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

December 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 "12 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 Update
(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

For more information, or if your agency is interested in sponsoring or hosting advanced training, contact the Legal Division at

912-267-2179

or

FLETC-LegalTrainingDivision@dhs.gov

In This Issue

Federal Rules of Criminal Procedure
Changes
Effective December 1, 2009

An outline of changes to rules affecting federal law enforcement

Click HERE

****

Supreme Court and Circuit Courts of Appeals
Case Summaries

Click HERE

****

New Podcasts

2009 Supreme Court Wrap-Up Part 1: Review of October 2008 Term Cases

2009 Supreme Court Wrap-Up Part 2: Preview of October 2009 Term Cases

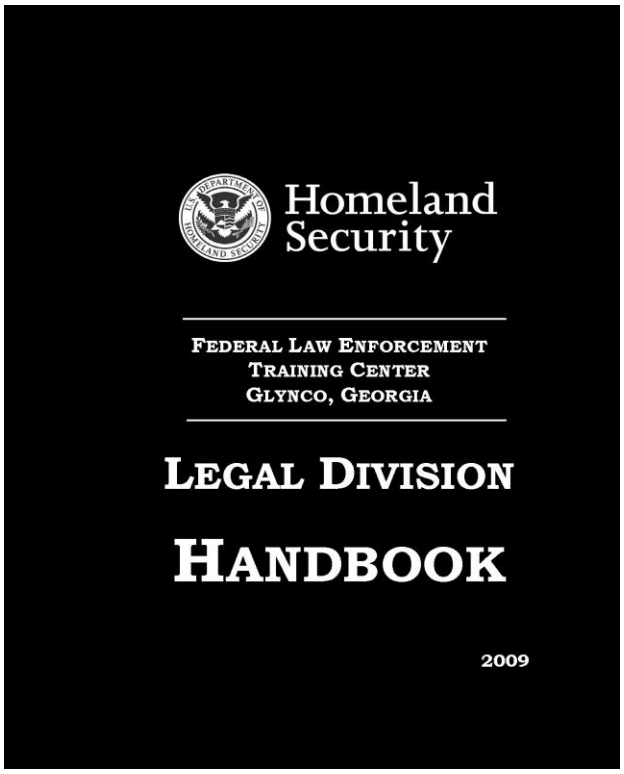
Click HERE

New Videocasts

Self-Incrimination

Part 1 – The Fifth Amendment Right to Remain Silent
Part 2 – Miranda Warnings and Waiver

Click HERE



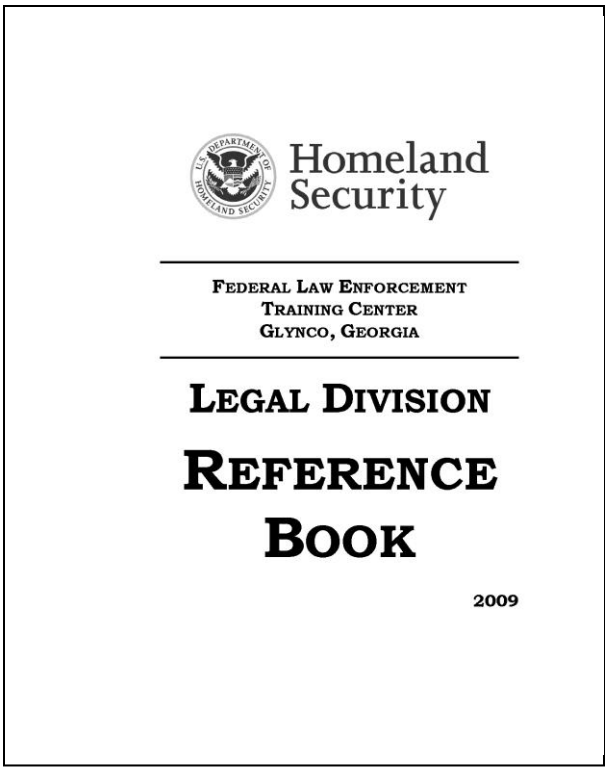


Table of Contents

Chapter 1 – Authority and Jurisdiction of Federal Land Management Agencies
Chapter 2 – Conspiracy and Parties
Chapter 3 – Constitutional Law
Chapter 4 – Courtroom Evidence
Chapter 5 – Courtroom Testimony
Chapter 6 – Criminal Law
- **Subpart A – Assault**
- **Subpart B – Bribery**
- **Subpart C – Federal Firearms Violations**
- **Subpart D – Federal Drug Offenses**
- **Subpart E – The Entrapment Defense**
- **Subpart F – False Statements**
- **Subpart G – Theft**
- **Subpart H – Obstruction of Justice**
- **Subpart I – Federal Fraud Statutes**

Chapter 7 – Electronic Law and Evidence
Chapter 8 – Federal Court Procedures
Chapter 9 – Fourth Amendment
Chapter 10 – Government Workplace Searches
Chapter 11 – Officer Liability
Chapter 12 – Searching and Seizing Computers
Chapter 13 – Fifth and Sixth Amendments
Chapter 14 – Use of Force
Topical Index

Table of Contents

Supreme Court Case Briefs Covering:
Fourth Amendment
Fifth Amendment / Miranda
Sixth Amendment Right To Counsel
Additional Cases of Interest
- **Use of Force**
- **Civil Liability**
- **Brady Material**
- **Other Cases**

Additional Resources

The United States Constitution
Official Guidance from
- **Department of Justice**
- **Department of Homeland Security**
- **Department of State**

Selected Federal Rules of Criminal Procedure
Selected Federal Rules of Evidence
Selected Federal Statutes
- **Title 18 – Crimes and Criminal Procedure**
- **Title 21 – Food and Drugs**
- **Title 42 – The Public Health and Welfare**

The USA Patriot Act
Table of Cases

Now Available for Purchase at the GPO On-Line Bookstore

Click HERE to Order

******Click HERE to download the Supplement to the 2009 Legal Division Handbook******

Changes to the FRCrP
Effective December 1, 2009

Generally

Time Computation Provisions

Most time periods that are currently listed at 10 days, or in some cases 7 days, have been replaced with a time period of 14 **calendar** days, which includes weekends and holidays. This is designed to promote consistency throughout the rules and to eliminate any confusion regarding the exclusion of weekends and holidays for the time periods of "10 days or less." See generally Rule 45.

For law enforcement, the pertinent changes affect the timing of preliminary hearings and the serving of search warrants.

Rule 5.1

Preliminary Hearing
Scheduling

New Rule 5.1(c) now provides that the Preliminary Hearing must be scheduled no later than 14 days after the Initial Appearance if the defendant is detained and no later than 21 days if the defendant is released.

Rule 41

Warrant Service

New Rule 41(e)(2)(A)(i) extends the maximum time within which to serve a warrant from 10 to 14 days.

Search Warrants Seeking Electronically Stored Information

New Rule 41(e)(2)(B) provides as follows:

> *Warrant Seeking Electronically Stored Information*. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A)

> refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

This provision adopts and approves the two-step procedure commonly used for computer searches in which computers are seized or imaged during execution of the warrant and then removed for off-site review to search for information that falls within the scope of the warrant. Though the rule contemplates that the Court may permit off-site forensic examinations, it imposes no specific standards of approval and thus implicitly leaves it to the Magistrate's discretion based upon reasonable need demonstrated by the affiant. The new rule also adopts the widely accepted understanding that Rule 41 places no explicit time limit on the duration of any forensic analysis of a seized computer (though the Fourth Amendment may nevertheless require that the time for the analysis be reasonable). However, some magistrates are inclined to place their own time restrictions on forensic analysis, and this provision will not prevent them from doing so.

The following has been added to the end of the inventory provision of Rule 41(f)(1)(B):

> In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

Under this provision, Magistrates should no longer require an inventory to specify particular information or records seized from a storage medium. Nor should Magistrates include provisions in search warrants requiring the government to return all copies of seized information.

NOTE: Both of these new provisions in Rule 41(f)(1)(B) conflict with the Ninth Circuit's recent decision in United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009) (en banc) ("CDT"). Still in question is whether the Ninth Circuit's decision in CDT was grounded in the Fourth Amendment or in the Court's inherent supervisory powers. The opinion itself is silent on this. If based on the Fourth Amendment, CDT's guidelines may take precedence over the new Rule 41, although CDT would appear to conflict with the Supreme Court's own constitutional judgment in approving the amendments to Rule 41. However, if CDT is based on supervisory power, the new Rule 41 would govern. See Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) (holding that "a federal court may not invoke supervisory power to circumvent" Rule 52's harmless error standard).

Arguable support for the latter position follows from the CDT opinion in that (1) the Ninth Circuit made no attempt to ground its decision in existing case law or Fourth Amendment analysis, and (2) the Court's guidelines are prospective in nature, which would be improper for a constitutional rule under Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

Thank you to Joe Urbaniak, Legal Division Subject Matter Expert for Federal Court Procedures
and
Jim McAdams, Legal Division Subject Matter Expert for Searching and Seizing Computers.

****

CASE SUMMARIES

SUPREME COURT

Michigan v. Fisher, 2009 U.S. LEXIS 8773, December 7, 2009

Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The police officers here were responding to a report of a disturbance. When they arrived on the scene they encountered a tumultuous situation in the house--and they also found signs of a recent injury, perhaps from a car accident, outside. The officers could see violent behavior inside. The officers saw defendant screaming and throwing things. It is objectively reasonable to believe that defendant's projectiles might have a human target (perhaps a spouse or a child), or that defendant would hurt himself in the course of his rage. The officer's entry was reasonable under the Fourth Amendment. See Brigham City v. Stuart, 547 U. S. 398 (2006).

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

*****

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Aguilar, 2009 U.S. App. LEXIS 24324, November 05, 2009

Under 18 U.S.C. § 848(e)(1)(A) it is a crime to commit murder while "engaging in an offense punishable under 21 U.S.C. § 841(b)(1)(A), drug distribution. The government does not have to prove that a drug related motive was the sole, primary, or most important reason for a killing as long as it was one purpose.

The "substantive connection" requirement implied in the "engaging in" element of § 848(e)(1)(A) can be satisfied by proof that at least one of the purposes of the killing was related to an ongoing drug conspiracy. It can also be satisfied by proof that the defendant used his position in or control over such a conspiracy to facilitate the murder, for instance to induce confederates to participate in the murder by promising to forgive past drug debts and to supply drugs in the future.

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

*****

7th CIRCUIT

U.S. v. Vaughn, 2009 U.S. App. LEXIS 24105, November 03, 2009

Even though experts have repeatedly testified that guns are tools of the drug trade, in order to show that a firearm furthered a drug trafficking crime in violation of 18 U.S.C. § 924(c), the government must establish a specific nexus between the particular weapon and the particular drug crime at issue. It must present specific, non-theoretical evidence to tie that gun and the drug crime together.

In the usual § 924(c) case, weapons are used more as a stick, but there's no reason they couldn't be used as a carrot. Defendant offered the gun like Mary Kay might offer a pink Cadillac to a top selling cosmetics salesperson. In the same way that a sales commission plays a role in a business transaction, defendant used the rifle "to speed the payment and to assure full payment." The government thus tied the particular weapon to the particular transaction and demonstrated that defendant's possession of the rifle helped forward the sale of the six pounds of marijuana.

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

*****

9th CIRCUIT

U.S. v. Garcia-Villalba, 2009 U.S. App. LEXIS 23984, November 02, 2009

For a wiretap order, a "cascading theory of necessity" is insufficient to establish that other investigative procedures have been and/or would be unsuccessful. A "cascading theory of necessity" is one in which with each wiretap order obtained and employed successfully during the investigation, the need for the next wiretap is more and more presumed and other investigative methods are more and more discounted as inconvenient or inefficient such that by the time of the application for another wiretap, the allegations of necessity become largely conclusory statements that improperly attempt to fold the showing of necessity to previous wiretaps into the current application. The government is not free to transfer a statutory showing of necessity from one application to another—even within the same investigation.

Although the government may not rely on the conclusion that a previous wiretap was necessary to justify the current application, historical facts from previous applications, particularly those within the same investigation, will almost always be relevant. So will previous investigatory tactics, so long as they bear on whether the government has adequately shown necessity within the current application. If these facts are incorporated into the latest affidavit, the issuing judge may examine them. Nothing prohibits an affidavit from employing such a technique, which is designed merely to save time, not to piggyback an earlier showing of necessity into a later affidavit. The key question will always be whether the wiretap application separately satisfies the necessity requirement.

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

U.S. v. Liera, 2009 U.S. App. LEXIS 24127, November 04, 2009

4:15 a.m. – defendant arrested
9:18 a.m. – defendant first interrogated
10:45 a.m. – two material witnesses interrogated
1:30 p.m. – discovery of a malfunction of video recording equipment used during defendant's first interrogation (did not record any audio)
2:57 p.m. – the government conducted a second interrogation of defendant
3:00 p.m. – Magistrate Court in session
10:48 a.m. the next day – defendant presented to court (over thirty hours after his arrest)

Instead of presenting defendant to a magistrate as quickly as possible, the government delayed defendant's arraignment so that it could interrogate defendant a second time and obtain an audio recording of his statements. The delay was unreasonable and unnecessary. Therefore, defendant's recorded statement is inadmissible.

Administrative delays due to the unavailability of government personnel and judges required to complete the arraignment process are reasonable and necessary. (A twenty-four hour pre-arraignment delay was reasonable and necessary because the defendant needed to receive medical treatment; A thirty-one hour pre-arraignment delay was necessary because the defendant spoke only Spanish, and the first available Spanish-speaking FBI agent did not arrive until approximately 27 hours after defendant's arrest (cites omitted)**).**

Editor's Note: See Corley v. United States, 129 S. Ct. 1558 (April 6, 2009); McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957); Federal Rule of Criminal Procedure 5(a); and 18 U.S.C. § 3501(c).

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

*****

U.S. v. Ruckes, 2009 U.S. App. LEXIS 24578, November 09, 2009

Search of the passenger compartment of defendant's car incident to his arrest for driving on a suspended license was unlawful under Arizona v. Gant. However, the gun and drugs are admissible under the inevitable discovery exception to the exclusionary rule. Evidence is admissible if the prosecution can establish by a preponderance of the evidence that the items ultimately or inevitably would have been discovered by lawful means. The evidence would have been discovered during an inventory after the car was lawfully impounded.

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

*****

U.S. v. Mahan, 2009 U.S. App. LEXIS 25131, November 16, 2009

A defendant who receives guns in exchange for drugs possesses those guns "in furtherance of" his drug trafficking offense within the meaning of 18 U.S.C. § 924(c). The natural meaning of "in furtherance of" is "furthering, advancing or helping forward." The government can establish that a defendant has used a gun to "promote or facilitate" a crime if facts in evidence reveal a nexus between the guns discovered and the underlying offense. The government need not show that the defendant *intended to use* the firearm to promote or facilitate the drug crime.

The 1st, 4th, 5th, 6th, and 10th circuits have confronted cases factually similar to this one, and all have either decided or assumed without deciding that a defendant who receives firearms in exchange for drugs possesses those firearms "in furtherance of" a drug trafficking offense (cites omitted)**.**

Editor's Note: See Watson v. United States, 552 U.S. 74 (2007), where the Court held that a defendant does not "use" a gun when he receives it in trade for drugs. Watson, however, interpreted only section 924(c)'s "use" prong.

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

*****