CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF

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CHAPTER FOUR

INSERT on page 285, after note (4b):

(5) In *Lange v. California*, 594 U.S. _____, 141 S. Ct. 2011, 210 L. Ed.2d 486 (2021), an officer sought to pull Lange over for a noise infraction when he was "about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him[,]" observed "signs of intoxication," and administered "sobriety tests." Ultimately, he obtained evidence that Lange had been driving under the influence of alcohol. Lange contested the warrantless entry of his home. The state courts rejected his challenge, agreeing with the prosecution's contentions "that the officer had probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal" and that "pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry." Resolving a division in the lower courts, a majority of Justices held that "the pursuit of a fleeing misdemeanor suspect" does not "always . . . qualif[y] as an exigent circumstance" that justifies a warrantless home entry. According to the Court, even though a "great many misdemeanor pursuits [do] involve exigencies," whether an exigency exists "turns on the particular facts of the case."

The majority observed that the Court's opinions had "generally applied the exigent-circumstances exception on a case-by-case basis. . . . . [W]hether an officer has 'no time to secure a warrant' . . . depends upon the facts on the ground[,]" that is, "'the totality of the circumstances.'" The majority stressed that the interest at stake was "the sanctity of a person's living space," and that home privacy "'is entitled to special protection.'" According to the majority, *United States v. Santana* [see Note (1) following *Warden v. Hayden*] did not hold that when officers have probable cause to believe an individual has committed any criminal offense hot pursuit of that individual always permits warrantless home entries. The Court saw "no need to consider Lange's" claim "that *Santana* did not establish *any* categorical rule—even one for fleeing felons." The majority "[a]ssum[ed] that *Santana* treated fleeing felon-cases categorically," but concluded that "it . . . said nothing about fleeing misdemeanants."

The majority deemed "two facts about misdemeanors" to be important—that "[t]hey vary widely" and that they "may be (in a word) 'minor.'" The Justices observed that the Court had "held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry." *Welsh v. Wisconsin* [see Note (3) following *Warden v. Hayden*] recognized that the "'gravity" of an offense "is 'an important factor to be considered when determining whether any exigency exists.'" In the absence of flight, the commission of "'only a minor offense'" provides "reason to question whether a compelling law enforcement need is present," and it is "'particularly appropriate' to 'hesitat[e] in finding exigent circumstances.'" *Welsh* "concluded" that "'the exigent-circumstances exception'" was "'rarely'" applicable "'in the context of a home entry . . . when there is probable cause to believe that only a minor offense' is involved."

The addition of "a suspect's flight" does change "the calculus[,] . . . but not enough to justify" a "categorical rule" for cases involving pursuit of a misdemeanant. The majority had "no doubt that in a great many cases flight creates a need for police to act swiftly." If a suspect "is intent on discarding evidence" or evinces "a willingness to flee yet again" while a warrant is being sought, exigency exists. "But no evidence suggests that every case of misdemeanor flight poses such dangers." There are times when, considering the "minor, non-violent" nature of the offense, officers have time to secure a warrant "even when a misdemeanant has forced the police to pursue him." A categorical exception is fatally overbroad because it allows warrantless home entries when the risks of harm from delaying to seek a warrant are insufficient.

In sum, "[i]n misdemeanor cases flight does not always supply the exigency . . . demanded for a warrantless home entry. . . . [C]ase by case" assessment of "exigencies arising from misdemeanants' flight" is required. "That approach will in many, if not most, cases allow a warrantless home entry. When the totality of the 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. . . . . [However, w]hen the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers . . . must get a warrant." The majority believed that "[t]he common law in place at the Constitution's founding [led] to the same conclusion." It did "not support a categorical rule allowing warrantless home entry when a misdemeanant flees."

Chief Justice Roberts and Justice Alito concurred in the judgment, but disagreed with the majority's rejection of the categorical rule for fleeing misdemeanants. In their view, "hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It is itself an exigent circumstance. . . . . [F]light, not the underlying offense, . . . has always been understood to justify the general rule" that "'hot pursuit of a fleeing suspect'" permits officers to "'enter premises without a warrant.'"

A categorical rule is justified and reasonable because every pursuit "implicates substantial government interests, regardless of the offense precipitating the flight." Interests present in "every hot pursuit" include "ensuring compliance with law enforcement" and "public safety." Moreover, "hot pursuit often gives rise to multiple other exigencies, such as destruction of evidence, violence, and escape." The concurring Justices acknowledged that the categorical rule they preferred was "not without exceptions or qualifications." Officers may not "manufacture an unnecessary pursuit to enable a search of a home rather than to execute an arrest." And "if a reasonable officer would not believe that the suspect fled into the home to 'thwart an otherwise proper arrest,' warrantless entry would not be reasonable." In addition, there must be "hot pursuit"—"'some sort of chase[,]'" "[t]he pursuit must be 'immediate or continuous[,]'" and "the suspect should have known the officer intended for him to stop." Finally, officers must enter homes in a reasonable manner and limit their searches to places where the suspect may be found, and they may stay no longer than necessary to complete the arrest and depart.

The concurring Justices asserted that the categorical rule provides needed guidance, whereas the majority's rule "provides no guidance at all." The case-by-case approach requires officers in pursuit of suspects to make exigency assessments "'on the spur (and in the heat) of the moment.'" It is "famously difficult to apply" and "hopelessly indeterminate." In the concurrers' view, it is quite unclear what circumstances, in addition to flight, will suffice to support a reasonable belief that harm will occur if officers end their pursuit and seek a warrant.

CHAPTER FIVE

INSERT on page 458, between notes (3) and (4) following *California v. Hodari D.*:

(3a) In *Torres v. Madrid*, 592 U.S. _____, 141 S. Ct. 989, 209 L. Ed. 2d 190 (2021), a woman who had been shot by officers, but had fled, filed a civil suit claiming that the officers had unreasonably seized her in violation of the Fourth Amendment. The district court granted summary judgment for the officers, and the court of appeals affirmed that ruling. The appellate court "relied on . . . precedent providing" that a seizure by means of "'physical touch (or force)'" requires termination of an individual's movement or "physical control over the" individual. The question before the Supreme Court was "whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting." By a 5-3 vote, the Court held "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."

According to the majority, *Hodari D.* "articulate[d] 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." Whether or not these principles were dictum in *Hodari D.*, the *Torres* majority "independently reach[ed] the same conclusions." When the Fourth Amendment was adopted, there was "virtual unanimity" at common law. A person was seized by even the "'unsuccessful'" use of "'physical force to restrain movement.'" In fact, "the slightest application of [physical] force" constituted "an arrest." The Court acknowledged that in this case the force was applied by bullets, not by hands—that is, it involved "an application of force from a distance." The Justices saw "no basis for drawing an artificial line between grasping with a hand and other means of applying physical force." They refused to "carve out" what they deemed a "greater intrusion on personal security from the mere-touch rule [simply] because founding-era courts [had] not confront[ed] apprehension by firearm." For Fourth Amendment seizure purposes, shooting a person with a bullet had to be treated like touching a person with the hand in order to preserve "'the privacy and security'" interests that the Framers intended to protect.

The defendants' argument and the dissent's conclusion that a seizure of a person occurred only when there is "'an intentional acquisition of physical control' . . . improperly erased the distinction between seizures by control and seizures by force. . . . . 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." The common law did require "actual control" when officers made a show of authority or used other means to restrain a person. (According to the majority, erecting a roadblock that a person crashes into is an example of the termination of movement by neither a show of authority nor physical force.) "But the requirement of control or submission never extended to seizures by force." In addition, the common law "recognized" that a control requirement "would be difficult to apply" in force cases and "avoided . . . line-drawing problems" by not imposing such a requirement.

The majority noted that not "every physical contact between a government employee and a member of the public" was "a Fourth Amendment seizure. A seizure requires the use of force *with intent to restrain*. . . . . Moreover, the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain." Neither "the subjective motivations of police officers" nor "the subjective perceptions of the seized person" matter. In addition, "a seizure by force—absent submission—lasts only as long as the application of force. . . . . The fleeting nature of some seizures by force undoubtedly may inform . . . damages" in a civil case and "what evidence" is to be excluded from a criminal trial. In this case, the shooting of the plaintiff "applied physical force to her body and objectively manifested an intent to restrain her from driving away. [T]herefore[,] the officers seized [her] for the instant that the bullets struck her." Whether that seizure was unreasonable was a question left "open on remand" to the lower courts.

Justice Gorsuch authored a dissent joined by Justices Thomas and Alito. According to the dissenters, "[u]ntil today, a Fourth Amendment 'seizure' has required taking possession of someone or something." The majority's view that merely touching a person constitutes a seizure "even if the [person] refuses to stop, evades capture, and rides off into the sunset never to be seen again . . . is as mistaken as it is novel." The majority had "disregard[ed] the Constitution's original and ordinary meaning . . . and bypass[ed] the main currents of the common law. . . . . Neither the Constitution nor common sense can sustain" the "definition of a 'seizure'" adopted by the Court. "[T]he Fourth Amendment's text, its history, and our precedent all confirm that 'seizing' something doesn't mean touching it; it means taking possession."

CHAPTER SEVEN

INSERT on page 754, after note (3):

(4) In *Vega v. Tekoh*, 597 U.S._____, _____ S. Ct. _____, _____ L. Ed. 2d _____ (2021), an accused was acquitted of a sex offense following a trial in which a judge denied a motion to exclude his incriminating statement under *Miranda*. He filed a civil suit under 42 U.S.C. §1983 against the officer who obtained his confession and others, claiming that the admission of his unwarned statement entitled him to damages. The trial judge in the civil suit refused to instruct the jury that if it found that the officer had obtained the statement from the plaintiff in violation of *Miranda* and that the statement was improperly used against him in his criminal trial, his Fifth Amendment right against compelled incrimination was violated. The judge reasoned that *Miranda* had "established a prophylactic rule . . . that . . . could not alone provide a ground for §1983 liability." On appeal, the Ninth Circuit reversed, "holding that the 'use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a §1983 claim' against the officer who obtained the statement." In a 6-3 decision, the Supreme Court reversed the court of appeals, holding that "a violation of the *Miranda* rules [does not] provide[] the basis for a claim under §1983."

The majority noted that "[s]ection 1983 provides a cause of action against any person acting under color of state law" for a "deprivation of any rights . . . secured by the Constitution and laws." Although a violation of the Fifth Amendment right against compelled self-incrimination does furnish a basis for a damages claim under that provision, the Ninth Circuit was "wrong" to hold that "a violation of *Miranda* "constitutes a violation of the Fifth Amendment." According to the Court, the original opinion in *Miranda* "was clear." It "did not hold that a violation of the rules it established necessarily constitute[d] a Fifth Amendment violation." In several subsequent decisions, "the Court . . . repeatedly described the [*Miranda*] rules . . . as 'prophylactic,'" and developed "the dimensions of the[] new prophylactic rules." The majority observed that a number of these post-*Miranda* decisions "would not have been possible if *Miranda* represented an explanation of the meaning of the Fifth Amendment right as opposed to a set of rules designed to protect that right." These cases "acknowledged the prophylactic nature of the *Miranda* rules and engaged in cost-benefit analysis to define the scope of these prophylactic rules."

Dickerson v. United States "did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision." Although the Court held that *Miranda* "was a 'constitutional decision' that adopted a 'constitutional rule,'" the Court also "made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation." The Court did recognize that the rules were "necessary to protect" the Fifth Amendment right. However, the object of stating that the rules were "'constitutionally based' and have 'constitutional underpinnings' . . . was to avoid saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right." In sum, *Dickerson* confirmed that *Miranda* prescribes "prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination." Because

"a violation of *Miranda* does not necessarily constitute a violation of the Constitution, . . . such a violation does not constitute 'the deprivation of [a] right . . . secured by the Constitution'" under §1983.

Alternatively, §1983 provides for claims based on deprivation of a right "'secured by the . . . *laws*.'" It is arguable that because the *Miranda* rules are "federal 'law,'" violations of those rules can provide the basis for damages under that provision. According to the majority, the merits of this argument depended on whether *Miranda*'s "'law' should be expanded to include the right to sue for damages under §1983." Past decisions established that "'[a] judicially crafted' prophylactic rule should apply 'only where its benefits outweigh its costs.'" The majority concluded that the benefits of permitting civil claims for *Miranda* violations "would be slight, [while] the costs would be substantial." For this reason, the Justices "refuse[d] to extend *Miranda* in the way . . . request[ed]." They concluded that the use of an unwarned statement against an accused in a criminal trial does not constitute the deprivation of a right secured by federal law that can serve as the basis for a §1983 damages claim.

In a dissent joined by Justices Sotomayor and Kagan, Justice Breyer asserted that the protections afforded by *Miranda* "are a 'right[]' 'secured by the Constitution' under" §1983. The majority erred in "strip[ping] individuals of the ability to seek a [damages] remedy for violations of the right recognized in *Miranda*."