Department of Homeland Security
Federal Law Enforcement Training Center
Legal Division

May 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 "5 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**
- **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**

Just Added

- **Interviewing Government Employees**

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

Transcripts of each podcast are also available here

The

Department of Homeland Security

Federal Law Enforcement Training Center

Legal Division

and

Department of Justice

DEA Academy

Legal Instruction Section

and

FBI Academy

Legal Instruction Unit

present the second

Federal Law Enforcement Legal Advisors Conference

FLELAC II

“Information Law”

September 3-4, 2008

Bolger Center

Potomac, MD

This conference is designed for Federal Government attorneys who provide legal advice and support to Federal law enforcement agencies and departments.

Additional conference information and registration procedure will follow soon.

CASE SUMMARIES

SUPREME COURT

Baze v. Rees, 128 S. Ct. 1520, April 16, 2008

To constitute cruel and unusual punishment, an execution method must present a "substantial" or "objectively intolerable" risk of serious harm. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain. Kentucky's continued use of the three-drug protocol does not pose an "objectively intolerable risk" of serious harm.

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

* * * *

Burgess v. U.S., 128 S. Ct. 1572, April 16, 2008

Title 21 U.S.C. § 841(b)(1)(A) of the Controlled Substances Act doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a "felony drug offense." "Felony drug offense" in that section is defined exclusively by 21 U.S.C. § 802(44). A state drug offense punishable by more than one year qualifies as a "felony drug offense" even if state law classifies the offense as a misdemeanor.

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

* * * *

Begay v. U.S., 128 S. Ct. 1581, April 16, 2008

Title 18 U. S. C. § 924(e)(1), the Armed Career Criminal Act, imposes a special mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing …"a violent felony." The Act defines "violent felony" as, inter alia, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Even assuming that DUI involves conduct that "presents a serious potential risk of physical injury to another," it is not "a violent felony" because it is simply too unlike the example crimes to indicate that Congress intended that provision to cover it.

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

Virginia v. Moore, 2008 U.S. LEXIS 3674, April 23, 2008

Warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Fourth Amendment. States are free to restrict such arrests however they desire. Such state restrictions do not alter the Fourth Amendment's protections. If states choose to impose higher standards for arrests or searches, those protections must be enforced by recourse to state law.

Officers may perform searches incident to constitutionally permissible arrests to ensure their safety and safeguard evidence. This rule covers any "lawful arrest," meaning any arrest based upon probable cause even if it violates a state statute.

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

****

CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Morales-Aldahondo, 2008 U.S. App. LEXIS 8839**,** April 24, 2008

When evaluating a claim that information in a search warrant affidavit was stale, the timeliness of information is not measured simply by counting the number of days that have elapsed. Instead, the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information is considered.

Three year old information is not stale when supported by the testimony of an agent, based on his experience and training, that people who download child pornography value their collections to such an extent that they keep the images for a period of time, usually years and that a person who uses a computer to access child pornography is likely to use his computer both to augment and to store the collected images. History teaches that collectors prefer not to dispose of their dross, typically retaining obscene materials for years.

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

* * * *

2nd CIRCUIT

Mora v. People of the State of New York, 2008 U.S. App. LEXIS 8870, April 24, 2008

Failure to inform detained aliens of the prospect of consular notification as required by the Vienna Convention on Consular Relations will not support an individual civil action for damages under 42 U.S.C. § 1983 or the Alien Tort Statute.

The 9th Circuit agrees (cite omitted).
The 7th Circuit disagrees (cite omitted).

The 5th and 6th Circuits have ruled in criminal cases that the treaty does not create a judicially enforceable individual right (cites omitted).

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

*****

3rd CIRCUIT

U.S. v. Smith, 2008 U.S. App. LEXIS 7525**,** April 09, 2008

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

The constitutionality of a vehicle impoundment is judged by directly applying the Fourth Amendment reasonableness standard. The Fourth Amendment does not require that there be a standardized policy in place for impoundment under the "community caretaking function."

The 1st Circuit agrees (cite omitted).
The D.C. Circuit disagrees (cite omitted).

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

*****

7th CIRCUIT

U.S. v. Tejada, 2008 U.S. App. LEXIS 7658**,** April 10, 2008

When a warrant would *certainly*, and not merely probably, have been issued had it been applied for, evidence seized without a warrant is admissible under the inevitable discovery doctrine.

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

*****

9th CIRCUIT

U.S. v. Arnold, 2008 U.S. App. LEXIS 8590, April 21, 2008

Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.

The United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity. Generally, searches made at the border are reasonable simply by virtue of the fact that they occur at the border. Searches of closed containers and their contents can be conducted at the border without particularized suspicion. The search of his laptop and its electronic contents is logically no different from the suspicionless border searches of travelers' luggage that the Supreme Court and this court have allowed.

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

*****