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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 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.

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CASE SUMMARIES

SUPREME COURT

Florida v. Powell, 2010 U.S. LEXIS 1898, February 23, 2010

Miranda warnings that failed to expressly state that the suspect had a right to have a lawyer present during the questioning, but advised that he had "the right to talk to a lawyer before answering any of our questions" and the right to exercise that right at "anytime you want during this interview," adequately conveyed his rights under Miranda.

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

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Maryland v. Shatzer, 2010 U.S. LEXIS 1899, February 24, 2010

Lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in Miranda. Such incarceration is not necessarily "custody" for Miranda purposes.

A subsequent waiver of Miranda rights by a suspect who has previously invoked right to counsel under Miranda, who remains in custody, and who is re-approached by law enforcement is presumed to be involuntary.

A break in Miranda custody of fourteen (14) days provides ample time for the suspect to get reacclimated to his normal life, to consult with friends and family and counsel, and shake off any residual coercive effects of prior custody. After a fourteen (14) day break in custody, law enforcement may re-approach the suspect who is now back in custody. A waiver of Miranda rights then obtained is not presumed involuntary.

If a suspect invokes counsel under Miranda while in custody and is then released, nothing prohibits law enforcement from approaching, asking questions, and obtaining a statement without the Miranda lawyer present from the suspect who remains out of custody.

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

Editor's Note: The majority and Justice Thomas raise the specter of a "catch and release" tactic where, after invoking counsel, a suspect is released and then re-arrested. Unless fourteen (14) days elapse between release and re-arrest, the previous invocation remains effective. Although it does not expressly state so, Justice Thomas suggests that the majority opinion requires law enforcement to wait fourteen (14) days after release before re-approaching a suspect who remains out of custody after previously invoking counsel under Miranda.

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

Account Services Corp. v. U.S., 593 F.3d 155, February 01, 2010

Under the long-established "collective entity rule," corporations do not have a Fifth Amendment privilege against self-incrimination. The custodian of corporate records, who acts as a representative of the corporation, cannot refuse to produce corporate records on Fifth Amendment grounds.

However, because the act of producing documents can be both incriminating and testimonial - such as when it confirms the documents' existence, possession, or authenticity - a subpoenaed individual may be able to resist production on Fifth Amendment grounds. Even though a corporation's custodian of records cannot resist a subpoena on Fifth Amendment grounds, should the custodian stand trial, the government cannot introduce evidence that the custodian himself produced the records since he acted in his representative and not personal capacity. The jury might permissibly infer that the custodian was the source of the documents based on his position at the corporation.

A one person corporation does not have a Fifth Amendment privilege against self-incrimination. The corporation must produce the subpoenaed records even when the corporation is "essentially a one-man operation." This is true even when, although the government cannot introduce evidence of the production, a jury could conclude that the "one-man" actually produced the incriminating records.

The 1st and 4th circuits agree (cites omitted).

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

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5th CIRCUIT

U.S. v. Reagan, 2010 U.S. App. LEXIS 4242, February 04, 2010

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

Title 18 U.S.C.§ 641 punishes "[w]hoever embezzles, steals, purloins or knowingly converts to his use . . . *any* record, voucher, money, or thing of value of the United States." (emphases added). Each individual transaction in which government money is received is a separate count, even if the transaction is part of an overarching scheme.

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

Editor's Note: No other circuits have addressed this specific issue.

U.S. v. John, 2010 U.S. App. LEXIS 2742, February 09, 2010

Title 18 U.S.C. § 1030(a)(2) makes it unlawful to…

> **(2) intentionally access[] a computer without authorization or exceed[s] authorized access, and thereby obtain[]--**
>
> > **(A) information contained in a financial record of a financial institution, or of a card issuer….**

Under 18 U.S.C. § 1030(e)(6), the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter. . . ."

"Authorized access" or "authorization" may encompass limits placed on *the use* of information obtained by permitted access to a computer system and data available on that system when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime. To give but one example, an employer may "authorize" employees to utilize computers for any lawful purpose but not for unlawful purposes and only in furtherance of the employer's business. An employee would "exceed authorized access" if he or she used that access to obtain or steal information as part of a criminal scheme.

The 1st Circuit agrees (cite omitted)**.**

The 9th Circuit disagrees, limiting "exceeds authorized access" to cases in which the defendant had authorized access to the computer but not to the specific information accessed (cite omitted)**.**

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

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U.S. v. Banuelos-Romero, 2010 U.S. App. LEXIS 3613, February 23, 2010

Law enforcement may conduct a warrantless search of an automobile if (1) the officer conducting the search had probable cause to believe that the vehicle in question contained property that the government may properly seize; and (2) exigent circumstances justified the search. (Cites to prior 5th Circuit cases omitted.)

Merely fitting a drug courier profile will not suffice to raise probable cause. Evidence of a non-standard hidden compartment supports probable cause.

In a vehicle stop on a highway, the fact of the automobile's potential mobility supplies the requisite exigency.

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

6th CIRCUIT

U.S. v. Brooks, 2010 U.S. App. LEXIS 2441, February 05, 2010

Probable cause to search a location is not dependent upon whether the officers already have probable cause or legal justification to make an arrest. The question is whether the information known by the affiant and conveyed to the magistrate makes it fairly probable that there will be additional contraband or evidence of a crime in the place to be searched.

Probable cause to search for more marijuana exists where there is evidence of marijuana use immediately prior to the officers' arrival (the strong odor of marijuana smoke). The magistrate is not required to assume that the defendant has just smoked his last bit of marijuana immediately before the officers arrived. Instead, it is fairly probable under these facts that where there is smoke, there may be more there to smoke.

The same logic does not necessarily apply to the seeds in the ashtray as, standing alone and without the corroboration of the smell of marijuana smoke, it is impossible to know how long the seeds had been in the ashtray. Accordingly, the mere presence of marijuana seeds in an ashtray would likely be insufficient to establish probable cause to search the residence due to the uncertainty of how long ago the seeds got there.

"Even then, however, we [the Court] take note of the story told in Jim Stafford's down-home tribute to *Cannabis sativa*:

> **All good things gotta come to an end,**
> **And it's the same with the wildwood weeds.**
> **One day this feller from Washington came by,**
> **And he spied 'em and turned white as a sheet.**
> **Well, they dug and they burned,**
> **And they burned and they dug,**
> **And they killed all our cute little weeds.**
> **Then they drove away,**
> **We just smiled and waved,**
> **Sittin' there on that sack of seeds!**
>
> **JIM STAFFORD,WILDWOOD WEED (MGM 1974)."**

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

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8th CIRCUIT

U.S. v. Allmon, 2010 U.S. App. LEXIS 2747, February 10, 2010

A witness who has previously testified may not assert a Fifth Amendment privilege and refuse to give precisely the same testimony in a subsequent hearing. Testifying consistently

with his prior testimony would not expose the witness to any further jeopardy beyond that which existed by virtue of prior testimony.

A witness who has previously testified may not assert a Fifth Amendment privilege and refuse to testify in a subsequent hearing because fear of reprisals would cause him to commit perjury for which he could then be prosecuted. The Fifth Amendment confers no right upon a witness to avoid testifying simply because he refuses, for one reason or another, to do so truthfully.

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

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U.S. v. Estey, 2010 U.S. App. LEXIS 3398, February 19, 2010

Agents appropriately advised defendant of his rights prior to a noncustodial interview by telling him that he did not have to speak with them if he chose not to do so, that he had the right to refuse to answer all or any particular question, and that he was free to leave. The practice of agents providing such advice is a proper method to ensure that a noncustodial interview is not misinterpreted as a custodial interrogation and to avoid Miranda problems.

Because child pornographers commonly retain pornography for a lengthy period of time, evidence developed within several months (5 months in this case) of an application for a search warrant for a child pornography collection and related evidence is not stale.

The 4th and 9th circuits agree (cites omitted)**.**

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

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9th CIRCUIT

U.S. v. Borowy, 2010 U.S. App. LEXIS 3056, February 17, 2010

Defendant purchased and installed a version of the file sharing software LimeWire that allows the user to prevent others from downloading or viewing the names of files on his computer. He attempted, but failed, to engage this feature. Even though his purchase and attempt show a subjective expectation of privacy, his files were still entirely exposed to public view. Anyone with access to LimeWire could download and view his files without hindrance. Defendant's subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access. The agent's access to defendant's files through LimeWire and the use of a keyword search to locate these files did not violate the Fourth Amendment.

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

10th CIRCUIT

U.S. v. Prince, 593 F.2d 1178, February 01, 2010

Even if it were a mistake of law for ATF agents to conclude that "AK-47 flats" i.e., pieces of flat metal containing holes and laser perforations, are "receivers" and therefore "firearms," such a mistake of law carries no legal consequence if it furnishes the basis for a consensual encounter, as opposed to a detention or arrest.

It is well established that consensual encounters between police officers and individuals implicate no Fourth Amendment interests. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual and request consent to search property belonging to the individual that is otherwise protected by the Fourth Amendment. The agents' purported mistake of law neither independently resulted in a Fourth Amendment violation nor otherwise "tainted" the entire investigation.

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

Editor's Note: The Court declined to decide whether the flats at issue are "receivers" and therefore "firearms."

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U.S. v. Henderson, 2010 U.S. App. LEXIS 3126, February 17, 2010

A child pornography search warrant affidavit which states that the affiant "learned" that a computer with the relevant IP address had shared videos with child-pornography-related secure hash algorithm (SHA) values is insufficient to establish probable cause when it fails to identify how the affiant's source determined that a computer with the relevant IP address—rather than some other computer—shared videos with child pornography-related SHA values.

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

Editor's Note: The court never-the-less ruled the evidence admissible through the good faith exception to the exclusionary rule.

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DC CIRCUIT

U.S. v. Vinton, 2010 U.S. App. LEXIS 2450, February 05, 2010

After lawfully stopping defendant for a traffic violation, the Park Police Officer saw a fishing knife with a five-and-a-half-inch sheath in plain view on the backseat. During a frisk of the passenger compartment, the officer found a "butterfly knife" under the passenger side floor mat.

Defendant was arrested for "possession of a prohibited weapon" (PPW), D.C. Code § 22-4514(b). However, because the offense of PPW requires proof of intent to use the weapon *unlawfully* against another, the officer lacked probable cause to arrest for PPW. The arrest was still valid because there was probable cause to believe defendant committed the offense of "carrying a dangerous weapon" (CDW), D.C. Code § 22-4504(a), which does not require proof of intent to use the weapon for an unlawful purpose." A "deadly or dangerous weapon" is anything that is *likely* to produce death or great bodily injury by the use made of it. Even though it may be used as a tool in certain trades or hobbies or may be carried for utilitarian reasons, the surrounding circumstances indicate that defendant's purpose for carrying the butterfly knife was its use as a weapon.

The search of a locked briefcase in the passenger compartment incident to the arrest was lawful under Arizona v. Gant because it was reasonable to believe that the briefcase contained evidence relevant to the crime of arrest. The "reasonable to believe" standard probably is akin to the "reasonable suspicion" standard required to justify a Terry search. Accordingly, the officer's assessment of the likelihood that there will be relevant evidence inside the car must be based on more than "a mere hunch," but "falls considerably short of needing to satisfy a preponderance of the evidence standard."

The defendant was caught with a type of contraband sufficiently small to be hidden throughout a car and frequently possessed in multiple quantities. Indeed, this fact was well-known to the officer, who testified that "generally if one weapon is there . . . there's the chance that other weapons could be there." Having found two objects, mace and earplugs, that suggested at least a possible association with weapons, along with two other objects, a sheathed knife and a butterfly knife, that were clearly capable of being used as weapons, the officer had an objectively reasonable basis for believing that additional weapons might be inside the briefcase inside the car.

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