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Federal Law Enforcement Training Center
Legal Training Division

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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 Training 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.

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In This Issue

Announcing
the

Police Legal Advisors Training Program (PLATP)

The course is designed for currently employed attorneys for state and local law enforcement agencies and departments. Managers of those agencies and departments are invited on a space available basis.

August 10-14, 2009
Naval Station Mayport, Florida

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for a detailed description of the program and registration form.

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Supreme Court and Circuit Courts of Appeals
Case Summaries

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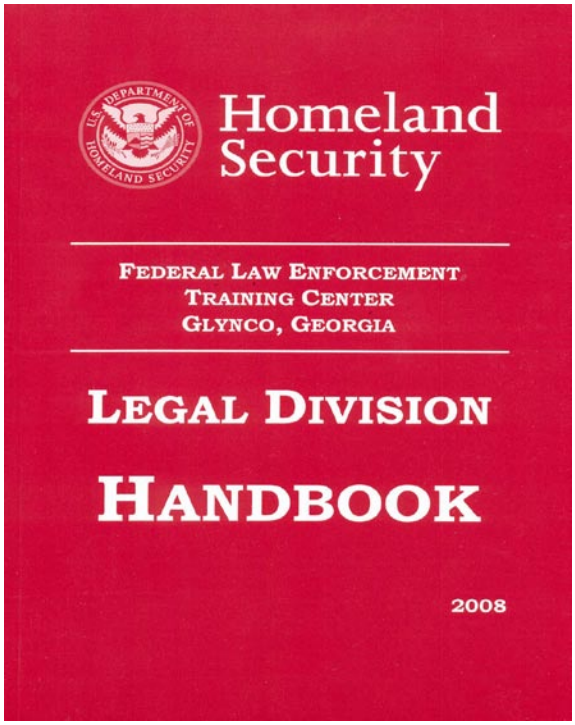

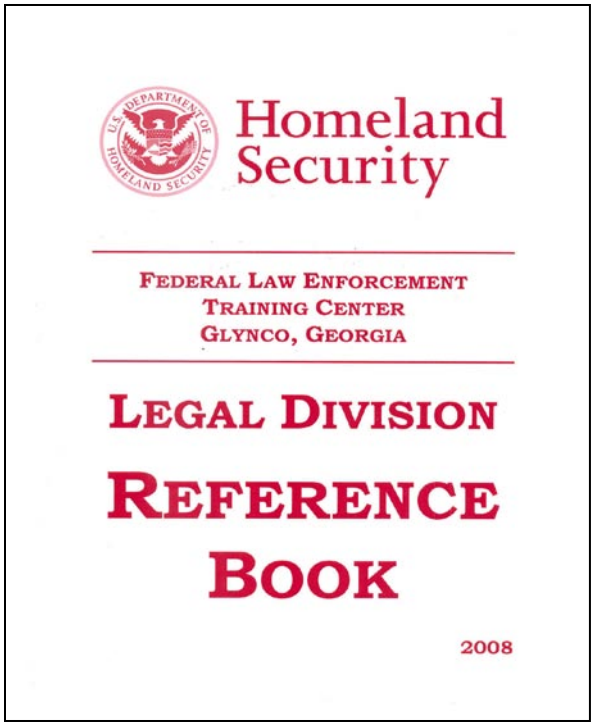

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CASE SUMMARIES

SUPREME COURT

Herring v. United States, 129 S. Ct. 695, January 14, 2009

Based upon erroneous information provided by another law enforcement agency about the existence of an active arrest warrant, defendant was arrested and searched. Evidence was seized. There was, in fact, no active arrest warrant, making the arrest and the search incident to it unlawful.

The exclusionary rule does not apply when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The pertinent analysis is objective, not an inquiry into the arresting officers' subjective awareness.

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

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Pearson v. Callahan, 2009 U.S. LEXIS 591, January 21, 2009

It was highly anticipated that the Court would rule on the issue of "consent once removed." However, the Court made no ruling on "consent once removed."

The "consent once removed" doctrine applies when an undercover officer enters a house by invitation, establishes probable cause to arrest or search and then immediately summons other officers for assistance. The theory is that once someone consents to the government (undercover officer) coming in, then entry by the backup officers is no greater intrusion and is covered by the initial consent – in for a penny, in for a pound. Four circuits – the 6th, 7th, 9th, and 10th – have adopted the doctrine. The 6th and 7th circuits have extended the doctrine to apply to situations in which an informant, not an undercover officer, is invited in. The 9th and 10th circuits limit it to undercover officers.

Instead of ruling on "consent once removed," the Court found that the officers were entitled to qualified immunity based on the law of the four circuits. The focus of the Court's opinion deals with how lower courts should analyze cases to determine qualified immunity. Basically, courts are no longer required to first find that a Constitutional violation has occurred before considering whether the law was clearly established.

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

Arizona v. Johnson, 2009 U.S. LEXIS 868, January 26, 2009

In a traffic stop setting, the first *Terry* condition - a lawful investigatory stop - is met whenever police lawfully detain an automobile and its occupants for a traffic violation. Police need not, in addition, have cause to believe any occupant of the vehicle is involved in criminal activity. All that is necessary to justify a frisk of the driver or a passenger during a traffic stop is reasonable suspicion that the person subjected to the frisk is armed and dangerous.

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

(Editor's note: On a closely related issue, one federal circuit has held that a *Terry* stop and a *Terry* frisk are "two independent actions, each requiring separate justifications." *U.S. v. Orman*, 486 F.3d 1170, (9th Cir. 2007) and *U.S. v. Salinas*, 246 Fed. Appx. 480 (9th Cir. 2007). In both cases the Ninth Circuit held that an officer may conduct a frisk during a voluntary/consensual encounter if he has a reasonable suspicion that the subject is presently armed and dangerous. The Supreme Court declined to hear the appeal of both cases.)

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CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Stewart, 551 F.3d 187, January 08, 2009

A traffic stop based on a reasonable suspicion of a traffic violation is lawful under the Fourth Amendment. Probable cause of a traffic violation is not required.

The 3rd, 5th, 8th, 9th, and D.C. circuits agree (cites omitted)**.**
The 6th circuit disagrees (cite omitted)**.**

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

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U.S. v. Draper, 2009 U.S. App. LEXIS 903, January 20, 2009

To sustain a witness retaliation charge, 18 U.S.C. § 1513, the government must establish three elements: (1) the defendant engaged in conduct that caused or threatened a witness with bodily injury; (2) the defendant acted knowingly, with the specific intent to retaliate against the witness for information the witness divulged to law enforcement authorities about a federal offense; and (3) the officials to which the witness divulged information were federal agents. A witness's interactions with local authorities, which just happen to be

eventually reported to federal authorities, does not provide the requisite federal contacts under the statute.

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

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4th CIRCUIT

U.S. v. Murphy, 552 F.3d 405, January 15, 2009

Deciding this issue for the first time in a published opinion, the Court holds:

Because of the "manifest need . . . to preserve evidence," officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest. Officers need not first ascertain the cell phone's storage capacity. Such would be an unworkable and unreasonable rule. It is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone. Rather, it is very likely that in the time it takes for officers to ascertain a cell phone's particular storage capacity, the information stored therein could be permanently lost.

The 5th and 7th circuits agree (cites omitted).

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

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6th CIRCUIT

U.S. v. Paull, 551 F.3d 516, January 09, 2009

A search warrant affidavit must allege facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. The expiration of probable cause is determined by the circumstances of each case and depends on the inherent nature of the crime. Because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography. The affidavit contained evidence that defendant had visited or subscribed to multiple websites containing child pornography over a two-year period and an expert description of the barter economy in child pornography. This made it likely that defendant was involved in an exchange of images and, therefore, likely to have a large cache of such images in order to facilitate that participation. Such information supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.

The 2nd, 5th, and 9th circuits agree (cites omitted)**.**

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

U.S. v. Panak, 552 F.3d 462, January 09, 2009

On the issue of "custody" for *Miranda* purposes, the question is not whether the interviewee knew of evidence that she may have committed a crime. And, the question is not whether the investigator knew of evidence inculpating the interviewee. The question is whether the investigator connected the two in front of the individual. An investigator's knowledge of an individual's guilt may bear upon the custody issue not simply because the officer possesses incriminating evidence but because he has conveyed it, by word or deed, to the individual being questioned, and thus has used the information to create a hostile, coercive, freedom-inhibiting atmosphere. That is why such knowledge is relevant only if (1) it was somehow manifested to the individual under interrogation and (2) it would have affected how a reasonable person in that position would perceive his or her freedom to leave.

The 11th circuit agrees (cite omitted).

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

*****

8th CIRCUIT

U.S. v. Molsbarger, 551 F.3d 809, January 06, 2009

Justifiable eviction terminates a hotel occupant's reasonable expectation of privacy in the room. When the police arrived and the manager confirmed that he wanted the occupants evicted, the police justifiably entered the room to assist the manager in expelling the individuals in an orderly fashion. Any right defendant had to be free of government intrusion into the room ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so.

The 2nd and 8th circuits agree (cites omitted).

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

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9th CIRCUIT

U.S. v. SDI Future Health, Inc., 2009 U.S. App. LEXIS 1329, January 27, 2009

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

A corporate defendant has standing with respect to searches of corporate premises and seizure of corporate records. An employee of a corporation, whether worker or manager, does not, simply by virtue of his status as such, acquire Fourth Amendment standing with

respect to company premises. Similarly, to be merely a shareholder of a corporation, without more, is also not enough.

Except in the case of a small, family-run business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized. The strength of such personal connection is determined with reference to the following factors: (1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; (2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization. Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes to challenge the search of a workplace beyond his internal office.

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

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10th CIRCUIT

U.S. v. DeJear, 2009 U.S. App. LEXIS 358, January 09, 2009

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

Under *New York v. Quarles*, 467 U.S. 649 (1984), an officer may question a suspect in custody without first giving the *Miranda* warnings if the questions arise out of "an objectively reasonable need to protect the police or the public from any immediate danger associated with a weapon." As a generally applicable standard, a sufficient threat to officer safety exists under *Quarles* when an officer, at minimum, has a reason to believe (1) that the defendant might have (or recently has had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it.

The 6th circuit agrees (cite omitted).

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

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U.S. v. Hooks, 551 F.3d 1205, January 09, 2009

When two or more people occupy the space where the firearm is found, proximity to the firearm alone is insufficient to establish knowledge of and access to that firearm. The government must demonstrate some connection or nexus between the defendant and the firearm which leads to at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband. Evidence of knowledge and access may be proved

by direct evidence, or inferred from circumstantial evidence, so long as the circumstantial evidence includes something other than mere proximity. A firearm does not need to be "readily accessible," *i.e.*, "visible and retrievable," to a defendant at the time of his arrest for the defendant to constructively possess it. Evidence of mere accessibility, without evidence of dominion and control, is insufficient to support a finding of constructive possession.

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

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U.S. v. Turner, 2009 U.S. App. LEXIS 1296, January 26, 2009

An arrest by state officers for a violation of federal law need not be authorized by state or federal law. Even if state law prohibits state police from arresting for a federal offense, that fact alone does not render the arrest a violation of the Fourth Amendment. See *Virginia v. Moore,* 128 S. Ct. 1598 (2008).

When state officers have probable cause to believe a person has committed a crime in their presence, the Fourth Amendment permits a warrantless arrest – and a search incident to that arrest – regardless of whether the crime qualifies as an arrestable offense under applicable state law.

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

(Editor's note: See also *United States v. Gonzales*, 535 F.3d 1174 (10th Cir. 2008) - police officers' traffic stop of the defendant, outside of their jurisdiction and in violation of Colorado law, did not violate the Fourth Amendment.)

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11th CIRCUIT

U.S. v. Bennett, 2009 U.S. App. LEXIS 993, January 21, 2009

After ordering the boys out of bed onto the floor and cuffing their hands behind their backs, agents decided to return the boys to the bed to question them. To secure the area before the move, one agent shook the sheets and pillows and then lifted the mattress. He uncovered a rifle between the mattress and box spring, about a foot from the edge of the bed. Officers cannot move detained people purely to bring an area they wish to search into that person's grab area. Because the agent had a reasonable belief that the boys could be dangerous and his reason for moving them to the bed was legitimate and not a pretext, his sweep of the boys' grab areas was properly limited. The under-mattress search was lawful. Law enforcement should not be required to endanger themselves by blindly sticking their hands into unknown and unseen spaces.

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