

THE FEDERAL LAW ENFORCEMENT —INFORMER—

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

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This edition of *The Informer* may be cited as "11 INFORMER 08".
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Supreme Court Preview

Our annual review of the law enforcement and criminal law cases to be decided by the Court this term.

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Supreme Court Law Enforcement Cases October 2008 Term

FOURTH AMENDMENT

Search Incident to Arrest

Herring v. United States
492 F. 3d 1212 (11th Cir. 2007)

Does the Fourth Amendment require suppression of evidence found during a search incident to an arrest when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent?

Arizona v. Gant
216 Ariz. 1 (2007)

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

Terry Frisk

Arizona v. Johnson
217 Ariz. 58 (2007)

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

Consent

Pearson, et al v. Callahan
494 F3d 891 (10th Cir. 2007)

(1) Several lower courts have recognized a “consent once removed” exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held in this case)?

(2) Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries?

(3) The Supreme Court, on its own, directed the parties to also brief the following question: Should the court’s decision in *Saucier v. Katz*, 533 U.S. 194 (2001) be overruled?

DEFENDANT STATEMENTS

Sixth Amendment Right to Counsel

Montejo v. Louisiana
974 So.2d 1238 (2008)

When an indigent defendant’s right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to “accept” the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

Kansas v. Ventris
285 Kan. 595 (2008)

Is a criminal defendant’s voluntary statement obtained in the absence of a knowing and voluntary waiver of the Sixth Amendment right to counsel admissible for impeachment purposes?

18 U.S.C. 3501 and FRCrP 5(a)

Corley v. United States

500 F.3d 210 (3rd Cir. 2007)

Must a confession taken more than six hours after arrest and before presentment (Initial Appearance) be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge?

FEDERAL CRIMINAL STATUTES

United States v. Hayes

482 F3d 749 (4th Cir. 2007)

Title 18 U.S.C. § 922(g)(9) makes it a crime for any person convicted of a “misdemeanor crime of domestic violence” to possess a firearm. To qualify as a “misdemeanor crime of domestic violence” under 18 U.S.C. 921(a)(33)(A), must an offense have as an element a domestic relationship between the offender and the victim?

Flores-Figueroa v. United States

274 Fed. Appx. 501 (8th Cir. 2008)

To prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), does the Government have to show that the defendant knew that the means of identification he used belonged to another person?

CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Boskic, 2008 U.S. App. LEXIS 23062, October 22, 2008

The quasi-coercive nature of an official immigration interview in a federal building, whether the door is open or not, is a factor to be considered in deciding whether a confession was given voluntarily because it would be naive to ignore the perception -- indeed fear-- of all non-citizens in the United States that immigration authorities control their fate. The following factors also weigh against voluntariness: (1) the agents' decision not to inform Boskic of the nature of the offenses that they suspected he had committed, (2) the absence of counsel during the interview, and (3) Boskic's nervousness and hesitancy at the outset of the interview.

The Supreme Court has never elaborated on what instruments beyond indictment and information would constitute a "formal charge" for purposes of the Sixth Amendment right to counsel. A federal complaint does not qualify as such, primarily because of its limited role as the precursor to an arrest warrant. The process of securing a federal criminal complaint does not involve the appearance of the defendant before a judicial officer. It is therefore unlike a preliminary hearing or arraignment. Nor does the process of securing a federal criminal complaint require, by statute or rule, the participation of a prosecutor. It is therefore unlike the procedures for securing an indictment or information, which require the participation of a prosecutor and, in that sense, manifest the "commitment to prosecute."

The 2nd, 3rd, 4th, 6th, 8th, 9th, and 11th circuits agree (cites omitted).

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

2nd CIRCUIT

U.S. v. Luna, 2008 U.S. App. LEXIS 21575, October 16, 2008

A conspiracy conviction requires proof that two or more persons agreed to participate in a joint venture intended to commit an unlawful act. A transfer of drugs from a seller to a buyer necessarily involves agreement, however brief, on the distribution of a controlled substance from the former to the latter. However, while the illegal sale of narcotics is a substantive crime requiring an agreement by two or more persons, the sale agreement itself

cannot be the conspiracy to distribute, for it has no separate criminal object. Without more, the mere buyer-seller relationship is insufficient to establish a conspiracy. The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy. They have no agreement to advance any joint interest.

However, this rationale does not apply where, for example, there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use. Under such circumstances, the participants in the transaction may be presumed to know that they are part of a broader conspiracy. A defendant may be deemed to have agreed to join a conspiracy if there is something more, some indication that the defendant knew of and intended to further the illegal venture, that he somehow encouraged the illegal use of the goods or had a stake in such use.

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

7th CIRCUIT

U.S. v. Franklin, 2008 U.S. App. LEXIS 22305, October 27, 2008

The odor of burning marijuana provides an officer with probable cause to search the passenger compartment and containers within the passenger compartment. A police dog's alerting to the presence of narcotics provides additional probable cause to search other parts of the vehicle for narcotics.

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

9th CIRCUIT

U.S. v. Seljan, 2008 U.S. App. LEXIS 22056, October 23, 2008

On rehearing of a previous panel decision, the full court decides:

The search of the FedEx package and reading of a personal letter by customs officials occurred at the functional equivalent of the border, did not involve the destruction of property, was not conducted in a particularly offensive manner, and was not a highly intrusive search of the person. Therefore, it did not require any articulable level of suspicion.

There was intrusion into defendant's privacy, but the degree of intrusion must be viewed in perspective. The defendant voluntarily gave the package containing the letter to FedEx for

delivery to someone in the Philippines, with knowledge that it would have to cross the border and clear customs. The reasonable expectation of privacy for that package was necessarily tempered.

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