
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 <https://www.fletc.gov/legal-resources>.

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The Informer – November 2014

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FLETC Informer Webinar Series

1. Use of Force Legal Refresher

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

This course will cover the *Fourth Amendment's* objective reasonableness test for seizing free citizens. It will cover the United States Supreme Court's analysis in *Graham v. Connor*, when deadly force and intermediate weapons are reasonable, and the defense of qualified immunity.

Date and Time: Thursday December 11, 2014: 3:00 p.m. EST.

To join this webinar: <https://share.dhs.gov/uof-refresher>

2. Law Enforcement Legal Refresher Training

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

This two-hour block of instruction focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

Date and Time: Tuesday December 16, 2014: 2:30 p.m. EST.

To join this webinar: <https://share.dhs.gov/lgd0312>

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Supreme Court Law Enforcement Cases October 2014 Term

Fourth Amendment: Mistake of Law / Reasonable Suspicion / Traffic Stop

Heien v. North Carolina

Decision Below: [737 S.E.2d 351 \(N.C. 2012\)](#)

A police officer stopped the car in which Heien was a passenger because it only had one operating brake light. During the stop, the officer received consent to search the car and discovered cocaine inside a duffel bag. Heien and the driver were charged with trafficking cocaine.

Heien argued North Carolina law did not require a vehicle to have all brake lights in working order or to be equipped with more than one brake light. As a result, Heien claimed the traffic stop constituted an unlawful seizure in violation of the *Fourth Amendment*; therefore, the cocaine should have been suppressed.

The North Carolina Court of Appeals agreed, holding North Carolina law requires motor vehicles to have only one brake light. As result, the court held the officer's mistaken belief about the requirements of the state's brake light law was objectively unreasonable, and the stop violated Heien's *Fourth Amendment* rights.

The state appealed and the North Carolina Supreme Court reversed the Court of Appeals. The North Carolina Supreme Court held the officer's mistake of the law was objectively reasonable, as no court in North Carolina had ever interpreted the motor vehicle laws to require only one functioning brake light. Consequently, the court held the officer had reasonable suspicion to conduct the traffic stop. Heien appealed to the United States Supreme Court.

The issue before the Supreme Court is whether a police officer's mistake of law can provide reasonable suspicion to support a traffic stop.

The Court heard oral arguments in this case on October 6, 2014.

First Amendment: Protected Speech / True Threats Exception

Elonis v. United States

Decision Below: [730 F.3d 321, \(3d Cir. 2013\)](#)

Elonis was convicted of making threatening communications in violation of *18 U.S.C. § 875(c)*. On appeal, Elonis argued the government was required to prove his subjective intent to threaten under the true threat exception to the *First Amendment*. Because he did not subjectively intend his Facebook posts to be threatening, Elonis argued his posts were not threats, but protected speech. The Third Circuit Court of Appeals disagreed and Elonis appealed.

The first issue before the Supreme Court is whether a conviction for threatening another person requires proof of the defendant's subjective intent to threaten, or whether it is sufficient to show that a reasonable person would regard the statements as threatening.

The second issue before the Supreme Court is whether a conviction for threatening another person under *18 U.S.C. § 875(c)* requires proof of the defendant's subjective intent to threaten.

The Court will hear oral arguments in this case on December 1, 2014.

Fourth Amendment: Traffic Stop / Canine Sniff / Reasonable Suspicion

Rodriguez v. United States

Decision Below: [741 F.3d 905 \(8th Cir. 2014\)](#)

A police officer conducted a traffic stop after he saw Rodriguez's car veer onto the shoulder of the road then swerve back into the lane of travel. The officer conducted a records check on Rodriguez and the front seat passenger. After the officer issued Rodriguez a written warning, he asked Rodriguez for permission to walk his drug-sniffing dog around the car. When Rodriguez refused, the officer directed Rodriguez to get out of the car until a back-up officer could arrive. After the back-up officer arrived, the officer walked his dog around Rodriguez's car and the dog alerted to the presence of drugs. The officer searched Rodriguez's car, found a large bag of methamphetamine and arrested Rodriguez. Approximately seven or eight minutes elapsed from the time the officer issued the written warning until the dog alerted on Rodriguez's car.

Rodriguez argued that after the officer issued the written warning, the officer did not have reasonable suspicion to detain him on the side of the road while waiting for the back-up officer to arrive.

The Eighth Circuit Court of Appeals disagreed. Without deciding whether the officer had reasonable suspicion to continue to detain Rodriguez after he issued the written warning, the Eighth Circuit held the traffic stop was not unreasonably prolonged by the dog sniff. First, even though the dog was located in the officer's patrol car, the officer waited to use it until the back-up officer arrived for safety reasons as there were two individuals in Rodriguez's car. Second, Rodriguez was only detained for an additional seven or eight minutes after the officer issued the written warning. The court concluded such a delay was reasonable and only constituted a *de minimis* intrusion on Rodriguez's personal liberty.

The issue before the Supreme Court is whether an officer may extend an already completed traffic stop for a canine sniff without reasonable suspicion or other lawful justification.

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

Fourth Amendment: Expectation of Privacy / Hotel Guest Registry / Warrantless Inspection

City of Los Angeles v. Patel

Decision Below: [738 F. 3d 1058 \(9th Cir. 2013\)](#)

Los Angeles Municipal Code §41.49 authorizes police officers with the Los Angeles Police Department to inspect hotel guest records at any time without consent or a search warrant. Failure to comply with an officer's inspection demand is a misdemeanor, punishable by up to six months in jail

and a \$1000 fine. Patel, a motel owner in Los Angeles, sued the city, asking the court to prevent the continued enforcement of §41.49's warrantless inspection provision. Patel argued that as written, or on its face, §41.49 violated the *Fourth Amendment's* prohibition against unreasonable searches and seizures.

The Ninth Circuit Court of Appeals agreed. Although Patel did not allege that an unconstitutional search occurred at his motel under §41.49, the court nevertheless held that § 41.49 was invalid on its face. Specifically, the court concluded §41.49 violated the *Fourth Amendment* because it authorized the inspection of hotel records without allowing the hotel owner an opportunity to obtain judicial review of the reasonableness of the demand, before suffering penalties for refusing to comply.

The first issue before the Supreme Court is whether a hotel has an expectation of privacy under the *Fourth Amendment* in a hotel guest registry where the guest-provided information is required by law and that law authorizes the police to inspect the registry. If the answer is "Yes," then the court will determine whether §41.49 is unconstitutional on its face, because it does not expressly provide for pre-compliance judicial review before police officers can inspect the registry.

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

Federal Rules of Criminal Procedure 41 (g): Motion to Return Property

Henderson v. United States

Decision Below: [555 Fed. Appx. 851 \(11th Cir. 2014\)](#)

Henderson, a former United States Border Patrol Agent, was charged with distribution of marijuana, a federal felony. As a condition of his bond, Henderson voluntarily surrendered nineteen firearms to the Federal Bureau of Investigation (FBI). Henderson pled guilty to the drug charge and became a convicted felon in 2007. In 2008, the FBI refused to return the firearms after Henderson proposed to transfer them to a potential buyer. Henderson then filed a motion under *Rule 41(g)* of the *Federal Rules of Criminal Procedure* requesting that he be allowed to transfer ownership of the firearms to the potential buyer, or to his wife.

The Eleventh Circuit Court of Appeals, in an unpublished opinion, denied Henderson's *Rule 41* motion. The court held it would be in violation of *18 U.S.C. § 922(g)* if the court delivered actual or constructive possession of firearms to a convicted felon. The court noted Henderson acknowledged in his plea agreement that as a felon he would not be allowed to possess firearms. In addition, the court stated a defendant who has been convicted of a felony drug offense has "unclean hands" to demand the equitable return of his firearms.

The issue before the Supreme Court is whether a felony conviction, which makes it unlawful for the defendant to possess a firearm, prevents a court under *Rule 41(g)* of the *Federal Rules of Criminal Procedure* or under general equity principles from ordering that the government: (1) Transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests; or (2) Sell the firearms for the benefit of the defendant.

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

CASE SUMMARIES

United States Supreme Court

Carroll v. Carman, 2014 U.S. LEXIS 7430 (U.S. Nov. 10, 2014)

The Pennsylvania State Police received a report that Zita, a suspect in a car theft, might be located at Andrew and Karen Carman's house. Two police officers were dispatched to the Carmans' house to conduct a knock and talk interview. The Carmans' house was situated on a corner lot with the front of the house facing a main street and the left side of the house facing a side street. The officers initially drove to the front of the house, but after discovering no available parking, drove down the side street next to the Carmans' house and parked at the far rear of the property. When the officers exited their cars, they walked toward the Carmans' house from the side and approached a sliding glass door that opened onto a ground-level deck. As the officers stepped onto the deck, Andrew Carman came out of the house and confronted the officers in a belligerent and aggressive manner. Carman refused to answer any of the officers' questions, and as Carman turned away from the officers, he appeared to reach for his waist. Officer Carroll grabbed Carman's arm to make sure Carman was not reaching for a weapon causing Carman to lose his balance and fall into the yard. At this point, Karen Carman came out of the house, spoke with the officers, and then consented to a search of the house. The officers searched the Carmans' house but did not find Zita. The Carmans were not charged with any crimes. The Carmans sued Officer Carroll, claiming that Carroll violated the *Fourth Amendment* when he went into their backyard and onto their deck without a warrant.

The Third Circuit Court of Appeals held Officer Carroll was not entitled to qualified immunity. The court found Officer Carroll violated the *Fourth Amendment* as a matter of law because the knock and talk exception requires police officers to begin their encounter at the front door, where they have an implied invitation to go. The court further held it was clearly established at the time of the incident that a police officer's right to knock at the front door while conducting a knock and talk did not automatically allow the officer to enter other parts of the curtilage. Officer Carroll appealed to the United States Supreme Court, which agreed to hear the case without briefing or oral arguments from the parties.

The Supreme Court reversed the Third Circuit Court of Appeals, holding at the time of the incident there was no clearly established law in the Third Circuit requiring police officers to initiate a knock and talk interview at the front door of a residence. Significantly, the Court did not elaborate on the rules police officers must follow when conducting knock and talk interviews where both the front and back doors of a residence appear to be readily accessible to visitors. The Court referenced cases from the Second and Seventh Circuit Courts of Appeal that left this choice to the officers. However, the Court added it was not ruling on whether those cases were correctly decided or whether a police officer may conduct a knock and talk at any entrance that is open to visitors rather than only at the front door.

See [6 Informer 14](#) for the case brief for Carman v. Carroll, 749 F.3d 192 (3d Cir. Pa., 2014)

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

Circuit Courts of Appeal

First Circuit

United States v. Awer, 2014 U.S. App. LEXIS 20700 (1st Cir. R.I. Oct. 29, 2014)

A police officer stopped a car for speeding and arrested the driver, Johnson, for failing to have a valid driver's license. While securing Johnson, the officer saw Awer moving around suspiciously inside the car. When the officer ordered Awer to exit the car, Awer reached for the center console instead. As the officer grabbed Awer and pulled him from the car, Awer told the officer he had marijuana in his pocket. The officer arrested Awer and while conducting an inventory search, found cocaine in the trunk of the car. The government indicted Awer for possession with intent to distribute cocaine.

Awer argued the cocaine should have been suppressed. First, Awer claimed the initial traffic stop was complete once the officer arrested Johnson; therefore, the officer needed reasonable suspicion of criminal activity to continue investigating him. Second, Awer claimed he was placed under de facto arrest without probable cause when the officer forcibly removed him from the car.

The court disagreed. The court found approximately three minutes elapsed between the time Johnson pulled over and the officer ordered Awer out of the car. This strongly suggested to the court the initial traffic stop was still ongoing, as the officer still had to determine what to do with the car after arresting Johnson. The court further held Awer's forcible removal from the car did not constitute a de facto arrest. During a traffic stop, a police officer may order the driver and any passengers out of the car until the traffic stop is complete. In addition, when a passenger refuses an officer's request to exit a vehicle, the officer may forcibly remove the person from the car. Here, when Awer refused to exit the car, the officer used a reasonable amount of force to pull Awer out of the car. The court concluded the officer's use of force did not transform the encounter with Awer into a de facto arrest.

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

Sixth Circuit

Cass v. City of Dayton, 2014 U.S. App. LEXIS 19812 (6th Cir. Ohio October 16, 2014)

Several police officers were involved in a buy-bust operation where a confidential informant (CI) had arranged to buy crack cocaine from Moore. Moore arrived at the meeting location in a blue Ford Taurus that contained three or four occupants. After the CI made a pre-arranged signal, several officers moved in to apprehend Moore. Officers House and St. Clair walked in front of the Taurus with their firearms drawn and yelled, "Dayton Police. Stop the car." Instead of stopping, the driver of the Taurus, Stargell, accelerated toward the officers. The Taurus struck Officer House, who rolled across the hood. After striking House, the Taurus struck Officer St. Clair's hand, causing him to accidentally discharge his firearm. Believing that St. Clair had fired in self-defense, House fired a single shot at the driver of the Taurus. House's bullet struck and killed Jordan, the front seat passenger. Stargell eventually crashed the Taurus into a tree. The City of Dayton Police Department later determined House and St. Clair violated the department's firearms policy by deliberately placing themselves in the path of the moving vehicle as Stargell drove away.

Cass, the administrator of Jordan’s estate, sued Officer House and the City of Dayton, claiming House used excessive force in violation of the *Fourth Amendment* against Jordan.

The court held Officer House was entitled to qualified immunity. In the Sixth Circuit, when analyzing deadly force claims concerning fleeing vehicles, the court must determine whether the officer has “reason to believe that the fleeing car presents an imminent danger” to “officers and members of the public in the area.” An officer is justified in using deadly force against “a driver who objectively appears ready to drive into an officer or bystander with his car.” Here, the court concluded Officer House’s use of deadly force was objectively reasonable. As House approached the Taurus, clearly identifying himself as a police officer, Stargell accelerated toward him. Almost immediately after being struck, House heard St. Clair discharge his firearm, in what House believed was self-defense. Knowing that two other officers were potentially in the path of the Taurus, House discharged his firearm in an attempt to stop the Taurus by shooting at the driver. Consequently, when House discharged his firearm, it was reasonable for him to believe the lives and safety of other police officers and members of the public in the area were in imminent danger. In addition, the court added House’s alleged violation of City policy did not change its conclusion that House acted objectively reasonable under the circumstances.

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

Seventh Circuit

Matz v. Klotka, 2014 U.S. App. LEXIS 19074 (7th Cir. Wis. Oct. 6, 2014)

While on patrol, two police officers saw Salazar and several other men standing on the porch of an apartment. The officers knew Salazar belonged to a local gang and that Salazar had an outstanding arrest warrant for armed robbery. By the time the officers turned around, the men on the porch had fled. The officers ran down an alley next to the apartment and saw two men in a car starting to drive away. The officers drew their handguns and ordered the occupants out of the car. When Matz exited the car, the officers handcuffed him and placed him in a patrol car. Shortly afterward, the officers discovered the car was stolen and arrested Matz. Salazar was arrested later inside the apartment.

Matz sued the police officers, claiming the officers violated the *Fourth Amendment* because they did not have reasonable suspicion to conduct a *Terry* stop. Alternatively, Matz argued his detention by the officers was not a *Terry* stop, but rather a de facto arrest that was not supported by probable cause.

The court disagreed. First, the officers saw Salazar, a known gang member, who had an outstanding arrest warrant for armed robbery. Second, when the officers approached Salazar and the other men on the porch, all of the men ran away. Third, it was objectively reasonable for the officers to believe Salazar could have been in the car driven by Matz. Consequently, it was reasonable for the officers to stop the car and briefly detain the occupants to determine if Salazar was inside.

The court further held that given the circumstances, it was reasonable for the officers to draw their firearms and handcuff Matz while they controlled the situation and determined who was in the car. While the use of firearms and handcuffs put Matz’s seizure at the outer edge of a lawful *Terry* stop, the court concluded that Matz’s detention was not a de facto arrest without probable cause.

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

United States v. Schmitt, 2014 U.S. App. LEXIS 20066 (7th Cir. Ind. Oct. 20, 2014)

A confidential informant told a police officer that Schmitt, a convicted felon, had recently acquired an assault rifle in exchange for \$200 and two grams of methamphetamine. Police officers followed up on the tip by conducting surveillance on Schmitt's house. During their surveillance, the officers saw Schmitt come to the front door several times to allow people to enter and exit his home. The next day, police officers returned to Schmitt's house with an arrest warrant for Schmitt. Within five minutes of entry, the officers located Schmitt and another individual. During that time, a police officer opened a locked door that led to the basement where he saw an assault rifle. The government indicted Schmitt for being a convicted felon in possession of a firearm.

Schmitt filed a motion to suppress the rifle, arguing after he was arrested upstairs, the officer violated the *Fourth Amendment* by opening the locked basement door and searching the basement.

The court disagreed, holding the officer discovered the assault rifle in plain view during a lawful protective sweep of the basement. A protective sweep is a quick and limited search of premises, incident to arrest, to protect the safety of the officers and others. This exception to the *Fourth Amendment's* warrant requirement allows police officers to conduct a visual inspection of those places in which a person might hide. Police officers may look in closets and other spaces immediately adjacent to the arrest area. However, to search beyond the immediate area, the officers must have facts which would lead a reasonable officer to believe the area to be swept harbors an individual who poses a danger to those at the scene.

In this case, without deciding whether the basement was immediately adjacent to the place of Schmitt's arrest, the court held the officers had reason to believe the basement could have harbored someone who posed a threat to the officers. First, the officers saw several people going in and out of Schmitt's house the day before. Second, the officers knew Schmitt had a violent criminal history. Third, the officers had information that Schmitt had a firearm in the house. Finally, although the basement door was locked, the court noted the officers would not have been protected if a person with a gun decided to kick the door down or shoot through it.

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

Eighth Circuit

United States v. Reid, 2014 U.S. App. LEXIS 20135 (8th Cir. Mo. Oct. 20, 2014)

Police officers went to Graham's house to arrest her on an outstanding warrant. When the officers arrived, the front door was ajar, and the officers saw Graham dressed in pajamas inside the house. The officers ordered Graham to approach the doorway and after she did, an officer handcuffed Graham, and pulled her outside. An officer then agreed to allow Graham to reenter the house to get dressed. While escorting Graham to her bedroom, an officer saw an assault rifle in plain view. When the officer asked Graham about the rifle, Graham told the officer it belonged to her live-in boyfriend, Reid. Graham subsequently consented to a search of the house and officers discovered a shotgun, ammunition and a disassembled pistol. The government indicted Reid for being a convicted felon in possession of a firearm.

Reid filed a motion to suppress the evidence seized from the house. First, Reid argued the assault rifle should have been suppressed because the officer violated the *Fourth Amendment* by entering the house

with Graham, without a warrant. Second, Reid argued the other firearms and ammunition should have been suppressed because they were discovered as a direct result of finding the assault rifle.

The court disagreed. The arrest of a person outside a home does not by itself justify a warrantless search of the residence. However, when an officer allows an arrestee to reenter her home for her own convenience, it is reasonable for the officer to accompany her and to monitor her movements. In this case, when the officers arrested Graham, she was clad only in pajamas. The court concluded it was reasonable for the officer to accompany Graham to her bedroom so she could change into clothes. Consequently, when the officer saw the assault rifle in plain view, he was allowed to lawfully seize it under the *Fourth Amendment*. The court further held the other firearms and ammunition were lawfully seized after Graham provided valid consent to search the house.

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

Ninth Circuit

United States v. Moore, 2014 U.S. App. LEXIS 20413 (9th Cir. Ariz. Oct. 23, 2014)

Federal agents suspected Moore was involved in a marijuana distribution ring. While conducting surveillance on the house Moore shared with his fiancée, Jones, the agents saw Jones leave. A few hours later, knowing Moore was home, agents knocked on the door of the house and rang the doorbell in an attempt to conduct a knock and talk interview. The agents heard people inside the house; however, no one answered the door. One of the agents then called Jones, identified himself, and explained why her house was under surveillance. Jones returned home and gave the agents consent to search the house. When Jones tried to unlock the front door, she discovered the door had been locked with a dead-bolt that could not be unlocked from the outside. After Jones knocked on the door and yelled for someone inside the house to come to the door without success, Jones gave the officers permission to break through the front door with a battering ram. Once inside the house, the agents found marijuana, scales and packing material. The government indicted Moore for possession of marijuana with intent to distribute.

Moore moved to suppress the evidence seized from his house. Even though Jones consented to the search of the house, Moore argued because he was present and did not consent to the search, the agents' warrantless search violated the *Fourth Amendment*.

The court disagreed. In *Georgia v. Randolph*, the United States Supreme Court held the consent of one occupant of a residence is not valid when another occupant is present and expressly refuses consent to search. In this case, the court held the search by the agents did not violate *Randolph* because Moore never expressly refused consent to search. Although Moore was present, the court found he remained inside the house while Jones worked with the agents to gain entry into the house. The court noted acquiescence to a co-occupant's consent to search and the police officers' subsequent actions is not sufficient to satisfy the "express refusal" requirement in *Randolph*. In addition, the court added there was nothing stated in *Randolph* that prohibits police officers from using a battering ram to gain access to a residence when the co-occupant is locked out and expressly consents to its use to gain entry.

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