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Dear Colleague:

This is the 2016 Letter Update for the fifth edition of *Criminal Procedure—Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials*, which was published in 2012, with a new Teacher's Manual. The Update covers developments through the Supreme Court's 2016 Term.

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.

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Chapter Two
Searches and Seizures

I. The Components of a Valid Warrant

B. Probable Cause and other "Certainty Levels"

1. Quality of Information

Page 128. After first full paragraph add:

What if an officer believes probable cause or reasonable suspicion exists, but that belief is based on a mistake about the facts? As long as the mistake is objectively "reasonable," a search or seizure based on it is constitutional. Thus, in *Hill v. California*, 401 U.S. 797 (1971), the Supreme Court upheld a search incident to the arrest of a person who police believed (or at least later claimed to believe) was the defendant but who turned out to be his roommate. Although the roommate had provided identification, the Court noted that "aliases and false identifications are not uncommon," and that a pistol and loaded ammunition clip were in plain view in the room behind him. Several other cases have made clear that, once the objective facts known to the police establish probable cause, whether they come from informants or firsthand information, it is immaterial that some or all of those facts turn out to be false, so long as the officer reasonably believed them to be true at the time of the arrest or search. See, e.g., *Franks v. Delaware*, 438 U.S. 154 (1978); *Henry v. United States*, 361 U.S. 98 (1959).

This type of reasoning has been extended to seizures and searches based on reasonable suspicion rather than probable cause, and to mistakes of law as well as of fact. In *Heien v. North Carolina*, 135 S. Ct. 530 (2015), a police officer stopped a car for having only a single backup lamp, mistakenly believing that state law required two such lamps. Eight members of the Court held that this mistake did not make the ensuing stop and seizure of evidence unconstitutional. Heien argued that, whereas mistakes of fact can be reasonable when officers are confronted with volatile or fast-moving situations, the reasonable officer should always know the law. But the Court, pointing to the fact that the statute in this case was vaguely written, concluded that an officer can also "suddenly confront" a situation where application of the law is unclear. The Court also emphasized that the mistake must be objectively reasonable, which two concurring justices suggested would only be the case when the relevant statue "is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work."

Page 145. To end of carryover paragraph add:

Compare also *Navarette v. California*, 134 S. Ct. 2683 (2014), where the police stopped a truck that matched the description, and was driving in the direction and location, given by an anonymous 911 caller who reported the vehicle had run her off the road. The Court held, 6-3, that the police had reasonable suspicion of drunken driving, despite the fact that they observed no erratic driving for the five minutes they followed the truck before stopping it.

II. When the Fourth Amendment is Implicated

B. The Definition of Search and Seizure

1. *The Meaning of "Search"*

d. Use of enhancement devices

Page 206. To end of last paragraph add:

The Court relied on *Jones* in *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), in holding that monitoring a sex offender with a tracking device affixed to the ankle is a search. The Court did not address whether this holding required a warrant or any degree of individualized suspicion.

Page 207. Replace the first and second paragraphs of Problem 32 with:

PROBLEM 32

FLORIDA v. JARDINES

133 S. Ct. 1409 (2013)

Officers acting on an unverified tip proceeded to the front door of the defendant's home with a drug-sniffing dog, using the driveway and a paved path to get there. The dog, on a six-foot leash, quickly signaled that it sensed the odor of drugs emanating from underneath the front door. Based on the dog sniff, a warrant was issued and drugs were found in the house.

Is the dog sniff a search? [Five members of the Court, in an opinion by Justice Scalia, concluded that although normal use of the driveway and path would not be a trespass, the police behavior in this case went beyond the typical implicit license granted visitors: "To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police."]. Should the result be different if use of the dog does not require entry onto private property, or the dog sniffs a car or luggage rather than a home? *In Illinois v. Caballes*, 453 U.S. 405 (2005), the Court held, 7-2, that a dog sniff of a lawfully stopped car does not implicate the fourth amendment as long as it does not prolong the stop. In *United States v. Place*, 462 U.S. 696 (1983), the Court held, 6-3, that a dog sniff of luggage is not a search, primarily because it "discloses only the presence or absence of narcotics, a contraband item."

Should it matter that even trained dogs are often inaccurate? See *United States v. Owens*, 167 F.3d 739 (1st Cir. 1999) (in which defendant claimed in his brief that a drug dog had a hit rate below 50%). In *Florida v. Harris*, 133 U.S. 1050 (2013), the Florida Supreme Court suppressed evidence found as a result of a dog sniff because the state had not provided field performance

records that could have exposed the handler's tendency to cue the dog to alert or indicated the dog's inability to distinguish between "residual odors and actual drugs." A unanimous Supreme Court reversed, noting that in the field a dog may alert to substances that are well hidden, present in very small quantities, or are vestiges of drugs previously in or on the item (thus making the dog appear to be wrong when in fact it is right), problems that can be avoided in standard training and certification programs, where trainers know whether drugs are present and why. Thus, if, as occurred in *Harris*, "a bona fide organization has certified a dog after testing his reliability in a controlled setting," or, as also occurred in *Harris*, "the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs," "a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search."

C. Consent/Waiver

Page 234. Before Problem 42 add:

Another common feature of a traffic stop is the sobriety test, refusal of which may lead to negative consequences. The Supreme Court has held that consent to a blood test after a DUI stop is invalid if given subsequent to being told that refusal can result in a criminal penalty. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). But the same threat does not necessarily invalidate consent to a breathalyzer test, which the Court views as less intrusive than a blood test. *Id*. Likewise, the Court has indicated that consent to a blood test after being told that refusal can lead to forfeiture of one's driver's license or be used as evidence of guilt can also be voluntary. *South Dakota v. Neville*, 459 U.S. 553 (1983). The Fifth Amendment is not violated in such cases because the results of the test are "nontestimonial."

Page 234. Before last two sentences on page add:

What result if police issue the citation and then wait seven or eight minutes for a drug-sniffing canine? [In *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the Court held that, after the police complete "duties incident to a traffic stop" (which the Court indicated included checking for outstanding warrants), this type of delay is impermissible for the purpose of "detecting evidence of ordinary criminal wrongdoing" unless police develop reasonable suspicion].

Page 239. Replace description of *United States v. Amratiel* in first full paragraph with:

What if the defendant objects and then is removed by police? In *Fernandez v. California*, 134 S. Ct. 1126 (2014), the Court held, 6-3, that the objection does not trump a co-occupant's consent that is obtained subsequent to the defendant's arrest and transfer to the police station.

Page 243. Replace last full paragraph with:

At first, Section 215 was used sparingly. Eric Lichtblau, *Frustration Over Limits on an Antiterror Law*, N.Y. TIMES, Dec. 11, 2004, at A1. But beginning in 2006, that provision became the

legal basis for what has come to be known as the NSA's "metadata program," which collects "envelope" information, including numbers, addresses and durational data, on phone calls, texts and emails sent to and from overseas as well as metadata about domestic communications. David S. Kris, *On the Bulk Collection of Tangible Things*, LAWFARE RESEARCH PAPER SERIES, Sept. 2013, at 20–22 (2013), *available at* http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-2.pdf. After Edward Snowden publicized the metadata program, the Second Circuit held that Section 215's relevance language did not contemplate bulk collection of metadata, *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015), and Congress passed the Freedom Act, Pub. L. 114-23, which prohibits collection of domestic metadata by the NSA. Furthermore, the Obama Administration limited NSA access to the metadata maintained by common carriers to data about contacts "two hops" from a "seed identifier" (i.e., a suspected terrorist). Alex Abdo, *Are "Two Hops" Too Many?* (March 27, 2014), available at https://www.aclu.org/blog/are-two-hops-too-many (also noting, however, that a given seed identifier could contact hundreds of people who in turn could contact hundreds more). Even after the Freedom Act, the NSA is still apparently collecting metadata on communications made to and from overseas. *See* Faiza Patel, *Bulk Collection Has Ended: What Next*? (Nov. 30, 2015), available at https://www.justsecurity.org/27996/bulk-collection-ended-whats-next/.

While Section 215 otherwise appears to play a small role in the federal government's surveillance efforts, NSLs, which can authorize the acquisition of the same type of information, are quite popular. The FBI alone issues roughly 30,000 to 50,000 NSLs a year and maintains all the records thereby obtained, even when they are not linked to terrorism. Gellman, supra.

III. The Scope of the Warrant and Probable Cause Requirements

A. Seizures of the Person

1. Distinguishing an Arrest for a Seizure

Page 258. To end of second full paragraph add:

Finally, compare *Bailey v. United States*, 133 S. Ct. 1031 (2013), where the Court held that when occupants of a house for which police have a valid search warrant are outside the "immediate vicinity" of the house, *Summers* does not apply.

3. Requirements for an Arrest

Page 290. After bracketed sentence in Problem 58 add:

What if the arrest had not involved entry into the home? In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), which involved a warrantless hospital blood test conducted 25 minutes after a driver suspected of being drunk was arrested in his car, the Court rejected the argument that the natural dissipation of alcohol in

the blood constitutes a per se exigency. Noting the advent of telephonic warrants and other methods of expeditiously obtaining warrants, as well as the fact that alcohol in the blood dissipates "gradually and predictably," Justice Sotomayor's opinion for four members of the Court concluded that "the State's per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition." Justice Kennedy, who provided the fifth vote for the result, emphasized in a concurring opinion that at some point the Court might want to provide more rule-based guidance in such cases.

B. Searches

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

Page 307: Replace final sentence of first full paragraph with:

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court held, unanimously, that a warrant is required to search the cellphone of an arrestee, absent exigent circumstances indicating that failing to do so at the time of arrest will endanger the police or evidence on the phone. In an opinion written by Chief Justice Roberts, the Court dismissed as exaggerated concerns that the contents of the phone could be remotely "wiped" before a warrant could be obtained and noted that, in any event, such wiping was preventable through removing the phone's battery, turning the phone off, or insulating it from radio waves. The Court also refused to apply *Gant's* analysis to the cellphone context, both because search of a cell phone is much more likely to reveal private facts than search of a car and because a phone might be said to contain evidence even of trivial offenses (e.g., GPS locational information might be relevant to driving infractions). Most notable was the Court's unwillingness to equate search of a phone with other searches of the person incident to arrest: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. . . . Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." In a similar vein was the Court's holding in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), where the Court held that a warrantless blood test after arrest on driving-while-intoxicated charges violated the Fourth Amendment; however, in the same case, the Court permitted warrantless breathalyzer testing, on the ground it was less intrusive.

5. Administrative and "Special Needs" Searches

Page 342. To end of first full paragraph add:

Compare also *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), where a five-member majority struck down a city ordinance permitting police officers to inspect hotel registries for the purpose of determining whether hotels were being used for criminal purposes. Justice Sotomayor's majority opinion accepted the assertion that the inspections were not aimed at "conducting criminal investigations" but at the same time rejected the argument that hotels are "closely regulated businesses" because of the licensure, tax, sanitation and other laws they must follow, stating "[i]f such general regulations were sufficient to invoke

the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." Instead, the majority held that government officials must seek "precompliance review"—which can consist of a "simple" administrative subpoena—before searching a non-consenting business owner's property, although it also suggested that the registry could be seized pending such a subpoena if police are concerned that tampering might otherwise occur. According to the majority, "[a]bsent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests."

Page 345. Replace material in second full paragraph between "Would either also justify DNA sampling of arrested individuals?" and the last full sentence on the page with:

In *Maryland v. King*, 133 S. Ct. 1958 (2013), a closely divided Supreme Court held that swabs to obtain DNA are fourth amendment are searches, but adopted the *Terry/Samson* balancing approach in concluding that they may be conducted on all people validly arrested for a "serious offense" even in the absence of any suspicion the swab will produce evidence of crime. Justice Kennedy's opinion for five members of the Court stated that the government's interests in comparing DNA to existing records—e.g., identifying arrestees and determining whether they have committed other crimes, are dangerous or are a flight risk—outweighed the slight intrusion associated with a buccal swab, at least when the DNA is used only for identification purposes, does not reveal genetic traits and is destroyed if the arrestee is acquitted. He likened the DNA matching process to fingerprinting, which has long been seen by the lower courts as "a natural part of the administrative steps incident to arrest." In dissent, Justice Scalia argued that DNA is more likely than fingerprinting to be used to match an arrestee to another crime. Should that matter? Although the Court limited its holding to DNA swabs of those arrested for serious crimes, two of the examples that Justice Kennedy used to show how identification procedures might improve investigative efficacy involved Timothy McVeigh (the Oklahoma City bomber, who was stopped for driving with a suspended license) and one of the terrorists involved in 9/11 (stopped for speeding two days before the event). Should the serious offense distinction matter? Should collection of DNA be extended to the entire population? In answering these questions, what are the implications of the political process model?

Consider also application of special needs and political process concepts to the National Security Agency's domestic national security electronic surveillance discussed on pp. 240-42, recently described by Eric Snowden, a one-time NSA analyst, as involving the interception not just of "envelope", subscriber and duration information relevant to phone and Internet communications overseas but also the content of at least some of those communications.

Page 346. To end of carryover paragraph add:

Relevant to whether any of this analysis matters is the question of standing to challenge national security surveillance and other covert investigations. In *Clapper v. Amnesty International, USA*, 133 S. Ct. 1138 (2013), the plaintiffs wanted to challenge the constitutionality of the 2007 amendments to the FISA, which permit interception of communications originating in the United States made to any non-citizen believed to be outside the United States—with no judicial oversight once a warrant is issued—if the government can show "a significant purpose of the acquisition is to obtain foreign intelligence information." To establish standing, the plaintiffs, many of whom were lawyers or human rights activists, contended that, although they could not prove their conversations had been intercepted, the likelihood of such interception was high, given the nature of their clients and associations and the government's strong interest in detecting terrorists. But the Court held, 5-4, that the threat of interception was "speculative" and not, as required by previous standing precedents, "certainly impending." To the argument that, given the covert nature of the surveillance, the 2007 amendments might otherwise be immune from challenge, Justice Alito responded for the majority that defendants who are prosecuted using intercepted information have standing to challenge the statute (which requires notification if such information is being used to prosecute), as do electronic service providers directed to assist the government in carrying out the surveillance. Note that the relevant statutes do not require defendants to receive notice when other types of surveillance information, such as metadata, are a basis of prosecution. *See* Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants and the Right to Notice*, 54 SANTA CLARA L. REV. 843, 878–95 (2015).

Chapter Three
Interrogation

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

E. Waiver

1. Waiver in the Absence of Rights Invocation

Page 417. To end of second paragraph in Problem 84 add:

What result if the defendant is *not* in custody and answers questions for an hour but, when asked about whether his shotgun would match the shells found at the crime scene, looks down at the floor and remains silent for a few moments, a silence later used by the prosecution in its case-in-chief to suggest guilty knowledge? [In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), three members of the Court held that because Salinas did not formally invoke the fifth amendment privilege and explain why he wanted to remain silent (thus leaving unclear whether he was asserting the right or simply wanting to avoid embarrassment or protect a third party), his silence could be used against him. Two other members of the Court concurred with the result on the ground that silence, whether or not invoked as a right, may always be used against a defendant as a constitutional matter (although evidentiary rules might bar its use on relevance grounds). In dissent, Justice Breyer argued that pre-custodial use of silence should be prohibited if one can "fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege."]. If Salinas had been read his rights, should the outcome have been different? See *Doyle v. Ohio*, 426 U.S. 610 (1976), discussion on pp. 490–91.

Chapter Six
Remedies

III. Limitations on the Exclusionary Rule

E. The Fruit of the Poisonous Tree Doctrine

2. Independent Source and Inevitable Discovery

Page 625. To end of carryover paragraph add:

Another decision along the same lines is *Utah v. Streiff*, 136 S. Ct. 2056 (2016), where an illegal stop led to discovery of an outstanding warrant for a traffic violation and a subsequent search incident to arrest that produced drugs. Apparently considering the warrant an "independent source," the five-member majority held the drugs were admissible. Justice Sotomayor argued in dissent that the holding would encourage police to illegally stop individuals in the hope that an outstanding warrant (over 7.8 million nationally as of 2014) would authorize a subsequent search. The majority responded that, in contrast to the stop here (where the officer had seen Streiff exit a house that an anonymous tipster said was a drug den), stops completely lacking in suspicion would be considered "flagrant" enough to taint a subsequent warrant-based search incident.