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The Federal Law Enforcement -Informer-

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

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CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

United States v. Ryan, 2013 U.S. App. LEXIS 19925 (1st Cir. Mass. Sept. 30, 2013)

Ryan was driving in the Charlestown Navy Yard, which is part of the Boston National Historic Park when a United States Park Ranger saw Ryan's car driving over the centerline of the road. The ranger followed Ryan, however, by the time the ranger pulled Ryan over, he and Ryan were no longer on federal land. The ranger arrested Ryan who was charged with three alcohol-related offenses. Ryan moved to suppress the evidence arising from his arrest, arguing the ranger had no statutory authority to arrest him outside the Park.

Even though the ranger lacked statutory authority to arrest Ryan, the court held the ranger established probable cause to arrest Ryan. Because Ryan's arrest was supported by probable cause, there was no *Fourth Amendment* violation; therefore, the court was not required to suppress the evidence obtained after Ryan's arrest.

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

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2nd Circuit

United States v. Getto, 2013 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 9, 2013)

Getto, an American citizen, was convicted of mail and wire fraud for his involvement in a conspiracy that defrauded American victims through a lottery telemarketing scheme that operated out of Israel.

Getto appealed the district court's denial of his motion to suppress evidence obtained through searches and surveillance undertaken in Israel by the Israeli National Police (INP) following a request by American Law Enforcement pursuant to a mutual legal assistance treaty.

The court held the ongoing collaboration between American Law Enforcement officers and the INP did not require application of the exclusionary rule to evidence obtained outside the United States by the INP. Even though the American Law Enforcement officers requested assistance with investigating Getto and shared the results of their preliminary investigation with the INP, the INP conducted an independent, parallel investigation of Getto. There was no evidence American Law Enforcement officers directed or controlled the investigation by the INP or that they participated in any law enforcement actions by the INP in Israel.

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

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3rd Circuit

United States v. Benoit, 2013 U.S. App. LEXIS 19312 (3d Cir. Virgin Islands. Sept. 19, 2013)

Law enforcement officers in Grenada received an anonymous tip that the vessel, Laurel, which was registered in the United States, was smuggling illegal drugs. Acting on this tip, the United States Coast Guard intercepted the Laurel and boarded it to investigate. Coast Guard officers attempted to conduct a space accountability inspection, which consists of taking measurements of a vessel to determine if there are any hidden compartments. After the officers were unable to complete this inspection because of rough seas, the Laurel was directed to the nearest United States port. In addition, Benoit, the master of the Laurel, gave officers inconsistent responses when questioned about the Laurel's destination and purpose for travel.

Once in port, two different drug dogs alerted to the presence of narcotics in the same area of the Laurel. Customs and Border Protection Officers then used a machine to search for anomalies in the vessel and found anomalous masses mid-ship and in the stern. The officers drilled a hole in the stern of the Laurel and found a substance that field-tested positive for cocaine. The officers eventually found 250 brick-like packages containing cocaine hidden in the stern.

Benoit was convicted of two federal drug offenses. On appeal, Benoit argued officers violated the *Fourth Amendment* by arresting him and searching the Laurel without probable cause.

The court disagreed. The United States Coast Guard has broad authority to board vessels on the open sea. The Coast Guard may stop American vessels to conduct document and safety inspections without having any suspicion of criminal activity and may conduct more intrusive searches based on reasonable suspicion. Here, the court held the information from the authorities in Grenada and Benoit's inconsistent statements to the Coast Guard officers established reasonable suspicion to briefly detain the Laurel and search the vessel for contraband. Because rough seas prevented the officers from completing their search, it was reasonable to direct the Laurel to the nearby port and detain it until the search was completed. Once the drug dogs alerted to the presence of narcotics, the officers had probable cause to arrest Benoit. Finally, drilling a hole into the vessel was reasonable after the drug dogs alerted and the officers discovered the anomalous masses in the vessel.

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

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6th Circuit

United States v. Stewart, 2013 U.S. App. LEXIS 18224 (6th Cir. Mich. September 3, 2013)

Stewart arrived at the Detroit Metropolitan Airport on a plane from Japan with two laptop computers, a Twinhead Customs and a Sony. A Customs and Border Protection Officer (CBP) randomly approached Stewart and began asking him questions about his passport and declaration sheet. After Stewart became confrontational, the CBP officer directed Stewart to a secondary inspection area where he could ask Stewart questions and search his luggage and computers before clearing customs.

The CBP officer attempted to search the Twinhead computer, but could not because it had a dead battery and required a foreign power cord converter. While searching the Sony computer, the CBP officer found a dozen images of nude children that he believed to be child pornography. The CBP officer turned the computers over to an Immigration and Customs Enforcement (ICE) agent who told Stewart he was free to go, but that his computers were being detained for further examination. Later that day, the ICE agent transported the two computers to ICE's main office in downtown Detroit, approximately twenty miles away, so they could be further examined.

The next day, another ICE agent conducted a brief search of the Twinhead computer and found what he believed were images of child pornography. The agent stopped his search and five days later, the initial ICE agent obtained a warrant to search both computers. A forensic examination of Stewarts' computers revealed images of child pornography.

After he was indicted, Stewart filed a motion to suppress all evidence obtained from his computers at ICE's Detroit office, arguing he was subjected to an extended border search without reasonable suspicion, in violation of the *Fourth Amendment*.

The court disagreed. The Supreme Court has recognized an exception to the *Fourth Amendment's* warrant requirement of probable cause or a warrant for searches conducted at the border. Under the border search exception, searches of people and their property at the borders are automatically considered reasonable because the government has a strong interest in preventing the entry of unwanted persons and items into the United States.

Distinct from border searches, an extended border search occurs after an individual or his property has been granted access into the United States. The typical extended border search takes place at a location away from the border where entry is not apparent, but where a police officer has reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity. With an extended border search, an individual is assumed to have cleared the border and regained an expectation of privacy in any property brought with him across the border.

In this case, Stewart was not subjected to an extended border search because his laptop computers never cleared the border. Although Stewart was cleared to enter the United States after the initial search of his Sony computer, his computers were not cleared for entry. The follow-up examination of the Twinhead computer that occurred the next day at the ICE field office twenty miles away from the airport was a continuation of the routine border search from the day before.

Consequently, the extended border search exception did not apply and the government's border search of Stewart's computers did not violate the *Fourth Amendment*.

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

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United States v. Hockenberry, 2013 U.S. App. LEXIS 19296 (6th Cir. Ohio Sept. 19, 2013)

Police received a telephone call stating a man driving a black Jeep Cherokee was attempting to sell firearms at a local auto parts store. The caller, who identified himself as an employee of the store, gave police a description of the Jeep and provided its license plate number.

A few hours later, police officers saw the Jeep and initiated a traffic stop after the driver turned without signaling. The officers encountered Hockenberry, Gray and Hunt. The officers arrested

Hunt after they discovered she had active arrest warrants. The officers decided to tow the Jeep after they discovered neither Hockenberry nor Gray had valid driver's licenses. The officers did not give Hockenberry an opportunity to call someone to retrieve the Jeep.

Before having the Jeep towed, the officers conducted an inventory search and found several firearms; however, the officers did not inventory some items they believed had no value. Hockenberry and Gray were indicted for possession of a firearm by a convicted felon.

Hockenberry and Gray argued the officers did not have probable cause to stop the Jeep, the officers failed to follow the department's standardized inventory search policy and the inventory search was a pretext for a search for criminal evidence.

The court disagreed. First the officers had probable cause to conduct the traffic stop after they saw the driver of the Jeep commit a traffic violation by failing to signal. Regardless of the officers' subjective motivation, the officers witnessed a traffic violation that supported stopping the Jeep.

Second, the officer's decision to impound the Jeep was reasonable as the vehicle was on a public street and neither Hockenberry nor Gray had a valid driver's license. In addition, the officers were not required to allow the men an alternative method of securing the Jeep. Given the circumstances, it was reasonable for the officers to conduct an inventory search. Even though the officers deviated from the department's inventory search policy by failing to inventory all items of "value" found in the Jeep, the officers immediately saw the firearms when they opened the Jeep's tailgate. The court noted the law allows for some flexibility in determining what items in a vehicle are considered "valuable" for the purposes of an inventory search.

Finally, the court held there was no evidence to establish the officers conducted the inventory search as a pretext for a search for criminal evidence.

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

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8th Circuit

Mitchell v. Shearrer, 2013 U.S. App. LEXIS 18756 (8th Cir. Mo. Sept. 10, 2013)

Mitchell allowed grass clippings and leaves from his lawn to be cast upon the street in front of his house in violation of a local ordinance. After the police department received a complaint about the clippings and leaves, Officer Shearrer went to Mitchell's house to investigate.

Officer Shearrer opened the glass storm door and knocked on the interior wooden door, which Mitchell answered. Officer Shearrer asked Mitchell to come outside so he could show Mitchell the grass clippings and leaves in the street. Mitchell refused and as he began to shut the interior door, Officer Shearer put his foot into the doorway, preventing the door from closing. Officer Shearrer repeated his request that Mitchell come outside, but Mitchell refused. Office Shearrer told Mitchell he was under arrest and then reached for Mitchell's arm as Mitchell stood in the doorway trying to shut the door. A short scuffle ensued and two back back-up officers helped Officer Shearer subdue and handcuff Mitchell.

Mitchell sued Officer Shearrer and the two back-up officers, claiming they violated his constitutional rights by arresting him in his home without first obtaining an arrest warrant.

The district court granted the back-up officers qualified immunity, but denied it as to Officer Shearrer. Officer Shearrer appealed.

The court of appeals held Officer Shearrer was not entitled to qualified immunity. Officer Shearrer decided to arrest Mitchell after Mitchell attempted to close the interior door to his house. A reasonable jury could find Mitchell was within his home, standing far enough away from the threshold where he had a reasonable expectation of privacy when Officer Shearrer tried to arrest him without a warrant.

Next, the court noted it is clearly established in the Eighth Circuit that unless exigent circumstances are present, an officer cannot reach over the threshold and into a person's home to forcibly make a warrantless arrest. Accordingly, the court held a reasonable officer would have known when Mitchell tried to close the interior door, he stood within his house; therefore, the officer could not pull Mitchell out of the house and arrest him without exigent circumstances.

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

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United States v. Morgan, 2013 U.S. App. LEXIS 18758 (8th Cir. Neb. Sept. 10, 2013)

At approximately 12:34 a.m., two police officers were patrolling 24-hour businesses in response to recent robberies in the area. From their patrol car, the officers saw a vehicle with tinted windows parked at the far corner of a grocery store parking lot. The officers noticed the occupants were ducked-down inside the vehicle. When the officers got out of their car to investigate, the person in the driver's seat sat up and reached under his seat with both hands. The officers drew their firearms and ordered the occupants out of the vehicle. Morgan, the driver, initially kept his hands under the seat, but complied with a second request to raise his hands. The officers handcuffed the three occupants of the car and searched the vehicle for weapons. When he reached under the driver's seat, one of the officers removed a lockbox that was large enough to conceal a handgun. The officer asked Morgan, "What is this?" Morgan replied, "There's meth in there, and I'm a dealer." The officer read Morgan his *Miranda* rights and Morgan again voluntarily admitted to being a drug dealer. The officer opened the lockbox and found methamphetamine and a white powdery substance Morgan admitted was cocaine. After the substances in the lockbox field-tested positive for methamphetamine and cocaine, the officer arrested Morgan.

The district court suppressed the physical evidence and the statements Morgan gave to the officer after being *Mirandized*. The district court concluded the officers exceeded the scope of a *Terry* stop and Morgan's unlawful arrest led directly to the seizure of the physical evidence and his incriminating statements.

The government appealed.

The court of appeals reversed the district court, holding the officers had reasonable suspicion to conduct a *Terry* stop on Morgan. First, the officers saw a vehicle with tinted windows, parked away from a store entrance, in an area where there had been recent robberies. Second, the occupants of the vehicle were attempting to conceal themselves.

Next, the court held the officers had the right to conduct a *Terry* frisk because as the officers approached the vehicle, Morgan made furtive gestures under the seat and refused to remove his

hands from under the seat when first ordered to do so. These actions gave the officers reason to believe there was a weapon in the vehicle, which justified the officer's search under seat. The officer was justified in searching the lockbox found under the seat, as it was large enough to conceal a weapon.

Finally, the court held the officers did not exceed the scope of the *Terry* stop. The officers established reasonable suspicion Morgan was involved in criminal activity and had reason to believe he was dangerous. The officer searched the vehicle for weapons immediately after securing Morgan and he did not use unreasonable force or detain Morgan for an unreasonably long time before arresting him.

The government did not challenge the district court's suppression of the statements Moran gave before he was *Mirandized*, that there was methamphetamine in the lock box and he was a drug dealer. The issue became whether the physical evidence and the statements Morgan made after being *Mirandized* should have been suppressed as the fruits of the *Miranda* violation.

First, the court noted the Supreme Court has held a *Miranda* violation does not justify the suppression of physical evidence obtained as the result of a voluntary statement; therefore, the methamphetamine and cocaine found in the lockbox should not have been suppressed.

Second, the court stated warned statements elicited after an initial *Miranda* violation may be admissible as long as the officers do not purposefully elicit an unwarned confession from a suspect in an effort to circumvent the *Miranda* requirements. In this case, after the officer *Mirandized* Morgan, Morgan volunteered he was a drug dealer and the substance in the lockbox was cocaine. There was no evidence the *Mirandized* statements were coerced. Consequently, Morgan's post-*Miranda* statements should not have been suppressed.

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

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9th Circuit

Gravelet-Blondin v. Shelton, 2013 U.S. App. LEXIS 18595 (9th Cir. Wash. Sept. 6, 2013)

Police officers were dispatched to a 911 call of a suicide in progress. When the officers arrived, they found an elderly man sitting in his car, which was parked in the side yard of his house with a hose running from the exhaust pipe to one of the car's windows. The officers had been warned the man owned a gun and would have it with him. Sergeant Shelton asked the man to get out of the car and the man complied, however, the man refused multiple commands to show his hands. Sgt. Shelton instructed another officer to deploy his Taser against the man in dart mode. After the officer deployed his Taser, the man fell to the ground and other officers moved in to handcuff him.

During this time, one of the man's neighbors, Blondin , heard the commotion and went outside to investigate. Blondin heard his neighbor moaning and saw several officers holding him on the ground. When Blondin was approximately thirty-seven feet away, he asked Sgt. Shelton what the officers were doing to his neighbor. Sgt. Shelton ran towards Blondin, pointing his Taser and ordered Blondin to get back, while another officer told Blondin to stop. Blondin froze. Sgt. Shelton began to warn Blondin that he would deploy his Taser against him if he did not leave. However, Sgt. Shelton deployed his Taser in dart mode before he finished giving Blondin that

warning. After Blondin fell down, Sgt. Shelton arrested him for obstructing a police officer. The charge was later dismissed.

Blondin sued Sgt. Shelton for excessive use of force, unlawful arrest and malicious prosecution. The court held Sgt. Shelton was not entitled to qualified immunity.

Concerning Sgt. Shelton's use of force, the court considered the factors outlined in *Graham v. Connor*. First, even if Sgt. Shelton had probable cause to arrest Blondin for obstruction of justice for not immediately backing away from the arrest scene, it was not a serious offense. In addition, Blondin was standing thirty-seven feet away and had received conflicting orders from two police officers. Second, based on Blondin's behavior, demeanor and distance from the officers, there was no reason to believe he posed an immediate threat to the officers or others. Finally, Blondin did not resist arrest or attempt to evade arrest by flight. The court also noted while Sgt. Shelton warned Blondin, he did so as he fired his Taser, leaving Blondin no time to react. The court held a reasonable jury could conclude Sgt. Sheldon's use of force was unreasonable and excessive in violation of the *Fourth Amendment*.

The court further held at the time of the incident it was clearly established the use of a Taser against someone who is merely engaging in passive resistance was more than a trivial use of force.

In addition, the court held a reasonable jury could conclude that Sgt. Shelton did not have probable cause to arrest Blondin; therefore, Sgt. Shelton was not entitled to qualified immunity on Blondin's unlawful arrest and malicious prosecution claims.

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

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United States v. Lopez-Cruz, 2013 U.S. App. LEXIS 18930 (9th Cir. Cal. Sept. 12, 2013)

A border patrol agent conducted a traffic stop on Lopez. While talking to Lopez, the agent saw two cell phones in the car's center console. The agent asked Lopez whether the phones were his and Lopez told the agent the phones, as well as the car, belonged to a friend. The agent asked Lopez, "Can I look in the phones? Can I search the phones?" Lopez consented by responding "yes." While searching the phones, one of the phones rang three times. Each time the agent answered the phone, pretended to be Lopez and engaged in a conversation with the caller. As a result of the phone calls, the agent obtained information that led to Lopez's arrest for conspiracy to transport illegal aliens.

Lopez filed a motion to suppress the evidence obtained when the agent answered the incoming phone calls, arguing the agent exceeded the scope of his consent to search the phones.

The government argued Lopez did not have standing to challenge the search because he disclaimed ownership of the phones. Alternatively, the government argued answering the cell phone fell within the scope of Lopez's consent.

First, the court held Lopez had standing to challenge the agent's search of the phone. To have standing to object to a search, a person must show he had a reasonable expectation of privacy in the item searched. The court noted the location of the phones within the car suggested the phones were in Lopez's possession and being used by Lopez when the agent encountered him.

In addition, even though Lopez denied ownership of the phones, ownership is only one factor used to determine whether a person has a reasonable expectation of privacy in an item. When Lopez told the agent the phones belonged to a friend, Lopez did not disclaim use of them or otherwise disassociate himself from them. The fact that the agent sought Lopez's permission before searching the phones suggests the agent did not believe Lopez had abandoned his privacy interest in the phones. Consequently, the court held Lopez had a reasonable expectation of privacy in the phones by virtue of possessing and using them and he had not abandoned his privacy interest by denying their ownership.

Second, the court held the agent's act of answering the incoming phone calls exceeded the scope of Lopez's consent. The scope of consent is determined by asking what a reasonable person would have understood by the exchange between the officer and the suspect. Here, the court held Lopez's consent to search the cell phone, by itself, did not constitute consent to answer the phone if it rang.

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

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United States v. Grandberry, 2013 U.S. App. LEXIS 19180 (9th Cir. Cal. Sept. 17, 2013)

After police officers arrested Grandberry for selling drugs, they searched a nearby apartment Grandberry had entered several times in the days before his arrest. The officers did not obtain a warrant to search the apartment because Grandberry was on parole and a condition of Grandberry's parole allowed officers to search his residence without a warrant. Inside the apartment, officers found cocaine and a firearm.

Grandberry moved to suppress the cocaine and firearm arguing the officers lacked probable cause the apartment was his residence. Grandberry claimed the apartment was his girlfriend's residence and when the officers saw him entering it, he was an invited guest.

Police officers may lawfully search a parolee's residence without a warrant when the parolee is subject to a provision authorizing warrantless searches and the officers have probable cause to believe that the parolee is a resident of the location to be searched. There was no issue that Grandberry's parole authorized warrantless searches; however, the court held the officers' observations were not sufficient to establish probable cause Grandberry lived at the apartment they searched. First, the officers knew Grandberry reported to his parole officer that he lived in a house at a different address, which was the same address on file with the Department of Motor Vehicles, and the officers did not check with Grandberry's parole officer to confirm where Grandberry lived. Second, the officers conducted minimal surveillance at the house and while they noticed it appeared to be occupied, they did not interview anyone at the house or any neighbors to determine if Grandberry lived there. Third, the officers never observed any signs that Grandberry stayed overnight at the apartment, even though some of the surveillance was conducted late in the evening.

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

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United States v. Schesso, 2013 U.S. App. LEXIS 19256 (9th Cir. Wash. Sept. 18, 2013)

Police officers discovered a child pornography video that was made available for download over a peer-to-peer file-sharing network from an Internet Protocol (IP) address assigned to Schesso. Officers obtained a warrant to search Schesso's residence for any computer, electronic equipment, or digital storage device that was capable of containing evidence of child pornography violations. Officers seized multiple pieces of electronic media and data storage devices and discovered hundreds of images and videos of child pornography.

The district court granted Schesso's motion to suppress the child pornography evidence, holding the search warrant affidavit did not establish probable cause to believe Schesso possessed child pornography.

The government appealed and the court of appeals reversed the district court. The court of appeals held the search warrant affidavit included facts, when combined with reasonable inferences from those facts, that provided probable cause to search Schesso's entire computer system and his digital storage devices for evidence of possession of or dealing in child pornography. Key to the court's determination that probable cause existed was the fact that Schesso took the affirmative steps of uploading and distributing the video on a network designed for sharing and trading. Based on that information, the officers could reasonably infer Schesso possessed or had downloaded other files containing child pornography.

Once the officers established probable cause to believe Schesso collected child pornography, the officers were entitled to seize and search his entire computer system and digital storage devices.

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

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10th Circuit

United States v. Mabry, 2013 U.S. App. LEXIS 18341 (10th Cir. Kan. Sept. 4, 2013)

Mabry was on parole from Kansas when he was discovered in Utah as a passenger in a vehicle, which contained twenty-two pounds of marijuana. Mabry was not arrested, but after his parole officer learned about the incident, an order to arrest and detain Mabry was issued on the basis Mabry had violated his parole by traveling out of state without first receiving permission. Officers went to Mabry's house, arrested him, searched the house, and discovered a sawed-off shotgun in a closet. Mabry was charged with unlawful possession of the firearm.

Even though Mabry's parole agreement contained a provision which allowed officers to search his house, Mabry argued the officers did not have reasonable suspicion to support the search of his house as required by Kansas Law.

The court disagreed. First, as a parolee, Mabry had a diminished expectation of privacy. Second, there was reliable information that Mabry had violated his parole and was involved with distributing drugs, which gave the officers reasonable suspicion to search his house. Finally, the State had a strong interest in monitoring Mabry's behavior to prevent his recidivism.

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

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