Department of Homeland Security
Federal Law Enforcement Training Center
Legal Division

January 2008

The Federal Law Enforcement –Informer–

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court and Circuit Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-2179 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting the Legal Division web page at: http://www.fletc.gov/legal.

This edition of *The Informer* may be cited as "1 INFORMER 08".
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4th Amendment Roadmap

Hot Issues

4th AMENDMENT ROADMAP

A step by step guide to searches

Posted Now

- **Introduction to 4th Amendment Searches**
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- **Reasonable Expectation of Privacy 1 and 2**
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HOT ISSUES

Supreme Court cases and emergent issues

Posted Now

- **Consent Searches – *GA v. Randolph***
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SELF INCRIMINATION ROADMAP

A step by step guide to Lawful Interviews

- **Self Incrimination: *Miranda* and the 5th Amendment**
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MILITARY INTERROGATIONS

The 5th Amendment, *Miranda*, and Article 31

- **Article 31(b), UCMJ**
- **Military Interrogations – The Fifth Amendment and *Miranda***

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Supreme Court
Case Summaries

SUPREME COURT

Watson v. U.S., 2007 U.S. LEXIS 13081, December 10, 2007

It is better to receive than to give.

Title 18 § 924(c)(1)(A) sets a mandatory minimum sentence for a defendant who, "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." The statute leaves the term "uses" undefined.

***In Smith* v. *U.S.*, 508 U. S. 223 (1993) the Supreme Court held that a criminal who trades his firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of §924(c)(1), thereby invoking the minimum mandatory sentence.**

In this case, the Supreme Court holds that a person who trades his drugs for a gun does not "use" a firearm "during and in relation to ... [a] drug trafficking crime" within the meaning of §924(c)(1).

Click **HERE** for the Court's Opinion.

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Kimbrough v. U.S., 2007 U.S. LEXIS 13082, December 10, 2007

Under 21 U.S.C. § 841, the statute criminalizing the manufacture and distribution of crack cocaine, and the relevant Guidelines prescription, 18 U.S.C. Appx § 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.

The Supreme Court holds that, under *U.S. v. Booker*, 543 U.S. 220 (2005), the cocaine Guidelines, like all other Guidelines, are advisory only. The crack/powder sentencing disparity is not mandatory. Although the Guidelines range must be included in the array of factors warranting consideration, the judge may determine that, in the particular case, a within-Guidelines sentence is "greater than necessary" to serve the objectives of sentencing. In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses.

Click **HERE** for the Court's Opinion.

Additional Law Enforcement Cases To Be Decided In The October 2007 Term

A. FIREARMS

District of Columbia v. Heller
(titled as ***Parker v. District of Columbia*** by the D.C. Court of Appeals) 478 F.3d 370

Do D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

*****

U.S. v. Ressam
9th Circuit Court of Appeals 474 F3d 597

Title 18 U.S.C. § 844(h)(2) prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States."

Does § 844(h)(2) require that the explosives be carried "in relation to" the underlying felony?

B. DEATH PENALTY

Kennedy v. Louisiana
Supreme Court of Louisiana 957 So 2d 757

Does the Eighth Amendment's Cruel and Unusual Punishment Clause permit a state to punish the crime of rape of a child under age 12 with the death penalty?

If so, does Louisiana's capital rape statute violate the Eighth Amendment because it fails genuinely to narrow the class of such offenders eligible for the death penalty.

C. MONEY LAUNDERING

Cuellar v. U.S.
5th Circuit Court of Appeals 478 F3d 282

Is merely hiding funds with no design to create the appearance of legitimate wealth sufficient to support a money laundering conviction?

D. DRUG OFFENSES

Burgess v. U.S.
4th Circuit Court of Appeals 478 F.3d 658

Must a "felony drug offense" that triggers the 20 year minimum mandatory penalty under 21 U.S.C. § 841(b)(1)(A) be punishable by more than one year in prison and be characterized as a felony by controlling law?

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CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

1st CIRCUIT

U.S. v. Brown, 2007 U.S. App. LEXIS 28298**,** December 07, 2007

A part of the driveway that is freely exposed to public view does not fall within the curtilage. This is true even where that part of the driveway is somewhat removed from a public road or street, and its viewing by passersby is only occasional. In order for a part of a driveway to be considered within the home's curtilage, public viewing of it must be, at most, very infrequent. The remoteness of the relevant part of the driveway and steps taken by the resident to discourage public entry or observation can support a finding that it falls within the curtilage.

The part of the driveway not visible from the public street, due in part to the 400-foot length of the driveway and vegetation between it and the street, was not curtilage since there were no erected barriers, no posted signs, and no other action taken to prevent or discourage public entry. Although there were also no signs directing visitors to the motor-repair business located in the garage, patrons were allowed onto the property to drop off and pick up motors.

The 7th and 8th circuits agree (cites omitted).
The 6th circuit agrees, using a somewhat different rationale (cite omitted).

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

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U.S. v. Mousli, 2007 U.S. App. LEXIS 28812, December 13, 2007

The Fourth Amendment warrant particularity requirement obligates the police to specify the precise unit of a multi-unit dwelling that is the subject of the search. The general rule is that a warrant that authorizes the search of an undisclosed multi-unit dwelling is invalid. There are exceptions to this rule.

The police can validly search a multi-unit dwelling even if the search warrant was only for a single-unit dwelling, provided the police reasonably believed that the dwelling contained only one unit. Search warrants and affidavits should be considered in a common sense manner, and hyper technical readings should be avoided.

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

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2nd CIRCUIT

U.S. v. Ganim, 2007 U.S. App. LEXIS 27936, December 04, 2007

The specific intent element (quid pro quo / this for that) for bribery, extortion, and honest services mail fraud crimes may be satisfied by showing that a government official received a benefit in exchange for his promise to perform specific official acts *or to perform such acts as the opportunities arise.* It is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence on behalf of the payor as specific opportunities arose.

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

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4th CIRCUIT

U.S. v. Jamison, 2007 U.S. App. LEXIS 27978, December 04, 2007

The question of custody for *Miranda* purposes typically turns on whether "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." In some circumstances, however, the defendant may be prevented from terminating the interrogation because of factors independent of police restraint. The restrictions on freedom arising from police interrogation must be separated from those incident to the background circumstances.

Placing bags on the hands of a gunshot victim receiving treatment at a hospital emergency room is not tantamount to custody. A reasonable person without a detailed knowledge of police procedures might find it odd that his hands were bagged as soon as he arrived at the hospital for treatment for a gunshot wound. However, the likelihood of such curiosity does not lead to an inference that a reasonable person would consequently feel unable to refuse police questioning.

***Miranda* and its progeny do not equate police investigation of criminal acts with police coercion. This distinction is especially important when the victim or suspect initiates the encounter with the police. Having invoked the protective and investigatory powers of the police, a reasonable person would think it prudent, not surprising, when asked to recount a description of the shooting.**

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

* * * *

U.S. v. Colonna, 2007 U.S. App. LEXIS 29403, December 20, 2007

"Custody" for *Miranda* purposes is not avoided by simply stating to a suspect that he is "not under arrest." Custody is determined by looking to the totality of the circumstances to determine whether an individual's freedom of action is curtailed to a degree associated with formal arrest.

In a police dominated environment, when agents do everything short of actual, physical restraint to make any reasonable man believe that he was not free to leave, simply stating to a suspect that he is "not under arrest" is insufficient to preclude a finding of a custodial interrogation.

Although advising someone that he or she is not under arrest mitigates an interview's custodial nature, an explicit assertion that the person may end the encounter is stronger medicine.

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

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5th CIRCUIT

Trinity Marine Prods., Inc. v. Chao, 2007 U.S. App. LEXIS 29742, December 26, 2007

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

When the target of an administrative (regulatory inspection) warrant forbids entry, the standard method of enforcement is a contempt proceeding. However, there is no constitutional right to a pre-execution contempt hearing, and administrative warrants, like criminal warrants, can be executed by means of reasonable force.

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

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7th CIRCUIT

U.S. v. Amaral-Estrada, 2007 U.S. App. LEXIS 28014, December 5, 2007

A driver who borrows a car with the owner's permission may acquire standing to challenge the search of the vehicle only if he can establish that he has a legitimate expectation of privacy in it or in the area searched.

A person who possesses a car for the purposes of transporting contraband; who expects while using the car that others will enter the vehicle and take and/or leave items therein; who, when asked by federal agents, denies any knowledge of the car and states that he does not care about the bag in the back seat of the car because it was not his bag and not his car, has no legitimate expectation of privacy in the car or the bag inside the car.

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

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U.S. v. Collins, 2007 U.S. App. LEXIS 28897, December 14, 2007

If police have probable cause to believe that evidence is being destroyed within a house (an emergency situation), then they can enter immediately without a warrant and without knocking. If they do not have such probable cause, they have to get a warrant.

There is a sense in which any time police knock and announce their presence and the occupants respond in a suspicious manner (such as running feet), the police can be regarded as the "manufacturers" of the emergency that they then use to justify their warrantless barging in and searching the house and arresting the occupants. However, that would not justify suppression of the evidence found in the search. The conduct of the police would be a "but for" cause (that is, a necessary condition) of the emergency, but it would not be culpable. They would be doing nothing wrong because there is no legal requirement of obtaining a warrant to knock on someone's door. For that matter there is nothing to forbid the police to lug the battering ram with them in open view, anticipating the worst. But the risk they take in proceeding in such a fashion is that the emergency will not materialize— that the occupant of the house will calmly open the door and ask to see their warrant—that there will be no sounds or sights signifying that evidence is about to be destroyed. The further risk is that no one will answer the knock and the government will be unable to prove that the police knew the house was occupied.

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

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8th CIRCUIT

U.S. v. Zimmerman, 2007 U.S. App. LEXIS 29178, December 17, 2007

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

Title 18 U.S.C. § 666(a)(1)(B) prohibits the acceptance of gratuities intended to be a bonus for taking official action involving any thing of value of $5,000 or more.

The $5000 value requirement in § 666(a)(1)(B) can be met if the amount of the gratuity itself is $5000 or more.

The 7th Circuit agrees (cite omitted).

Intangible benefits, such as development of a retail mall and the ability to more effectively market condominiums, can also satisfy the value requirement so long as the actual value of the intangible benefit meets the value threshold.

The 5th Circuit agrees (cite omitted).

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

* * * *

10th CIRCUIT

U.S. v. Baker, 2007 U.S. App. LEXIS 28296, December 06, 2007

Although recognizing the "necessity" defense to felon in possession of a firearm/ammunition, the court refuses to recognize an "innocent possession" defense.

The 1st, 4th, 7th, and 9th circuits agree (cites omitted).

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

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U.S. v. Revels, 2007 U.S. App. LEXIS 29524, December 20, 2007

Lawful investigative detention under the Fourth Amendment can be "custody" for purposes of *Miranda.*

Under the totality of the circumstances, would a reasonable person in the suspect's position understand her freedom of action has been restricted to a degree consistent with formal arrest. Several relevant factors inform the fact-specific analysis, including: (1) whether the circumstances demonstrated a police-dominated atmosphere; (2) whether the nature and length of the officers' questioning was accusatory or coercive; and (3) whether the police advise the suspect that she is free to refrain from answering questions, or to otherwise end the interview.

The officers' actions created the type of coercive environment that *Miranda* was designed to address. At 6:00 AM, seven police officers breached the front door with force, abruptly roused defendant from her bedroom, handcuffed her, placed her prone on the hall floor, and made her sit under the supervision of officers while police executed the search warrant. Then, after the search was completed and before any questioning began, three male officers separated her from her boyfriend and two children, and escorted her to a rear bedroom for questioning. Once inside the room, the officers isolated her from the other occupants of the home, and closed the door behind her. For much of the interview, all three of the officers remained in the room with her, and she was confronted with the seized drugs in an accusatory manner. They never advised her that she was not under arrest, free to leave, or that she was otherwise at liberty to decline to answer questions.

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

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11th CIRCUIT

U.S. v. Hurtado, 508 F.3d 603, November 21, 2007

Title 18 U.S.C. § 1028A, entitled "Aggravated Identity Theft," provides, in pertinent part:

> **Whoever, during and in relation to any felony violation enumerated in § 1028A(c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony….**

Congress did not define "without lawful authority."

Although stealing and then using another person's identification would fall within the meaning of "without lawful authority," the government does not have to prove that the defendant "stole" the means of identification. Using another's name without permission or based on consent obtained in exchange for money and illegal drugs would also be "without lawful authority."

The 8th Circuit agrees (cite omitted).

The defendant did not need to be aware that the numbers he knowingly used had been actually assigned to an real person.

The 4th Circuit agrees (cite omitted).

There is no requirement that the person whose identity was wrongfully used suffered any financial harm.

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