Department of Homeland Security
Federal Law Enforcement Training Center
Legal Division

February 2008

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.

This edition of *The Informer* may be cited as "2 INFORMER 08".
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4th Amendment Roadmap

Hot Issues

4th AMENDMENT ROADMAP

A step by step guide to searches

Posted Now

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- **Reasonable Expectation of Privacy 1 and 2**
- **Probable Cause 1 and 2**
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- **Consent**
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HOT ISSUES

Supreme Court cases and emergent issues

Posted Now

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Coming Soon

- **Interviewing Government Employees**

SELF INCRIMINATION ROADMAP

A step by step guide to Lawful Interviews

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- ***Miranda* Waivers and Invocations**
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MILITARY INTERROGATIONS

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

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

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Supreme Court
Case Summaries

Ali v. Federal Bureau of Prisons, 2008 U.S. LEXIS 1212, January 22, 2008

Under the Federal Tort Claims Act (FTCA), the United States waives sovereign immunity and can be liable for torts committed by federal employees acting in the scope of their employment. However, 28 U.S.C. § 2680 carves out exceptions to this waiver of immunity, specifically noting that the U.S. does not waive sovereign immunity for claims arising from detention of property by "any officer of customs or excise or *any other law enforcement officer*."

The Supreme Court holds that the phrase "any other law enforcement officer" in § 2680 is to be interpreted broadly. Accordingly, it prohibits claims against the United States for the unlawful detention of property by any law enforcement officer (emphasis added).

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

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CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

4th CIRCUIT

U.S. v. Reaves, 2008 U.S. App. LEXIS 265, January 08, 2008

To protect against mischief and harassment by an unknown, unaccountable informant, an anonymous tip must be suitably corroborated and must be reliable in its assertion of illegal conduct.

Although a caller's running account of the suspect's movement is of considerable assistance to the police in locating and stopping him and may contribute to the presence of reasonable suspicion, it may not, by itself, serve to validate the underlying tip.

When an unidentified tipster provides enough information to allow the police to readily trace her identity, thereby subjecting herself to potential scrutiny and responsibility for the

allegations, a reasonable officer may conclude that the tipster is credible.

An anonymous tipster's unconfirmed, blow-by-blow assertion of the basis of her knowledge is not sufficient by itself to make the tip reliable. Some corroboration is required because a fraudulent tipster can fabricate her basis of knowledge.

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

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U.S. v. Mowatt, 2008 U.S. App. LEXIS 1438, January 25, 2008

Even when officers never physically enter the room, a search under the Fourth Amendment occurs when officers gain *visual* access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority. Although officers have every right to knock on the door to try to talk to the occupant about a complaint, without a warrant, they cannot *require* him to open it.

Having first detected the odor of marijuana, the officers needed only to seek a warrant before confronting the apartment's occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes. Having created the "exigency" themselves for no apparent reason, the officers cannot rely on it to dispense with the warrant requirement.

The 3rd, 5th, 7th, 8th, and 11th circuits agree (cites omitted).

The good faith exception to the exclusionary rule does not apply when the warrant is based on information obtained in an illegal, warrantless search because the constitutional error was made by the officer, not by the magistrate.

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

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6th CIRCUIT

Pennington v. Metro. Gov't of Nashville & Davidson County, 2008 U.S. App. LEXIS 447, January 10, 2008

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

A breathalyzer test administered to an off-duty police officer does not amount to an unconstitutional seizure.

A person is seized only when, by means of physical force or a show of authority, his freedom of movement is restrained. A person is not seized simply because he believes that

he will lose his job. The Fourth Amendment does not protect against the threat of job loss.

Police officers: (1) may reasonably believe, based upon their workplace obligations to comply with department's guidelines and regulations, that their *employment relationship* will be severed if they refuse or disobey an order, direction, or request to accompany detectives to the department's headquarters; but (2) lack any reasonable basis to feel that they will be *restricted by force or a show of lawful authority in their freedom of movement or their ability to terminate the encounter.*

The 7th Circuit agrees (cite omitted).

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

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U.S. v. Nichols, 2008 U.S. App. LEXIS 788, January 15, 2008

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

Search-incident-to-arrest authority extends to the locked glove box in the passenger compartment of a vehicle.

The 7th, 8th, and 11th circuits, the only others that have considered this specific issue, agree (cites omitted).

A suspect impliedly waives his *Miranda* rights by voluntarily speaking with an officer after affirming that he understands these rights. Such a waiver can be clearly inferred from the actions and words of the person interrogated. While it does not require much to invoke the right to silence, it does require something that indicates a desire not to be questioned. Repeated, false denials of identity are not refusals to answer all police questions.

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

*****

U.S. v. Ridner, 2008 U.S. App. LEXIS 977, January 17, 2008

A defendant charged with being a felon-in-possession of a firearm may assert the necessity defense. This defense is limited to rare situations and should be construed very narrowly.

The defendant must produce evidence of the following five requirements:

(1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;
(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; . . . and
(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

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

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7th CIRCUIT

U.S. v. Upton, 2008 U.S. App. LEXIS 422, January 09, 2008

A *Miranda* waiver can be either express or implied. Waiver can never occur through "mere silence," but a person can act as though he has waived his rights without expressly saying so. Waiver may be inferred from the defendant's conduct, even when he has refused to sign a waiver form.

In assessing the voluntariness of a waiver, physical force is certainly a defining circumstance—and possibly a dispositive one. However, its incidental use can sometimes be excused where the other circumstances of the interview show a voluntary waiver. The relevant inquiry is the totality of the circumstances, looking to gaps in time between the use of force and the waiver, changed interrogators or location, defendant's background, experience and conduct, and renewed *Miranda* warnings.

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

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U.S. v. Tyler, 2008 U.S. App. LEXIS 446, January 10, 2008

A reasonable person in defendant's circumstances would not have believed he was free to leave. Although the encounter took place on a public street and the officers did not draw their weapons or (at least initially) lay hands on Tyler, they told him he was violating the law, took and retained his identification from him while they ran a warrant check, and told him he could not leave until the warrant check was completed. Defendant was seized.

When officers only generally identify themselves as investigators and immediately return the identification and travel documents, the initial consensual encounter does not ripen into a seizure.

An investigative detention cannot be justified by a mistaken belief that the law prohibits carrying open alcoholic beverages in public (a mistake of law as opposed to a mistake of fact).

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

U.S. v. Cazares-Olivas, 2008 U.S. App. LEXIS 1851, January 29, 2008

Failure by the agent, Assistant U.S. Attorney, and Magistrate Judge to follow the procedures for obtaining a telephonic search warrant as set out in FRCrP 41 means that the warrantless search, even though verbally approved by the judge, violated the Fourth Amendment. (This was the only time within the last 15 years, if not longer, that a telephonic warrant had been requested in the Western District of Wisconsin).

The exclusionary rule is used for only a subset of constitutional errors. Permitting people to get away with crime is too high a price to pay for errors that either do not play any causal role in the seizure (the inevitable-discovery situation) or stem from negligence rather than disdain for constitutional requirements (the good faith reliance situation). Had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The agents would have conducted the same search and found the same evidence (the inevitable-discovery situation).

Violations of federal rules alone do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval.

The 10th circuit agrees (cite omitted).

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

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8th CIRCUIT

U.S. v. Banks, 2008 U.S. App. LEXIS 326, January 09, 2008

Ordinarily, a warrant is necessary before police may open a closed container because by concealing the contents from plain view, the possessor creates a reasonable expectation of privacy. However, like objects that sit out in the open, the contents of some containers are treated similarly to objects in plain view. Some containers (for example a gun case) by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance. This exception is limited to those rare containers that are designed for a single purpose. Because the distinctive configuration of such containers proclaims their contents, the contents cannot fairly be said to have been removed from a searching officer's view. Because a gun, possessed by a felon, is always evidence of a crime, no warrant is necessary to search a bag whose size and shape suggests it contains a gun.

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

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Moore v. Indehar, 2008 U.S. App. LEXIS 2243, February 01, 2008

Not every police officer act that results in a restraint on liberty necessarily constitutes a seizure. The restraint must be effectuated "through means intentionally applied." Bystanders and hostages are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout. To establish a Fourth Amendment claim, a bystander must show that the officer intended to seize him through the means of firing his weapon at him.

The 1st, 2nd, 4th, 6th, and 10th circuits agree (cites omitted).

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

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9th CIRCUIT

Saleh v. Fleming, 2008 U.S. App. LEXIS 39, January 03, 2008

Incarceration does not automatically render an interrogation custodial. The need for a *Miranda* warning to a person in custody for an unrelated matter will only be triggered by some restriction on his freedom of action in connection with the interrogation itself.

The 8th and 9th circuits agree (cites omitted).

Under the "cat out of the bag" theory set forth in *United States v. Bayer*, 331 U.S. 532 (1947), after an accused has once let the cat out of the bag by confessing, he is never thereafter free of the psychological and practical disadvantages of having confessed. In such a sense, a later confession always may be looked upon as fruit of the first. Under *Oregon v. Elstad*, 470 U.S. 298 (1985), the "cat out of the bag" theory does not apply where, subsequent to a technical *Miranda* violation, a confession is voluntarily made under circumstances not requiring a *Miranda* warning.

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

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Bingue v. Prunchak, 2008 U.S. App. LEXIS 805, January 15, 2008

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

Police officers involved in *all* high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm. Only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience which is necessary for a due process violation under the Fourteenth Amendment.

The 8th circuit agrees (cite omitted).

The 3rd, 6th, 9th, and 10th circuits disagree, holding that the intent to harm standard only applies to emergency and nearly instantaneous pursuits, and that a deliberate indifference standard applies when the circumstances are such that actual deliberation is practical (cites omitted).

Regarding the emergency exigency that allows a warrantless search, the court overrules its prior decision (cite omitted) and adopts a two pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need. In accordance with *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006), the subjective motive of the officer is irrelevant.

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

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DC CIRCUIT

U.S. v. Cindy Sheehan, 2008 U.S. App. LEXIS 479, January 11, 2008

36 C.F.R. § 7.96(g)(2), a National Park Service ("NPS") regulation, governs demonstrations in all park areas in the National Capital Region, including the White House sidewalk, and provides that demonstrations involving more than 25 people may be held only pursuant to a permit. In order to sustain a conviction the government must prove that the defendant "knowingly" violated the regulation.

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

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