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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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CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

1st CIRCUIT

U.S. v. Ellison, 2010 U.S. App. LEXIS 7814, April 15, 2010

While being held at a county jail charged with attempting to set fire to the building where his ex-girlfriend lived, defendant indicated his willingness to give the police information about a pair of unsolved robberies elsewhere. The next day a second interview took place in the jail library. Defendant was brought there in restraints, but these were removed. Defendant was told that he was not under arrest for the robberies, did not have to answer any questions, and was free to end the interview at any time by pushing a button on the table to summon the guards. Defendant was not advised of other rights required by Miranda.

Custody under Miranda means a suspect is not free to go away; but, a suspect's lack of freedom to go away does not necessarily mean that questioning is custodial interrogation for purposes of Miranda. Never is this distinction more important than when the subject of interrogation is independently incarcerated. Even when he is given the option to end the interrogation as he chooses, he is not in the position of a suspect who is free to walk away and roam around where he pleases. Still, the restrictions on his freedom do not necessarily equate his condition during any interrogation with Miranda custody. In the usual circumstances of someone serving prison time following a conviction, so long as he is not threatened with harsher confinement than normal until he talks, he knows that the worst that can happen to him will be his return to prison routine, and that he will be back on the street (in most cases) whether he answers questions or refuses.

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

It is true that the condition of someone being held while awaiting trial, like defendant, is not exactly the same as the convict's position, since the suspect might reasonably perceive that the authorities have a degree of discretion over pretrial conditions, at least to the point of making recommendations to a court. But we see nothing in the facts of this case that would be likely to create the atmosphere of coercion subject to Miranda concern.

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

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U.S. v. Fernandez, 2010 U.S. App. LEXIS 6748, April 01, 2010

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

When police lawfully stop a vehicle, so long as the request does not measurably extend the duration of the stop, police do not need an independent justification to ask a passenger for identification.

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

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

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3rd CIRCUIT

U.S. v. King, 2010 U.S. App. LEXIS 8970, April 30, 2010

The Georgia v. Randolph, 126 S. Ct. 1515 (2006), holding that the consent of one party with authority is trumped by the refusal of another present party with authority is limited to searches and seizures of the home.

The consent by one party to the seizure of a computer shared equally without password protection is valid even when the other party is present and refuses consent.

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

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U.S. v. Vosburgh, 2010 U.S. App. LEXIS 8140, April 20, 2010

Deciding this issue for the first time, the court holds:

IP addresses are fairly "unique" identifiers. Evidence that the user of a computer employing a particular IP address possessed or transmitted child pornography can support a search warrant for the physical premises linked to that IP address.

Although there undoubtedly exists the possibility of mischief and mistake, the IP address provides a substantial basis to conclude that evidence of criminal activity would be found at the defendant's home, even if it did not *conclusively* link the pornography to the residence. Although it is technically possible that the offending emails "originate outside of the residence to which the IP address was assigned, it remains *likely* that the source of the transmissions is inside that residence.

In those cases where officers know or ought to know, for whatever reason, that an IP address does not accurately represent the identity of a user or the source of a transmission, the value of that IP address for probable cause purposes may be greatly diminished, if not reduced to zero.

The 5th, 6th, 8th, 9th, and 10th circuits agree (cites omitted).

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

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U.S. v. Sed, 2010 U.S. App. LEXIS 7075, April 06, 2010

Arrest of defendant in Ohio by Pennsylvania police officers was not unreasonable under the Fourth Amendment. The stop of defendant's car just before it entered Pennsylvania from Ohio was nothing more than an honest mistake and a *de minimis* one at that.

See Virginia v. Moore, 128 S. Ct. 1598 (2008)

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

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4th CIRCUIT

U.S. v. Claridy, 2010 U.S. App. LEXIS 7353, April 09, 2010

Deciding this issue for the first time, the court holds:

When federal and state agencies cooperate and form a joint law-enforcement effort, investigating violations of both federal and state law, an application for a search warrant cannot categorically be deemed a "proceeding" governed by the Federal Rules of Criminal Procedure, based simply on the role that federal law-enforcement officers played in the investigation.

Nothing in the Federal Rules of Criminal Procedure suggests that a joint task force cannot use either federal or state investigatory tools governed, respectively, by federal or state law. Search warrants obtained during a joint federal-state investigation may be authorized by Federal Rule 41(b) or by state law and may serve to uncover violations of federal law as well as state law.

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

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5th CIRCUIT

U.S. v. Garcia, 2010 U.S. App. LEXIS 7659, April 14, 2010

When an officer asks for consent to search a vehicle and does not express the object of the search, the searched party, who knows the contents of the vehicle, has the responsibility explicitly to limit the scope of the search. Otherwise, an affirmative response to a general request is evidence of general consent to search.

When officers request permission to search a vehicle after asking whether it was carrying "anything illegal," it is natural to conclude that they might look for hidden compartments or containers.

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

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6th CIRCUIT

U.S. v. Everett, 2010 U.S. App. LEXIS 7107, April 06, 2010

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

There is no categorical ban on suspicionless, unrelated questioning that may minimally prolong a traffic stop.

The 1st, 2nd, 9th, 8th, and 10th circuits (cites omitted).

The proper inquiry is whether the totality of the circumstances surrounding the stop indicates that the duration of *the stop as a whole* – including any prolongation due to suspicionless, unrelated questioning – was reasonable. The overarching consideration is the officer's diligence in ascertaining whether the suspected traffic violation occurred, and, if necessary, issuing a ticket.

The *subject* (that is to say, some questions are "farther afield" than others) and the quantity of the suspicionless, unrelated questions are part of the "totality of the circumstances" of the stop. Some amount of questioning relevant only to ferreting out unrelated criminal conduct is permissible. A lack of diligence may be shown when questions unrelated to the traffic violation constituted the bulk of the interaction between the trooper and the motorist.

Because the safety of the officer is a legitimate and weighty interest, the officers conducting a traffic stop may inquire about dangerous weapons.

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

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7th CIRCUIT

U.S. v. Pineda-Areola, 2010 U.S. App. LEXIS 7685, April 6, 2010

Defendant was arrested at the scene of a drug transaction, and his cell phone was seized. When, using another phone, officers dialed the phone number of the person through whom the drug transaction was arranged, defendant's phone vibrated.

Dialing a phone number causing defendant's phone to vibrate is not a "search." Even if dialing a phone were considered a search, the officers were entitled to search defendant and the phone incident to his lawful arrest.

Editor's Note: This is an unpublished opinion granting a request by defendant's counsel to withdraw from representing defendant on appeal. Counsel asserted, and the court agreed, that there were no non-frivolous grounds on which to appeal.

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U.S. v. Doody, 2010 U.S. App. LEXIS 6908, April 02, 2010

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

When a defendant receives a gun for drugs, he "possesses" the firearm in a way that "further[s], advance[s], or help[s] forward" the distribution of drugs in violation of 18 U.S.C. § 924(c)(1)(A).

The 1st, 5th, 6th, 9th, and 10th circuits agree (cites omitted).

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

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8th CIRCUIT

U.S. v. Hernandez-Mendoza, 2010 U.S. App. LEXIS 7116, April 06, 2010

The Trooper's act of leaving the defendants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning. The Trooper may have expected that the two men would talk to each other if left alone, but an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response. Officers do not interrogate a suspect simply by hoping that he will incriminate himself.

The Trooper had legitimate security reasons for recording the sights and sounds within his vehicle. The defendants had no reasonable expectation of privacy in a marked patrol car, which is owned and operated by the state for the express purpose of ferreting out crime.

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

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10th CIRCUIT

Armijo v. Peterson, 2010 U.S. App. LEXIS 75, April 13, 2010

In response to a bomb threat at a local high school, police made a warrantless entry into a home, conducted a protective sweep, and temporarily seized the lone occupant.

The emergency exigency authorizing a warrantless entry exists when (1) the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable.

In such an emergency, officers do not need probable cause. Reasonable belief does not require absolute certainty, and the standard is more lenient than probable cause.

The emergency exigency exception not only justifies warrantless entries into a house to aid *a potential victim in the house*, but also justifies warrantless entries into a house to stop *a person or property inside the house* from immediately harming *people not in or near the house*.

A protective sweep of a residence to ensure officer safety is not only authorized incident to an arrest, but may also be conducted under the exigent-circumstances doctrine *if* reasonable grounds exist to search to protect the safety of someone besides the officers.

Absent exigent circumstances and probable cause, or a warrant, officers may not enter a home and seize an individual for routine investigatory purposes, no matter whether the seizure is an investigatory stop or an arrest. In that sense, Terry stops have no place in the home. However, just as exigent circumstances permit a warrantless home entry, emergencies may justify a warrantless seizure in the home.

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

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U.S. v. Cook, 2010 U.S. App. LEXIS 7103, April 05, 2010

While defendant was incarcerated at a county detention center as a federal pretrial detainee in connection with a federal drug case, one of his cellmates was strangled to death in the cell.

Two months later, in March, sheriff's office investigators had defendant brought from his housing area to an interview room for questioning. Almost immediately after being brought to the interview room, defendant stated that he did not want to speak to the investigators and that he had a right to an attorney. Defendant went to the door and asked to be returned to his cell. The interview was terminated, and defendant was taken back to his cell.

Federal authorities promised to recommend leniency for an informant, himself facing a lengthy federal sentence, should he agree to approach defendant and question him about the murder. The FBI then became involved in the murder investigation, and the sheriff's office withdrew shortly thereafter. The FBI was not informed of defendant's March encounter with the sheriff's office investigators, or that he invoked his Miranda rights during that encounter.

In June, through the efforts of the FBI, the cooperating informant was wired and placed in a cell with defendant. The cooperating informant asked defendant about the murder, and

defendant described the roles that each of the three inmates played in the killing.

Defendant was completely unaware that he was in the presence of a government agent. Because Miranda and its progeny were directed at the prevention of pressure and coercion in custodial interrogation settings, the fears motivating exclusion of confessions which are the product of such custodial interrogation settings are simply not present in this case.

Deception which takes advantage of a suspect's misplaced trust in a friend or fellow inmate does not implicate the right against self-incrimination or the Fifth Amendment right to counsel. A suspect in those circumstances speaks at his own peril. The concerns underlying Miranda are inapplicable in the undercover agent context, even when the suspect is incarcerated.

Under Edwards v. Arizona, 451 U.S. 477 (1981), after an accused clearly invokes his right to have counsel present during a custodial interrogation, officers must cease all questioning and may not reinitiate questioning on any matter until counsel is provided, unless the accused himself initiates further communications, exchanges, or conversations with the police. But in order to implicate Miranda and Edwards, there must be a custodial interrogation. Edwards depended on the existence of custodial interrogation. In this case, defendant was unaware that he was speaking to a government agent. As a result, his questioning lacked the police domination inherent in custodial interrogation. Thus, without custodial interrogation, Edwards does not apply. And because Edwards does not apply, it is irrelevant that defendant had previously invoked his right to counsel in March when questioned by the sheriff's office investigators.

Under Michigan v. Mosley, 423 U.S. 96 (1975) law enforcement must honor an individual's invocation of the right to remain silent in order to counteract the coercive pressures of the custodial setting. Defendant did not know he was speaking to a government agent, and therefore, he was not subject to the pressures of a custodial setting. Thus, Mosley does not apply.

Defendant spoke freely with the cooperating informant, was not coerced, and the circumstances surrounding their conversation were nothing akin to police interrogation. Such casual questioning by a fellow inmate does not equate to "police interrogation," even though the government coordinated the placement of the fellow inmate and encouraged him to question defendant.

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

Editor's Note: The Court noted that since it "concluded that Cook was not subject to custodial interrogation when he made the incriminating statements at issue,"…"the rule announced in [Maryland v. Shatzer, 130 S. Ct. 1213 (2010)] is likewise inapplicable."

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