

VANDERBILT  Law School

131 21st Avenue South
Nashville, Tennessee 37203-1181

www.law.vanderbilt.edu
tel 615.322.2615; fax 615.322.6631

July 15, 2011

Dear Colleague:

This is the Letter Update for the fourth edition of *Criminal Procedure--Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials*, which was published in 2007, with a new Teacher's Manual. The Update covers developments in the Supreme Court's 2007-11 Terms and also includes materials describing changes to the Foreign Intelligence Surveillance Act and empirical research about police decisions to stop or search individuals.

Note that, contrary to the title page of the book, I am now a professor at Vanderbilt Law School. The easiest way to reach me is at c.slobogin@vanderbilt.edu.

Sincerely,

Christopher Slobogin

Christopher Slobogin
Milton Underwood Professor of Law

P.S. For those who are contemplating adoption of the book, a review of the first edition can be found at [23 F.S.U. L. Rev. 1042](#) (1996). Excerpted below is the concluding paragraph of the review:

All of us were improved by this three-credit vacation from the sometimes numbing effect of cases and the routine discussions they tend to inspire. We likewise enjoyed together the methodical, hornbook-like introductions to chapters, sections, and subsections and the unorthodox sources and intradisciplinary orientation (although there is no philosophy) that distinguish the text. *Criminal Procedure: Regulation of Police Investigation* is a serious book by a serious scholar—a true heir apparent—whose sharp break from law text conventions is as impressive as it is imaginative.

Daniel Yeager, Professor, California Western Law School

CHAPTER TWO SEARCHES AND SEIZURES

II. When the Fourth Amendment is Implicated

D. A Review: National Security Wiretaps, Subpoenas and Data Mining

Pages 248-49. Replace carryover paragraph with:

In July, 2007, Congress passed the Protect America Act, which eliminated the warrant requirement for national security surveillance, if and when the Attorney General and the Director of National Intelligence certified that the surveillance is “directed at a person reasonably believed to be located outside of the United States.” This law permitted warrantless surveillance of U.S. persons outside the U.S. as well as of persons in the U.S. who communicated with targeted persons outside the U.S. But in July, 2008, Congress amended the Act. H.R. 6304. Three provisions of the law are especially noteworthy. First, U.S. persons outside the country cannot be targeted for surveillance without a regular warrant unless the FISA court finds probable cause that the person should be targeted for intelligence surveillance, in which case a FISA warrant, valid for 90 days, is required. Second, a regular or FISA warrant is also required when a *non-U.S.* person is targeted if the purpose of the surveillance is to target a person “reasonably believed” to be in the U.S. Third, telecommunications companies are given immunity from suit for their cooperation with the government’s warrantless post-9/11 surveillance programs if a district court finds “substantial evidence” that the companies received a written request or directive from the Attorney General or a director of an intelligence agency indicating that the surveillance was authorized by the President and was designed to detect or prevent a terrorist attack. Of course, immunity for the telecommunications companies does not necessarily mean immunity for the government. Cf. *Al-Haramain Islamic Foundation et al. v. Bush et al.*, Northern District, California, No. 06-1791 (July 2, 2008) (holding that FISA preempts the state secrets privilege, and thus that the government may not prevent *in camera* review of evidence indicating a FISA violation, but also holding that plaintiffs must show that they were the subject of surveillance, which can be difficult given its covert nature).

III. The Scope of the Warrant and Probable Cause Requirements

A. Seizures of the Person

1. Distinguishing an Arrest from Other Seizures

Page 267. In third full paragraph, add to bracketed material:

In *Arizona v. Johnson*, [555 U.S. 323](#) (2009), Johnson, a passenger in the back seat of a car stopped for a traffic violation by three gang task force officers, was asked to get out of the car and then frisked. Assuming the officer’s suspicion that Johnson was armed was reasonable, a unanimous Court upheld the seizure and frisk, stating that “[a]n officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain [citing *Mena*], do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”

Page 270. After second full paragraph add:

In *Ashcroft v. al-Kidd*, [131 S.Ct. 2074](#) (2011), the Supreme Court held that pretextual use of the material witness statute does not violate the Fourth Amendment. In *Al-Kidd* the government's material warrant application had claimed that Al-Kidd's testimony was needed in a criminal prosecution and that he was on the verge of leaving for Saudi Arabia on a one-way ticket; in fact, al-Kidd asserted, his ticket was round-trip, his parents, wife and children were all citizens and residents of the U.S., and he had already cooperated with the FBI on several occasions, all of which suggested the real reason for the material witness warrant was to detain him despite a lack of probable cause to arrest. Five members of the Court, in an opinion by Justice Scalia, held that the Fourth Amendment was not violated even if al-Kidd's allegations were true. The Court interpreted *Whren v. United States* (see pp. 173-74) to stand for the proposition that seizures or searches based on "individualized suspicion" are permissible even if the police have an ulterior motive and are lacking in probable cause. Because al-Kidd only advanced the pretext argument and did not challenge the material witness warrant itself, the Court left unresolved whether a material witness detention is permissible on the facts of *al-Kidd*, or indeed whether material witness warrants are even governed by the Fourth Amendment.

2. *Requirements for Seizures Other Than an Arrest*

Page 282. Before last sentence on page add:

More recent studies corroborate these findings. One study analyzing more than 500,000 stops that took place in New York in 2006 found that in 102,000 of them (or roughly 20%) the police used force, ranging from patdowns and handcuffing to throwing people on the ground and drawing a weapon. In 90% of these use-of-force cases, the suspects were not arrested. Of 2700 stops where police pulled a weapon, 553 ended in arrest. *NYPD Stop, Question & Frisk Data Base, available at www.icpsr.umich.edu/cocoon/ICPSR/STUDY/21660.xml* (June 9, 2008). Another study analyzing 175,000 pedestrian stops by the New York Police Department over a fifteen-month period found that persons of African and Hispanic descent were stopped more frequently than whites, even after controlling for precinct variability and race-specific estimates of crime participation. Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop and Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASSOC. 813 (2007).

3. *Requirements for Arrest*

Page 299. Replace last sentence of first full paragraph with:

If the police had gone to Santana's door, knocked and shouted "Police," and, upon hearing rustling noises consistent with drug destruction, made a warrantless entry, should Santana be able to exclude the evidence if she can show the police could have obtained a warrant before knocking? [In *Kentucky v. King*, [131 S.Ct. 1849](#) (2011), the Court held, 8-1, that so long as the police act in a non-threatening manner, warrantless entry is permissible in these circumstances; the possibility that police acted pretextually, or unnecessarily "created" exigent circumstances that allowed them to enter without a warrant, is irrelevant].

B. Searches

2. Searches of Persons and Effects Incident to Arrest or Stop

Pages 315: To the end of the first paragraph in the Note add:

What if the police do take the offender into custody, but do so in violation of a state law that prohibits arrest and permits only the issuance of a citation? In *Virginia v. Moore*, [553 U.S. 164](#) (2008), the Court unanimously held that, so long as the police have probable cause for the traffic arrest, the fact that they violated state law is irrelevant to Fourth Amendment analysis. Holding that Fourth Amendment protection should be tied to applicable state law, Justice Scalia wrote for the Court, would be inconsistent with the Court's cases (discussed in Chapter One) that permit states to provide more protection than the federal minimum, would require exclusion when (as here) the state contemplated only tort and administrative remedies for violation of its law, and would mean that Fourth Amendment protections would vary from state to state and, where federal officers are involved, even within states.

Page 316. In second full paragraph replace fifth sentence to end of paragraph with:

However, in *Arizona v. Gant*, [129 S.Ct. 1710](#) (2009), the Court held, 5-4, that searches of cars incident to arrest may occur only when (1) the interior of the car is *actually* accessible to car occupants who might thereby obtain a weapon or destroy evidence, or (2) it is "reasonable to believe the vehicle contains evidence of the offense of arrest." As Justice Scalia pointed out in his concurring opinion, because police almost always handcuff arrestees and put them in the squad car before contemplating a search, the first part of *Gant's* rule will seldom be met. The second part will apply more often, especially if, as the Court apparently intends, the "reasonable to believe" standard is somewhat easier to meet than "probable cause." The Court has also held, in *Michigan v. Long*, [463 U.S. 1032](#) (1983), that even if the occupant of a car is not arrested police may search "the passenger compartment to an automobile, limited to those areas in which a weapon may be placed or hidden, . . . if [they] possess a reasonable [suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons."]

5. Administrative and "Special Needs" Searches

Page 353. After fifth sentence in first full paragraph add:

Relying on *Ortega*, in *City of Ontario v. Quon*, [130 S.Ct. 2619](#) (2010), the Court unanimously upheld an audit of a police officer's text messages sent on a department-issued pager over a two-month period. The purpose of the audit was to determine why he was routinely exceeding the character limits of the pager; upon discovery that the bulk of his messages were personal in nature, the officer was disciplined.

Page 353. To end of first full paragraph add:

Pushing in the other direction is the holding in *Safford Unified School District v. Redding*, [129 S.Ct. 2633](#) (2009), where the Court held, 8-1, that reasonable suspicion is insufficient justification to carry out a "strip search" of a student suspected of distributing drugs. The school official in this case told the student to disrobe down to her underwear and pull it away from her body, which exposed her breasts and pelvic region "to some degree."

CHAPTER THREE INTERROGATION

I. *Miranda v. Arizona* and the Fifth Amendment Approach

B. Custody

Page 405. To end of material in first bracket in second full paragraph add:

Compare also *J.D.B. v. North Carolina*, 131 S.Ct. ____ (2011), where a 13 year-old was taken from his class, closeted in a room with two officers and two school administrators, and questioned for 30 to 45 minutes; the Court, in an opinion by Justice Sotomayor, remanded the case with instructions to take into account J.D.B.’s youth in determining whether he was in custody, over a four-member dissent arguing that the decision undermined *Miranda*’s goal of establishing bright-line rules for the police and that any difference in coercion experienced by immature suspects could be taken into account under due process analysis).

D. The Warnings Requirement

Page 418. Add to end of carryover paragraph:

Same question with respect to a *Miranda* statement of rights that provide the first two warnings, then tell suspects they have a right to counsel and to state-paid counsel “before” questioning, and end with the statement that they have “the right to use any of these rights at any time you want during this interview.” [In *Florida v. Powell*, [130 S.Ct. 1195](#) (2009), the Court held these warnings sufficient, despite admitting that they were not the “clearest possible formulation of *Miranda*.”]

E. Waiver

1. *Waiver in the Absence of Rights Invocation*

Page 430. To the end of Problem 84 add:

What result if the suspect receives and understands the warnings, but does not indicate a desire to talk, says virtually nothing during a three-hour interrogation, and makes only one incriminating statement—a “Yes” answer to a question, asked two hours and forty-five minutes into the interrogation, about whether he has asked God to forgive him for his crime.? [In *Berghuis v. Thompkins*, [130 S.Ct. 2250](#) (2010), the Court held, 5-4, that an implicit waiver occurred on these facts].

2. *Post-Invocation Waiver*

Page 447. After second sentence of first paragraph insert:

In *Maryland v. Shatzer*, [130 S.Ct. 1213](#) (2010), the Court also held that the police may re-initiate contact with the suspect if there is a “break in custody”—during which the suspect returns to his or her “normal life”—that last two weeks or longer after invocation. The Court added that such a

break could occur even in prison if the suspect is returned to the general population and thus is no longer “isolated” with his accusers in a situation in which they have “power to increase the duration of incarceration.”

Page 448. After the second full paragraph following the transcribed interrogation add:

If Smith had not invoked the right to counsel, but had instead simply remained silent, would his silence constitute an invocation of the right to silence or, analogous to the rule announced in *Davis*, would he have to state clearly his intention not to talk? [In *Berghuis v. Thompkins*, [130 S.Ct. 2250](#) (2010), the Court cited *Davis* in holding that a suspect must “unambiguously” assert the right to silence in order to stop the interrogation. Is there a difference between the warning about the right to counsel and the warning about the right to silence that supports a contrary holding?] As to the consequences of invoking the right to silence rather than the right to counsel, see Problem 89.

II. The Sixth Amendment Approach

Page 455. Replace third sentence of second full paragraph (beginning See also), with:

See also Rothgery v. Gillespie County, Texas, [554 U.S. 191](#) (2008) (holding that the Sixth Amendment is triggered by an arrested person’s initial appearance in front of a judicial officer, even if the prosecutor is not involved and even if charges are modified at a later time).

Page 457. In first full paragraph, replace text after note 7 with:

For a number of years another difference between fifth and sixth amendment analysis was that, in the sixth amendment context, a request for counsel at arraignment prevented further interrogation unless the defendant initiated contact, whereas in the fifth amendment setting the analogous *Edwards* rule was triggered only by a request for counsel at interrogation. Compare *Michigan v. Jackson*, [475 U.S. 625](#) (1997) to *McNeil v. Wisconsin*, [501 U.S. 171](#) (1991) (described in Problem 87). However, in *Montejo v. United States*, [129 S.Ct. 2079](#) (2009), a majority of five concluded that the interest to be protected is the same in both the fifth and sixth amendment contexts: prevention of police badgering of defendants who state they need counsel’s assistance *during interrogation*. Thus, a request for or appointment of counsel at arraignment, as opposed to during interrogation, is irrelevant to sixth amendment analysis of any ensuing interrogation. However, in contrast to the rule under *Edwards*, sixth amendment protection is triggered even if the request for counsel during interrogation comes from an individual who is not in custody, so long as “criminal prosecution” has begun. *United States v. Fellers*, [540 U.S. 519](#) (2004).

III. Other Approaches

Page 474. In the second full paragraph, replace third and fourth sentences with:

However, in *Corley v. United States*, [129 S.Ct. 1558](#) (2009), the Court held, 5-4, that this language still implies, consistent with *McNabb-Mallory*, that a confession obtained *after* the six-hour period or a reasonable extension thereof must be excluded, even if it is voluntary. The Court has strictly limited this rule to federal prosecutions.

CHAPTER SIX REMEDIES

I. The Exclusionary Rule: Its Rationale

B. The Impact of the Rule

Page 569. After carryover paragraph add:

Observation studies of how police conduct searches and seizures reach somewhat different conclusions. For instance, one study asked over 200 officers from a city police department and a county sheriff's office in the southeastern United States how often they conducted illegal searches. Of those officers who had carried out searches, 19% said they conducted searches of "questionable constitutionality" at least once a month, and 4% said they conducted searches they knew to be unconstitutional at least once a month. As the authors of the study indicate, these numbers likely underreport the amount of illegal activity. Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENTER RES. BULL. 1 (1986). Another study of one large jurisdiction found that police conducted between six and seven unconstitutional searches per 100 residents every year, comprising 30% of the total number of searches, only 3% of which resulted in prosecution (in which a suppression motion could be made). Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the Constitution*, 3 CRIMINOL. & PUBLIC POL'Y 315 (2004).

III. Limitations on the Exclusionary Rule

B. The Reasonable Good Faith Exception

Page 607. In the first full paragraph, replace material in second bracket and the following sentence with:

In *Herring v. United States*, [555 U.S. 135](#) (2009), the Court held that even in this situation suppression should occur only if the record-keeping error is "flagrant," "knowing" or "reckless", or, as suggested by the concurring justices in *Evans*, there is proof of systemic flaws in the database; in all other cases, the minimal deterrent effect of exclusion is outweighed by "the substantial costs of exclusion." What if an officer acts in accordance with caselaw that is subsequently overruled? [In *Davis v. United States*, 131 S.Ct. ___ (2011), the Court held, 7-2, that the good faith exception applies here as well, over a dissent by Justice Breyer arguing that the decision would remove any incentive to bring claims arguing that precedent should be overruled; the majority left open the possibility that, "if necessary" to prevent "ossification of the Fourth Amendment," the litigant who successfully petitions the Court for reversal would be able to obtain exclusion].

C. Impeachment

Page 610. Replace Problem 112 with the following:

PROBLEM 112
KANSAS V. VENTRIS
[129 S.Ct. 1841](#) (2009)

Prior to trial but after Ventris had been formally charged with felony murder, aggravated burglary and aggravated robbery, officers planted an informant in Ventris's holding cell, instructing him to "keep [his] ear open and listen" for statements that might incriminate Ventris. According to the informant, Ventris divulged that "[h]e'd shot this man in his head and in his chest" and taken "his keys, his wallet, about \$350.00, and ... a vehicle," in response to the informant's statement that Ventris appeared to have "something more serious weighing in on his mind." At trial, Ventris took the stand and blamed the robbery and shooting entirely on his co-defendant. The court allowed the informant to testify to impeach this assertion, but instructed the jury to "consider with caution" all testimony given in exchange for benefits from the State. The jury ultimately acquitted Ventris of felony murder but returned a guilty verdict on the aggravated burglary and aggravated robbery counts.

May the informant's statements be used to impeach Ventris? Consider whether the costs and benefits of exclusion in this situation are different from those in *Harris* and *Havens*. Consider also research concluding that "[t]he myriad benefits and favored treatment which are potentially available to informants are . . . a strong motivation to fabricate . . . testimony," yet informants who lie on the stand are seldom prosecuted for perjury. REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 9 (June 16, 1994). [In a decision written by Justice Scalia, the Court held, 7-2, that the statements could be used impeachment.]