
THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List; have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting <http://www.fletc.gov/training/programs/legal-division/the-informer>.

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Free FLETC Informer Webinar Series Schedule

January 2014

1. Government Workplace Searches

John Besselman provides an explanation of the law that regulates the government's ability to search in the workplace. Who has a reasonable expectation of privacy in the workplace, how is it established, and how can it be overcome, are some of the questions that will be answered. Mr. Besselman has provided this course via webinar in the past, though not since August of 2013. If this area of the law is new to you or you are interested in a refresher, this course is right for you.

1-hour webinar presented by John Besselman, FLETC Legal Division.

Dates and Times:

Wednesday January 8, 2014: 2:30 pm EST

To join this meeting: <https://share.dhs.gov/fletclgd0108/>

Wednesday January 15, 2014: 8:30 am EST

To join this meeting: <https://share.dhs.gov/fletclgd0115/>

2. Warrantless Searches and Seizures under Exigent Circumstances Part I: The Overview

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

Dates and Times:

Tuesday January 14, 2014: 1:30 pm EST

To join this meeting: <https://share.dhs.gov/lgd0114/>

Tuesday January 21, 2014: 1:30 pm EST

To join this meeting: <https://share.dhs.gov/lgd0121/>

3. *Kalkines* and *Garrity* Overview

John Besselman will look at these two important cases and how they affect the government's ability to obtain statements from its employees that may be suspected of criminal activity.

1-hour webinar presented by John Besselman, FLETC Legal Division

Dates and Times:

Friday January 17, 2014: 8:30 am EST

To join this meeting: <https://share.dhs.gov/fletclgd0117/>

Friday January 24, 2014: 2:30 pm EST

To join this meeting: <https://share.dhs.gov/fletclgd0124/>

4. Federal Emergency Vehicle Operations

1-hour webinar presented by Tim Miller, FLETC Legal Division

This webinar is for federal law enforcement officers and covers some of the legal aspects of federal emergency vehicle operations. The webinar will begin with a hypothetical high-speed pursuit of a suspect that leads to innocent parties being injured. The issues: Who can sue whom, and for what? When is the party who is being sued liable for damages?

Dates and Times:

Monday January 27, 2014: 1:30 pm EST

To join this meeting: <https://share.dhs.gov/tm0127/>

Friday January 31, 2014: 1:30 pm EST

To join this meeting: <https://share.dhs.gov/tm0131/>

5. Understanding the Inspection Search

1-hour webinar presented by John Besselman, FLETC Legal Division

John Besselman examines the administrative-inspection search. This common and varied search enables enforcement agencies of all types to protect the public from harms, though its scope and purpose is sometimes misunderstood and misapplied.

Dates and Times:

Wednesday January 29, 2014: 2:30 pm EST

To join this meeting: <https://share.dhs.gov/fletc0129/>

Friday January 31, 2014: 8:30 am EST

To join this meeting: <https://share.dhs.gov/fletcLGD0131/>

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2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the webinar.
6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Meeting rooms will be open and fully accessible at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

If there are any specific legal topics that you would like to see offered in future FLETC Informer webinars, please let us know!

Address any inquiries to lgdwebinar@fletc.dhs.gov

Law Enforcement Case Granted Certiorari by the United States Supreme Court for the October 2013 Term

Qualified Immunity

Wood v. Moss

Decision Below: [711 F.3d 941 \(9th Cir. 2013\)](#)

During the 2004 presidential campaign, Moss and others who opposed President Bush organized a demonstration at a campaign stop in Oregon. United States Secret Service agents, while protecting President Bush, allegedly required a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was dining. After they were moved, the anti-Bush demonstrators were slightly farther away from the alley than a group of pro-Bush demonstrators. In addition, the Secret Service agents allowed only the pro-Bush demonstrators to remain along the President's after-dinner motorcade route.

The anti-Bush demonstrators claimed Secret Service agents engaged in viewpoint discrimination in violation of the *First Amendment* by moving them to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President and those around him.

The Ninth Circuit Court of Appeals held the Secret Service agents were not entitled to qualified immunity. The court ruled, if true, the allegations by the Bush protestors would be sufficient to support a claim of viewpoint discrimination in violation of the *First Amendment*. Additionally, the court held this right was clearly established in 2004.

The first issue before the court is whether the Ninth Circuit Court of Appeals improperly denied qualified immunity to the Secret Service agents when it concluded that pro and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on the outdoor patio and then while he was traveling by motorcade.

The second issue before the court is whether the anti-Bush demonstrators have adequately pleaded viewpoint discrimination when no factual allegations support their claim of discriminatory motive by the Secret Service agents and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther away pro-Bush group.

The court has not yet scheduled oral arguments in this case.

CASE SUMMARIES

Circuit Courts of Appeals

2nd Circuit

United States v. Freeman, 2013 U.S. App. LEXIS 22594 (2d Cir. N.Y. Nov. 7, 2013)

A 911 operator received two anonymous calls, from the same person, reporting a Hispanic male, wearing a black hat and white t-shirt had a gun. The caller refused to identify herself and the 911 operator could not re-contact the caller after making multiple attempts. The 911 operator was never able to verify whether the anonymous caller actually saw a gun. When police officers arrived, they saw a person fitting the description, later identified as Freeman, walking down the street. One of the officers approached Freeman and attempted to talk to him; however, Freeman continued to walk down the street. The officer then placed his hand on Freeman's elbow, but Freeman kept walking. Finally, the officer grabbed Freeman around the waist in a "bear hug" and the pair fell to the ground. After a short struggle, the officers handcuffed Freeman and removed a gun from his waistband. Freeman was charged with being a felon in possession of a firearm.

Freeman argued the police lacked reasonable suspicion to stop him: therefore, the gun recovered from his waistband should have been suppressed.

The court agreed, holding the officer never established reasonable suspicion to stop Freeman.

The officer stopped Freeman based on information provided by two anonymous 911 phone calls. Anonymous tips, without further corroboration by the police to demonstrate that the tip has sufficient indicia of reliability, are insufficient to provide the reasonable suspicion needed to conduct a valid *Terry* stop. Here, there was no way for the police to assess the caller's credibility and there was no risk of consequence if the caller was making false reports. When the officer first encountered him, Freeman had the right to ignore the officer and go about his business. In addition, Freeman's refusal to cooperate with the officer, without more, could not provide the officer reasonable suspicion to stop him. When the officer grabbed Freeman around the waist, Freeman was seized for *Fourth Amendment* purposes; however, the officer had still not established reasonable suspicion to stop him.

Click [HERE](#) for the court's opinion.

Lynch v. City of New York, 2013 U.S. App. LEXIS 23074 (2d Cir. Nov. 15, 2013)

The New York City Police Department (NYPD) enacted a policy, which required the administration of a breathalyzer test to any officer whose discharge of his firearm within New York City resulted in death or injury to any person. The union representing New York City's police officers sought to block the NYPD from enforcing this policy. The union argued the policy violated the *Fourth Amendment* because it was unreasonable to compel officers to submit to warrantless searches without any suspicion of wrongdoing.

The district court disagreed, and refused to block enforcement of the policy. The union appealed.

The Second Circuit Court of Appeals held the NYPD policy was lawful under the special needs exception to the *Fourth Amendment's* warrant requirement. First, the court concluded the primary purpose of the policy was not to obtain criminal evidence to prosecute police officers, but rather personnel management by determining an officer's fitness for duty and the maintenance of public confidence in the NYPD. Second, the court ruled the policy was narrowly and specifically defined as officers were put on notice they would have to submit to a breathalyzer test; therefore, requiring a search warrant would not add any further notice and was unnecessary.

After determining the policy qualified as a special need, the court further held the policy was reasonable. First, the court noted because NYPD officers are authorized to carry firearms and use deadly force, they have a diminished expectation of privacy in employer testing that ensures their fitness for duty. Second, the court found the breathalyzer was minimally intrusive and the NYPD's special needs outweighed the privacy interests of the officers.

Click [HERE](#) for the court's opinion.

4th Circuit

Cooper v. Sheehan, 2013 U.S. App. LEXIS 22616 (4th Cir. N.C. Nov. 7, 2013)

Just after 11:00 p.m., a neighbor called 911 to report a disturbance at Cooper's mobile home after hearing two men screaming at each other. The caller did not indicate whether the men were armed or otherwise dangerous. Two police officers arrived in separate cars, without activating their blue lights or sirens, parked on the edge of Cooper's property and approached the mobile home on foot. To alert the occupants of the officers' presence, one of the officers tapped on a window with his flashlight, but neither officer announced his presence or identified himself as a police officer. Cooper called out for anyone in the yard to identify himself, but neither officer responded. Cooper retrieved a shotgun, and pointing the muzzle toward the ground opened the back door and walked onto the porch. After the officers saw Cooper holding the shotgun, they drew their service weapons, fired at Cooper without warning, and wounded him.

Cooper sued the officers for excessive use of force in violation of the *Fourth Amendment* and several state law torts.

The court held the officers were not entitled to qualified immunity.

Citing *Tennessee v. Garner*, the court noted a reasonable police officer is entitled to use deadly force "where the police officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others."

Here, when the officers fired on Cooper, he was standing at the threshold of his home, holding the shotgun in one hand, with its muzzle pointed at the ground. Cooper made no sudden moves or threats and the officers had no other information suggesting that Cooper might harm them. The court held these facts failed to establish that a reasonable officer would have had probable cause to feel threatened by Cooper's actions.

In addition, the court found it reasonable for Cooper to bear a firearm while investigating a disturbance on his property. The court found it significant that the officers never identified themselves, even after being asked by Cooper, and that no reasonable officer could have believed Cooper was aware of the officers' presence when he stepped onto his porch. If Cooper had been

aware of the officers' presence and still come onto the porch with a firearm, it would have been more likely for the court to find that Cooper posed a threat to the officers.

Finally, the court held, at the time of the shooting, it was clearly established that individuals who posed no threat to police officers had the right to be free from the use of deadly force against them.

Click [HERE](#) for the court's opinion.

7th Circuit

United States v. Huart, 2013 U.S. App. LEXIS 23581 (7th Cir. Wis. Nov. 22, 2013)

As Huart was nearing the completion of his sentence for possession of child pornography, the Bureau of Prisons (BOP) transferred him to a privately operated halfway house that contracted with the BOP. Huart was not permitted to possess a cell phone while at the halfway house. During a random search of Huart's room, a staff member found a cell phone on Huart's bed. A search of the phone revealed numerous images of child pornography. Huart admitted to possessing the phone and the images. The director of the halfway house gave Huart's phone to the FBI who obtained a warrant to search it. Because Huart's phone was password protected, it had to be sent to FBI headquarters for analysis. It was unclear why the staff at the halfway house was able to search Huart's phone initially, but the FBI could not. Agents did not unlock the phone and locate the images of child pornography until February 13, 2012. The warrant to search Huart's phone specified that the search was to be conducted before December 15, 2011.

Huart claimed he had a reasonable expectation of privacy in his cell phone and that its confiscation and subsequent search of its contents violated that privacy. Huart argued because the FBI failed to break the passcode and examine the contents of the phone before the warrant's expiration date, the search was unlawful. Huart also argued the government's seizure of his cell phone violated his privacy because it was a trespass under *U.S. v. Jones*.

The court disagreed, holding Huart had no reasonable expectation of privacy in the cell phone or its contents. Huart was not permitted to possess a cell phone while at the halfway house; therefore, any phone he brought into the facility was contraband, subject to confiscation and search. Because Huart lacked a reasonable expectation of privacy in his cell phone and its contents, the confiscation and search of the phone did not implicate the *Fourth Amendment*.

The court further held because the Huart's phone was contraband, it was not a trespass for the halfway house staff to confiscate the phone from his room and search it. The court stated even if *Jones* applied to this case, it would establish only that a *Fourth Amendment* search occurred, not that the search was unreasonable.

Click [HERE](#) for the court's opinion.

8th Circuit

Coker v. Arkansas State Police, 2013 U.S. App. LEXIS 22420 (8th Cir. Ark. Nov. 5, 2013)

A police officer clocked Coker's motorcycle travelling 102 mph and pursued Coker in his patrol car. After a brief chase, the officer bumped the motorcycle with his patrol car, causing the motorcycle to tip over and Coker to fall to the ground. Coker then jumped up and ran to the side of the road, outside the view of the patrol car's dash camera. The officer claimed when he got out of his patrol car to pursue Coker on foot, Coker turned to face him in a crouched fighting stance. According to the officer, he told Coker to get on the ground, but Coker refused. The officer stated he kicked Coker in the face, knocking him to the ground, and may have struck Coker in the face with his metal Maglite flashlight during the ensuing struggle to handcuff Coker. Coker claimed he complied with all of the officer's commands and immediately fell to the ground, waiting to be handcuffed. At that point, Coker claimed the officer kicked him in the face and then struck him in the face with his flashlight, breaking his cheek bones. Coker also claimed the officer struck him in the face with his elbow after he was handcuffed.

Coker claimed the officer used excessive force in violation of the *Fourth Amendment* during the arrest.

Without the aid of video or an understandable audio recording, the court concluded it was impossible to determine what happened after Coker ran out of view of the patrol car's dash camera without weighing the officer's version of events against Coker's version. However, the court stated it is the job of the jury and not the court to determine issues of witness credibility when there are two conflicting versions of an event and to decide whose story is more plausible. Consequently, the officer was not entitled to qualified immunity, as a reasonable jury could find the severity of Coker's injuries resulted from an excessive use of force, especially if the jury believed the officer struck Coker with his metal flashlight after Coker was on the ground and allegedly complying with the officer's commands.

Click [HERE](#) for the court's opinion.

9th Circuit

United States v. Arreguin, 2013 U.S. App. LEXIS 23506 (9th Cir. Cal. Nov. 22, 2013)

Federal agents went to a house to conduct a knock and talk investigation because they suspected the occupants were involved in drug trafficking. An agent testified he and his fellow agents did not know who lived in the house, but they planned to obtain this information during the knock and talk. The agent also acknowledged that when the agents approached the house, they did not know who was inside. After the agent knocked on the door, Valencia opened it. The agent told Valencia he knew drug-related activity occurred at the house in the past and then said to Valencia, "We would like to come in and look around. Can we come in?" Valencia said "Yes," and stepped back to allow the agents to enter the house.

The agents went into the master bedroom and attached master bathroom where under the sink they found a shoebox containing a white powdery substance. The agents also went through a door in the master bedroom that led to the garage. In the garage, the agents seized cash from a car parked there.

While agents searched the house, Arreguin told one of the agents he and his wife lived in the house and that Valencia was a guest visiting from out-of-town.

After the government indicted Arreguin, he moved to suppress the evidence seized by the agents, claiming the agents lacked valid consent for the warrantless search of his house.

The court held it was not objectively reasonable for the agents to believe Valencia had authority to consent to a search of the master bedroom and bathroom or the garage just because he answered the door. When the agents obtained Valencia's consent to "look around" the house, the court concluded they knew virtually nothing about Valencia, the various rooms and areas inside the house or the nature and extent of Valencia's connection to those areas. Instead of asking Valencia additional questions, the agents quickly rushed past him in a state of near ignorance when they searched the master bedroom and garage. The agents knew far too little to hold an objectively reasonable belief that Valencia could consent to a search of those areas.

Click [HERE](#) for the court's opinion.

Armstrong v. Asselin, 2013 U.S. App. LEXIS 23319 (9th Cir. Alaska Nov. 1, 2013)

Armstrong gave a fourteen-year old boy a book that the boy's parents considered pornographic. The boy's parents gave the book to the police who obtained an arrest warrant charging Armstrong with dissemination of indecent material to a minor as well as a warrant to search Armstrong's home for evidence of the dissemination offense. In the warrant applications, the police included a four-page excerpt from the alleged pornographic book. The state district judge who approved both warrants reviewed the applications at the same time did not request the full copy of the book and consulted the dissemination ordinance before signing the warrants. The dissemination charge against Armstrong was later dismissed.

Armstrong sued several police officers claiming that a reasonable officer would have known the warrant applications failed to establish probable cause.

The court held the officers were entitled to qualified immunity. First, in their warrant applications, the officers only needed to establish probable cause, not absolute proof that giving the alleged pornographic book to the minor violated the ordinance. The book's cover portraying a bare buttocks squatting over a dinner plate and the four-page excerpt included in the warrant applications supported a reasonable belief the book as a whole contained material that violated the ordinance. Second, the officers consulted prosecutors and submitted their warrant applications to a neutral and detached judge for review before they arrested Armstrong and searched his home.

Click [HERE](#) for the court's opinion.

10th Circuit

United States v. Cash, 2013 U.S. App. LEXIS 22345 (10th Cir. Okla. Nov. 4, 2013)

A police officer pulled Cash over for a traffic violation. During the stop, the officer saw an artificial bladder device in plain view in Cash's car and discovered Cash was on his way to take a drug test for his federal probation officer. Suspecting that Cash planned to use the bladder device to defeat a urine test, a violation of Oklahoma State Law, the officer detained Cash until his federal probation officer arrived at the scene approximately nineteen minutes later.

When Cash's probation officer arrived, he saw a firearm in plain view in the back seat of Cash's car, a violation of Cash's supervised release. Cash fought with the officers as they tried to arrest him; however, Cash was eventually subdued, handcuffed and placed in the back of a police car. Cash was not given *Miranda* warnings. The officers conducted an inventory search of Cash's car and found a variety of illegal drugs. Cash then called his probation over to the police car, initiated a conversation with him and made several incriminating statements.

Cash was charged with drug and firearms offenses.

Cash moved to suppress the physical evidence found in his car as well as the incriminating statements he made to his probation officer.

The court held when officer saw the bladder device and then Cash admitted he was on his way to take a drug test, the officer had reasonable suspicion to detain Cash beyond the time needed to write the citation for the initial traffic violation. Consequently, Cash's prolonged detention was reasonable and the evidence seized from Cash's car was admissible.

The court further held the conversation between Cash and his probation officer did not constitute interrogation for *Miranda* purposes. First, Cash initiated the conversation when he called the probation officer over to the police car. In response to Cash's request to see him, the probation officer asked Cash, "What was going on?" Although phrased as a question, this was not interrogation as the probation officer was not trying to elicit an incriminating response from Cash, but rather trying to understand why Cash wanted to speak to him. Second, the probation officer's follow-up question, "What's the deal?" in response to Cash's statement that people were "trying to kill him" did not constitute interrogation. The court found this question was an attempt to clarify Cash's statement and not designed to elicit an incriminating response from Cash. Because neither of Cash's statements occurred during interrogation, there was no *Miranda* violation and the statements were admissible against Cash.

Finally, the court concluded that Cash's statements were made voluntarily to his probation officer. Even though Cash was injured while resisting arrest, there was no evidence the probation officer coerced him into making any of his statements.

Click [HERE](#) for the court's opinion.

District of Columbia Circuit

United States v. Glover, 2013 U.S. App. LEXIS 22667 (D.C. Cir. Nov. 8, 2013)

The FBI obtained a warrant from a district court judge in the District of Columbia to install an audio recording device in Glover's truck. At the time, Glover's truck was parked in Baltimore, Maryland. The warrant stated the FBI agents could forcibly enter Glover's truck, regardless of whether the vehicle was located in the District of Columbia, District of Maryland or the Eastern District of Virginia. Information obtained from the recording device was admitted against Glover at trial.

Glover argued the evidence obtained from the recording device should have been suppressed because the warrant authorizing its installation was invalid. Specifically, Glover claimed under 18 U.S.C. § 2518(3) the judge in the District of Columbia could not authorize the installation of the recording device in his truck while the truck was located in Maryland.

The government argued the district court judge in the District of Columbia could authorize the installation of the recording device on a vehicle located anywhere in the United States.

The court agreed with Glover. The court held under 18 U.S.C. § 2518(3) a judge could not authorize the installation of an electronic recording device, if at the time the warrant was issued, the property on which the recording device was to be installed was not located in the authorizing judge's jurisdiction. Consequently, the judge from the District of Columbia did not have the authority to issue the warrant authorizing the installation of the recording device in Glover's truck while the truck was located in the District of Maryland.

Click [HERE](#) for the court's opinion.
