SUMMER 2024 UPDATE

LEARNING CRIMINAL PROCEDURE

Second Edition

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LEARNING SERIES

WEST ACADEMIC

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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 restraint 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. Fleeing 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 misdemeanant.[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 approving 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 731, insert the following text at the end of the third paragraph:]

In determining whether a precedent provides unequivocal notice, courts will evaluate the similarity of the facts in the precedent with the facts of the police action. These facts include the severity of the crime the police were investigating, whether the criminal defendant was armed, and the nature and the length of the police intrusion.[9]

[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

[9] Rivas-Villegas, 142 S.Ct. 4 (2021)

speech, a lawsuit against the officer will be dismissed if the officer had probable cause to make the arrest.[10]

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

[10] 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 26

Interrogations and Miranda

[On page 813, after the numbered list, add the following text:]

The effect of *Miranda* violations is limited in one other significant way. As you recall from **Chapter 23**, when a police officer violates a defendant's Fourth Amendment rights, the defendant can potentially sue the police officer under §1983. Section 1983 actions are also potentially available for violations of the Fifth Amendment or the Due Process Clause, as we saw in *Chavez v. Martinez* in the last chapter.[11] However, a criminal defendant cannot sue for damages under §1983 for a violation of their *Miranda* rights, because the Supreme Court has held that "a violation of *Miranda* does not necessarily constitute a violation of the Constitution," and that the costs of allowing such lawsuits would outweigh their benefits.[12]

[11] 538 U.S. (2003).
[12] Vega v. Tekoh, 142 S.Ct. 2095 (2022).

Chapter 28

Screening by Prosecutors

[On page 952, before subsection 3, add the following text:]

Another legal check on the prosecutor's power is the bar against **malicious prosecution**. A malicious prosecution claim is not a defense to the criminal case; rather, it is a civil claim that the criminal defendant could bring against the prosecutor, usually after the criminal case has been dismissed. In a malicious prosecution claim, the former criminal defendant (now a plaintiff) sues the prosecutor under 42 U.S.C. §1983, which is a statutory provision that allows individuals to recover damages from a state or local official because of the deprivation of a constitutional right. A malicious prosecution claim alleges that the prosecutor engaged in an illegal seizure under the Fourth Amendment, by detaining the plaintiff based on a criminal charge that lacked probable cause. The claim is based on an old common law tort of malicious prosecution, and requires the plaintiff to establish:

> (i) the suit or proceeding was "instituted without any probable cause";
> (ii) the "motive in instituting" the suit "was malicious," which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and
> (iii) the prosecution "terminated in the acquittal or discharge of the accused."[13]

The Supreme Court has recently clarified two of these elements. Regarding the first element, the Court has held that if a plaintiff was charged on multiple counts, they are allowed to move forward with a claim of malicious prosecution on any count that was initiated without probable cause even if some of the other counts were clearly supported by probable cause, as long as the plaintiff can prove that at least some duration of their seizure was related to one of the baseless charges.[14] And regarding the third element, the plaintiff need not show that the prosecution ended with an affirmative indication of their innocence (such as an acquittal), only that the prosecution ended without a conviction.[15]

Like selective prosecution and vindictive prosecution defenses, malicious prosecution claims are difficult to win due to the high standards of proof required to establish a "malicious" motive.

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[13] Thompson v. Clark, 596 U.S. 36, 44.
[14] Chiaverini v. City of Napoleon, Ohio, 144 S.Ct. 1745, 1748.
[15] Thompson, 596 at 49.

Chapter 30

The Sixth Amendment Right to Counsel

[On page 980, line 6, replace the sentence that begins with "The Supreme Court has never…" with the following:]

However, the defendant has a right to counsel in a misdemeanor case if they received a suspended sentence.[16]

[16] Alabama v. Shelton, 535 U.S. 654 (2002).

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 40

Joinder and Severance

[On page 1342, beginning with the first full paragraph, replace all the text up until the Quick Summary with the following text:]

In theory, redaction is the best solution—it removes the prejudice from the evidence since the co-defendant is no longer being implicated, and because the defendant is no longer accusing the co-defendant, redaction avoids the Confrontation Clause issue. However, the confession must be redacted so that it does not "directly implicate" the non-confessing defendant. In one post-*Bruton* case, *Gray v. Maryland*, the prosecutor simply replaced the co-defendant's name with the word "deleted" when the police detective read the confession to the jury, and replaced the co-defendant's name with a blank line when the written confession was admitted into evidence. The Supreme Court held that this redaction was insufficient, since "[a] juror somewhat familiar with criminal law would know immediately that the blank refers to [the co-defendant]. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to [the co-defendant], sitting at counsel table, to find what will seem the obvious answer…."[17] In other words, such a blatantly obvious redaction still "directly implicates" the co-defendant, and therefore violates the co-defendant's Confrontation Clause rights if the confessing defendant does not take the stand.

However, as long as the prosecutor redacts the confession in a way that only "indirectly" refers to the co-defendant, the confession will be admissible:

> **Example: Samia v. United States, 2023 WL 4139001 (2023).** Adam Samia, Joseph Hunter, and Carl Stillwell were charged with killing Catherine Lee as part of a murder-for-hire scheme for a crime boss. Stillwell confessed to the crime but did not testify at trial, so the prosecutor had a police detective read Stillwell's confession after redacting it "in a way that eliminated Samia's name while avoiding any obvious indications of redaction." Here is the colloquy between the prosecutor and the detective:
>
> "Q. Did [Stillwell] say where [the victim] was when she was killed?
> "A. Yes. He described a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving."
>
> The trial judge instructed the jury that this testimony was only admissible as to Stillwell and should not be considered as to Samia or Hunter. After Samia was convicted, he appealed, arguing that the jury could easily infer that Samia was the "other person" mentioned in the confession. For example, during the prosecutor's opening statement, the prosecutor asserted that Stillwell drove the van while Samia "was in the passenger seat,"

[17] Gray v. Maryland, 523 U.S. 185, 193 (1998).

and that Samia pulled out a gun, "turned around, aimed carefully and shot [Lee]." Thus, Samia contended that this statement, even as modified, violated the *Bruton* rule.

Analysis: The Court rejected Samia's argument, distinguishing between "directly accusatory" incriminating statements (such as the deletions and blanks in *Gray*), and statements that do "not refer directly to the defendant," but "bec[o]me incriminating only when linked with evidence introduced later at trial." The Court held that there is no need 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."[18]

Not only did *Samia* provide prosecutors with a relatively easy way to redact and avoid a *Bruton* problem, it did so using language that subtly called into question the very foundation of *Bruton*'s holding. The Court noted that "[e]vidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. And, 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." The Court provided a number of examples where limiting instructions are deemed sufficient even though the statements they refer to are "more credible and inculpatory than a codefendant's confession," including confessions were obtained in violation of *Miranda* that are used only to impeach the defendant.[19]

For now, however, *Bruton* is still good law, and so if a prosecutor chooses to admit a confession from a non-testifying defendant that mentions co-defendants, the prosecutor must either (1) sever the trial; or (2) ensure that the confession is redacted so that it does not "directly implicate" the non-confessing defendant.

[On page 1343, replace the final paragraph of the Quick Summary with the following text:]

Finally, there is one critical constitutional issue raised by the law of joinder and severance. The *Bruton* doctrine states that if multiple defendants are being tried together, and the prosecutor wants to admit a confession by one of them that implicates another, the prosecutor will have to redact the confessing defendant's statement so that it does not "directly implicate" the co-defendant. If that is not possible, the court must sever the defendants and try them separately.

[18] Samia v. United States, 2023 WL 4139001, *10 (2023).

[19] *Id.* at *7 (internal quotations omitted).

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.[20] 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.[21]

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."[22]

[20] Ramos v. Louisiana, 140 S.Ct. 1390 (2020).
[21] Id. at 1397.
22 Richardson, 526 U.S. at 817.

Chapter 45

Sentencing

[On page 1536, add the following sentences after the end of the first full paragraph:]

It is important to note that the foundational question of whether the government can criminalize certain behavior will generally not give rise to a viable Cruel and Unusual Punishment claim. For example, the Court rejected an Eighth Amendment challenge to a city's ban on camping on public land that was being used to punish homeless people.[23] Thus, almost all Eighth Amendment jurisprudence surrounds the appropriateness of a given form of punishment.

[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.[24]

[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."[25] 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.[26] 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.

[23] City of Grants Pass v. Johnson, 144 S.Ct. 2202 (2024).
[24] Timbs v. Indiana, 139 S.Ct. 682 (2019).
[25] Timbs, 139 S.Ct. at 689 (internal citations and quotations omitted).
[26] United States v. Bajakajian, 524 U.S. 321 (1998).

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.

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 of 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."[27]

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.[28] 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.[29]

[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).

[27] Id. at 340.
[28] Austin v. United States, 509 U.S. 602 (1993).
[29] 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).

[On page 1601, add the following sentence at the end of the third full paragraph:]

On the other end of the spectrum, the Court has held that a verdict of "not guilty by reason of insanity" counts as an "acquittal" for the purposes of the double jeopardy clause.[30]

[30] McElrath v. Georgia, 601 U.S. 87 (2024)

Chapter 48

Post-Conviction

[On page 1707, replace the second and third full paragraphs on the page (the final two paragraphs of C.3.), with the following:]

To date, the Supreme Court has only acknowledged the possibility that a claim of freestanding innocence might exist. A theoretical claim of freestanding innocence was first recognized by the Court in *Herrera v. Collins*[31] and then again in *Schlup v. Delo*[32]. However, in neither case did the Court find such a claim. The Court took up the question a third time in *House* and again refused to definitively recognize the claim. Instead, the Court "assumed without deciding that 'in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim.'"[33] More recently, the Court has suggested it may be cooling to the application of the theory.

In *Jones v. Hendrix*, Marcus Jones was convicted of unlawful possession of a firearm by a felon and sentenced to just over 27 years in prison. At the time of his conviction, the law did not require proof that Jones was aware he had been disqualified from possessing weapons. Approximately twenty years later, the Supreme Court held in an unrelated case that Jones' offense of conviction did in fact require proof that the defendant knew of his disqualified status. Rejecting Jones' request for post-conviction relief, the Court held that standard procedural bars to relief applied notwithstanding Jones' claim of statutory innocence – "The inability of a prisoner with a statutory claim to satisfy [the procedural hurdles to relief] does not mean he can bring his claims in a habeas petition under the savings clause. It means that he cannot bring it at all. Congress has chosen finality over error correction in his case." At 17.

It is entirely uncertain whether a claim of freestanding innocence will ever be recognized. What is certain is the threshold for establishing any such claim is even higher than that for a claim of gateway innocence.[34] And, it is clear that any such claim requires far more than a mere change in the law originally justifying conviction.

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[31] 506 U.S. 390 (1993).
[32] 513 U.S. 298.
[33] Bell, 546 U.S. at 554 (citing Herrera v. Collins, 506 U.S. 390, 417 (1993)).
[34] Bell, 546 U.S. at 555.