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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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4th Amendment Roadmap

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**
- **Inventories**

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SELF INCRIMINATION ROADMAP

A step by step guide to

The 5th Amendment – *Miranda* – the 6th Amendment

HOT ISSUES

Supreme Court cases and emergent issues

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- **Consent Searches – *GA v. Randolph***
- **Anticipatory Warrants – *US v. Grubbs***
- **GPS Tracking**
- **Covert Entry Search Warrants**

****To be added this week****

- **Deadly Force – *Scott v. Harris***

Coming Soon

- **Interviewing Represented Military Suspects**
- **FISA – An Overview for Officers and Agents**

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UNITED STATES SUPREME COURT
CASE BRIEF

Scott v. Harris, 2007 U.S. LEXIS 4748, April 30, 2007

A claim of excessive force in the course of making a seizure of a person is properly analyzed under the Fourth Amendment's objective reasonableness standard of *Graham* v. *Connor*, 490 U. S. 386 (1989).

***Tennessee v. Garner*, 471 U. S. 1 (1985), did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's reasonableness test to the use of a particular type of force in a particular situation.**

Whatever *Garner* said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts.

Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

In determining the reasonableness of a seizure, balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

In judging whether Scott's actions were reasonable, consider the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Harris posed. It is appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.

A police officer's attempt to terminate a dangerous high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

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

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CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

1st CIRCUIT

U.S. v. Ossai, 2007 U.S. App. LEXIS 9293, April 24, 2007

The "interstate nexus" element of the Hobbs Act, 18 U.S.C. § 1951(a), is established by testimony that the stolen money would have been deposited into the business owner's bank account and used to run the business, which necessarily required the ordering of products manufactured outside of the state. The government need only adduce evidence of a realistic probability that the robbery had some slight or minimal impact on interstate commerce. The government need not prove that the precise funds stolen were certain to be used in future business purchases. It matters not that the actual effect of the robbery may be slight or even untraceable.

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

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4th CIRCUIT

U.S. v. Hayes, 2007 U.S. App. LEXIS 8627, April 16, 2007

Title 18 U.S.C. §§ 922(g)(9) prohibits the possession of a firearm by one convicted of a "misdemeanor crime of domestic violence" (MCDV). The definition of a MCDV in 18 U.S.C.§ 921(a)(33)(A) requires that the predicate offense have as an element a domestic relationship between the offender and the victim. Even if the victim was the offender's spouse, a "simple assault" conviction does not qualify since it does not require, as an element, proof of a domestic relationship.

The 4th Circuit is alone in its holding.

All nine other circuits, the 1st, 2nd, 5th, 8th, 9th, 10th, 11th, D.C., and Federal, that have decided this issue disagree. (cites omitted).

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

* * * *

U.S. v. Wilson, 2007 U.S. App. LEXIS 8967, April 19, 2007

Title 18 U.S.C.A. § 2518(3) requires that the government to show the "necessity" of any wiretap application via a full and complete statement as to whether normal investigative

procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. This burden is not great, and the adequacy of such a showing is to be tested in a practical and commonsense fashion that does not hamper unduly the investigative powers of law enforcement agents. Although wiretaps are disfavored tools of law enforcement, the government need only present specific factual information sufficient to establish that it has encountered difficulties in penetrating the criminal enterprise or in gathering evidence such that wiretapping becomes reasonable.

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

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7th CIRCUIT

U.S. v. Rand, 2007 U.S. App. LEXIS 7978, April 06, 2007

Murdering an innocent man in order to fake the death of a defendant in a criminal case violates 18 U.S.C. § 1512(a)(1)(C), "Tampering with a witness, victim, or an informant." The statute makes it a crime to "kill[s] or attempt[s] to kill *another person*, with intent to—(C) prevent the communication by *any person* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense (emphasis added). The plain reading of the statute demonstrates that the murder victim does not have to be a witness or an informant. The statute makes it a federal crime to kill or attempt to kill "*another person*"—regardless of who that person is—in order to prevent the communication of information by "*any person*" to law enforcement or the court. The statute is not limited to killing another person in order to prevent *that* person from communicating information law enforcement or to the court.

The 11th Circuit agrees. (cite omitted.)

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

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8th CIRCUIT

U.S. v. Varner, 481 F.3d 569, April 04, 2007

Ordinarily, the arrest of a person outside of a residence does not justify a warrantless entry into the residence itself. One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. Even absent an affirmative indication that the arrestee might have a weapon available or might attempt to escape, the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee's elbow at all times. Additionally, it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as

his judgment dictates, following the arrest. The officer's need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested.

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

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U.S. v. Timlick, 2007 U.S. App. LEXIS 8217, April 10, 2007

To convict on a violation of 21 U.S.C. § 841(a)(1), the Government must prove knowing possession with the intent to distribute. Proof of constructive possession is sufficient to satisfy the element of knowing possession. To prove constructive possession, the government must show knowledge and ownership, dominion, or control over the contraband itself, or dominion over the vehicle in which the contraband is concealed. The holder of the key, be it to the dwelling, vehicle or motel room, has constructive possession of the contents therein.

All five other circuits, the 2nd, 3rd, 5th, 7th, and D.C., that have decided this issue agree. (cites omitted).

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

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U.S. v. Ferrer-Montoya, 2007 U.S. App. LEXIS 8954, April 19, 2007

The scope of a search is generally defined by its expressed object. An officer may reasonably interpret a suspect's unqualified consent to search a vehicle for drugs to include consent to search containers within that car which might bear drugs, probe underneath the vehicle, open compartments that appear to be false, or puncture such compartments in a minimally intrusive manner. A trained dog's failure to alert may reduce the likelihood that a particular vehicle contains narcotics, but it has no bearing upon what a typical reasonable person would have understood by the exchange between the officer and the suspect in the initial grant of consent to a search.

A suspect invokes his right to remain silent under *Miranda* by making a clear, consistent expression of a desire to remain silent. Indirect, ambiguous, and equivocal statements or assertions of an intent to exercise the right to remain silent are not enough. Being evasive and reluctant to talk is different from invoking one's right to remain silent.

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

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10th CIRCUIT

U.S. v. Luke-Sanchez, 2007 U.S. App. LEXIS 8787, April 17, 2007

Bartering drugs for firearms constitutes "use" of the firearms "in furtherance of a drug trafficking crime" under 18 U.S.C. § 924(c)(1)(A).

The 1st, 3rd, 4th, 5th, 8th, and 9th Circuits agree. (cites omitted).

The 6th, 7th, 11th, and D.C. Circuits disagree. (cites omitted).

**** The Supreme Court will decide the case of *Watson v. U.S.*** (5th Cir.) **on this issue in its October 2007 term.****

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

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U.S. v. Andrus, 2007 U.S. App. LEXIS 11124, April 25, 2007

The location of the computer within the house and other indicia of household members' access to the computer is important in assessing a third party's apparent authority to consent to the search of a home computer. Third party apparent authority to consent has generally been upheld when the computer is located in a common area of the home that is accessible to other family members under circumstances indicating the other family members were not excluded from using the computer.

Another critical issue is whether law enforcement knows or should reasonably suspect because of surrounding circumstances that the computer is password protected.

If the circumstances reasonably indicate mutual use of or control over the computer, officers are under no obligation to ask clarifying questions about password protection even if the burden would be minimal. Officers are not obligated to ask questions unless the circumstances are ambiguous.

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

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11th CIRCUIT

Velazquez v. City of Hialeah, 2007 U.S. App. LEXIS 9127, April 20, 2007

An officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for failing to intervene though he administered no blow. It is not necessary that the victim be able to identify

which of the officers used excessive force. Where the law prohibits both the beating and the failure to intervene, the testimony of the victim that he was beaten after being handcuffed and that two officers were present supports the inference that one or more of the officers present beat him and that if one did not beat him, then he failed to intervene in the beating.

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

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DC CIRCUIT

*****The Court has vacated and reversed the June 23, 2006, decision in the *U.S. v. Powell* case originally summarized in QR-7-4. *****

In that decision, the Court had ruled that the police may not conduct a warrantless search of the passenger compartment of a car incident to arrest before "formal arrest" (informing an occupant of the car that he is under arrest) or "custodial arrest" (restraining his movement in a manner that would lead a reasonable person in his position to believe he is under arrest).

U.S. v. Powell, 2007 U.S. App. LEXIS 8690, April 17, 2007

The Court now holds that based on the U.S. Supreme Court's holding in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), police may conduct a search incident to arrest of a suspect whom they have probable cause to arrest if the formal arrest follows quickly on the heels of the challenged search. In *Rawlings* the Supreme Court was quite clear in stating that, assuming such proximity in time, it is not particularly important that the search preceded the arrest rather than vice versa.

The lawfulness of a search incident to arrest that precedes formal arrest does not require that the subject be in custodial arrest at the time of the search.

Probable cause to arrest is by itself insufficient to support this exception to the warrant requirement. Rather, it is the fact of the arrest that makes all the difference.

The 1st, 2nd, 4th, 5th, 6th, 8th, and 11th Circuits agree. (cites omitted).

The 7th Circuit disagrees. (cite omitted).

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