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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 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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Search Incident to Arrest and Electronic Personal Communication Devices

Jim McAdams
Senior Legal Instructor
Legal Division
Federal Law Enforcement Training Center

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For the past eight years, it has been my distinct honor to serve as Program Manager for Legal Division Advanced Training Programs and as Editor of *The Federal Law Enforcement Informer*.

Through the Continuing Legal Education Training Program (CLETP) and the Police Legal Advisors Training Program (PLATP), I have had the pleasure of travelling all over the country and meeting countless, dedicated federal and state and local agents and officers and attorneys. My involvement as an instructor in those programs was a shared learning experience. I learned a lot, and I'm confident that what you taught me made me a better instructor for "the kids" going through basic training here at Glynco.

When I took over *The Informer*, called *The Quarterly Review* then, we had a subscription list of under 200. Our subscribers now number over 9100 officers, agents, prosecutors, agency counsel, law enforcement trainers, and criminal justice professors all over the world. I know that it is also forwarded to the thousands of members of several other federal and state and local law enforcement list services. Thank you for all of your positive feedback and suggestions. I'm glad that you have found it to be a valuable resource in your daily activities.

I'm not leaving the FLETC or the Legal Division; the work is still challenging and a whole lot of fun. Instead, I have been offered and have accepted the position of Chief of the Legal Division Administrative Branch – same great place and people, just different responsibilities. My big project is the development of the eCLETP, a web based version of our current instructor led program. I hope to have it completed and up and running on the new FLETC electronic learning portal by this fall.

I turn over the Advanced Training Programs and *The Informer* to Ken Anderson. Ken is a former Legal Division Senior Instructor and Branch Chief who is coming back to us from a tour with the Counterterrorism Division.

Again, I thank you for all of your support and encouragement, and I look forward to keeping in contact for many years to come.

Bob Cauthen

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"Not For Cell?"
Search Incident to Arrest and Electronic Personal Communication Devices

Jim McAdams
Senior Legal Instructor
Legal Division
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I. Introduction

When a law enforcement officer arrests a suspect, that officer should immediately be thinking about what search or searches may be lawfully undertaken pursuant to that arrest - of the suspect, the area immediately adjacent to the place of arrest, containers in the suspect's possession, his wallet, and, in some instances, the suspect's vehicle. The Supreme Court and lower federal courts have confirmed search incident to arrest (SIA) authority in numerous opinions and one might therefore assume that legal issue to be long since resolved.

Over the past two decades, however, a new item has become as common as the wallet among the inventory of an arrestee's pocket or purse – the cell phone. Moreover, during those 20 years, the cell phone has progressed technologically from a device designed merely to make and receive telephone calls to one used by many to organize their lives, record voice memos, take photographs and videos, listen to music, roam the Internet, and make and receive "Tweets" via their Twitter accounts. Indeed, in a recent article, the New York Times reported that cell phone service providers report that in 2009 the amount of data transmitted in text, e-mail, streaming video, and other services on mobile devices surpassed the amount of voice data transmitted on those devices.[1]

Though cell phones have quickly become as integral a part of modern life (much as automobiles did nearly a century ago), the Courts have lagged behind in terms of whether they are to be treated the same as other less technological repositories of private information, or with a different quantum of constitutional deference. In particular, recent SIA cases reveal that federal and state courts simply do not agree on a law enforcement officer's SIA authority when it comes to cell phones found in the possession of a suspect. This writing will summarize the cases that serve as the historical context for the current state of the law on SIAs of cell phones and attempt to provide practical and informed advice to officers and agents who contemplate such searches in the future.[2]

II. The Origins of SIA Authority

In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court held that, subsequent to a lawful arrest, a police officer may conduct a warrantless search of the arrestee's person and of

[1] *Cellphones Now Used More for Data Than for Calls* by Jenna Wortham, New York Times, May 13, 2010.
[2] For a more in-depth legal analysis and a prediction of the demise of SIAs of cell phones as their uses becomes increasingly like those of a computer, *see Note: Bringing an End to Warrantless Cell Phone Searches*, 42 Ga. L. Rev. 1165 (2008)

any area into which the arrestee might reach in order to grab a weapon or gain access to evidentiary items. 395 U.S. at 762-63. Numerous courts have acknowledged that a law enforcement officer may take reasonable steps to preserve evidence from unnecessary loss or destruction during an incident to that officer's lawful arrest of a suspect. *See, e.g., United States v. Robinson,* 414 U.S. 218, 224-6 (1973). To be a valid SIA, however, the search must not only follow from a lawful arrest, it also must be confined to "the area within the control of the arrestee" and must be contemporaneous to the arrest in time and place. *Chimel v. California,* 395 U.S. at 763. *United States v. Chadwick,* 433 U.S. 1, 15 (1977) (quote omitted).

Over a decade after *Chimel*, in *New York v. Belton,* 453 U.S. 454 (1981), the Court extended the exception to the warrant requirement holding that, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. . . ." 453 U.S. at 460. [3] The Court in *Belton* found that the officer was also justified in examining the contents of the zipped pocket of a jacket on the back seat of the defendant's automobile, not because the arrestee lacked a reasonable expectation of privacy in his jacket pocket, but because that examination followed a lawful custodial arrest. *Id.* at 461. Nor did it matter to the Court that the officer searched the pocket after gaining "exclusive control" over the jacket because, the Court reasoned, to hold otherwise would literally eviscerate the validity of virtually any search incident to arrest. *Id.*

Following *Belton*, several federal circuit courts of appeals addressed SIAs of personal items in the context of closed container searches. In *United States v. Johnson,* 846 F.2d 279, 282 (5th Cir. 1988), the Fifth Circuit approved the search of a briefcase as a valid SIA because the item was located within the arrestee's reach. In *United States v. Molinaro,* 877 F.2d 1341, 1344 (7th Cir. 1989), the Seventh Circuit, first noting that any personal property within an arrestee's pockets could be searched incident to arrest, upheld an arresting officer's search of the arrestee's wallet and the seizure therefrom of incriminating evidence. A few years later, in *United States v. Rodriguez,* 995 F.2d 776, 778 (7th Cir. 1993), that same Court held that a police officer was justified, as an attempt to preserve evidence, in photocopying pages from an address book found in an arrestee's wallet.

In *United States v. Hudson,* 100 F.3d 1409, 1420 (9th Cir. 1996), the Ninth Circuit validated an arresting officer's SIA of a rifle case at the feet of the arrestee both because of the item's proximity to the arrestee and because of the potential danger to the arresting officer. *Id.* The Ninth Circuit had also previously held invalid a SIA of a purse at the police station more than an hour after the arrest of the owner of the purse. In that case, the Court reasoned that there was no longer any "protective rationale for the search[.]" *United States v. Monclavo-Cruz,* 662 F.2d 1285, 1286-88 (9th Cir. 1981).

With the foregoing as an historical context, let's now turn to the issue of the search incident to arrest of electronic devices found in the arrestee's possession.

[3] In *Arizona v. Gant,* 556 U.S. ___, 129 S.Ct. 1710 (2009), the Supreme Court narrowed the scope of SIAs of vehicles occupied or recently occupied by an arrestee. After *Gant,* the arresting officer may only conduct a SIA of the vehicle (1) if the arrestee or recent occupant of the vehicle is within reaching distance of the of passenger compartment at the time of the search, i.e., has actual, not just theoretical, access to passenger compartment, or (2) the officer has an articulable reason to believe that in the car is evidence of the crime for which the owner/occupier of the car has been arrested. *Id.* at 1723-24.

III. Pagers

Well before cell phones became a ubiquitous part of modern life there was the pager or beeper. As agents and prosecutors in the 1980's and early 1990's can well attest, the beeper was an ever-present tool in the arsenal of devices used by drug dealers and other criminals to communicate with each other in furtherance of their criminal schemes. Naturally, it became routine for an agent to find such a device clipped to the belt (or purse) of an arrestee and important for that agent to acquire access to the contents of the device as evidence in the case. The question, of course, is how to do so legally. Close behind and very much a part of that query is whether and under what circumstances may that data be accessed without having to meet the requirement of probable cause or a search warrant.

Some general information about pagers is important for contextual purposes.[4] When a new page is received while the unit is in the "on" mode, the new message alert will appear in the display window and the page number will be revealed by pushing the mode button. The incoming page number may contain up to 16 digits, depending on the features of the particular pager. Thus, not only could they include the telephone number of the person leaving the page, the numeric message might also contain a pre-arranged code or codes in furtherance of a criminal enterprise. The "last number" information may be accessed by pushing the power/mode button. Turning off some pagers will erase the pager's memory. All have a limited storage capacity. Once that capacity is reached, the receipt of a new page will cause one of two things to happen depending on the pager: either the oldest recorded number in the pager will be lost or the new page number will not be recorded and is therefore lost.

In analyzing searches of pagers/beepers, some courts have looked to earlier case law dealing with closed containers. Thus, like a briefcase, the contents of someone's pocket, or the pieces of miscellany in a wallet, evidence stored in a pager in an arrestee's possession at the time of arrest is subject to seizure and examination after a valid arrest. *See, e.g., United States v. Galante*, 1995 U.S.Dist. LEXIS 12376 (consent to search car included consent to search closed container, i.e., pager, within car); *United States v. Lynch*, 908 F.Supp. 284, 286-89 (DVI-St. Thomas 1995)(search of pager found on arrestee's hip after valid arrest same as search of his wallet or address book).

Other analysis of the constitutionality of warrantless searches of data in pagers focused on the legitimate need to protect from the loss of relevant evidence. Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button. *See, e.g., United States v. Meriwether*, 917 F.2d 955, 957 (6th Cir. 1990). Thus, the need for evidence preservation justifies a warrantless search incident to a valid arrest.

The Northern District of California, in *United States v. Chan*, 830 F.Supp. 531 (NDCA 1993), upheld a federal agent's post-arrest retrieval of telephone numbers from the defendant's pager. There was certainly no danger presented that the pager could serve as a weapon and the Court viewed there to be no real chance that the defendant could access the pager to destroy evidence. The District Court found, however, that, given the proximity in time and space of the defendant's arrest and the search of the pager, accessing the pager's memory was a valid SIA.

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[4]For a discussion of the operational capabilities of digital pagers, s*ee generally, United States v. Reyes*, 922 F.Supp. 818, 832-33 (SDNY 1996). *See also*, http://www.ehow.com/how-does_4588169_a-pager-work.html.

In *United States v. Reyes*, 922 F. Supp. 818 (SDNY 1996), the Court was faced with multiple warrantless search issues, including the search of a pager incident to, and approximately 20 minutes after, the arrest of its owner. *Id. at* 832-34. The Court first reviewed the Supreme Court's decision in *United States v. Chadwick*, 433 U.S. 1 (1977). In that case, a defendant was arrested in possession of a large footlocker that the agents transported to their office along with the defendant. Ninety minutes later the agents performed a warrantless search of the footlocker and seized evidence from within. The Supreme Court rejected a SIA justification for that warrantless search finding that it had occurred too remotely in time and place from the arrest. Based on *Chadwick*, the *Reyes* court found that the search of the pager 20 minutes after the arrest of its owner to be sufficiently close in time and place to the arrest.

IV. Cell Phones

Courts have struggled, and in so doing have diverged in the analysis used, to define the appropriate parameters of privacy attendant to the use of cell phones. In *Smith v. Maryland,* 442 U.S. 735 (1979), the Supreme Court noted that a telephone is connected to and part of the public communications network. Users of those devices necessarily understand that the numbers dialed must be made known to the telephone company in order that, among other reasons, the calls may be completed and billing records for those calls may be maintained. *Id. at 742.* The Court further noted that one has no legitimate expectation of privacy in information he voluntarily turns over to a third party. *See, e. g., United States v. White,* 401 U.S. 745, 752, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (taped conversations to third party). Thus, the Court held that the installation of a pen register -- a device that captures the telephone number called by a target telephone -- does not violate the Fourth Amendment because there is no reasonable expectation of privacy in the telephone numbers one dials. *Smith v. Maryland,* 442 U.S. at 745-46.

In its decision in *Beckwith v. Erie County Water Authority,* 413 F.Supp2d 214 (WDNY 2005), the Western District of New York discussed privacy expectations specifically in the context of cell phones. That Court wrote that, during the ordinary use of a cell phone, one voluntarily provides numerical information to the cell phone service provider. Having thereby exposed such information to the cell phone company's equipment, the cell phone user loses any reasonable expectation of privacy in both the existence of such calls and identification information pertaining to such calls. *Id. at 224.*

The first of the circuit courts of appeals to tackle the issue of searching a cell phone seized incident to the lawful arrest of its owner/possessor was the Fifth Circuit in *United States v. Finley,* 477 F.2d 250 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007). Finley was the subject of a lawful traffic stop after he and another individual delivered drugs to, and collected marked currency from, a police informant. During a search of Finley's car after the stop, the agents found drugs and other marked currency and arrested Finley. A search of the cell phone taken from Finley after his arrest revealed call records and text messages related to narcotics use and trafficking. The Court reiterated well-settled law that a warrantless search of one who has been lawfully arrested is reasonable under the Fourth Amendment and that the permissible scope of that search includes both open and closed containers found on the arrestee's person at the time of arrest. *Id.* at 259-60 (citing, *inter alia, United States v. Robinson*, 414 U.S. 218, 235 (1973)).

Accordingly, the Court found that the agents' warrantless post-arrest search of Finley's cell phone was lawful.[5]

The Fourth and Seventh Circuits have also reached a similar conclusion on searches of cell phones incident to arrest. *See, e.g., United States v. Young*, 278 Fed. Appx. 242, 245-46 (4th Cir. May 15, 2008) (per curiam) (holding that officers may retrieve text messages from cell phone during search incident to arrest), *cert. denied sub nom., Young v. United States*, 2008 U.S. LEXIS 8016 (Nov. 3, 2008); *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009)(same); *United States v. Pineda-Areola*, 2010 U.S. App. LEXIS 7685 (7th Cir. April 6, 2010)(same).

Recently, however, some courts have diverged, not so much from the analysis in *Finley*, but from the conclusion in that case. In *United States v. Park*, 2007 U.S. Dist. LEXIS 40596 (NDCA May 23, 2007), the Northern District of California noted that cell phones are capable of storing a great quantity of personal information. Therefore, instead of characterizing a cell phone as an element of individual's clothing or person subject to a search incident to arrest, the Court concluded that it is as a possession within an arrestee's immediate control entitled to Fourth Amendment protection. Moreover, the Court declined to presume the possibility that data could be lost and found that the government had made no showing that the search was necessary to prevent the destruction of evidence. For these reasons, the *Park* court declined to follow *Finley*.[6]

A District Court in the Southern District of Florida has also rejected *Finley*. In *United States v. Wall*, 2008 U.S. Dist. LEXIS 103058 (SDFL December 22, 2008), the Court declined, as it concluded the Finley court had done, "…to extend law to provide an exception to the warrant requirement for searches of cell phones." The search of the cell phone in *Wall* was at the police station following arrest, which the court found was not sufficiently contemporaneous with arrest. Second, the court found that there was no evidence in the record that data on the phone would have been lost or destroyed. Finally, the Court noted that in the content of a text message on a cell phone there is no danger of physical harm to the arresting officers or others. In light of the foregoing, the Court concluded that searching through information stored on a cell phone is analogous to a search of a sealed letter and therefore requires a search warrant.[7]

The Supreme Court for the State of Ohio has also recently declined to join those cases that follow *Finley*. In *State of Ohio v. Smith*, 920 N.E.2d 949 (2009),[8] the Court acknowledged that the U.S. Supreme Court's decision in *New York v. Belton*, 454 U.S. 454 (1981) allows for

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[5] In *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008), the Court, citing *Finley*, stated that a cell phone is similar to a personal computer and that cell phone owners routinely use these devices to store a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers. The Court reasoned, then, that cell phone owners have a reasonable expectation of privacy regarding this information that may not be lawfully searched in the absence of a valid arrest or other exception to the warrant requirement. *Id.* at 577-78 (citing *Finley*, 477 F.3d at 258-59).

[6] The court further found that the search of the cell phones could not be considered an inventory search, because such searches are used to document possessions of a person in custody, not as a "ruse for a general rummaging in order to discover incriminating evidence." 2007 U.S. Dist. LEXIS 40596 at *10.

[7] For similar reasons, other district courts have also invalidated warrantless searches of cellular phones seized incident to arrest. *See, e.g., United States v. Quintana*, 594 F. Supp. 2d 1291, 1301 (M.D.FL 2009); *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at *3-4 (D. NE July 21, 2009); *United States v.Lasalle*, 2007 U.S. Dist. LEXIS 34233 (D.HI 2007).

[8] On May 11, 2010, the State of Ohio filed a Petition for Writ of Certiorari with the U.S. Supreme Court in the case of *State of Ohio v. Smith*, 2010 WL 1932620. The U.S. Supreme Court has not yet ruled on that Petition.

warrantless searches incident to arrest of a "closed container," that is, something that can store a physical object inside it. While cell phones can and do store vast quantities of data, the *Smith* court found that such data are not physical items; therefore, a cell phone is not a "closed container" and may not be the subject of a post-arrest warrantless search. The police may certainly collect the cell phone at arrest and retain it to insure no loss or destruction of data; to search its contents, however, the police will need a search warrant.[9]

V. CONCLUSION

As the foregoing discussion illustrates, the courts in this country simply do not agree on the issue of law enforcement searches of cell phones incident to arrest. Until the U.S. Supreme Court eliminates the disarray by resolving that issue, the question of how to proceed concerning an arrestee's cell phone must be answered primarily based on geography, that is, where would the seizure of the cell phone occur and by which police authority? With that information, the answer as to which court opinion or opinions to follow should be more apparent. Admittedly, though, that may provide little solace to an officer in a jurisdiction where the courts have yet to provide any guidance on SIAs of cell phones.

All of that said, the best advice is, if there is any doubt, **get a warrant!** If that is not an option, because, for example, there is no probable cause to search the phone, the arresting officer may nevertheless seize the phone following the arrest of its owner/possessor. On the other hand, if there is probable cause to search the cell phone for evidence of a crime, the agent or officer may retain possession of that cell phone for a reasonable period of time following the arrest in order to seek a search warrant. The cell phone may also be held (but not searched) while the arrestee is in custody awaiting release on bond; but, unless it has been shown either to be, or to contain, evidence of the underlying crime, the cell phone should ordinarily be returned to the arrestee when he is released on bond. The agent or officer in the field need not make the foregoing decisions alone. He or she should put their own cell phones to good use when faced with these issues in the field: that is, ***call an Assistant United States Attorney***.

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[9] In an unpublished opinion dated May 17, 2010, a California Court of Appeal upheld the warrantless search of a cell phone seized by a police officer during a vehicle search. *People v. Chho*, 2010 Cal. App. Unpub. LEXIS 3591. The court explicitly noted that it need not address the analyses cited in several of the cases discussed in this article that held both for and against cell phone searches. Rather, it chose to validate the search in this case as a lawful part of a vehicle search under *United States v. Ross*, 456 U.S. 798, 808-09 (1982).

CASE SUMMARIES

SUPREME COURT

Berghuis v. Thompkins, 2010 U.S. LEXIS 4379, June 1, 2010

Police arrested Thompkins and attempted to question him about his role in a shooting. After advising him of his rights under *Miranda* the officers began their interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Detective Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. Thompkins moved to suppress the statements made during the interrogation arguing that he invoked his privilege to remain silent by not saying anything for a sufficient period of time; therefore the interrogation should have ceased before he made his inculpatory statements.

Reversing the Sixth Circuit Court of Appeals, (see 12 Informer 08) the Court held that the *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

A suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins's right to remain silent before interrogating him.

The Court held that there was no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. In *Davis v. United States, 512 U.S. 452 (1994),* the Court held that when a suspect

invokes the *Miranda* right to counsel he must do so "unambiguously". If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights. There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

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

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CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Guzman, 2010 U.S. App. LEXIS 9080, May 3, 2010

The government indicted Guzman for two counts of arson in violation of 18 U.S.C. § 844 (i) for fires that occurred on April 3 and June 9, 2003. After his arrest on June 9, Guzman was taken to the police station and read his *Miranda* rights. Guzman invoked his right to counsel and was not questioned further. Guzman was charged in state court for the June 9 arson and was released on bail from July 2003 until November 2003 when he was returned to state custody for violating conditions of his bail.

On November 12, 2003 two ATF agents traveled to the correctional facility to interview Guzman about the April 3 arson. Guzman agreed to meet with the agents and signed a form consenting to the interview. At the outset of the meeting, the agents advised Guzman of his *Miranda* rights, and Guzman signed the top half of a form acknowledging that he had been advised of his rights. The bottom half of the form, containing a waiver of *Miranda* rights, remained unsigned at this time. Guzman was also told by the agents several times that he could leave the meeting at any time.

The ATF agents told Guzman that they were there to speak about the April 3 fire. After listening to the agents for about an hour, Guzman responded, saying that the April 3 fire had been "bothering him." He gave his version of the events and admitted that he had helped Cruz commit the arson by providing fuel and acting as a lookout. After Guzman had told his story, the ATF agents asked Guzman to provide a written or recorded version of his statement. Guzman said that he would do so only with his lawyer present. The agents ceased questioning him but asked Guzman to sign the bottom half of the *Miranda* waiver form, indicating that he had waived his rights and agreed to talk with them. Guzman signed the waiver at approximately 1:15 p.m., but,

at the agents' request, Guzman indicated on the form that he had waived his rights at 12:15 p.m., when he began telling his version of events to the officers.

On appeal Guzman argued that he was in the ATF agents' custody at the time that he gave the November 12 statement, and that, as a result, his June 9 invocation of his right to counsel barred the ATF agents from initiating further interrogation, even though he was released on bail for a period of about four months between the time of the first and second interrogations. Because of the very recent Supreme Court decision in *Shatzer*, Guzman's argument fails. Even assuming arguendo that the November 12 meeting between Guzman and the agents was a "custodial interrogation," *Shatzer* forecloses the claim.

In *Shatzer*, the Supreme Court established a bright-line rule that if a suspect who has invoked his right to have counsel present during a custodial interrogation is released from police custody for a period of fourteen days before being questioned again in custody, then the *Edwards* presumption of involuntariness will not apply.

In this case, Guzman was released on bail for about four months between the time that he originally invoked his right to counsel and the ATF agents' subsequent attempt to question him. This far exceeds the time period required by *Shatzer* and thus its break-in-custody exception to *Edwards* applies.

The court also found that Guzman voluntarily waived his *Miranda* rights when he spoke to the ATF agents about the April 3 fire.

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

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2nd CIRCUIT

U.S. v. Torres, 2010 U.S. App. LEXIS 9344, May 5, 2010

The evidence at trial, viewed as a whole and taken in the light most favorable to the government, was insufficient to permit the jury to find beyond a reasonable doubt that Torres knew that the packages addressed to him contained narcotics, and hence was insufficient to establish that he had knowledge of the purposes of the conspiracy of which he was accused.

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

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U.S. v. Harrison, 2010 U.S. App. LEXIS 10694**,** May 26, 2010

Officer Krywalski's questions to Harrison, a passenger in the vehicle, which lasted five to six minutes, did not measurably extend the duration of the lawful traffic stop, so as to render it unconstitutional.

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

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4th CIRCUIT

U.S. v. Bynum, 2010 U.S. App. LEXIS 9220**,** May 5, 2010

The defendant raised two *Fourth Amendment* challenges to the district court's refusal to suppress evidence seized during the search of the Bynum home, including the computer that uploaded and stored the child pornography at issue here.

The 'touchstone' of *Fourth Amendment* analysis is whether the individual has a reasonable expectation of privacy in the area searched. In order to demonstrate a legitimate expectation of privacy, Bynum must have a subjective expectation of privacy, and that subjective expectation must be reasonable.

In this case, Bynum can point to no evidence that he had a subjective expectation of privacy in his internet and phone "subscriber information"--*i.e.*, his name, email address, telephone number, and physical address--which the Government obtained through the administrative subpoenas. Bynum voluntarily conveyed all this information to his internet and phone companies. In so doing, Bynum assumed the risk that those companies would reveal that information to the police. Moreover, Bynum deliberately chose a screen name derived from his first name, *compare* "markie_zkidluv6" *with* "Marques," and voluntarily posted his photo, location, sex, and age on his Yahoo profile page.

Even if Bynum could show that he had a subjective expectation of privacy in his subscriber information, such an expectation would not be objectively reasonable. Indeed, every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the *Fourth Amendment's* privacy expectation.

Additionally, Bynum presented no reason as to why minor date discrepancies, or the delay between the administrative subpoenas and the request for the warrant undermine the magistrate judge's reasonable conclusion the home of Bynum's mother contained evidence of a crime.

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

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U.S. v. Roe, 2010 U.S. App. LEXIS 10865**,** May 27, 2010

Sergeant Russell's testimony was properly admitted as lay testimony, pursuant to *Fed. R. Evid. 701*. He was in charge of the unit that issues handgun carry permits as well as security guard and private detective certifications in Maryland. Based on his personal knowledge acquired in that capacity he was qualified to testify as to the requirements for getting such permits and certifications, and to state what possessing those permits allowed an individual to do.

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

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U.S. v. Lewis, 2010 U.S. App. LEXIS 10872**,** May 27, 2010

The police may approach an individual on a public street and ask questions without implicating the *Fourth Amendment's* protections. The officers were thus entitled to approach Lewis, who was sitting in his parked car, late at night. As they approached the vehicle, one of the officers related to Officer Mills that there was an open beer bottle in the vehicle. Mills then approached the driver-side window and asked Lewis for identification. When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle, and they were entitled to order Lewis out of the vehicle while their search was accomplished.

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

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6th CIRCUIT

U.S. v. Lazar, 2010 U.S. App. LEXIS 9119, May 4, 2010

The first paragraph of Attachment B to the search warrant gave sufficient direction when it referred to "the below listed patients" and "the following patients." Any patient list presented to the issuing Magistrate Judge thus was effectively incorporated into the search warrants. If the record otherwise shows that the government seized patient files according to the list, if any, presented to the issuing Magistrate Judge, a lack of formal incorporation by reference into the warrants does not justify a finding of facial insufficiency. Incorporation" of one thing into another need not be by express reference. Phrases such as 'incorporated by reference' are not talismanic, without which we do not consider additional necessary documents that effectuate the parties' agreement.

The Supreme Court's decision in *Groh v. Ramirez, 540 U.S. 551, 12, (2004)* controls, and requires suppression of all patient records seized beyond the scope of any patient list presented to the issuing Magistrate Judge.

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

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U.S. v Hughes, 2010 U.S. App. LEXIS 10802, May 27, 2010

For a traffic stop to be permissible under the *Fourth Amendment*, a police officer must know or reasonably believe that the driver of the car is doing something that represents a violation of law at the time of the stop. An officer may not use after-the-fact rationalizations to justify a traffic stop where, at the time of the stop, the officer was not aware that a defendant's actions were illegal.

The Sixth Circuit has developed two separate tests to determine the constitutional validity of vehicle stops. An officer must have probable cause to make a stop for a civil infraction, and reasonable suspicion of an ongoing crime to make a stop for a criminal violation. In this case, the government raises only either civil infractions or misdemeanors that were clearly *completed* by the time the officer actually stopped Hughes. In order for the stop to have been proper the officer needed to have probable cause rather than reasonable suspicion that Hughes had violated a traffic ordinance at the time of the stop.

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

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7th CIRCUIT

U.S. v Thomas, 2010 U.S. App. LEXIS 9838, May 13, 2010

Probable cause exists "when there is a 'fair probability' . . . that contraband or evidence of a crime will be found in a particular place. A magistrate need only find "reasonable grounds for belief" that evidence will be found in order to justify the issuance of a search warrant. When an affidavit relies on hearsay information from a confidential informant, the judicial officer (and reviewing court) must consider the veracity, reliability, and basis of knowledge for that information as part of the totality-of-the-circumstances review. Independent corroboration of the tip by police is not required when the court is provided with assurances that the informant is reliable. If the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.

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

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Carmichael v. Village of Palatine, 2010 U.S. App. LEXIS 10378, May 21, 2010

The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the officer at the time he acts. The record before us requires us to conclude that the district court erred in finding that probable cause supported the stop.

The doctrine of qualified immunity shields from liability public officials who perform discretionary duties and it thus protects police officers "who act in ways they reasonably believe to be lawful." The defense provides "ample room for mistaken judgments" and protects all but the "plainly incompetent or those who knowingly violate the law."

The record before us contains no evidence that Officer Sharkey had any factual basis for stopping the plaintiffs at gun point. He admits that the reasons that he initially gave for stopping the car, absence of a front license plate and tinted windows, were not known to him at the time that he affected the stop. The record shows, moreover, that the reason that he later gave for the stop, the absence of tail and brake lights, was not true. As the state court determined during the

earlier criminal proceeding against the plaintiffs, there is simply no basis in the record upon which a determination of probable cause can be sustained. Certainly, any reasonable police officer, acting at the time Officer Sharkey acted, would have known this elementary principle of the law of arrest. Officer Sharkey is not entitled to qualified immunity with respect to the stop.

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

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8th CIRCUIT

U.S. v. Buchanan, 2010 U.S. App. LEXIS 9136, May 4, 2010

The district court did not abuse its discretion in admitting the officers' testimony regarding the numeric inscription on the safe where the narcotics were found. The officers' testimony that the safe contained the inscription "2010" is not hearsay; instead, the inscription is similar to the marking of "Made in Spain" on the gun in *Thody*. (*U.S. v. Thody*, 978 F2d 625, 630 (10th Cir. 1992)). As the Tenth Circuit explained, such a marking is "technically not an assertion by a declarant" under *Rule 801*. Furthermore, the inscription was not offered "to prove the truth of the matter asserted"--that the safe was, in fact, a 2010 model. Instead, it was admitted to show that the number on the safe matched the number on Buchanan's key.

Failure to seize the safe and introduce it into evidence did not implicate the Best Evidence Rule (FRE 1002), therefore the government witnesses could testify as to the inscription on the safe.

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

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U.S. Cook, 2010 U.S. App. LEXIS 9372, May 7, 2010

To convict a defendant of being a felon in possession of ammunition, the government must prove beyond a reasonable doubt that (1) the defendant had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, (2) the defendant knowingly possessed ammunition, and (3) the ammunition had traveled in or affected interstate commerce.

The testimony that Cook was found in possession of the loaded revolver is sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Cook knowingly possessed the ammunition in the revolver.

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

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U.S. v. Manes, 2010 U.S. App. LEXIS 9493, May 10, 2010

The *Fourth Amendment* is not violated when a law enforcement officer briefly detains an individual to investigate circumstances which gave rise to a reasonable suspicion that criminal

activity was underway. A confidential informant's tip may support a reasonable suspicion if it has sufficient indicia of reliability, such as the informant's track record as a reliable source or independent corroboration of the tip. When an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. The reasonableness of such an inference is bolstered if the tip is corroborated not only by matching an identity or description, but also by accurately describing a suspect's future behavior.

Based on the informant's track record and corroboration of significant aspects of the tip, the officers reasonably inferred that the two white males traveling in the maroon truck were attempting to engage in an illicit drug transaction.

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

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U.S. v Muhammad, 2010 U.S. App. LEXIS 9575, May 11, 2010

Under *Terry*, a law enforcement officer may conduct a warrantless pat-down search for the protection of himself or others nearby in order to discover weapons if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous. An officer may, however, seize other evidence discovered during a pat-down search for weapons as long as the search stays within the bounds marked by *Terry*. Muhammad contends that because Agent McCrary knew that the object in Muhammad's back pocket was not a weapon or an object concealing a weapon, Agent McCrary could not lawfully remove the wallet from Muhammad's pocket. The record does not support this assertion. Agent McCrary testified that during a pat-down search it is often difficult to tell whether an object is a weapon or might conceal a weapon merely by touching the object. He stated that officers must generally "pull the suspicious object out and actually inspect it" to determine whether the object presents a safety concern. He further testified that he was not certain what the hard four-inch long and three-inch wide object in Muhammad's pocket was, but he said that the item "felt like an object that could conceal a weapon." This pat-down search stayed within the bounds of *Terry*, and the *Fourth Amendment* permitted Agent McCrary to remove the object from Muhammad's pocket.

We must next decide whether Agent McCrary lawfully seized the cash protruding from the wallet. The plain-view exception allows officers to seize contraband or other evidence of a crime in limited situations. Under the plain-view exception, officers may seize an object without a warrant if they are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object.

We conclude that Agent McCrary lawfully removed the wallet from Muhammad's pocket and Muhammad does not dispute that the cash was visible without opening the wallet; therefore the first and third requirements of the plain-view exception are met.

While cash is not inherently incriminating, under these circumstances, Agent McCrary had probable cause to believe that the cash protruding from the wallet was evidence of the robbery. The plain-view exception permitted Agent McCrary to seize the cash, which then allowed him to confirm that five of the $20 bills were bait bills taken during the robbery.

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

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U.S. v. Colbert, 2010 U.S. App. LEXIS 10267, May 20, 2010

Although the search warrant affidavit in this case may not be a model of detailed police work, it sets forth a number of specific facts and explains the investigation that took place therefore the argument that the affidavit was too conclusory to establish probable cause fails.

There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. Child pornography is in many cases simply an electronic record of child molestation. Accordingly, we conclude that Colbert's attempt to entice a child was a factor that the judicial officer reasonably could have considered in determining whether Colbert likely possessed child pornography, all the more so in light of the evidence that Colbert heightened the allure of his attempted inveiglement by telling the child that he had movies she would like to watch. That information established a direct link to Colbert's apartment and raised a fair question as to the nature of the materials to which he had referred.

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US. v Marquez, 2010 U.S. App. LEXIS 10394, May 21, 2010

To establish a *Fourth Amendment* violation, a defendant must show that he had a reasonable expectation of privacy in the area searched. A defendant lacks standing to contest the search of a place to which he has an insufficiently close connection. Acosta-Marquez neither owned nor drove the Ford and was only an occasional passenger therein. He therefore lacked standing to contest the installation and use of the GPS device.

Even if Acosta-Marquez had standing, we would find no error. A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another. When electronic monitoring does not invade upon a legitimate expectation of privacy, no search has occurred. When police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

In this case, there was nothing random or arbitrary about the installation and use of the device. The installation was non-invasive and occurred when the vehicle was parked in public. The police reasonably suspected that the vehicle was involved in interstate transport of drugs. The vehicle was not tracked while in private structures or on private lands.

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

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U.S. v. Parish, 2010 U.S. App. LEXIS 10460, May 24, 2010

Since the police had probable cause to arrest Parish on the drug charges, his arrest was lawful. Because the only purpose of the arranged meeting was for Parish to distribute drugs, the police had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle.

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

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9th CIRCUIT

U.S. v. Struckman, 2010 U.S. App. LEXIS 9140, May 4, 2010

The police officers' warrantless seizure of Struckman within his backyard and their entry into the yard to perfect his arrest violated the *Fourth Amendment*. Police officers must either obtain a warrant or consent to enter before arresting a person inside a home or its curtilage *or* make a reasonable attempt to ascertain that he is actually a trespasser before making the arrest. That easily could have been done here by asking Struckman to identify himself, a step one would ordinarily expect from the police where trespass is suspected.

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10th CIRCUIT

US v Campbell, 2010 U.S. App. LEXIS 9488, May 10, 2010

A search warrant subsequently determined to lack probable cause demands suppression of the resulting evidence in at least four situations: (1) when "the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his 'reckless disregard of the truth'"; (2) "when the 'issuing magistrate wholly abandon[s her] judicial role'"; (3) "when the affidavit in support of the warrant is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; and, (4) "when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid."

Recently, the Supreme Court in *United States v. Herring, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)*, appears to have described another situation in which Leon would not apply--when the warrant's flaw results from recurring or systemic police negligence.

The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. When police error is the result of negligence, "rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule does not serve its purpose and, therefore, does not apply.

In this case: (1) probable cause existed to support the warrant, (2) the officers involved in the

preparation of the affidavit supporting the warrant did not deliberately mislead or act with reckless indifference to the truth, and, otherwise, (3) law enforcement relied in objective good faith upon the warrant

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

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11th CIRCUIT

Penley v. Eslinger, 2010 U.S. App. LEXIS 9106, May 3, 2010

Christopher Penley, a fifteen-year-old middle school student brought a pistol to school. He briefly held one classmate hostage who escaped before the police officers arrived. Penley eventually took refuge in a bathroom, and on three occasions walked laterally past the open bathroom door, aiming his gun at the police officers. On Penley's third pass Lieutenant Weippert fired a single shot from his scoped semi-automatic rifle, striking Penley in the head. Police entered the bathroom and discovered that Penley's gun was a plastic air pistol modified to look like a real gun. Penley died two days later.

The Penleys' claim that, when he shot their son, Lieutenant Weippert used excessive force, in violation of Mr. Penley's *Fourth Amendment* right to be free from unreasonable seizure.

To satisfy the objective reasonableness standard imposed by the *Fourth Amendment*, Lieutenant Weippert must establish that the countervailing government interest was great. Analysis of this balancing test is governed by (1) the severity of the crime at issue; (2) whether Mr. Penley posed an immediate threat to the officers or others; and (3) whether he actively resisted arrest. In this case, the reasonableness analysis turns on the second of these factors: presence of an imminent threat.

Both the first and third factors weigh in Lieutenant Weippert's favor. Bringing a firearm to school, threatening the lives of others, and refusing to comply with officers' commands to drop the weapon are undoubtedly serious crimes. As the Penleys themselves concede, they "have never taken the position that because the gun turned out to be a toy, the situation was any less serious." The third factor favors a finding of reasonableness as well. While the Penleys argue that Mr. Penley did not attempt to run from the bathroom, they do not contest that their son refused to comply with repeated commands to drop his weapon. Non-compliance of this sort supports the conclusion that use of deadly force was reasonable.

Though a closer call, the second factor also supports Lieutenant Weippert's argument that he acted reasonably. Mr. Penley demonstrated his dangerous proclivities by bringing to school what reasonable officers would believe was a real gun. He refused to drop the weapon when repeatedly commanded to do so. Most importantly, he pointed his weapon several times at Lieutenant Weippert and Deputy Maiorano. We have held that a suspect posed a grave danger under less perilous circumstances than those confronted by Lieutenant Weippert.

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

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US v. Boffil-Rivera, 2010 U.S. App. LEXIS 10838, May 27, 2010

To sustain a conviction for violation of *18 U.S.C. section 1001*, the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States.

There was sufficient evidence for a jury to conclude that the defendant's statement to the ICE agents was false, that the defendant intended to deceive the agents and that the statement was material because it was capable of influencing the agency's investigation.

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

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US v. Alfaro-Moncada, 2010 U.S. App. LEXIS 10841, May 27, 2010

The suspicionless search of the defendant's cabin on a foreign cargo ship, while it was docked at the Antillean Marine on the Miami River, was not a violation of the *Fourth Amendment*.

The CBP Agricultural Enforcement Team had statutory authority under *19 U.S.C. § 1581 (a)* to search the defendant's cabin.

Given the dangers we face, the paramount national interest in conducting border searches to protect this nation and its people makes it unreasonable to require any level of suspicion to search any part of a foreign cargo vessel coming into this country. Crew members' cabins are no exception because, like any other part of a vessel, they can be used to smuggle in weapons of mass destruction, illegal devices, or other contraband, such as child pornography, as was the case here.

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

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