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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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Hot Issues

4th AMENDMENT ROADMAP

A step by step guide to searches

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- **Introduction to 4th Amendment Searches**
- **Who is a Government Agent?**
- **Reasonable Expectation of Privacy 1 and 2**
- **Probable Cause 1 and 2**
- **What is a Search Warrant?**
- **Search Warrant Service 1 and 2**
- ***Terry* Stop and Frisk**
- **Protective Sweeps**
- **Search Incident to Arrest**
- **Consent**
- **Mobile Conveyances**
- **Exigent Circumstances**
- **Plain View**
- **Exclusionary Rule 1 and 2**
- **Inspections**
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- **Consent Searches – *GA v. Randolph***
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- **GPS Tracking**
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A step by step guide to Lawful Interviews

- **Self Incrimination: *Miranda* and the 5th Amendment**
- ***Miranda* Waivers and Invocations**

MILITARY INTERROGATIONS

The 5th Amendment, *Miranda*, and Article 31

- **Article 31(b), UCMJ**
- **Military Interrogations – The Fifth Amendment and *Miranda***

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Coming in November

The Supreme Court Preview

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In This Issue

The New Article 120, UCMJ

Rape, Sexual Assault, and other Sexual Misconduct

A Practical Guide for Investigators

By Senior Legal Instructor Keith Hodges
Keith, a retired Colonel, U.S. Army, JAGC, served for nine years as a Trial Judge before becoming a Senior Instructor at FLETC in 2000.

Here's an excerpt

The new Article 120.

Congress amended Article 120, U.C.M.J. (10 U.S.C. § 920) effective for offenses occurring on and after October 1, 2007. Article 120 was formerly known as "Rape and carnal knowledge," but is now entitled "Rape, sexual assault, and other sexual misconduct." The change to Article 120 and the proposed Manual for Courts-Martial (MCM) changes are monumental in that:

a. They create 36 offenses. These 36 offenses replace those offenses under the former Article 120 and others that used to be MCM offenses under Article 134.

b. The new Article 120 replaces the following Article 134 offenses:
(1) Indecent assault (Paragraph 63, Part IV, MCM).
(2) Indecent acts or liberties with a child (Paragraph 87, Part IV, MCM).
(3) Indecent exposure (Paragraph 88, Part IV, MCM).
(4) Indecent acts with another (Paragraph 90, Part IV, MCM).

c. The UCMJ change also amends some Article 134 offenses.

Elements of the offenses and law enforcement officers.

When punitive articles are taught, it is traditional to discuss each offense and then review the elements. This is not a useful approach for this new Article because of the large number of

offenses and therefore the tendency to "get lost in the weeds." Such an approach is also not helpful for it is the facts that result from the investigation that will drive what offense occurred, and until the investigation is completed agents and the prosecution do not know what offense, if any, has been committed. In other words, law enforcement officers should not approach an investigation focusing on the elements of 36 offenses (though certainly they should be globally familiar with key elements and definitions), but determine the facts and then – in conjunction with the trial counsel – examine what offenses may have been committed. Once the facts are known and what elements can be satisfied agents should focus on specifically what U.C.M.J. offense, if any, was committed.

Click HERE for the Full Article

(It takes a couple of minutes to load)

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The FLETC Journal

"The Fourth Amendment – Supreme Court Cases from the 2005-2006 Term"

By Senior Legal Division Instructor Jeff Fluck

"Lawsuits: The Overblown Worry"

By Senior Legal Division Instructor Keith Hunsucker

"Tracking Devices: The New Federal Rule 41"

By Senior Legal Division Instructor Keith Hodges

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CIRCUIT COURTS OF APPEALS CASE SUMMARIES

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CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

2nd CIRCUIT

U.S. v. Carvajal, 2007 U.S. App. LEXIS 21182, September 05, 2007

In *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), the Supreme Court held that although a police officer's failure to abide by the knock-and-announce rule may violate an individual's right to be free from unreasonable searches under the Fourth Amendment, the exclusionary rule does not apply to evidence discovered in the ensuing search with a warrant. *Hudson* involved state law enforcement officers whose actions were governed solely by the Fourth Amendment and not by 18 U.S.C. § 3109. Because the Fourth Amendment knock-and-announce principle and § 3109 share the same common law roots, overlap in scope, and protect the same interests, the results in terms of the exclusionary rule's application are necessarily similar.

A technical violation by federal officers of the knock-and-announce rule under either the Fourth Amendment or § 3109 cannot form the basis for suppression of evidence.

The facts underlying an alleged violation of § 3109 may form the basis for attacking the propriety of the search as a violation of the Fourth Amendment outside of just the knock and announce context. If such is the case, a cause of action for damages may lie against the federal officer under *Bivens.*

The 5th and D.C. Circuits agree (cites omitted)**.**

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

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U.S. v. Wilson, 2007 U.S. App. LEXIS 22608, September 24, 2007

Title 21 U.S.C. § 856(a)(2) makes it unlawful for a person with a premises to knowingly and intentionally allow its use for the purpose of manufacturing, storing or distributing drugs. The person who manages or controls the building and then rents to others need not have the express purpose in doing so that drug related activity take place. The phrase "for the purpose," as used in this provision, references the purpose and design not of the person with the premises, but rather of those who are permitted to engage in drug-related activities there.

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

3rd CIRCUIT

U.S. v. Lafferty, 2007 U.S. App. LEXIS 22888, September 28, 2007

Putting a suspect in an interrogation room with an alleged confederate after the suspect had invoked her right to remain silent and after the confederate had promised to give a confession is inconsistent with "scrupulously honoring" the suspect's assertion of her right to remain silent. Such a joint interrogation would likely force the suspect to either react to the confederate's statements or suggest her assent to those statements by remaining silent while he incriminated her in a conspiracy. Waiver of her right to remain silent cannot be inferred merely because she was willing to go into the interrogation with her confederate.

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

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5th CIRCUIT

U.S. v. Morganfield, 2007 U.S. App. LEXIS 22733, September 25, 2007

Title 18 U.S.C. § 514(a)(2) provides that "Whoever, with intent to defraud… passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States… any false or fictitious instrument…." Terms in § 514(a) are defined by reference to 18 U.S.C. § 513(c). Section 513(c)(3)(A) defines a "security" as including a check. Neither § 514 nor § 513(c) define what constitutes a "false or fictitious instrument, document, or other item."

"False or fictitious instrument" in § 514 refers to nonexistent instruments. Fictitious instruments are not counterfeits of *any existing negotiable instrument.* A check that is genuine on its face, even if it is worthless, is not, as a matter of law, a "false or fictitious instrument."

The 6th and 8th Circuits agree (cites omitted)**.**

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

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6th CIRCUIT

Garner v. Mitchell, 2007 U.S. App. LEXIS 21705, September 11, 2007

Whether a waiver of *Miranda* rights is a knowing and intelligent depends upon the totality of the circumstances, including the suspect's age, experience, education, background, and intelligence, and the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. There is no categorical rule that a low IQ or other significant limitations in intellectual functioning make a suspect with such characteristics unable to give a valid waiver of *Miranda* rights. The standard of proof is a preponderance of evidence.

(This case involved expert testimony on four standardized mental tests designed specifically to determine whether a waiver of *Miranda* rights is knowing and intelligent.)

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

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Taylor v. Michigan Dep't of Natural Resources, 2007 U.S. App. LEXIS 22021, September 14, 2007

A search under the Fourth Amendment is a government intrusion into a reasonable expectation of privacy. A "reasonable expectation of privacy" exists when (1) the individual has manifested a subjective expectation of privacy in the object of the challenged search and (2) society is willing to recognize that expectation as reasonable. The second prong generally addresses two considerations. The first focuses on what a person had an expectation of privacy *in*, for example, a home, office, phone booth or airplane. The second consideration examines what the person wanted to protect his privacy *from*, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. The purpose and degree of the government's intrusion is relevant to the second consideration.

A conservation officer's daylight, five minute, suspicionless "property (security) check" of a temporarily unoccupied residence, consisting of calling out to determine if anyone was home, checking the doors and windows to ensure they were locked, peering briefly into the interior through the open curtains of a window, and leaving his business card in the front door is not a Fourth Amendment search.

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

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9th CIRCUIT

Stoner v. Santa Clara County Office of Education, 2007 U.S. App. LEXIS 21470, September 07, 2007

Under the False Claims Act ("FCA"), "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). School districts in California, including county offices of education, are arms of the state, and therefore not "persons" subject to *qui tam* liability under the FCA.

State officials, sued for damages in their individual capacities, are "persons" within the meaning of 31 U.S.C. § 3729.

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

Melendez v. Gonzales, 2007 U.S. App. LEXIS 22351, September 19, 2007

An alien may not avoid the immigration consequences of a drug conviction as a "first time offender" when, as the result of a previous arrest for drug possession, he was granted "pretrial diversion" under a state rehabilitation scheme that did not require him to plead guilty.

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

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Cornejo v. County of San Diego, 2007 U.S. App. LEXIS 22616, September 24, 2007

Article 36 of the Vienna Convention on Consular Relations does not create judicially enforceable rights that support a 42 U.S.C. § 1983 action. It confers legal rights and obligations on *States* in order to facilitate and promote consular functions including protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, detained foreign nationals benefit from Article 36's provisions. But the right to protect nationals belongs to *States* party to the Convention; no private right is unambiguously conferred on individual detainees such that they may pursue it through § 1983.

The 7th Circuit, the only other Circuit to squarely answer the question, disagrees (Jogi v. Voges, 480 F.3d 822 (March 2007)).

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

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U.S. v. Dearing, 2007 U.S. App. LEXIS 22678, September 25, 2007

18 U.S.C. § 1347, provides that one commits health care fraud when he: knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud.

As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose." In other words, in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. Willfulness may be inferred from circumstantial evidence of fraudulent intent. Intent can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.

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

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10th CIRCUIT

U.S. v. Schaefer, 2007 U.S. App. LEXIS 21200, September 05, 2007

U.S.C. §§ 2252(a)(2) and (a)(4)(B), make unlawful the receipt and possession of child pornography images mailed, shipped or transported in interstate or foreign commerce. The jurisdictional language unambiguously requires the movement of the images across state lines. Absent evidence of (1) the server locations of the websites searched; or (2) the server location of defendant's internet service provider, it is not enough to assume that an internet communication necessarily traveled across state lines. In many, if not most, situations the use of the internet will involve the movement of communications or materials between states. But this fact does not suspend the need for evidence of this interstate movement. The government is required to prove that any internet transmissions containing child pornography that moved to or from the defendant's computer crossed state lines. There is no "internet exception" to the statute's jurisdictional requirements.

The 1st, 3rd, and 5th circuits disagree (cites omitted).

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

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11th CIRCUIT

Bruce v. Beary, 2007 U.S. App. LEXIS 21283, September 06, 2007

Administrative searches are an exception to the Fourth Amendment's warrant requirement and do not violate the Constitution simply because of the existence of specific suspicion of criminal wrongdoing. But, they are not an exception to the Fourth Amendment's requirement for reasonableness. The scope and execution of an administrative inspection must be reasonable in order to be constitutional. To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it.

Absent evidence of any reason to believe that the inspection would be met with resistance or defiance, an administrative search is unreasonable when a group of approximately twenty officers armed with Glock 21 sidearms, some carrying Bennelli automatic shotguns, some dressed in SWAT uniforms - ballistic vests imprinted with SWAT in big letters, camouflage pants, and black boots - arrive in unmarked trucks and SUVs, surround the entire premises, block all exits, enter with guns drawn, order the employees to line up along the fence, pat down and search the employees, search pockets and purses, and detain employees for ten hours.

If an administrative search is unlawful from its inception or in its execution, then nothing discovered in the ensuing search can be used to support the required probable cause to arrest or to seize property.

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