2008
SUPREME COURT and CIRCUIT COURTS OF APPEAL CASE BRIEFS
BY SUBJECT

(Click on subject to go to those cases)

(last updated July 22, 2008)

Cases are arranged with Supreme Court decisions first followed by Courts of Appeals decisions in chronological order. Miscellaneous Criminal Statutes are arranged in numerical order.

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Fourth Amendment

Search

U.S. v. Askew, 2008 U.S. App. LEXIS 13315 (D.C. Cir.)**,** June 20, 2008

The full Court vacated and now reverses the decision by a panel in *U. S. v. Askew,* 482 F.3d 532 (D.C. Cir. 2007).

Unzipping a jacket to expose a sweatshirt underneath is a "search." A reasonable suspicion of criminal activity cannot justify a search that does not have a weapon as its "immediate object." There is no search-for-evidence counterpart to the *Terry* weapons search, permissible on only a reasonable suspicion that such evidence would be found. When there are no reasonable grounds for believing that it would establish or negate appellant's identification as the robber, unzipping a jacket to expose a sweatshirt during a show-up is precisely the sort of evidentiary search that is impermissible in the context of a *Terry* stop. (The Court expressly stated that it was not ruling that reasonable grounds for believing that it would establish or negate appellant's identification as the robber would make the search reasonable under the Fourth Amendment.) **The police may not maneuver a suspect's outer clothing – such as unzipping a suspect's outer jacket to facilitate a witness's identification at a show-up during a *Terry* stop.**

Click **HERE** for the court's opinion.

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U.S. v. Forbes, 528 F.3d 1273 (10th Cir.)**,** June 17, 2008

Even assuming that a Customs and Border Protection agent first searched the interior of the trailer without consent or probable cause, no incriminating evidence was found during that search. The subsequent canine alert provided an independent source of suspicion to search the interior of the tractor, where the marijuana was discovered.

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Mora v. City of Gaithersburg, 519 F.3d 216 (4th Cir.), March 04, 2008

(Editor's note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition).

The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Protecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way. Police, then, must be entitled to take effective preventive action when evidence surfaces of an individual who intends slaughter.

To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Mowatt, 513 F.3d 395 (4th Cir.), January 25, 2008

Even when officers never physically enter the room, a search under the Fourth Amendment occurs when officers gain *visual* access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority. Although officers have every right to knock on the door to try to talk to the occupant about a complaint, without a warrant, they cannot *require* him to open it.

Click **HERE** for the court's opinion.

* * * *

Frisk

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Click **HERE** for the court's opinion.

* * * *

REP

U.S. v. Harris, 526 F.3d 1334 (11th Cir.), May 08, 2008

Passengers in a taxicab can have a reasonable expectation of privacy in the passenger compartment. The cab driver has the authority to consent to a search of the passenger compartment.

(Editor's Note: The Court did not define the "passenger compartment" in which the taxicab passenger could have a reasonable expectation of privacy. The Court suggests in dicta based on the Supreme Court's decision in *Georgia v. Randolph* that a refusal by the passenger who is present would prevail over consent by the driver.)

Click **HERE** for the court's opinion.

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U.S. v. Banks, 514 F.3d 769 (8th Cir.), January 09, 2008

Ordinarily, a warrant is necessary before police may open a closed container because by concealing the contents from plain view, the possessor creates a reasonable expectation of privacy. However, like objects that sit out in the open, the contents of some containers are treated similarly to objects in plain view. Some containers (for example a gun case) by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance. This exception is limited to those rare containers that are designed for a single purpose. Because the distinctive configuration of such containers proclaims their contents, the contents cannot fairly be said to have been

removed from a searching officer's view. Because a gun, possessed by a felon, is always evidence of a crime, no warrant is necessary to search a bag whose size and shape suggests it contains a gun.

Click **HERE** for the court's opinion.

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Search Warrants

U.S. v. Giberson, 527 F.3d 882 (9th Cir.)**,** May 30, 2008

Even when the search warrant does not specifically authorize it, the search of a computer does not exceed the scope of the warrant when there is ample evidence that the documents authorized in the warrant could be found on the computer.
Computers are able to store massive quantities of intangible, digitally stored information, distinguishing them from ordinary storage containers. But neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context. There is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Morales-Aldahondo, 524 F.3d 115 (1st Cir.)**,** April 24, 2008

When evaluating a claim that information in a search warrant affidavit was stale, the timeliness of information is not measured simply by counting the number of days that have elapsed. Instead, the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information is considered.

Three year old information is not stale when supported by the testimony of an agent, based on his experience and training, that people who download child pornography value their collections to such an extent that they keep the images for a period of time, usually years and that a person who uses a computer to access child pornography is likely to use his computer both to augment and to store the collected images. History teaches that collectors prefer not to dispose of their dross, typically retaining obscene materials for years.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Tejada, 524 F.3d 809 (7th Cir.)**,** April 10, 2008

When a warrant would *certainly*, and not merely probably, have been issued had it been applied for, evidence seized without a warrant is admissible under the inevitable discovery doctrine.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Rogers, 521 F.3d 5 (1st Cir.), March 25, 2008

The term "photos" certainly includes "developed print photographs." Given the current state of technology, the term "photos" also reasonably includes images captured on videotapes or by a digital camera. It is reasonable to believe that a videotape could contain "photos." Search of a videotape for "photos" is within the scope authorized by the warrant.

Click **HERE** for the court's opinion.

* * * *

U.S. v. LaFortune, 520 F.3d 50 (1st Cir.)**,** March 18, 2008

The best practice is for an applicant seeking a warrant based on images of alleged child pornography to append the images or provide a sufficiently specific description of the images to enable the magistrate judge to determine independently whether they probably depict real children.

Neither expert testimony nor "informed lay opinion" is required to support a judge's search warrant probable cause determination that the alleged child pornography involves real children rather than virtual children.

Click **HERE** for the court's opinion.

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U.S. v. Cazares-Olivas, 515 F.3d 726 (7th Cir.), January 29, 2008

Failure by the agent, Assistant U.S. Attorney, and Magistrate Judge to follow the procedures for obtaining a telephonic search warrant as set out in FRCrP 41 means that the warrantless search, even though verbally approved by the judge, violated the Fourth Amendment. (This was the only time within the last 15 years, if not longer, that a telephonic warrant had been requested in the Western District of Wisconsin).

The exclusionary rule is used for only a subset of constitutional errors. Permitting people to get away with crime is too high a price to pay for errors that either do not play any causal role in the seizure (the inevitable-discovery situation) or stem from negligence rather than disdain for constitutional requirements (the good faith reliance situation). Had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The agents would have conducted the same search and found the same evidence (the inevitable-discovery situation).

Violations of federal rules alone do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval.

The 10th circuit agrees (cite omitted).

Click **HERE** for the court's opinion.

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Seizure

Virginia v. Moore, 128 S. Ct. 1598, April 23, 2008 **(Supreme Court)**

Warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Fourth Amendment. States are free to restrict such arrests however they desire. Such state restrictions do not alter the Fourth Amendment's protections. If states choose to impose higher standards for arrests or searches, those protections must be enforced by recourse to state law.

Officers may perform searches incident to constitutionally permissible arrests to ensure their safety and safeguard evidence. This rule covers any "lawful arrest," meaning any arrest based upon probable cause even if it violates a state statute.

Click **HERE** for the court's opinion.

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U.S. v. Reeves, 524 F.3d 1161 (10th Cir.), May 07, 2008

Opening the door was not voluntary when, between 2:30 and 3:00 in the morning, three officers pounded on the door and window continuously for at least twenty minutes while yelling and loudly identifying themselves as police officers. A reasonable person faced with those circumstances would not feel free to ignore the officers' implicit command to open the door.

If an individual's decision to open the door to his home to the police is not made voluntarily, the individual is seized inside his home. Absent a warrant or exigent

circumstance, the seizure violates the Fourth Amendment, and evidence seized inside is inadmissible as fruit of the poisonous tree.

The 6th, 7th, and 8th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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U.S. v. Peralez, 526 F.3d 1115 (8th Cir.), May 14, 2008

The Fourth Amendment is violated when the extent and duration of the trooper's focus on non-routine questions prolongs a traffic stop beyond the time reasonably required to complete its purpose. However, suppression of evidence is the appropriate remedy only if the constitutional violation was "at least a but-for cause of obtaining the evidence."

Because the drug dog was available at the outset of the stop, and because at the outset of the stop the trooper indicated to both the driver and passenger that he intended to run the dog around the exterior of the van, regardless of the responses to the trooper's expanded inquiries, the dog sniff was not "the consequence of a constitutional violation." The positive indication during the dog sniff provided probable cause to search the van, resulting in the discovery of the evidence.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Blair, 524 F.3d 740 (6th Cir.), May 02, 2008

An officer must have probable cause to make a stop for a civil traffic infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation.

Presence in a high-crime area at 10:30 p.m. does not by itself justify a *Terry* stop. That a given locale is well known for criminal activity will not by itself justify a *Terry* stop, although it may be taken into account with other factors. A late hour can contribute to reasonable suspicion; however, 10:30 p.m. is not late enough to arouse suspicion of criminal activity.

Click **HERE** for the court's opinion.

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U.S. v. Smith, 522 F.3d 305 (3rd Cir.)**,** April 09, 2008

Looking at this issue for the first time, the court decides:

The constitutionality of a vehicle impoundment is judged by directly applying the Fourth Amendment reasonableness standard. The Fourth Amendment does not require that there be a standardized policy in place for impoundment under the "community caretaking function."

The 1st Circuit agrees (cite omitted).
The D.C. Circuit disagrees (cite omitted).

Click **HERE** for the court's opinion.

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Floyd v. City of Detroit, 518 F.3d 398 (6th Cir.), March 06, 2008

The Fourth Amendment prohibits a police officer's use of deadly force to "seize" an unarmed, non-dangerous suspect. Shooting at but missing a suspect is a show of authority that amounts to a "seizure" under the Fourth Amendment when it actually has the intended effect of contributing to the suspect's immediate restraint.

Not all mistakes—even honest ones—are objectively reasonable. Honest but objectively unreasonable use of force mistakes violate the Fourth Amendment.

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Mora v. City of Gaithersburg, 519 F.3d 216 (4th Cir.), March 04, 2008

(Editor's note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition).

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To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Hughes, 517 F.3d 1013 (8th Cir.), February 25, 2008

There is no *per se* rule prohibiting Terry stops to investigate a completed misdemeanor. To determine whether such a Terry stop is constitutional, balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors.

Of the three other Circuit Courts that have addressed this issue –

The 9th and 10th Circuits agree (cites omitted).
The 6th Circuit disagrees, adopting a *per se* rule prohibiting such stops (cite omitted)**.**

Click **HERE** for the court's opinion.

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Moore v. Indehar, 514 F.3d 756 (8th Cir.), February 01, 2008

Not every police officer act that results in a restraint on liberty necessarily constitutes a seizure. The restraint must be effectuated "through means intentionally applied." Bystanders and hostages are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout. To establish a Fourth Amendment claim, a bystander must show that the officer intended to seize him through the means of firing his weapon at him.

The 1st, 2nd, 4th, 6th, and 10th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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The full Ninth Circuit has set aside the earlier panel decision and will rehear this case (as summarized below in 2 Informer 07) dealing with whether police, after a long standoff, are required to get a warrant before firing tear gas into a home in which an armed man had barricaded himself.

Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.
A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

Click **HERE** for the court's opinion.

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Pennington v. Metro. Gov't of Nashville & Davidson County, 511 F.3d 647 (6th Cir.), January 10, 2008

Looking at this issue for the first time, the Court decides:

A breathalyzer test administered to an off-duty police officer does not amount to an unconstitutional seizure.

A person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. A person is not seized simply because he believes that he will lose his job. The Fourth Amendment does not protect against the threat of job loss.

Police officers: (1) may reasonably believe, based upon their workplace obligations to comply with department's guidelines and regulations, that their *employment relationship* will be severed if they refuse or disobey an order, direction, or request

to accompany detectives to the department's headquarters; but (2) lack any reasonable basis to feel that they will be *restricted by force or a show of lawful authority in their freedom of movement or their ability to terminate the encounter*.

The 7th Circuit agrees (cite omitted).

Click **HERE** for the court's opinion.

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U.S. v. Tyler, 512 F.3d 405 (7th Cir.), January 10, 2008

A reasonable person in defendant's circumstances would not have believed he was free to leave. Although the encounter took place on a public street and the officers did not draw their weapons or (at least initially) lay hands on Tyler, they told him he was violating the law, took and retained his identification from him while they ran a warrant check, and told him he could not leave until the warrant check was completed. Defendant was seized.

When officers only generally identify themselves as investigators and immediately return the identification and travel documents, the initial consensual encounter does not ripen into a seizure.

Click **HERE** for the court's opinion.

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Use of Force

Torres v. City of Madera, 524 F.3d 1053 (9th Cir.), May 05, 2008

Five factors are relevant in determining whether an officer's mistake in using the Glock rather than the Taser was objectively unreasonable: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

This determination of reasonableness must allow for the fact that police officers are often forced to make split second judgments.

Click **HERE** for the court's opinion.

* * * *

Floyd v. City of Detroit, 518 F.3d 398 (6th Cir.), March 06, 2008

The Fourth Amendment prohibits a police officer's use of deadly force to "seize" an unarmed, non-dangerous suspect. Shooting at but missing a suspect is a show of authority that amounts to a "seizure" under the Fourth Amendment when it actually has the intended effect of contributing to the suspect's immediate restraint.

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* * * *

Traffic Stops

U.S. v. Blair, 524 F.3d 740 (6th Cir.), May 02, 2008

An officer must have probable cause to make a stop for a civil traffic infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation.

Presence in a high-crime area at 10:30 p.m. does not by itself justify a *Terry* stop. That a given locale is well known for criminal activity will not by itself justify a *Terry* stop, although it may be taken into account with other factors. A late hour can contribute to reasonable suspicion; however, 10:30 p.m. is not late enough to arouse suspicion of criminal activity.

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Arrest Warrants

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Protective Sweeps

U.S. v. Mata, 517 F.3d 279 (5th Cir.), February 11, 2008

Lawful arrest is not an indispensable element of a protective sweep. The government need not prove the sweep was incident to a lawful arrest.

Exigent circumstances do not include the likely consequences of the government's own actions or inactions. The moment to determine whether exigent circumstances exist is before the defendant is aware of the officers' presence.

There is a split of circuits on both issues. Refer to the **2006 and 2007 Subject Matter Case Digests** on "Protective Sweeps" and "Exigent Circumstances" on the website.

Click **HERE** for the court's opinion.

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SIA

U.S. v. Nichols, 512 F.3d 789 (6th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Search-incident-to-arrest authority extends to the locked glove box in the passenger compartment of a vehicle.

The 7th, 8th, and 11th circuits, the only others that have considered this specific issue, agree (cites omitted).

Click **HERE** for the court's opinion.

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RS / PC

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There is no *per se* rule prohibiting <u>Terry</u> stops to investigate a completed misdemeanor. To determine whether such a <u>Terry</u> stop is constitutional, balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors.
Of the three other Circuit Courts that have addressed this issue –

The 9th and 10th Circuits agree (cites omitted).
The 6th Circuit disagrees, adopting a *per se* rule prohibiting such stops (cite omitted)**.**

Click **HERE** for the court's opinion.

* * * *

U.S. v. Tyler, 512 F.3d 405 (7th Cir.), January 10, 2008

An investigative detention cannot be justified by a mistaken belief that the law prohibits carrying open alcoholic beverages in public (a mistake of law as opposed to a mistake of fact).

Click **HERE** for the court's opinion.

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U.S. v. Reaves, 512 F.3d 123 4th Cir.), January 08, 2008

To protect against mischief and harassment by an unknown, unaccountable informant, an anonymous tip must be suitably corroborated and must be reliable in its assertion of illegal conduct.

Although a caller's running account of the suspect's movement is of considerable assistance to the police in locating and stopping him and may contribute to the presence of reasonable suspicion, it may not, by itself, serve to validate the underlying tip.

When an unidentified tipster provides enough information to allow the police to readily trace her identity, thereby subjecting herself to potential scrutiny and responsibility for the allegations, a reasonable officer may conclude that the tipster is credible.

An anonymous tipster's unconfirmed, blow-by-blow assertion of the basis of her knowledge is not sufficient by itself to make the tip reliable. Some corroboration is required because a fraudulent tipster can fabricate her basis of knowledge.

Click **HERE** for the court's opinion.

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Exigency

Mora v. City of Gaithersburg, 519 F.3d 216 (4th Cir.), March 04, 2008

(Editor's note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition).

The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Protecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way. Police, then, must be entitled to take effective preventive action when evidence surfaces of an individual who intends slaughter.

To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

Click **HERE** for the court's opinion.

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U.S. v. Mata, 517 F.3d 279 (5th Cir.), February 11, 2008

Lawful arrest is not an indispensable element of a protective sweep. The government need not prove the sweep was incident to a lawful arrest.

Exigent circumstances do not include the likely consequences of the government's own actions or inactions. The moment to determine whether exigent circumstances exist is before the defendant is aware of the officers' presence.

There is a split of circuits on both issues. Refer to the **2006 and 2007 Subject Matter Case Digests** on "Protective Sweeps" and "Exigent Circumstances" on the website.

Click **HERE** for the court's opinion.

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U.S. v. Mowatt, 513 F.3d 395 (4th Cir.), January 25, 2008

Having first detected the odor of marijuana, the officers needed only to seek a warrant before confronting the apartment's occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes. Having created the "exigency" themselves for no apparent reason, the officers cannot rely on it to dispense with the warrant requirement.

The 3rd, 5th, 7th, 8th, and 11th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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Bingue v. Prunchak, 512 F.3d 1169 (9th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Regarding the emergency exigency that allows a warrantless search, the court overrules its prior decision (cite omitted) and adopts a two pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and

manner were reasonable to meet the need. In accordance with *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006), the subjective motive of the officer is irrelevant.

Click **HERE** for the court's opinion.

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The full Ninth Circuit has set aside the earlier panel decision and will rehear this case (as summarized below in 2 Informer 07) dealing with whether police, after a long standoff, are required to get a warrant before firing tear gas into a home in which an armed man had barricaded himself.

Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir.), January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry*.

Click **HERE** for the court's opinion.

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Consent

U.S. v. Groves, 2008 U.S. App. LEXIS 13560 (7th Cir.), June 27, 2008

Even though appellant had repeatedly refused consent to search his home a few weeks earlier, consent from a co-occupant obtained after the appellant had left for work was lawful because the appellant was not physically present and objecting and because the police had no active role in procuring his absence.

Click **HERE** for the court's opinion.

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U.S. v. Purcell, 526 F.3d 953 (6th Cir.)**,** May 29, 2008

The discovery of men's clothing in a bag that a female claimed to own erases for future bags the apparent authority that justified the officers' warrantless search of the first bag, thereby making a subsequent search illegal. The discovery of men's clothing eviscerated any apparent authority, but the officers could have reestablished apparent authority by asking the supposed bag owner to verify her control over the other bags to be searched.

Click **HERE** for the court's opinion.

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The full Eighth Circuit Court vacates and reverses the earlier panel decision (as summarized below in 9 Informer 06) dealing with whether the express refusal of a cotenant not present at the scene trumps the consent to search of a cotenant who is present at the scene.

U.S. v. Hudspeth, 459 F.3d 922 (8th Cir.), **August 25, 2006**

The consent of one who possesses common authority over the premises or effects is valid against the absent person who does not expressly refuse consent. The consent of one cotenant does not overcome the express refusal by another who is physically present. The consent of one cotenant also does not overcome the express refusal by another who is not physically present. When one co-occupant expressly denies consent to search, police must get a warrant.

The court now holds

U.S. v. Hudspeth, 518 F.3d 954 (8th Cir.), March 11, 2008

The Supreme Court decided in *Georgia v. Randolph*, 547 U.S. 103 (2006), that "a warrantless search of a shared dwelling for evidence over the *express refusal of consent by a physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." (emphasis added). That rule is limited to those situations in which the refusing party is present at the scene. A prior refusal of a cotenant who is not present does not trump the consent of a cotenant at the scene. Police do not have to tell the consenting party that the other cotenant has refused.

Click **HERE** for the court's opinion.

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U.S. v. Murphy, 516 F.3d 1117 (9th Cir.), February 20, 2008

Consent to search given by a co-tenant is ineffective (as to the objector) when one tenant has already refused consent, even if the objecting tenant is not physically present at the scene because he has been arrested and taken away. If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Once a co-tenant has registered his objection, his refusal to grant consent remains effective (as to him) barring some objective manifestation that he has changed his position and no longer objects.

When an objection has been made by either tenant prior to the officers' entry, the search is not valid as to the objector and no evidence seized may be used against him.

Click **HERE** for the court's opinion.

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Eidson v. Owens, 515 F.3d 1139 (10th Cir.), February 13, 2008

A suspect's consent to search may be tainted by a threat of detention that essentially amounts to an arrest if consent is refused. A threat to hold the suspects—apparently at the end of their driveway—for as long as three days while a warrant was obtained suggests a detention amounting to arrest. However, such coercion is minimal when, based on a confession and other information, probable cause for arrest exists.

The 9th Circuit agrees (cite omitted).

Tricking or deceiving a suspect into granting consent can be improperly coercive.

Telling the suspects that if they insisted on a search warrant, "the judge would go harder on you in court and you would be considered uncooperative," is coercive, as it indicates that there are punitive ramifications to the exercise of the constitutional right to refuse.

The 3rd and 6th Circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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Inspections

U.S. v. Arnold, 523 F.3d 941 (9th Cir.), April 21, 2008

Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.

The United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity. Generally, searches made at the border are reasonable simply by virtue of the fact that they occur at the border. Searches of closed containers and their contents can be conducted at the border without particularized suspicion. The search of his laptop and its electronic contents is logically no different from the suspicionless border searches of travelers' luggage that the Supreme Court and this court have allowed.

Click **HERE** for the court's opinion.

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Exclusionary Rule

U.S. v. Peralez, 526 F.3d 1115 (8th Cir.), May 14, 2008

The Fourth Amendment is violated when the extent and duration of the trooper's focus on non-routine questions prolongs a traffic stop beyond the time reasonably required to complete its purpose. However, suppression of evidence is the appropriate remedy only if the constitutional violation was "at least a but-for cause of obtaining the evidence."

Because the drug dog was available at the outset of the stop, and because at the outset of the stop the trooper indicated to both the driver and passenger that he intended to run the dog around the exterior of the van, regardless of the responses to the trooper's expanded inquiries, the dog sniff was not "the consequence of a constitutional violation." The positive indication during the dog sniff provided probable cause to search the van, resulting in the discovery of the evidence.

Click **HERE** for the court's opinion.

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U.S. v. Tejada, 524 F.3d 809 (7th Cir.)**,** April 10, 2008

When a warrant would *certainly*, and not merely probably, have been issued had it been applied for, evidence seized without a warrant is admissible under the inevitable discovery doctrine.

Click **HERE** for the court's opinion.

U.S. v. Cazares-Olivas, 515 F.3d 726 (7th Cir.), January 29, 2008

Failure by the agent, Assistant U.S. Attorney, and Magistrate Judge to follow the procedures for obtaining a telephonic search warrant as set out in FRCrP 41 means that the warrantless search, even though verbally approved by the judge, violated the Fourth Amendment. (This was the only time within the last 15 years, if not longer, that a telephonic warrant had been requested in the Western District of Wisconsin).

The exclusionary rule is used for only a subset of constitutional errors. Permitting people to get away with crime is too high a price to pay for errors that either do not play any causal role in the seizure (the inevitable-discovery situation) or stem from negligence rather than disdain for constitutional requirements (the good faith reliance situation). Had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The agents would have conducted the same search and found the same evidence (the inevitable-discovery situation).

Violations of federal rules alone do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval.

The 10th circuit agrees (cite omitted).

Click **HERE** for the court's opinion.

* * * *

U.S. v. Mowatt, 513 F.3d 395 (4th Cir.), January 25, 2008

The good faith exception to the exclusionary rule does not apply when the warrant is based on information obtained in an illegal, warrantless search because the constitutional error was made by the officer, not by the magistrate.

Click **HERE** for the court's opinion.

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Defenses

Entrapment

U.S. v. White, 519 F.3d 342 (7th Cir.), March 05, 2008

Sentencing entrapment occurs in situations when a defendant who lacks a predisposition to engage in more serious crimes nevertheless does so as a result of unrelenting government persistence. In this case the government insisted on a

certain amount of a certain drug in order to trigger a mandatory minimum sentence under the 21 U.S.C. § 841(b)(1)(A)(iii) - 20 years with a prior felony drug conviction. To overcome this sentencing entrapment argument, the government need not explain or defend its motives, but must show only that the defendant was in fact predisposed to violate the law without extraordinary inducements.

Click **HERE** for the court's opinion.

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Necessity

U.S. v. Ridner, 512 F.3d 846 (6th Cir.), January 17, 2008

A defendant charged with being a felon-in-possession of a firearm may assert the necessity defense. This defense is limited to rare situations and should be construed very narrowly.

The defendant must produce evidence of the following five requirements:

(1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
(2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
(3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;
(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; . . . and
(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

Click **HERE** for the court's opinion.

* * * *

Self Incrimination

Miranda

U.S. v. Pacheco-Lopez, 2008 U.S. App. LEXIS 13448 (6th Cir.), June 26, 2008

***Miranda* warnings are not required for "booking questions" such as the defendant's name, address, height, weight, eye color, date of birth and current address. But, during the service of a drug search warrant, asking where he was from, how he had arrived at the house, and when he had arrived are questions reasonably likely to**

elicit an incriminating response, thus mandating a *Miranda* warning. The location, the nature of the questioning and the failure to take notes or document the defendant's identity also support the conclusion that the booking exception is not applicable in this case. Application of the booking exception is most appropriate at the station, where administrative functions such as bookings normally take place. Extending the exception to the type of questioning here – which occurred in a private home during the investigatory stage of criminal proceedings – would undermine the protections that *Miranda* seeks to afford to criminal suspects. Where the booking exception does not apply, statements made before *Miranda* advice and waiver are "irrebuttably presumed involuntary" and must be suppressed.

Subsequent *Miranda* warnings are not effective unless the warnings place a suspect who has just been interrogated in a position to make an *informed choice*. A *Miranda* waiver is ineffective when the same officers conduct the interrogation in the same location without any break between the two sets of questions, and the post-*Miranda* question resulted from the knowledge gleaned during the initial questioning. There is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Click **HERE** for the court's opinion.

* * * *

Anderson v. Terhune, 516 F.3d 781 (9th Cir.), February 15, 2008

"I plead the Fifth" is an unambiguous, unequivocal invocation of the right to remain silent. From television shows like "Law & Order" to movies such as "Guys and Dolls," we are steeped in the culture that knows a person in custody has "the right to remain silent." *Miranda* is practically a household word. And surely, when a criminal defendant says, "I plead the Fifth," it doesn't take a trained linguist, a Ph.D, or a lawyer to know what he means. In popular parlance and even in legal literature, the term "Fifth Amendment" in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination. Failure to scrupulously honor such an invocation makes the subsequent statements inadmissible.

Playing dumb and asking, "Plead the Fifth. What's that?" is not a legitimate clarifying question. This effort to keep the conversation going was almost comical and, at best, was mocking and provoking the defendant.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Nichols, 512 F.3d 789 (6th Cir.), January 15, 2008

A suspect impliedly waives his *Miranda* rights by voluntarily speaking with an officer after affirming that he understands these rights. Such a waiver can be clearly inferred from the actions and words of the person interrogated. While it does not require much to invoke the right to silence, it does require something that indicates a desire not to be questioned. Repeated, false denials of identity are not refusals to answer all police questions.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Upton, 512 F.3d 394 (7th Cir.), January 09, 2008

A *Miranda* waiver can be either express or implied. Waiver can never occur through "mere silence," but a person can act as though he has waived his rights without expressly saying so. Waiver may be inferred from the defendant's conduct, even when he has refused to sign a waiver form.

In assessing the voluntariness of a waiver, physical force is certainly a defining circumstance—and possibly a dispositive one. However, its incidental use can sometimes be excused where the other circumstances of the interview show a voluntary waiver. The relevant inquiry is the totality of the circumstances, looking to gaps in time between the use of force and the waiver, changed interrogators or location, defendant's background, experience and conduct, and renewed *Miranda* warnings.

Click **HERE** for the court's opinion.

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Saleh v. Fleming, 512 F.3d 548 (9th Cir.), January 03, 2008

Incarceration does not automatically render an interrogation custodial. The need for a *Miranda* warning to a person in custody for an unrelated matter will only be triggered by some restriction on his freedom of action in connection with the interrogation itself.

The 8th and 9th circuits agree (cites omitted).

Under the "cat out of the bag" theory set forth in *United States v. Bayer*, 331 U.S. 532 (1947), after an accused has once let the cat out of the bag by confessing, he is never thereafter free of the psychological and practical disadvantages of having confessed. In such a sense, a later confession always may be looked upon as fruit of the first. Under *Oregon v. Elstad*, 470 U.S. 298 (1985), the "cat out of the bag"

theory does not apply where, subsequent to a technical *Miranda* violation, a confession is voluntarily made under circumstances not requiring a *Miranda* warning.

Click **HERE** for the court's opinion.

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6th Amendment Counsel

Rothgery v. Gillespie County, 128 S. Ct. 2578, June 23, 2008 **(Supreme Court)**

The Court reaffirms its long standing position which an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Click **HERE** for the court's opinion.

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U.S. v. Burgest, 519 F.3d 1307 (11th Cir.), March 13, 2008

Looking at this issue for the first time, the court decides:

The Sixth Amendment right to counsel is offense specific. When the same conduct violates both state laws and federal laws, the offenses are distinct for purposes of the right to counsel. The invocation of a Sixth Amendment attorney for the state offenses does not bar federal agents from questioning the suspect about the federal offenses. Voluntary statements obtained by federal agents are admissible in the federal prosecution.

The 1st, 4th, and 5th Circuits agree (cites omitted)**.**
The 2nd and 8th Circuits disagree (cites omitted)**.**

Click **HERE** for the court's opinion.

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Civil Liability

Ali v. Federal Bureau of Prisons, 128 S. Ct. 831, January 22, 2008 **(Supreme Court)**

Under the Federal Tort Claims Act (FTCA), the United States waives sovereign immunity and can be liable for torts committed by federal employees acting in the scope of their employment. However, 28 U.S.C. § 2680 carves out exceptions to this

waiver of immunity, specifically noting that the U.S. does not waive sovereign immunity for claims arising from detention of property by "any officer of customs or excise or *any other law enforcement officer*."

The Supreme Court holds that the phrase "any other law enforcement officer" in § 2680 is to be interpreted broadly. Accordingly, it prohibits claims against the United States for the unlawful detention of property by <u>any</u> law enforcement officer (emphasis added).

Click **HERE** for the court's opinion.

* * * *

Gandara v. Bennett, 528 F.3d 823 (11th Cir.), May 22, 2008

<u>Looking at this issue for the first time, the court decides</u>:

Article 36 of the Vienna Convention on Consular Relations provides that a foreigner who has been arrested and detained in this country must be advised of his rights regarding notification of representatives of his home country. Failure to comply with this international treaty cannot form the basis of a civil suit under 42 U.S.C. § 1983.

Click **HERE** for the court's opinion.

The 9th Circuit agrees. *Cornejo v. County of San Diego*, 504 F.3d 853 (2007) (Click **10 Informer 07**).

The 7th Circuit disagrees. *Jogi v. Voges*, 480 F.3d 822 (2007). (Click **HERE**).

* * * *

Torres v. City of Madera, 524 F.3d 1053 (9th Cir.), May 05, 2008

Five factors are relevant in determining whether an officer's mistake in using the Glock rather than the Taser was objectively unreasonable: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

This determination of reasonableness must allow for the fact that police officers are often forced to make split second judgments.

Click **HERE** for the court's opinion.

Mora v. People of the State of New York, 524 F.3d 183 (2nd Cir.), April 24, 2008

Failure to inform detained aliens of the prospect of consular notification as required by the Vienna Convention on Consular Relations will not support an individual civil action for damages under 42 U.S.C. § 1983 or the Alien Tort Statute.

The 9th Circuit agrees (cite omitted).
The 7th Circuit disagrees (cite omitted).

The 5th and 6th Circuits have ruled in criminal cases that the treaty does not create a judicially enforceable individual right (cites omitted).

Click **HERE** for the court's opinion.

* * * *

Bingue v. Prunchak, 512 F.3d 1169 (9th Cir.), January 15, 2008

Looking at this issue for the first time, the Court decides:

Police officers involved in *all* high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm. Only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience which is necessary for a due process violation under the Fourteenth Amendment.

The 8th circuit agrees (cite omitted).
The 3rd, 6th, 9th, and 10th circuits disagree, holding that the intent to harm standard only applies to emergency and nearly instantaneous pursuits, and that a deliberate indifference standard applies when the circumstances are such that actual deliberation is practical (cites omitted).

Click **HERE** for the court's opinion.

* * * *

Pennington v. Metro. Gov't of Nashville & Davidson County, 511 F.3d 647 (6th Cir.), January 10, 2008

Looking at this issue for the first time, the Court decides:

A breathalyzer test administered to an off-duty police officer does not amount to an unconstitutional seizure.

A person is seized only when, by means of physical force or a show of authority, his

freedom of movement is restrained. A person is not seized simply because he believes that he will lose his job. The Fourth Amendment does not protect against the threat of job loss.

Police officers: (1) may reasonably believe, based upon their workplace obligations to comply with department's guidelines and regulations, that their *employment relationship* will be severed if they refuse or disobey an order, direction, or request to accompany detectives to the department's headquarters; but (2) lack any reasonable basis to feel that they will be *restricted by force or a show of lawful authority in their freedom of movement or their ability to terminate the encounter*.

The 7th Circuit agrees (cite omitted).

Click **HERE** for the court's opinion.

* * * *

Firearms

U.S. v. Ressam, 128 S. Ct. 1858, May 19, 2008 **(Supreme Court)**

Proof that there were explosives in defendant's car at the time he lied on a customs form (18 U.S.C. § 1001) while attempting to enter the United States is sufficient to convict for "carrying" explosives "during" the commission of a felony in violation of 18 U.S.C. § 844 (h)(4). The government does not have to prove that the explosives were carried "in relation to" the underlying felony. The government only has to prove that the explosives were carried while the felony was being committed.

Click **HERE** for the court's opinion.

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D.C. v. Heller, 128 S. Ct. 2783, June 26, 2008 **(Supreme Court)**

The Second Amendment guarantees an individual right to keep and bear arms. The District's bans on possessing an operable handgun or other firearm in the home are unconstitutional. "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."

Click **HERE** for the court's opinion.

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Possession

U.S. v. Sanders, 520 F.3d 699, March 21, 2008

In order to convict under 26 U.S.C. § 5861(d) for possession of an unregistered, short-barrel shotgun as defined in 26 U.S.C. § 5845(a), the government must prove intentional possession of a shotgun that <u>the defendant knows to be</u> of an overall length of less than 26 inches or a barrel length of less than 18 inches. Such knowledge can be inferred from evidence that the defendant handled the shotgun if the appearance of the shotgun would have revealed those characteristics. A barrel length of only 11 and 7/16 inches, more than one-third shorter than the legal length, is a large enough difference that it would be obvious to someone who handled it that the barrel was not 18 inches long.

Click **HERE** for the court's opinion.

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U.S. v. Ridner, 512 F.3d 846 (6th Cir.), January 17, 2008

A defendant charged with being a felon-in-possession of a firearm may assert the necessity defense. This defense is limited to rare situations and should be construed very narrowly.

The defendant must produce evidence of the following five requirements:

(1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
(2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
(3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;
(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; . . . and
(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

Click **HERE** for the court's opinion.

* * * *

Drugs

Possession

U.S. v. Fambro, 526 F.3d 836 (5th Cir.), May 02, 2008

A person is in constructive possession of contraband if he knowingly has ownership, dominion, or control over the contraband itself or over the premises in which the contraband is located. Constructive possession need not be exclusive. It may be joint with others, and it may be proven with circumstantial evidence. When there is joint occupancy, control or dominion over the place in which contraband is found is not by itself sufficient to establish constructive possession. Constructive possession in such cases exists only when there is some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the contraband.

Click **HERE** for the court's opinion.

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U.S. v. Tran, 519 F.3d 98 (2nd Cir.), March 10, 2008

A defendant's sole occupancy of a vehicle cannot alone suffice to prove knowledge of contraband found hidden in the vehicle. Corroborating evidence, such as nervousness, a false statement, or suspicious circumstances, is necessary to prove this element. Even where drugs are hidden and therefore not immediately visible to the occupant or others, the possibility of discovery may cause an individual with knowledge of the drugs to respond with nervousness to a law enforcement officer's presence. "Nervousness" is one type of evidence that, when considered alongside the defendant's sole occupancy of a vehicle, can support an inference that the defendant knew about the drugs in the hidden compartment. Nervousness alone is not enough. There must be facts which suggest that the defendant's nervousness or anxiety derives from an underlying consciousness of criminal behavior.

The 5th and 6th Circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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Miscellaneous Criminal Statutes **(In numerical order)**

8 U.S.C. § 1324

U.S. v. Ozcelik, 527 F.3d 88 (3rd Cir.)**,** May 27, 2008**.**

The terms "shielding," "harboring," and "concealing" under 8 U.S.C. § 1324 encompass conduct "tending to substantially facilitate an alien's remaining in the United States illegally" and to prevent government authorities from detecting the alien's unlawful presence.

General advice to, in effect, keep a low profile and not do anything illegal do not tend to "substantially" facilitate the alien remaining in the country; rather, it simply states an obvious proposition that anyone would know or could easily ascertain from almost any source. Comments about changing addresses were irrelevant because the illegal alien had already taken the action on his own accord. Holding someone criminally responsible for passing along general information to an illegal alien would effectively write the word "substantially" out of the applicable test.

The 5th Circuit agrees (cite omitted)**.**

Click **HERE** for the court's opinion.

* * * *

18 U.S.C. § 111

U.S. v. Chapman, 528 F.3d 1215 (9th Cir.)**,** June 23, 2008

Even though it appears to prohibit six different types of actions, only one of which is "assault," convictions under 18 U.S.C. § 111 require at least some form of assault.

Title 18 U.S.C. § 111(a) allows misdemeanor convictions only in cases where the acts constitute simple assault. To constitute simple assault, an action must be "either a willful attempt to inflict injury upon the person of another, or a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." "Tensing up" in anticipation of arrest and disobeying orders to move and lie down, may have made the officers' job more difficult, but did not amount to a simple assault. Mere passive resistance is not sufficient for a conviction under § 111(a).

The 2nd, 3rd, 5th, 8th, and 10th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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18 U.S.C. § 1028A

U.S. v. Kowal, 527 F.3d 741 (8th Cir.)**,** May 29, 2008

Title 18 U.S.C. § 1028A(a)(1), the aggravated identity theft statute, covers the theft of a *deceased* person's identity.

Click **HERE** for the court's opinion.

* * * *

U.S. v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir.), March 28, 2008

To sustain a conviction for aggravated identify theft in violation of 18 U.S.C. § 1028A(a)(1), the identification used must belong to an actual person. The government does not have to prove that the defendant knew that the identification belonged to an actual person.
The 4th and 11th Circuits agree (cites omitted)**.**
The D.C. Circuit disagrees (cite omitted)**.**

Click **HERE** for the court's opinion.

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U.S. v. Mitchell, 518 F.3d 230 (4th Cir.), March 06, 2008

To be convicted under 18 U.S.C. § 1028A(a)(1), aggravated identity theft, the government must prove that the defendant coupled his use of a name with a sufficient amount of correct, distinguishing information to identify a specific individual. Although there were two real individuals with the name used by defendant on the fake driver's license, the name alone was not sufficiently unique to identify a specific individual.
A government issued driver's license number is a unique identifier belonging to a real person and, as such, identifies a specific individual.

Click **HERE** for the court's opinion.

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U.S. v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir.), February 15, 2008

To obtain a conviction under section 18 U.S.C. §1028A(a)(1), the "aggravated identity theft" statute, the government must prove the defendant *knew* the means of identification he transferred, possessed, or used actually belonged to "another person." It is insufficient for the government just to show that the means of identification *happened* to belong to another person.

Every other circuit that has construed this language, the 4th, 8th, and 11th Circuits, disagrees (cites omitted).

Click **HERE** for the court's opinion.

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18 U.S.C. § 1341 and 1343

U.S. v. Black, 2008 U.S. App. LEXIS 13355 (7th Cir.)**,** June 25, 2008

In a mail and/or wire fraud case based upon a scheme to defraud an employer of honest services, the fact that the inducement was the anticipation of money from a third party and not the employer is no defense, even when that third party never receives a benefit.

Click **HERE** for the court's opinion.

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18 U.S.C. § 1512

U.S. v. Black, 2008 U.S. App. LEXIS 13355 (7th Cir.)**,** June 25, 2008

Title 18 U.S.C. § 1512(c)(1), concealing or attempting to conceal documents "with the intent to impair the [documents'] integrity or availability for use in an official proceeding" does not require proof of materiality for the excellent reason that being able to deny the materiality of a document is the usual reason for concealing the document. All that need be proved is that the document was concealed in order to make it unavailable in an official proceeding.

Click **HERE** for the court's opinion.

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18 U. S. C. §1956

U.S. v. Santos, 128 S. Ct. 2020**,** June 02, 2008 **(Supreme Court)**

The federal money-laundering statute, 18 U. S. C. §1956, prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity. The word "proceeds" applies only to transactions involving criminal *profits*, not criminal receipts. In this illegal gambling operation, money paid as salary, commissions, and to winning gamblers were not "proceeds."

Therefore, none of the transactions on which the money-laundering convictions were based involved lottery "profits."

Click **HERE** for the court's opinion.

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***Cuellar v. U.S.*,** 128 S. Ct. 1994**,** June 02, 2008 **(Supreme Court)**

Evidence that money was concealed during transportation is not sufficient to sustain a conviction under 18 U. S. C. §1956, the federal money-laundering statute. The government must prove knowledge that taking the funds to Mexico was "designed," at least in part, to conceal or disguise their "nature," "location," "source," "ownership," or "control." Merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money. The Government's own expert testified that the transportation's purpose was to compensate the Mexican leaders of the operation. Thus, the evidence suggested that the transportation's secretive aspects were employed to *facilitate* it, but not necessarily that secrecy was its *purpose.*

Click **HERE** for the court's opinion.

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18 U.S.C. § 3553

***U.S. v. Fernandez*,** 526 F.3d 1247 (9th Cir.)**,** May 27, 2008

Under 18 U.S.C. § 3553(f)(2), a defendant is entitled to relief from a mandatory minimum sentence if "the defendant did not . . . possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." The burden is on the defendant to prove that it was clearly improbable that he possessed a firearm in connection with the offense. The circumstances in which the firearms were found, coupled with the implausibility of the defendants' explanations may serve as grounds for concluding that firearms were possessed in connection with the offense of conviction. "Offense" means the offense of conviction *and all relevant conduct*. Any infraction is an offense, whether one is caught or not.

Click **HERE** for the court's opinion.

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26 U.S.C. § 5861
26 U.S.C. § 5845

U.S. v. Sanders, 520 F.3d 699 (7th Cir.), March 21, 2008

In order to convict under 26 U.S.C. § 5861(d) for possession of an unregistered, short-barrel shotgun as defined in 26 U.S.C. § 5845(a), the government must prove intentional possession of a shotgun that the defendant knows to be of an overall length of less than 26 inches or a barrel length of less than 18 inches. Such knowledge can be inferred from evidence that the defendant handled the shotgun if the appearance of the shotgun would have revealed those characteristics. A barrel length of only 11 and 7/16 inches, more than one-third shorter than the legal length, is a large enough difference that it would be obvious to someone who handled it that the barrel was not 18 inches long.

Click **HERE** for the court's opinion.

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36 C.F.R. § 7.96

U.S. v. Cindy Sheehan, 512 F.3d 621, January 11, 2008

36 C.F.R. § 7.96(g)(2), a National Park Service ("NPS") regulation, governs demonstrations in all park areas in the National Capital Region, including the White House sidewalk, and provides that demonstrations involving more than 25 people may be held only pursuant to a permit. In order to sustain a conviction the government must prove that the defendant "knowingly" violated the regulation.

Click **HERE** for the court's opinion.

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Title III

U.S. v. Fernandez, 526 F.3d 1247 (9th Cir.)**,** May 27, 2008

When the government reasonably and in good faith concludes that the target of its wiretap surveillance has adopted a new alias, it may continue to intercept such target's conversations without violating the § 2518(5) minimization requirement.

Click **HERE** for the court's opinion.

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Aliens / Immigration

U.S. v. Ozcelik, 527 F.3d 88 (3rd Cir.)**,** May 27, 2008**.**

The terms "shielding," "harboring," and "concealing" under 8 U.S.C. § 1324 encompass conduct "tending to substantially facilitate an alien's remaining in the United States illegally" and to prevent government authorities from detecting the alien's unlawful presence.

General advice to, in effect, keep a low profile and not do anything illegal do not tend to "substantially" facilitate the alien remaining in the country; rather, it simply states an obvious proposition that anyone would know or could easily ascertain from almost any source. Comments about changing addresses were irrelevant because the illegal alien had already taken the action on his own accord. Holding someone criminally responsible for passing along general information to an illegal alien would effectively write the word "substantially" out of the applicable test.

The 5th Circuit agrees (cite omitted)**.**

Click **HERE** for the court's opinion.

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Sentencing

Baze v. Rees, 128 S. Ct. 1520, April 16, 2008 **(Supreme Court)**

To constitute cruel and unusual punishment, an execution method must present a "substantial" or "objectively intolerable" risk of serious harm. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain. Kentucky's continued use of the three-drug protocol does not pose an "objectively intolerable risk" of serious harm.

Click **HERE** for the court's opinion.

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Burgess v. U.S., 128 S. Ct. 1572, April 16, 2008 **(Supreme Court)**

Title 21 U.S.C. § 841(b)(1)(A) of the Controlled Substances Act doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a "felony drug offense." "Felony drug offense" in that section is defined exclusively by 21 U.S.C. § 802(44). A state drug offense punishable by more than one year qualifies as a "felony drug offense" even if state law classifies the offense as a misdemeanor.

Click **HERE** for the court's opinion.

Begay v. U.S., 128 S. Ct. 1581, April 16, 2008 **(Supreme Court)**

Title 18 U. S. C. § 924(e)(1), the Armed Career Criminal Act, imposes a special mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing …"a violent felony." The Act defines "violent felony" as, inter alia, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Even assuming that DUI involves conduct that "presents a serious potential risk of physical injury to another," it is not "a violent felony" because it is simply too unlike the example crimes to indicate that Congress intended that provision to cover it.

Click **HERE** for the court's opinion.

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U.S. v. Rodriquez, 128 S. Ct. 1783, May 19, 2008 **(Supreme Court)**

The Armed Career Criminal Act, 18 U.S.C. 924(e), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia,* a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." A state drug-trafficking offense, for which state law authorized a ten-year sentence *because the defendant was a recidivist,* qualifies as a predicate offense under the Act, mandating the minimum 15 year sentence.

Click **HERE** for the court's opinion.

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Kennedy v. La., 128 S. Ct. 2641, June 25, 2008 **(Supreme Court)**

A death sentence for one who rapes but does not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment.

Click **HERE** for the court's opinion.

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