

ASPEN PUBLISHERS

emanuel CrunchTime[®]

Your Exam Study Partner



Criminal Procedure

Steven L. Emanuel

Contains

- Flow Charts
- Capsule Summary
- Exam Tips
- Short-Answer Q&As
- Essay Q&As



Wolters Kluwer

Law & Business



30806115

ASPEN PUBLISHERS

CRIMINAL PROCEDURE

SIXTH EDITION

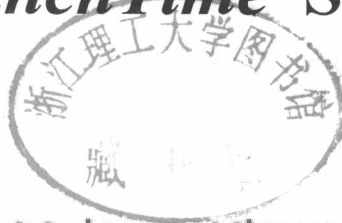
STEVEN L. EMANUEL

Harvard Law School, J.D. 1976

Founder & Editor-in-Chief, Emanuel Bar Review

Member, NY, CT, MD and VA Bars

The *CrunchTime*® Series



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

3420010
© 2009 Aspen Publishers. All Rights Reserved.
<http://lawschool.aspenpublishers.com>

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-7891-3

This book is intended as a general review of a legal subject. It is not intended as a source for advice for the solution of legal matters or problems. For advice on legal matters, the reader should consult an attorney.

Seigel's, Emanuel, the judge logo, Law in a Flash and design, CrunchTime and design, Strategies & Tactics and design, and The Professor Series are registered trademarks of Aspen Publishers.

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

Preface

Thank you for buying this book.

The *CrunchTime*[®] Series is intended for people who want Emanuel quality, but don't have the time or money to buy and use the full-length *Emanuel*[®] *Law Outline* on a subject. We've designed the Series to be used in the last few weeks (or even less) before your final exams.

This book includes the following features, most of which have been extracted from the corresponding *Emanuel*[®] *Law Outline*:

- **Flow Charts** — We've reduced many of the principles of *Criminal Procedure* to a series of six Flow Charts, created specially for this book and never published elsewhere. We think these will be especially useful on open-book exams. The Flow Charts begin on p. 1.
- **Capsule Summary** — This is an 80-or-so-page summary of the subject. We've carefully crafted it to cover the things you're most likely to be asked on an exam. The Capsule Summary starts on p. 41.
- **Exam Tips** — We've compiled these by reviewing dozens of actual essay and multiple-choice questions asked in past law-school and bar exams, and extracting the issues and "tricks" that surface most often on exams. The Exam Tips start on p. 127.
- **Short-Answer** questions — These questions are generally in a Yes/No format, with a "mini-essay" explaining each one. The questions start on p. 161. The answers begin on p. 193.
- **Essay** questions — These questions are actual ones asked on law school exams. They start on p. 215. A sample answer follows each question.

We hope you find this book helpful and instructive.

Good luck.

Steve Emanuel
Larchmont NY
October 2009

TABLE OF CONTENTS

FLOW CHARTS	1
CAPSULE SUMMARY	41
EXAM TIPS	127
SHORT-ANSWER QUESTIONS	161
ANSWERS TO SHORT-ANSWER QUESTIONS	193
ESSAY EXAM QUESTIONS & ANSWERS	215
TABLE OF CASES	227
SUBJECT MATTER INDEX	231

FLOW CHARTS

TABLE OF CONTENTS

to

FLOW CHARTS

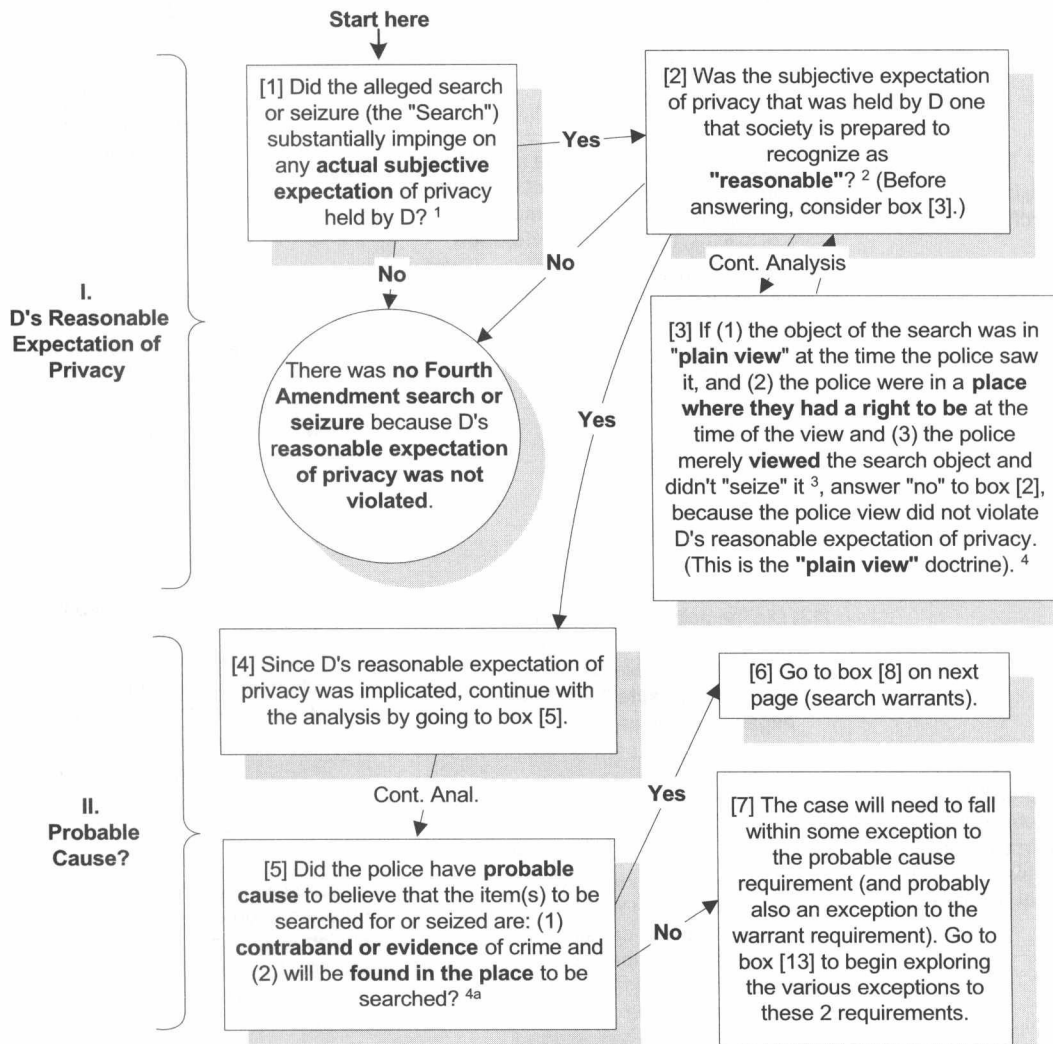
Fig.

1	Was the Search or Seizure a Violation of the Fourth Amendment?	3
2	Electronic Surveillance and Secret Agents	15
3	Confessions and Police Interrogation.	19
4	Lineups and Other Pre-Trial Identification Procedures	25
5	The Exclusionary Rule.	29
6	The Right to Appointed Counsel	37

Figure 1

Was the Search or Seizure a Violation of the Fourth Amendment?

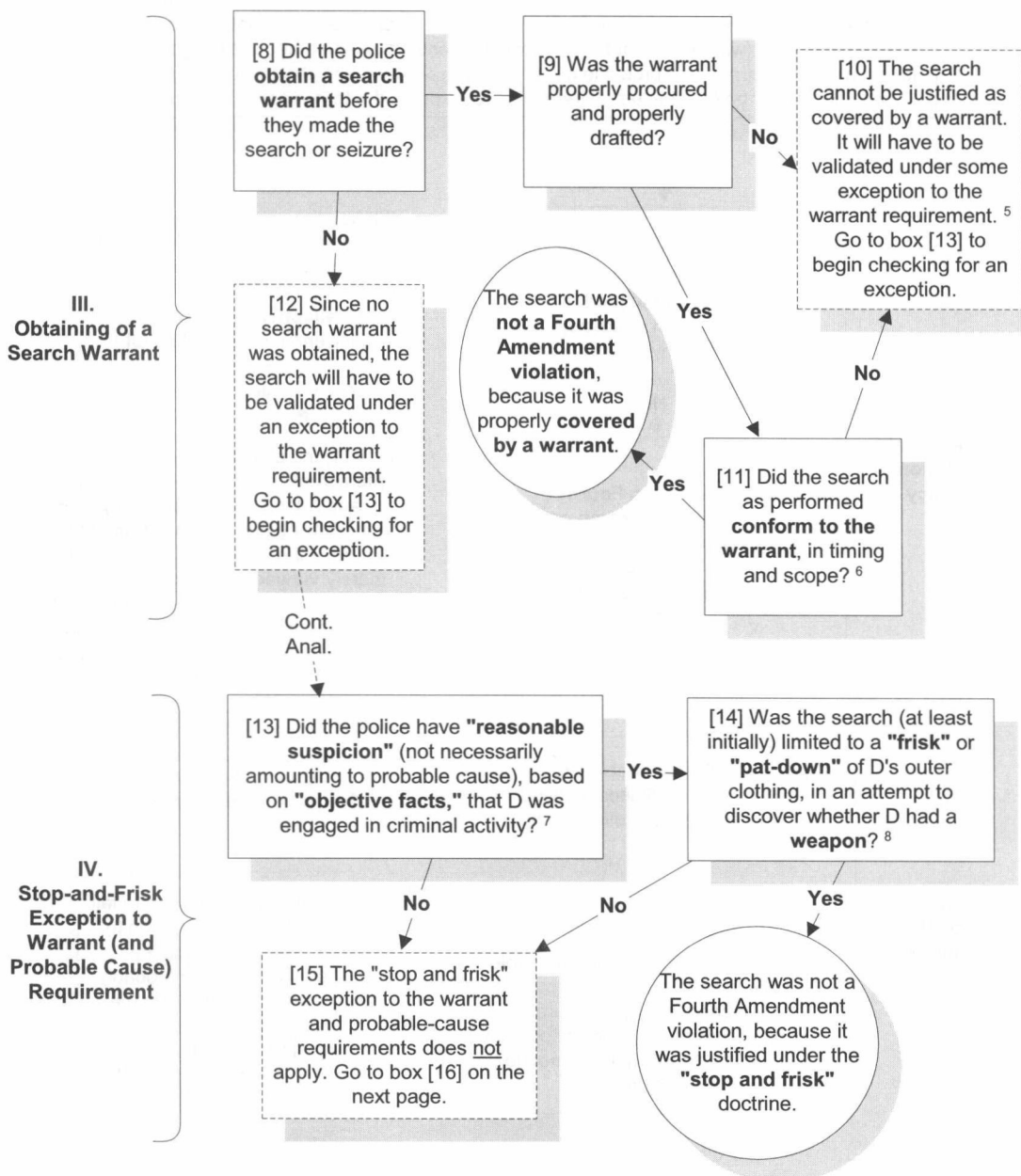
Use this chart to determine whether an alleged search or seizure violated the Fourth Amendment. D is the person who is claiming that the search/seizure violated his Fourth Amendment rights (whether or not D is a criminal defendant). Remember that the general rule is that a search warrant and probable cause are both required; the chart helps you figure out whether one or both of these requirements are dispensed with in a particular situation.



See footnotes beginning on p. 7 of chart.

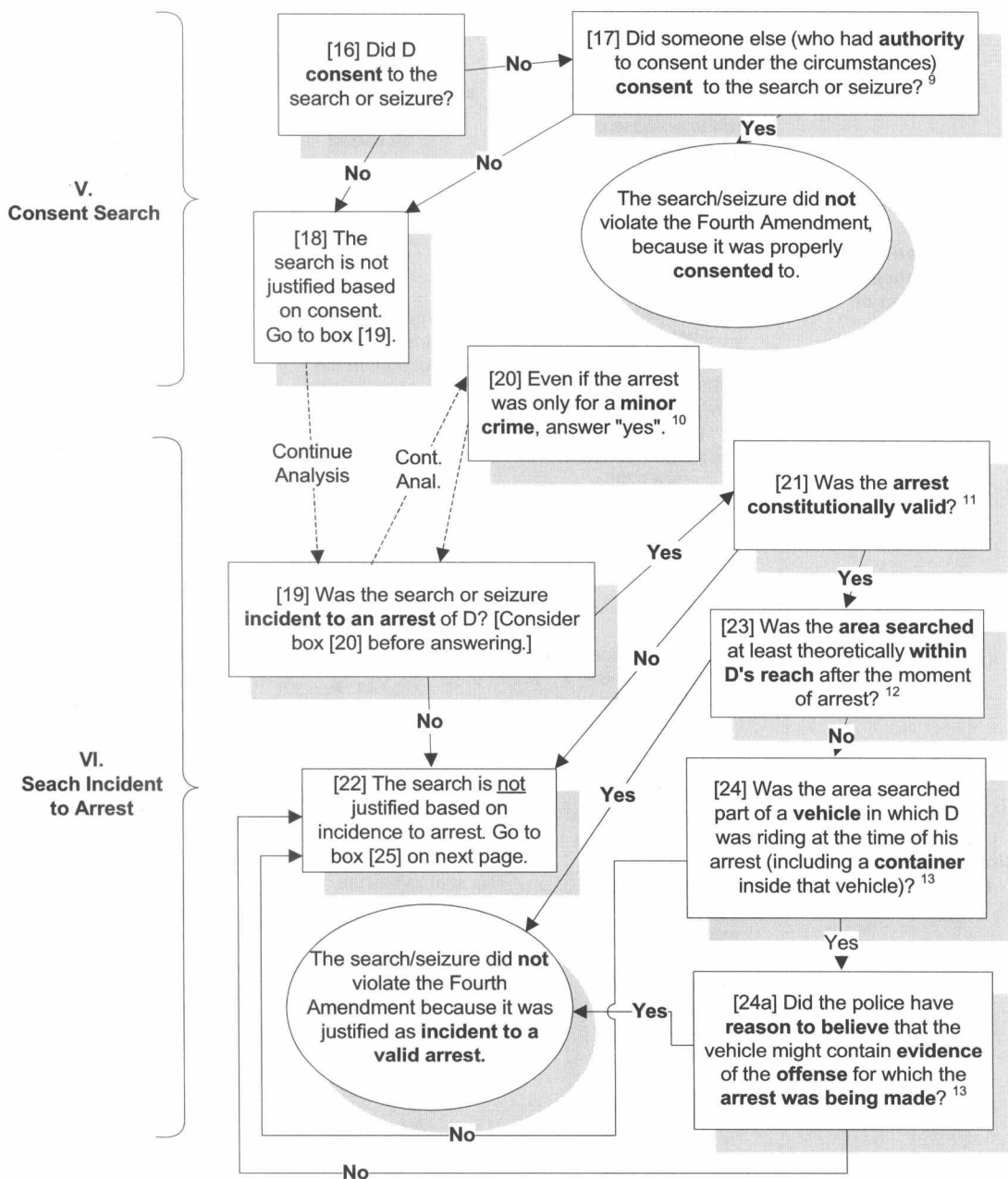
Figure 1 (Cont.)

Was the Search or Seizure a Violation of the Fourth Amendment? (p. 2)



See footnotes beginning on p. 7 of chart.

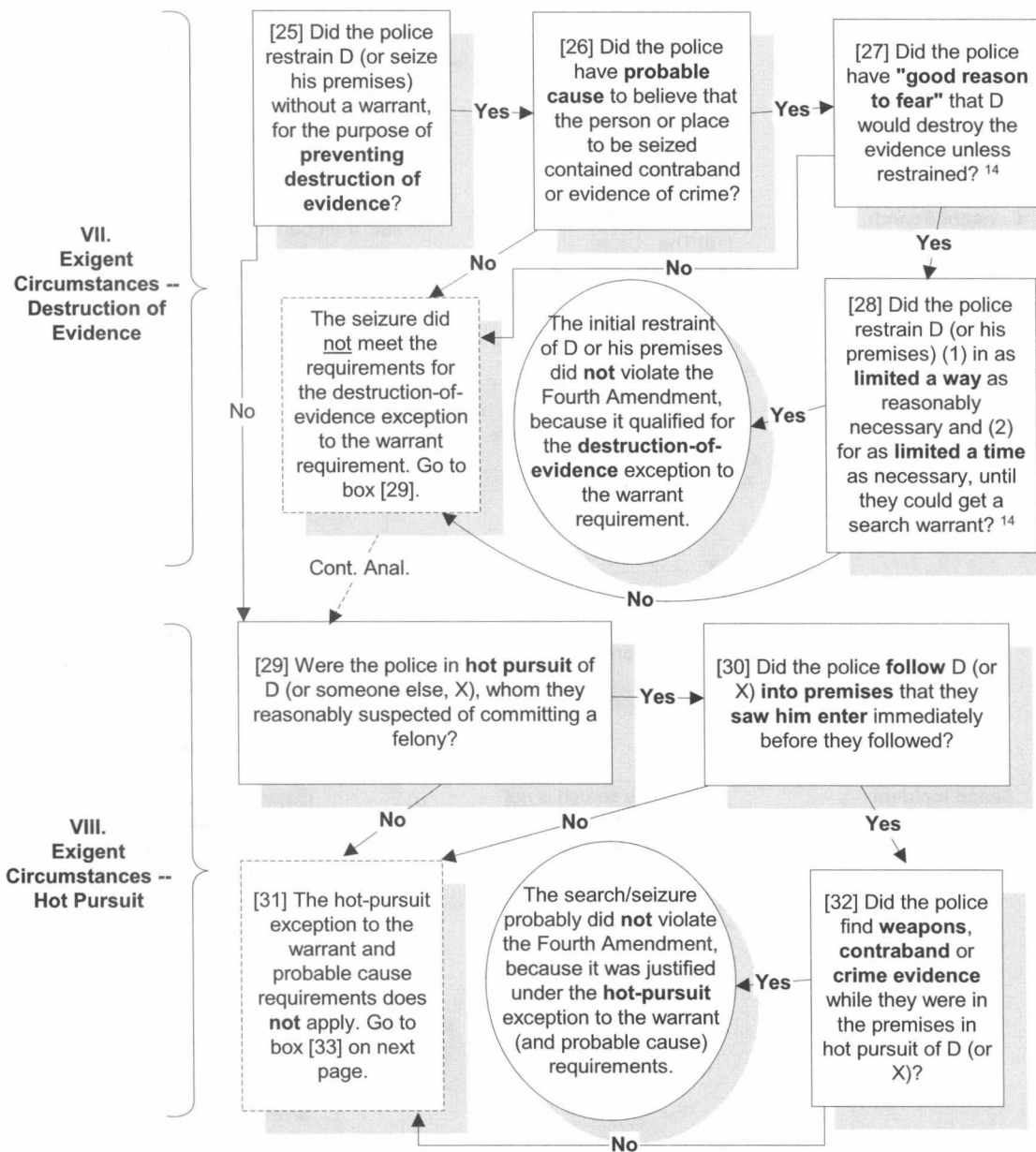
Figure 1 (Cont.)
**Was the Search or Seizure a Violation
 of the Fourth Amendment? (p. 3)**



See footnotes beginning on p. 7 of chart.

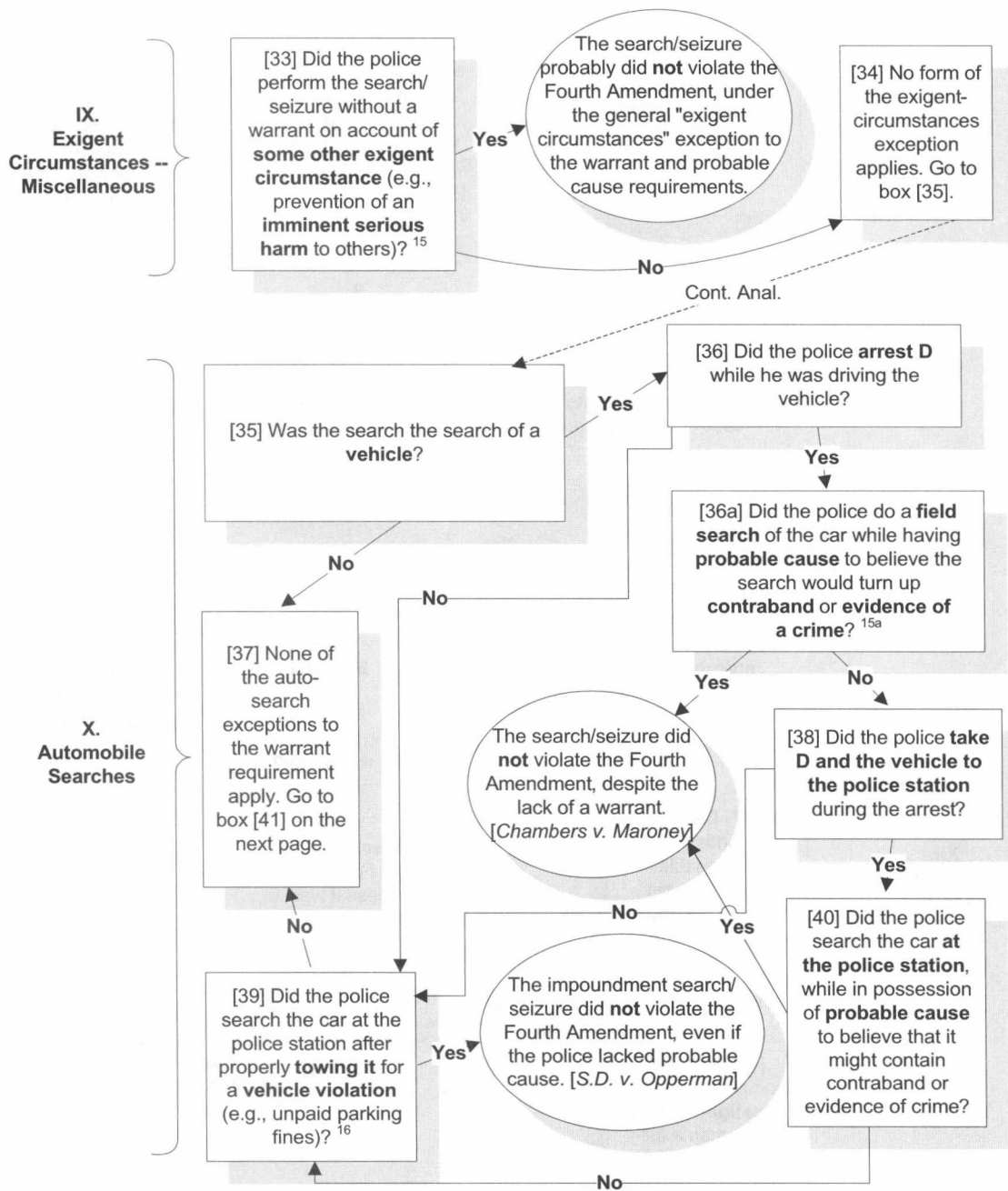
Figure 1 (Cont.)

Was the Search or Seizure a Violation of the Fourth Amendment? (p. 4)



See footnotes beginning on p. 7 of chart.

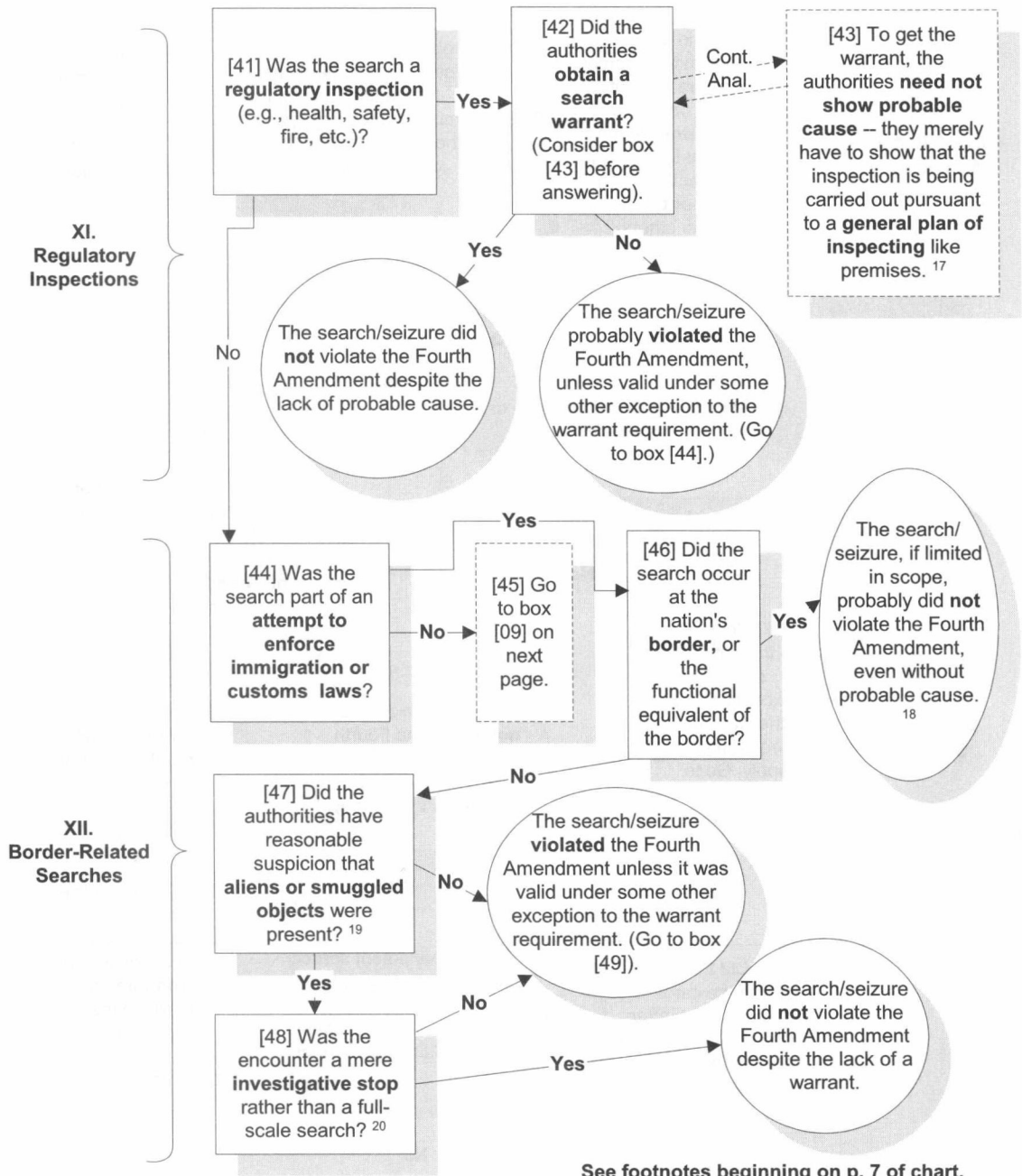
Figure 1 (Cont.)
**Was the Search or Seizure a Violation
 of the Fourth Amendment? (p. 5)**



See footnotes beginning on p. 7 of chart.

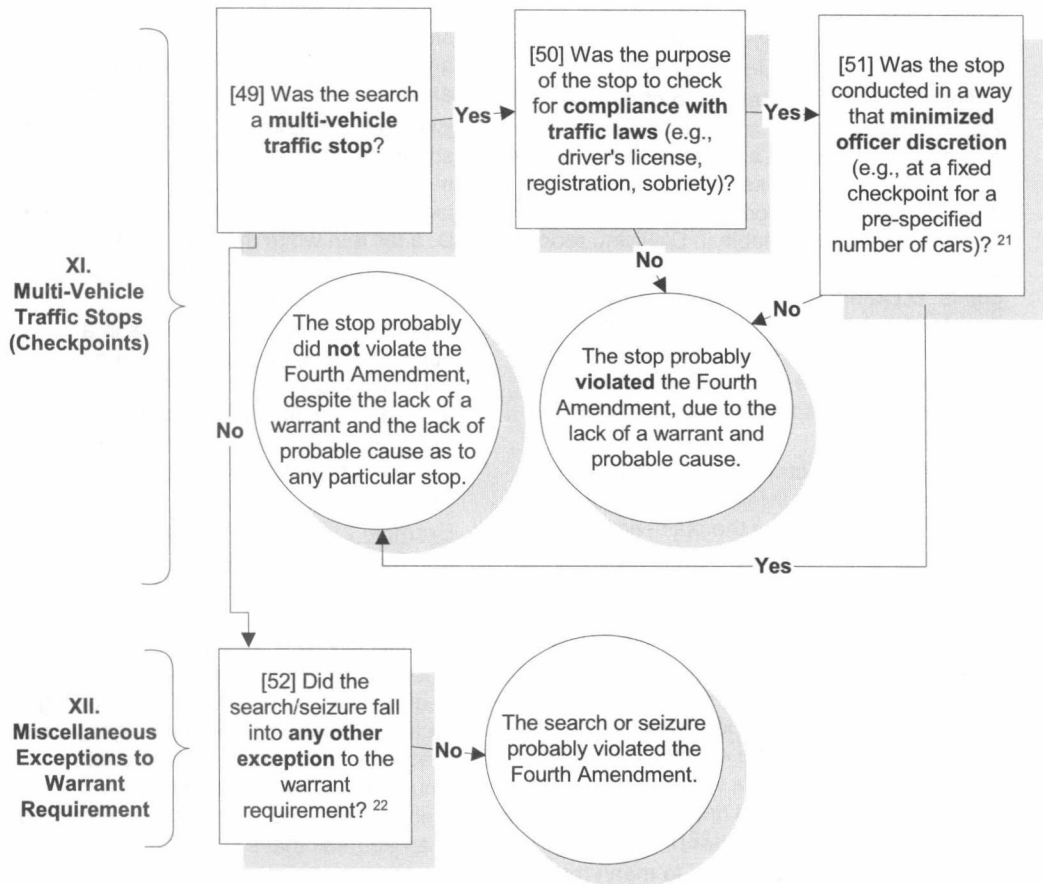
Figure 1 (Cont.)

Was the Search or Seizure a Violation of the Fourth Amendment? (p. 6)



See footnotes beginning on p. 7 of chart.

Figure 1 (Cont.)
**Was the Search or Seizure a Violation
 of the Fourth Amendment? (p. 7)**



Notes

¹ Examples of situations where D will probably be found to have had no actual subjective expectation of privacy: (1) abandoned property, such as trash; (2) things a person says or does in public.

² Example: D puts dead marijuana leaves in a garbage bag at the edge of his lawn, so that sanitation workers will pick it up. The police, acting on a tip,

ransack the bag before it's picked up, and seize the plants as evidence that D is cultivating marijuana in his house. Even if D subjectively believed that no one would open up the bag (i.e., he had a subjective expectation of privacy), this expectation of privacy was not a "reasonable" one. (See *Cal. v. Greenwood*.) Therefore, you'd

Notes continue on next page.

Notes to Figure 1 (Search and Seizure)

answer "no" to the question in box [2]. Consequently, no Fourth Amendment search would be deemed to have taken place.

- ³ In other words, the plain-view doctrine applies only to things that would otherwise be searches, not things that would otherwise be seizures. Example: O, a police officer, responds to a call that a domestic disturbance is occurring at D's house. As D is standing in the open doorway, O looks over D's shoulder and sees a brightly lit table in D's living room, containing what appear to be marijuana plants. D cannot rely on the plain-view doctrine to permit him to go into the room and seize the plants, even though he saw them in plain view. (But see next footnote for how the plain-view doctrine *would* apply on these facts.)
- ⁴ Example: Same facts as prior example (marijuana plants in living room). O's view of the plants is covered by the plain-view doctrine (since O was standing in a place he had a right to be -- the open doorway, following the disturbance call -- and since O only saw, rather than seized, the plants). Now, what O saw can supply probable cause for O to obtain a search warrant, which when issued would permit O to seize the plants. Furthermore, O would be entitled to remove D from the premises while a warrant was being sought, so that D couldn't destroy the evidence. (See boxes [25]-[28]).
- ^{4a} "Probable cause" now seems to mean merely a "reasonable likelihood," not "more likely than not." Cf. *Maryland v. Pringle*. So to have probable cause to make the search or seizure, the police must be in possession of facts causing them to believe that it is reasonably likely that (1) the items to be searched for or seized are connected with criminal activities, and (2) those items will be found in the place to be searched.
- ⁵ The remaining boxes cover various exceptions to the warrant requirement (e.g., stop-and-frisk, consent, search-incident-to-arrest, exigent-circumstances, automobile-searches, etc.)
- ⁶ Example: Suppose that a properly-issued

search warrant authorizes search of the "bedroom" of D's apartment. The police ransack D's living room, and find a hidden stash of cocaine. On these facts, you'd answer "no", because the search exceeded the scope of the warrant.

- ⁷ Example 1: V tells O, a police officer, that she was just mugged by a tall thin white male wearing a blue windbreaker. 2 blocks away and 10 minutes later, O sees D, a tall thin white male wearing a windbreaker. On these facts, you'd answer "yes" to box [13].

Keep in mind that if D engages in a number of acts in sequence, each of which is innocent in itself, there will still be grounds for a stop if the acts taken together would create reasonable suspicion that D is engaged in wrongdoing.

Example 2: D is driving near the border with Mexico, in a rural area known for smuggling. When O, a border patrol agent, drives near D, D slows down dramatically. D is driving a minivan (a type of vehicle known to be used frequently for smuggling). D is following a route, and at a particular time of day, that is not used by many people except smugglers. O radios in a check of D's license plate, and finds that it's registered to an address that's in an area known for housing smugglers. Even though each individual fact observed by O is innocent, all of the facts viewed together probably justify O in having a reasonable suspicion that D is smuggling, and therefore justify O in stopping D's vehicle. [Cf. *U.S. v. Arvizu*]

- ⁸ Example: Same basic facts as Example 1 in note 7. Now, assume that O stops D to ask him some questions. If, prior to the questions, O does a pat-down of D's outer clothing to see if D is carrying a weapon, you would answer "yes" to box [14]. Then, if O discovered a gun (not licensed as required) during the pat-

Notes continue on next page.

Notes (cont.) to Figure 1 (Search and Seizure)

down, O would be able to seize the gun, and arrest D for carrying it without a permit. The initial stop, although a Fourth Amendment "search," would not be a Fourth Amendment violation, because even though it was done without either a search warrant or probable cause, it qualifies under the stop-and-frisk doctrine.

In the case of a vehicle stop, the police may pat down either the driver or a passenger, if they have reason to believe that the person may be armed or dangerous. They may do the pat-down even if they have no reason to suspect the driver or passenger of wrongdoing. [*Ariz. v. Johnson*]

⁹ Example: H and W are husband and wife. O, a police officer, suspects that H has been growing marijuana in his garage. O knocks on the door of the house, and W answers (H is not home). O explains that he's heard a tip that H may be growing pot. W is angry at H because he's been having an affair, so W gives permission to O to do the search. Assuming that the garage is an area used by both H and W, W has authority to consent to the search. [*Cf. U.S. v. Matlock*] (But if H was present and objected, W's consent wouldn't be effective as against H. [*Ga. v. Randolph*])

¹⁰ In other words, a warrantless search can be performed incident to a proper arrest for even a minor violation. Example: P, while driving, is stopped by Officer for not signalling while changing lanes. Officer examines P's driver's license, and finds that it has expired. Officer arrests P for this very minor violation. Officer will then be entitled to search P's person incident to this arrest (and will also be entitled to search the passenger compartment of P's car, as described in box [24]).

¹¹ Most importantly, this means that the arrest must itself be supported by probable cause to believe that D committed the offense in question. So if, at trial (or at a pre-trial suppression hearing) D can establish that the arresting officer did not have probable cause to make the arrest, the search incident to that arrest will be invalid, and its fruits will normally have to be suppressed.

By the way, the police can have probable cause to arrest for Offense A even if they tell the suspect, at the time of the arrest, that the arrest is for Offense B. So as long as the police at the time of arrest were in possession of facts making it reasonably likely that D committed Offense A, that will make the arrest valid even if they subjectively believed (and told D) that they were arresting for Offense B, for which they later turned out not to have had probable cause. *Cf. Devenpeck v. Alford*.

¹² Example: D is arrested in the front hall of his house. The police then search the entire house, even though they have no reason to believe that anyone else is present. In the bedroom, they look into a chest of drawers that is too small to hold a person, and in one drawer they find heroin. This search will not be justified by the search-incident-to-arrest doctrine, because it was not even theoretically within D's reach after the arrest.

Note that where an arrest occurs in the suspect's home, the police may make a "protective sweep" of all or part of the premises, if they have a "reasonable belief" based on "specific and articulable facts" that another person who might be dangerous to the officer may be present in the areas to be swept. [*Maryland v. Buie*]. So on the facts of the above example, if the arresting officers knew that D's wife, W, was present, they would be entitled to do a sweep through the house to make sure that W was not present and dangerous. (But this would not justify the police in looking in places too small to contain W, such as the drawers above.)

Where the arrest is of a driver, it's now the case that the same "within the arrestee's reach" requirement applies, a big change from pre-2009 law. So if the driver has been, say, handcuffed and placed in the patrol car, the police can no longer automatically search the passenger compartment incident to the arrest. See note 13 for more about this.

Notes continue on next page.