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

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CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Fagan, 2009 U.S. App. LEXIS 18046, August 13, 2009

The Warrant Clause of the Fourth Amendment has been interpreted to permit searches not only of the premises specified in a warrant but also of structures "appurtenant" to those premises. Whether a searching officer reasonably could conclude that a specific structure is appurtenant to the premises specified in a particular search warrant necessarily demands close attention to the facts incident to the search in question. Factors include the proximity of the structure to the described premises; the location's layout and the context-specific relationship between the structure and the premises specified in the warrant; and extrinsic evidence, including evidence discovered during admittedly valid portions of the search, suggesting that the structure is appurtenant to the premises specified in the warrant.

In the case at hand, the third-floor closet was located on the third-floor landing, no more than eight feet from the front door of the apartment; the landing itself was small and led to the apartment; the spatial relationship between the closet and the apartment was intimate; the other residential units in the building were physically removed from both the third floor and the third-floor landing; and the key found in the defendant's bedroom opened the padlock that secured the closet. Thus, evidence found in the flat quite literally opened the door to the closet. That combination of factors was sufficient to permit an objectively reasonable officer to conclude that the storage closet was appurtenant to the apartment and to search the closet under the purview of the warrant.

What counts is whether the searching officer has an objectively reasonable basis for believing that a particular structure is appurtenant to the premises specified in the search warrant. If he does, he may search that structure under the purview of the warrant; he need not halt his search to scrutinize lease arrangements, interrogate landlords, or interview other occupants of the building.

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

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3rd CIRCUIT

U.S. v. Saybolt, 2009 U.S. App. LEXIS 18432, August 18, 2009

Because the purpose of a 18 U.S.C. § 286 conspiracy must be to obtain payment of a claim, the conspirators must understand, at least implicitly, that the agreed-upon methods of accomplishing the fraud are capable of causing the payment of a claim. Accordingly, where the Government alleges that the conspirators agreed to make false statements and representations as part of the conspiracy to defraud, § 286 requires proof that the conspirators agreed that those statements or representations would have a material effect on the Government's decision to pay a false, fictitious, or fraudulent claim.

Section 286's language leaves open the possibility that other conspiracies to defraud may be actionable under the statute; it does not explicitly specify that the conspiracy must involve an agreement to make false statements or representations. Accordingly, we express no view on whether materiality is a required element of any alleged conspiracies that do not involve an agreement to make false statements or representations.

The 6th Circuit disagrees (cite omitted)**.**

Title 18 U.S.C. § 287, False, fictitious, or fraudulent claims, is clear and unambiguous. Because the terms "false," "fictitious," and "fraudulent" are connected with the disjunctive "or," the terms must be given separate meaning and thus, proof of materiality is not necessary to establish a violation of § 287.

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

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4th CIRCUIT

U.S. v. Passaro, 2009 U.S. App. LEXIS 17676, August 10, 2009

Title 18 U.S.C. § 7(9) explicitly extends special maritime and territorial jurisdiction to "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership . . . ."

Section 7(9) pertains only to fixed locations, rather than a mobile group of people conducting an operation. "The premises of . . . military . . . missions" refers to fixed physical locations, i.e., land and buildings, on which the United States has established a "military mission." Section 7(9) does not reach so broadly as to encompass any area that U.S. soldiers occupy, no matter how temporary or mobile their presence. Relevant factors include the size of a given military mission's premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the

occupation of the premises by a significant number of United States personnel, and the host nation's consent (whether formal or informal) to the presence of the United States. Asadabad, Afghanistan, Firebase is within §7(9) jurisdiction.

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

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7th CIRCUIT

U.S. v. Jackson, 576 F.3d 465, August 06, 2009

In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court held that an arrest warrant "carries with it the limited authority to enter a dwelling when there is *reason to believe* the suspect is within." Nearly every court of appeals to consider the issue has held that law enforcement officers do not need a search warrant in addition to an arrest warrant to enter a third party's residence in order to effect an arrest (3rd, 6th, 8th, and 9th circuits - cites omitted; the 1st circuit held that a search warrant is required but strongly suggested that the arrestee's presence in a third party's residence is an exigency – cite omitted.). Although the third party's Fourth Amendment rights are violated and evidence against the third party might not be admissible, the arrest is still valid.

Three circuits (2nd, 10th, and D.C. circuits – cites omitted) have explicitly concluded that "reasonable belief" requires a lesser degree of knowledge than probable cause. Four other circuits (5th, 6th, 9th, and 11th – cites omitted) have disagreed, holding that "reasonable belief" amounts to the same thing as "probable cause." Although the court "might be inclined to adopt the view of the narrow majority of our sister circuits that 'reasonable belief' is synonymous with probable cause," it declined to decide whether the standard is probable cause or something lower. The court concluded that there was probable cause to believe the target was present which would meet the lower standard as well.

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

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U.S. v. Cox, 2009 U.S. App. LEXIS 18386, August 18, 2009

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

Title 18 U.S.C. § 2423(a), transportation of minors with the intent to engage in criminal sexual activity, does not require that the government prove that a defendant knew his victim was a minor.

The 2nd, 3rd, 4th, and 9th circuits agree (cites omitted)**.**

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

8th CIRCUIT

U.S. v. Stults, 575 F.3d 834, August 14, 2009

There is no reasonable expectation of privacy in files on a personal computer where peer-to-peer software such as LimeWire is installed and used to make files accessible to others for file sharing. Although as a general matter an individual has an objectively reasonable expectation of privacy in his personal computer, this expectation cannot survive a decision to install and use file-sharing software, thereby opening his computer to anyone else, including law enforcement, with the same freely available program.

The 9th and 10th circuits agree (cites omitted)**.**

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

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U.S. v. McMullin, 2009 U.S. App. LEXIS 18357, August 17, 2009

Consent to enter to search for a fugitive does not authorize re-entry after the fugitive is found and taken into custody outside the house, even though there was no withdrawal of the original consent. The Marshals had already completed their task of arresting the fugitive in the backyard. There was no necessity or legal basis for them to re-enter the house.

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

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9th CIRCUIT

Bressi v. Ford, 575 F.3d 891, August 04, 2009

A roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non- Indians.

Once they departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, the officers were acting under color of state law. Tribal officers who are authorized to enforce state as well as tribal law, and proceed to exercise both powers in the operation of a roadblock, will be held to constitutional standards in establishing roadblocks. If a tribe wishes to avoid such constitutional restraints, its officers operating roadblocks will

have to confine themselves, upon stopping non-Indians, to questioning to determine non-Indian status and to detention only for obvious violations of state law.

The mere presence of federal agents at the roadblock does not convert the tribal officers into federal actors.

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

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U.S. v. Fraire, 575 F.3d 929, August 04, 2009

A momentary checkpoint stop of all vehicles at the entrance of a national park, aimed at preventing illegal hunting— which is minimally intrusive, justified by a legitimate concern for the preservation of park wildlife and the prevention of irreparable harm, directly related to the operation of the park, and confined to the park gate where visitors would expect to briefly stop — is reasonable under the Fourth Amendment.

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

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U.S. v. Monghur, 2009 U.S. App. LEXIS 17815, August 11, 2009

When made to a law enforcement officer, an unequivocal, contemporaneous, and voluntary disclosure that a package or container contains contraband waives any reasonable expectation of privacy in the contents. The Constitution does not require the formality of a warrant in such circumstances.

The 7th circuit agrees (cite omitted)**.**

During a jail house telephone call, cognizant that jail personnel might be listening, Monghur attempted to disguise the subject matter by using ambiguous, generic language to describe the handgun and its whereabouts: "the thing" was in a closet, "in the green." It is relevant that Monghur never explicitly identified the contraband at issue. Nor did Monghur specifically identify the container itself. Monghur never made a voluntary disclosure directly to law enforcement. There was no "direct and explicit" waiver of an expectation of privacy in a container hidden elsewhere. The warrantless search of the container violated the Fourth Amendment.

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

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Stoot v. City of Everett, 2009 U.S. App. LEXIS 18079, August 13, 2009

A coerced statement in violation of the Self-Incrimination Clause of the Fifth Amendment can form the basis of a 42 U.S.C § 1983 action when the statement is "used against the suspect in a criminal case."

A coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status.

The 2nd and 7th circuits agree (cites omitted)**.**

The 3rd, 4th, and 5th circuits disagree and require the allegedly coerced statements to have been admitted against the defendant *at trial* (cites omitted)**.**

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

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U.S. v. Gonzalez, 2009 U.S. App. LEXIS 18958, August 24, 2009

The Supreme Court decision of Arizona v. Gant, 129 S. Ct. 1710 (2009), applies to all cases pending at the time of the decision. Therefore, the search of the car incident to the arrest of an occupant violated the Fourth Amendment. The good faith exception to the Exclusionary Rule does not apply.

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

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U.S. v. Comprehensive Drug Testing, Inc., 2009 U.S. App. LEXIS 19119, August 26, 2009

When the government wishes to obtain a warrant to examine a computer hard drive or electronic storage medium in searching for certain incriminating files, or when a search for evidence could result in the seizure of a computer, magistrate judges must be vigilant in observing the guidance we have set out throughout our opinion, which can be summed up as follows:

1. **Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.**

2. **Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.**

3. **Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.**

4. **The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.**

5. **The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.**

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

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10th CIRCUIT

Manzanares v. Higdon, 575 F.3d 1135, *August 10, 2009*

Even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within a home, police may not enter without a warrant absent exigent circumstances. Payton v. New York, 445 U.S. 573 (1980). Police may enter a home without a warrant on valid consent. Consent may be withdrawn, and if it is, police violate the Fourth Amendment by remaining in the home. Labeling an encounter in the home as either an investigatory stop or an arrest is meaningless because Payton's probable cause requirement applies to all such seizures in the home. Based upon facts known at the time, probable cause of a crime did not exist.

Witness detentions are confined to the type of brief stops that interfere only minimally with liberty. Neither the Supreme Court nor this court has countenanced such a detention in a home. Because the detention here occurred inside a home, it was unquestionably unconstitutional unless supported by probable cause.

A "protection-of-investigation" rationale requires probable cause to believe that the person is about to commit the crime of obstruction. Based upon facts known at the time, probable cause of the crime of obstruction did not exist.

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

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