UNDERSTANDING CRIMINAL PROCEDURE

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PREFACE

This Supplement includes all relevant United States Supreme Court decisions handed down since the most recent editions of *Understanding Criminal Procedure* (Vol. 1, 8th ed.; Vol. 2, 5th ed.) went to press. It also includes selected citations to recently published literature in the field and, where pertinent, to state and lower federal court decisions.

Joshua Dressler
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July 2025

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Volume 1

CHAPTER 4 (Vol. 1)

FOURTH AMENDMENT: OVERVIEW

§ 4.04[F] WHO ARE "THE PEOPLE" PROTECTED BY THE FOURTH AMENDMENT?

Page 62, add the following at the end of the section:

One point to keep in mind throughout the study of Criminal Procedure is that the Constitution is not the only way that government action is regulated. There are also various federal (and state) statutes that limit the government's powers. For example, a provision of the Immigration Nationality Act sets out the rules for detaining and deporting undocumented immigrants. The statute holds that after law enforcement apprehends an undocumented immigrant, the government can only detain them for ninety days unless they fall into one of four specific categories.[1] For those who do fall withing one of the four categories, the Due Process Clause of the Fifth Amendment limits the length of detention to "a period reasonably necessary to bring about the alien's removal from the United States."[2] Recently the Supreme Court was asked to interpret the statute to determine whether those undocumented immigrants who were being held beyond the ninety day period were entitled to a bail hearing, and the Court held that no such right existed in the statute, although they left open the possibility that the Due Process Clause could create such a right.[3]

[1] 8 U.S.C. § 1231.
[2] Zadvydas v. Davis, 533 U. S. 678, 679 (2001).
[3] Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1834 (2022).

CHAPTER 7 (Vol. 1)

FOURTH AMENDMENT TERMINOLOGY: "SEIZURE"

§ 7.03(B) SEIZURES OF PERSONS

Page 120, replace the second full paragraph with the following:

The Terry rule has been slightly restated by later Court decisions this way: A person is seized when the officer by one of the means noted in Terry— use of physical force or show of authority— either terminates or restrains the individual's freedom of movement through means intentionally applied.[21] According to this definition, D is "seized" by an officer when, for example: she is physically restrained or ordered to stop so that she can be frisked or questioned on the street;[22] she is taken into custody and brought to a police station for questioning[24] or fingerprinting;[25] she is the driver or passenger in a car ordered to pull off the highway for questioning or to receive a traffic citation;[26] or she is intentionally forced to stop her car by means of a roadblock.[27] Any application of physical force, regardless of its intensity, duration, or method, is sufficient to create a seizure as long as the officer acts with the intent to restrain. This includes shooting a suspect, and may also include using pepper spray or tear gas on the suspect, as long as the officer uses these tools with the intent to restrain the suspect.[27.1] It does not, however, include unintentional contact or contact without a purpose to restrain—for example, when a police officer accidentally strikes the driver of a driver of a motorcycle during a high-speed pursuit.[28]

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[21] Brendlin v. California, 551 U.S. at 254 (2007).
[22] Terry v. Ohio, 392 U.S. 1 (1968).
[24] Dunaway v. New York, 442 U.S. 200 (1979).
[25] Hayes v. Florida, 470 U.S. 811 (1985).
[26] United States v. Hensley, 469 U.S. 221 (1985) (driver); Brendlin v. California, 551 U.S. 249 (2007) (passenger).
[27] Brower v. Inyo County, 489 U.S. 593 (1989).
[27.1] Torres v. Madrid, 592 U.S. 306 (2021).
[28] County of Sacramento v. Lewis, 523 U.S. 833 (1998).

CHAPTER 9 (Vol. 1)

ARRESTS

§ 9.06 BEYOND WARRANTS: EXECUTING AN ARREST

Page 173, at the end of the section, add:

In determining whether the use of force or deadly force is reasonable, courts will analyze the totality of the circumstances. This demands "careful attention to the facts and circumstances relating to the incident, as then known to the officer."68.1 The Court clarified this standard in *Barnes v. Felix*.68.2 In *Barnes*, a police officer pulled *B* over for toll violation, and when *B* started the ignition before the traffic stop was over, the officer jumped onto the doorsill of the car and ordered *B* not to move the car. When the car began to move forward, the officer shot twice into the compartment of the car, killing *B.* The officer argued that the court should apply the "moment of threat" rule, meaning that a court would only examine the instant of the use of force in determining whether the use of force was reasonable. The Supreme Court rejected that doctrine, noting that:

> the "totality of the circumstance" inquiry into a use of force has no time limit. Of course, the situation at the precise time of the shooting will often be what matters most; it is, after all, the officer's choice in that moment that is under review. But earlier facts and circumstances may bear on how a reasonable officer would have understood and responded to later ones.68.3

68.1 *Graham*, 490 U.S. at 396. The Supreme Court also used blunter language to describe this process, noting that a reasonableness analysis requires a court to "slosh its way through a factbound morass." *Scott*, 550 U.S. at 383.
68.2 145 S. Ct. 1353 (2025).
68.3 *Id.* at 1359.

CHAPTER 11 (Vol. 1)

WARRANTLESS SEARCHES: EXIGENT CIRCUMSTANCES

§ 11.01 EXIGENCY EXCEPTION: EXPLAINED

Page 198, replace the final paragraph with the following:

Finally, it is important to keep in mind that the search warrant exception now under discussion relates to criminal investigations. If the police are not investigating a crime, a lower standard governs the constitutionality of their search. For example, the Court has allowed police to search automobiles under a broad "community caretaking" function, which includes investigating accidents, providing aid to motorists, or searching an impounded car for a weapon that could endanger the public.[5] The Court has also permitted a warrantless entry of a home under a narrower "emergency assistance" exception when the police are acting to provide help to an injured occupant or to protect an occupant from imminent injury.[6] The constitutionality of both types of searches depends on the fact that the police are conducting their search for a non-law enforcement reason, "totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute."[6.1]

In such circumstances, different principles apply: not only are search warrants— intended for criminal investigations— inapplicable, but "probable cause," which is a criminal investigatory concept, is not required. Instead, there need only be reasonable grounds to believe emergency assistance is needed. Any criminal evidence discovered in plain view during the noncriminal police activity may lawfully be seized and used in a subsequent criminal investigation.[7] Unfortunately, the line between a criminal investigation and activity unrelated to crime control can be difficult to discern.[8] Remember also that the subjective intent of the police officers is irrelevant in this context, so even if the police have a subjective intent to find evidence of criminal activity, they are permitted to conduct the warrantless search as long as there is a sufficiently important non-criminal justification for their action.

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[5] Cady v. Dombrowski, 413 U.S. 433 (1973). Examples of such "caretaking functions" include: opening the door of an automobile, parked on the side of the highway with the lights off but motor running at 3:00 a.m., after the apparently asleep driver did not respond to a knock on the window, State v. Lovegren, 51 P.3d 471 (Mont. 2002); detaining a person near an apartment complex because he was swaying and walking unsteadily, which suggested he might need medical care, Commonwealth v. Waters, 456 S.E.2d 527 (Va. Ct. App. 1995); and entering a private residence when a trail of blood led to the door of the residence and there was blood on the outside of the door, State v. Matalonis, 875 N.W.2d 567 (Wis. 2016). In regard to non-criminal investigations generally, *see* Chapters 15 (inventory searches) and 18 (various "special needs" circumstances), *infra*.

[6] Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006). The broader "community caretaking" exception that applies to automobiles does not apply to home entries; in order to conduct a warrantless entry of a home, the police must have a reasonable belief that an occupant has been harmed or is in imminent danger of harm. Caniglia v. Strom, 593 U.S. 194 (2021).

[6.1] Cady, 413 U.S. at 441.

[7] See generally Chapter 14, infra.

[8] In this regard, *see generally* John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. Crim. L. & Criminology 433 (1999).

§ 11.04 ENTRY AND SEARCH OF A HOME

Page 204, at the end of the section, add the following text:

Both *Hayden* and *King* involved hot pursuit of a suspected felon, and the flight of a suspected felon is alone enough to create sufficient exigency to allow police to enter a residence. However, if the police are in hot pursuit of someone whom they suspect committed a misdemeanor, they may only enter a residence if they have evidence of a further exigency—for example, if there is evidence that the suspect will cause imminent harm to the officer or to another person, or that she will destroy evidence, or escape from the home.[22A]

[22A] Lange v. California, 141 S. Ct. 2011 (2021).

CHAPTER 18 (Vol. 1)

MORE "REASONABLENESS" BALANCING

§ 18.03 INTERNATIONAL BORDER SEARCHES AND SEIZURES

Page 319, after the second full paragraph, add the following text:

A new exception to this rule may be developing for cell phones and personal computers. As we saw in Section 12.06, the Supreme Court in *Riley v. California* recognized that cell phones are different in kind from other kinds of property, since the scope and volume of personal information stored on a cell phone is vastly different than what is found in any traditional bag or container, and is in many ways more private than the interior of a person's home.[22.1] Thus, *Riley* held that the search incident to lawful arrest exception does not apply to cell phones. Some circuit courts have used the broad language in *Riley* to impose a reasonable suspicion requirement for searches of cell phones and other personal electronic devices at the border. According to the Fourth Circuit, in the wake of *Riley* "a forensic search of a digital phone must be treated as a nonroutine border search, requiring some form of individualized suspicion.[22.2] Even before *Riley*, the Ninth Circuit had already imposed such a rule for electronic devices at the border, for substantially the same reasons as the Supreme Court cited in *Riley.*[22.3] However, not all circuit courts agree,[22.4] and this is a circuit split that may need to be resolved by the Supreme Court.

[22.1] Riley v. California, 573 U.S. 373 (2014).
[22.2] United States v. Kolsuz, 890 F.3d 133 (4th Cir. 2018).
[22.3] United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (en banc).
[22.4] *See, e.g.,* United States v. Touset, 890 F.3d 1227 (11th Cir. 2018).

CHAPTER 28 (Vol.1)

THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 28.08[B] "INEFFECTIVE ASSISTANCE: THE *STRICKLAND* TEST

Page 622, immediately before subsection [c], add the following text:

Indeed, a few years after *Buck*, the Court held in *Thornell v. Jones*[233.1] that there was no *Strickland* prejudice to the defendant. In *Thornell*, *T* claimed that his trial attorney had failed to introduce evidence of *T*'s mental illness, his cognitive impairment, his childhood abuse, and his substance abuse. Applying the *Strickland* test, the Court held that these omissions failed to demonstrate prejudice because the state courts had already heard other evidence about each of these factors, so there was "no reasonable chance that courts would reach a different result on a second look at essentially the same evidence." The Court also noted the overwhelming aggravating factors in the case: "multiple homicides, cruelty, pecuniary motivation, and murder of a child"—and noted that there was no recorded case in which the state supreme court vacated a judgement of death in a case involving multiple murders.

[233.1] 144 S. Ct. 1302 (2024).

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Volume 2

CHAPTER 4 (Vol. 2)

THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 4.08[B] "INEFFECTIVE ASSISTANCE: THE *STRICKLAND* TEST

Page 99, at the end of the page, add the following text:

Indeed, a few years after *Buck*, the Court held in *Thornell v. Jones*[233.1] that there was no *Strickland* prejudice to the defendant. In *Thornell*, *T* claimed that his trial attorney had failed to introduce evidence of *T*'s mental illness, his cognitive impairment, his childhood abuse, and his substance abuse. Applying the *Strickland* test, the Court held that these omissions failed to demonstrate prejudice because the state courts had already heard other evidence about each of these factors, so there was "no reasonable chance that courts would reach a different result on a second look at essentially the same evidence." The Court also noted the overwhelming aggravating factors in the case: "multiple homicides, cruelty, pecuniary motivation, and murder of a child"—and noted that there was no recorded case in which the state supreme court vacated a judgement of death in a case involving multiple murders.

[233.1] 144 S. Ct. 1302 (2024).

CHAPTER 11 (Vol. 2)

CONFRONTATION CLAUSE

§ 11.02 OUT-OF-COURT STATEMENTS BARRED BY THE CONFRONTATION CLAUSE

Page 267, immediately before subsection [2], add the following text:

Twelve years after *Williams*, the Court returned to the question of forensic reports under *Crawford* in *Smith v. Arizona*, [66.1] a decision which on its face strengthens the *Crawford* barrier but may also signal a significant loophole. In *Smith*, *S* was arrested and charged with illegally possessing various drugs for sale. The state sent items seized from *S*'s property to a state laboratory for analysis. *R*, an analyst at the lab, tested the material and prepared typed notes and a signed report on the state lab's letterhead detailing the tests and her conclusion that the material included methamphetamine and cannabis. By the time of *S*'s trial, *R* no longer worked at the lab, and so, rather than calling the former employee *R* as a witness, the State chose to call as an expert witness *L*, a different forensic analyst, who had no previous connection with the case. *L* reviewed *R*'s notes and report and then testified to what those records said and his "independent opinion" that the items were the drugs indicated in *R*'s report. *S* challenged his conviction in the Supreme Court on the grounds that *L*'s testimony based on *R*'s records violated the Confrontation Clause.

Justice Kagan's opinion for the Court majority broke the case down into two issues. First, did *L*'s expert testimony introduce the statements in *R*'s records for their truth? According to the Court, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[66.2] Second, if *R*'s statements in her records did come in for their truth, were those statements "testimonial?" According to the Court, only if both conditions are met—out-of-court statements are offered for their truth *and* they are testimonial—is the Confrontation Clause violated.[66.3]

As to the first of these issues, the majority opinion held that the statements in *R*'s records were offered for their truth. In the Court's words, "[i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of the matter asserted." This is so, the Court said, because *R*'s out-of-court statements were what "gives value to the state expert's opinion. So there is no meaningful distinction between disclosing an out-of-court statement to explain the basis of an expert's opinion [the state's proffered not-for-the-truth purpose] and disclosing that statement for its truth."[66.4]

This portion of the opinion, which was joined by all the Justices except long-time *Crawford* critics Alito and Roberts, clearly strengthened *Crawford*'s Sixth Amendment barrier. As the Court pointed out, the opposite result would allow any lab report into evidence through any trained surrogate analyst who used it to form an "independent opinion." Under *Smith*, admitting testimonial forensic evidence through that approach is clearly prohibited.

As to the second issue, whether *R*'s notes and reports were "testimonial," the Court left the question for the state courts to consider on remand since those courts had not yet addressed it. Nonetheless, in a portion of the opinion that garnered only five votes (Justices Thomas and Gorsuch abandoned this part of the majority opinion) Justice Kagan "offer[ed] a few thoughts" about the testimonial issue. Most importantly, the Court noted that some lab records may be created for non-evidentiary purposes (e.g., for quality control) or "may be written simply as reminders to self." According to the Court, "[i]n those cases, the record would not count as testimonial." To "count" as testimonial, the Court said, the document's primary purpose "must have a focus on court" (which was a fresh restatement of the primary purpose test).

These "thoughts" could prove significant, and not just for the new "focus on court" language. If forensic scientists have or develop the habit of writing notes about their tests and results for the "primary purpose" of remembering those tests and results (perhaps to be used in drafting a report), the dictum suggests that the notes might not be testimonial. This would open the door to their admission through a different analyst from the one that conducted the test—a potentially large loophole.

Of the four new justices since the *Williams* decision, Kavanaugh, Barrett and Jackson all joined the "thoughts" part of the opinion. Their views about the definition of "testimonial" are unknown, though Justice Kavanaugh's questions at oral argument in *Smith* suggested sympathy for Justice Thomas' narrow view of what "counts" as testimonial. Of the four, only Justice Gorsuch, in a separate concurrence, suggested that in a future case the definition of testimonial might need to be broadened from the "primary purpose" test, writing that the test "may be a limitation of [the Court's] own creation of the confrontation right."[66.5] Justice Sotomayor (also a part of the "thoughts" majority) has previously authored opinions suggesting ways of narrowing the definition of testimonial, and Justices Thomas, Alito and Roberts have all authored or joined opinions advocating a narrower definition. In light of all this, the ultimate strength of the Confrontation Clause limit on the admission of forensic evidence through 3rd party analysts (and perhaps, the meaning of "testimonial" more broadly) remain uncertain.

[66.1] 144 S. Ct. 1785 (2024).
[66.2] *Id.* at 1796-97 (internal quotation omitted).
[66.3] *See id.* at 1792.
[66.4] *Id.* at 1798 (internal quotations omitted).
[66.5] *Id.* at 1804 (Gorsuch, J. concurring).

CHAPTER 13 (Vol. 2)

BURDEN OF PROOF AND VERDICT ISSUES

§ 13.04 INCONSISTENT VERDICTS

Page 319, at the end of footnote 63, add the following text:

See McElrath v. Georgia, 601 U.S. 87 (2024).

CHAPTER 14 (Vol. 2)

DOUBLE JEOPARDY

§ 14.03 REPROSECUTION AFTER AN ACQUITTAL

Page 346, immediately before subsection [2], add the following text:

Most recently in this regard, the Supreme Court affirmed that the bar on reprosecution applies in the context of inconsistent verdicts. When a court vacates a conviction on the ground that it was inconsistent with the jury's simultaneous acquittal on a different count (a practice authorized in some states), the Double Jeopardy Clause prohibits retrial of the defendant on the count of acquittal.[128.1]

Page 348, replace the final sentence with the following:

As the Court recently reiterated in a unanimous decision, under the Double Jeopardy Clause, "the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons."[144.1]

[128.1] *See* McElrath v. Georgia, 601 U.S. 87 (2024).
[144.1] *See* McElrath v. Georgia, 601 U.S. 87, 95 (2024) (quoting *Smith v. United States* 599 U.S. 236, 253 (2023).

CHAPTER 15 (Vol. 2)

SENTENCING

§ 15.04 CONSTITUTIONAL LIMITS ON GUIDELINES SYSTEMS: *APPRENDI* AND ITS PROGENY

Page 402, at the end of footnote 195, add the following text:

Most recently, in *Erlinger v. United States*, 144 S. Ct. 1840 (2024), the Court decided that when a mandatory minimum sentence depends not only on the number of prior convictions, but also on whether the defendant committed those crimes "on different occasions," a jury must decide the "different occasions" question. The Court thus refused to extend *Almendarez-Torres* to cover this aspect of prior convictions, and, in writing for a 6-3 majority of the Court, Justice Gorsuch quoted many of the Court's previous disparaging comments about *Almendarez-Torres*, while noting that "there is no need" to revisit the case to decide *Erlinger*. As usual, however, only Justice Thomas expressly called for reconsidering *Almendarez-Torres* in the future, and Justice Kavanaugh wrote a lengthy opinion, joined by Alito and Jackson, defending *Almendarez-Torres*.

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