Department of Homeland Security
Federal Law Enforcement Training Center
Legal Division

March 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 "3 INFORMER 08".
(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**
- **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**
- **Use of Force Continuum**

Coming Soon

- **Interviewing Government Employees**

SELF INCRIMINATION ROADMAP

A step by step guide to Lawful Interviews

- ***Miranda* and the 5th Amendment**
- ***Miranda* Waivers and Invocations**
- **6th Amendment Right to Counsel**
- **Comparing the 5th and 6th Amendment Rights to Counsel**

MILITARY INTERROGATIONS

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

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

Click **HERE** to download or listen

CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

5th CIRCUIT

U.S. v. Mata, 2008 U.S. App. LEXIS 2966, February 11, 2008

Lawful arrest is not an indispensable element of a protective sweep. The government need not prove the sweep was incident to a lawful arrest.

Exigent circumstances do not include the likely consequences of the government's own actions or inactions. The moment to determine whether exigent circumstances exist is before the defendant is aware of the officers' presence.

There is a split of circuits on both issues. Refer to the **Subject Matter Case Digests** on "Protective Sweeps" and "Exigent Circumstances" on the website.

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

* * * *

8th CIRCUIT

U.S. v. Hughes, 2008 U.S. App. LEXIS 4011, February 25, 2008

There is no *per se* rule prohibiting Terry stops to investigate a completed misdemeanor. To determine whether such a Terry stop is constitutional, balance the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. Under this test, the nature of the misdemeanor and potential threats to citizens' safety are important factors.

Of the three other Circuit Courts that have addressed this issue –

The 9th and 10th Circuits agree (cites omitted).
The 6th Circuit disagrees, adopting a *per se* rule prohibiting such stops (cite omitted)**.**

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

*****

9th CIRCUIT

Anderson v. Terhune, 2008 U.S. App. LEXIS 3227, February 15, 2008

"I plead the Fifth" is an unambiguous, unequivocal invocation of the right to remain silent. From television shows like "Law & Order" to movies such as "Guys and Dolls," we are steeped in the culture that knows a person in custody has "the right to remain silent." *Miranda* is practically a household word. And surely, when a criminal defendant says, "I plead the Fifth," it doesn't take a trained linguist, a Ph.D, or a lawyer to know what he means. In popular parlance and even in legal literature, the term "Fifth Amendment" in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination. Failure to scrupulously honor such an invocation makes the subsequent statements inadmissible.

Playing dumb and asking, "Plead the Fifth. What's that?" is not a legitimate clarifying question. This effort to keep the conversation going was almost comical and, at best, was mocking and provoking the defendant.

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

*****

U.S. v. Murphy, 2008 U.S. App. LEXIS 3505, February 20, 2008

Consent to search given by a co-tenant is ineffective (as to the objector) when one tenant has already refused consent, even if the objecting tenant is not physically present at the scene because he has been arrested and taken away. If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Once a co-tenant has registered his objection, his refusal to grant consent remains effective (as to him) barring some objective manifestation that he has changed his position and no longer objects.

When an objection has been made by either tenant prior to the officers' entry, the search is not valid as to the objector and no evidence seized may be used against him.

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

*****

10th CIRCUIT

Eidson v. Owens, 2008 U.S. App. LEXIS 3149, February 13, 2008

A suspect's consent to search may be tainted by a threat of detention that essentially amounts to an arrest if consent is refused. A threat to hold the suspects—apparently at the end of their driveway—for as long as three days while a warrant was obtained suggests a

detention amounting to arrest. However, such coercion is minimal when, based on a confession and other information, probable cause for arrest exists.

The 9th Circuit agrees (cite omitted).

Tricking or deceiving a suspect into granting consent can be improperly coercive.

Telling the suspects that if they insisted on a search warrant, "the judge would go harder on you in court and you would be considered uncooperative," is coercive, as it indicates that there are punitive ramifications to the exercise of the constitutional right to refuse.

The 3rd and 6th Circuits agree (cites omitted).

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

*****

DC CIRCUIT

U.S. v. Villanueva-Sotelo, 2008 U.S. App. LEXIS 3254, February 15, 2008

To obtain a conviction under section 18 U.S.C. §1028A(a)(1), the "aggravated identity theft" statute, the government must prove the defendant *knew* the means of identification he transferred, possessed, or used actually belonged to "another person." It is insufficient for the government just to show that the means of identification *happened* to belong to another person.

Every other circuit that has construed this language, the 4th, 8th, and 11th Circuits, disagrees (cites omitted).

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

*****