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

August 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 "8 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.

In This Issue

Circuit Courts of Appeals

Case Summaries

Click HERE

******

Coming Soon
To the Legal Division Website

www.fletc.gov/legal

Videocasts and new Podcasts

Arizona v. Gant
Terry Frisks
Right to Remain Silent and Miranda
Testimony Skills
Warrantless Searches of Cell Phones

CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Plugh, 2009 U.S. App. LEXIS 16979, July 31, 2009

Police may not question a suspect in custody who, when informed of his Miranda rights, expresses uncertainty with regard to asserting his Fifth Amendment rights while contemporaneously refusing to sign a waiver of rights form. Defendant invoked his Fifth Amendment rights by unequivocally refusing to sign the waiver form in response to a custodial agent's instruction to sign the waiver form if defendant agreed with it. Therefore, his custodial agents were required to refrain from further interrogation.

While defendant's statements, "I am not sure if I should be talking to you" and "I don't know if I need a lawyer," appear ambiguous, defendant's ultimate action – his refusal to sign – constituted an unequivocally negative answer to the question posed together by the waiver form and the agent, namely, whether he was willing to waive his rights.

The agents did not scrupulously honor defendant's rights when they repeatedly told him that any cooperation would be brought to the attention of the AUSA and by telling him that he was about to be taken to the Marshal's office. Even if defendant invoked his right to counsel and his right to remain silent equivocally or ambiguously, suppression is nonetheless required since the agents, at least as to the defendant's right to remain silent, failed to limit themselves to narrow questions only for the purpose of clarifying the ambiguity.

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

*****

3rd CIRCUIT

U.S. v. Cuevas-Reyes, 572 F.3d 119, July 10, 2009

To convict under 8 U.S.C. § 1324, "bringing in and harboring certain aliens" the government must show that defendant's actions…tended to substantially facilitate the alien *remaining* in the United States.

The goal of § 1324 is to prevent aliens from entering or remaining in the United States illegally by punishing those who shield or harbor them. Defendant's actions were undertaken for the purpose of *removing* the women from the United States rather than

helping them remain here. Punishing defendant for helping illegal aliens *leave* the country is contrary to that goal.

Defendant failed to inform the women that they were required to pass inspection by Immigration and Customs Enforcement officials at the airport despite having been aware of their illegal status. Defendant's failure to follow procedures set by the federal government did not amount to concealing the illegal immigrants from detection while in the United States. To the extent defendant's instructions to meet him directly at the plane helped the departing women avoid detection by Immigration and Customs Enforcement, this too facilitated their removal from the country. They presumably would have been detained in the United States and remained even longer had they been apprehended.

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

*****

6th CIRCUIT

Moldowan v. City of Warren, 570 F.3d 698, July 01, 2009

All witnesses — police officers as well as lay witness — are absolutely immune from civil liability based on their trial testimony in judicial proceedings. As with any witness, police officers enjoy absolute immunity for any testimony delivered at adversarial judicial proceedings. A witness is entitled to testimonial immunity no matter how egregious or perjurious that testimony was alleged to have been. That protection, however, does not extend to non-testimonial conduct, despite any connection these acts might have to later testimony. Although there is a well-established exception to the doctrine of absolute testimonial immunity "insofar as [an official] performed the function of a complaining witness," that exception does not extend to testimony delivered at trial.

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

*****

U.S. v. Washington, 2009 U.S. App. LEXIS 16073, July 22, 2009

The landlord's mere authority to evict a person cannot of itself deprive that person of an objectively reasonable expectation of privacy. A landlord's unexercised authority over a lodging with overdue rent alone does not divest any occupant of a reasonable expectation of privacy. A tenant's violation of a lease cannot alone deprive him and his guests of a legitimate expectation of privacy. An occupant is not a trespasser if the landlord does not treat him as such.

An ongoing criminal trespass, on its own, does not constitute an exigency that overrides the warrant requirement. The critical issue is whether there is a "true immediacy" that absolves an officer from the need to apply for a warrant and receive approval from an

impartial magistrate. When people may have the capacity to harm others, but are not engaged in an inherently dangerous activity, officers cannot lawfully dispense with the warrant requirement. An ongoing nuisance that results in non-physical harm to others may constitute an exigency. However, the mere possibility of physical harm does not. Here the underlying offense under Ohio law was criminal trespass—a fourth-degree misdemeanor punishable by a maximum sentence of thirty days' imprisonment. The government's interest in investigating a fourth-degree misdemeanor is relatively minor.

The community caretaker exception does not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing harm to the community at large.

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

*****

8th CIRCUIT

U.S. v. Davis, 569 F.3d 813, July 02, 2009

Police may validly search an automobile incident to an "arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest." Arizona v. Gant, 129 S. Ct. 1710 (2009).

At the time of the search, the officer had already discovered marijuana in defendant's pocket and placed him in custody. The odor of marijuana was wafting from the car. Empty beer bottles lay strewn in the back seat. Three passengers, all of whom had been drinking, were not in secure custody and outnumbered the two officers at the scene. Although defendant had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana. Each of these facts comports with Gant's within-reach requirement and its two underlying rationales as articulated in Chimel. These facts are textbook examples of "[t]he safety and evidentiary justifications underlying Chimel's reaching-distance rule."

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

*****

U.S. v. Alvarez-Manzo, 570 F.3d 1070, July 06, 2009

Law enforcement's detention of property entrusted to a third-party common carrier constitutes a Fourth Amendment seizure only when the detention does any of the following: (1) delays a passenger's travel or significantly impact[s] the passenger's freedom of movement, (2) delays the checked luggage's timely delivery, or (3) deprives the carrier of its custody of the checked luggage. With respect to the third factor, a "seizure" occurs

when the government's actions go beyond the scope of the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody. Removing checked luggage from the lower luggage compartment to a room inside the terminal *at the carrier's request* does not deprive the carrier of its custody of the checked luggage. The third factor does not turn on *where* law enforcement takes the bag, but *at whose direction* law enforcement acts when doing so. When law enforcement takes a bag into the passenger section of the bus terminal on its own accord and *not* at the direction of the carrier, the carrier is deprived of its custody of the checked luggage. Thus, law enforcement "seized" the defendant's bag within the meaning of the Fourth Amendment.

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

*****

U.S. v. Johnson, 572 F.3d 449, July 10, 2009

To establish that a defendant is an "unlawful user" of marijuana while possessing a firearm, 18 U.S.C. § 922(g)(3) does not require proof of contemporaneous use of a controlled substance and possession of a firearm. The Government need only prove that the defendant was an "unlawful user" of marijuana at the time he possessed the firearm. Possession of a small amount of marijuana supports the inference that the possessor is a user of marijuana.

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

*****

9th CIRCUIT

U.S. v. Payton, 2009 U.S. App. LEXIS 15969, July 21, 2009

Computers are capable of storing immense amounts of information and often contain a great deal of private information. Searches of computers therefore often involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers. Such considerations commonly support the need specifically to authorize the search of computers in a search warrant.

The drug search warrant did not authorize the search for or search of computers, but did explicitly authorize a search to find and seize, among other things, "sales ledgers showing narcotics transactions such as pay/owe sheets," and "financial records of the person(s) in control of the premises." These provisions did not authorize the officers to look for such records on defendant's computer.

Where there is no evidence that the documents in the warrant could be found on the computer, a search of the computer not expressly authorized by a warrant is not a reasonable search.

Editor's Note: See United States v. Giberson, 527 F.3d 882 (9th Cir. 2008), in the Case Digest by Subject under 4th Amendment / Computers and Electronic Devices.

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

*****

10th CIRCUIT

U.S. v. McCane, 2009 U.S. App. LEXIS 16557, July 28, 2009

The good-faith exception to the exclusionary rule applies to a search of a vehicle incident to the arrest of an occupant justified at the time under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by the Supreme Court decision Arizona v. Gant, 129 S. Ct. 1710 (2009).

First, the exclusionary rule seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers. A police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct

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

*****

DC CIRCUIT

Mills v. Dist. of Columbia, 571 F.3d 1304, July 10, 2009

D.C. established a Neighborhood Safety Zone (NSZ) program authorizing the police to set up checkpoints at the perimeters of the zone and stop all those attempting to enter by vehicle. When motorists were stopped at the checkpoint, officers were required to identify themselves and inquire whether the motorists had "legitimate reasons" for entering the NSZ area. Legitimate reasons for entry fell within one of six defined categories: the motorist was (1) a resident of the NSZ; (2) employed or on a commercial delivery in the NSZ; (3) attending school or taking a child to school or day-care in the NSZ; (4) related to a resident of the NSZ; (5) elderly, disabled or seeking medical attention; and/or (6) attempting to attend a verified organized civic, community, or religious event in the NSZ. If the motorist provided the officer with a legitimate reason for entry, the officer was authorized to request additional information sufficient to verify the motorist's stated reason for entry into the NSZ area. Officers denied entry to those motorists who did not have a legitimate reason for entry, who could not substantiate their reason for entry, or who refused to provide a legitimate The stated primary purpose of the NSZ was not to

make arrests or to detect evidence of ordinary criminal wrongdoing, but to increase protection from violent criminal acts, and promote the safety and security of persons within the NSZ by discouraging–and thereby deterring–persons in motor vehicles from entering the NSZ intending to commit acts of violence.

Without question, a seizure occurs when a vehicle is stopped at a police checkpoint. When the primary purpose of a checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Because the purpose of the NSZ checkpoint program is not immediately distinguishable from the general interest in crime control, appellants' the seizures are unconstitutional.

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

*****