Department of Homeland Security
Federal Law Enforcement Training Center
Legal Training Division

November 2009

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 "11 INFORMER 09".
(The first number is the month and the last number is the year.)

Join The Informer E-mail Subscription List

It's easy! Click HERE to subscribe.

THIS IS A SECURE SERVICE. No one but the FLETC Legal Training Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Training Division.

Export Federal Advanced Legal Training

Continuing Legal Education Training Program
(CLETP)

The CLETP provides refresher training to field agents and officers in legal subject areas covering the 4th, 5th, and 6th Amendments, use of force, use of race, electronic law and evidence, civil liability, and recent statutes and rules changes. All instruction is updated by a review of the most recent court decisions and legislative changes to the laws that are applicable to federal law enforcement agents and officers. The CLETP is three instructional days (Tuesday – Thursday) and consists of nineteen (19) course hours.

Legal Updates
(LU)

Legal Updates last 4-12 hours over a 1 to 2 day period. These updates can be tailored to your urgent and/or specific agency subjects and issues and include the most recent court decisions and legislative changes to the laws that are applicable to those subjects.

WE CAN BRING THIS TRAINING TO YOU!

Costs are the travel and per diem for the instructor(s) plus training materials. The full materials package is approximately $35.00 per student.

We are now developing our FY 10 export training calendar

If your agency is interested in sponsoring or hosting this advanced training, contact the Legal Division at

912-267-2179

or

FLETC-LegalTrainingDivision@dhs.gov

In This Issue

Supreme Court Preview

Our annual review of the law enforcement and criminal law cases to be decided by the Court this October 2009 term.

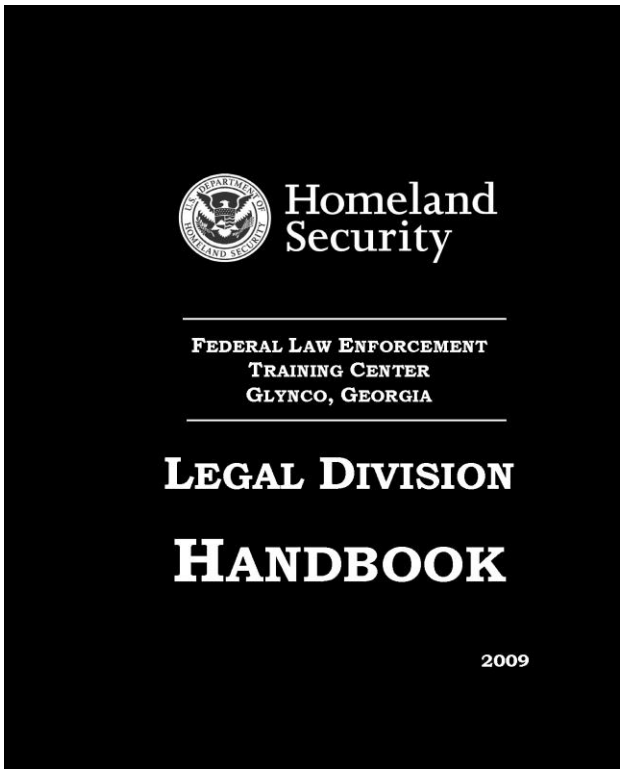
Click HERE

****

Circuit Courts of Appeals
Case Summaries

Click HERE

****



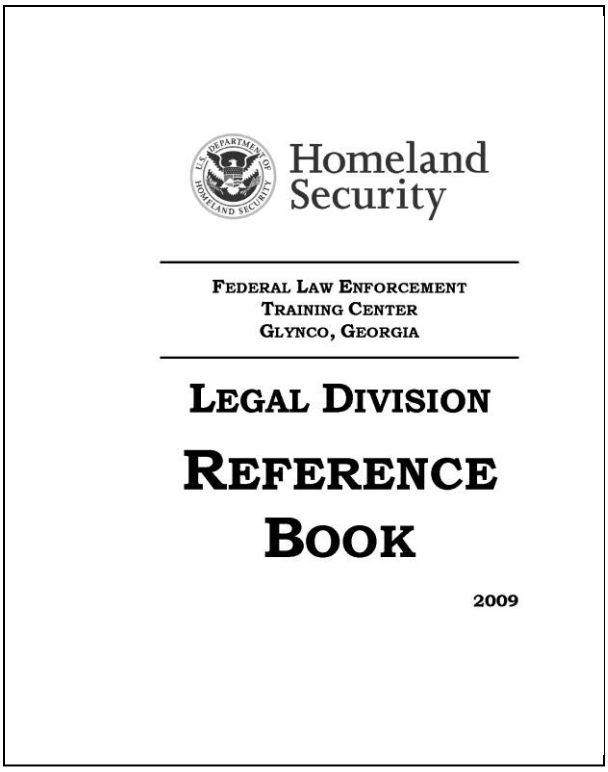


Table of Contents

Click HERE

(A big file that takes a while to download)

Table of Contents

Additional Resources

Click HERE

(A big file that takes a while to download)

Supreme Court
Law Enforcement Cases
October 2009 Term

DEFENDANT STATEMENTS

Miranda

Maryland v. Shatzer
Decision below: **954 A.2d 1118**
Maryland Court of Appeals

Is the Edwards v. Arizona prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda?

*****

Florida v. Powell
Decision below: **998 So.2d 531**
Florida Supreme Court

Must a suspect be expressly advised of his right to counsel *during* custodial interrogation?

If so, does the failure to provide express advice of the *right to the presence of counsel during questioning* vitiate Miranda warnings which advise of both (a) the right to talk to a lawyer "before questioning" and (b) the "right to use" the right to consult a lawyer "at any time" during questioning?

*****

Berghuis v. Thompson
Decision below: **547 F.3d 572**
6th Circuit

Does the Miranda rule prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them?

*****

HONEST SERVICES FRAUD

Black v. United States
Decision below: **530 F.3d 596**
7th Circuit

Does 18 U.S.C. § 1346, which defines "scheme to defraud" to include depriving "another of the intangible right to honest services," apply to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed?

*****

Weyhrauch v. United States
Decision below: **548 F.3d 1237**
9th Circuit

In order to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§1341 and 1346), does the government have to prove that the defendant violated a disclosure duty imposed by state law?

*****

Skilling v. United States
Decision below: **554 F.3d 529**
5th Circuit

Does the federal "honest services" fraud statute, 18 U.S.C. § 1346, require the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague.

*****

ARMED CAREER CRIMINAL ACT

Johnson v. United States
Decision below: **528 F.3d 1318**
11th Circuit

Is a holding by a state's highest court that a given offense of that state does not have as an element the use or threatened use of physical force binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, inter alia, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another?"

Is the physical force required a de minimis touching in the sense of "Newtonian mechanics" or must the physical force required be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so?

*****

United States v. O'Brien
Decision below: **542 F.3d 921**
1st Circuit

Under 18 § 924(c)(1), is the sentence enhancement to a 30-year minimum when the firearm is a machinegun an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence?

****

CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Shim, 2009 U.S. App. LEXIS 21536, October 01, 2009

The Mann Act, 18 U.S.C. § 2421, punishes "[w]hoever knowingly transports any individual in interstate . . . commerce . . . with intent that such individual engage in prostitution . . . ." "Knowingly" qualifies "interstate commerce." Therefore, the government must prove beyond a reasonable doubt, as an essential element of the offense, that the defendant knew the women were transported in interstate commerce.

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

*****

U.S. v. Romero-Padilla, 2009 U.S. App. LEXIS 22020, October 07, 2009

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

Title 21 U.S.C. § 959(a) makes it "unlawful for any person to manufacture or distribute a controlled substance . . . (1) intending that such substance or chemical will be unlawfully imported into the United States . . . *or* (2) *knowing* that such substance or chemical will be

unlawfully imported into the United States. The government must prove beyond a reasonable doubt that the defendant actually knew or intended that a controlled substance he distributed or manufactured would be illegally imported into the United States. When the government does not prove the specific intent, it must prove actual (as opposed to constructive) knowledge that such substance or chemical will be unlawfully imported into the United States.

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

*****

5th CIRCUIT

U.S. v. Rangel-Portillo, 2009 U.S. App. LEXIS 23608, October 27, 2009

To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." "Factors (no single factor is dispositive) that may be considered include: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border; (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance and behavior."

Proximity of the stop to the border (in this case a mere 500 yards) is afforded great weight, but this factor alone does not constitute reasonable suspicion to stop.

Factual conditions, such as wearing seatbelts, sitting rigidly, refraining from talking to one another, and having no shopping bags when leaving Wal-Mart (even when consistent with alien smuggling), do not provide reasonable suspicion if those conditions also occur even more frequently in the law-abiding public.

Whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight.

Reasonable suspicion cannot result from the simple fact that two cars are traveling on a roadway or exiting a parking lot, one in front of the other, unless there are other "connecting factors" to establish that their simultaneous travel could rationally be considered suspicious.

In cases that present no evidence of erratic driving, no features on the defendant's vehicle that would make it a likely mode of transportation for illegal aliens, and no tips by informants, this Court has been quite reluctant to conclude a stop was based on reasonable suspicion.

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

6th CIRCUIT

U.S. v. Quinney, 2009 U.S. App. LEXIS 21635, October 01, 2009

Under the inevitable-discovery doctrine, if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received. See *Nix v. Williams*, 467 U.S. 431, 444 (1984). However, the inevitable-discovery doctrine does not permit police, who have probable cause to believe a home contains contraband, to enter a home illegally, conduct a warrantless search and escape the exclusionary rule on the ground that the police *could* have obtained a warrant yet chose not to do so.

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

*****

8th CIRCUIT

U.S. v. Goodwin-Bey, 2009 U.S. App. LEXIS 23755, October 28, 2009

After officers received a report of an earlier incident involving occupants of a car displaying a weapon, they stopped a car of the same make, model and color. Officers arrested a passenger on an existing warrant, frisked the other three occupants, and then searched the passenger compartment. After getting the key from the driver, they found a handgun in the locked glove box.

The earlier incident report, along with the number of the vehicle's unsecured occupants, sufficiently implicated officer safety concerns to justify a search of the passenger compartment incident to arrest.

The earlier incident report also provided a reasonable suspicion that there was a weapon in the vehicle that the unsecured occupants could immediately access. Even if the search incident to arrest exception did not apply, these same concerns for officer safety would justify a Terry frisk of the passenger compartment.

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

*****

10th CIRCUIT

Bowling v. Rector, 2009 U.S. App. LEXIS 23542, October 26, 2009

To be valid under the Fourth Amendment, the search warrant must meet three requirements: (1) it must have been issued by a neutral, disinterested magistrate; (2) those seeking the warrant must have demonstrated to the magistrate their probable cause to believe that the evidence sought would aid in a particular apprehension or conviction for a

particular offense; and (3) the warrant must particularly describe the things to be seized, as well as the place to be searched.

These requirements are satisfied where officers obtain a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction authorizing them to search a particular location, even if those officers are acting outside their jurisdiction as defined by state law.

The 8th Circuit agrees (cite omitted)**.**

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

*****

U.S. v. Johnson, 2009 U.S. App. LEXIS 23676, October 27, 2009

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

The warrantless search of the storage unit did not violate defendant's Fourth Amendment rights because he had "forfeited" any privacy rights he might have had in the storage unit by directing his girlfriend to enter into the rental agreement using another person's name and stolen identification.

While some courts have found an expectation of privacy when an individual uses an alias or a pseudonym, because of the potential harm to innocent third parties, there is a fundamental difference between merely using an alias and using another's identity.

What matters is not whether defendant might have some legitimate property interest in the storage unit but whether defendant's interest is one that the Fourth Amendment is intended to protect. "We will not be a party to the fraud by legitimizing Johnson's interest in the storage unit. Therefore, whatever subjective privacy expectations Johnson had in the storage unit were not expectations that 'society is prepared to recognize . . . as objectively reasonable.'"

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