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MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

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Consent to Enter or Search by Deception

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Officers often use deception during the course of their investigations. Hoping to entice a confession from a suspect, an officer may legally, but falsely, tell a suspect that his fingerprints were found at a crime scene, that his criminal acts were recorded by a concealed video camera, or that a co-criminal has confessed and implicated him. An undercover officer, by design, is engaged in a pattern and practice of deception.

Officers also often use deception when asking for and receiving consent to enter or search. By giving a law enforcement officer valid consent to search, the person has waived 4th Amendment reasonable expectation of privacy in the article or place to be searched. To be valid, the consenter must have either actual or apparent authority over the item or area to be searched. In addition, the person providing consent can limit the scope of the consent or withdraw consent at any time.

To be valid, consent to enter or must also be voluntarily. In deciding this issue, the court will consider the "totality of the circumstances" surrounding the consent. The burden is on the government to prove, by the preponderance of the evidence, that the consent was voluntary. Certainly, consent obtained through coercion is not voluntary. But, what about consent by deception? To what extent may an officer use deception without violating the requirement that consent be voluntary?

Lawful Deception

The Delivery Man With a Warrant

Armed with a search warrant for possession of cocaine, Alaska State Troopers and U.S. Postal Inspectors went to the defendant's home to serve the search warrant. The officers knocked on the door. A voice from inside responded, "who is it?" One of the troopers then announced, "Federal Express." A female occupant of the home then answered the door, whereupon the officers announced their true identity and purpose. The officers executed the warrant, seized cocaine and arrested the defendant. The defendant moved for suppression of the evidence claiming that the officers executing the search warrant did not comply with 18 U.S.C. § 3109, the federal "knock-and-announce" statute, which requires officers to announce their authority and purpose and be refused admittance prior to opening a closed door to gain entry. (18 U.S.C. 3109) The court denied the motion and found the deception used to get somebody to open the door did not violate federal law. *United States v. Contreras-Ceballos*, 999 F.2d 432 (CA9 1993). See also, *United States v. Salter*, 815 F.2d 1150 (CA7 1987).

The Undercover Narcotics Buyer

Lying about whether you are law enforcement is OK.

On December 3, 1964, a defendant engaged in a telephone conversation with an undercover narcotics agent and invited the agent to his home for the purpose of selling him marijuana. Upon arrival, the undercover agent knocked on the defendant's door, identified himself as the potential purchaser and the defendant invited him inside. A sale of marijuana from the defendant to the agent took place. On December 17, 1964 the two parties completed a similar transaction. During both of these visits to the defendant's home, the agent did not see, hear or take anything that was not contemplated by the defendant. Agents subsequently arrested the defendant and a grand jury indicted him. The defendant filed a motion to suppress the marijuana. He argued that his admittance to the agent into his home was not voluntary, as the agent had engaged in deliberate deception by not revealing his true status as a federal agent. The U.S. Supreme Court denied the motion, stating, "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Lewis v. United States*, 385 U.S. 206 (1966).

Consent Once Removed

The "consent once removed" doctrine applies when an undercover law enforcement officer is invited into a house or other location where a reasonable expectation of privacy exists, establishes probable cause to make an arrest or conduct a warrantless search, and then summons additional officers for assistance. The doctrine holds that initial consensual entry covers the admission of additional officers and does not result in any greater government intrusion.

The United States Supreme Court recently had an opportunity to address the "consent once removed" doctrine. See *Pearson v. Callahan*, 129 S. Ct. 808 (2009). They declined and decided the case on qualified immunity grounds. However, the 6th, 7th, 9th and 10th circuits have approved of the doctrine. The 6th and 7th circuits have extended the doctrine to apply in situations where a police informant was invited in to the home. The 10th circuit has expressly refused to extend the doctrine to informants, limiting the scope of the doctrine to undercover police officers. See *United States v. Pollard*, 215 F.3rd 643, 648-649 (6th Cir.), cert denied 531 U.S. 999 (2000), *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir.), cert denied 484 U.S. 857 (1987), *United States v. Bramble*, 103 F.2d 1475 (9th Cir. 1996), *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986), *United States v. Yoon*, 398 F.3d 802, 806-808, (6th Cir.) cert. denied 546 U.S. 977 (2005), and *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007).

Unlawful Deception

The Non-existent Warrant

Lying about the existence of a warrant is not OK.

Four North Carolina police officers were investigating a rape. Two days after the alleged offense the officers responded to a residence the suspect shared with his grandmother. The grandmother met the officers at her door and one of them falsely announced that he had a search warrant. In

response, the grandmother opened the door and told the officers to "go ahead." During the subsequent search, the officers seized a rifle. The prosecutor introduced the rifle at trial after the court denied a motion to suppress. During argument on the motion, the state conceded it had relied on consent to justify the entry and search instead of a search warrant. On appeal, the United States Supreme Court ruled that consent based upon a false assertion that the officers possessed a search warrant cannot be voluntary and is thus invalid. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

The 7th Circuit Court of Appeals faced a similar circumstance where an officer gained consent to enter a home by falsely stating she had an arrest warrant for the homeowner's son. In denying summary judgment on a 42 U.S.C. 1983 claim against the officer, the court stated that the consent in this case was obtained "by an outright and material lie, and was therefore ineffectual." *Hadley v. Williams,* 368 F.3d 747 (7th Cir. 2004).

The Deceitful Purpose

Telling the truth about being "government" but lying about what part of the government or lying about your true purpose is <u>not</u> OK.

Bosse was a licensed firearms dealer with a pending application to sell machine guns. An agent from the State of California arrived at Bosse's home to inspect his premises and the surrounding area as part of the application process. A federal ATF agent accompanied the state agent but failed to identify himself as such. The state agent merely told Bosse that the federal agent "is with me." Bosse gave the agents consent for the purpose of conducting the licensing inspection. In fact the ATF agent was present for the independent purpose of furthering a federal criminal investigation into Bosse's firearms activity.

The federal agent testified that he used the access to Bosse's home to prepare diagrams of the layout of the house in preparation for obtaining a search warrant. A court subsequently issued a search warrant and federal agents seized an illegal sawed-off shotgun, which resulted in Bosse's indictment. Bosse then argued that the shotgun was seized as a direct result of the ATF agent's illegal search of his residence.

While the 9th Circuit Court of Appeals remanded the case to the trial court for further findings, it did condemn the actions by the ATF agent. The court found that the misrepresentation of the ATF agent's purpose and position invalidated Bosse's consent. The court stated, "We think it is clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust." The 9th circuit reiterated that a known government agent who misrepresents his true purpose for entry cannot rely on consent to justify that entry. *United States v. Bosse,* 898 F.2d 113 (9th Cir. 1990).

In an earlier 9th Circuit case, the court disapproved of the entry of federal agents into a home that was accomplished with the assistance of local police officers. The local officers requested to enter to investigate a fictitious burglary. The officers used this ruse in order to gain access to the defendant in his own home for the purpose of placing him under arrest without first obtaining an arrest warrant. *United States v. Phillips,* 497 F.2d 1131 (9th Cir. 1974).

The 5th Circuit also found consent to be invalid when a suspect turned over tax records to an IRS revenue agent who represented that he was conducting a civil audit. The suspect's accountant asked the revenue agent if a "special agent" was involved in the matter. The revenue agent stated that no special agent was involved. In fact, the revenue agent was conducting the audit at the request of the Organized Crime and Racketeering Section of the Department of Justice. Because of the revenue agent's statements implying the lack of an existing criminal investigation, the defendant made some records available to the revenue agent who then microfilmed all of the records. On remand, the 5th Circuit stated, "It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery or misrepresentation of the Internal Revenue agent." *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977).

On the other hand, the 8th Circuit found consent to be valid when officers consent to enter an apartment by telling the renter that they were looking for her boyfriend to discuss an "important matter" with him. In fact, the officers intended to arrest him for an earlier bank robbery but had not obtained an arrest warrant. The 8th Circuit ruled that there was no deceitful misrepresentation by the officers and that their stated purpose did not appear to have been said with the intent of tricking the girlfriend into giving consent to the officers. *United States v. Briley*, 726 F.2d 1301 (1984).

The Deceitful Objective

Lying about what you are searching for is <u>not</u> OK.

An individual may limit the scope of any consent given to law enforcement. For example, a person may give consent to officers to search his home, with the exception of a bedroom. A citizen may allow a search of his person, but not his briefcase. In addition, a person giving consent to a search of his home for the sole and express purpose of locating stolen pianos restricts the officers' search to only those areas large enough to conceal pianos.

Often times when asked for consent to search, a subject will ask what the officer is searching for. The officer needs to be honest and forthright in answering that question. If the officer asks for and receives consent to search a car for drugs, the U.S. Supreme Court has ruled that such consent can extend to containers in the vehicle that could contain the drugs. *Florida v. Jimeno*, 500 U.S. 248 (1991). But when officers receive consent to search for narcotics and then also search for and seize currency and exchange receipts, insurance policies, loan receipts, and certificates of title to real estate, the officers have misused the limited consent as a license to conduct a general exploratory search. Such unlawful action by government officers or agents raises the issue of the overall voluntariness of the actual consent. *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971).

Frank Connelly currently instructs legal subjects to the Federal Air Marshals, the Federal Flight Deck Officers, Bureau of Indian Affairs officers, tribal police officers, and United States Border Patrol agents. Frank retired from twenty-eight years of service as a municipal police officer in the Seattle, Washington area. He served in patrol, detectives and training units during my law enforcement career. Frank graduated, cum laude, from the Seattle University School of Law in 1987 and is an active member of the Washington State Bar.

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Judge Sotomayor's 2nd Circuit Law Enforcement Decisions As Reported in *The Informer*

2006 to present

Authored

U.S. v. Draper, 553 F.3d 174, 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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U.S. v. Ganim, 510 F.3d 134, December 04, 2007

The specific intent element (quid pro quo / this for that) for bribery, extortion, and honest services mail fraud crimes may be satisfied by showing that a government official received a benefit in exchange for his promise to perform specific official acts *or to perform such acts as the opportunities arise.* It is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence on behalf of the payor as specific opportunities arose.

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

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Cassidy v. Chertoff, 471 F.3d 67, November 29, 2006

It is a "governmental search" for purposes of the Fourth Amendment when employees of a private transportation company search the carry-on baggage of randomly selected passengers and inspect randomly selected vehicles, including their trunks, pursuant to the company's security policy implemented in order to satisfy the requirements imposed by the Maritime Transportation Security Act of 2002 and its implementing regulations.

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

On Panel

U.S. v. Simmons, 560 F.3d 98, March 17, 2009

An anonymous tip concerning an ongoing emergency "is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality."

The 4th, 7th, 9th, 10th, and 11th circuits agree (cites omitted).

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

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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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CASE SUMMARIES

SUPREME COURT

Montejo v. Louisiana, 2009 U.S. LEXIS 3973, May 26, 2009

Once the adversary judicial process has begun, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal

proceedings. Interrogation by the state is such a stage. In the absence of a valid waiver, statements obtained after the Sixth Amendment right to counsel has attached are inadmissible.

Even though the Sixth Amendment right to counsel has attached, unless and until the defendant invokes the right in the specific context of being questioned, law enforcement may approach and obtain a waiver. Relinquishment of the right must be voluntary, knowing, and intelligent. *Miranda* advice and waiver is sufficient to waive Sixth Amendment counsel.

Once the Sixth Amendment right to counsel attaches and the defendant invokes in the specific context of being questioned, law enforcement may not approach and question defendant without the presence and/or consent of defendant's lawyer. After such an invocation, waivers obtained after approach by law enforcement are presumed involuntary.

Previous appointment of a Sixth Amendment lawyer does not, in and of itself, create the presumption that a subsequent waiver obtained after approach by law enforcement is involuntary. Even if it is reasonable to presume from a defendant's *request* for counsel that any subsequent waiver of the right was coerced, no such presumption can seriously be entertained when a lawyer was merely "secured" on the defendant's behalf, by the state itself, as a matter of course.

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

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***Flores-Figueroa v. U.S.*,** 129 S. Ct. 1886, May 4, 2009

Title 18 U. S. C. §1028A(a)(1), aggravated identity theft, imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if*, during (or in relation to) the commission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person.*" (emphasis added). To obtain a conviction under this statute, the government must prove that the defendant knew that the means of identification belonged to a real person.

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

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CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Ness, 2009 U.S. App. LEXIS 9947, May 08, 2009

Defendant's avoidance of a paper trail, hiding of the drug proceeds in packages of jewelry, and use of code words show only that he concealed the proceeds in order to transport them. While such evidence may indicate that defendant was concealing the nature, location, or source of the narcotics proceeds, it does not prove that his purpose in transporting the proceeds was to conceal these attributes. It evidences not "why" he moved the money, but only "how" he moved it. Under *Cuellar v. United States*, 128 S. Ct. 1994 (2008), such evidence is not sufficient to prove transaction or transportation money laundering offenses. A conviction under 18 U.S.C. § 1956(a)(2)(B)(i) must be based on evidence that the defendant: (i) attempted to transport the funds across the United States border; (ii) knew that those funds "represent[ed] the proceeds of some form of unlawful activity;" and (iii) knew that such transportation was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds.

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

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4th CIRCUIT

U.S. v. Crabtree, 2009 U.S. App. LEXIS 10720, May 19, 2009

Communications intercepted, recorded, and disclosed by private persons, with no involvement by government, in violation of 18 U.S.C. § 2511 (Title III), are inadmissible as evidence under § 2515. There is no "clean hands" exception under § 2515.

The 1st, 3rd, and 9th circuits agree (cites omitted)**.**

The 6th circuit disagrees (cite omitted)**.**

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

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7th CIRCUIT

Guzman v. City of Chicago, 2009 U.S. App. LEXIS 10177, May 13, 2009

Officers served a warrant to search what was described as a single-family residence. Although the officers thought the building looked like a single-family house, they should have known pretty quickly that their belief was mistaken. Learning that the front of the

building housed a real estate office, that they could not get to the rest of the house from that office, that they had to go outside to access the second-floor apartment, and that there was a separate door for the first-floor apartment should have informed them that this was not a single-family residence. So informed, they should have called off the search.

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

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9th CIRCUIT

U.S. v. Jefferson, 2009 U.S. App. LEXIS 11169, May 26, 2009

An addressee has both a possessory and a privacy interest in a mailed package.

The postal inspector's visual inspection of the package did not implicate the Fourth Amendment because what a person knowingly exposes to the public is not a subject of Fourth Amendment protection.

The possessory interest in a mailed package is solely in the package's "timely" delivery.

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

An addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed. Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment. Once the guaranteed delivery time passes, however, law enforcement must have a "reasonable and articulable suspicion" that the package contains contraband or evidence of illegal activity for further detainment.

The 1st circuit agrees (cite omitted)**.**

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

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U.S. v. Alderman, 2009 U.S. App. LEXIS 10934, May 12, 2009

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

Congress has the authority under the Commerce Clause of the United States Constitution to criminalize the possession by a felon of body armor that has been "sold or offered for sale in interstate commerce." Title 18 U.S.C. §§ 931 and 921(a)(35). Put another way, the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under Congress's Commerce Clause authority.

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