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

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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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# PodCasts

# 4th Amendment Roadmap

# Hot Issues

## 4th AMENDMENT ROADMAP

**A** step by step guide to searches

**Posted Now**

- **Introduction to 4th Amendment Searches**
- **Who is a Government Agent?**
- **Reasonable Expectation of Privacy 1 and 2**
- **Probable Cause 1 and 2**
- **What is a Search Warrant?**
- **Search Warrant Service 1 and 2**
- ***Terry* Stop and Frisk**
- **Protective Sweeps**
- **Search Incident to Arrest**
- **Consent**
- **Mobile Conveyances**
- **Exigent Circumstances**
- **Plain View**
- **Exclusionary Rule 1 and 2**
- **Inspections**
- **Inventories**

## HOT ISSUES

Supreme Court cases and emergent issues

**Posted Now**

- **Consent Searches – *GA v. Randolph***
- **Anticipatory Warrants – *US v. Grubbs***
- **GPS Tracking**
- **Covert Entry Search Warrants**
- **Use of Force – *Scott v. Harris***
- **Passengers and Traffic Stops – *Brendlin v. California***
- **FISA Parts 1 and 2 – An Overview for Officers and Agents**

**Coming Soon**

- **Use of Force Continuum**

## SELF INCRIMINATION ROADMAP

A step by step guide to Lawful Interviews

- **Self Incrimination: *Miranda* and the 5th Amendment**
- ***Miranda* Waivers and Invocations**

## MILITARY INTERROGATIONS

The 5th Amendment, *Miranda*, and Article 31

- **Article 31(b), UCMJ**
- **Military Interrogations – The Fifth Amendment and *Miranda***

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# In This Issue

## The Annual
## Supreme Court Preview

**A summary of Law Enforcement cases to be decided in the October 2007 Term.**

## Click HERE

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## The Classified Information Procedures Act:

### An Introduction and Practical Guide for Criminal Investigators

By Senior Legal Instructor Jim McAdams

Jim joined the Legal Division staff as a Senior Instructor in 2006 after a 25 year career with the United States Attorney's Office in the Southern District of Florida. He assisted in the prosecution of a number of major criminal cases, including former Panamanian dictator Manuel Noriega, former Colombian cartel leader Fabio Ochoa, and the so-called "Iraq-gate" case against the Atlanta Branch Manger of Banco Nationale Lavorro involving alleged diversion by Saddam Hussein's government of $5 billion in Department of Agriculture crop guarantees. Jim served as co-chair of a Joint Intelligence Community and Law Enforcement Working Group responsible for developing protocols for improved information sharing between the Intelligence and Law Enforcement communities. In June 1995, Attorney General Reno appointed Jim as her Counsel for Intelligence Policy.

### Here's an excerpt

It's Monday morning. You are the Group Supervisor in a small office of the Customs and Border Protection. You've just poured your second cup of coffee and are starting to review your case file in preparation for an upcoming trial when you are interrupted by the phone ringing. It's your administrative assistant advising that two Customs and Border Protection officers (CBPO) are here to see you. The CBPOs say they've been up all night working on a case that started as a routine border matter but which now apparently involves extremely

sensitive and classified information. So much for preparing for trial. You lean back in your office chair and listen to the CBPOs as they begin their case presentation.

Just before midnight, Marcos Sandaval, a Venezuelan businessman, arrived at the Jacksonville Airport aboard a charter flight from Caracas. He presented his Venezuelan passport to Immigration and was then allowed to proceed for inspection by U.S. Customs. In his Customs Declaration, Sandaval had indicated that he was not carrying in excess of $10,000 in U.S. currency. The Customs Inspector, acting on a hunch after questioning Sandaval, directed him to a secondary inspection. During secondary, the Inspector found $500,000 in U.S. Currency concealed in the lining of Sandaval's briefcase along with a second passport, this one from Eritrea, in Sandaval's name. The Customs Inspector thereafter placed Sandaval under arrest and called his supervisor. The supervisor and his immediate assistant, both of whom are now sitting before you making the case presentation, responded to the airport. Sandaval, after being advised of his *Miranda* rights, invoked his rights of silence and to have his attorney present before any questioning. … the CBPOs learned what they had begun to suspect: Sandaval is a documented CIA source.

## Click HERE for the Full Article

**(It takes a couple of minutes to load)**

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# Circuit Courts of Appeals Case Summaries

## Click HERE

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# SUPREME COURT PREVIEW

## Law Enforcement Cases To Be Decided In The October 2007 Term

### A. DEATH PENALTY

***Baze v. Rees***
Supreme Court of Kentucky 217 S.W.3d 207 (2006)

**Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?**

**When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?**

### B. CONSULAR NOTIFICATION

***Medellin v. Texas***
Court of Criminal Appeals of Texas 2006 WL 3302639

**Based upon violations of the Vienna Convention on Consular Relations, the International Court of Justice determined that 51 named Mexican nationals were entitled to receive review and reconsideration of their state convictions and sentences. President George W. Bush determined that the United States would comply with its international obligation by giving those 51 individuals review and reconsideration in the state courts.**

**Does the President of the United States have the constitutional and statutory foreign affairs authority to require the states to comply with the United States' treaty obligation to comply with the International Court of Justice judgment in those cases?**

**Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate?**

## C. EXCLUSIONARY RULE

***Virginia v. Moore***
Supreme Court of Virginia 636 S.E. 2d 395

**Officers arrested and searched defendant for driving with a suspended license, a Class 1 misdemeanor, rather than issuing a traffic summons and releasing him as required by Virginia statute. They seized crack cocaine from defendant's pocket.**

**Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?**

## D. FIREARMS VIOLATIONS

***Watson v. U.S.***
5th Circuit Court of Appeals 191 Fed. Appx. 326

**Title 18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court held that "use" of a firearm under § 924(c) means "active employment."**

**Does the mere receipt of an unloaded firearm as payment for drugs constitute "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(l)(A) and the Court's decision in *Bailey*?**

* * * *

***Logan v. U.S.***
7th Circuit Court of Appeals 453 F3d 804

**Does the "civil rights restored" provision of 18 U.S.C. §921(a)(20) apply to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. §924(e)?**

* * * *

***U.S. v. Rodriquez***
9th Circuit Court of Appeals 464 F3d 1072

**The Armed Career Criminal Act, 18 U.S.C. 924(e), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, inter alia, a state-law controlled substance offense "for which**

**a maximum term of imprisonment of ten years or more is prescribed by law." Does a state drug-trafficking offense, for which state law authorized a ten-year sentence *because the defendant was a recidivist,* qualify as a predicate offense under the Armed Career Criminal Act?**

* * * *

***Begay v. U.S.***
10th Circuit Court of Appeals 470 F3d 964

**Defendant, convicted of felon in possession of a firearm, had three prior convictions for felony driving while intoxicated. Is felony driving while intoxicated a "violent felony" triggering the minimum mandatory sentence provision under the Armed Career Criminal Act?**

## E. MONEY LAUNDERING

***U.S. v. Santos***
7th Circuit Court of Appeals 461 F.3d 886

**The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. Does the term "proceeds" mean the gross receipts from the unlawful activities or only the profits, i.e., gross receipts less expenses?**

## F. CHILD PORNOGRAPHY

***U.S. v. Williams***
11th Circuit Court of Appeals 444 F3d 1286

**Title 18 2252A(a)(3)(B) prohibits "knowingly …advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] … any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography.**

**Is § 2252A(a)(3)(B) overly broad and impermissibly vague, and thus facially unconstitutional?**

## G. CIVIL LIABILITY – THE FEDERAL TORT CLAIMS ACT

***Ali v. Federal Bureau of Prisons***
11th Circuit Court of Appeals 204 Fed. Appx. 778

**Under 28 U.S.C. 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to "[a]ny claim arising in respect of …the detention of**

**any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."**

**Is the term "other law enforcement officer" limited to officers acting in a tax, excise, or customs capacity?**

## H. SENTENCING

***Kimbrough v. U.S.***
4th Circuit Court Of Appeals 174 Fed. Appx. 798

**Does the so-called "100:1 crack/powder cocaine ratio" violate the U.S. Sentencing Guidelines mandate to impose a sentence that is "sufficient but not greater than necessary" and to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?**

**********

# CIRCUIT COURTS OF APPEALS
# CASE SUMMARIES

## 1st CIRCUIT

***U.S. v. Barnes,*** 2007 U.S. App. LEXIS 25310, October 29, 2007

**The reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context. An initial strip search for contraband and weapons is clearly justified given an arrest for a drug trafficking crime. However, a visual body cavity search involves a greater intrusion into personal privacy. Accordingly, a more particularized suspicion that contraband is concealed is required prior to conducting a visual body cavity search.**

**Reasonable suspicion or even probable cause can be established by the "collective knowledge" or "pooled knowledge" principle. Specifically, reasonable suspicion can be imputed to the officer conducting a search if he acts in accordance with the direction of another officer who has reasonable suspicion.**

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

* * * *

## 2nd CIRCUIT

***U.S. v. Gagliardi,*** 2007 U.S. App. LEXIS 24644, October 22, 2007

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

**Title 18 § 2422(b), which imposes criminal liability on anyone who "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, *or attempts to do so,*" does not require that the enticement victim be an actual "individual who has not attained the age of 18 years." The government must prove that the defendant had the intent and took a substantial step toward committing the crime, as required for attempt liability, even though it was factually impossible to commit the substantive offense.**

**The 3rd, 5th, 8th, 9th, 10th, and 11th Circuits agree** (cites omitted)**.**

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

* * * *

***Moore v. Andreno,*** 2007 U.S. App. LEXIS 24649, October 22, 2007

**A third party has authority to consent to a search of a home when that person(1) has access to the area searched and (2) has either (a) common authority over the area, (b) a substantial interest in the area, or (c) permission to gain access to the area. A third party who has been told not to enter a room, who has been prevented from entry by padlocks, who has gained entry only by cutting the locks with bolt cutters, and who has made these facts known to the officers, has neither actual nor apparent authority to grant consent. Such entry violates the Fourth Amendment.**

**Because the court has never adequately defined the meaning of "access" or how "substantial" an interest must be over an area to vest a third party with authority to consent, the law governing the authority of a third party to consent to the search of an area under the predominant control of another is unsettled. Therefore, the officers are entitled to qualified immunity.**

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

* * * *

## 3rd CIRCUIT

***U.S. v. Yamba,*** 2007 U.S. App. LEXIS 24655, October 22, 2007

**Assuming that an officer is authorized to conduct a *Terry* search at all, he is authorized to**

**assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon.**

**A *Terry* search cannot purposely be used to discover contraband, but it is permissible to confiscate contraband if it is spontaneously discovered during a properly executed *Terry* search. The proper question, therefore, is not the immediacy and certainty with which an officer knows an object to be contraband or the amount of manipulation required to acquire that knowledge, but rather what the officer believes the object is by the time he concludes that it is not a weapon. Moreover, when determining whether the scope of a particular *Terry* search was proper, the areas of focus should be whether the officer had probable cause to believe an object was contraband *before* he knew it not to be a weapon and whether he acquired that knowledge in a manner consistent with a routine frisk.**

**The 2nd and 9th Circuits agree** (cites omitted).

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

* * * *

***U.S. v. Introcaso,*** 2007 U.S. App. LEXIS 24945, October 25, 2007

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

**Title 26 U.S.C. § 5845(g) exempts "antique firearms" from registration. An "antique firearm" is defined in pertinent part as "any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade." Congress did not declare clearly an intent to impose a registration requirement on pre-1899 firearms for which ammunition specifically designed for it is no longer manufactured in the United States but in which any modern ammunition is usable. Therefore, the statute in ambiguous and will not support a conviction.**

**The only other circuits to address this issue, the 2nd Circuit (published) and the 7th Circuit (unpublished), disagree** (cites omitted).

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

* * * *

## 5th CIRCUIT

***U.S. v. Pando Franco,*** 2007 U.S. App. LEXIS 23362, October 04, 2007

**Evidence of post-arrest, post *Miranda* silence is admissible because of the knowing, intelligent, and voluntary waiver of *Miranda* rights. Silence in the face of questions about**

**silence is not an exercise of the privilege against self-incrimination at that time. Answering questions about post-arrest, pre- and post-*Miranda* silence allows the entire conversation, including the implicit references to silence contained therein, to be used as substantive evidence of guilt. The admission of such evidence of silence at trial does not violate the Fifth Amendment privilege against self-incrimination.**

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

* * * *

## 6th CIRCUIT

***U.S. v. Wilson,*** 2007 U.S. App. LEXIS 25289, October 29, 2007

**The so-called "automatic companion" rule whereby any companion of an arrestee would be subject to a cursory pat-down reasonably necessary to give assurance that they are unarmed is rejected. The *Terry* requirement of reasonable suspicion under the circumstances has not been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates. Although the government can rely on the fact that the defendant's traveling companion was found to be carrying a weapon as *part* of the basis for establishing reasonable suspicion with regard to the defendant, the government must point to additional specific and articulable facts in order to satisfy *Terry.***

**There is nothing about being seated in a car which is itself suspicious. The fact that a person is seated in a vehicle does not create a different *Terry* frisk test, but instead is simply a relevant consideration under the totality of the circumstances.**

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

* * * *

## 8th CIRCUIT

***Brockinton v. City of Sherwood,*** 2007 U.S. App. LEXIS 23259, October 04, 2007

**To establish a violation of due process of law under the Fourteenth Amendment by conducting an inadequate investigation, the plaintiff must show that the failure to investigate was intentional or reckless, thereby shocking the conscience. Negligent failure to investigate does not violate due process. Qualified immunity protects officers from "mistaken judgments."**

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

* * * *

***U.S. v. Kattaria,*** 2007 U.S. App. LEXIS 23365, October 05, 2007

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

**The same Fourth Amendment reasonable suspicion standard that applies to *Terry* investigative stops applies to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. The traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. Factors justifying application of this standard, rather than probable cause, are "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives." The "practical alternatives" factor provides good reason to shift the analysis when the issue is the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Thermal imaging information provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search.* If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.**

**The 9th Circuit disagrees and requires probable cause for a thermal imaging warrant** (cite omitted)**.**

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

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