

Summer 2021 Update

Learning Criminal Procedure

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(Note: This supplement contains all necessary edits to the second edition)

Chapter 9

What is a “Seizure?”

[On page 190, replace the final sentence of the paragraph following the blue text box with the following:]

Likewise, if the officer grabs the suspect by the arm and holds him, but the officer honestly believes that the suspect was allowed to leave at any time, the court will ignore the officer's subjective intent and determine whether an objective observer would believe that the officer intended to restrain the suspect when he grabbed the suspect's arm.

[On page 192, insert the following after the third full paragraph, right after “...show of authority.”:]

The Supreme Court later clarified *Hodari D.* by holding that the application of force to a person is only a seizure if the police officer “manifested an objective intent to restrain the suspect”—that is, only if an objective observer would believe the officer intended to restrain the suspect when he applied the force.¹

¹ Torres v. Madrid, 141 S.Ct. 989 (2021).

Chapter 17

Exceptions to the Warrant Requirement: Exigent Circumstances

[On page 473, replace the final paragraph on the page with the following:]

1. Fleeting Felons and “Hot” Pursuit. One of the first cases in which the Court weighed the exigent circumstances exception involved the police pursuit of an armed robber who retreated into his home to avoid capture. In the case, the Court established the principle that the “hot pursuit” of a suspected felon will justify police officers’ entry of a home, even without a warrant.

[On page 475, insert the following text immediately after the blue box:]

The Court later clarified that the *Hayden* rule only applies if the police are chasing a person suspected of committing a felony; if the police only suspect the fleeing person of a misdemeanor, their suspicion alone will not be sufficient to permit them to follow the suspect into the home. However, the Court noted that in many cases, there will be additional factors (such as the risk that the suspect might destroy evidence, or that she might continue to flee while the police take the time to get the warrant) that will provide the police with enough exigency to enter the home in pursuit of the misdemeanor.²

[On page 482, insert the following text immediately after the blue box:]

McNeely remains good law, and so as of now there is no *per se* exigency for a blood test in every drunk-driving investigation. However, the Supreme Court moved towards re-establishing a *per se* exigency rule in the later case of *Mitchell v. Wisconsin*.³ In *Mitchell*, the defendant was unconscious and so unable to provide a breath test, and the Court held that this additional factor created an exigency. The Court approvingly cited *Schmerber*, noting that an exigency exists when “(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.”⁴ Although the Court did not overrule *McNeely*, *Mitchell* makes it easier to find exigency in drunk-driving cases, as long as the police can point to some other factor (the accident in *Schmerber*, the defendant’s unconscious state in *Mitchell*) that adds to the urgency of the situation.

² *Lange v. California*, 141 S.Ct. 2011, 2017 (2021).

³ 139 S.Ct. 2525 (2019).

⁴ *Id.* at 2537.

Chapter 18

Exceptions to the Warrant Requirement: Special Needs Searches

[On page 513, insert the following text immediately before the subsection on border checkpoints:]

In a later case, the Court clarified that the emergency aid exception does not apply to every action the police take when performing their “community caretaking” duties. In order for the exception to allow for a warrantless entry into a home, there must be “an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger,” as was the case in *Stuart*.⁵ However, the Court suggested in dictum that the emergency aid exception probably applies even if the need or danger was not imminent, such as if a concerned relative or neighbor reported that an elderly resident was not responding to phone calls, or if a person called 911 and said they were feeling suicidal and had access to a firearm.⁶

⁵ *Caniglia v. Strom*, 141 S.Ct. 1596, 1600 (2021) (Alito, J. concurring).

⁶ *Id.* at 1602-3 (Kavanaugh, J., concurring).

Chapter 19

Reasonable Suspicion and Terry's "Stop and Frisk"

[On page 574, insert the following text immediately after the second paragraph on the page:]

Police officers are also permitted to rely on their own "common sense" in determining whether reasonable suspicion exists. In *Kansas v. Glover*,⁷ a police officer saw the defendant driving, ran the license plates of his car, and determined that the owner of the truck had a suspended driver's license. The officer pulled the car over based solely on this information, along with the common sense inference that the driver of a car is usually the owner of the car. The defendant had argued that the police could only rely on inferences derive from their specialized training or experience, but, the Court disagreed, holding that police may also rely upon "factual inferences based on the commonly held knowledge they have acquired in their everyday lives."⁸ However, the officer still must have specific and articulable facts—such as the suspended license—before conducting the *Terry* stop or the traffic stop.

⁷ *Kansas v. Glover*, 140 S.Ct. 1183 (2020).

⁸ *Id.* at 1189-90.

Chapter 23

Remedies for Violations of the Fourth Amendment

[On page 729, replace the list in the middle of the page with the following list:]

1. They can generally only be brought against law enforcement agents, not prosecutors or judges.
2. The public employer is frequently not liable for the unlawful actions of its law enforcement officers, leaving the plaintiffs to sue only the “shallow pockets” of the law enforcement officers themselves.
3. Law enforcement officers enjoy a qualified immunity from such suits, which a plaintiff must overcome in order to proceed.
4. In order to obtain injunctive relief, the plaintiff must establish a likelihood of future violations of the Fourth Amendment.
5. If the plaintiff is suing on the basis of a retaliatory arrest, the claim will be denied if there was probable cause to arrest the plaintiff at the time of the arrest.
6. Private lawsuits are expensive, and the monetary damages for most violations of the Fourth Amendment are not extensive.

[On page 733, insert the following text after the second paragraph:]

The courts have created another obstacle for liability in cases in which the plaintiff is suing the police for retaliatory arrest. This cause of action requires the plaintiff to prove that the police officer’s motivation to arrest the plaintiff was caused by the plaintiff’s constitutionally protected speech. Proving a causal link between the plaintiff’s speech and the arrest is already challenging, but even if the plaintiff is able to do so, the claim will still fail unless the plaintiff can also prove that there was no probable cause to make the arrest. In other words, even if the police officer was motivated to arrest the plaintiff to punish him for constitutionally protected speech, a lawsuit against the officer will be dismissed if the officer had probable cause to make the arrest.⁹

[On the following line, replace “Fifth and finally” with “Sixth and finally”]

⁹ Nieves v. Bartlett, 139 S.Ct. 1715 (2019). The no-probable-cause requirement does not apply if the plaintiff can prove that the police had probable cause to arrest others who engaged in the same criminal conduct but only arrested the plaintiff.

Chapter 31

Sixth Amendment Right to Effective Counsel

[On page 1026, insert the following text immediately at the end of footnote 12:]

This conduct is *per se* prejudicial even if the defendant waived his right to appeal. *Garza v. Idaho*, 139 S.Ct. 738 (2019).

Chapter 43

Trial by Jury

[On page 1445, add the following sentence to the end of the final paragraph:]

Regardless of the size of the jury, the Sixth Amendment mandates that all criminal jury verdicts must be **unanimous**.

[On page 1446, delete the entire first paragraph.]

[Replace Section 5, pp1468-71, with the following text:]

5. The Need for Unanimity. A jury in a criminal case may not convict unless it unanimously agrees that each element of the government’s case was proven beyond a reasonable doubt.¹⁰ Although the language of the Sixth Amendment does not explicitly require unanimity, the Supreme Court noted that at the time the Amendment was drafted, the British common law had required unanimity for decades, and all of the individual states appeared to require unanimity. And since the right to a jury trial is “fundamental to the American scheme of justice,” the content of the right—including the unanimity requirement—is also incorporated against the states under the Fourteenth Amendment.¹¹

There is a significant limitation on this unanimity requirement. Although jurors in federal cases are required to unanimously agree that each element of the government’s case has been satisfied, they are not obliged to unanimously agree on the particular **way** in which an element of the government’s case was accomplished by the accused. For example, if “an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all twelve jurors unanimously concluded that the Government had proved the necessary related element—namely, that the defendant had threatened force.”¹²

¹⁰ Ramos v. Louisiana, 140 S.Ct. 1390 (2020).

¹¹ Id. at 1397.

¹² Richardson, 526 U.S. at 817.

Chapter 45

Sentencing

[On page 1538, add the following paragraph after the end of the third paragraph:]

Finally, the Eighth Amendment limits the amount of fines and degree of property forfeiture that a state may impose as a consequence of criminal conduct.¹³

[On page 1548, add the following paragraph at the end of the subsection:]

In addition to banning cruel and unusual punishment, the Eighth Amendment also protects criminal defendants against “excessive fines” being imposed in response to criminal activity. The Court has noted that there is a significant danger of fines being “employed in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a State money.”¹⁴ The standard used by the Court to determine whether a fine is “excessive” is technically the same proportionality review mandated by the cruel and unusual punishment clause: a fine is unconstitutional if the amount of the forfeiture is “grossly disproportionate” to the gravity of the defendant’s offense.¹⁵ However, claims of excessive fines are more likely to succeed than claims of cruel and unusual punishment, especially in cases in which the government brings a civil forfeiture action against a defendant to seize his property:

Example – *United States v. Bajakajian*, 524 U.S. 321 (1998): Defendant Hosep Bajakajian and his family were flying from Los Angeles to Italy carrying over \$345,000 in cash in their luggage. Using dogs trained to detect currency, customs inspectors discovered the money after Bajakajian checked his bags and approached him in the terminal, informing him that under federal law he was required to report any money in excess of \$10,000 that they were taking out of the country. Bajakajian responded that he was only carrying \$8,000 and his wife was carrying another \$7,000. The customs inspectors then arrested him, charged him with “willfully” failing to report transportation of currency over \$10,000, and seized all of the currency. After Bajakajian was found guilty, the government sought forfeiture of the entire \$350,000, arguing that the reporting crime for which he was convicted stated that the court “shall order that the person forfeit to the United States any property...involved in such offense.” The district court refused to follow the language of the statute, finding that forfeiting such a large amount of money in punishment for this minor crime would violate the Eighth Amendment. The government appealed the ruling all the way to the Supreme Court.

¹³ *Timbs v. Indiana*, 139 S.Ct. 682 (2019).

¹⁴ *Timbs*, 139 S.Ct. at 689 (internal citations and quotations omitted).

¹⁵ *United States v. Bajakajian*, 524 U.S. 321 (1998).

Analysis: The statute mandating forfeiture of the entire amount of property involved in the offense violated the Eighth Amendment in this context. The Court noted that the maximum sentence for the reporting crime was six months in jail and a \$5,000 fine, and so seizing over \$350,000 was grossly disproportionate to the magnitude of the offense. The Court distinguished this case from an *in rem* seizure, in which the defendant has made substantial money from selling drugs or evading taxes, and the government seeks forfeiture of the fruits of the crime. In those cases, it is appropriate to seize all of the money that the defendant obtained from his criminal activity in order to ensure he does not profit from his crime. In contrast, Bajakakian’s money was legally his; his only crime was not reporting it to the government, and thus the amount of the seizure bore “no articulable correlation to any injury suffered by the government.”¹⁶

As the Court noted in *Bajakajian*, a seizure will generally be found to be disproportionate if the monetary value of the seizure is far greater than the maximum fine allowed for the crime, and/or far greater than the illicit gains made by the defendant as a result of the crime.

The excessive fine clause also applies to civil forfeiture actions brought by the government to seize a defendant’s property after conviction.¹⁷ However, the excessive fines clause only applies to fines or seizures levied by the government; it does not apply to an award of punitive damages in a civil case between two private parties.¹⁸

[On page 1559, add the following footnote after the last sentence on the page:]

The Court does not seem inclined to make such a ruling; in 2021 it held that a trial judge does not have to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. *Jones v. Mississippi*, 141 S.Ct. 1307 (2021).

¹⁶ *Id.* at 340.

¹⁷ *Austin v. United States*, 509 U.S. 602 (1993).

¹⁸ *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.D. 257 (1989).

Chapter 46

Double Jeopardy

[On page 1596, replace footnote 9 with the following:]

⁹ *Gamble v. United States*, 139 S. Ct. 1960 (2019).