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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 HFLETC-LegalTrainingDivision@dhs.govH. 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: Hhttp://www.fletc.gov/legalH.

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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?**
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- ***Terry* Stop and Frisk**
- **Protective Sweeps**
- **Search Incident to Arrest**
- **Consent**
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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***
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- **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***

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CASE SUMMARIES

SUPREME COURT

Medellin v. Texas, 2008 U.S. LEXIS 2912, March 25, 2008

In 2004, in a case brought by Mexico, the International Court of Justice held that the United States had violated the Vienna Convention on Consular Relations by failing to inform 51 named Mexican nationals of their Vienna Convention rights and that those individuals were entitled to review and reconsideration of their U. S. state-court convictions and sentences. President Bush then issued a memorandum stating that the United States would discharge its international obligations by having State courts give effect to the decision. However, state rules governing challenges to criminal convictions prohibited further consideration of the cases.

While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis. Regarding the Vienna Convention on Consular Relations, Congress did not enact enabling statutes and the treaty language is not self-executing. Therefore, states are not required to consider a successive appeal otherwise prohibited by state rules.

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

In ***Sanchez-Llamas v. Oregon,*** decided on June 28, 2006, the Supreme Court held that failure to comply with the Vienna Convention on Consular Relations does not trigger the exclusionary rule to suppress statements made to state law enforcement officers by the foreign national.
(Click **QR-7-3**)

Two federal circuits have decided whether a violation of this treaty can form the basis of a lawsuit for damages under 42 U.S.C. § 1983.

The 7th Circuit says yes. *Jogi v. Voges*, 480 F.3d 822 (2007). (Click **HERE**).
The 9th Circuit says no. *Cornejo v. County of San Diego*, 504 F.3d 853 (2007)
(Click **10 Informer 07**).

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CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. LaFortune, 2008 U.S. App. LEXIS 5684**,** March 18, 2008

The best practice is for an applicant seeking a warrant based on images of alleged child pornography to append the images or provide a sufficiently specific description of the images to enable the magistrate judge to determine independently whether they probably depict real children.

Neither expert testimony nor "informed lay opinion" is required to support a judge's search warrant probable cause determination that the alleged child pornography involves real children rather than virtual children.

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

* * * *

U.S. v. Rogers, 2008 U.S. App. LEXIS 6171, March 25, 2008

The term "photos" certainly includes "developed print photographs." Given the current state of technology, the term "photos" also reasonably includes images captured on videotapes or by a digital camera. It is reasonable to believe that a videotape could contain "photos." Search of a videotape for "photos" is within the scope authorized by the warrant.

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

* * * *

2nd CIRCUIT

U.S. v. Tran, 519 F.3d 98, March 10, 2008

A defendant's sole occupancy of a vehicle cannot alone suffice to prove knowledge of contraband found hidden in the vehicle. Corroborating evidence, such as nervousness, a false statement, or suspicious circumstances, is necessary to prove this element. Even where drugs are hidden and therefore not immediately visible to the occupant or others, the possibility of discovery may cause an individual with knowledge of the drugs to respond with nervousness to a law enforcement officer's presence. "Nervousness" is one type of evidence that, when considered alongside the defendant's sole occupancy of a vehicle, can support an inference that the defendant knew about the drugs in the hidden compartment.

Nervousness alone is not enough. There must be facts which suggest that the defendant's nervousness or anxiety derives from an underlying consciousness of criminal behavior.

The 5th and 6th Circuits agree (cites omitted).

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

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4th CIRCUIT

Mora v. City of Gaithersburg, 519 F.3d 216, March 04, 2008

(Editor's note: Mora called a healthcare hotline and told the operator that he was suicidal, had weapons in his apartment, and could understand shooting people at work. He ended the call by saying, "I might as well die at work." Police immediately responded, seized Mora in the parking lot, transported him for psychiatric evaluation, searched his apartment, and seized 41 firearms and 5,000 rounds of ammunition).

The officers who seized Mora and his weapons were engaged in a preventive action aimed at incapacitating an individual they had reason to believe intended a crime. Protecting the physical security of its people is the first job of any government, and the threat of mass murder implicates that interest in the most compelling way. Police, then, must be entitled to take effective preventive action when evidence surfaces of an individual who intends slaughter.

To be objectively reasonable in preventative action situations, balancing the government interest against the intrusion, includes consideration of three important factors: (1) the likelihood or probability that a crime will come to pass; (2) how quickly the threatened crime might take place; and (3) the gravity of the potential crime. As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action. The proper application of a balancing test in preventive action cases respects the room for judgment that law enforcement must enjoy in any emergency where lives are on the line.

The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope.

The authority to defuse the threat Mora presented included the authority to take the weapons that made him so threatening.

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

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U.S. v. Mitchell, 518 F.3d 230, March 06, 2008

To be convicted under 18 U.S.C. § 1028A(a)(1), aggravated identity theft, the government must prove that the defendant coupled his use of a name with a sufficient amount of correct, distinguishing information to identify a specific individual. Although there were two real individuals with the name used by defendant on the fake driver's license, the name alone was not sufficiently unique to identify a specific individual.

A government issued driver's license number is a unique identifier belonging to a real person and, as such, identifies a specific individual.

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

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6th CIRCUIT

Floyd v. City of Detroit, 518 F.3d 398, March 06, 2008

The Fourth Amendment prohibits a police officer's use of deadly force to "seize" an unarmed, non-dangerous suspect. Shooting at but missing a suspect is a show of authority that amounts to a "seizure" under the Fourth Amendment when it actually has the intended effect of contributing to the suspect's immediate restraint.

Not all mistakes—even honest ones—are objectively reasonable. Honest but objectively unreasonable use of force mistakes violate the Fourth Amendment.

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

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7th CIRCUIT

U.S. v. White, 519 F.3d 342, March 05, 2008

Sentencing entrapment occurs in situations when a defendant who lacks a predisposition to engage in more serious crimes nevertheless does so as a result of unrelenting government persistence. In this case the government insisted on a certain amount of a certain drug in order to trigger a mandatory minimum sentence under the 21 U.S.C. § 841(b)(1)(A)(iii) - 20 years with a prior felony drug conviction. To overcome this sentencing entrapment argument, the government need not explain or defend its motives, but must show only that the defendant was in fact predisposed to violate the law without extraordinary inducements.

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

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U.S. v. Sanders, 2008 U.S. App. LEXIS 5877, March 21, 2008

In order to convict under 26 U.S.C. § 5861(d) for possession of an unregistered, short-barrel shotgun as defined in 26 U.S.C. § 5845(a), the government must prove intentional possession of a shotgun that the defendant knows to be of an overall length of less than 26 inches or a barrel length of less than 18 inches. Such knowledge can be inferred from evidence that the defendant handled the shotgun if the appearance of the shotgun would have revealed those characteristics. A barrel length of only 11 and 7/16 inches, more than one-third shorter than the legal length, is a large enough difference that it would be obvious to someone who handled it that the barrel was not 18 inches long.

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

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8th CIRCUIT

The full Eighth Circuit Court vacates and reverses the earlier panel decision (as summarized below in 9 Informer 06) dealing with whether the express refusal of a cotenant not present at the scene trumps the consent to search of a cotenant who is present at the scene.

U.S. v. Hudspeth, 459 F.3d 922, **August 25, 2006**

The consent of one who possesses common authority over the premises or effects is valid against the absent person who does not expressly refuse consent. The consent of one cotenant does not overcome the express refusal by another who is physically present. The consent of one cotenant also does not overcome the express refusal by another who is not physically present. When one co-occupant expressly denies consent to search, police must get a warrant.

The court now holds

U.S. v. Hudspeth, 518 F.3d 954, March 11, 2008

The Supreme Court decided in *Georgia v. Randolph*, 547 U.S. 103 (2006), that "a warrantless search of a shared dwelling for evidence over the *express refusal of consent by a physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." (emphasis added). That rule is limited to those situations in which the refusing party is present at the scene. A prior refusal of a cotenant who is not present does not trump the consent of a cotenant at the scene. Police do not have to tell the consenting party that the other cotenant has refused.

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

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U.S. v. Mendoza-Gonzalez, 2008 U.S. App. LEXIS 6475, March 28, 2008

To sustain a conviction for aggravated identify theft in violation of 18 U.S.C. § 1028A(a)(1), the identification used must belong to an actual person. The government does not have to prove that the defendant knew that the identification belonged to an actual person.

The 4th and 11th Circuits agree (cites omitted)**.**
The D.C. Circuit disagrees (cite omitted)**.**

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

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9th CIRCUIT

The full Ninth Circuit has set aside the earlier panel decision and will rehear this case (as summarized below in 2 Informer 07) dealing with whether police, after a long standoff, are required to get a warrant before firing tear gas into a home in which an armed man had barricaded himself.

Fisher v. City of San Jose, 475 F.3d 1049, January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry.*

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

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11th CIRCUIT

U.S. v. Burgest, 2008 U.S. App. LEXIS 5349, March 13, 2008

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

The Sixth Amendment right to counsel is offense specific. When the same conduct violates both state laws and federal laws, the offenses are distinct for purposes of the right to

counsel. The invocation of a Sixth Amendment attorney for the state offenses does not bar federal agents from questioning the suspect about the federal offenses. Voluntary statements obtained by federal agents are admissible in the federal prosecution.

The 1st, 4th, and 5th Circuits agree (cites omitted)**.**
The 2nd and 8th Circuits disagree (cites omitted)**.**

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

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