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Federal Law Enforcement Training Center
Legal Training Division

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THE FEDERAL LAW ENFORCEMENT -INFORMER-

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

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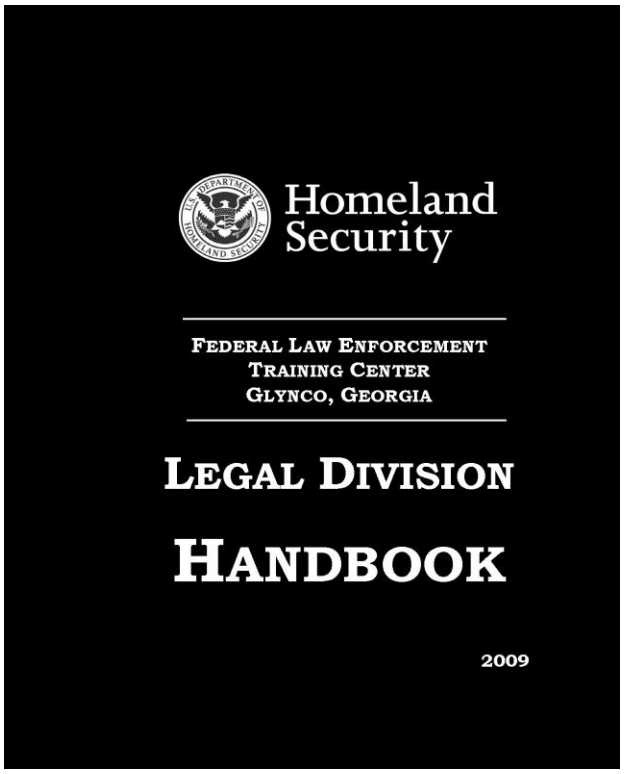

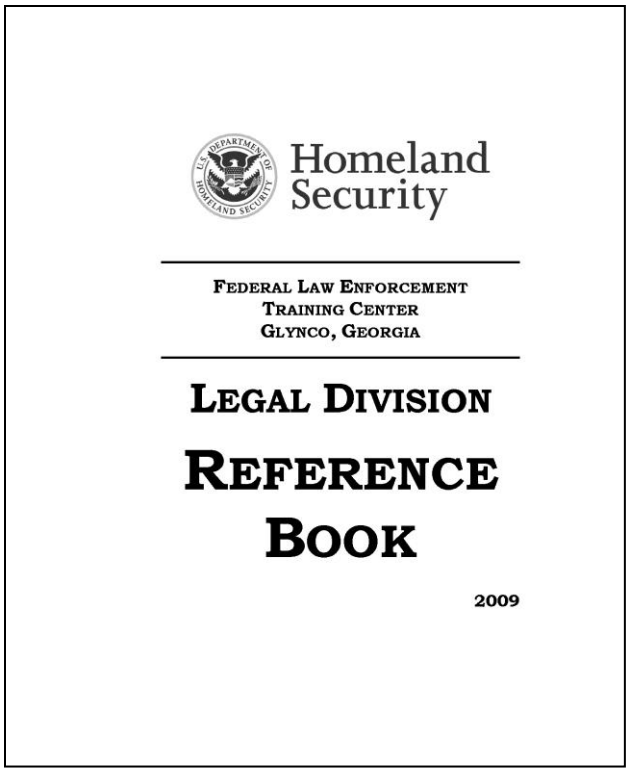

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Additional
Supreme Court Law Enforcement Case
To Be Decided in the October 2009 Term

REP IN TEXT MESSAGES ON A GOVERNMENT SYSTEM

City of Ontario v. Quon
Decision below: **529 F.3d 892**
9th Circuit

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the operational realities of the workplace. Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer - for non-investigatory work-related purposes or for investigations of work-related misconduct - is permissible if reasonable under the circumstances. O'Connor v. Ortega, 480 U.S. 709 (1987).

1. Does a SWAT team member have a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers?

2. Did the Ninth Circuit contravene Supreme Court Fourth Amendment precedents and create a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager?

3. Do individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer?

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CASE SUMMARIES

SUPREME COURT

Michigan v. Fisher, 130 S. Ct. 546, 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.

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CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Leon-Quinones, 2009 U.S. App. LEXIS 26617, December 07, 2009

A conviction under 18 U.S.C. § 924(c) requires proof that the defendant used a real firearm when committing the predicate offense. A toy or replica will not do. Although § 924(c) requires proof that the gun is real, the government's proof need not reach a level of scientific certainty. Descriptive lay testimony can be sufficient to prove that the defendant used a real gun.

The direct evidence included three bank employees, each of whom observed the object carried by De León at close range, who called it either a "revolver," "pistol," or a "firearm." One employee further testified that the "pistol or revolver" was "nickel plated," a description which is consistent with the jury's finding that defendant carried a real gun. Moreover, none of the witnesses called the gun a "toy gun," or "replica gun" or otherwise described it in a way that would indicate that the gun was not real. There was also circumstantial evidence indicating that defendant carried a real firearm. At trial, some of the employees stated that they were "afraid" that defendant might hurt someone with the gun. And, throughout the robbery, the employees at the bank reacted as if the gun was real, following defendant's various orders. From the totality of the evidence, including the

reactions of the witnesses, the jury was entitled to infer that defendant carried a real firearm.

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

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4th CIRCUIT

U.S. v. Rumley, 588 F.3d 202, December 07, 2009

During a traffic stop, after learning that defendant had two prior convictions for driving with a suspended license, the deputy arrested defendant, handcuffed him, and placed him in the backseat of the deputy's patrol car. The deputy then returned to the passenger side of defendant's truck and requested that the front seat passenger step out of the truck. When the passenger moved his right leg to step out, the deputy noticed and seized a silver pistol lying on the floorboard in front of the passenger-side seat.

The deputy lawfully seized defendant's pistol when it came into plain view *before* any search of defendant's vehicle, and so Arizona v. Gant (search of a vehicle incident to arrest of an occupant) does not apply to the facts.

In Maryland v. Wilson, 519 U.S. 408, 414-15 (1997), the Supreme Court held that an officer conducting a lawful traffic stop may, as a safety measure, order any passenger to exit the vehicle as a matter of course. Nothing in Gant undermines the bright-line rule established in Wilson.

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

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U.S. v. Matthews, 2009 U.S. App. LEXIS 28764, December 31, 2009

A police department's policy on inventory searches does not have to specifically use the phrase "closed containers" to permit the search and seizure of such items. (The 2nd and 7th circuits in published opinions and the 5th and 6th circuits in unpublished opinions agree (cites omitted)).

Like the policies discussed in 2nd and 7th circuit cases, the Department's policy, though not explicitly using the phrase "closed containers," sufficiently regulates the opening of such containers to provide standardized criteria to justify the deputy's search of defendant's bags. That policy requires, in relevant part, for "[a] complete inventory [to] be taken on all impounded or confiscated vehicles including the interior, glove compartment and trunk." Only by opening all closed containers could a police officer effectively comply with this requirement for a "complete inventory." In addition, that the policy expressly permits examination of glove boxes, which are closed containers, strongly suggests that a "complete inventory" requires the opening of closed containers.

Policies of opening all containers or of opening no containers are unquestionably permissible. It is equally permissible to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.

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

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5th CIRCUIT

U.S. v. Sandlin, 2009 U.S. App. LEXIS 26153, December 1, 2009 (Revised December 22, 2009)

The elements of 18 U.S.C. § 1014, false statements on a loan application, are:

(1) the defendant knowingly and willfully made a false statement to the bank,
(2) the defendant knew that the statement was false when he made it,
(3) the defendant made the false statement for the purpose of influencing the bank to extend credit, and
(4) the bank to which the false statement was made was federally insured.

The false statement need not be material nor relied upon by the bank to violate § 1014. If a person makes a false statement that has the capacity to influence the bank then the specific intent necessary to violate § 1014 may be inferred and the offense is complete. Because the relevant inquiry concerns defendant's intent, not the bank's, it does not matter that the bank might have made the loans even without considering what was on the application.

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

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7th CIRCUIT

U.S. v. Crowder, 2009 U.S. App. LEXIS 27880, December 07, 2009

Defendant did not have a reasonable expectation of privacy in the car after he turned it over to the shipper. Although individuals do not surrender their expectations of privacy in closed containers when they send them by mail or common carrier, the car in this case can hardly be considered a closed container. The doors were left unlocked, the driver of the car carrier was given the keys, and defendant knew that the driver would enter the car and drive it. No one could have a reasonable expectation of privacy in the contents of a vehicle under those circumstances. Although there is no evidence that defendant directly authorized the driver to search the vehicle, in light of the circumstances described above it is clear that the driver was authorized to act in direct contravention to defendant's privacy interest.

Hiding the drugs in a secret compartment in the car clearly shows defendant's subjective desire that the drugs not be discovered. But defendant must also show that his expectation of privacy was objectively reasonable - the simple act of hiding something will not necessarily trigger Fourth Amendment protections.

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

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U.S. v. Villalpando, 2009 U.S. App. LEXIS 27427, December 16, 2009

While a false promise of leniency may render a statement involuntary, police tactics short of the false promise are usually permissible. Trickery, deceit, even impersonation do not render a confession inadmissible . . . unless government agents make threats or promises. A confession induced by a promise to bring cooperation by the defendant to the attention of prosecutors does not render a confession involuntary.

A false promise is treated differently than other somewhat deceptive police tactics (such as cajoling and duplicity) because a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable. Police conduct that influences a rational person who is innocent to view a false confession as more beneficial than being honest is necessarily coercive, because of the way it realigns a suspect's incentives during interrogation.

The explicit promises offered by the detective were that she would try to persuade the probation officer not to revoke defendant's probation, and she would not arrest him that night if he cooperated with the investigation against the unnamed target (presumably defendant's supplier). She offered, for instance "to go to bat" for defendant and indicated that she would "sit down" with the DEA, the police, and his probation officer to "work this out." She indicated that "we don't have to charge you." None of these, standing alone or in the context of the interview, represented a solid offer of leniency in return solely for his admission to cocaine possession. It is far different to offer to intercede on someone's behalf than to promise that such an intercession will be effective.

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

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8th CIRCUIT

U.S. v. Brewer, 2009 U.S. App. LEXIS 27660, December 17, 2009

A warrantless entry and search by law enforcement officers does not violate the Fourth Amendment if the officers have obtained the consent of a third party who possesses common authority over the premises. However, a physically present co-occupant's stated refusal to permit entry renders the warrantless search unreasonable and invalid as to him. In the absence of such a refusal, a third party's consent to search is valid so long as there is

no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.

The officers were tasked with serving the valid ex parte order. Defendant was removed pursuant to a valid ex parte order of protection and in furtherance of these concerns, not for the sake of avoiding a possible objection to the search.

***See* Georgia v. Randolph, 547 U.S. 103 (2006).**

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

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U.S. v. Rehak, 2009 U.S. App. LEXIS 28179, December 22, 2009

Defendant police officers were convicted under 18 U.S.C. § 241 of conspiring to violate the rights of Vincent Pelligatti, a fictitious person, by stealing his drug money.

Police officers who convert to private purposes funds lawfully seized from suspected criminals violate those criminals' civil rights.

Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective. Factual impossibility is not a defense to an inchoate offense such as conspiracy or attempt. The objective of defendants was to take the money of a drug trafficker, Vincent Pelligatti. Their goal, to keep his money as their own, violates the law. The fact that Pelligatti was fictitious was unknown to defendants. This circumstance prevented them from actually violating a person's due process rights. While it was factually impossible to violate his rights, defendants were charged and convicted of *conspiring* to violate his rights. The crime was committed upon their agreement to steal his money. That they were unsuccessful is irrelevant to their culpability for conspiring.

Even if defendants believed the money was forfeitable, agreeing to convert it to personal use, rather than following forfeiture procedures, is sufficient for conviction under § 241.

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

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9th CIRCUIT

Bryan v. McPherson, 2009 U.S. App. LEXIS 28413, December 28, 2009

Tasers and stun guns fall into the category of non-lethal force. (Like any generally non-lethal force, the taser is capable of being employed in a manner to cause the victim's death.) Non-lethal, however, is not synonymous with non-excessive; all force - lethal and non-lethal - must be justified by the need for the specific level of force employed. Nor is "non-lethal" a monolithic category of force. A blast of pepper spray and blows from a baton are not

necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Because of the physiological effects, the high levels of pain, and foreseeable risk of physical injury, the X26 and similar devices are a greater intrusion than other non-lethal methods of force. Tasers like the X26 constitute an intermediate or medium, though not insignificant, quantum of force that must be justified by a strong government interest that *compels* the employment of such force.

Under Graham v. Connor, the government's interest in the use of force is evaluated by examining three core factors, the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. These factors, however, are not exclusive. The totality of the circumstances are examined and whatever specific factors may be appropriate in a particular case, whether or not listed in Graham, are considered.

Traffic violations generally will not support the use of a significant level of force. While the commission of a misdemeanor offense is not to be taken lightly, it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and posed no threat to the safety of the officers or others. (The 10th and 11th circuits agree (cites omitted)). **The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense.**

The objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

Police officers normally provide warnings where feasible, even when the force is less than deadly. The failure to give such a warning is a factor to consider.

Although police officers need not employ the "least intrusive" degree of force possible, police are required to *consider* what other tactics if any were available' to effect the arrest.

Viewing the facts in the light most favorable to Bryan, the totality of the circumstances here did not justify the deployment of the Taser X26. A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.

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

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10th CIRCUIT

U.S. v. Davis, 2009 U.S. App. LEXIS 27901, December 18, 2009

Police arrested the driver of a car on an outstanding warrant for failure to appear. The defendant, a passenger in the car, was arrested for public intoxication. Police found a gun during a search of the car incident to the arrests. The defendant's arrest was illegal and a

search of the car incident to the arrest of both him and the driver violated the Fourth Amendment pursuant to Arizona v. Gant, 129 S. Ct. 1710 (2009). The arrests and search occurred before the Gant decision.

The good-faith exception to the exclusionary rule applies when an officer acts in reasonable reliance upon settled case law that is later made unconstitutional by the Supreme Court. The evidence is admissible.

***See* U.S. v. McCane, 573 F.3d 1037 (10th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3221 (U.S. Oct. 1, 2009) (No. 09-402). 8 INFORMER 09**

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

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