Department of Homeland Security
Federal Law Enforcement Training Center
Legal Training Division

April 2009

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 Training 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.

This edition of *The Informer* may be cited as "4 INFORMER 09".
(The first number is the month and the last number is the year.)

Join The Informer E-mail Subscription List

It's easy! Click HERE to subscribe.

THIS IS A SECURE SERVICE. No one but the FLETC Legal Training Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Training Division.

In This Issue

Question from the Field

"Can I Be Sued If I Participate in a Crime During an Undercover Operation?"

By Tim Miller
Branch Chief
Legal Training Division, FLETC

Click HERE

******

Supreme Court and Circuit Courts of Appeals Case Summaries

Click HERE

******

Announcing the

Police Legal Advisors Training Program (PLATP)

The course is designed for currently employed attorneys for state and local law enforcement agencies and departments. Managers of those agencies and departments are invited on a space available basis.

August 10-14, 2009
Naval Station Mayport, Florida

Click HERE

for a detailed description of the program and registration form.

Question from the Field

"Can I Be Sued If I Participate in a Crime During an Undercover Operation?"

By Tim Miller
Branch Chief
Legal Training Division, FLETC

Every month, the Legal Division receives interesting and instructional questions from you - officers and agents working real cases.[1] From time to time, we will share some of your questions and our answers with other readers. Here is a question from a criminal investigator: "To catch a crook, I may have to pretend to be one. If I participate in a criminal enterprise during an undercover operation and an innocent party is injured, can the injured party sue? Can I be prosecuted?" The answer to both questions is "yes." An injured party or prosecutor can always bring the action in court. But you have protections and potential defenses against personal liability.

Innocent parties have been injured by undercover operations. The victims in *Suter v. United States* suffered financially during a large-scale Ponzi and money laundering operation.[2] They filed a lawsuit against the United States alleging that the Federal Bureau of Investigation (FBI), in connection with its investigation of a fraudulent scheme, "participated in the very frauds which it was investigating. In *Georgia Casualty & Surety Co. v. United States*, the insurance carrier, Georgia Casualty, was required to reimburse the unsuspecting buyers of automobiles stolen by a ring of thieves.[3] Their lawsuit alleged that an FBI agent and an FBI informant posed as salvage dealers, providing a salvage yard from which thieves could purchase salvage VINs and blank motor vehicle titles for vehicles re-sold to innocent buyers. In both cases, undercover operatives of the (FBI) were authorized by their agency to work alongside the criminals, to gather evidence, and to participate in the criminal enterprise causing the victims' financial loss. "

In *Suter* and *Georgia Casualty*, the victims sued the United States under the Federal Tort Claims Act (FTCA). When a federal employee is sued for a wrongful or negligent act, the Federal Employees' Liability Reform and Tort Act empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose…."[4] Upon certification, the employee is dismissed from

[1] The Legal Division **teaches** federal law enforcement officers federal law. The information we provide comes from appellate and Supreme Court decisions, legal treatises, and other reliable sources. **We cannot provide legal advice** about how that information should be used in law enforcement operations. **Only your supervisor, agency counsel, or prosecuting attorney can approve of law enforcement actions; therefore, any information we provide that may be relevant to such action should first be shared with them.**
[2] *Suter v. United States*, 441 F.3d 306 (4th Cir. 2006)
[3] *Georgia Casualty & Surety Co. v. United States*, 823 F.2d 260 (8th Cir. 1987)
[4] 28 USC 2679(d)(1),(2)

the action and the United States is substituted as the defendant. The case then falls under the governance of the FTCA.[5]

The FTCA is a limited waiver of the federal government's sovereign immunity. In effect, the federal government steps into the shoes of the agent and agrees to be sued. There are several exceptions to the sovereign immunity waiver. One exception shields the United States from liability for making certain discretionary decisions.[6] Called the "discretionary function exception," it prevents judicial second-guessing of executive decisions grounded in social, economic, and political policy through tort-actions.[7] To determine whether the exception applies, a court must first determine whether the action causing the plaintiff's harm was a matter of judgment or choice for the acting employee.[8] The exception will not apply when a federal statute, regulations, or policy "specifically prescribes a course of action for an employee to follow."[9] In *Suter* and *Georgia Casualty*, the court found that the FBI had broad discretionary power to determine whether a particular investigative technique, like an undercover operation and participating in the crimes under investigation, were appropriate."[10] The court dismissed the cases, finding that such strategies for enforcing the law involved the permissible exercise of policy judgment.[11] The discretionary function exception protects the federal government from liability that "would seriously handicap" efficient government operations.[12] The downside is that the victims are left without a viable tort action against any party.

Criminal prosecutions are possible, but unlikely. Federal law authorizes undercover operatives to engage in certain illegal activity.[13] What about state law? Looking back on our nation's history, federal and state relationships have at time been less than "cordial." Unpopular federal laws have been met with state indictments of the federal officers attempting to enforce them.[14] Fortunately, our founding fathers understood that such conflicts might exist and placed

---

[5] 28 USC 2679(d)(2)

[6] 28 USC 2680(a) provides that the United States is not liable for "[a]ny claim…based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[7] *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

[8] *Berkovitz v. United States*, 486 U.S. 531, 535 (1988)

[9] Id, at 535 (in this event, the employee has no rightful option but to adhere to the directive and the employee's conduct cannot appropriately be the product of judgment or choice.)

[10] See *Suter*, 441 F.3d at 312 (Agent Vega's participation in criminal activity during the undercover investigation involved an element of judgment or choice because there was no statute, regulation, or policy directive that mandated how the FBI conduct investigative techniques in carrying out fraud and money laundering investigations; rather, the FBI has broad discretionary power to determine whether a particular investigative technique, such as an undercover operation, is appropriate); *Georgia Casualty*, 823 F.2d at 263 (the FBI's decision to maintain secrecy during an undercover operation (and not notify potential victims of the on-going criminal enterprise) involved the balancing of policy consideration protected by the discretionary function exception).

[11] *Suter*, 441 F.3d at 312 (to participate in criminal activity likely to result in financial loss to third parties is one which the court "would expect to be inherently grounded in considerations of policy" (citation omitted)).

[12] *Id*, at 312 citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)

[13] See *United States v. Fulcher*, 250 F.3d 244, 254 (4th Cir. 2001) (the "public authority defense" recognizes that actions properly sanctioned by the government are not illegal and that a defendant may rely on a government official's real authority to authorize covert activity).

[14] See *Wyoming v. Livingston*, 443 F.3d 1211 (10th Cir 2006) (the record supports the suspicion that the prosecution of USFWS agents for trespassing was to hinder a locally unpopular federal program of collaring and tracking wolves); *Idaho v. Horiuchi*, 266 F.3d 979 (9th Cir. 2001) (Idaho prosecuted a federal agent for killing an unarmed woman and pet dog in connection with the notorious raid on a cabin at Ruby Ridge); *In re McShane's Petition*, 235

the Supremacy Clause in the United States Constitution.[15] The Supremacy Clause implies that the states may not impede or interfere with the actions of federal executive officials when they are carrying out federal laws.[16] Supremacy Clause Immunity is a complete defense.[17] The case is removed to federal court and dismissed, if the agent had "an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties." [18] Removal is predicated on a federal defense.[19] For example, an undercover operative's federal defense might be that his participation in a Ponzi scheme was sanctioned by an executive agency of the federal government and excusable under the Supremacy Clause.

Benjamin Franklin was one of the founding fathers who had the foresight to think about the Supremacy Clause and the common sense to know that "an ounce of prevention is worth a pound of cure." Federal agents who liaison with state law enforcement agencies before beginning an investigation may be able to work-out their differences and avoid the need for any peripheral litigation. While alerting potential victims of an undercover operation may not be practical, agents should at least attempt to minimize public harm.[20] Agents should know what crimes they can participate in. They should not participate in acts of violence except in self-defense.[21] Moreover, an undercover identity is not a license to violate the Constitution. Discussing these parameters with agency supervisors and legal counsel should help agents stay within the scope of their employment and avoid personal liability and unwanted litigation.

Tim Miller earned BS and JD degrees from Southern Illinois University. He received his LL.M from the Army Judge Advocate General's School in Charlottesville, Virginia. Tim joined the United States Marine Corps in

---

F.Supp. 262 (N.D. Miss. 1964) (Mississippi prosecuted a federal marshal for breach of the peace for using tear gas to control riots erupting over the admission of the first African American student to its state university.)

[15] The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[16] See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, 4. L.Ed. 579 (1819) (the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.); *Wyoming v. Livingston*, 443 F.3d at 1214

[17] See *Wyoming v. Livingston*, 443 F.3d at 1222 citing *In re Neagle*, 135 U.S. 1, 75 (1890).

[18] See *Wyoming v. Livingston*, 443 F.3d 1211, 1221 ("In harmony with the Second, Sixth, and Ninth Circuits, we hold that a federal officer is not entitled to Supremacy Clause immunity unless, in the course of performing an act which he is authorized to do under federal law, the agent had an objectively reasonable and well-rounded basis to believe that his actions were necessary to fulfill his duties. We leave for another day the question whether the belief must be both subjectively and objectively reasonable."); *but cf New York v. Tanella*, 374 F.3d 141, 147 (2nd Cir 2004) (the agent must have a subjective belief that his conduct was justified, and the belief must be objectively reasonable); *Kentucky v. Long*, 837 F.2d 727 (6th Cir 1988); *Clifton v. Cox*, 549 F.2d 722 (9th Cir 1977).

[19] *Wyoming v. Livingston*, 443 F.3d 1211, 1230 (10th Cir 2006) (a USFWS agent had a federal duty to monitor wolves through a capture and collar operation when he trespassed on private property); *In re Neagle*, 135 U.S. 1 (1890) (A U.S. Marshal had a federal duty to protect a U.S. Supreme Court Justice when he shot and killed an assailant); *Tennessee v. Davis*, 100 U.S. 257, 262 (1880) (a federal revenue collector was in the process of executing his duty to seize an illegal distillery when he shot and killed an assailant in self-defense); C*f Mesa et.al. v. California*, 489 U.S. 121(1989) (where U.S. Postal Service employees charged with traffic crimes in state court could not raise a colorable claim of federal immunity or other federal defense.)

[20] See *Sute*r 441 F.3d at 312, fn. 5 (FBI Undercover Guidelines restrict agent participation in illegal activity for limited purposes, such as to obtain critical evidence not otherwise available or to establish credibility of a cover identity)

[21] *Id* at 312, fn. 5.

1984 after taking the Illinois state bar exam. During his 20-year career, he served as a prosecutor, defense counsel, military judge, and staff judge advocate. He deployed to Okinawa, Japan, Somalia, Africa, Guantanamo Bay Naval Base, Cuba, and in support of Operation Iraqi Freedom. Tim retired from the Marine Corps in July 2004 and joined the Legal Division that same month. He was a Senior Instructor for two years and accepted the Branch Chief position in 2006. Tim is Branch Chief of basic legal training and Acting Branch Chief of advanced legal training for the Legal Division at the Federal Law Enforcement Training Center.

****

CASE SUMMARIES

SUPREME COURT

Corley v. U.S., 2009 U.S. LEXIS 2512, April 6, 2009

(Editor's note: This case pertains to federal prosecutions. See 18 U.S.C. §3501(c), and see *McNabb* v. *United States*, 318 U. S. 332 (1943) and *Mallory* v. *United States*, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge.)

Statements given before the initial appearance but within six hours of the arrest are admissible so long as they are otherwise voluntary and in compliance with *Miranda.*

If, in order to obtain a statement, the initial appearance is delayed to beyond six hours after arrest, such statements given more than six hours after arrest but before the appearance can be suppressed even if voluntary and in compliance with *Miranda*.

Statements given before the initial appearance but more than six hours after arrest may be admissible if the delay was not for the purpose of obtaining the statement, and the delay was otherwise reasonable and necessary.

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

****

CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Simmons, 2009 U.S. App. LEXIS 5541, March 17, 2009

An anonymous tip concerning an ongoing emergency "is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality."

The 4th, 7th, 9th, 10th, and 11th circuits agree (cites omitted).

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

*****

7th CIRCUIT

U.S. v. Hodge, 558 F.3d 638, March 11, 2009
U.S. v. Lee, 558 F.3d 651, March 11, 2009

(Editor's note: These unrelated but very similar cases were decided by the court on the same day. See *U.S. v. Santos*, 128 S. Ct. 2020 (2008). Click **HERE** for the Court's opinion.)

The federal money-laundering statute, 18 U. S. C. §1956, prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity. The word "proceeds" applies only to transactions involving criminal "profits," not criminal receipts. Both of these cases involved health spas as fronts for prostitution operations. Money laundering convictions in both were based upon evidence of rent, utilities, and advertising expenses. These costs are essential operating expenses which do not count as "proceeds" within the meaning of § 1956(a)(1). None of the transactions on which the money-laundering convictions were based involved prostitution "profits." Evidence of rent, utilities, and advertising expenses is insufficient to support the convictions.

Click **HERE** for the court's opinion in *U.S. v. Hodge.*

Click **HERE** for the court's opinion in *U.S. v. Lee.*

*****

9th CIRCUIT

The Supreme Court reversed and remanded the decision below (as first summarized in 9 Informer 07), citing *Pearson v. Callahan* (see 2 Informer 09). The Ninth Circuit then reversed its earlier ruling. See the new ruling below.

(Editor's note: This case is a civil action under 42 U.S.C. § 1983 alleging an unlawful arrest in violation of the 4th Amendment.)

Rodis v. City & County of San Francisco, 499 F.3d 1094, August 28, 2007

To support a conviction for possession of counterfeit currency with intent to defraud under 18 U.S.C. § 472, the government must prove three elements: (1) possession of counterfeit money; (2) knowledge, at the time of possession, that the money is counterfeit; and (3) intent to defraud. The mere passing of a counterfeit bill is not a criminal offense. The defendant must not only possess or pass counterfeit money, but he must know the money is counterfeit *and* he must intend to use the money to defraud another. To act with the "intent to defraud" means to act willfully, and with the *specific intent* to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

For specific intent crimes, evidence of intent is required to establish probable cause. Without at least some evidence regarding the knowledge or intent elements of this crime, probable cause is necessarily lacking.

*****

The court now holds

Rodis v. San Francisco, 558 F.3d 964, March 9, 2009

The officers are entitled to qualified immunity because the arrest was not clearly established as unlawful. Every circuit (the 5th, 6th, 7th, 8th, and 11th circuits) which has considered the intent issue has found that such arrests were lawful even without some evidence of intent to defraud. It is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. In such cases those officials should not be held personally liable. The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. Rodis's $ 100 bill looked odd, and it lacked many modern security features. Although the arrest was unfortunate, the officers' belief that the bill was fake was not plainly incompetent.

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

*****

U.S. v. Krstic, 558 F.3d 1010, March 10, 2009

Title 18 U.S.C. § 1546(a) prohibits possession of a forged, counterfeited, altered, or falsely made immigration document. It also prohibits possession of an otherwise authentic immigration document that one knows has been procured by means of a false claim or statement.

This statute punishes "possession" of such a document, not the material falsehood that was used to obtain it. Unlike false statement crimes, possessory offenses have long been described as "continuing offenses" that are not complete upon receipt of the prohibited item. Rather, the statute of limitations does not begin to run until the possessor parts with the item.

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

*****

The full Ninth Circuit vacates and reverses the earlier panel decision (as summarized below in 2 Informer 07). See the new ruling below.

Fisher v. City of San Jose, 475 F.3d 1049, January 16, 2007

In general, absent exigent circumstances police may not enter a person's home to arrest him without obtaining a warrant.

The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place *inside* his home.

A situation is exigent if a warrant could not be obtained in time to effectuate the arrest *safely* — that is, without causing a delay dangerous to the officers or to members of the public.

The critical time for determining whether any exigency exists is the moment the officer makes the warrantless *entry.*

The court now holds

Fisher v. City of San Jose, 558 F.3d 1069, March 11, 2009

During an armed standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

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