

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 Training 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 “9 INFORMER 08”.
(The first number is the month and the last number is the year.)

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ANNOUNCING

The first
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Webinar

“Supreme Court Wrap Up and Look Ahead”

A discussion of the significant law enforcement cases decided during the October 2007 Term and those already accepted by the Court for its October 2008 Term

September 10, 2008

2:00 pm ET

Export Advance Federal Legal Training

Continuing Legal Education Training Program (CLETP)

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(LU)

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<h1>PodCasts</h1>		<h2>4th Amendment Roadmap</h2> <h3>Hot Issues</h3>
<h3><u>**Just Added**</u></h3> <ul style="list-style-type: none">• Territorial Jurisdiction on Federal Property• ICE Administrative Removal Warrants• Interviewing Government Employees• Use of Force – Myths and Realities Part 1	<h3><u>Coming Soon</u></h3> <ul style="list-style-type: none">• Vehicle Searches• Use of Force Legal Aspects (Graham, Scott, and Garner)• The Federal Court System: Structure and Function• Chain of Custody and Evidentiary Foundations	
<h3>4th AMENDMENT ROADMAP</h3> <p>A step by step guide to searches</p>	<h3>HOT ISSUES</h3> <p>Supreme Court cases and emergent issues</p>	
<ul style="list-style-type: none">• Introduction to 4th Amendment Searches• Who is a Government Agent?• Reasonable Expectation of Privacy 1 and 2• Probable Cause 1 and 2• What is a Search Warrant?• Search Warrant Service 1 and 2• Terry Stop and Frisk• Protective Sweeps• Search Incident to Arrest• Consent• Mobile Conveyances• Exigent Circumstances• Plain View• Exclusionary Rule 1 and 2• Inspections• Inventories	<ul style="list-style-type: none">• Consent Searches – <i>GA v. Randolph</i>• Anticipatory Warrants – <i>US v. Grubbs</i>• GPS Tracking• Covert Entry Search Warrants• Use of Force – <i>Scott v. Harris</i>• Passengers and Traffic Stops – <i>Brendlin v. California</i>• FISA Parts 1 and 2 – An Overview for Officers and Agents• Use of Force Continuum• Intercepting Wire, Oral, and Electronic Communications	
<h3>SELF-INCRIMINATION ROADMAP</h3> <p>A step by step guide to Lawful Interviews</p>	<h3>MILITARY INTERROGATIONS</h3> <p>The 5th Amendment, <i>Miranda</i>, and Article 31</p>	
<ul style="list-style-type: none">• <i>Miranda</i> and the 5th Amendment• <i>Miranda</i> Waivers and Invocations• 6th Amendment Right to Counsel• Comparing the 5th and 6th Amendment Rights to Counsel• Interviewing Government Employees	<ul style="list-style-type: none">• Article 31(b), UCMJ• Military Interrogations – The Fifth Amendment and <i>Miranda</i>	
<p>Click HERE to download or listen.</p> <p>Transcripts of each podcast are also available here.</p>		

CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

5th CIRCUIT

U.S. v. Carriles, 2008 U.S. App. LEXIS 17306, 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.

6th CIRCUIT

U.S. v. Hardin, 2008 U.S. App. LEXIS 18135, 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.

7th CIRCUIT

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. Spells, 2008 U.S. App. LEXIS 16861, 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" under the ACCA.

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

U.S. v. Mikos, 2008 U.S. App. LEXIS 18157, 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.

8th CIRCUIT

U.S. v. Fincher, 2008 U.S. App. LEXIS 17209, 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.

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9th CIRCUIT

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.
