making gagging noises," Reeves directed the rest of the group to "go through Johnson's pockets to get his money." Throughout the rest of the day, Reeves repeatedly "bragged about having shot Johnson," boasting that the murder "would earn him a 'teardrop,' a gang tattoo acquired for killing someone." At a party that night, Reeves invented a dance in which he "pretended to pump a shotgun" and "jerked his body in a manner mocking the way that Willie Johnson had died."

Alabama charged Reeves with murder and appointed counsel for him. His attorneys took several steps to develop mitigating evidence, including exploring the possibility that Reeves was intellectually disabled. They obtained extensive records of Reeves' educational, medical, and correctional history. Counsel also requested funding to hire a neuropsychologist, Dr. John Goff, to evaluate Reeves and prepare mitigation evidence. And when the trial court rejected that request, counsel successfully sought reconsideration. After the court granted funding, Reeves' attorneys managed to acquire additional mental-health records from the State, including

documents related to a pretrial competency evaluation that featured a partial administration of an IQ test. The totality of the evidence reflected that Reeves had a troubled childhood, suffered from numerous behavioral difficulties, and was within the "borderline" range of intelligence. While in school—before being expelled for violence and misbehavior—he had been referred to special services for emotional conflict and behavioral issues. But records also showed that he had previously been *denied* special educational services for intellectual disability. Counsel also learned that Reeves had attended classes and earned certificates in welding, masonry, and automotive mechanics. And the psychologist who initially evaluated Reeves later opined that he was not intellectually disabled. At some point before trial, Reeves' attorneys apparently elected to pursue other mitigation strategies instead of hiring Dr. Goff. The record does not reveal the reason for this decision—likely because Reeves did not ask them to testify. The record does show that counsel presented a holistic mitigation case. Counsel called several witnesses at sentencing—including Reeves' mother and the psychologist who performed the competency evaluation—and elicited testimony about Reeves' turbulent childhood, neglectful family, and educational difficulties. The jury, however, recommended a death sentence.

Reeves sought postconviction relief in state court, alleging almost 20 theories of error. Relevant here, he asserted that he was categorically exempt from execution by reason of intellectual disability, or at the very least that counsel should have hired Dr. Goff to develop mitigation along those lines for use at sentencing. At a 2-day hearing in state court, Reeves called two experts, including Dr. Goff. The doctor concluded that Reeves was intellectually disabled, explaining that the so-called Flynn Effect—a controversial theory involving the inflation of IQ scores over time—required adjusting Reeves' score downward into the 60s. Dr. Goff also cited a number of behavioral assessments that supposedly showed Reeves' shortcomings in adaptive functioning. For its part, the State offered the expert testimony of Dr. King, who administered his own evaluation and concluded that Reeves was not intellectually disabled. In fact, Dr. King pointed out that Reeves had a leadership role in a drug-dealing group and earned as much as $2,000 a week. Despite Reeves' focus on his attorney's performance, he did not give them the opportunity to explain their actions. Although all three of his lawyers were alive and available, Reeves did not call them to testify. The trial court denied relief, and the Alabama Court of Criminal Appeals affirmed. First, it agreed that Reeves had failed to prove that he was actually intellectually disabled and thus exempt from execution. The court specifically addressed Dr. Goff's reliance on the Flynn Effect, reiterating that this approach "has not been accepted as scientifically valid by all courts" and was "not settled in the psychological community." In fact, even Dr. Goff had "admitted that he did not use the 'Flynn Effect' for over 20 years after it was first discovered." Second, the court rejected Reeves' claim that counsel should have hired an expert to develop mitigating evidence of intellectual disability. Stressing that an attorney's decision not to hire an expert is "typically a strategic decision" that will "not constitute *per se* deficient performance," the court looked to the record to assess the "reasoning behind counsel's actions." In this case, the court observed, "the record was silent as to those reasons" "because Reeves failed to call his counsel to testify." Hence, he could not overcome the "presumption of effectiveness" that courts must afford to trial counsel. Reeves sought certiorari, which we denied over a dissent.

Reeves next sought federal habeas review. The District Court denied relief, but the

Eleventh Circuit reversed. Like every court before it, the Eleventh Circuit rejected Reeves' claim that he was intellectually disabled. But, it held that his lawyers were constitutionally deficient for not developing more evidence of intellectual disability and that this failure might have changed the outcome of the trial. In reaching that result, the Eleventh Circuit explained that it owed no deference to the "unreasonable" decision of the Alabama court. The panel reasoned that "a *per se* rule that the petitioner must present counsel's testimony" was clearly contrary to federal law. The Eleventh Circuit then reasoned that the state court surely must have imposed this "categorical rule" because its opinion also said that Reeves' "failure to call his attorneys to testify was fatal to his claims." But that quote was not quite complete; the original sentence reads, "*In this case*, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel."

This case presents a simple question: Did the Alabama court violate clearly established federal law when it rejected Reeves' claim that his attorneys should have hired an expert? In answering this question, we owe deference to both Reeves' counsel *and* the state court. As to counsel, we have often explained that strategic decisions—including whether to hire an expert—are entitled to a "strong presumption" of reasonableness. Defense lawyers have "limited" time and resources, and so must choose from among "countless" strategic options. Such decisions are particularly difficult because certain tactics carry the risk of "harming the defense" by undermining credibility with the jury or distracting from more important issues. The burden of rebutting this presumption "rests squarely on the defendant," and "it should go without saying that the absence of evidence cannot overcome it." Even if there is reason to think that counsel's conduct "was far from exemplary," a court still may not grant relief if "the record does not reveal" that counsel took an approach that no competent lawyer would have chosen. This analysis is "doubly deferential" when, as here, a state court has decided that counsel performed adequately. A federal court may grant habeas relief only if a state court violated "*clearly established* Federal law, as determined by *the Supreme Court* of the United States." § 2254(d)(1). This "wide latitude" means that federal courts can correct only "extreme malfunctions in the state criminal justice system." And federal judges must begin with the "presumption that state courts know and follow the law." A federal court may grant relief only if *every* "fairminded jurist" would agree that *every* reasonable lawyer would have made a different decision.

We start with the case as it came to the Alabama court. Reeves filed a 100-plus-page brief alleging manifold errors, including several theories of ineffective assistance of counsel. Many of these attacked basic strategic choices, including his current argument that counsel should have hired Dr. Goff to develop additional evidence of intellectual disability. Despite Reeves' determination to find fault with his lawyers, he offered no testimony or other evidence from them. That omission was particularly significant given the "range of possible reasons counsel may have had for proceeding as they did." This is not a case in which a lawyer "failed to uncover and present *any* evidence of mental health or mental impairment, or his family background." Counsel's initial enthusiasm to collect Reeves' records and obtain funding hardly indicates professional neglect and disinterest. Rather, we simply do not know what information and considerations emerged as counsel reviewed the case and refined their strategy. The attorneys may very well have pored over the voluminous evidence in their possession—including those obtained *after* their funding request—and identified several reasons that a jury was unlikely to be persuaded by a

claim of intellectual disability. After all, although Reeves' records suggested that his intelligence was below average, they also indicated that he was not intellectually disabled. Counsel might also have been concerned about the evidence of Reeves' history of violence, criminal past, and behavior problems, and concluded that presenting these characteristics alongside a full-throated intellectual-disability argument would have convinced the jury that Reeves "was simply beyond rehabilitation." Or, counsel may have uncovered additional evidence confirming their concerns about an intellectual-disability strategy. Perhaps Reeves informed them, as he later did Dr. King, that he was savvy enough to earn thousands of dollars a week in a drug-dealing operation where he had a leadership role. Or, counsel may well have further investigated Dr. Goff and decided that his debatable methodologies would undermine credibility with a local jury—possibly a prescient choice given that *every single court* to consider the issue has rejected Reeves' claim of intellectual disability. In fact, around the time that counsel were formulating their trial strategy, Dr. Goff was already performing questionable evaluations. It is not unreasonable for a lawyer to be concerned about overreaching. Simply put, if the attorneys had been given the chance to testify, they might have pointed to information justifying the strategic decision to devote their time and efforts elsewhere. Yet, Reeves declined to put that testimonial evidence before the Alabama court. Given that the Alabama court was entitled to reject Reeves' claim if trial counsel had any "possible reason for proceeding as they did," it surely was not obliged to accept Reeves' blanket assertion on an incomplete evidentiary record that "no reasonable strategy could support counsel's failure."

The Alabama court reasonably concluded that the incomplete evidentiary record—which was notably "silent as to the reasons trial counsel chose not to hire Dr. Goff or another neuropsychologist"—doomed Reeves' belated efforts to second-guess his attorneys. The Eleventh Circuit recharacterized this case-specific analysis as a "categorical rule" that *any* prisoner will *always* lose if he fails to call and question "trial counsel regarding his or her actions and reasoning." We think it clear from context that the Alabama court did not apply a blanket rule, but rather determined that the facts of this case did not merit relief. The Alabama court twice recognized that there *can* be instances of "*per se* deficient performance." It simply concluded that here, counsel's choice regarding experts involved a strategic decision entitled to a presumption of reasonableness. Moreover, *other* portions of the opinion's lengthy recitation of the law belie a categorical approach. The court twice said that it would consider "all the circumstances" of the case, and it qualified its supposedly categorical rule by explaining that "counsel should *ordinarily* be afforded an opportunity to explain his actions before being denounced as ineffective."

Other parts of the opinion yield the same interpretation. For example, the court devoted almost nine pages to discussing ineffective assistance of counsel. That would have been a curious choice for a "busy state court" if a single sentence applying a *per se* rule could have sufficed. Within that lengthy discussion, the court individually mentioned many of Reeves' specific theories, including his current intellectual-disability argument. Moreover, that the court in a footnote summarily rejected *different* ineffective-assistance-of-counsel claims for procedural reasons further weighs against imputing a *per se* rule for the theories that the court discussed in the body of its opinion. Even more important, the actual analysis of the claim reflects a case-specific approach. The court did not merely say that Reeves' "failure to call his attorneys to testify was fatal to his claims." Rather, the opinion prefaced this quote with an important qualifier—"*In this case*." And the court proceeded to explain why Reeves could not prevail "in

this case"—because "the record was silent as to the reasoning behind counsel's actions." To be sure, the record happened to be deficient "because Reeves failed to call his counsel to testify." But, this unremarkable observation of cause and effect in light of the facts before the court was hardly an absolute bar in *every* case where *other* record evidence might fill in the details. And, it certainly was not contrary to clearly established law given that this Court and the Eleventh Circuit have made the same observation that a silent record cannot discharge a prisoner's burden.

For the foregoing reasons, we grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals, and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, with whom Justice KAGAN joins, dissenting.

The sole question is whether the Court of Criminal Appeals of Alabama applied a categorical rule that Reeves' failure to call his attorneys to testify was fatal to his IAC claim as a matter of law. No one disputes that such a rule would be an "unreasonable application" of *Strickland* and its progeny. Under those decisions, no single type of evidence, such as counsel's testimony, is a prerequisite to relief. The Court of Criminal Appeals improperly applied such a *per se* rule here. It began by invoking Reeves' burden "to present evidence" sufficient to overcome the "strong presumption that counsel acted reasonably." It then ignored all of the evidence that Reeves' counsel had acted unreasonably, including Dr. Goff 's description of the evaluation he would have conducted, Dr. Ronan's warning that her testimony was no substitute for an actual intellectual disability assessment, and trial counsel's repeated representations about the necessity of hiring Dr. Goff to conduct such an evaluation. The court held that none of this evidence mattered because trial counsel did not testify: "Because Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel chose not to hire Dr. Goff or another neuropsychologist." The court treated that fact as "fatal" to Reeves' claim. Because Reeves could not establish the subjective "reasoning behind counsel's actions, the presumption of effectiveness was sufficient to deny relief." After perfunctorily citing the *Strickland* standard, the state court never actually followed through on its obligation to consider the evidence. Its analysis began and ended with counsel's failure to testify. The Court erroneously embraces the state court's flawed assumption that IAC claims require direct evidence of the subjective "reasoning behind counsel's actions."

Point for Discussion

Note that the Justices in the majority and the dissent unanimously agree that there is no *per se* rule that a defendant's failure to call his or her attorneys to testify in an ineffectiveness hearing is fatal to an ineffectiveness claim as a matter of law. Their disagreement instead was factual, i.e. did the lower court *actually* apply such a categorical rule? From what you've read, what do you think?

On p. 124, at the end of point a. in the Points for Discussion, insert the following:

Most recently, in *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022), a 6-to-3 majority of the Court held that, pursuant to the AEDPA, a federal habeas court may not conduct an evidentiary hearing or otherwise consider new evidence beyond the state-court record based on ineffective assistance of state postconviction counsel as, in the majority view, "under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner."

On p. 135, at the end of the Points for Discussion, insert the following:

g. State Court Rulings & AEDPA

In *Brown v. Davenport*, 142 S.Ct. 1510 (2022), a 6-to-3 majority of the Supreme Court ruled that under the AEDPA, a state court's determination, that a due process violation from defendant's shackling during trial was harmless and thus not prejudicial, was neither contrary to nor an unreasonable application of clearly established federal law and, hence, it was not actionable as ineffective assistance of counsel, reversing the lower court's independent assessment of the error's prejudicial effect.

Chapter 4

Arrest, Search & Seizure

A. Search Warrants

On p. 182, in point b., add the following at the end of the string citations before the period:

; *Lundquist v. State*, 179 N.E.3d 1051, 1055-56 (Ind. Ct. App. 2021) (error in listing defendant's mother's address instead of defendant's address held OK where executing officer's knew correct home)

On p. 195, make the Futile Gestures Point for Discussion on that page point a. and after point a., add the following:

b. No-Knock Search Warrants

Over the past few years, there has been much controversy about the Breonna Taylor case. In that case, the judge issued a no knock warrant. However, the evidence suggests that the police actually did knock on her door before entering. There is a dispute regarding whether the police announced themselves. See further discussion in Hypo 2 at p. 270 in this Supplement.

On p. 199, at the end of the Hypo, add the following:

See also, e.g., United States v. Joshua, 564 F.Supp.3d 860 (D. Alas. 2021) (detention of defendant at gas station one-quarter mile from search premises).

On p. 200, make the Hypo on that page Hypo 1, and after Hypo 1, add the following:

Hypo 2: Nighttime Search for Narcotics #2

A magistrate found reasonable cause existed for nighttime execution of a search warrant for defendant's home for evidence relating to methamphetamine sales, where a police officer's affidavit averred that an informant revealed that there was “probably” a large quantity of narcotics on the property, that the drugs could and “probably” would be removed, and that nighttime service would reduce the possibility of any physical altercation between officers and persons present at the home. Do you think that these justifications were enough to support a nighttime search? *See State v, Hutton*, 169 Idaho 756, 503 P.3d 972 (Idaho 2022).

B. PROTECTED FOURTH AMENDMENT INTERESTS

On p. 208, at the beginning of the section, add the following:

In order to apply the Fourth Amendment, we need to think about the interests that it protects. As we shall see, a distinction is made (in terms of the applicable constitutional standards) between "searches" and "seizures." In this section, we seek to define the term "search."

1. DEFINING THE TERM "SEARCH"

On p. 210, delete the following caption:

1. Development of the Reasonable Expectation of Privacy Test

On p. 213, at the end of the Food for Thought, add the following:

Should the fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement defeat his otherwise reasonable expectation of privacy? *See Byrd v. United States*, 138 S. Ct. 1518 (2018).

On p. 214, add the following to the end of the first paragraph:

If two people are intimate partners and share a home, and one obtains a "no contact" order against the other, does the other lose their REOP in the home? *See State v. Rebo*, 482 P.3d 569 (Idaho 2020); *United States v. Schram*, 901 F.3d 1042 (9th Cir. 2018). If individuals neither own nor rents an apartment, but is simply a squatter, can they acquire a REOP in the apartment by adverse possession? *See Gill v. Dawkins*, 2020 WL 7042647 (E.D.N.Y.).

On p. 215, at the end of the first paragraph, insert the following new paragraph:

In *Collins v. Virginia,* 138 S. Ct. 1663 (2018), the police had probable cause to believe that a motorcycle in the driveway of a house was stolen. However, when they entered the driveway in order to examine it without a warrant, they both violated the REOP in the curtilage and engaged in a physical intrusion upon a constitutionally protected area. Would the result be different if the vehicle had been parked in the parking area for the residents of an apartment building? *See Jones v. United States*, 893 F.3d 66 (2d Cir. 2018).

On p. 216, at the end of the last paragraph, insert the following:

For an example of a private search conducted by Google, see *United States v. Miller*, 982 F.3d 412 (6th Cir. 2020) (allowing Google to match files in Gmail account with child pornography files, to send a report with the files and IP address to the National Center for Missing and Exploited Children, which then traces the IP address so that a detective in locality can connect the defendant to the Gmail account).

2. Struggling to Define the REOP Test

On p. 221, change the word Point to Points in the heading, number the current Point as "a. Precedent for Smith's Third Party Doctrine," insert new point "b." with the following heading and text:

b. The Scope of Third Party Doctrine

A government employer places login banners on its computers warning employees that all uses of the system may be monitored and recorded. An employee falsifies records in an effort to get her husband fired from his job. In the process, she leaves a personal flash drive plugged into an office computer. Does she have a REOP in her personal flash drive if it is found by her employer and turned over to the police? *See Edwards v. State*, 274 So.3d 1222 (Fl. Ct. App. 2019). Does an employee at a state university have a REOP in his email account? Does it matter that the account is subject to the state's open records law? *See Walker v. Coffey*, 905 F.3d 138 (3d Cir. 2018). Does an injured individual seeking treatment at a hospital have a REOP in a bag supplied by the hospital for the individual to use as a container for his belongings while in the hospital? *See United States v. Perez,* No. 3:19-cr-00304 (JAM) (D. Conn. September 16, 2020).

On p. 224, after the first two paragraphs, insert the following:

Food for Thought

Suppose that city parking enforcement officials have a habit of "chalking" tires to help parking enforcement officials know how a vehicle has been parked in a particular spot. After *Jones*, should chalking be regarded as a search within the meaning of the Fourth Amendment? *See Taylor v. City of Saginaw*, 11 F.4th 483 (6h Cir. 2021).

On p. 226, at the end of the Point for Discussion, insert the following:

Assume that a city council votes to authorize the police department to maintain continuous drone surveillance of the entire city. Through that surveillance, members of the police force happen to notice that Johnson is illegally growing marijuana in his backyard. Did the surveillance

violate Johnson's REOP? *See Leaders of a Beautiful Struggle v. Baltimore Police Department*,979 F.3d 219 (4th Cir. 2020).

3. Evolving Constitutional Standards

On p. 235, Hypo 2, at the end, insert the following:

Suppose that a police officer inserts a key in the lock of a suspect's vehicle,. Has the officer conducted a "search" within the meaning of the Fourth Amendment? See United States v. Dixon, 984 F.3rd 814 (9th Cir. 2020).

On p. 235, after Hypo 2, insert the following new Hypo:

Hypo 3: *Minimal Intrusion*

Does the test firing of a gun violate the REOP of a gun owner when the gun is in the lawful possession of police? The gun owner claims that there is a REOP in the unique characteristics of the gun barrel and the rifling and tool marks. The gun owner also argues that the test firing was a physical trespass. Assume that the test fire was analyzed by the Integrated Ballistic Information System, and that the shells matched the casings that had been discovered by the police as evidence. What reasoning could the court use to analyze the defendant's arguments? *See United States v. Wondie*, 2021 WL 1424707 (W.D. Wash. April 15, 2021).

On p. 240, change the word Point to Points in the heading, number the current Point as "a. Protection for Electronic Communications," insert the following new point "b." with the following heading and text:

b. *Riley*'s Impact on *Smith*'s Third Party Doctrine

The *Riley* opinion's only reference to *Smith* appeared in the Court's rebuttal to the Government argument that *Smith*'s approval of the warrantless seizure of phone numbers should serve as authority for justifying the warrantless searches of call logs. The Court dismissed this analogy because call logs "contain more information than just phone numbers," and said nothing about the fact that call logs also are REOP-protected, whereas dialed numbers are not. Even though *Riley* did not explicitly cast doubt upon the continuing validity of *Smith*'s reasoning in the digital age, *Riley* arguably undermines the third party doctrine.

On p. 255, before the problems, insert the following:

Point for Discussion

After *Carpenter*, the Georgia Supreme Court was confronted by another cell-site records case. In that case, thegovernment obtained cell tower information from AT &T without a warrant,

invoking the exigent circumstances test under the Stored Communications Act. The evidence showed that Swinson was suspected of having committed two murders, that a third person's life was in danger, and that Swinson was considered to be "armed and dangerous."After Swinson was apprehended, the police used the cell tower information to obtain a warrant to search his cell phone. *See Swinson v. States*, (Ga. 2021).

On p. 255, at the end of the citation in Hypo 1, delete the period and insert the following new citations:

; *Jones v. United States*, 168 A.3d 703 (D.C. Ct. App. 2017); *United States v. Ellis*, 270 F. Supp. 3d 1134 (N.D. Cal. 2017). Does the warrantless use of a cell-site simulator for 30 days violate REOP if used to locate the cell phone of a fugitive in an unknown location? *See In re Use of a Cell-Site Simulator to Locate a Cellular Device Associated With One Cellular Tel. Pursuant to Rule 41,* 531 F.Supp.3d 1 (D.D.C. 2021).

On p. 256, at the end of Hypo 4, add the following:

For an example of a lawsuit challenging facial recognition technology in Michigan and Illinois, see *Williams v. City of Detroit*, case # 2:21-cv10827 (E.D. Mich. April 13, 2021), described in Diamond Naga Siu, *Detroit PD Sued over False Arrest Using Facial Recognition,* Law360.com/articles/1374707, April 14, 2021. *See also* Davy Alba, *A.C.L.U. Accuses Clearview AI of Privacy 'Nightmare Scenario'*, THE NEW YORK TIMES, May 28, 2020 (describing ACLU's suit claiming violations of Illinois Biometric Information Privacy Act for collecting images without consent).

On p. 258, after Hypo 7, add the following new Hypos:

Hypo 8: *Pole Camera*

In order to gather more information about possible illegal drug activities, the police set up a pole camera across the street from a woman's house. The camera maintains 24 hour surveillance of the house, allows the police to focus in on specifics (e.g., the license plates of cars that come to the house), and allows magnification of details as well as time-log features. Does the use of the pole camera constitute a search within the meaning of the Fourth Amendment? If there is constant surveillance over an eight month period with the pole camera, does that alter your analysis? *See United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021).

Hypo 9: *The Drone Program*

Drone Program. The Baltimore Police Department establishes a drone program which flies drones above Baltimore equipped with camera technology that captures roughly 32 square miles per second. The drones cover roughly 90% of the city during daylight hours. Any single image can

be magnified so that people and cars are individually visible. The drones transmit their photographs to "ground stations" where analysts use the data to "track individuals and vehicles from crime scenes and extract information that assists BPD in the investigation of Target Crimes," which include "homicides and attempted murder; shootings with injury; armed robbery; and carjacking." Plaintiffs are advocates whose activities necessarily involve traveling in areas with high rates of violent crime, and they visit scenes of gun violence as soon as possible after a crime takes place. Does the drone program infringe their REOP? *See Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 230 (4th Cir. En Banc).

C. Probable Cause

On p. 262, at the end of Hypo 4, add the following:

Suppose that the officer searches the interior of the car for marijuana, but finds nothing. However, because of the driver's "suspicious body language," he decides to search the trunk as well. Was it permissible for the officer to search the trunk? *See United States v. Kizart*, 967 F.3d 693 (7th Cir. 2020).

On p. 270, insert a new Hypo # 2, and renumber the remaining hypos:

Hypo 2: *The Breonna Taylor Case*

An internal police department report revealed Ms. Taylor's connections with the principal target of a drug ring (Glover). In Dec. 2019 (the raid on Taylor's apartment occurred on Mar. 13, 2020), Taylor posted a $2,500 bond for one of Glover's alleged accomplices. A GPS device installed on Glover's car showed that he drove to Taylor's apartment six times in the month of January 2020. Glover called Ms. Taylor 27 times between Jan. 2016 and Jan. 2020. On Jan. 3, 2020, Glover called Ms. Taylor and asked her to call a friend to get bail money for him. Ms. Taylor told Glover that the friend was already "at the trap" (slang for a house used for drug trafficking). Glover told Ms. Taylor that, if he made bail, he was going to "get some rest" in Ms. Taylor's bed. Glover told Ms. Taylor "Love you" and she responded "Love you, too." In a call from the county jail, after he was arrested, Glover stated that Ms. Taylor was holding $8,000 of his money and he further stated that she was "handling all my money" and that "She had the eight grand I gave her the other day, and she picked up another six." When asked why she was holding the money, Glover stated "Don't take it wrong but Bre been handling all the money." Despite Glover's assertion, another accomplice stated (again in a call from the jail) that someone else was holding the money. On Feb. 13, Ms. Taylor was seen with Glover driving up to her apartment in her car. In addition, Ms. Taylor's car had been seen at the drug house multiple times. Do these facts provide the police with probable cause to believe that Ms. Taylor has illegal drugs or the cash from crime in her apartment? *See* Andrew Wolfson, *Report details why police decided to forcibly search Breonna Taylor's home*, Louisville Courier-Journal (Aug. 25, 2020).

On p. 286, at the bottom of the page, insert the following:

Food for Thought

Suppose that the police pull over Braddy for a traffic violation. Because Braddy is acting suspiciously, the officers (each of which had a drug sniffing canine) decided to walk their dogs around Braddy's car. As the dogs approached the driver's door, they leaned forward, closed their mouths, changed their breathing patterns, and straightened their tails. One officer's dog was hindered by the fact that the officer tripped over it. While these actions are short of a full-fledged alert, the officers deemed them sufficient to suggest that illegal drugs were present. Do the officers have probable cause to believe that illegal drugs can be found in the car? *See United States v. Braddy*, 11 F.4th 1298 (11th Cir. 2021).

D. Warrantless Searches and Seizures

2. Search Incident to Legal Arrest

On p. 305, before Hypo 1, insert the following:

Food for Thought

A police officer is called to the scene of a one car accident (a man ran into a telephone pole on the side of the road). The man had slurred speech, bloodshot eyes, trouble balancing, and he told the officer that he lived in "Chicago-Miami." The man admitted that he had consumed one beer earlier in the evening. The officer put the man through a field sobriety test which he failed. Based on circumstances, the officer arrested the man for driving under the influence. However, when the man was given a Breathalyzer test at the police station, and a blood test at a nearby hotel, both of which indicated that he was not intoxicated. As it turns out, the wreck and the man's symptoms were attributable to the fact that he suffered a seizure. However, the man failed to reveal that fact to the arresting officer. Did the officer violate the man's rights by arresting him? *See Braun v. Village of Palatine*, 56 F.4th 542 (7th Cir. 2022).

On p. 317, after Hypo 2, add the following new Food for Thought:

Food for Thought

Suppose that the police validly arrest a suspect who is outside his vehicle (as is his backpack). Do the police have the right to search the backpack if the suspect is handcuffed and lying on the ground. The backpack is nearby. Do the police have an automatic right (under the search incident to legal arrest exception) to search the backpack? *See United States v. Davis*, 997 F.3d 191 (4th Cir. 2021).

On p. 318, after Hypo 4, add the following new Food for Thought:

Food for Thought

Suppose that the police validly arrest a suspect who is outside his vehicle. His backpack is lying nearby. In light of the holding in *Arizona v. Gant, supra*, do the police have an automatic right (under the search incident to legal arrest exception) to search the backpack, or must they obtain a warrant? *See United States v. Davis*, 997 F.3d 191 (4th Cir. 2021).

4. AUTOMOBILE EXCEPTION

On p. 341, before "b. Delayed Automobile Searches," insert the following:

Food for Thought

When the police observe a car with expired license plate, they activate their lights intending to pull them over. The driver does not stop immediately and ultimately pulls his car into a driveway. As it turns out, the driver is driving with an expired driver's license so the police decided to arrest him and tow the vehicle to an impoundment lot. In addition, the police decide to search the vehicle. Since the car is parked on private property, and the police do not know whether the suspect has permission to park there, are the police precluded (under the *Collins* holding) from seizing or searching the vehicle? *See United States v. Anderson*, 56 F.4th 748 (9th Cir. 2022). Could the police validly enter a shared apartment building parking lot and observe vehicles parked there? *See United States v. Jones*, 893 F.3d 66 (2nd Cir. 2018).

5. INVENTORY EXCEPTION

On p. 355, change Hypo 1 to a Food for Thought.

On p. 355, following the new Food for Thought, insert the following new Hypo 1:

Hypo 1: *Is Impoundment Permissible?*

When the police see Venezia make an illegal turn (he failed to signal), and notice that his license plates are improperly displayed, they approach Venezia after he exits his car at a hotel. During the stop, the officers realize that the car is still registered to a prior owner, and they learn that Venezia does not have a driver's license, car insurance, title to the vehicle, or a bill of sale. In addition, his driver's license has been revoked, and he is subject to an outstanding misdemeanor warrant for failure to appear on a traffic ticket. The officers arrest Venezia on the warrant. When they are unable to reach the registered owner of the vehicle by telephone, they impounded the vehicle. An inventory search reveal illegal drugs. Was the impoundment permissible? *See United States v. Venezia*, 995 F.3d 1170 (10th Cir. 2021).

On p. 357, before Hypo 3, insert the following new Food for Thought:

Food for Thought

Police receive reports of an armed man at a gas station. At the scene, they see Rosario walk to his car, drive about a block away and park the vehicle, and then return on foot to the gas station. When the police try to talk to Rosario, he turns and runs towards his vehicle. While he is fleeing, Rosario throws away a bag which appears to contain marijuana, and a bottle of pills. When the officers catch up with him, they place Rosario under arrest. At that point, even though the car is legally parked, they decide to impound it, and ultimately subject the car to an inventory search. Was it permissible to impound and search the vehicle under these circumstances? *See United States v. Del Rosario-Acosta*, 968 F.3d 123 (1st Cir. 2020).

On p. 357, before Hypo 4, insert the following new Food for Thought:

Food for Thought

A suspect's vehicle is validly impounded pursuant to police department policy. Under that policy, the officer was required to prepare a "complete and accurate" inventory of the vehicle's contents. However, although the officer filled out the inventory form, he did so incompletely. Does the officer's failure to comply with departmental policies requiring a "complete and thorough" inventory invalidate the search? *See United States v. Magdirila*, 962 F.3d 1152 (9th Cir. 2020).

5. INVENTORY EXCEPTION

On p. 375, following Hypo 1, insert the following:

Food for Thought

Landlords and Consent. As a general rule, one would expect a landlord to have some authority to enter rental properties (e.g., to do routine or necessary maintenance). But would you expect a landlord to have the authority to consent to a police search of a tenant's residence? Should it matter that the tenant rented the condo using an alias? Does the use of an alias deprive the tenant of a REOP in the premises? *See United States v. Thomas*, 65 F.4th 922 (7th Cir. 2023).

7. ADMINISTRATIVE INSPECTIONS

On p. 400, at the bottom of the page, insert the following:

Food for Thought

Should a dog kennel be regarded as a "pervasively regulated" industry? Under the Kansas Pet Animal Act, those who operate pet boarding kennels must apply for a license and permit unannounced inspections of their facilities. Is the Act consistent with the Fourth Amendment? *See Johnson v. Smith*, 2023 WL 3275782 (D. Kan.).

On p. 401, at the end of the Food for Thought, add the following:

What about massage parlors? Should they be treated as “closely regulated businesses?” The state argues that it has a compelling interest in stopping prostitution, that massage parlors have a close connection to prosecution, and that warrantless searches are necessary to prevent prostitution at parlors’ Is it correct? *See Killgore v. City of South El Monte*, 3 F.4th 1186 (9th Cir. 2021).

8. STOP AND FRISK

On p. 414, following Hypo 1, insert the following new Food for Thought:

Food for Thought

An automobile is stolen during an aggravated robbery. Ten days later, the police spot Thomas in “close physical proximity” to the stolen vehicle congregating with three other individuals (as well as two individuals who are seated in the vehicle). Do the officers have sufficient cause to conduct a stop and frisk of those in the vehicle? What about Thomas who is outside the vehicle, but is talking to the individuals seated in the vehicle? *See United States v. Thomas*, 997 F.3d 603 (5th Cir. 2021).

On p. 416, replace Hypo 5 with the following:

Hypo 5: *Hanging Out in High Crime Areas*

Police are patrolling in a high-crime part of the city, where a series of gang-related driver-by shootings have recently occurred, when they observe a group of people standing on the sidewalk. As they approach the group, they spot a man in red shorts (the color of the Bloods gang), another man in a windbreaker (despite the fact that it is a warm summer night) and a backpack, and they see a woman walk away. Nobody else in the group is wearing red. Do the officers have sufficient cause to stop and question the group? To conduct a frisk? *See United States v. McKinney*, 980 F.3d 485 (5th Cir. 2020).

On p. 439, before the hypos, insert the following new case:

Torres v. Madrid
141 S.Ct. 989 (2021).

Chief Justice ROBERTS delivered the opinion of the Court.

At dawn on July 15, 2014, 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. Neither Officer Madrid nor Officer Williamson 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. The District Court granted summary judgment to the officers, and the Court of Appeals for the Tenth Circuit affirmed on the ground that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." We granted certiorari.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This case concerns the "seizure" of a "person," which can take the form of "physical force" or a "show of authority" that "in some way restrains the liberty" of the person. *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968). The question is whether the application of physical force is a seizure if the force, despite hitting its target, fails to stop the person. In *California v. Hodari D.*, 499 U.S. 621 (1991), we interpreted the term "seizure" by consulting the common law of arrest, the "quintessential 'seizure of the person' under our Fourth Amendment jurisprudence." 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. The common law distinguished the application of force from a show of authority, such as an order for a suspect to halt. The latter does not become an arrest unless and until the arrestee complies with the demand. As the Court explained in *Hodari D.*, "an arrest requires *either* physical force ... *or*, where that is absent, *submission* to the assertion of authority." *Hodari D.* articulates two pertinent principles. First, common law arrests are Fourth Amendment seizures. And second, the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped.

At the adoption of the Fourth Amendment, a "seizure" was the "act of taking by warrant" or "of laying hold on suddenly"—for example, when an "officer seizes a thief." 2 N. WEBSTER, AN

AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828). A seizure did not necessarily result in actual control or detention. It is true that, when speaking of property, "from the time of the founding to the present, the word 'seizure' has meant a 'taking possession.' " *Hodari D.*, 499 U.S., at 624. But the Framers selected a term—seizure—broad enough to apply to all the concerns of the Fourth Amendment: "persons," as well as "houses, papers, and effects." As applied to a person, "the word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." Then, as now, an ordinary user of the English language could remark: "She seized the purse-snatcher, but he broke out of her grasp." The "seizure" of a "person" plainly refers to an arrest. That linkage existed at the founding. Samuel Johnson, for example, defined an "arrest" as "any ... seizure of the person." 1 A DICTIONARY OF THE ENGLISH LANGUAGE 108 (4th ed. 1773). And that linkage persists today. As we have repeatedly recognized, "the arrest of a person is quintessentially a seizure." *Payton v. New York*, 445 U.S. 573, 585 (1980); see *Hodari D.*, 499 U.S., at 624.

Because arrests are seizures of a person, *Hodari D.* properly looked to the common law of arrest for "historical understandings 'of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.' " *Carpenter* v. *United States*, 138 S.Ct. 2206, 2214 (2018) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925). 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 "all 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." *Nicholl* v. *Darley*, 2 Y. & J. 399, 400, 148 Eng. Rep. 974 (Exch. 1828). The slightest application of force could satisfy this rule. The touching of the person—frequently called a laying of hands—was enough. Only later did English law grow to recognize arrest without touching through a submission to a show of authority. See *Horner* v. *Battyn*, Bull. N. P. 62 (K. B. 1738).

Early American courts adopted this mere-touch rule from England, just as they embraced other common law principles of search and seizure. See *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995). Courts continued to hold that an arrest required only the application of force—not control or custody—through the framing of the Fourteenth Amendment, which incorporated the protections of the Fourth Amendment against the States. Stated simply, the cases "abundantly shew that the slightest touch [was] an arrest in point of law." *Nicholl*, 2 Y. & J., at 404, 148 Eng. Rep., at 976. Indeed, it was not even required that the officer have, at the time of such an arrest, "the power of keeping the party so arrested under restraint." *Sandon* v. *Jervis*, El. Bl. & El. 935, 940, 120 Eng. Rep. 758, 760 (Q. B. 1858).

This case, of course, does not involve "laying hands," *Sheriff* v. *Godfrey*, 7 Mod. 288, 289, 87 Eng. Rep. 1247 (K. B. 1739), but instead a shooting. 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. The closest decision seems to be *Countess of Rutland's Case*, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605). In that case, serjeants-at-mace tracked down Isabel Holcroft, Countess of Rutland, to execute a writ for a judgment of debt. They "shewed her their mace, and touching her body with it, said to her, we arrest you, madam." The case is best understood as an example of an arrest made by touching with an object. The arrest could be viewed as a submission to a show of authority because a mace served not only as a

weapon but also as an insignia of office. But that view is difficult to reconcile with the fact that English courts did not recognize arrest by submission to a show of authority until the following century.

While firearms have existed for a millennium and were certainly familiar at the founding, we have observed that law enforcement did not carry handguns until the latter half of the 19th century, at which point "it became possible to use deadly force from a distance as a means of apprehension." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). So it should come as no surprise that neither we nor the dissent has located a common law case in which an officer used a gun to apprehend a suspect. As noted, our precedent protects "that degree of privacy against government that existed when the Fourth Amendment was adopted," *Kyllo v. United States*, 533 U.S. 27, 34 (2001)—a protection that extends to "subtler and more far-reaching means of invading privacy" adopted only later, *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). There is nothing subtle about a bullet, but the 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. We do not accept the dissent's invitation to opine on matters not presented here—pepper spray, flash-bang grenades, lasers, and more.

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." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). 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." *Hodari D.*, 499 U.S., at 625. 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.

Applying these principles to the facts viewed in the light most favorable to Torres, the officers' shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her. The officers would introduce a single test for all types of seizures: intentional acquisition of control. This rule is inconsistent with the history of the Fourth Amendment and our cases. The common law did not define the arrest of a debtor any differently from the arrest of a felon. Whether the arrest was authorized by a criminal indictment or a civil

writ, "there must be a corporal seizing, or touching the defendant's person; or, what is tantamount, a power of taking immediate possession of the body, and the party's submission thereto, and a declaration of the officer that he makes an arrest." 1 J. Backus, A Digest of Laws Relating to the Offices and Duties of Sheriff, Coroner and Constable 115–116 (1812). Treatises on the law governing criminal arrests cited *Genner* v. *Sparks*, 6 Mod. 173, 87 Eng. Rep. 928—the preeminent mere-touch case involving a debtor—for the proposition that, "in making the arrest, the constable or party making it should actually seize or touch the offender's body, or otherwise restrain his liberty." 1 R. BURN, THE JUSTICE OF THE PEACE 275 (28th ed. 1837). This uniform definition also explains why an arrest by mere touch carried legal consequences in both the criminal and civil contexts. The tort of false imprisonment is the "closest analogy' to an arrest without probable cause reinforces the conclusion that the common law considered touching to be a seizure. The mere-touch rule was particularly well documented in cases involving the execution of civil process. An officer pursuing a debtor could not forcibly enter the debtor's home unless the debtor had escaped arrest, such as by fleeing after being touched. Officers seeking to execute criminal process, on the other hand, possessed greater pre-arrest authority to enter a felon's home.

The officers and the dissent derive from our cases a different touchstone for the seizure of a person: "an intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). Under their alternative rule, the use of force becomes a seizure "only when there is a governmental termination of freedom of movement through means intentionally applied." *Id.*, at 597.

This approach improperly erases the distinction between seizures by *control* and seizures by *force*. In all fairness, we too have not always been attentive to this distinction when a case did not implicate the issue. See, *e.g.*, *Brendlin v. California*, 551 U.S. 249, 254 (2007). But each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule. See *Hodari D.*, 499 U.S., at 624.

Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. A prime example of the latter comes from *Brower*, where the police seized a driver when he crashed into their roadblock. 489 U.S., at 598. Under the common law rules of arrest, actual control is a necessary element for this type of seizure. Such a seizure requires that "a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Brower*, 489 U.S., at 599. But that requirement of control or submission never extended to seizures by force. Any such requirement of control would be difficult to apply in cases involving the application of force. At the most basic level, it will often be unclear when an officer succeeds in gaining control over a struggling suspect. Courts will puzzle over whether an officer exercises control when he grabs a suspect, when he tackles him, or only when he slaps on the cuffs. Neither the officers nor the dissent explains how long the control must be maintained—only for a moment, into the squad car, or all the way to the station house. To cite another example, counsel for the officers speculated that the shooting would have been a seizure if Torres stopped "maybe 50 feet" or "half a block" from the scene of the shooting to allow the officers to promptly acquire control. None of this squares with our recognition that "a seizure is a single act, and not a continuous fact." *Hodari D.*, 499 U.S., at 625. For centuries, the common law rule has avoided such line-drawing problems by clearly fixing the moment of the seizure.

The dissent argues that we advance a "schizophrenic reading of the word 'seizure.' " But

our cases demonstrate the unremarkable proposition that the nature of a seizure can depend on the nature of the object being seized. It is not surprising that the concept of constructive detention or the mere-touch rule developed in the context of seizures of a person—capable of fleeing and with an interest in doing so—rather than seizures of "houses, papers, and effects."

The dissent also criticizes us for "positing penumbras" of "privacy" and "personal security" in our analysis of the Fourth Amendment. But the *text* of the Fourth Amendment expressly guarantees the "right of the people to be *secure* in their *persons*," and our earliest precedents recognized privacy as the "essence" of the Amendment—not some penumbral emanation. *Boyd*, 116 U.S., at 6304. We have relied on that understanding in construing the meaning of the Amendment. See, *e.g.*, *Riley v. California*, 573 U.S. 373, 403 (2014).

We hold that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. The Fourth Amendment does not forbid all or even most seizures—only unreasonable ones. All we decide today is that the officers seized Torres by shooting her with intent to restrain her movement. We leave open on remand any questions regarding the reasonableness of the seizure, the damages caused by the seizure, and the officers' entitlement to qualified immunity.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, dissenting.

A mere touch may be a battery. It may even be part of an attempted seizure. But the Fourth Amendment's text, its history, and our precedent all confirm that "seizing" something doesn't mean touching it; it means taking possession. Countless contemporary dictionaries define a "seizure" or the act of "seizing" in terms of possession. 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. Blackstone defined "an arrest" in the criminal context as "the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime." 4 COMMENTARIES ON THE LAWS OF ENGLAND 286 (1769). Hale and Hawkins both equated an "arrest" with "apprehending," "taking," and "detaining" a person. *See* 1 M. HALE, PLEAS OF THE CROWN 89, 93–94 (5th ed. 1716); 2 W. HAWKINS, PLEAS OF THE CROWN 74 (3d ed. 1739). And Hawkins stated that an arrest required the officer to "actually have" the suspect "in his Custody." *Id.*, at 129.

On p. 448, before Hypo 3, insert the following new Food for Thought:

Food for Thought

The police receive a 911 call from someone at the Rehab Bar around 3:00 a.m. who states that about 30 people are involved in a fight, that someone appears to have a gun, and that one person has been knocked out and is lying on the ground. An officer goes to the scene and is told that a black man wearing red pants and a black shirt has a gun, and that he just left the bar walking eastbound. The officers radio information about the man to the dispatcher. Shortly thereafter, another officer sees a black man in red pants and a black shirt walking eastbound. The officer stops

the man, frisks him, and finds a gun (which he was not allowed to have because he was a convicted felon). Did the officer act properly in stopping the man? Was it permissible for him to frisk the man? *See United States v. Mitchell*, 963 F.3d 385 (4th Cir. 2020).

On p. 449, before Hypo 5, insert the following new Food for Thought:

Food for Thought

The police receive a tip that a man is involved in selling heroin and cocaine, and that confirms his description (a light-skinned, heavyset, black male with a full beard), and the man's license plate number. The police investigate the license plate number and find that it belongs to a man named Drakeford. Several months later, the police see Drakeford meet with two men. The three exchange brief handshakes and begin talking. After a few minutes, they shake hands again, but for a longer time. Do the police have sufficient evidence of a drug transaction (during the longer handshake) to stop the individuals? Do they also have the basis for a frisk? *See United States v. Drakeford*, 992 F.3d 255 (4th Cir. 2021).

On p. 449, after Hypo 5, insert the following:

Food for Thought

Immigration and Customs Enforcement personnel went to a house looking for a 24 year-old named Juan Ramiro who was believed to be in the U.S. illegally.As they approached the house, they saw Mitra-Hernandez exited the house. Mitra-Hernandez was 38 years old, but the same height as Ramiro. Mitra-Hernandez produced a Mexican immigration card, indicating that he was not Ramiro. Rather than end the encounter at that point, the officials asked Mitra-Hernandez questions about his immigration status, and learned that he was in the US illegally. He was arrested. Did the officials improperly extend the stop by asking Mitra-Hernandez questions about his immigration status? *See United States v. Mitra-Hernandez*, 2022 WL 205419 (3rd Cir.).

On p. 450, before Hypo 6, insert the following new Food for Thought:

Food for Thought

Around 1:00 a.m., a police officer stops a driver for a traffic infraction (illegal fog lamps). When the driver cannot produce proof of insurance, the officer checks the state's electronic system. While the officer does so, he asked the driver to sit in his car and the officer asked him questions. At some point, the officer asks the driver whether he has been to Mexico. When the driver answers "yes," the officer becomes suspicious that the driver might be transporting illegal drugs. As a result, the officer decides to check a data base and learns information about the driver's criminal history and his crossings to and from Mexico in recent days. The process takes approximately 17 minutes from the start of the stop until the officer checks the data base, and another 15 minutes for the check. Was the stop excessively long? *See United States v. Morales*, 961 F.3d 1086 (10th Cir. 2020).

On p. 463, following the Hypo, insert the following:

Food for Thought

Suppose that, unlike the *Rodriguez* case, a driver is stopped because the police have reason to believe that he was involved in drug trafficking as well as for a traffic violation (there was no light illuminating the license plate). Prior to the stop, the officer was aware that the state Division of Criminal Investigation was investigating the driver for illegal drug activity, and that he had recently visited someone known to be involved in narcotics trafficking. Once the drivwer puller over, the officer summoned a drug sniffing dog, and then spent 16 minutes issuing a citation to the driver for the missing light. After the officer issued the citation, it took another six minutes for the drug sniffing dog to arrive. As a result, the stop consumed a total of 22 minutes. Was the delay unreasonable under the circumstances? *See United States v. Rederick*, 65 F.4th 961 (8th Cir. 2023).

On p. 471, following Hypo 2, insert the following new Food for Thought:

Food for Thought

At 2:00 a.m., a man was driving when his check engine light came on. The man pulls off the road and opens his head to check for problems. Suspecting that the car was disabled, a police officer pulls over to offer help. The driver walked over to greet the police officer. At that point, the police officer demanded that the driver produce identification. When the driver refused to do so, the officer arrested him. The officers claimed that catalytic converters had been stolen in the area, and the officers feared that the man might be involved? Did the officer have the right to demand identification from the driver? *See Wingate v. Fulford*, 987 F.3d 299 (4th Cir. 2021).

On p. 473, before Hypo 6, insert the following new Food for Thought:

Food for Thought

At 2:30 a.m., a police officer stops a motorcycle for speeding. As the officer approaches the cyclist, he sees the driver pass a cigarette pack to his female passenger. She hides it between her legs. Given that both the cyclist and his passenger are wearing "OMC" (Outcast Motor Club) jackets, a group that has been in trouble in the past, the officer demands to see the cigarette pack. When the officer looks inside, he finds illegal narcotics. Was it permissible for the officer to demand that the driver hand over the cigarette pack, as well as for the officer to look inside the pack? *See United States v. Williams*, 2021 WL 1174560 (11th Cir.).

On p. 478, before Points for Discussion B, add the following new Food for Thought:

Food for Thought

Police are on patrol when they see a man running away from them holding his waistband.

The man ignores police commands to "stop" and runs into a house. A few minutes later, they apprehend the man (he climbed out a rear window of the house). The police enter the house in an effort to determine whether there is anyone inside who poses a threat to them or needs help. Was it appropriate for the police to enter the home under these circumstances? *See United States v. Garcia*, 974 F.3d 1071 (9th Cir. 2020).

On p. 481, insert a new Hypo 3, and renumber the remaining hypos:

Hypo 3: *The Scope of a Protective Sweep*

The police, who had a warrant to arrest Cooper on firearms and narcotics charges, went to his home. When Cooper's girlfriend admitted the police to the home, they conducted a protective sweep. As an officer enters Cooper's bedroom, he does not find anyone, but does see a lump in the mattress. Is it permissible for the officer to investigate the lump? *See United States v. Cooper*, 24 F.4th 1086 (6th Cir. 2022).

On p. 481, before Hypo 3, insert the following new Food for Thought:

Food for Thought

The police develop probable cause to believe that a man (Mora) has been smuggling illegal aliens into the U.S. The police go to Mora's house and find only his son. They ask the son for permission to search the home, but the son refuses the request. Fearing that there may be other people in the home, and that those other people might present a danger to the police, the officers conduct a protective sweep of the interior of the house. Is a protective sweep permissible under such circumstances? *See United States v. Mora*, 989 F.3d 794 (10th Cir. 2021).

On p. 473, before Hypo 6, insert the following new Food for Thought:

Food for Thought

At 2:30 a.m., a police officer stops a motorcycle for speeding. As the officer approaches the cyclist, he sees the driver pass a cigarette pack to his female passenger. She hides it between her legs. Given that both the cyclist and his passenger are wearing "OMC" (Outcast Motor Club) jackets, a group that has been in trouble in the past, the officer demands to see the cigarette pack. When the officer looks inside, he finds illegal narcotics. Was it permissible for the officer to demand that the driver hand over the cigarette pack, as well as for the officer to look inside the pack? *See United States v. Williams*, 2021 WL 1174560 (11th Cir.).

On p. 490, before Hypo 2, add the following Food for Thought:

Food for Thought

Suppose that a police officer believes that a murder suspect is riding in a vehicle, may the

officer stop the vehicle? What type of proof (that the suspect is in the vehicle) is required? Can the officer act based on a hunch (he knows that the driver is friends with the suspect and believes that the suspect ***might*** be in the vehicle)? Suppose that the police have no information placing the suspect in the vehicle at that time, but they have information suggesting that the suspect has been in the vehicle a couple of times over the prior two months, and that the driver had gone to two locations with connections to the suspect in the last month. Is that sufficient? *See United States v. Williams*, 843 Fed. Appx. 111 (10th Cir. 2021).

On p. 490, insert a new Hypo 4 and then renumber the remaining hypos:

Hypo 4: ***Air Freshners and Stops***

A city ordinance prohibits a car from containing objects that obstruct a driver's clear view through the front windshield. When an officer spots an air freshener (as well as a small black box) hanging from a driver's rearview mirror, the officer stops the driver and issues a citation for violation of the ordinance. The freshener was 4.7" x 2.75" and the officer believed that the freshener was "shaking" at the car moved. Is it permissible for a police officer to stop a vehicle under these circumstances? *See United States v. Jackson*, 962 F.3d 353 (7th Cir. 2020).

On p. 490, insert new Hypos 8 & 9 at the end of the hypos:

Hypo 8: ***Leaning into a Vehicle***

A police officer, who sees a vehicle without a license plate, approaches the vehicle to investigate. The driver tells the officer that he just bought the vehicle, and offers to show the officer the purchase documents. While the driver reaches for the papers, the officer sticks his head inside the vehicle and sees contraband. Was it permissible for the officer to stick his head inside the vehicle? *See United States v. Ngumezi*, 980 F.3d 1285 (9th Cir. 2020).

Hypo 9: Extended Stop

A police officer validly stops a driver for speeding. During the stop, he learns that the car is rented, but that the rental agreement has expired. While running background checks on the driver and his passenger, he learns that both have extensive criminal records, including drug and weapons crimes, and that they are suspects in a high intensity drug operation. The officer calls for backup as well as for a drug sniffing dog. They arrive some 18 to 37 minutes later. Was the length of the stop permissible? *See United States v. Garner*, 961 F.3d 264 (3rd Cir. 2020).

9. BORDER SEARCHES

On p. 504, in the Food for Thought, after the word "See" before the Cotterman cite, add the following:

Alasaad v. Mayorkas, 988 F.3d 8 (1st Cir. 2021);

11. EXIGENT CIRCUMSTANCES

On p. 526, before the case, insert the following new case:

Lange v. California

141 S.Ct. 2011 (2021}.

Justice Kagan delivered the opinion of the Court.

Petitioner Arthur Lange drove past a California highway patrol officer in Sonoma. Lange was listening to loud music with his windows down and honking his horn. The officer began to tail Lange, and soon turned on his overhead lights to signal that Lange should pull over. By that time, Lange was only about a hundred feet from his home. Rather than stop, Lange continued and entered his attached garage. The officer followed and began questioning him. Observing signs of intoxication, the officer put Lange through field sobriety tests. Lange did not do well, and a later blood test showed that his blood-alcohol content was more than three times the legal limit. The State charged Lange with the misdemeanor of driving under the influence of alcohol, plus a noise infraction. Lange moved to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The Superior Court denied Lange's motion, and the appellate division affirmed. The California Court of Appeal also affirmed. The California Supreme Court denied review.

II

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). That standard "generally requires the obtaining of a judicial warrant" before a law enforcement officer can enter a home without permission. *Riley* v. *California*, 573 U. S. 373, 382 (2014). But the "warrant requirement is subject to certain exceptions." *Brigham City*, 547 U. S., at 403. One exception is for exigent circumstances. It applies when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *King*, 563 U. S., at 460. The exception enables law enforcement officers to handle "emergencies"—situations presenting a "compelling need for official action and no time to secure a warrant." *Riley*, 573 U. S., at 402; *Missouri* v. *McNeely*, 569 U. S. 141, 149 (2013). This Court has identified several such exigencies. An officer may "enter a home without a warrant to render emergency assistance to an injured occupant to protect an occupant from imminent injury," or to ensure his own safety. *Brigham City*, 547 U. S., at 403. The police may make a warrantless entry to "prevent the imminent destruction of evidence" or to "prevent a suspect's escape." *Brigham City*, 547 U. S., at 403. In those circumstances, the delay required to obtain a warrant would bring about "real immediate and serious consequences"—and so the absence of a warrant is excused. *Welsh* v. *Wisconsin*, 466 U. S. 740, 751 (1984).

The exigent-circumstances exception "requires a court to examine whether an emergency justified a warrantless search." *Riley*, 573 U. S., at 402. Whether a "now or never situation"

actually exists—whether an officer has "no time to secure a warrant"—depends upon facts. The issue is most naturally considered by "looking to the totality of circumstances" confronting the officer. The question here is whether to use that approach, or instead apply a categorical warrant exception, when a suspected misdemeanant flees from police into his home. Under the usual view, an officer can follow the misdemeanant when, but only when, an exigency—for example, the need to prevent destruction of evidence—allows insufficient time to get a warrant. The appointed *amicus* asks us to replace that case-by-case assessment with a flat rule finding exigency in every case of misdemeanor pursuit. In her view, those "entries are categorically reasonable, regardless of whether" any risk of harm (like destruction of evidence) "materializes in a particular case." The fact of flight from the officer, she says, is itself enough to justify a warrantless entry.

The place to start is with the constitutional interest at stake: the sanctity of a person's living space. "When it comes to the Fourth Amendment, the home is first among equals." [*Florida* v. *Jardines*, 569 U. S. 1, 6 (2013)]. At the Amendment's "very core," "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Collins* v. *Virginia*, 584 U. S. ___ (2018). What lies behind that line is not inviolable. An officer may always enter a home with a proper warrant. And exigent circumstances allow even warrantless intrusions. But the contours of any warrant exception permitting home entry are "jealously and carefully drawn," in keeping with the "centuries-old principle" that the "home is entitled to special protection." *Georgia* v. *Randolph*, 547 U. S. 103, 109 (2006). We are not eager to print a new permission slip for entering the home without a warrant.

In [*United States* v. *Santana*, 427 U. S. 38 (1976)], police officers drove to Santana's house with probable cause to think that Santana was dealing drugs, a felony. When the officers pulled up, they saw Santana standing in her home's open doorway, some 15 feet away. As they got out of the van and yelled "police," Santana "retreated into the house's vestibule." The officers followed and discovered heroin. We upheld the warrantless entry as one involving "hot pursuit" even though the chase "ended almost as soon as it began." Citing "a realistic expectation that any delay would result in destruction of evidence," we recognized the officers' "need to act quickly." But we framed our holding in broader terms: Santana's "act of retreating into her house" could "not defeat an arrest" that had "been set in motion in a public place." Assuming *Santana* treated fleeing-felon cases categorically (as *always* presenting exigent circumstances allowing warrantless entry), it still said nothing about fleeing misdemeanants.

Misdemeanors vary widely, but may be "minor." [*Welsh*, 466 U. S., at 750]. Misdemeanors run the gamut of seriousness. Some involve violence. California classifies as misdemeanors various forms of assault. And across the country, "many perpetrators of domestic violence are charged with misdemeanors," despite "the harmfulness of their conduct." *Voisine* v. *United States*, 579 U. S. 686, ___ (2016). So a "felon" is not always "more dangerous than a misdemeanant." [*Tennessee* v. *Garner*, 471 U. S. 1, 14 (1985)]. But calling an offense a misdemeanor usually limits prison time to one year. States thus tend to apply that label to less violent and less dangerous crimes. In California, it is a misdemeanor to litter on a public beach. And to "negligently cut" a plant "growing upon public land." And to "willfully disturb another person by loud and unreasonable noise." Most States count as misdemeanors such offenses as traffic violations, public intoxication, and disorderly conduct.

When a minor offense is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. In *Welsh*, officers responded to a call about a drunk

driver only to discover he had abandoned his vehicle and walked home. So no police pursuit was necessary. The officers went to the driver's house, entered without a warrant, and arrested him for a "nonjailable" offense. The State contended that exigent circumstances supported the entry because the driver's "blood-alcohol level might have dissipated while the police obtained a warrant." We rejected that argument. "The gravity of the underlying offense," we reasoned, is "an important factor to be considered when determining whether any exigency exists." When only a minor offense has been committed" (again, without any flight), there is reason to question whether a compelling law enforcement need is present; so it is "appropriate" to "hesitate in finding exigent circumstances." We concluded: "Application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense" is involved.

Add a suspect's flight and the calculus changes—but not enough to justify a categorical rule. In a great many cases flight creates a need for police to act swiftly. A suspect may flee because he is intent on discarding evidence. Or his flight may show a willingness to flee yet again, while the police await a warrant. But no evidence suggests that every case of misdemeanor flight poses such dangers. Recall that misdemeanors can target minor, non-violent conduct. When that is so, officers can probably take the time to get a warrant. At times that will be true even when a misdemeanant has forced the police to pursue him (especially given that "pursuit" may cover just a few feet of ground). Those suspected of minor offenses may flee for innocuous reasons and in non-threatening ways. Our Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from flight. That approach will in many 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 include the flight itself. But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.

The common law in place at the Constitution's founding leads to the same conclusion. The Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *United States* v. *Jones*, 565 U. S. 400, 411 (2012). But the common law did not recognize a categorical rule enabling entry in every case of misdemeanor pursuit. The common law afforded the home strong protection from government intrusion. To protect that interest, all "came to embrace" the "understanding" that generally "a warrant must issue" before a government official could enter a house. An officer could enter a house to pursue a felon. Many modern felonies were "classified as misdemeanors" at common law, with the felony label mostly reserved for crimes "punishable by death." So if a person suspected "upon probable grounds" of a felony "fly and take house," Sir Matthew Hale opined, "the constable may break open the door, tho he have no warrant." 2 PLEAS OF THE CROWN 91–92 (1736) (Hale).

Commentators did not always agree. But none suggested any kind of all-misdemeanor-flight rule. Instead, approval of entry turned on circumstances. Blackstone explained that "breaking open doors" was allowable not only "in case of a felony" but also in case of "a dangerous wounding whereby a felony is likely to ensue." In other words, the felony rule extended to crimes that would become felonies if the victims died. Another set of cases involved

crimes, mostly violent themselves, liable to provoke felonious acts. Often called "affrays" or "breaches of the peace," a typical example was "the fighting of two or more persons" to "the terror of his majesty's subjects." BLACKSTONE 145, 150. Hale also approved a warrantless entry to stop a more mundane form of harm: He thought a constable could act to "suppress the disorder" associated with "drinking or noise in a house at an unseasonable time of night." HALE 95. But when a suspected misdemeanant, fleeing or otherwise, threatened no harm, the constable had to get a warrant. The common law thus does not support a categorical rule allowing warrantless home entry when a misdemeanant flees. The common law made distinctions based on "the gravity of the underlying offense." Flight alone was not enough. Whether a constable could make a warrantless entry depended as well on other circumstances suggesting a potential for harm and a need to act promptly. In that way, the common-law rules mostly mirror our modern caselaw. The former demanded a law enforcement exigency before an officer could "break open" a fleeing misdemeanant's doors. BLACKSTONE 292.

III

The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances 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. Because the California Court of Appeal applied the categorical rule we reject today, we vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Kavanaugh, concurring.

Fleeing misdemeanants will almost always *also* involve a recognized exigent circumstance—such as a risk of escape, destruction of evidence, or harm to others—that will justify warrantless entry into a home. The approach adopted by the Court will still allow the police to make a warrantless entry into a home "nine times out of 10 or more" in cases involving pursuit of a fleeing misdemeanant. Importantly, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is an exigent circumstance justifying warrantless entry into a home.

Justice Thomas, with whom Justice Kavanaugh joins as to Part II, concurring in part and concurring in the judgment.

I

The majority sets out a general rule requiring a case-by-case inquiry when an officer enters a home without a warrant in pursuit of a person suspected of committing a misdemeanor. But history suggests several categorical exceptions to this rule. First, warrantless entry is categorically allowed when a person is arrested and escapes. Second, authorities at common law categorically allowed warrantless entry when in hot pursuit of a person who committed an affray. Third, those authorities allowed the same for what the majority calls certain "pre-felonies." Finally, some authorities appear to have allowed warrantless entry when in pursuit of a person who had breached the peace. *See*, *e.g.,* 2 M. HALE, PLEAS OF THE CROWN 95 (1736). What crimes amounted to

"breach of peace" for purposes of warrantless entry is not clear. The term sometimes was used to refer to violence, but the majority recognizes historical support for a broader definition. Cases decided before and after the Fourteenth Amendment was ratified used the term "breach of peace" in a broad sense. *E.g., State* v. *Lafferty*, 5 Del. 491 (1854) ("blowing a trumpet at night through the streets"). I join the majority on the understanding that its case-by-case rule does not foreclose historical, categorical exceptions.

II

Even if the state courts on remand conclude that the officer's entry was unlawful, the exclusionary rule does not require suppressing any evidence. "The exclusionary rule is not an individual right." *Herring* v. *United States*, 555 U. S. 135, 141 (2009). It is a " 'prudential' doctrine created by this Court," *Davis* v. *United States*, 564 U. S. 229, 236 (2011), and there is a "high obstacle for those urging application of the rule," *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 364 (1998). The rule "does not apply when the costs of exclusion outweigh its deterrent benefits." *Strieff*, 579 U.S., at 235. Cases of fleeing suspects involve more than enough added costs to render the exclusionary rule inapplicable. First, the exclusionary rule does not apply when it would encourage bad conduct by criminal defendants. Here, exclusion would encourage suspects to flee. Second, criminal defendants cannot use the exclusionary rule as "a shield against" their own bad conduct. *Walder* v. *United States*, 347 U. S. 62 (1954). In most States, fleeing from police after a lawful order to stop is a crime. The evidence that petitioner seeks to exclude would have been discovered had he complied with the officer's order to stop.

Chief Justice Roberts, with whom Justice Alito joins, concurring in the judgment.

Hot pursuit is itself an exigent circumstance. We have never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would be a misdemeanor or felony. It is the flight, not the underlying offense, that has always been understood to justify the general rule.

Flight is a direct attempt to evade arrest and thereby frustrate our "society's interest in having its laws obeyed." Flight always involves the "paramount" government interest in public safety. *Scott* v. *Harris*, 550 U. S. 372 (2007). A fleeing suspect "intentionally places himself and the public in danger." *Scott*, 550 U. S., at 384. Vehicular pursuits are often catastrophic. Affording suspects the opportunity to evade arrest by winning the race rewards flight and encourages dangerous behavior. And hot pursuit gives rise to multiple other exigencies, such as destruction of evidence, violence, and escape. The act of pursuing a fleeing suspect makes simultaneously assessing which other exigencies might arise especially difficult to ascertain "on the spur of the moment." *Atwater*, 532 U. S., at 347. Whether at night or during the day, the officer is obviously vulnerable to those inside the home while awaiting a warrant, including from a suspect who has already demonstrated himself to be undeterred by police orders. Even if the area remains tranquil, the suspect inside is free to destroy evidence or continue his escape, and can dash out the back door. Even the quickest warrant will be too late. All of these factors make it possible that the officer will *never* be able to identify the suspect if he cannot continue the pursuit. Against these government interests we balance the suspect's privacy interest. Just as arrestees have "reduced privacy interests," so too do those who evade arrest by leading the police on car chases into their garages. The officer must in all events effect a reasonable entry. And his authority to search is

circumscribed to "those spaces where a person may be found" for "no longer than it takes to complete the arrest and depart the premises." *Maryland* v. *Buie*, 494 U. S. 325, 335 (1990). Finally, arrests conducted "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests" are subject to even more stringent review. *Whren* v. *United States*, 517 U. S. 806, 818 (1996).

We have rejected as "untenable" the "assumption that a 'felon' is more dangerous than a misdemeanant." *Tennessee* v. *Garner*, 471 U. S. 1, 14 (1985). "Numerous misdemeanors involve conduct more dangerous than many felonies." *Ibid.* At any rate, the fact that a suspect flees when suspected of a minor offense could well be indicative of a larger danger, given that he has voluntarily exposed himself to much higher criminal penalties in exchange for the prospect of escaping or delaying arrest. The Court permits constitutional protections to vary based on how each State has chosen to classify a given offense. For example, "human trafficking" can be a misdemeanor in Maryland, and in Pennsylvania so can involuntary manslaughter. Vehicular flight is a felony in several States. For these reasons, we have not crafted constitutional rules based on the distinction between modern day misdemeanors and felonies. In *Atwater*, we held that the general probable-cause rule for warrantless arrests applied to "even a very minor criminal offense," "without the need to balance the interests and circumstances. We could not expect every police officer to automatically recall "the details of frequently complex penalty schemes," and concluded that distinguishing between "permissible and impermissible arrests for minor crimes" was a "very unsatisfactory line to require police officers to draw on a moment's notice."

The Court lists several "exigencies above and beyond the flight itself " that would permit home entry, notably when "the fleeing misdemeanant" will "escape from the home." When a suspect flees into a dwelling there typically will be another way out, such as a back door or fire escape. Under the Court's rule warrantless entry into a home in hot pursuit of a fleeing misdemeanant would presumably be permissible, as long as the officer reasonably believed the home had another exit. Is that correct? Police in the field deserve to know.

The common law history is not nearly as clear as the Court suggests. Common law authorities describe with approval warrantless home entry in pursuit of those who had committed an affray (public fighting), 1 W. HAWKINS, PLEAS OF THE CROWN 137 (1716), and "disorderly drinking," W. SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND THE PARISH OFFICER 26 (1761). And the doctrine of "hue and cry" permitted townspeople to pursue those suspected of "misdemeanors" if the perpetrator "escaped into his house." R. BEVILL, LAW OF HOMICIDE 162 (1799). Finally, an officer could "break open Doors, in order to apprehend Offenders" whenever a person was arrested for "*any Cause*," and thereafter escaped. 2 HAWKINS, PLEAS OF THE CROWN, at 86–87 (1787). And the common law did not differentiate among escapees based on the perceived magnitude of their underlying offense. The list of offenses that historically justified warrantless home entry in hot pursuit of a fleeing suspect were as broad and varied as those found in a contemporary compilation of misdemeanors.

Even if the common law practice surrounding hot pursuit were unassailably clear, the common law did not recognize the remedy Lange seeks: exclusion of evidence in a criminal case. We have no guidance from history as to how our doctrines surrounding the exclusionary rule, such as inevitable discovery, would map onto situations in which a person attempts to thwart a public arrest by retreating to a private place.

On p. 529, before the Points for Discussion, add the following new case:

Caniglia v. Strom

141 S.Ct. 1596 (2021).

Justice THOMAS delivered the opinion of the Court.

During an argument with his wife at their Rhode Island home, Edward Caniglia (petitioner) retrieved a handgun from the bedroom, put it on the dining room table, and asked his wife to "shoot him now and get it over with." She declined, and instead left to spend the night at a hotel. The next morning, when petitioner's wife discovered that she could not reach him by telephone, she called the police (respondents) to request a welfare check. Respondents accompanied petitioner's wife to the home, where they encountered petitioner on the porch. Petitioner spoke with respondents and confirmed his wife's account, but denied that he was suicidal. Respondents, however, thought that petitioner posed a risk to himself or others. They called an ambulance, and petitioner agreed to go to the hospital for a psychiatric evaluation—but only after respondents promised not to confiscate his firearms. Once the ambulance had taken petitioner away, however, respondents seized the weapons.

Petitioner sued, claiming that respondents violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The District Court granted summary judgment to respondents, and the First Circuit affirmed solely on the ground that the decision to remove petitioner and his firearms from the premises fell within a "community caretaking exception" to the warrant requirement. We granted certiorari.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "very core" of this guarantee is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions "on private property," —only "unreasonable" ones. We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps most familiar are searches and seizures pursuant to a valid warrant. We have also held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Kentucky v. King*, 563 U.S. 452, 460 (2011). And, of course, officers may generally take actions that "any private citizen might do" without fear of liability.

Cady v. Dombrowski, 413 U.S. 433 (1973), involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home—"'a constitutional difference" that the opinion repeatedly stressed. What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly "declined to expand the scope of ... exceptions to the warrant requirement to permit warrantless entry into the home." We thus vacate the judgment below and remand for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice BREYER joins, concurring.

Fifteen years ago, this Court unanimously recognized that "the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006). A warrant to enter a home is not required when there is a "need to assist persons who are seriously injured or threatened with such injury." Nothing in today's opinion is to the contrary.

Justice ALITO, concurring.

There is no special Fourth Amendment rule for a broad category of cases involving "community caretaking." While 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. Those rules may or may not be appropriate for use in various non-criminal-law-enforcement contexts. We do not decide that issue today. Many elderly persons, live alone. Many elderly men and women fall in their homes, or become incapacitated for other reasons, and unfortunately, there are many cases in which such persons cannot call for assistance. In those cases, the chances for a good recovery may fade with each passing hour. Our current precedents do not address situations like this. We have held that the police may enter a home without a warrant when there are "exigent circumstances." But circumstances are exigent only when there is not enough time to get a warrant, and warrants are not typically granted for the purpose of checking on a person's medical condition. Perhaps States should institute procedures for the issuance of such warrants, but in the meantime, courts may be required to grapple with the basic Fourth Amendment question of reasonableness. Searches and seizures conducted for other non-law-enforcement purposes may arise and may present their own Fourth Amendment issues. Today's decision does not settle those questions.

Justice KAVANAUGH, concurring.

The Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid. Police officers may enter a home without a warrant in circumstances where they are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury. Drawing on common-law analogies and a commonsense appraisal of what is "reasonable," the Court has recognized various situations where a warrant is not required. For example, the exigent circumstances doctrine allows officers to enter a home without a warrant in certain situations, including: to fight a fire and investigate its cause; to prevent the imminent destruction of evidence; to engage in hot pursuit of a fleeing felon or prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury.

The Court's Fourth Amendment case law already recognizes the exigent circumstances doctrine, which allows an officer to enter a home without a warrant if the "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City*, 547 U.S. at 403. Consistent with that reality, the Court's exigency precedents permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now. See, *e.g.*, *Sheehan*, 575 U.S. at 612; *Michigan v. Fisher*, 558 U.S. at 48;

Brigham City, 547 U.S. at 406. The officers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter.

On p. 531, at the bottom of the page, insert the following:

Food for Thought

The police, responding to a domestic call from a home, see an 11-year-old girl frantically waving at them from an upstairs window. Seeing the police, a woman emerges from the house and tells the police that everything is fine. However, the womanis visibly upset, and has bruises on her face and neck. The woman would not allow the police to enter the home. However, when she opened the door to reenter the home, the police could hear a baby crying. Under such circumstances, are there exigent circumstances which would allow the police to enter the home without a warrant? *See United States v. Sanders*, 4 F.4th 672 (8th Cir. 2021).

Chapter 5

Entrapment

On p. 581, at the end of Hypo 4, add the following new Food for Thought:

Food for Thought

Sieg, a police officer with the child exploitation unit of Homeland Security, posts a fictitious profile on Grindr – a social media network primarily aimed at gay men. When a man responds to the profile, Sieg asks whether the man likes “really young boys” and states that he has an 11-year old boyfriend. The man replies in the affirmative and they agree to meet in a parking lot so that the man can have sex with the fictitious boyfriend. When the man is arrested, he claims entrapment. Under the circumstances, is the man entitled to an entrapment instruction? If the instruction is given, is he likely to prevail? *See United States v. Perez-Rodriguez*, 13 F.4th 1 (1st Cir. 2021).

Chapter 6

Police Interrogations & Confessions

B. The Fifth Amendment and *Miranda*

On p. 625, at the end of Points for Discussion a., insert the following:

Likewise, in *Vega v. Tekoh*, 142 S.Ct. 2095 (2022), the Court held that, "because a violation of *Miranda* is not itself a violation of the Fifth Amendment, . . . we see no justification for expanding *Miranda* to confer a right to sue under § 1983.

On p. 631, add the following new Food for Thought before Hypo 1:

Food for Thought

A police officer concludes that a suspect is involved in "suspicious behavior" on a "dark street" in the middle of the night, and decides to approach him for questioning. Given the circumstances, the officer decides to handcuff the man for the purposes of "officer safety." Is the man in custody for *Miranda* purposes? Is this interrogation equivalent to a station house interrogation? Should it matter that the interrogation takes place in front of the suspect's home, and the officer is not accusatory or threatening? *See United States v. Coulter* , --- F.4th ----, 2022 WL 2801185 (5th Cir. 2022) .

3. ADEQUATE WARNINGS

On p. 653, before Hypo 2, add the following new Food for Thought:

Food for Thought

Khweis, a suspected terrorist, is captured by troops in Iraq and accused of providing aid to the Islamic State of Iraq. An FBI agent visits Khweis at the detention center and conducts 11 different interviews, all without *Miranda* warnings. Ten days after the last interview, other FBI agents begin preparing charges against Khweis. The new agents are "walled off" from the prior interviews, and Khweis is told that the prior interviews were undertaken "solely for intelligence purposes," and that the whole process is starting anew. The new agents read Khweis his *Miranda* rights, which he waives, and then Khweis makes incriminating statements. Are the incriminating statements made at the later interview be admissible? *See United States v. Khweis*, 971 F.3d 453 (4th Cir. 2020).

On p. 678, after the FYI box, insert the following:

Food for Thought

Defendant, who was under investigation for distributing and possessing fetanyl resulting in death. After being given a *Miranda* warning, defendant was willing to talk about hiw supplier, and the scourge of drug use, but refused to talk about his friend who died of a drug overdose. The police respected that decision. However, after talking to the police for about 20 minutes, defendant started (unprompted) talking about the friend who died, and he made incriminating statements (claiming that he tried the fetanyl himself before giving some to the friend). Did the police violate defendant's fifth or sixth amendment rights? *See United States v. Rought*, 11 F.4th 178 (3rd Cir. 2021).

On p. 690, before the Points for Discussion, add the following:

Food for Thought

Defendant was incarcerated on drug and gun charges, and his cellmate elicited information from him regarding his trial strategy. In particular, although defendant admitted that he owned the guns in question, and had shot another drug dealer who encroached on his territory, defendant told the cellmate that he planned to claim that he was at his girlfriend's house at the time of the shooting. At the time of the shooting, the cellmate was not working with the police. Afterwards, he went to the prosecution and explained that defendant planned to lie on the stand. The cellmate testified to these facts at defendant's trial. Did the government violate defendant's right to counsel by using the cellmate's elicited testimony? *See United States v. Chandler*, 56 F.4th 27 (2nd Cir. 2022).

E. POST-*MIRANDA* DUE PROCESS LAW

On p. 705, before Hypo 4, add the following FYI box:

FYI

In *Lentz v. Kennedy*, 967 F.3d 675 (7th Cir. 2020), a woman is being interrogated on suspicion of murdering her father. Her daughter is present at the interrogation. When the woman expresses concern about her daughter, a detective tells her: "I can't tell you what's going to happen with your daughter until you tell me what happened with your dad." The woman's subsequent incriminating statements were held to be admissible because she had already confessed to the murder after having been given a *Miranda* warning.

On p. 705, Hypo 4, before the period at the end of A), add the following:

but see United States v. Young, 964 F.3d 938 (10th Cir. 2020).

Chapter 8

The Exclusionary Rule

A. The Exclusionary Rules Application to Federal and State Proceedings

On p. 767, before the first Point for Discussion, insert the following FYI:

FYI

In the wake of the George Floyd murder, Congress and many state legislators are debating whether to remove or limit the qualified immunity that protects police officers. The legislation is designed to make it easier to sue police officers and make them more accountable.

On p. 767, after the first Point for Discussion, insert the following FYI:

FYI

In *Mancini v. City of Tacoma*, 479 P.3d 656 (Wash., en banc, 2021), the Washington Supreme Court upheld a $250,000 judgment for wrongfully searching a woman's apartment. The court concluded that the search was based on a negligent investigation. The police broke down the apartment door, entered with gun's drawn, and removed her in handcuffs in her nightgown to the front yard.

On p. 768, at the end of the FYI box, insert the following citation:

See also Egbert v. Boule, 142 S.Ct. 1793 (2022) ("Since it was decided, *Bivens* has had no shortage of detractors. Recently, we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution. ")

B. Modern Decisions Construing the Scope of the Exclusionary Rule

On p. 787, following the Food for Thought, add the following new FYI box:

FYI

In *United States v. Reed*, 993 F.3d 431 (6th Cir. 2021), the court applied the good faith exception to uphold a search. In *Reed*, police officers searched a home pursuant to a warrant. While the trial court concluded that it was reasonable to conclude that drug dealers hide drugs in their homes, the affidavits did not provide a sufficient link between the home and the drugs. The appellate court concluded that the police acted in good faith reliance on the warrant.

D. The Scope of the Exclusionary Rule

2. "Fruit of the Poisonous Tree" Doctrine

On p. 837, before the case, add the following new hypo:

Hypo: *A Substantial Break in Time*

A man is suspected of having pointed a laser at a police aircraft, temporarily blinding the pilot. The police determine that the laser beam came from the man's house, and go to interview him. The police handcuff the man, take him to his front porch, and interrogate him without giving him a *Miranda* warning. After he confesses, the police seize his laser. Eight months later, the police return to the man's house and tell him that they want to ask him more questions about the incident. Again, the officer does not read the man a *Miranda* warning, but this time the conversation is friendly. The man again admits his involvement in the incident. Does the lapse of eight months between the two interrogations overcome the absence of a *Miranda* warning at the first interrogation? *See United States v. Bocharnikov*, 966 F.3d 1000 (9th Cir. 2020).

On p. 844, before Hypo 1, add the following new Food for Thought:

Food for Thought

Police are on patrol when they see a man running away from them holding his waistband. The man ignored police commands to "stop" and ran into a house. A few minutes later, they apprehend the man (he had climbed out a rear window of the house). The police then entered the house in an effort to determine whether there was anyone inside who posed a threat to them, or needed help. Inside, they find Garcia, run a records check, and learn that he is subject to a supervised release condition authorizing suspicionless searches of his person and residence. At that point, the police conduct a search of his residence during which they discover illegal drugs. Under *Streiff*, should the evidence be admissible against Garcia? *See United States v. Garcia*, 974 F.3d 1071 (9th Cir. 2020).

On p. 844, insert a new Hypo 1 and renumber the remaining hypos:

Hypo 1: More on Attenuation

The police stop Forjan's vehicle without reasonable suspicion, and he searched the vehicle, believing that Forjan was involved in meth distribution. The search revealed illegal drugs. However, during the stop, the officer learned that Forjan's driver's license was expired, and the officer testified that he would have arrested Forjan, impounded his vehicle and searched it. Was the taint of the original illegal stop sufficiently attenuated? *See United States v. Forjan*, 66 F.4th 739 (8th Cir. 2023).

On p. 481, before the Point for Discussion, insert the following:

Hypo 3: ***The Scope of a Protective Sweep***

The police, who had a warrant to arrest Cooper on firearms and narcotics charges, went to his home. When Cooper's girlfriend admitted the police to the home, they conducted a protective sweep. Although they do not find anyone else in the house, they do find a mattress which has a suspicious lump. The police investigate, find a weapon, and charged Cooper as a felon in possession of a weapon. After the gun was discovered, Cooper's girlfriend gave the police permission to search the entire house. If the initial discovery of the gun was illegal (because it exceeded the scope of a protective sweep), does the inevitable discovery doctrine applied (on the theory that the police would have found the gun during their subsequent search of the home)? *See United States v. Cooper*, 24 F.4th 1086 (6th Cir. 2022).

Chapter 10

Initial Appearance & Pretrial Release

B. Pretrial Release

On p. 908, at the bottom of the page, next to the paragraph on "cash bond," insert the following new FYI box:

FYI

In *Daves v. Dallas County*, 984 F3d 381 (5th Cir. 2020), the court upheld a lower court order blocking Dallas County from detaining indigent arrestees who cannot afford to pay cash bail. The trial court judge noted "a clear showing of routine wealth-based detention." However, the decision was vacated. *Daves v. Dallas County*, 988 F.3d 834 (5th Cir., en banc, 2021)/

Chapter 12

Case Screening: Preliminary Hearings & Grand Juries

C. GRAND JURIES

On p. 974, before the Hypo, insert the following new FYI box:

FYI

In *State v. Vega-Larregui*, 248 A.3d 1124 (N.J. 2021), the court held that, during the pandemic, the state could hold virtual grand jury proceedings. The court rejected the argument that the grand jury did not contain a "fair cross-section" of the community because some potential jurors might have been excluded because of the lack of a computer or internet access. However, the court provided jurors with the equipment they needed, and even trained them. The court also rejected the argument that the proceedings were not secret, viewing that argument as "speculative." The court emphasized that the online proceedings were temporary until the pandemic subsided.

Chapter 15

Pre-Charge Delay and Speedy Trial

B. Delay in Bringing Defendant to Trial

On p. 1078, after "b. Reasons for the Delay," insert the following new Food for Thought:

Food for Thought

An Uzbek immigrant was charged with providing material support for the Islamic Jihad Union, but was held in detention and not brought to trial for 6.5 years. The government sought to justify the delay on the basis that defendant made broad discovery of the prosecution. In addition, the case involved 39,000 audio recordings in Russian, Ubek and Tajik which had to be translated and any release of the audio had to comply with the Classified Information Procedures Act. Is a 6.5 year delay excessive under the circumstances? *See United States v. Muhtorov*, 20 F.4th 558 (10th Cir. 2021).

On p. 1088, before Hypo 3, insert the following new Food for Thought:

Food for Thought

Defendant is indicted for murder, but it takes 21 months for the prosecution to bring him to trial. Defendant claims that his right to a speedy trial is infringed by the delay. Defendant's attorney did not initially object to the delay, and even agrees that the reason for the delay (to obtain a DNA analysis regarding a hat) involves a "crucial piece of evidence." Defendant eventually filed a *pro se* motion objecting to the delay, but he still was not brought to trial until a year later. During this time, the prosecutor repeatedly contacted the DNA lab for details. In addition, defendant was already in jail on state charges. When the DNA analysis came back, there was no link between defendant and the crime. Under the Barker factors, is dismissal for undue delay appropriate? *See Miles v. Jordan*, 988 F.3d 916 (6th Cir. 2021).

On p. 1089, following the Hypo, insert the following:

Food for Thought

Cooley was indicted by a grand jury in August, 2019, and an arrest warrant was entered into the National Crime Information Center (NCIC) system. Fourteen months later (October, 2020), the FBI realized that the warrant had been inadvertently removed from the system and reentered it. In March, 2021, officers arrested Cooley and scheduled his trial for July, 2021. After two continuances, which were sought by Cooley's co-defendants and to which Cooley did not object, the case was tried in December, 2021. Under the circumstances, did the prosecution violate Cooley's right to a speed y trial? *See United States v. Cooley*, 63 F.4th 1173 (8th Cir. 2023).

Chapter 16

Guilty Pleas

On p. 1104, at the bottom of the page, add the following new Food for Thought:

Food for Thought

Under Rule 11, defendants can withdraw a guilty plea prior to sentencing if they "can show a fair and just reason for requesting a withdrawal." In one case, the judge mistakenly stated that the mandatory minimum term of supervised release for the crime with which defendant was charged was five years when it was actually ten. Defendant was ultimately sentenced to fifteen years in prison and ten years of supervised release. Defendant seeks to withdraw his plea, claiming that he was misled by the judge's misstatement and therefore that his plea was not "knowing" and "intelligent." Under these circumstances, should defendant be allowed to withdraw his plea? What if the evidence suggests that the misstatement was not "material" in the sense that defendant would have entered into the plea agreement anyway? *See United States v. Freeman*, 17 F.4th 255 (2nd Cir. 2021).

Chapter 17

Jury Trials

B. Jury Size and Unanimity

On p. 1142, before the new section, add the following new Food for Thought:

Food for Thought

In *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), the Court held that jury verdicts must be unanimous, concluding that the non-unanimous rule was based on racial animus. In *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021), the Court held that *Ramos* should not be retroactively applied to those seeking collateral review of prior convictions based on non-unanimous verdicts. Did *Edwards* reach the correct decision? After all, if non-unanimous requirements were based on racial animus, shouldn't *Ramos'* unanimity requirement be applied retroactively?

On p. 1147, at the bottom of the page, insert the following new Point for Discussion:

Unvaccinated Jurors

In *United States v. Colon*, 64 F.4th 589 (4th Cir. 2023), the court held that a trial court judge could exclude jurors who were not vaccinated against Covid-19 without violating the fair cross-section guarantee. The trial took place during the height of the Delta variant of Covid-19 in 2021. The court concluded that the unvaccinated individuals posed a risk to other jurors and anyone else in the courtroom.

C. Selecting Prospective Jurors

2. Jury Selection Process

On p. 1149, at the end of the first paragraph, insert the following FYI box:

FYI

In 2021, Arizona became the first state to prohibit peremptory challenges. The Chief Justice of Arizona's Supreme Court described the action as follows: "Eliminating peremptory strikes of jurors will reduce the opportunity for misuse of the jury selection process and will improve jury participation and fairness."

D. THE NO IMPEACHMENT RULE

On p. 1194, at the end of the hypos, insert the following new hypo:

Hypo 4: *Opposition to Interracial Marriage*

Defendant, who was in an interracial marriage, was being tried for the murder of his wife. During *voir dire*, the court learned that a prospective juror does not support interracial marriage. Suppose that the juror indicates that he is able to set aside his bias and to decide the case based on the evidence presented during the trial. Would the judge commit error by deciding to seat the juror? *See Thomas v. Lumpkin*, 995 F.3d 432 (5th Cir. 2021).

Chapter 18

The Confrontation Clause

On p. 1199, insert the following new section and renumber the following sections:

B. The *Bruton* Rule

Samia v. United States

143S.Ct. 2004 (2023).

Justice Thomas delivered the opinion of the Court.

Prosecutors have long tried criminal defendants jointlywhere the defendants are alleged to have engaged in a common criminal scheme. When prosecutors seek to introduce a nontestifying defendant's confession implicating his codefendants, a constitutional concern may arise. The Confrontation Clause of the Sixth Amendment states that, "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." In *Bruton v. United States*, 391 U.S. 123 (1968), this Court "held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 201 (1987). We must determine whether the Confrontation Clause bars the admission of a nontestifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the nonconfessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant. Considering longstanding historical practice, the general presumption that jurors follow their instructions, and the relevant precedents, we conclude that it does not.

Petitioner Adam Samia traveled to the Philippines in 2012 to work for crime lord Paul LeRoux. While there, LeRoux tasked Samia, Joseph Hunter, and Carl Stillwell with killing Catherine Lee, a local real-estate broker who LeRoux believed had stolen money from him. Lee was found dead shortly thereafter, shot twice in the face at close range. Later, LeRoux was arrested by the U. S. Drug Enforcement Administration (DEA) and became a cooperating witness for the Government. Hunter, Samia, and Stillwell were arrested thereafter. During a search of Samia's home, law enforcement found a camera containing surveillance photographs of Lee's home as well as a key to the van in which Lee had been murdered. During Stillwell's arrest, law enforcement found a cell phone containing thumbnail images of Lee's dead body. During a postarrest interview with DEA agents, Stillwell waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and gave a confession. Stillwell admitted that he had been in the van when Lee was killed, but he claimed that he was only the driver and that Samia had shot Lee.

The Government charged all three men in a multicount indictment. Samia and Stillwell were charged with conspiracy to commit murder-for-hire, conspiracy to murder and kidnap in a foreign country, causing death with a firearm during and in relation to a crime of violence, and conspiracy to launder money. Hunter was charged with all but the money-laundering count. The Government tried all three men jointly in the Southern District of New York. While Hunter and Stillwell admitted that they had participated in the murder, Samia maintained his innocence. Prior to trial, the Government moved *in limine* to admit Stillwell's confession. But, because Stillwell would not testify and the full confession inculpated Samia, the Government proposed that an agent testify as to the content of Stillwell's confession in a way that eliminated Samia's name while avoiding any obvious indications of redaction. The District Court granted the Government's motion but required further alterations.

At trial, the Government's theory was that Hunter had hired Samia and Stillwell to pose as real-estate buyers and visit properties with Lee. The Government also sought to prove that Samia, Stillwell, and Lee were in a van that Stillwell was driving when Samia shot Lee. In accordance with the court's ruling on its motion *in limine*, the Government presented testimony about Stillwell's confession through DEA Agent Eric Stouch. Stouch recounted the key portion of Stillwell's confession implicating Samia as follows:"Q. Did Stillwell say where [the victim] was

when she was killed? A. Yes. He described when the *other person* he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving." Other portions of Stouch's testimony also used the "other person" descriptor to refer to someone with whom Stillwell had traveled and lived and who carried a particular firearm. During Stouch's testimony, the [court] instructed the jury that his testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. The [court] provided a similar limiting instruction before the jury began its deliberations. The jury convicted Samia and his codefendants on all counts, and the District Court denied Samia's post-trial motions. The District Court sentenced Samia to life plus 10 years' imprisonment.

Samia argued [on appeal] that the admission of Stillwell's confession—even as altered and with a limiting instruction—was constitutional error because other evidence and statements at trial enabled the jury to immediately infer that the "other person" described in the confession was Samia himself. During opening statements, the Government asserted that Stillwell drove the van while Samia "was in the passenger seat," and that Samia pulled a gun, "turned around, aimed carefully and shot Lee." He also pointed out that "Stillwell admitted to driving the car while the man he was with turned around and shot Lee." So, even though Samia's position in the van and shooting of Lee were relevant to the Government's theory of the case with or without Stillwell's confession, Samia argued that those statements would allow the jury to infer that he was the "other person" in Stillwell's confession. Samia pointed out that the Government had elicited testimony that Samia and Stillwell coordinated their travel to the Philippines and lived together there. Samia noted that there was testimony that he had the type of gun that was used to shoot Lee. In its closing argument, the Government argued that video evidence showing Hunter speaking about hiring two men to murder Lee was "admissible against all three defendants," allowing the jury to infer that Samia and Stillwell were co-conspirators. Finally, Samia argued that, while discussing Stillwell's confession, the prosecution had recounted how Stillwell "described a time when the other person he was with in the Philippines pulled the trigger on that woman in a van that Stillwell was driving." The Second Circuit rejected Samia's view, holding that the admission of Stillwell's confession did not violate Samia's Confrontation Clause rights. It pointed to the established practice of replacing a defendant's name with a neutral noun or pronoun in a nontestifying codefendant's confession. The Second Circuit also noted that its considered the altered confession separate from the other evidence that had been introduced at trial. We granted certiorari to determine whether the admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's rights under the Confrontation Clause.

The Sixth Amendment's Confrontation Clause guarantees the right of a criminal defendant "to be confronted with the witnesses against him." This Clause forbids the introduction of out-of-court "testimonial" statements unless the witness is unavailable and the defendant has had the chance to cross-examine the witness previously. See *Crawford v. Washington*, 541 U.S. 36 (2004). Because Stillwell's formal, *Mirandized* confession which the Government sought to introduce, is testimonial, it falls within the Clause's ambit. Nonetheless, the Confrontation Clause applies only to witnesses "against the accused." *Crawford*, 541 U.S., at 50. "Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, 481 U.S., at 206. This rule is consistent with the text of the Clause, historical practice, and the law's reliance on limiting instructions in other contexts.

For most of our Nation's history, longstanding practice allowed a nontestifying codefendant's confession to be admitted in a joint trial so long as the jury was properly instructed not to consider it against the nonconfessing defendant. While some courts would omit the defendant's name or substitute a reference to "another person," it is unclear whether any courts considered such alterations to be necessary. In any event, the combination of such alterations and an appropriate limiting instruction was generally sufficient to permit the introduction of such confessions. One early treatise explained that, when "some part of a confession concerns other prisoners who are tried on the same indictment," "all that can be done is to direct the jury not to take into their consideration such parts as affect the other prisoners." S. PHILLIPPS, LAW OF EVIDENCE 82 (1816). In English practice, where confessions were not admissible against third persons, "the names of such persons were by most judges ordered to be omitted," but "by other judges the names were ordered read and the jury instructed not to use the confession against them." 3 J. WIGMORE, EVIDENCE § 2100, p. 2841 (1904). "In the United States, the latter practice was favored." *Id*., n. 5.

Considerable authority supports this approach. In *Sparf v. United States*, 156 U.S. 51, 58 (1895), the Court held that, because codefendant declarations "were not, in any view of the case, competent evidence against" another defendant, the trial court should have admitted them as evidence only against their respective declarants. One year

later, in *United States v. Ball*, 163 U.S. 662 (1896), a case involving a joint murder trial of three defendants, the Court approved the use of a limiting instruction to restrict the jury's consideration of one defendant's incriminatory statements made after the killing had occurred. Citing *Sparf*, the Court emphasized that the trial judge had "said, in the presence of the jury, that the one defendant's declarations would be only evidence against him." State practice was in accord, permitting the introduction of nontestifying codefendants' confessions subject only to a limiting instruction. Though the Federal Confrontation Clause did not apply to these proceedings, state constitutions contained similar terms. See 5 J. WIGMORE, EVIDENCE § 1397, pp. 155 (J. Chadbourn rev. 1974). Notably, none of the early treatises or cases suggests that a confession naming a codefendant *must* in *all* cases be edited to refer to "another person" (or something similar) such that the codefendant's name is not included in the confession. While it is unclear whether alteration of any kind was necessary, historical practice suggests at least that altering a nontestifying codefendant's confession not to name the defendant, coupled with a limiting instruction, was enough to permit the introduction of such confessions at least as an evidentiary matter.

This historical evidentiary practice is in accord with the law's broader assumption that jurors can be relied upon to follow the trial judge's instructions. Evidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. Our legal system presumes that jurors will "attend closely the particular language of such instructions in a criminal case and strive to understand, make sense of, and follow" them. *United States v. Olano*, 507 U.S. 725 (1993). The Court has presumed that jurors will follow instructions to consider a defendant's prior conviction only for purposes of a sentence enhancement and not in determining whether he committed the criminal acts charged. *Marshall v. Lonberger*, 459 U.S. 422 (1983). This presumption works in tandem with a defendant's Fifth Amendment right not to testify against himself, by ensuring that jurors do not draw an adverse inference from his choice not to testify. It also applies to situations with potentially life-and-death stakes for defendants: A limiting instruction may be used to instruct jurors to consider mitigating evidence for purposes of one defendant and not another at the sentencing stage of a joint capital trial. *Kansas v. Carr*, 577 U.S. 108 (2016).

The presumption that jurors follow limiting instructions applies to statements that are often substantially more credible and inculpatory than a codefendant's confession. For example, this Court has held that statements elicited from a defendant in violation of *Miranda* can be used to impeach the defendant's credibility, provided the jury is properly instructed not to consider them as evidence of guilt. *Harris v. New York*, 401 U.S. 222 (1971). Such statements, elicited from the defendant, are often some of the most compelling evidence of guilt available to a jury. By contrast, jurors may cast a critical eye on accomplice testimony—and, in particular, self-serving accomplice testimony like Stillwell's that accuses another of the most culpable conduct. The presumption credits jurors by refusing to assume that they are either "too ignorant to comprehend, or were too unmindful of their duty to respect, instructions" of the court. *Pennsylvania Co. v. Roy*, 102 U.S. 451 (1880). To disregard or to make unnecessary exceptions to it "would make inroads into the entire complex code of criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Spencer v. Texas*, 385 U.S. 554, 562 (1967).

In *Bruton* v. *United States*, this Court "recognized a narrow exception to" the presumption that juries follow their instructions, holding "that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial," even with a proper instruction. *Richardson*, 481 U.S., at 207. In *Richardson* v. *Marsh*, the Court "declined to extend *Bruton*" to "confessions that do not name the defendant." *Id.*, at 211. *Gray v. Maryland*, 523 U.S. 185 (1998), later qualified *Richardson* by holding that certain obviously redacted confessions might be "directly accusatory," and thus fall within *Bruton*'s rule, even if they did not specifically use a defendant's name. Thus, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly. Under these precedents, and consistent with the longstanding historical practice discussed above, the introduction of Stillwell's altered confession coupled with a limiting instruction did not violate the Confrontation Clause.

In *Bruton*, the Court considered the joint trial of George Bruton and William Evans for armed postal robbery. During two pretrial interrogations, Evans confessed to a postal inspector that he and Bruton—whom he implicated by name—had committed the robbery. The confession was introduced at trial, coupled with a limiting instruction that it not be used against Bruton. "Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining Bruton's guilt, admission of Evans' confession in this joint trial violated Bruton's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." The Court acknowledged that a defendant is "entitled to a fair trial but not a perfect one" and conceded that "it is not unreasonable to conclude that in many cases the jury can and will follow

the trial judge's instructions to disregard certain information." "If it were true that the jury disregarded the reference to Bruton, no question would arise under the Confrontation Clause." Yet, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Accordingly, "the introduction of Evans' confession posed a substantial threat to Bruton's right to confront the witnesses against him."

In *Richardson*, the Court declined to expand *Bruton* to a redacted confession that inculpated defendant only when viewed in conjunction with other evidence. There, Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assault and murder. 481 U.S., at 202. Marsh and Williams were tried jointly. The State introduced Williams' confession, taken by police shortly after his arrest. "The confession was redacted to omit all reference to Marsh—indeed, to omit all indication that *anyone* other than Martin and Williams participated in the crime." The confession largely corroborated the victim's testimony and additionally described a conversation between Williams and Martin as they drove to the scene of the crime: "According to Williams, Martin said that he would have to kill the victims after the robbery." The trial judge instructed the jury not to use [the confession] against Marsh in any way, an instruction reiterated in the jury charge at the conclusion of trial. In her testimony, however, Marsh volunteered that, during the drive to the crime scene, she "knew that Martin and Williams were talking' but could not hear the conversation because 'the radio was on and the speaker was in her ear." Both Marsh and Williams were convicted. This Court noted that, "ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant," emphasizing the "almost invariable assumption that jurors follow their instructions." It then explained that *Bruton* represented a "narrow exception." Whereas the confession in *Bruton* had " 'expressly implicated' the defendant and his accomplice," the confession in *Richardson* "was not incriminating on its face, and became so only when linked with evidence introduced later at trial." The former evidence, the Court explained, is "more vivid" and thus "more difficult to thrust out of mind." Additionally, in the case of inferential incrimination, the Court posited that "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference," leaving "no incrimination to forget."[2]

Gray then confronted a question *Richardson* expressly left open: whether a confession altered "by substituting for the defendant's name in the confession a blank space or the word 'deleted' " violated the Confrontation Clause. 523 U.S., at 188. In *Gray*, the Court considered Anthony Bell's confession to Baltimore police, implicating himself, Kevin Gray, and co-conspirator Jacquin Vanlandingham in a murder. The prosecution sought to introduce the confession at trial, and the trial judge required that it be redacted to use the word "deleted" or "deletion" whenever Gray's or Vanlandingham's names appeared. At trial, the prosecution had a police detective read the confession aloud to the jury verbatim, substituting the words "deleted" or "deletion" for Gray's or Vanlandingham's names.[3] "Immediately after" the detective finished reading the confession, "the prosecutor asked, 'after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?' The officer responded, 'That's correct.' " In instructing the jury at the close of trial, the judge specified that Bell's confession was evidence only against Bell, admonishing the jury not to use the confession as evidence against Gray. The jury convicted Bell and Gray. This Court held that the confession was inadmissible under *Bruton*. "Unlike *Richardson*'s redacted confession, Bell's confession referred directly to the 'existence' of the nonconfessing defendant." The Court then concluded that, when a redacted confession "simply replaces a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration," the

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[2] The Court ended on a cautionary note, explaining that the prosecutor had linked Marsh with Williams' confession in his closing argument. Thus, the Court observed, "the prosecutor had sought to undo the effect of the limiting instruction by urging the jury to use Williams' confession in evaluating Marsh's case." If a claim of error on this count were preserved, the Court suggested that relief could be appropriate.

[3] The prosecution also introduced a written copy of the confession with Gray's and Vanlandigham's names omitted, "leaving in their place blank white spaces separated by commas."

evidence "so closely resembles *Bruton*'s unredacted statements that the law must require the same result." The Court reasoned that such "obvious blanks" would cause the jurors to speculate as to whom the omitted individual may be, "lifting their eyes to the nonconfessing defendant, sitting at counsel table, to find what will seem the obvious answer," as the judge's "instruction will provide an obvious reason for the blank." It also reasoned that "statements redacted to leave a blank or some other similarly obvious alteration" were "directly accusatory," "pointing directly to the defendant in a manner similar to Evans' use of Bruton's name or to a testifying codefendant's accusatory finger."

While the Court "conceded that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially," it explained that "inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, and descriptions as unique as the 'red-haired, bearded, one-eyed man-with-a-limp.' " The Court elaborated:

"That being so, *Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial.' The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." Finally, the Court stressed that its holding, which addressed only obviously redacted confessions, was sufficiently narrow to avoid "unnecessarily leading prosecutors to abandon the relevant confession or joint trial."

Viewed together, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly. *Richardson* explicitly declined to extend *Bruton*'s "narrow exception" to the presumption that jurors follow their instructions beyond those confessions that occupy the former category. *Gray* qualified but confirmed this legal standard, reiterating that the *Bruton* rule applies only to "directly accusatory" incriminating statements, as distinct from those that do "not refer directly to the defendant" and "become incriminating only when linked with evidence introduced later at trial." Neither *Bruton*, *Richardson*, nor *Gray* provides license to flyspeck trial transcripts in search of evidence that could give rise to a collateral inference that the defendant had been named in an altered confession.

The District Court's admission of Stillwell's confession, accompanied by a limiting instruction, did not run afoul of this Court's precedents. Stillwell's confession was redacted to avoid naming Samia, satisfying *Bruton*'s rule. And, it was not redacted in a manner resembling the confession in *Gray*; the neutral references to some "other person" were not akin to an obvious blank or the word "deleted." In fact, the redacted confession is strikingly similar to a hypothetical modified confession we looked upon favorably in *Gray*, where we posited that, instead of saying "he, deleted, deleted, and a few other guys," the witness could easily have said "me and a few other guys." Accordingly, it "falls outside the narrow exception *Bruton* created." *Richardson*, 481 U.S., at 208. Moreover, it would not have been feasible to further modify Stillwell's confession to make it appear, as in *Richardson*, that he had acted alone. Stillwell was charged with conspiracy and did not confess to shooting Lee. Consequently, the evidence of coordination between Stillwell and Lee's killer (whether Samia or not) was necessary to prove an essential element of the Government's case. Editing the statement to exclude mention of the "other person" may have made it seem as though Stillwell and Lee were alone in the van at the time Lee was shot. Such a scenario may have led the jurors—who sat in judgment of both Samia and Stillwell—to conclude that Stillwell was the shooter, an obviously prejudicial result. Expanding the *Bruton* rule in the way Samia proposes would be inconsistent with longstanding practice and our precedents. It would also work an unnecessary and imprudent change in law, resulting in precisely the practical effects that the Court rejected in *Richardson*. The Confrontation Clause rule that Samia proposes would require federal and state trial courts to conduct extensive pretrial hearings to determine whether the jury could infer from the Government's case in its entirety that the defendant had been named in an altered confession. That approach would be burdensome and "far from foolproof," and we decline to endorse it.

In a criminal trial, all evidence that supports the prosecution's theory of the case is, to some extent, mutually reinforcing. Thus, the likely practical consequence of Samia's position would be to mandate severance whenever the prosecution wishes to introduce the confession of a nontestifying codefendant in a joint trial. But that is "too high" a price to pay. Joint trials have long "played a vital role in the criminal justice system," preserving government resources and allowing victims to avoid repeatedly reliving trauma. See *United States v. Marchant*, 12

Wheat. 480, 482 (1827) (STORY, J.). Further, joint trials encourage consistent verdicts and enable more accurate assessments of relative culpability. Also, separate trials "randomly favor the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Richardson*, 481 U.S., at 210. Samia offers that the Government may choose to forgo use of the confession entirely, thereby avoiding the need for severance. But confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid.* The Confrontation Clause ensures that defendants have the opportunity to confront witnesses against them, but it does not provide a freestanding guarantee against the risk of potential prejudice that may arise inferentially in a joint trial. Here, the Clause was not violated by the admission of a nontestifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction.

We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

Justice KAGAN, with whom Justice SOTOMAYOR and Justice JACKSON join, dissenting.

Until today, *Bruton*'s application turned on the effect a confession is likely to have on the jury. In *Richardson,* we approved the admission of a confession "redacted to eliminate not only a co-defendant's name, but any reference to his or her existence." Despite that redaction, the confession served to incriminate the co-defendant later in the trial, when her own testimony placed her in a car ride that the confession described. But we thought that a confession that incriminated only "by connection" with subsequent evidence was neither so "vivid" nor so "powerful" as a confession that "incriminated on its face." For that reason, the jury was more "likely to obey the instruction" to disregard the confession as to the co-defendant. But we held in *Gray* that the calculus is different when a confession "refers directly to the 'existence' of the nonconfessing defendant," even though not by name. Such a confession itself points a finger at a co-defendant, so that the jury can "immediately" and "vividly" grasp how it implicates her. The impact is so similar to naming the defendant that "the law must require the same result." In both situations, the confession's "powerfully incriminating" effect "creates a special, and vital, need for cross-examination"—just as if "the codefendant pointed directly to the defendant in the courtroom."

According to the prosecution's theory, Paul LeRoux, the head of a transnational criminal organization, ordered the killing; and Hunter, one of LeRoux's managers, hired Samia and Stillwell as hitmen. Before trial, Stillwell confessed to federal agents that both he and Samia were present at the murder, but told them that Samia was the triggerman. On that version, Samia shot the victim in a van that Stillwell was driving. At trial, one of the agents testified about Stillwell's confession, replacing Samia's name with placeholders like "somebody else" and "the other person." When the prosecutor asked the agent what Stillwell said about his arrival in the Philippines, the agent answered: "He stated that he had met somebody else there." When asked whether Stillwell had recounted the crime, the agent testified: "Yes. He described a time when the other person pulled the trigger on that woman in a van that he and Mr. Stillwell was driving." From the jury's perspective, the identity of the triggerman would have been obvious. The jury knew from the start of trial that there were just three defendants. It knew based on the prosecutor's opening statement that those defendants were on trial for offenses related to a death in the Philippines. And it knew the role that each defendant allegedly played in the crime: Hunter had hired Stillwell and Samia as hitmen, and those two men carried out the murder. In fact, the prosecutor began his opening statement with the exact sequence of events Stillwell described in his interview: The prosecutor told jurors that Samia "shot [the victim] twice in the face" while the victim "was riding in a van driven" by Stillwell. So when the federal agent took the stand, it didn't make a lick of difference that he didn't identify the shooter by name. Any reasonable juror would have realized immediately—and without reference to other evidence—that "the other person" who "pulled the trigger" was Samia. That fact makes Stillwell's confession inadmissible under *Bruton*. The agent's testimony about the confession pointed a finger straight at Samia, no less than if the agent had used Samia's name or called him "deleted."

The majority distinguishes "between confessions that directly implicate a defendant and those that do so indirectly." The majority holds that Stillwell's confession does not "directly" implicate Samia for two reasons. It "was redacted to avoid naming Samia." And the redaction was "not akin to an obvious blank or the word 'deleted.' " This Court has made clear that the first fact—that Stillwell's confession did not use Samia's name—is not dispositive. A confession redacted with a blank space also avoids naming the defendant; yet *Gray* held that it falls within *Bruton*'s scope. So today's decision must rest on the second feature of the confession: that the placeholder used (*e.g.*, "the other person") was neither a blank space nor the word "deleted." But that distinction makes

nonsense of the *Bruton* rule. *Bruton*'s application has always turned on a confession's inculpatory impact. A confession that swaps a phrase like "the other person" for a defendant's name may incriminate just as powerfully as one that swaps a blank space. The majority warps our *Bruton* precedent by categorically putting the two on opposite sides of the constitutional line.

Gray repudiates rather than supports the distinction adopted today. In holding that *Bruton*'s protections extend beyond confessions with names to confessions with blanks, *Gray* explained that what should matter is not a confession's form but its effects. A jury, *Gray* noted, "will often react similarly" to the two kinds of confessions; the blank space (rather than name) is "not likely to fool anyone." Ignoring *Gray*'s forest for one tree, the majority points to a passage in which the Court described how a confession in the case could have been further redacted: Instead of saying "me, deleted, deleted, and a few other guys," the witness could have said "me and a few other guys." But on *Gray*'s facts, the latter version was unproblematic. The crime was a gang assault involving six perpetrators, while only one other person was on trial with the confessing defendant. The "[m]e and a few other guys" phrase thus did not point a finger directly at the co-defendant, as "the other person" phrase here did at Samia. The more relevant reference discussed in *Gray* was to the "white guy" in a trial with only one white defendant. *Gray* left no doubt that the confession with that phrase should have been excluded—and for the same reason as the confession with "deleted." When a modified confession has an "accusatory" effect "similar" to one with names, the Court reasoned, the law "requires the same result." *Gray* could not have cared less whether the modification takes the form of a blank space or of a different, but no less accusatory, placeholder.

On the majority's view, a ruling for Samia would require courts to conduct "extensive pretrial hearings" reviewing "the Government's case in its entirety." But the *Bruton* rule—whether applying to confessions with names, with blanks, or with other placeholders—demands only that a court consider "in advance of trial" such matters as the content of the confession, the number of defendants, and the prosecution's general theory of the case. Courts have long considered those basic factors when applying *Bruton*. And the Government has proved unable to cite a single case in which doing so created "administrability" issues, much less "fewer joint trials." In any event, greater "convenience in the administration of the law," as *Bruton* noted, cannot come at the expense "of fundamental principles of constitutional liberty." "That price," we recognized then, "is too high."

The majority reaches for two props inconsistent with *Bruton* itself. One is the "presumption that jurors follow limiting instructions." The majority forgets that the presumption does not apply when the evidence is an accusatory co-defendant confession. Under this decision, prosecutors can always circumvent *Bruton*'s protections. *Bruton* will still bar the prosecution from using the original version of a confession, expressly naming a codefendant. So too the rule will prevent the prosecution from swapping out [defendant's] for a blank space or the word "deleted." But no worries—the government can simply replace [the codefendant's] name with "woman" or "man" and the *Bruton* issue will go away. But the serious Sixth Amendment problem remains. Defendants in joint trials will not have the chance to confront some of the most damaging witnesses against them. And a constitutional right once guaranteeing that opportunity will no longer.

Justice JACKSON, dissenting.

I join Justice KAGAN's dissent. The introduction of a "testimonial" statement from an unavailable declarant violates the Confrontation Clause unless the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004). Stillwell's statement to law enforcement was testimonial, Stillwell was unavailable, and Samia had no opportunity to cross-examine Stillwell. The default presumption should have been that Stillwell's confession was *not* admissible at his and Samia's joint trial, because the statement implicated Samia on its face, and Samia could not cross-examine the declarant.[*] Before today, this Court had never held that a

[*] A codefendant's confession implicates a defendant's Sixth Amendment rights even if it does "not directly accuse [the defendant] of wrongdoing," but "rather is inculpatory only when taken together with other evidence," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009). That conclusion follows from the text of the Sixth Amendment, which guarantees the right of the accused to "confron[t]" "witnesses *against* him" (emphasis added), not just those witnesses who "facially incriminate" him

limiting instruction, combined with a redaction that merely replaces the defendant's name, sufficiently “cures” the constitutional problem. In *Gray v. Maryland*, 523 U.S. 185 (1998), the Government tried to get an exception to the Confrontation Clause—adding an obvious redaction of the defendant's name in the confession on top of the limiting instruction—but this Court rebuffed such efforts.

On p. 1206, before the Point for Discussion, insert the following new case:

Hemphill v. New York

142 S.Ct. 681 (2022).

Justice Sotomayor delivered the opinion of the Court.

In April 2006, Ronnell Gilliam and several other individuals got into a physical fight near Tremont Avenue in the Bronx. Shortly after the fight, someone fired a 9-millimeter handgun. The bullet killed a 2-year-old child sitting in a nearby minivan. Police officers determined that Gilliam was involved and that Nicholas Morris, Gilliam's best friend, had been at the scene. Officers searched Morris’ apartment. On Morris’ nightstand, the officers found a 9-millimeter cartridge and three .357-caliber bullets. Three witnesses identified Morris as the shooter out of a police lineup. The police arrested Morris the next day and observed bruising on his knuckles consistent with fist fighting. Gilliam surrendered and identified Morris as the shooter. Gilliam later returned to the police station and recanted, stating that Hemphill, Gilliam's cousin, had in fact been the shooter. Investigators initially did not credit Gilliam's recantation; instead, the State charged Morris with the child's murder and for possession of a 9-millimeter handgun. After opening statements at Morris’ 2008 trial, the State decided not to oppose Morris’ application for a mistrial to allow the State to reconsider the charges against him. Six weeks later, the State agreed to dismiss the murder charges against Morris if he pleaded guilty to criminal possession of a weapon. But rather than having Morris plead to the charge in the existing indictment for possession of a 9-millimeter handgun, the State filed a new charge alleging that Morris had possessed a .357-magnum revolver, a different type of firearm than the one used to kill the victim. In exchange for this plea, the prosecution recommended a sentence of time served.

In 2011, the State learned that Hemphill's DNA matched a sample from a blue sweater that police had recovered in a search of Gilliam's apartment shortly after the crime. Eyewitnesses had described the shooter as wearing a blue shirt or sweater. In 2013, Hemphill was arrested and indicted for the murder. At trial, Hemphill pursued a third-party culpability defense by blaming Morris for the shooting. Hemphill's counsel noted that officers had recovered 9-millimeter ammunition from Morris’ nightstand hours after a 9-millimeter bullet killed the victim. The State did not object, but later contended that Hemphill's argument had been misleading because officers also had found .357-caliber bullets on the nightstand and because Morris ultimately pleaded guilty to possessing a .357 revolver. Morris, however, was unavailable to testify at Hemphill's trial. As a result, the State sought to introduce the transcript of Morris’ plea allocution to suggest that he had possessed only a .357 revolver. Hemphill's counsel objected, arguing that the plea allocution was “clearly hearsay” and that Hemphill was being “deprived of an opportunity for cross-examination.” The [trial] court relied on *People* v. *Reid*, 19 N. Y. 3d 382, 971 N. E. 2d 353. In *Reid*, New York's highest court held that a criminal defendant could “open the door” to evidence that would

otherwise be inadmissible under the Confrontation Clause if the evidence was “reasonably necessary to correct a misleading impression” made by the defense's “evidence or argument.” The trial court applied *Reid* as follows: “A significant aspect of the defense in this case is that Morris, who was originally prosecuted for this homicide, was, in fact, the actual shooter and that the defendant, Hemphill, was excluded as the shooter. There is, however, evidence contrary to the argument presented by the defense in this case. In my judgment, the defense's argument, which in all respects is appropriate and under the circumstances of this case probably a necessary argument to make, nonetheless, opens the door to evidence offered by the State refuting the claim that Morris was, in fact, the shooter.” Based on this ruling, the State published to the jury the portions of the transcript of Morris’ plea hearing containing Morris’ admission to possessing a .357 revolver and his counsel's statements that he was doing so against counsel's advice, without corroborating evidence, in order to get out of jail immediately. Hemphill premised his closing argument, like the rest of his defense, on the theory that Morris was the shooter. The State, in its closing, cited Morris’ plea allocution and emphasized that possession of a .357 revolver, not murder, was “the crime Morris actually committed.” The jury found Hemphill guilty, and the court sentenced him to 25 years to life in prison. Hemphill appealed. Before the Appellate Division, he argued that “the court denied Mr. Hemphill his right to confront the witness against him.” The Appellate Division affirmed. It reasoned that “defendant created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression.” The Court of Appeals affirmed. This Court granted certiorari.

One of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment, which states: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”[***] In *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), this Court had held that this confrontation right did not bar the admission of statements of an unavailable witness so long as those statements had “adequate ‘indicia of reliability,’ ” meaning that they fell “within a firmly rooted hearsay exception” or otherwise bore “particularized guarantees of trustworthiness.” However, 24 years later, this Court rejected that reliability-based approach to the Confrontation Clause. In charting a different path, *Crawford* examined the history of the confrontation right at common law and concluded that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” The Court continued, “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”[****] Because “the text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the

[***] The Clause binds the States through the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965).

[****] *Crawford* defined “testimony” as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” “At a minimum,” this includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations.”

courts," the requirement was "most naturally read" to admit "only those exceptions established at the time of the founding."

The State does not dispute that Morris' plea allocution was testimonial, meaning that it implicated Hemphill's rights under the Confrontation Clause. The State attempts to characterize the *Reid* rule as a mere "procedural rule" that "treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation." So construed, the *Reid* rule limits only the manner of asserting the confrontation right, not its substantive scope. It is true that the Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation. For example, "States are free to adopt procedural rules governing objections," including contemporaneous objection requirements and, in the context of forensic evidence, "notice-and-demand statutes." *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009). The Confrontation Clause will not bar a defendant's removal from a courtroom if, despite repeated warnings, he "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois* v. *Allen*, 397 U. S. 337, 343 (1970).

The door-opening principle incorporated in *Reid* is not a member of this class of procedural rules. Rather, it is a substantive principle of evidence that dictates what material is relevant and admissible in a case. The principle requires a trial court to determine whether one party's evidence and arguments, in the context of the full record, have created a "misleading impression" that requires correction with additional material from the other side. Moreover, the State's argument would negate *Crawford*'s emphatic rejection of the reliability-based approach of *Ohio* v. *Roberts*. If *Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U. S., at 61. It "thus reflects a judgment, not only about the desirability of reliable evidence, but about how reliability can best be determined." *Ibid.* "A mere judicial determination" regarding the reliability of evidence is no substitute for the "constitutionally prescribed method of assessing reliability." *Id.,* at 62. The upshot is that the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed. The trial court violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.

The State insists that the *Reid* rule is necessary to safeguard the truth-finding function of courts because it prevents the selective and misleading introduction of evidence. Even as it has recognized and reaffirmed the vital truth-seeking function of a trial, the Court has not allowed such considerations to override the rights the Constitution confers upon criminal defendants. The State cites cases in which this Court permitted a State to impeach a defendant using evidence that would

normally be barred from use at trial. None of those cases, however, involved exceptions to constitutional requirements. In each case, the Court considered the appropriate scope of a prophylactic rule designed to remedy "a violation that had already occurred." For example, the Court distinguished violations of the Fourth Amendment's guarantee against unreasonable searches or seizures from the prophylactic rule designed to deter violations of that guarantee by excluding the fruits of such searches or seizures from trial. Because the prophylactic exclusionary rule is a "deterrent sanction" rather than a "substantive guarantee," the Court applied a balancing test to allow States to impeach defendants with the fruits of prior Fourth Amendment violations, even though the rule barred the admission of such fruits in the State's case-in-chief.

The Court has not held that defendants can "open the door" to violations of constitutional requirements merely by making evidence relevant to contradict their defense. Thus, in *New Jersey* v. *Portash*, 440 U. S. 450, 458 (1979), the Court rejected a State's effort to impeach a defendant through the introduction of his own coerced testimony. It did so despite the strong and obvious interest in preventing perjury because the very introduction of the coerced testimony would violate the Fifth Amendment's provision that "no person ... shall be compelled in any criminal case to be a witness against himself." In view of that guarantee, balancing of interests was "not simply unnecessary," but "impermissible." *Portash*, 440 U. S., at 459. The Sixth Amendment speaks with equal clarity: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." It admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140 (2006).

The State warns that a reversal will leave prosecutors without recourse to protect against abuses of the confrontation right. These concerns are overstated. State and federal hearsay rules generally preclude all parties from introducing unreliable, out-of-court statements for the truth of the matter asserted. Even for otherwise admissible evidence, "well-established rules," such as Federal Rule of Evidence 403, "permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U. S. 319, 326 (2006). If a court admits evidence before its misleading or unfairly prejudicial nature becomes apparent, it generally retains the authority to withdraw it, strike it, or issue a limiting instruction as appropriate.

Finally, the Court does not decide the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party "against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder." *Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153 (1988) (quoting 7 J. WIGMORE, EVIDENCE § 2113, p. 653 (J. Chadbourn rev. 1978)). The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court.

The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. The trial court's admission of unconfronted testimonial hearsay over Hemphill's objection, on the view that it was reasonably necessary to correct Hemphill's misleading argument, violated that fundamental guarantee. The judgment of the New York Court of Appeals is reversed, and the case is remanded

for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Alito, with whom Justice Kavanaugh joins, concurring.

When a defendant introduces the statement of an unavailable declarant on a given subject, he commits himself to the trier of fact's examination of what the declarant has to say on that subject. The remainder of the declarant's statement or statements—and any other statements by the same declarant on the same subject—are fair game. The defendant cannot reasonably claim otherwise, given his tactical choice to put the declarant's statements on the relevant subject in contention despite his unavailability for cross-examination. And that is true regardless of whether the defendant attempts to "invoke" his right to confront an unavailable declarant after introducing his out-of-court statements. Having made the choice to introduce the statements of an unavailable declarant, a defendant cannot be heard to complain that he cannot cross-examine that declarant with respect to the remainder of that statement or the declarant's related statements on the same subject. The Court emphasizes that its decision does not call into question the rule of completeness or other principles that may support implied waiver of the confrontation right. On this understanding, I join the opinion of the Court in full.

Justice Thomas, dissenting.

Because Darrell Hemphill did not raise his Sixth Amendment claim in the New York Court of Appeals, we lack jurisdiction to review that court's decision. I respectfully dissent.

On p. 1227, after the first paragraph, insert the following:

Food for Thought

At defendant's trial for sex trafficking, the prosecution seeks to introduce police body camera footage which depicts a woman (defendant's co-conspirator, Moore) yelling that defendant was prostituting young girls. Moore entered into a plea deal with the government and was not called as a witness at defendant's trial. Were Moore's statements testimonial so that defendant has the right to confront her at trial? *See United States v. Graham*, 47 F.4th 561 (7th Cir. 2022).

Chapter 19

Freedom of the Press and Fair Trials

B. PRETRIAL PUBLICITY & DEFENDANT'S RIGHT TO A FAIR TRIAL

On p. 1275, before the Points for Discussion, insert the following new case:

United States v. Tsarnev

142 S.Ct. 1024 (2022).

Justice THOMAS delivered the opinion of the Court.

On April 15, 2013, Dzhokhar and Tamerlan Tsarnaev planted and detonated two homemade pressure-cooker bombs near the finish line of the Boston Marathon. The blasts hurled nails and metal debris into the assembled crowd, killing three while maiming and wounding hundreds. Three days later, the brothers murdered a campus police officer, carjacked a graduate student, and fired on police who had located them in the stolen vehicle. Dzhokhar attempted to flee in the vehicle but inadvertently killed Tamerlan by running him over. Dzhokhar was soon arrested and indicted. A jury found Dzhokhar guilty of 30 federal crimes and recommended the death penalty for 6 of them. The District Court accordingly sentenced Dzhokhar to death. The Court of Appeals vacated the death sentence. We now reverse.

The Tsarnaev brothers immigrated to the United States in the early 2000s and lived in Massachusetts. Little more than a decade later, they were actively contemplating how to wage radical jihad. They downloaded and read al Qaeda propaganda, and, by December of 2012, began studying an al Qaeda guide to bomb making. On April 15, 2013, the brothers went to the Boston Marathon finish line on Boylston Street. They each brought a backpack containing a homemade pressure-cooker bomb packed with explosives inside a layer of nails, BBs, and other metal scraps. Tamerlan left his backpack in a crowd of spectators and walked away. Dzhokhar stood with his backpack outside the Forum, a nearby restaurant where spectators watched the runners from the sidewalk and dining patio. For four minutes, Dzhokhar surveyed the crowd. After speaking with Tamerlan by phone, Dzhokhar left his backpack among the spectators. Tamerlan then detonated his bomb. While the crowd looked toward the explosion, Dzhokhar walked the other way. After a few seconds, he detonated his bomb. Each detonation sent fire and shrapnel in all directions. The blast from Tamerlan's bomb shattered Krystle Campbell's left femur and mutilated her legs. She bled to death. Dzhokhar's bomb ripped open the legs of Boston University student Lingzi Lu. She too bled to death.

Dzhokhar's and Tamerlan's bombs maimed and wounded hundreds of other victims. Many people lost limbs.

After fleeing the scene, the brothers returned to their normal lives. Dzhokhar attended his college classes the next day. He went to the gym with friends. He posted online that he was "a

stress free kind of guy." Several days later, after the Federal Bureau of Investigation (FBI) released images of the suspected bombers, a friend saw the images and texted Dzhokhar. Dzhokhar responded: "Better not text me my friend. Lol." Recognizing that investigators were closing in on them, Dzhokhar met up with Tamerlan that evening. The brothers collected more homemade bombs and a handgun and loaded them into Tamerlan's car. While driving past the Massachusetts Institute of Technology, they saw 27-year-old campus police officer Sean Collier sitting in his patrol car. They approached his car and shot him five times at close range, including once between the eyes. With Collier dead, the brothers tried to steal his service pistol but were unable to remove it from the holster. They then carjacked and robbed another man, Dun Meng, who was driving his SUV home from work. When the brothers forced Meng to stop at a gas station for fuel and snacks, he fled on foot. The brothers made off with Meng's SUV.

Meng contacted the police, who used the SUV's GPS device to track the Tsarnaevs. When officers found the brothers in Watertown a few hours later, a street battle ensued. Tamerlan fired on the officers with a handgun, while Dzhokhar threw homemade bombs. When Tamerlan's handgun ran out of ammunition, officers subdued him. As they tried to handcuff Tamerlan, Dzhokhar returned to the SUV and sped towards the officers. They evaded the SUV. Tamerlan did not. Dzhokhar ran over Tamerlan and dragged him roughly 30 feet down the road. Tamerlan disentangled from the undercarriage when Dzhokhar rammed a police cruiser before escaping. Tamerlan died soon after from his injuries. Dzhokhar abandoned the SUV a few blocks away. He found a covered boat in a nearby backyard. Taking shelter inside, he carved the words "stop killing our innocent people, and we will stop" into the planking. He also wrote a manifesto in pencil on the bulkhead of the boat's cockpit justifying his actions and welcoming his expected martyrdom. The next day, the boat's owner found him. Police eventually forced Dzhokhar out of the boat and arrested him.

A federal grand jury indicted Dzhokhar for 30 crimes, 17 of which were capital offenses. In preparation for jury selection, the parties jointly proposed a 100-question form to screen the prospective jurors. The District Court adopted almost all of them, including many that probed for bias. For example, some of the District Court's questions asked whether a prospective juror had a close association with law enforcement. Others asked whether a prospective juror had strong feelings about Islam, Chechens, or the several Central Asian regions with which the Tsarnaevs were connected. Still others asked whether the prospective juror had a personal connection to the bombing. Several questions also probed whether media coverage might have biased a prospective juror. One question asked if the prospective juror had "formed an opinion" about the case because of what he had "seen or read in the news media." Others asked about the source, amount, and timing of the person's media consumption. Still another asked whether the prospective juror had commented or posted online about the bombings. The District Court did reject one media-related question. The proposed questionnaire had asked each prospective juror to list the facts he had learned about the case from the media and other sources. Concerned that such a broad, "unfocused" question would "cause trouble" by producing "unmanageable data" of minimal value that would come to dominate the entire *voir dire*, the District Court declined to include it in the questionnaire. After Dzhokhar objected to the removal, the District Court further explained that the question was "too unguided."

Recognizing the intense public interest in the case, the District Court summoned an expanded jury pool. In early January 2015, the court called 1,373 prospective jurors for the first

round of jury selection. After reviewing their answers to the questionnaire, the court reduced the pool to 256. As jury selection began in earnest, Dzhokhar renewed his request that the court ask each juror about the content of the media he had consumed. The District Court again refused Dzhokhar's blanket request and instead permitted counsel to ask appropriate followup questions about a prospective juror's media consumption based on the answers to questions in the questionnaire or at *voir dire*. Several times, the court permitted Dzhokhar's attorneys to follow up on a prospective juror's earlier answers with specific questions about what the juror had seen or heard in the news. Over the course of three weeks of in-person questioning, the District Court and the parties reduced the 256 prospective jurors down to 12 seated jurors.

After the District Court seated the jury, the case went to trial. Dzhokhar did not contest his guilt and the jury thus returned a guilty verdict on all counts. When the sentencing proceedings finished, the jury concluded that Dzhokhar warranted the death penalty for 6 of the 17 death-penalty-eligible crimes, despite Dzhokhar's argument that Tamerlan was more culpable. The District Court accordingly sentenced Dzhokhar to death.

The Court of Appeals vacated Dzhokhar's capital sentence. The Court of Appeals held that the District Court abused its discretion during jury selection by declining to ask every prospective juror what he learned from the media about the case. According to the panel, such questions were required by that court's 1968 decision in *Patriarca v. United States*, 402 F.2d 314 (CA1 1968), which had mandated this *voir dire* rule "in the exercise of [the court of appeals'] discretionary supervisory powers, not as a matter of constitutional law." We granted certiorari.

The Government argues that the Court of Appeals improperly vacated Dzhokhar's capital sentences based on the juror questionnaire. We agree. The Sixth Amendment guarantees "the accused" the right to a trial "by an impartial jury." The right to an "impartial" jury "does not require *ignorance*." *Skilling v. United States*, 561 U.S. 358, 381 (2010). Notorious crimes are "almost, as a matter of necessity, brought to the attention" of those informed citizens who are "best fitted" for jury duty. *Reynolds v. United States*, 98 U.S. 145 (1879). A trial court protects the defendant's Sixth Amendment right by ensuring that jurors have "no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States*, 158 U.S. 408 (1895).

Jury selection falls "particularly within the province of the trial judge." *Skilling*, 561 U.S., at 386. A trial "judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record," such as a "prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling*, 561 U.S., at 386. A trial court's broad discretion includes deciding what questions to ask prospective jurors. See *Mu'Min*, 500 U.S., at 427. A court of appeals reviews the district court's questioning of prospective jurors only for abuse of discretion. See, *e.g.*, *Skilling*, 561 U.S., at 387; *Mu'Min*, 500 U.S., at 427; *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion). That discretion does not vanish when a case garners public attention. Indeed, "when pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes especially good sense.' " *Skilling*, 561 U.S., at 386 (quoting *Mu'Min*, 500 U.S., at 427). After all, "the judge 'sits in the locale where the publicity is said to have had its effect' and may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.' " *Ibid.* . Because conducting *voir dire* is committed to the district court's sound discretion, there is no blanket constitutional requirement that it must ask each prospective juror what he heard, read, or saw about a case in the media. *Mu'Min*, 500 U.S.,

at 417. Instead, the district court's duty is to conduct a thorough jury-selection process that allows the judge to evaluate whether each prospective juror is “to be believed when he says he has not formed an opinion about the case.” *Id.*, at 425.

The District Court did not abuse its broad discretion by declining to ask about the content and extent of each juror's media consumption regarding the bombings. The court recognized the significant pretrial publicity concerning the bombings, and reasonably concluded that the proposed media-content question was “unfocused,” risked producing “unmanageable data,” and would at best shed light on “preconceptions” that other questions already probed. At *voir dire*, the court explained that it did not want to be “too tied to a script” because “every juror is different” and had to be “questioned in a way that was appropriate” to the juror's earlier answers. The court was concerned that a media-content question had “the wrong emphasis,” focusing on what a juror knew before coming to court, rather than on potential bias. Based on “years” of trial experience, the court concluded that jurors who came in with some prior knowledge would still be able to act impartially and “hold the government to its proof.” The District Court's decision was reasonable and well within its discretion. If any doubt remained, the rest of the jury-selection process dispels it. The District Court summoned an expanded jury pool of 1,373 prospective jurors and used the 100-question juror form to cull that down to 256. The questionnaire asked prospective jurors what media sources they followed, how much they consumed, whether they had ever commented on the bombings in letters, calls, or online posts, and, most pointedly, whether any of that information had caused the prospective juror to form an opinion about Dzhokhar's guilt or punishment. The court then subjected those 256 prospective jurors to three weeks of individualized *voir dire* in which the court and both parties had the opportunity to ask additional questions and probe for bias. Dzhokhar's attorneys asked several prospective jurors what they had heard, read, or seen about the case in the media. The District Court also provided “emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.” *Skilling*, 561 U.S., at 388. The court reminded the prospective jurors that they “must be able to decide the issues in the case based on the information or evidence presented in the course of the trial, not on information from any other sources,” an instruction the court gave during *voir dire* and repeated during the trial. The court's jury selection process was both eminently reasonable and wholly consistent with this Court's precedents.

The Court of Appeals erred in holding otherwise. As it saw things, its decision nearly 50 years prior in *Patriarca* had, pursuant to its “supervisory authority,” required district courts presiding over high-profile cases to ask about the “‘kind and degree of the prospective juror's exposure to the case or the parties.” This Court has held many times that a district court enjoys broad discretion to manage jury selection, including what questions to ask prospective jurors. See, *e.g.*, *Skilling*, 561 U.S., at 387, n. 20; *Mu'Min*, 500 U.S., at 427; *Ristaino*, 424 U.S., at 594; *Ham*, 409 U.S., at 527; *Connors*, 158 U.S., at 4131. Our cases establish that a reviewing court may set aside a district court's questioning only for an abuse of discretion. Rather than ask whether media-content questions were necessary in light of the District Court's exhaustive *voir dire*, the Court of Appeals handed down a purported legal rule that media-content questions are required in all high-profile cases, and then concluded that the District Court committed legal error when it failed to comply with that rule. But a court of appeals cannot supplant the district court's broad discretion to manage *voir dire* by prescribing specific lines of questioning, and thereby circumvent a well-established standard of review.

Dzhokhar Tsarnaev committed heinous crimes. The Sixth Amendment nonetheless guaranteed him a fair trial before an impartial jury. He received one. The judgment of the United States Court of Appeals for the First Circuit is reversed.

It is so ordered.

Justice BARRETT, with whom Justice GORSUCH joins, concurring.

The First Circuit asserted "supervisory power" to impose a procedural rule on the District Court. Because that rule (which required a district court to ask media-content questions on request in high-profile prosecutions) conflicts with our cases (which hold that a district court has broad discretion to manage jury selection), I agree that the First Circuit erred.

On p. 1276, before Hypo 2, add the following Food for Thought:

Food for Thought

In 2021, former Minneapolis police officer Derek Chauvin was tried for the murder of George Floyd. Floyd's death in 2020 set off nationwide protests regarding allegations of systemic racism. When Floyd came to trial, Minneapolis had lots of Black Lives Matter (BLM) protestors on Minneapolis streets. In addition, the week before the trial started, the City of Minneapolis entered into a $26 million settlement with Floyd's family, and President Biden stated that he hopes that the jury comes in with the "right verdict." Was it appropriate to try the case in Minneapolis, or should the judge have granted Chauvin's request for a change of venue? Under the circumstances, should the jury have been sequestered during the trial? What else might the judge have done to guarantee Chauvin a fair trial?

On 1276, insert new Hypos 2 & 3, that read as follows, and renumber the remaining hypos:

Hypo 2: *The Congresswoman's Exhortations*

The Chauvin case was complicated by the fact that the night before the case was submitted to the jury, California Congresswoman Maxine Waters flew to Minneapolis and exhorted those who were protesting on the streets. She told them that, if Chauvin is acquitted: "We got to stay on the street, we've got to get more active, we've got to get more confrontational." At the end of the trial, the judge stated: "Waters may have given you something on appeal that may result in this whole trial being overturned." If you were the judge in the case, how would you have handled Waters' remarks? Should you have *voir dired* the jury regarding its ability to keep an open mind regarding Chauvin's guilt or innocence? What else would you have done to ensure that Chauvin received a fair trial?

Hypo 3: *Possible Gang Retaliation*

Members of the Black Guerilla Family, a violent street gang, were on trial for racketeering, conspiracy to distribute illegal drugs, and murder. Several jurors were excused after they stated that the gang's propensity for retribution caused them to fear for their safety. The judge then talked to all of the other jurors individually and inquired whether they were able to remain

impartial. Two jurors expressed fear and were excused. After they were convicted, defendants' appealed claiming that the judge should have asked each juror individually about one juror's fears. Did the judge act properly in his handling of *voir dire*? *See United States v. Smith*, 919 F.3d 825 (4th Cir. 2019).

D. Press Access to Judicial Proceedings

On p. 1290, keep the heading, but replace the text of Hypo 1 with the following:

21 defendants are charged with drug trafficking and racketeering although some defendants plead guilty prior to trial. Because there are so many defendants, and lawyers, the judge decides to close *voir dire* to the public because of "capacity limitations." The judge allows only the defendants, their attorneys, and court personnel to be present. None of the defendants object at the time. Neither do any members of the press or the public. Once the two days of jury selection are over, all remaining proceedings are open to the public. In addition, the judge made a transcript of the *voir dire* proceedings available to the public shortly after it ended. Was it permissible for the judge to close *voir dire* under these circumstances? *See United States v. Williams*, 974 F.3d 320 (3d Cir. 2020); *Barrows v. United States*, 15 A.3d 673 (D.C. App. 2011).

Chapter 21

Double Jeopardy

On p. 1351, at the end of the first paragraph, insert the following new case:

Denezpi v. United States

142 S.Ct. 1838 (2022).

Justice BARRETT delivered the opinion of the Court.

This case presents a twist on the usual dual-sovereignty scenario. The mine run of these cases involves two sovereigns, each enforcing its own law. This case arguably involves a single sovereign (the United States) that enforced its own law (the Major Crimes Act) after having separately enforced the law of another sovereign (the Code of the Ute Mountain Ute Tribe). Petitioner contends that the second prosecution violated the Double Jeopardy Clause because the dual-sovereignty doctrine requires that the offenses be both enacted *and* enforced by separate sovereigns. We disagree. By its terms, the Clause prohibits separate prosecutions for the same offense; it does not bar successive prosecutions by the same sovereign. So even assuming that petitioner's first prosecutor exercised federal rather than tribal power, the second prosecution did not violate the Constitution's guarantee against double jeopardy.

In 1882, Secretary of the Interior H. M. Teller wrote to his Department's Office of Indian Affairs (now known as the Bureau of Indian Affairs) to suggest that the Office "formulate certain rules for the government of the Indians on the reservations." Letter to H. Price, Comm'r of Indian Affairs (Dec. 2, 1882), in Dept. of Interior, Rules Governing the Court of Indian Offenses 3–4 (1883). In response, the Commissioner of Indian Affairs adopted regulations prohibiting certain acts and directing that a "Court of Indian Offenses" be established for nearly every Indian tribe or group of tribes to adjudicate rule violations. Given their basis in what is now the Code of Federal Regulations, the courts are sometimes called C.F.R. courts. Today, most tribes have established their own judicial systems, thereby displacing the C.F.R. courts. But some tribes, often due to resource constraints, have not. Five C.F.R. courts remain, serving 16 of the more than 500 federally recognized tribes. Their stated purpose is "to provide adequate machinery for the administration of justice for Indian tribes" in certain parts of Indian country "where tribal courts have not been established." The Department's Assistant Secretary for Indian Affairs appoints C.F.R. court judges, called magistrates, subject to a confirmation vote by the governing body of the tribe that the court serves. The Assistant Secretary may remove magistrates for cause of his own accord or upon the recommendation of the tribal governing body. Unless a contract with a tribe provides otherwise, a Department official appoints the prosecutor for each C.F.R. court. C.F.R. courts have jurisdiction over two sets of crimes. First, federal regulations set forth a list of offenses that may be enforced in C.F.R. court. In addition, a tribe's governing body may enact ordinances that, when approved by the Assistant Secretary, are enforceable in C.F.R. court and

supersede any conflicting federal regulations. The reservation of the Ute Mountain Ute Tribe spans over 500,000 acres in southwestern Colorado, northern New Mexico, and southeastern Utah. The Tribe has more than 2,000 members. It has not created its own court system, so it makes use of the Southwest Region C.F.R. Court. The Tribe has, however, adopted its own penal code, which is enforceable in that court.

A violation of the tribal code lies at the heart of this case. Merle Denezpi and V. Y., both members of the Navajo Nation, traveled to Towaoc, Colorado, a town within the Ute Mountain Ute Reservation. While the two were alone at a house belonging to Denezpi's friend, Denezpi barricaded the door, threatened V. Y., and forced her to have sex with him. After Denezpi fell asleep, V. Y. escaped from the house and reported Denezpi to tribal authorities. An officer with the federal Bureau of Indian Affairs filed a criminal complaint in C.F.R. court. That complaint charged Denezpi with three crimes: assault and battery, in violation of 6 Ute Mountain Ute Code § 2 (1988); terroristic threats, in violation of 25 C.F.R. § 11.402; and false imprisonment, in violation of 25 C.F.R. § 11.404. Denezpi pleaded guilty to the assault and battery charge, and the prosecutor dismissed the other charges. The Magistrate sentenced Denezpi to time served—140 days' imprisonment. Six months later, a federal grand jury in the District of Colorado indicted Denezpi on one count of aggravated sexual abuse in Indian country, an offense covered by the federal Major Crimes Act. Denezpi moved to dismiss the indictment, arguing that the Double Jeopardy Clause barred the consecutive prosecution, but the District Court denied the motion. A jury convicted Denezpi. The Tenth Circuit affirmed. We granted certiorari.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." The Clause by its terms does not prohibit twice placing a person in jeopardy "for the same *conduct* or *actions*." *Gamble* v. *United States*, 587 U. S. —— (2019) (slip op., at 3). Instead, it focuses on whether successive prosecutions are for the same "offence." That term "was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Ibid.* An offense, then, is "defined by a law." *Gamble*, 587 U. S., at —— (slip op., at 4). And a law is defined by the sovereign that makes it, expressing the interests that the sovereign wishes to vindicate. *Gamble*, 587 U. S., at —— (slip op., at 4). Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign. That means that the two offenses can be separately prosecuted without offending the Double Jeopardy Clause—even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign. See *Gamble*, 587 U. S., at ——, n. 1, —— (slip op., at 3, n. 1, 4); cf. *Blockburger v. United States*, 284 U.S. 299 (1932).

This dual-sovereignty principle applies where "two entities derive their power to punish from wholly independent sources." *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 68 (2016). The doctrine has come up most frequently in the context of the States. It applies, however, to Indian tribes too. *United States v. Wheeler*, 435 U.S. 313, is the seminal case. There, a member of the Navajo Tribe was convicted in tribal court of violating a provision of the Navajo Tribal Code; he was later charged in federal court with violating a federal statute based on the same underlying conduct. Citing the dual-sovereignty doctrine, the Court rejected Wheeler's double jeopardy argument. Before Europeans arrived on this continent, tribes "were self-governing sovereign political communities" with "the inherent power to prescribe laws for their members and to punish infractions of those laws." While "Congress has in certain ways regulated the manner and extent of

the tribal power of self-government," Congress did not "*create*" that power. When a tribe enacts criminal laws, "it does so as part of its retained sovereignty and not as an arm of the Federal Government." Thus, Wheeler's prosecution for a tribal offense did not bar his later prosecution for a federal offense.

Wheeler controls here. Denezpi's single act transgressed two laws: the Ute Mountain Ute Code's assault and battery ordinance and the United States Code's proscription of aggravated sexual abuse in Indian country. The Ute Mountain Ute Tribe, like the Navajo Tribe in *Wheeler*, exercised its "unique" sovereign authority in adopting the tribal ordinance. Likewise, Congress exercised the United States' sovereign power in enacting the federal criminal statute. The two laws, defined by separate sovereigns, therefore proscribe separate offenses. Because Denezpi's second prosecution did not place him in jeopardy again "for the same offence," that prosecution did not violate the Double Jeopardy Clause.

Denezpi agrees that sovereigns define distinct offenses, that the Tribe and the United States are separate sovereigns, and that his prosecutions involved a tribal offense and a federal offense respectively. But he argues that the dual-sovereignty doctrine is concerned not only with who defines the offense, but also with who *prosecutes* it. Denezpi was initially prosecuted in a C.F.R. court. While tribal prosecutors in tribal courts indisputably exercise tribal authority, Denezpi claims that prosecutors in C.F.R. courts exercise federal authority because they are subject to the control of the Bureau of Indian Affairs. He concludes that he was therefore prosecuted twice by the United States. And that, he insists, violated the Double Jeopardy Clause because "the dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign, regardless of the source of the power to adopt the criminal codes enforced in each prosecution."

We need not sort out whether prosecutors in C.F.R. courts exercise tribal or federal authority because we disagree with Denezpi's premise. The Double Jeopardy Clause does *not* prohibit successive prosecutions by the same sovereign. It prohibits successive prosecutions "for the same offence." And an offense defined by one sovereign is different from an offense defined by another. Thus, even if Denezpi is right that the Federal Government prosecuted his tribal offense, the Clause did not bar the Federal Government from prosecuting him under the Major Crimes Act too.

Denezpi presents the dual-sovereignty doctrine as "a carveout to the rule against double jeopardy" and argues that the carveout does not extend to successive prosecutions by a single sovereign. But Denezpi is wrong. *Gamble* was clear. "Although the dual-sovereignty rule is often dubbed an 'exception' to the double jeopardy right, it is not an exception at all. On the contrary, it follows from the text that defines that right in the first place." 587 U. S., at —— (slip op., at 3). The Clause does not ask who puts a person in jeopardy. It zeroes in on what the person is put in jeopardy for: the "offence." In 1791, "offence" meant the violation of a law. An offense has always referred to the crime itself, which is complete when a person has carried out all of its elements. So Denezpi's proposal would put us in the position of holding that a person's single act constitutes two separate offenses at the time of commission (because the act violates two different sovereigns' laws) but that those offenses later become the same offense if a single sovereign prosecutes both. He offers no textual justification for this nonsensical result.

Finally, Denezpi asserts that the conclusion we reach might lead to "highly troubling" results. He suggests that sovereigns might more broadly assume the authority to enforce other sovereigns' criminal laws in order to get two bites at the apple. But if there is a constitutional

barrier to such cross-enforcement, it does not derive from the Double Jeopardy Clause. As we have explained, the Clause does not bar successive prosecutions of distinct offenses, even if a single sovereign prosecutes them.

Denezpi's single act led to separate prosecutions for violations of a tribal ordinance and a federal statute. Because the Tribe and the Federal Government are distinct sovereigns, those "offences" are not "the same." Denezpi's second prosecution therefore did not offend the Double Jeopardy Clause. We affirm the judgment of the Court of Appeals.

It is so ordered.

Justice GORSUCH, with whom Justice SOTOMAYOR and Justice KAGAN join as to Parts I and III, dissenting.

Unlike a tribal court operated by a Native American Tribe pursuant to its inherent sovereign authority, the Court of Indian Offenses is "part of the Federal Government." It is a creature of the Department of the Interior. Secretary H. M. Teller instructed the Commissioner of Indian Affairs to promulgate "certain rules" to establish a new "tribunal" and to define new "offenses of which it was to take cognizance." The resulting "court" was composed of magistrates appointed by the Department who could "read and write English readily, wore citizens' dress, and engaged in civilized pursuits." The Department appointed officers charged with investigating the crimes it created. The Department's new criminal code also assimilated "the laws of the State or Territory within which the reservation may be located," and instructed that sentences for assimilated offenses should match those imposed by state or territorial law.

Some of the old federal offenses aimed at punishing tribal customs are gone. But the regulations still list many crimes created by federal agency officials. And the regulations continue to assimilate other crimes too. Instead of assimilating state and territorial crimes, federal regulations today assimilate tribal crimes. They do so, however, only if and to the extent those tribal crimes are "approved by the Assistant Secretary of Indian Affairs or his or her designee." § 11.449. Any federal punishment for assimilated offenses may not exceed the sentence provided for by the assimilated (here, tribal) law. Even today, prosecutors continue to be hired and controlled by the Department unless a Tribe opts out of that arrangement. § 11.204. Likewise, the Department retains full authority to "appoint a magistrate without the need for confirmation by the Tribal governing body." 85 Fed. Reg. 10714 (2020). And the Department retains the power to remove these adjudicators.

Federal officials charged Mr. Denezpi with three offenses: terroristic threats, false imprisonment, and assault and battery. Federal regulations define the first two offenses. The third offense—assault and battery—is an assimilated Ute Mountain Ute tribal offense "approved" by federal officials. Ultimately, federal authorities dismissed the first two charges and Mr. Denezpi pleaded no contest to the third while maintaining his innocence. Pursuant to federal regulation, the court was empowered to sentence Mr. Denezpi to no more than six months in prison, the maximum punishment the assimilated tribal law permits. The court sentenced him to 140 days. Federal authorities may have regretted their hasty prosecution. Six months after Mr. Denezpi finished his Interior Department sentence, the Justice Department brought new charges against him for the same offense under federal statutory law. These new charges carried the potential for a much longer sentence, one unconnected to tribal judgments about the appropriate punishments for tribal members. A federal district court convicted Mr. Denezpi and sentenced him to an additional

30 years in prison, followed by 10 years of supervised release.

Throughout, Mr. Denezpi has argued that the Constitution's Double Jeopardy Clause barred his second prosecution. Unless carefully cabined, the dual-sovereignty doctrine can present serious dangers. Taken to its extreme, it might allow prosecutors to coordinate and treat an initial trial in one jurisdiction as a dress rehearsal for a second trial in another. All of which would amount, in substance if not form, to successive trials for the same offense. For reasons like these, this Court has said repeatedly that the doctrine applies only when two requirements are satisfied. First, the two prosecutions must be brought under "the laws of two sovereigns." Sánchez Valle, 579 U.S. at 67. Second, the "two prosecuting *entities*" must "derive their power to punish from wholly independent sovereign sources." Here, neither condition is satisfied.

The Court suggests that his first conviction was for a tribal offense and only his second involved a federal offense. But that is wrong. Mr. Denezpi's first prosecution in the Court of Indian Offenses was for the violation of federal regulations that assimilated tribal law into federal law. By all indications, it was "approved" by the Assistant Secretary for assimilation into federal regulations. The regulation governing the Court of Indian Offenses' criminal jurisdiction states that, except as otherwise provided, the court has jurisdiction over "any action by an Indian that is *made a criminal offense under this part*" by federal officials. § 11.114. The italicized language clearly refers to the list of "Criminal Offenses" in Subpart D. And predictably enough, "the Ute Mountain Ute Code's assault and battery ordinance" is not on that list. What *is* on the list is a federal regulatory crime—"Violation of an approved tribal ordinance"—an offense that (to repeat) assimilates certain federally "approved" tribal laws. § 11.449.

Historical context further indicates that Mr. Denezpi was prosecuted for a federal regulatory crime. As we have seen, the Department of the Interior created the Court of Indian Offenses. And the Department wrote its own criminal code for enforcement in the court. Initially, that code included freestanding federal crimes outlawing everything from "heathenish dances" to "conjurers' arts." Other early regulations assimilated certain state and territorial laws into federal law and defined the punishment for these crimes by reference to these local laws. As we have seen, federal authorities have exercised the power to revise their code from time to time. They have eliminated some offenses and created others. They have chosen to end the assimilation of state and territorial offenses and incorporate instead certain "approved" tribal offenses. Unless it should break some promise made to a particular Tribe, federal authorities could close the whole operation tomorrow just as they chose to open it in the first place. Both text and context indicate that Mr. Denezpi was prosecuted in the Court of Indian Offenses for a federal crime, not a tribal one.

On p. 1384, at the bottom of the page, insert the following:

4. Dismissal Based on Venue or Vicanage

Smith v. United States

143 S.Ct. 1594 (2023).

Justice ALITO delivered the opinion of the Court.

When a conviction is reversed because of a trial error, this Court has allowed retrial in nearly all circumstances. We consider in this case whether the Constitution requires a different outcome when a conviction is reversed because the prosecution occurred in the wrong venue and before a jury drawn from the wrong location. It

does not.

Timothy Smith is a software engineer and avid angler from Mobile, Alabama, who spends much of his time fishing, sailing, and diving in the Gulf of Mexico. In 2018, he discovered StrikeLines, a company that uses sonar equipment to identify private, artificial reefs that individuals construct to attract fish. StrikeLines sells the geographic coordinates of those reefs to interested parties. This business model irritated Smith, who believed that StrikeLines was unfairly profiting from the work of private reef builders. Smith used a web application to obtain tranches of coordinates from the company's website surreptitiously. He then announced on a social-media website that he had StrikeLines' data and invited readers to message him and "see what reef" coordinates StrikeLines had discovered. When contacted by StrikeLines, Smith offered to remove his social-media posts and fix the company's security issues in exchange for "one thing": the coordinates of certain "deep grouper spots" that he had apparently been unable to obtain from the website. The ensuing negotiations over grouper coordinates eventually failed, leading StrikeLines to contact law-enforcement authorities. Smith was indicted in the Northern District of Florida for, among other charges, theft of trade secrets. Before trial, he moved to dismiss the indictment for lack of venue, citing the Constitution's Venue Clause, Art. III, § 2, cl. 3, and its Vicinage Clause, Amdt. 6. He argued that trial in the Northern District of Florida was improper because he had accessed the data from Mobile (in the Southern District of Alabama) and the servers storing StrikeLines' coordinates were located in Orlando (in the Middle District of Florida). The District Court denied the motion to dismiss without prejudice. After the jury returned a verdict of guilty, Smith moved for a judgment of acquittal based on improper venue. The District Court denied the motion, reasoning that StrikeLines felt the effects of the crime at its headquarters in the Northern District of Florida. The Eleventh Circuit held that venue was improper on the trade secrets charge, but it disagreed with Smith that this error barred reprosecution. It concluded that the "remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," and that the "Double Jeopardy Clause is not implicated by a retrial in a proper venue." We granted certiorari to determine whether the Constitution permits the retrial of a defendant following a trial in an improper venue and before a jury drawn from the wrong district.

Except as prohibited by the Double Jeopardy Clause, it "has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events." *United States v. Ewell*, 383 U.S. 116, 121 (1966). Remedies for constitutional violations in criminal trials "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). When a conviction is obtained in a proceeding marred by harmful trial error, "the accused has a strong interest in obtaining a fair readjudication of his guilt," and society "maintains a valid concern for insuring that the guilty are punished." *Burks v. United States*, 437 U.S. 1, 15 (1978). Therefore, the appropriate remedy for prejudicial trial error, in almost all circumstances, is simply the award of a retrial, not a judgment barring reprosecution. See, *e.g.*, *Morrison*, 449 U.S., at 363, 365. We have recognized one exception to this general rule: violations of the Speedy Trial Clause, which we have described as "generically different" from "any" other criminal right in the Constitution, *Barker v. Wingo*, 407 U.S. 514 (1972), preclude retrial. In all other circumstances, retrial is the strongest appropriate remedy, and we have applied this rule to every other Clause of the Sixth Amendment except for the Vicinage Clause. Against this backdrop, we are asked to consider whether violations of the Venue and Vicinage Clauses are exceptions to the retrial rule. Text and precedent provide no basis for that result. The Venue Clause concerns the place where a trial must be held. That Clause mandates that the "Trial of all Crimes shall be held in the State where the ... Crimes shall have been committed." Art. III, § 2, cl. 3.[4] Nothing about the language that frames this requirement suggests that a new trial in the proper venue is not an adequate remedy for its violation.

Smith contends that the purpose of the Venue Clause supports his argument, but that argument is unpersuasive for at least two reasons. First, the purpose he attributes to the Clause is insufficient to justify a departure from the general retrial rule. Smith primarily argues that the Venue Clause aims to prevent the infliction of additional harm on a defendant who has already undergone the hardship of an initial trial in a distant and

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[4] The Venue Clause also includes a necessary exception: the trial for crimes "not committed within any State ... shall be at such Place or Places as the Congress may by Law have directed." Art. III, § 2, cl. 3.

improper place. But any criminal trial, whether or not in the right venue, imposes hardship, and any retrial after a reversal for trial error adds to that initial harm. In some cases, the lost time, emotional burden, and expense of a flawed initial trial in a defendant's home State may exceed the hardship of an initial trial in a State that is nearby but improper under the Venue Clause. And the mere burden of a second trial has never justified an exemption from the retrial rule. See *Ewell*, 383 U.S., at 121. Second, Smith exaggerates the connection between the venue right and the hardship of trial in an improper venue. The most convenient trial venue for a defendant would presumably be where he lives, and yet the Venue Clause is keyed to the location of the alleged "Crimes," Art. III, § 2, cl. 3, "not ... the district where the accused resides, or even ... the district in which he is personally at the time of committing the crime," *In re Palliser*, 136 U. S. 257, 265 (1890). Thus, the Clause does not allow "variation for convenience of the accused." *Johnston v. United States*, 351 U.S. 215, 221 (1956). The State in which a crime is committed may be far from a defendant's residence. For example, a resident of New York charged with committing a crime during a short visit to Hawaii may be tried in Hawaii under the Venue Clause even though that trial may be very inconvenient. Equally telling, the Clause would *preclude* trial for that crime in New York unless it somehow extended to the State. See, *e.g.*, *Travis v. United States*, 364 U.S. 631 (1961); *United States v. Lombardo*, 241 U.S. 73 (1916). If avoiding hardship to a defendant were a "core purpose" of the Venue Clause, such results would be inexplicable. This disconnect between the State where trial would be least burdensome and the State where a crime was committed is exacerbated by the fact that many federal crimes occur in multiple States. A trial may be held "where any part" of a crime "can be proved to have been done." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (quoting *Lombardo*, 241 U.S., at 77). As a result, the Venue Clause permits a defendant charged with conspiracy to be tried in any State in which any co-conspirator took any overt act in furtherance of the endeavor, *Hyde v. United States*, 225 U.S. 347, 365 (1912), and a defendant charged with illegally shipping goods may be tried in any State through which the goods were illegally transported, *Armour Packing*, 209 U.S., at 76. In these cases, as others, we have repeatedly rejected objections based on the "serious hardship in prosecutions in places distant from the defendant's home." *Id.*, at 77.

The Vicinage Clause provides no stronger textual support for petitioner's argument. That Clause guarantees "the right to an impartial jury of the State and district wherein the crime shall have been committed." Amdt. 6. The Clause "reinforces" the Venue Clause because, in protecting the right to a jury drawn from the place where a crime occurred, it functionally prescribes the place where a trial must be held. *Rodriguez-Moreno*, 526 U.S., at 278. But the Vicinage Clause differs from the Venue Clause in two ways: it concerns jury composition, not the place where a trial may be held, and it narrows the place where trial is permissible by specifying that a jury must be drawn from "the State *and district* wherein the crime shall have been committed." Amdt. 6. Nothing about these differences dictates a remedy that is broader than the one awarded when the Venue Clause is violated. The vicinage right is only one aspect of the jury-trial rights protected by the Sixth Amendment, and we have repeatedly acknowledged that retrials are the appropriate remedy for violations of other jury-trial rights. See, *e.g.*, *Ramos* v. *Louisiana*, 140 S.Ct. 1390 (2020). Retrial is the appropriate remedy when a defendant is tried by a jury that does not reflect a fair cross-section of the community. See, *e.g.*, *Glasser v. United States*, 315 U.S. 60 (1942). There is no reason to conclude that trial before a jury drawn from the wrong geographic area demands a different remedy than trial before a jury drawn inadequately from within the community.

Failing to demonstrate that he is entitled to an acquittal based on text or precedent, Smith appeals to the historical background of the Venue and Vicinage Clauses. The history underlying the Clauses cannot justify an exception to the retrial rule. The relevant starting point is the common-law "vicinage" right, which presumptively entitled defendants to a jury of the "neighbourhood" where the crime was allegedly committed. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769) (Blackstone). As a practical matter, this right imposed a venue requirement: trials needed to be held at the location where "the matter of fact issuable" allegedly occurred to allow the "Inhabitants whereof" to serve on the jury. 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND § 193, at 125 (1628) (Coke). Both of these requirements were well settled by the founding. See, *e.g.*, *Rex* v. *Harris*, 3 Burr. 1330, 1334, 97 Eng. Rep. 858, 860 (K. B. 1762) (WILMOT, J.) (opining that there was "no rule better established" than " 'that all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed' "). Smith contends, however, that the Constitution not only incorporated this right but "elevated" it "to an even higher stature in American law," and that this enhanced right favors his preferred remedy. The historical record does not support this argument.

There is no question that the founding generation enthusiastically embraced the vicinage right and wielded

it "as a political argument of the Revolution."[6] Prior to the Revolution, Parliament enacted measures to circumvent local trials before colonial juries, most notably by authorizing trials in England for both British soldiers charged with murdering colonists and colonists accused of treason.[7] The Continental Congress and colonial legislatures forcefully objected to trials in England before loyalist juries, characterizing the practice as an affront to the existing "common law of England, and more especially to the great and inestimable privilege of being tried by ... peers of the vicinage."[8] The Declaration of Independence also denounced these laws, under which, it said, British soldiers were "protected by a mock Trial" and colonists were "transported beyond the Seas to be tried for pretended offences."[9] As States declared independence, most incorporated some form of a venue or vicinage clause in their governing documents, but none of these provisions specified a particular remedy for violations. The common-law vicinage right, both as a jury requirement and as a proxy for venue, remained prominent during debates over the ratification of the Constitution. As originally proposed, the Constitution contained only the Venue Clause, which says nothing about jury composition. Appealing to "ancient common law," Anti-Federalists objected to this omission.[11] Federalists responded that Congress could secure the vicinage right by statute, analogizing to common law, where "the preservation of this right [was] in the hands of Parliament."[12]

After ratification of the Constitution, Congress yielded in part to the Anti-Federalists' argument and included a vicinage right in the Sixth Amendment. James Madison's initial draft of the Amendment required a jury "of the vicinage," 1 Annals of Cong. 435 (1789), but Congress amended that language so that it guaranteed a jury from the State of the crime and from any smaller judicial districts that Congress chose to create. This history tells us two important things about the way in which the Constitution dealt with the common-law vicinage right. First, the right was highly prized by the founding generation, and this right undoubtedly inspired the Venue and Vicinage Clauses. Second, although the Clauses depart in some respects from the common law—most notably by providing new specifications about the place where a crime may be tried—there is no meaningful evidence that the Constitution altered the remedy prescribed by common law for violations of the vicinage right.

With this background in mind, we examine the remedy at common law for an initial trial in the wrong venue or before a jury drawn from the wrong vicinage, and we find that this history does not demand a departure from the retrial rule. By the time of the founding, compelling evidence supported the conclusion that pleas of prior acquittal or conviction could not be grounded on a verdict issued in or returned by a jury from the wrong vicinage. The leading decision at common law was *Arundel's Case*, 6 Co. Rep. 14a, 77 Eng. Rep. 273 (K. B. 1593), which concerned a vicinage challenge to a jury that had found the defendant guilty of murder. The King's Bench arrested judgment on the conviction because the jury was insufficiently local, but it did not bar retrial. Instead, "a new *venire facias* was awarded to try the issue again." Discussing *Arundel's Case*, Sir Edward Coke's 17th-century treatise agreed that juries lacked authority to convict outside of their vicinage and added that a verdict by an improperly constituted jury would cause a "mistryall." 1 COKE § 193, at 125; see also *Rex* v. *Fenwicke*, 1 Keble 546, 83 Eng. Rep. 1104 (K. B. 1662); *Rex* v. *Talbot*, Cro. Car. 311, 312, 79 Eng. Rep. 871, 872 (K. B. 1633).

Arundel's remedy remained unchanged throughout the 18th century. Because "indictments are local," one

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[6] F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 95 (1951)

[7] See 14 Geo. 3, c. 39 (1774).

[8] Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, in 1 Journals of the Continental Congress, 1774–1789, at 69 (W. Ford. ed. 1904).

[9] Declaration of Independence ¶¶17, 21.

[11] 3 Debates on the Constitution 446–447 (J. Elliot ed. 1836).

[12] 3 Elliot's Debates 558 (J. Marsha ll)

prominent treatise explained, a prior acquittal on an indictment "laid in an improper county" would not "bar ... a subsequent indictment in the proper county." 2 W. HAWKINS, PLEAS OF THE CROWN 526 (6th ed. 1788). Hale and Blackstone reached similar conclusions. See 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 245 (1736); 4 Blackstone 368–369. In sum, no common-law principle at the founding precluded retrial following a trial in an improper venue or before an improper jury.

Early American practice provides further confirmation that violations of the Venue and Vicinage Clauses do not exempt defendants from retrial. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Perhaps most relevant, this Court embraced the retrial rule for a venue error in *United States v. Jackalow*, 1 Black 484, 17 L.Ed. 225 (1862). In that case, defendant had been convicted in New Jersey for a crime committed on a ship located off the coast of New York and Connecticut. Because the crime occurred outside of New Jersey, trial in that State was proper under the Venue and Vicinage Clauses only if the crime was committed outside the limits of *any* State. Because the jury's special verdict on the issue of venue did not establish that fact, the Court directed the lower court "to set aside the special verdict, and grant a new trial." *Jackalow*, 1 Black at 488. This decision did not break new ground. Decades earlier, Justice Story concluded that "there are cases where there may be a new trial; as in cases of a mis-trial by an improper jury," *United States v. Gibert*, 25 F.Cas. 1287, 1302 (No. 15,204) (CC Mass. 1834), and Justice Iredell found it "unnecessary" to consider a vicinage objection because a new trial was warranted on other grounds, *United States v. Fries*, 3 Dall. 515, 518, 1 L.Ed. 701 (CC Pa. 1799). Other federal decisions ordered retrials for venue violations, or otherwise accepted that a retrial would be sufficient to cure such an error. State courts had likewise begun reaching similar conclusions, notwithstanding the existence of venue and vicinage clauses in their State Constitutions. Far from justifying an exemption from the retrial rule, the historical background of the Venue and Vicinage Clauses supports the opposite inference. Smith points to no decision barring retrial based on a successful venue or vicinage objection in either the centuries of common law predating the founding or in the early years of practice following ratification. This absence alone is considerable evidence that the Clauses do not bar retrial of their own force. Moreover, courts affirmatively allowed retrial following trials in an improper venue or before improperly constituted juries. We have no reason to doubt that the retrial rule applies.

Smith argues that even if the Venue and Vicinage Clauses do not bar retrial of their own force, they are "inseparably interwoven" with the Double Jeopardy Clause, which, he claims, precludes retrial here. Smith starts from the premise that juries in criminal trials often resolve factual disputes related to venue and, thus, can acquit defendants if venue is absent. Because a jury's general verdict of acquittal categorically precludes retrial for the same offense under the Double Jeopardy Clause, Smith contends that a judicial ruling that venue was improper on a motion to acquit should have the same result. The Eleventh Circuit rejected this argument and held that the Double Jeopardy Clause "is not implicated by a retrial in a proper venue." We agree. A judicial decision on venue is fundamentally different from a jury's general verdict of acquittal. When a jury returns a general verdict of not guilty, its decision "cannot be upset by speculation or inquiry into such matters" by courts. *Dunn v. United States*, 284 U.S. 390 (1932). To conclude otherwise would impermissibly authorize judges to usurp the jury right. And because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations, the jury holds an "unreviewable power to return a verdict of not guilty" even "for impermissible reasons." *Powell*, 469 U.S., at 63.

This rationale is consistent with the general rule that "culpability is the touchstone" for determining whether retrial is permitted under the Double Jeopardy Clause. *Evans v. Michigan*, 568 U.S. 313 (2013). When a trial terminates with a finding that the defendant's "criminal culpability had not been established," retrial is prohibited. *Burks*, 437 U.S., at 10. This typically occurs with "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005). But it also extends to "essentially factual defenses" that negate culpability by "providing a legally adequate justification for otherwise criminal acts." *United States v. Scott*, 437 U.S. 82, 97 (1978). Conversely, retrial is permissible when a trial terminates "on a basis unrelated to factual guilt or innocence of the offence." *Scott*, 437 U.S., at 99. The Double Jeopardy Clause is not triggered when a trial ends in juror deadlock, see *Blueford v. Arkansas*, 566 U.S. 599 (2012), or with a judgment dismissing charges because of a procedural issue like preindictment delay. In these circumstances, the termination of proceedings is perfectly consistent with the possibility that the defendant is guilty of the charged offense. The reversal of a conviction based on a violation of the Venue or Vicinage Clauses, even when styled as a "judgment of acquittal" under Rule 29, plainly does not resolve "the bottom-line question of 'criminal culpability.' " *Evans*, 568 U.S., at 324. Instead, such a reversal is quintessentially a decision that "the

Government's case against the defendant must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *Scott*, 437 U.S., at 96. In this case, the Eleventh Circuit's decision that venue in the Northern District of Florida was improper did not adjudicate Smith's culpability. It thus does not trigger the Double Jeopardy Clause.

For these reasons, the judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.