2008
CIRCUIT COURTS OF APPEALS
CASE BRIEFS

(final update on March 26, 2009)

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1st CIRCUIT

U.S. v. Boskic, 545 F.3d 69, October 22, 2008

The quasi-coercive nature of an official immigration interview in a federal building, whether the door is open or not, is a factor to be considered in deciding whether a confession was given voluntarily because it would be naive to ignore the perception -- indeed fear-- of all non-citizens in the United States that immigration authorities control their fate. The following factors also weigh against voluntariness: (1) the agents' decision not to inform Boskic of the nature of the offenses that they suspected he had committed, (2) the absence of counsel during the interview, and (3) Boskic's nervousness and hesitancy at the outset of the interview.

The Supreme Court has never elaborated on what instruments beyond indictment and information would constitute a "formal charge" for purposes of the Sixth Amendment right to counsel. A federal complaint does not qualify as such, primarily because of its limited role as the precursor to an arrest warrant. The process of securing a federal criminal complaint does not involve the appearance of the defendant before a judicial officer. It is therefore unlike a preliminary hearing or arraignment. Nor does the process of securing a federal criminal complaint require, by statute or rule, the participation of a prosecutor. It is therefore unlike the procedures for securing an indictment or information, which require the participation of a prosecutor and, in that sense, manifest the "commitment to prosecute."

The 2nd, 3rd, 4th, 6th, 8th, 9th, and 11th circuits agree (cites omitted)**.**

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

*****

U.S. v. Godin, 534 F.3d 51, July 18, 2008

To obtain a conviction under 18 U.S.C. § 1028A(a)(1), the aggravated identity theft statute, the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person.

The D.C. Circuit agrees (cite omitted)**.**
The 4th, 8th, and 11th circuits disagree (cites omitted)**.**

The 9th Circuit also now agrees with the 1st and D.C. circuits - see *U.S. v. Miranda-Lopez* (9th Cir.) below.

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

*****

U.S. v. Morales-Aldahondo, 524 F.3d 115, 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. Rogers, 521 F.3d 5, 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, March 18, 2008

The best practice is for an applicant seeking a warrant based on images of alleged child pornography to append the images <u>or</u> 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.

*****

2nd CIRCUIT

U.S. v. Hayes, 551 F.3d 138, December 24, 2008

There is no legitimate expectation of privacy in the front yard of a home clearly within plain view of the public road and adjoining properties insofar as the presence of the scent of narcotics in the air is capable of being sniffed by a police narcotics dog.

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

*****

U.S. v. Lopez, 547 F.3d 397, November 13, 2008

The voluntary consent of a co-tenant is valid absent the affirmative objection by the defendant who is present. Law enforcement has no duty to ask the defendant whether he consents to the search, no matter how easy or convenient it might be to do so. Rather, the onus is on the defendant to object to the search.

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

*****

U.S. v. Lopez, 547 F.3d 364, November 10, 2008

A separate itemization of each object found, regardless of its value, is not required for an inventory search to be reasonable under the Fourth Amendment. Such an obligation would interfere severely with the enforcement of the criminal laws by requiring irrational, unjustified suppression of evidence of crime where officers, conducting a *bona fide* search of an impounded vehicle, found evidence of serious crime but, in making their inventory, failed to distinguish between the maps of Connecticut and New York, or failed to list separately the soiled baby blanket or a pack of gum.

When officers, following standardized inventory procedures, seize, impound, and search a car in circumstances that suggest a probability of discovering criminal evidence, the officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably

disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes.

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

*****

U.S. v. Luna, 547 F.3d 66, October 16, 2008

A conspiracy conviction requires proof that two or more persons agreed to participate in a joint venture intended to commit an unlawful act. A transfer of drugs from a seller to a buyer necessarily involves agreement, however brief, on the distribution of a controlled substance from the former to the latter. However, while the illegal sale of narcotics is a substantive crime requiring an agreement by two or more persons, the sale agreement itself cannot be the conspiracy to distribute, for it has no separate criminal object. Without more, the mere buyer-seller relationship is insufficient to establish a conspiracy. The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy. They have no agreement to advance any joint interest.

However, this rationale does not apply where, for example, there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use. Under such circumstances, the participants in the transaction may be presumed to know that they are part of a broader conspiracy. A defendant may be deemed to have agreed to join a conspiracy if there is something more, some indication that the defendant knew of and intended to further the illegal venture, that he somehow encouraged the illegal use of the goods or had a stake in such use.

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

*****

Mora v. People of the State of New York, 524 F.3d 183, 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.

*****

U.S. v. Tran, 519 F.3d 98**,** 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.

*****

3rd CIRCUIT

U.S. v. Ozcelik, 527 F.3d 88, 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.

*****

U.S. v. Smith, 522 F.3d 305, 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.

*****

4th CIRCUIT

U.S. v. Whorley, 550 F.3d 326, December 18, 2008

Under 18 U.S.C. § 1462, it is a crime to "bring[s] into the United States . . . or knowingly use[s] any express company or other common carrier or interactive computer service… for carriage in interstate or foreign commerce —
(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;…."
Japanese anime-style cartoons of children engaged in explicit sexual conduct with adults qualify as "obscene" even though real children are not depicted.

Text e-mails describing sexually explicit conduct involving children, including incest and molestation by doctors qualify as "obscene" even though they do not include any obscene visual depictions and are not accompanied by attachments containing obscene material.

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

*****

U.S. v. Williams, 548 F.3d 311, December 03, 2008

Warrants to search a suspect's residence are valid when based on (1) evidence of the suspect's involvement in drug trafficking combined with (2) the reasonable suspicion (whether explicitly articulated by the applying officer or implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes.

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

*****

U.S. v. Mitchell, 518 F.3d 230, 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.

*****

Mora v. City of Gaithersburg, 519 F.3d 216, 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, 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.

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).

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.

*****

U.S. v. Reaves, 512 F.3d 123, 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.

*****

5th CIRCUIT

U.S. v. Carriles, 541 F.3d 344, August 14, 2008

The government did not set a "perjury trap" for defendant – that is a pretextual civil proceeding designed to elicit evidence for a criminal prosecution. Carriles was the instigator of the civil proceeding when he applied for naturalization. His lies on the application and then in the interview about the circumstances of his entry into the country can be prosecuted as false statements.

Because Carriles approached the government to initiate the civil proceedings, it is "highly incongruous, to say the least, for these proceedings to be characterized as a sham engineered by the government." For

the defendant to show outrageous government conduct sufficient to support dismissal of an indictment, there must be "government over-involvement combined with a passive role by the [himself]."

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

*****

U.S. v. Valle, 538 F.3d 341, July 30, 2008

Title 18 U.S.C. § 201 does not require that the public official actually commit the violation of his official duty. It only requires that he demand or agree to accept something of value in return for "being induced" to commit the violation. The statute clearly requires that the official's demand be "corrupt." The public official acts "corruptly" when he knows that the purpose behind the payment that he has received, or agreed to receive, is to induce or influence him in an official act, even if he has no intention of actually fulfilling his end of the bargain

The 2nd Circuit agrees (cite omitted).

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

*****

U.S. v. Ramos, 537 F.3d 439, July 28, 2008

Failing to report the discharge of their weapons is not obstruction of an "official proceeding" in violation of 18 U.S.C. § 1512. Internal investigations into agency employee conduct are not "official proceedings" under § 1512. An "official proceeding" involves some formal convocation of the agency in which parties are directed to appear, instead of an informal investigation conducted by any member of the agency. "Official proceeding" is consistently used throughout § 1512 in a manner that contemplates a formal environment in which persons are called to appear or produce documents.

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

*****

U.S. v. Fambro, 526 F.3d 836, 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.

U.S. v. Mata, 517 F.3d 279, 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 **Subject Matter Case Digests** on "Protective Sweeps" and "Exigent Circumstances" on the website.

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

*****

6th CIRCUIT

Thompkins v. Berghuis, 547 F.3d 572, November 19, 2008

A heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. A valid waiver will not be presumed simply from the silence of the accused after warnings are given or from the fact that a confession was in fact eventually obtained. The courts must presume that a defendant did not waive his rights.

During a three hour interrogation, a suspect who "consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes," who is described as "so uncommunicative" and "not verbally communicative," who "largely …remained silent," and who "shared very limited verbal responses with us," consisting of "yeah," or a "no," or "I don't know", who only "sporadically" made eye contact or nodded his head, and who, after being advised under *Miranda*, orally confirmed understanding of those rights but refused to sign the printed form, has not affirmatively waived his right to remain silent.

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

*****

Vance v. Wade, 546 F.3d 774, November 17, 2008

For an excessive-force-in-handcuffing claim, a plaintiff must show

(1) that officers handcuffed the plaintiff excessively and unnecessarily tightly, and
(2) that officers ignored the plaintiff's pleas that the handcuffs were too tight.

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

*****

U.S. v. Hardin, 539 F.3d 404, August 25, 2008

In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within."(emphasis added). Is *reason to believe* the same as probable cause or is it a lesser standard?

If you think the Sixth Circuit had already answered that question, you are wrong. The language addressing this question in its two prior cases, *United States v. Jones*, 641 F.2d 425 (6th Cir. 1981), and *United States v. Pruitt*, 458 F.3d 477 (6th Cir. 2006), was dicta and not controlling. The Court, when faced with the same question in this case, still does not decide the issue. Rather, the Court holds that regardless of which threshold is required, the government failed to support either. Prior to the entry, there were no facts to suggest that Hardin was present.

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

*****

U.S. v. Pacheco-Lopez, 531 F.3d 420, 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.

*****

U.S. v. Purcell, 526 F.3d 953, 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.

*****

U.S. v. Blair, 524 F.3d 740, 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.

*****

Floyd v. City of Detroit, 518 F.3d 398, 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.

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

*****

U.S. v. Ridner, 512 F.3d 846, 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.

*****

U.S. v. Nichols, 512 F.3d 789, 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).

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.

*****

Pennington v. Metro. Gov't of Nashville & Davidson County, 511 F.3d 647, 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.

*****

7th CIRCUIT

U.S. v. Colon, 549 F.3d 565, December 08, 2008

A sale, by definition, requires two parties; their combination for that limited purpose does not increase the likelihood that the sale will take place, so conspiracy liability would be inappropriate. "Regular" purchases on "standard" terms cannot transform a customer into a co-conspirator. Agreement – the crime of conspiracy – cannot be equated with repeated transactions.

A wholesale customer of a drug conspiracy – one who buys for resale rather than for his personal consumption – is not a coconspirator per se. Large quantities of controlled substances, without more, cannot sustain a conspiracy conviction. The joint objective of distributing drugs is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs.

An aider and abettor is conventionally defined as one who knowingly assists an illegal activity, wanting it to succeed. Even though the buyer of drugs assists an illegal activity, which he doubtless wants to be successful, it is not enough to establish aiding and abetting. Otherwise, every buyer from a drug conspiracy is an aider and abettor of a conspiracy and is therefore to be treated by the law exactly as a member of the conspiracy would be treated.

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

*****

U.S. v. Morris, 549 F.3d 548, December 05, 2008

Stings are schemes for getting a person who is predisposed to criminal activity to commit a crime at a time or place in which he can be immediately apprehended. They are an essential tool of law enforcement against crimes that have no complaining victim. Private sting operations may become even more common now that there are organizations like "Perverted Justice," which trains adult volunteers to pose as children in chat rooms and unmask sexual predators, and TV shows like Dateline NBC's "To Catch a Predator" which popularizes sexual-predation stings. Just as there is no defense of private entrapment, so there is no exclusionary rule applicable to evidence obtained improperly by private persons.

A private stinger can find himself accused of committing a crime in his attempt to catch others. The "private sting operation" defense requires the defendant's reasonable belief that he committed the

charged conduct while acting as an agent for law enforcement authority.

Entrapment refers to the use of inducements that cause a normally law-abiding person to commit a crime, and is a defense when the entrapment is conducted by law enforcement officers or their agents. There is no defense of private entrapment. Individuals tempted, induced or set up by anyone besides a state agent cannot raise an entrapment defense to criminal charges.

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

*****

U.S. v. Franklin, 547 F.3d 726, October 27, 2008

The odor of burning marijuana provides an officer with probable cause to search the passenger compartment and containers within the passenger compartment. A police dog's alerting to the presence of narcotics provides additional probable cause to search other parts of the vehicle for narcotics.

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

*****

U.S. v. Jennings, 544 F.3d 815, September 15, 2008

Officers executing a search warrant have categorical authority to detain any occupant of the subject premises during the search. *Muehler v. Mena*, 544 U.S. 93, 98 (2005); *Michigan v. Summers*, 452 U.S. 692 (1981). This authority exists in part because the probable cause underlying a warrant to search a premises gives police reason to suspect that its occupants are involved in criminal activity, and also because the officers have a legitimate interest in minimizing the risk of violence that may erupt when an occupant realizes that a search is underway.

The rule of *Summers* also permits police to detain people who approach a premises where a search is in progress. Jennings' intrusion into the apartment parking lot within the security perimeter of officers preparing to serve a search warrant permitted his detention. The crack cocaine was in plain view in his vehicle and is therefore admissible evidence.

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

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

*****

Osagiede v. U.S., 543 F.3d 399, September 09, 2008

Article 36 of the Vienna Convention on Consular Relations imposes three separate obligations on a detaining authority (the government): (1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay, and (3) inform a detained foreign national of "his rights" under Article 36 without delay.

Although the government's failure to comply with the Convention's requirements will not alone support exclusion of evidence or statements otherwise lawfully obtained, dismissal of an indictment, or reversal of a conviction or sentence, defense counsel's failure to inform her client of these rights can support a Sixth Amendment claim of ineffective assistance of counsel.

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

*****

U.S. v. Mikos, 539 F.3d 706, August 25, 2008

A "sneak and peek" warrant, pursuant to 18 U.S.C. §3103a permits inspection but not seizure. Lack of seizure explains the "peek" part of the name; the "sneak" part comes from the fact that agents need not notify the owner until later. Such warrants are designed to permit an investigation without tipping off the suspect. Even assuming that the removal of a large cache of firearms and ammunition from a storage unit and spreading them on the ground just outside to inventory and photograph is a "seizure" unauthorized by the warrant, use of the exclusionary rule would be unwarranted. First, it did not cause Mikos any distinct injury; second, a seizure was inevitable once the agents saw the arsenal. A premature seizure does not lead to exclusion of evidence when an immediately requested warrant, authorizing everything that occurred, was certain to issue.

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

*****

U.S. v. Spells, 537 F.3d 743, August 8, 2008

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1) mandates a 15 year prison term for felons in possession of a firearm who has three or more previous convictions for certain drug crimes or "violent felonies." Under § 924(e)(2)(B)(ii) a "violent felony" is defined as "burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*;"(emphasis added).

In *Begay v. United States*, 128 S. Ct. 1581 (2008), the Court determined that "the provision's listed examples—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope." Thus, the residual clause in § 924(e)(2(b)(ii) covers only "crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." Those kinds of crimes make it "more likely that an offender, later possessing a gun, will use the gun deliberately to harm a victim.

Flight from the police in a vehicle poses a serious potential risk of physical injury to another. Because flight from the police is knowing and intentional, and therefore purposeful, those people would have a greater propensity to use a firearm in an effort to evade arrest. Therefore, the crime qualifies as a "violent felony" funder the ACCA.

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

U.S. v. Henderson, 536 F.3d 776, August 6, 2008

***Georgia v. Randolph*, 547 U.S. 103 (2006), left the bulk of third-party consent law in place. Its holding applies only when the defendant is both present and objects to the search of his home. Although defendant was initially at home and objected to the presence of the police when they arrived, his objection lost its force when he was validly arrested and taken to jail for domestic battery. At that point the co-tenant was free to consent to a search notwithstanding defendant's prior objection. *Randolph* does not permanently disable a co-tenant's shared authority to consent to an evidentiary search of the home. The co-tenant's subsequent consent, freely given when defendant was no longer present and objecting, rendered the warrantless search of their home reasonable and valid as to him.**

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

*****

U.S. v. Hicks, 531 F.3d 555, July 09, 2008

Anonymous tips about an ongoing emergency are treated differently that those regarding general criminality. Because of the special reliability inherent in reports of ongoing emergencies, such 911 calls are subject to less testing in court than other out-of-court statements. When an officer relies on an emergency report in making a stop, a lower level of corroboration is required.

The 2nd, 3rd, 4th, 7th, 9th, 10th, and 11th circuits agree (cites omitted)**.**

No circuits disagree.

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

*****

U.S. v. Groves, 530 F.3d 506, 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.

*****

U.S. v. Black, 530 F.3d 596, 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.

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.

*****

U.S. v. Tejada, 524 F.3d 809**,** 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. 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 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.

*****

U.S. v. White, 519 F.3d 342, 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.

*****

U.S. v. Cazares-Olivas, 515 F.3d 726, 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. Tyler, 512 F.3d 405, 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.

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.

*****

U.S. v. Upton, 512 F.3d 394, 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.

*****

8th CIRCUIT

U.S. v. Oliver, 550 F.3d 734, December 23, 2008

During a traffic stop, when the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation, passengers may be frisked during a traffic stop based upon reasonable suspicion they may be armed and dangerous See *Knowles v. Iowa*, 525 U.S. 113 (1998). No reasonable suspicion of criminal activity unrelated to the traffic stop is required to justify the pat-down search.

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

Editor's note: The Supreme Court affirmed the circuit court's decision in the case of *Arizona v. Johnson, Arizona v. Johnson,* 2009 U.S. LEXIS 868, January 26, 2009.

Click **HERE** for the Supreme Court's opinion.

*****

U.S. v. Fincher, 538 F.3d 868, August 13, 2008

Membership in the Washington County Militia (WCM), a private militia unrelated to or sanctioned by the state government, is no defense to the charges of unregistered possession of machine guns and short-barrel shotguns. As an unorganized and unregulated militia, the WCM does not fall within the auspices of the Second Amendment.

Although, as established in *D.C. v. Heller*, 128 S. Ct. 2783 (2008), there is an individual right to possess firearms unrelated to membership in a militia, machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.

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

*****

The full Eighth Circuit Court affirms the earlier panel decision (as summarized below in 11 Informer 07), but on different grounds. See new ruling below.

U.S. v. Kattaria, 503 F.3d 703, October 05, 2007

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

The same Fourth Amendment reasonable suspicion standard that applies to *Terry* investigative stops applies to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. The traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. Factors justifying application of this standard, rather than probable cause, are "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." The "practical alternatives" factor provides good reason to shift the analysis when the issue is the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Thermal imaging information provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search.* If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.

The 9th Circuit disagrees and requires probable cause for a thermal imaging warrant (cite omitted)**.**

The court now holds

U.S. v. Kattaria, 553 F.3d 1171, January 30, 2009 en banc reconsideration

The Court declined to address the issue of whether a warrant to use a thermal imaging device to detect excess heat emanating from a home may be issued on reasonable suspicion. The Court affirmed the District Court's denial of the motion to suppress and the panel's earlier ruling affirming that decision by determining that the facts used to support the thermal imaging warrant amounted to traditional probable cause.

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

*****

U.S. v. Kowal, 527 F.3d 741**,** 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. Peralez, 526 F.3d 1115, 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. Mendoza-Gonzalez, 520 F.3d 912, 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.

*****

The full Eighth Circuit Court vacates and reverses the earlier panel decision (as summarized below in 9 Informer 06). See new ruling below.

U.S. v. Hudspeth, 459 F.3d 922, 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, 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.

*****

U.S. v. Hughes, 517 F.3d 1013, 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.

*****

U.S. v. Banks, 514 F.3d 769, 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.

*****

Moore v. Indehar, 514 F.3d 756, 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.

*****

9th CIRCUIT

U.S. v. Blixt, 548 F.3d 882, November 26, 2008

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

Forging another's signature on a check in furtherance of mail fraud constitutes the use of that person's name and thus qualifies as a "means of identification" under 18 U.S.C. § 1028A. Title 18 U.S.C. § 1028(d) provides that "in this section and section 1028A . . . (7) the term 'means of identification' means *any name* or number that may be used, *alone or in conjunction with any other information, to identify a specific individual,* including any — (A) *name*…." There is nothing in the language of the statute that suggests the use of another's name in the form of a signature is somehow excluded from the definition of "means of identification."

(Editor's note: The court could find no other decision of any circuit court addressing this issue.)

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

*****

U.S. v. Weyhrauch, 548 F.3d 1237, November 26, 2008

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

Failure to disclose a conflict of interest, even when not required by state law, can be the basis of an honest services fraud conviction under 18 U.S.C. § 1341. The government is not required to prove that the fraud violated an independent state law.

The 1st, 4th, 7th, and 11th circuits agree (cites omitted).
The 3rd and 5th circuits disagree (cites omitted).

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

*****

U.S. v. Nevils, 548 F.3d 802, November 20, 2008

Simply finding a firearm resting on the stomach of and another resting against the leg of a sleeping (passed out) defendant does not establish either actual or constructive custody of the weapons.

Possession—whether actual or constructive—requires a showing that the defendant had knowledge of the firearms and the ability and intention to control them. When the evidence establishes that the defendant was asleep or passed out, the fact that the firearms were physically touching him is not sufficient to show that he was conscious of their presence. That the weapons were touching defendant is a factor tending to make knowing possession more likely, but it is not enough without evidence that the defendant was aware of their presence.

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

*****

U.S. v. Youssef, 547 F.3d 1090, November 05, 2008

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

Title 18 U.S.C. § 1015(a), making a false statement in an immigration document, does not require the false statement to be "material" as an element of the offense.

The 4th Circuit agrees (cite omitted).

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

*****

U.S. v. Seljan, 547 F.3d 993, October 23, 2008

On rehearing of a previous panel decision, the full court decides:

The search of the FedEx package and reading of a personal letter by customs officials occurred at the functional equivalent of the border, did not involve the destruction of property, was not conducted in a particularly offensive manner, and was not a highly intrusive search of the person. Therefore, it did not require any articulable level of suspicion.

There was intrusion into defendant's privacy, but the degree of intrusion must be viewed in perspective. The defendant voluntarily gave the package containing the letter to FedEx for delivery to someone in the Philippines, with knowledge that it would have to cross the border and clear customs. The reasonable expectation of privacy for that package was necessarily tempered.

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

*****

U.S. v. Nader, 542 F.3d 713, September 05, 2008

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

The Travel Act, 18 U.S.C. § 1952(a), provides that "[w]hoever . . . uses the mail or any facility in interstate or foreign commerce" with intent to carry on unlawful activity is guilty of a crime. Since telephones are instrumentalities of interstate commerce, even completely intrastate telephone calls involve the use of a facility "in" interstate commerce in violation of the Travel Act. As in 18 U.S.C. § 1958, the murder-for-hire statute, the Travel Act does not require actual interstate activity.

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

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

*****

U.S. v. Craighead, 539 F.3d 1073, August 21, 2008

Craighead was in "custody" for *Miranda* purposes in his own home for the twenty to thirty minute interview when eight law enforcement officers, representing three different agencies (five FBI agents, a detective from the Pima County Sheriff's Department, and two members from the OSI) went to Craighead's residence to serve a search warrant; all of these law enforcement officers were armed and some of them unholstered their firearms in Craighead's presence; all of the FBI agents were wearing flak jackets or "raid vests;" an agent, accompanied by a detective who wore a flak jacket and firearm, directed Craighead to a storage room at the back of his house, "where they could have a private conversation;" the door was shut "for privacy;" and the detective placed himself between Craighead and the door.

"Custody" existed in those circumstances despite the fact that Craighead was told he was not under arrest; that any statement he might make would be voluntary; that he would not be arrested that day regardless of what information he provided; that he was free to leave; and despite the fact that no force, threats or promises were used to induce Craighead to speak.

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

*****

Luz Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, August 8, 2008

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court held that the Fourth Amendment exclusionary rule does not generally apply in deportation proceedings, where the sole issues are identity and alienage. However, the Court expressly left open the possibility that the exclusionary rule might still apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."

Even in administrative proceedings, administrative tribunals are still required to exclude evidence that was obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution. A Fourth Amendment violation is "egregious" if evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution. A reasonable officer knows that entry into a home without a warrant, exigent circumstance, or consent is a clear violation of the Fourth Amendment. The Court's "confidence in this result is further underscored by our cognizance of the extensive training INS agents receive in Fourth Amendment law."

The government may not show consent to enter from the defendant's failure to object to the entry. There is no inferred consent in the absence of a request by the officers or ongoing, affirmative cooperation by the suspect.

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

*****

U.S. v. Caseres, 533 F.3d 1064, July 21, 2008

A person who had parked the car, gotten out and was quickly walking away, who was in a yard two houses away from the car when first approached by the police, who then ran from police and was 1 ½ blocks away from the car when seized and arrested was not a "recent occupant" of the car authorizing a search of the car incident to the arrest. He was handcuffed and taken into custody a full 1 ½ blocks away from his car. Several armed police officers were present. Under the circumstances, there was no danger that he could have used any weapons in the car or could have destroyed any evidence inside the car, unless he "possessed of the skill of Houdini and the strength of Hercules." He is not being rewarded for fleeing from police by having the evidence recovered from his car deemed inadmissible as a result because he was already a substantial distance from his car when he fled.

(Editor's note: The Supreme Court recently granted certiorari to address the question of whether law enforcement officers must demonstrate a need to preserve evidence related to the crime of conviction to justify a warrantless vehicular search incident to arrest. *See Arizona v. Gant*, Sup. Ct. No.07-542; *see also Arizona v. Gant*, 162 P.3d 640 (Ariz. 2007).)

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

*****

U.S. v. Miranda-Lopez, 532 F.3d 1034, July 17, 2008

The crime of aggravated identity theft, 18 U.S.C. § 1028A(a)(1), requires proof that the defendant knew that the means of identification belonged to another person. It is not enough to prove only that the defendant knew he was using a false document.

The D.C. Circuit agrees (cite omitted)**. See *U.S. v. Godin* (1st Cir.) above.**

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

U.S. v. Chapman, 528 F.3d 1215**,** 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.

*****

U.S. v. Giberson, 527 F.3d 882**,** 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. Fernandez, 526 F.3d 1247**,** 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.

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.

*****

Torres v. City of Madera, 524 F.3d 1053, 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.

*****

U.S. v. Arnold, 523 F.3d 941, 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.

*****

U.S. v. Murphy, 516 F.3d 1117, 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.

*****

Anderson v. Terhune, 516 F.3d 781, 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.

*****

The full Ninth Circuit vacates and reverses the earlier panel decision (as summarized below in 2 Informer 07). See new ruling below.

Fisher v. City of San Jose, 475 F.3d 1049, 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.*

The court now holds

Fisher v. City of San Jose, 2009 U.S. App. LEXIS 5567, March 11, 2009

During an armed standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

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

*****

Bingue v. Prunchak, 512 F.3d 1169, 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).

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.

*****

Saleh v. Fleming, 512 F.3d 548, 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.

*****

10th CIRCUIT

U.S. v. Chavez, 534 F.3d 1338, July 29, 2008

Under the "collective knowledge" doctrine, absent any traffic violation, a police officer may rely on the instructions of another law enforcement agency or officer to initiate a traffic stop and then conduct a search pursuant to the automobile exception.

"Horizontal" collective knowledge

When individual law enforcement officers have pieces of the probable cause puzzle, but no single officer possesses information sufficient for probable cause, the officers can communicate the information they possess individually and, thereby, pool their collective knowledge to meet the probable cause threshold.

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

"Vertical" collective knowledge

In stopping and searching a car, a police officer may rely on the instructions of another law enforcement officer or agency with knowledge of the probable cause facts even if that officer himself is not privy to all the facts.

The 3rd, 5th, 7th, 8th, and 9th circuits agree (cites omitted)**.**

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

*****

U.S. v. Forbes, 528 F.3d 1273**,** 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.

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

U.S. v. Reeves, 524 F.3d 1161, 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.

*****

Eidson v. Owens, 515 F.3d 1139, 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.

*****

11th CIRCUIT

Gandara v. Bennett, 528 F.3d 823, May 22, 2008

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

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** for the court's opinion).

*****

U.S. v. Harris, 526 F.3d 1334, 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.

*****

U.S. v. Burgest, 519 F.3d 1307, 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.

*****

D.C. CIRCUIT

U.S. v. Askew, 529 F.3d 1119, June 20, 2008

The full Court vacates and 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.

*****

U.S. v. Villanueva-Sotelo, 515 F.3d 1234, 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.

*****

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.