

THE FEDERAL LAW ENFORCEMENT - INFORMER -

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT
OFFICERS

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>.

This edition of *The Informer* may be cited as "1 INFORMER 07".
(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 Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Division.

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

**** Just Added ****

- Protective Sweeps
- Search Incident to Arrest
- Consent

To be Posted Soon

- Mobile Conveyances
- Exigent Circumstances
- Plain View

HOT ISSUES

Supreme Court cases and emergent issues

Posted Now

- Consent Searches – *GA v. Randolph*
- Anticipatory Warrants – *US v. Grubbs*

**** Just Added ****

- GPS Tracking

Click [HERE](#) to download or listen

New ADDED FEATURE to the LGD Web Site

“What’s New”

This page lists and links you to the 10 most recent additions to the web site. You can quickly access the items you have not reviewed. Look for the link in the upper left corner of the main page or click [HERE](#).

E-mail your comments and suggestions to FLETC-LegalTrainingDivision@dhs.gov

IN THIS ISSUE

CIRCUIT COURTS OF APPEALS CASE SUMMARIES

3rd CIRCUIT

U.S. v. Jones, 2006 U.S. App. LEXIS 31926, December 28, 2006

Health care fraud in violation of 18 U.S.C. § 1347(2), requires misrepresentation by the defendant in connection with the delivery of, or payment for, health care benefits, items, or services.

An employee’s theft of money already paid by patients is not “in connection with the delivery of or payment for health care benefits.”

Fraud is different from theft. Theft is the taking of another’s property by trespass with intent to deprive permanently the owner of the property. Fraud means to cheat or wrongfully deprive another of his property by deception or artifice. An employee’s implicit promise not to steal from the employer cannot be the basis for a fraud.

Instead, see 18 U.S.C. § 669, theft or embezzlement in connection with healthcare.

Click [HERE](#) for the court’s opinion.

* * * *

4th CIRCUIT

U.S. v. Jones, 2006 U.S. App. LEXIS 31514, December 22, 2006

Although the victim’s minor status is a fact which the prosecution must prove, defendant’s

knowledge of the victim's minority is not an element of the offense of 18 U.S.C. § 2423(a), transportation of minors for illegal sexual activity.

All four circuits that have addressed this issue, the 2nd, 3rd, 9th, and 10th Circuits, agree. (cites omitted).

Click [HERE](#) for the court's opinion.

* * * *

5th CIRCUIT

U.S. v. Newman, 2006 U.S. App. LEXIS 29813, December 5, 2006

Officers may not impermissibly create exigent circumstances by revealing their presence in order to alert suspects who would, in response, destroy evidence or put the police in danger. Whether the exigent circumstances are impermissibly manufactured is determined by "the reasonableness and propriety of the investigative tactics that generated the exigency." The "knock and talk" approach has been recognized as legitimate, and the officers did not manufacture an exigency by employing this legitimate investigative tactic.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Maldonado, 2006 U.S. App. LEXIS 30519, December 12, 2006

There is no general "security check" exception to the warrant requirement. However, depending on the circumstances, a "protective sweep" may be conducted to protect the safety of police officers or others. There must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. The protective sweep doctrine may apply even if the arrest occurs outside the home and even when the agents have no certain knowledge that other individuals are in the home. However, lack of information alone cannot provide an articulable basis upon which to justify a protective sweep.

Fear for officer safety may be reasonable during drug arrests, even in the absence of any particularized knowledge of the presence of weapons. In drug dealing it is not uncommon for traffickers to carry weapons.

To determine reasonableness, look to the totality of the circumstances and for both direct and circumstantial evidence. The brief time available to conduct surveillance, the exposure of the agents in the open area, the opening and closing of the door during the arrest, and the reasonable expectation that weapons are present during drug transactions are

sufficient circumstantial evidence to support a finding that the agents' fear was reasonable.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Penaloza-Duarte, 2006 U.S. App. LEXIS 31299, December 20, 2006

To convict for possession of methamphetamine with intent to distribute, the prosecution must prove that the defendant (1) knowingly (2) possessed methamphetamine (3) with the intent to distribute it.

To prove that a defendant “aided and abetted,” the prosecution must also prove that the defendant associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture succeed. “Association” means that the defendant shared in the principal’s criminal intent (in this case, specific intent to distribute). “Participation” means that the defendant engaged in some affirmative conduct designed to aid the venture or to assist the perpetrator of the crime. Thus, a defendant must share in the intent to commit the offense as well as play an active role in its commission. It is not enough to show that the defendant engaged in otherwise innocent activities that just happened to further the criminal enterprise.

Click [HERE](#) for the court's opinion.

* * * *

8th CIRCUIT

U.S. v. Jones, 2006 U.S. App. LEXIS 31285, December 20, 2006

During the execution of a premises search warrant, officers may conduct a protective sweep of a vehicle not on the curtilage but parked on an adjacent public street if articulable facts support a reasonable belief that it harbors someone who may pose a danger to them.

Federal Rule of Criminal Procedure 41 (and 18 U.S.C. § 3109) applies when a warrant is sought by a federal law enforcement officer or when the search is “federal in character.” Searches may be “federal in character” if there is significant federal involvement in the search. Federal involvement is determined by considering factors such as the existence of an extensive joint state-federal investigation involving the defendant, a joint state-federal application for or execution of the search warrant, and whether federal agents used state officers and more flexible state procedures as a means of avoiding the strictures of Rule 41. Federal Special Agents, as well as Deputy U.S. Marshals, permanently detailed to the Career Criminal Unit of the Kansas City, Missouri Police Department (“KCPD”), acting at all times under the command and supervision of the KCPD, were participating as “state officers” in the execution of a state search warrant. There was no expectation of federal

prosecution. Therefore, Rule 41, requiring application for a search warrant to a Federal Magistrate Judge, did not apply.

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Davis, 2006 U.S. App. LEXIS 31884, December 28, 2006

Protective sweeps are not allowed in all cases, regardless of departmental policies to conduct a sweep of a house during *every* home arrest as a matter of course. Each protective sweep must be justified by articulable facts on an individualized basis.

Click [HERE](#) for the court's opinion.

* * * *

9th CIRCUIT

U.S. v. Luong, 2006 U.S. App. LEXIS 31952, December 26, 2006

Under 18 U.S.C. § 2518(3), a federal district judge, upon proper showing, may authorize “interception of . . . electronic communications within the territorial jurisdiction of the court in which the judge is sitting.” The court in one district may authorize interception of communications to and from a mobile phone when that phone and its area code are located outside of the issuing court's district but the government's listening post is located within it. The intercepted communications are first heard by the government within the issuing court's district. An “interception” occurs where the tapped phone is located *and* where law enforcement officers first overhear the call.

The 2nd, 5th, and 7th Circuits agree. (cites omitted).

Click [HERE](#) for the court's opinion.

* * * *

U.S. v. Nobriga, 2006 U.S. App. LEXIS 32040, December 29, 2006

18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by one previously convicted of a “misdemeanor crime of domestic violence,” does not require that the misdemeanor statute charge a domestic relationship as an element. Section 922(g)(9) requires only that the misdemeanor have been committed against a person who is in one of the domestic relationships specified under 18 U.S.C. § 921(a)(33)(A)(ii).

All seven circuits that have addressed this issue, the 1st, 2nd, 5th, 8th, 11th, D.C, and Federal Circuits, agree. (cites omitted).

The phrase “physical force” in the definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the

intentional *violent use of force against the body of another individual*. Crimes that involve the reckless use of force cannot be considered “crimes of violence.”

All three circuits that have addressed this issue, the 1st, 10th, and 11th Circuits, agree. (cites omitted).

Click [HERE](#) for the court’s opinion.

* * * *

10th CIRCUIT

U.S. v. Torres-Castro, 2006 U.S. App. LEXIS 30420, December 12, 2006

“Protective sweeps” are only permitted incident to an arrest. (The court has twice refused to authorize protective sweeps absent arrest (cites omitted)).

The 8th Circuit and one panel of the 9th Circuit agree. (cites omitted).

A majority of circuits have extended the protective sweep doctrine to cases where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest. See, e.g., 1st, 2nd, 5th Circuits, and another panel of the 9th Circuit. (cites omitted).

Protective sweeps, wherever they occur, may precede an arrest, and still be “incident to that arrest,” so long as the arrest follows quickly thereafter. The time at which an officer forms the intent to arrest is not determinative. To be “incident to an arrest,” there must have been a legitimate basis for the arrest that existed before the sweep. The legitimate basis for an arrest is purely an objective standard and can be for any crime, not merely that for which the defendant is ultimately charged after the protective sweep.

Click [HERE](#) for the court’s opinion.

* * * *

11th CIRCUIT

U.S. v. Evans, 2006 U.S. App. LEXIS 31744, December 26, 2006

Under 18 U.S.C. § 1343A, wire fraud, an unsolicited fax from the victim to the defendant is “for the purpose of executing” the scheme if it is “incident to an essential part of the scheme.” Transmissions after a scheme has “reached fruition” cannot have been “for the purpose of executing” the scheme. A scheme has “reached fruition” when it is “fully consummated.” Transmissions after the money is obtained may nevertheless be “for the purpose of executing” the fraud if designed to conceal a fraud, by lulling a victim into inaction. As such, they constitute a continuation of the original scheme to defraud. The success of the lulling effort is immaterial.

A transmission from the victim who recognizes the likelihood of fraud and threatens to sound the alarm if not swiftly satisfied, may not be in furtherance of the scheme if its “only likely effect would be to further detection of the fraud.”

Click [HERE](#) for the court’s opinion.