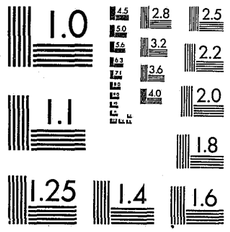
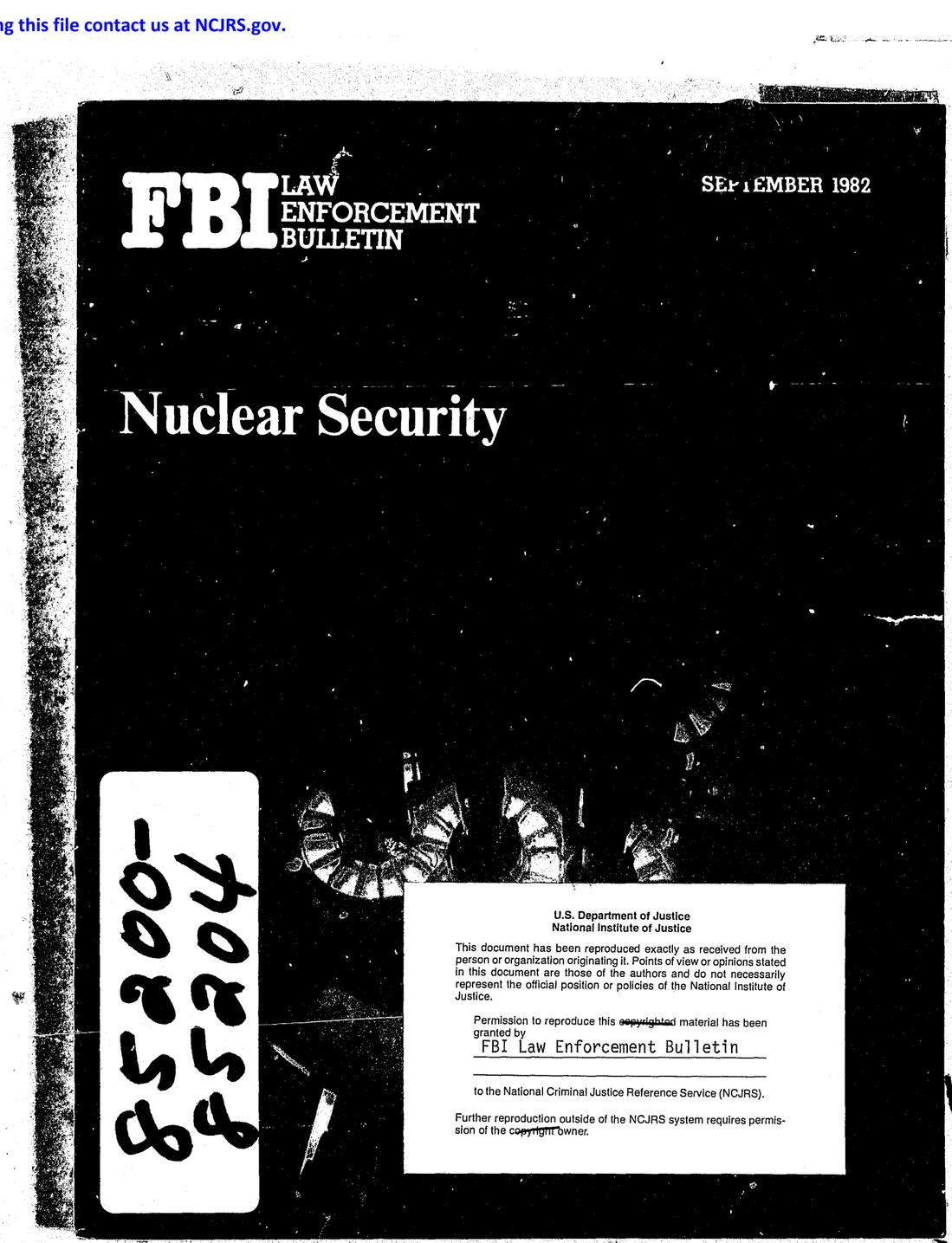


FBI LAW ENFORCEMENT BULLETIN

SEPTEMBER 1982

Nuclear Security



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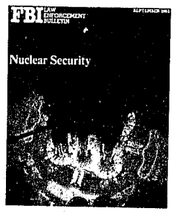

The Cover:
A remote location in Idaho provides an excellent setting for a nuclear testing site. See article p. 1.

Federal Bureau of Investigation
United States Department of Justice
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William H. Webster, Director

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REASONABLE EXPECTATION OF PRIVACY, THE EMPLOYEE-INFORMANT, AND DOCUMENT SEIZURES (CONCLUSION)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Part one of this article proposed a hypothetical situation in which an employee, identified as B, acting as a police informant, turned over to police incriminating records which belonged to A, her employer. Part one concluded that such conduct was lawful in that A gave B access to and control over the records by virtue of her employment duties. Since A voluntarily exposed criminal conduct to B in the form of documents, A retained no reasonable expectation of privacy in the records with respect to B. A was held to have misplaced his trust in B and to have assumed the risk that B might provide the records to the police. Inasmuch as A lacked a reasonable expectation of privacy, no search took place, and the fourth amendment was not implicated by B's conduct.

Search By Consent

A footnote in *United States* v. *Ziperstein* suggests that an alternative argument can be made by the Government under circumstances wherein an employee-informant had access to and control over certain incriminating documents. In such cases, if a court were to reject the absence of reasonable expectation of privacy analysis set forth in part one of this article and characterize the employee's conduct as a search, the Government could argue that the employee-informant had the authority to consent to a search and seizure for the materials. Specifically, the seventh circuit in *Ziperstein* stated: "We also note that the government's use of this evidence can be justified under the Fourth Amendment on a consent theory."[25] The circuit court cited the U.S. Supreme Court's opinion in *United States* v. *Matlock*[26] as authority for the proposition that employees, like the pharmacist in *Ziperstein,* possess sufficient control over items relating to their employment to consent to their search.

In *Matlock,* the defendant was arrested by local police for robbery of a federally insured bank. The police obtained consent from the defendant's girlfriend to search a room he shared with her. The district court suppressed the evidence, holding that the Government could not produce sufficient admissible testimony that Matlock's paramour had actual authority to consent to the search. A Federal appellate court affirmed, and the Government appealed. The Supreme Court determined that the issue in the case was whether the evidence presented by the United States was legally sufficient for the Court to conclude that the police obtained from a third party voluntary consent to search. The Court observed that the Government is not limited to proving consent to search was obtained from the defendant, but may show such consent was received from a third party who possessed common authority or other sufficient relationship to the area or things searched. In a footnote, the Court defined common authority as:

Special Agent Callahan

> ". . . mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."[27]

The Court found there was ample factual basis for the police to conclude that the defendant's girlfriend had common authority over the room she shared with the defendant, which gave her the ability to consent. She told the police she shared the room with the defendant and led the officers to the room, shared a dresser in the room with him, and identified clothing inside the room as hers. The decisions of the lower courts were reversed.

The rationale of *Matlock* was applied in the employer-employee context by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Grasso.*[28] Grasso was suspected of selling untaxed cigarettes in his store. State authorities went to the store in an effort to confirm these suspicions. A clerk who was in control of the entire store permitted the officers to conduct a search after they informed him of the purpose of their visit. Untaxed cigarettes were discovered behind the store's counter which could not be seen from the public area of the store. Grasso was convicted of possession of untaxed cigarettes and appealed. The court affirmed the conviction and found that the store clerk had sufficient authority to consent to the search. The court explained that the items seized were located in an area accessible to the clerk and under his control.

Third party consent, obtained from one having common authority to furnish it, has been used in several cases to justify the Government's coming into possession of incriminating records. In *United States* v. *Antonelli Fireworks Co.,*[29] Antonelli, president of the corporation, was convicted of fraud in a U.S. district court. On appeal, he claimed that certain corporate records turned over to the FBI by the corporation's office manager, Simon, and later offered in evidence, should have been suppressed, since Simon was not in a position to consent on behalf of the corporation. The appellate court affirmed Antonelli's conviction, holding that the office manager was in sole control of the office and the records and clearly had the right to turn the records over to the FBI.

In *United States* v. *Curtis,*[30] a corporate office manager was held to have sufficient authority to allow State officials to examine and take with them corporate records which were ultimately instrumental in the conviction of a high-level company officer for mail fraud.

A more recent Federal decision is also instructive on this point. In *United States* v. *Allison,*[31] FBI Agents appeared at the offices of the Laborers International Union of North America, Local 1282, and were allowed to take with them certain union records which incriminated Allison, a union officer. The district court ordered the records suppressed, holding that Greer, the union's secretary-treasurer and records custodian, did not voluntarily

"An employee-informant must have access to and control over the records and the place from which they are obtained in order to turn them over lawfully to the Government under either an absence of a reasonable expectation of privacy rationale or a consent theory."

consent to the Government's taking of the records. On appeal, the order was reversed. The appellate court determined that the search was conducted on the authority of the consenting party, Greer, who was the person with legal custody of the records.

In the hypothetical situation, it seems clear that B, the employee, could lawfully turn over to police the documents which incriminate A, the employer, either because A has no expectation of privacy in the documents with respect to B or because B has sufficient common authority over the documents and the place they are stored to voluntarily consent to their search or seizure by the Government.

Access and Control Critical

An employee-informant must have access to and control over the records and the place from which they are obtained in order to turn them over lawfully to the Government under either an absence of a reasonable expectation of privacy rationale or a consent theory. Suppose, for example, that the records are kept in a locked safe in A's office and B has access to and control over them only during normal business hours. Suppose further that B enters A's office after business hours and by means of a sophisticated device is able to enter the safe surreptitiously and take the documents. A's reasonable expectation of privacy with respect to a safe in his own office would likely defeat an assertion by the Government that the fourth amendment was inapplicable.

Consider altering the facts of the hypothetical. Suppose B's employment status is reduced and is limited to that of a messenger. Assume that A hands B a closed briefcase with instructions to deliver same to a third party. B suspects that it contains incriminating documents. Could B lawfully open the closed briefcase and turn over the incriminating papers to the police or consent to a police opening of the briefcase?

A recent decision of a Federal court in *United States* v. *Humphrey*[32] considers this issue. In *Humphrey,* the defendant furnished to an FBI informant a sealed envelope with instructions to deliver the envelope to certain individuals outside the United States. Instead, the informant delivered the envelope to the FBI. It was opened without a warrant. Evidence of espionage was found and seized. The district court ruled such warrantless conduct unlawful, in that the defendant had a reasonable expectation of privacy in the contents of a sealed envelope and this interest continued even after he furnished the envelope to the informant for delivery. The court rejected the Government's consent argument by holding that the warrantless opening of the sealed envelope exceeded the scope of the consent furnished to the informant. The informant arguably had common authority over the envelope itself, but had no right of access to its contents.

Applying this conclusion to the hypothetical case, if B had access to and control over the records during business hours, but after hours could obtain them only from A's private office safe, such conduct would likely violate the fourth amendment. Nor could this action be supported under a consent analysis because, although B would have common authority over the documents during regular working hours because of access and control, obtaining them from A's private office safe after normal working hours would require B to enter an area not commonly controlled, i.e., a place reserved for A's exclusive use.

Plain View Seizures

Another argument that the Government might make to support B's taking of the incriminating documents in the original hypothetical is based upon the "plain view" doctrine. The plain view concept was examined by the Supreme Court in *Coolidge* v. *New Hampshire.*[33] Reduced to its basic terms, the plain view doctrine requires three conditions. First, the officer making the plain view discovery must be lawfully present in the place where the evidence is discovered. Second, the discovery of the evidence must be inadvertent. Finally, the item seized must be immediately apparent as evidence of a crime. The usefulness of this principle to support the legality of B's taking the documents in the original hypothetical is illustrated in *United States* v. *Baldwin.*[34]

In *Baldwin,* Hoing, an undercover police officer, was hired by Baldwin to act as his chauffeur. The defendant subsequently allowed the officer to move into his home and occupy a downstairs bedroom. Baldwin gave him free access to all parts of the house, including his bedroom. While staying in the house, Hoing observed and seized two samples of white powder from a table top in Baldwin's bedroom. He found a third sample of the white powder while cleaning the interior of Baldwin's car as part of his job as chauffeur. Hoing seized the samples because he suspected that the substance observed was cocaine. A fourth sample was seized from Baldwin's bedroom dresser drawer after Hoing was instructed to bring cocaine from the drawer to a nightclub. Baldwin was convicted of possession of cocaine. A Federal appellate court rejected Baldwin's claim that he never consented to the presence of a police spy in his home. The court explained that Baldwin's consent to the undercover officer's presence in his home and his unlimited access to the interior were not in any way vitiated by the officer's failure to disclose his status as a law enforcement officer. The court justified the various seizures of the cocaine by applying the plain view rationale.

Application of the plain view doctrine to the hypothetical is not without problems, however. Although only four Justices adhered to the inadvertent discovery requirement announced in *Coolidge,* that condition has since been widely accepted as a necessary part of the plain view doctrine.[35] However, since *Coolidge,* there has been disagreement in the lower courts over the meaning of the inadvertence requirement. The words of Justice Stewart in *Coolidge* are instructive on this point: "This Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds."[36]

Most courts confronted with the inadvertence problem since *Coolidge* have concluded that it is permissible for the police to seize an item in plain view even though they suspect, prior to entry, that it might be found in an area they intend to enter. However, if police have probable cause to believe they will find an item in a place they can enter on other lawful grounds, a search warrant would be necessary, absent an emergency. Given the prior existence of probable cause, the plain view doctrine would likely be inapplicable.[37] In the hypothetical, a court could find that after B informed the police of her suspicions regarding A and what the records would disclose, probable cause as to the evidentiary nature of the records would exist. The inadvertent discovery requirement could not be met.

Finally, there exists the issue of whether an informant has the same authority as a law enforcement officer to make a plain view seizure. *United States* v. *Glassel*[38] is instructive on this point. In *Glassel,* an undercover police officer and an informant were invited into the defendant's home to purchase narcotics. After the defendant displayed narcotics to the officer, the informant left, purportedly to obtain cash. Other officers then entered the premises without knocking and announcing their purpose and authority. Cocaine was seized at this time and Glassel was convicted. On appeal, he argued that the entry of the other officers, in violation of a Federal knock and announce statute, tainted the subsequent seizure of the cocaine. In support of this conclusion, he cited *Sabbath* v. *United States,*[39] in which an informant was invited into the defendant's home and was present when Federal officers entered without complying with the Federal announcement statute. The Supreme Court concluded such entry was unlawful, and the evidence seized pursuant to it was declared inadmissible. In *Glassel,* the appellate court rejected Glassel's argument and distinguished the *Sabbath* case as follows:

> "In *Sabbath,* Jones (the informant) did not participate in the arrest or seizure, *nor was he authorized to do so.* He was merely the defendant's unfaithful cohort whose temporary role as 'agent' involved nothing more than being a stool pigeon,"[40] (emphasis added)

By contrast, the court explained that the undercover officer in *Glassel* was a full-time narcotics officer who had authority to make arrests and seize evidence. Since the undercover officer was already lawfully present and was in constructive possession of the cocaine at the time of entry by other officers, the manner of entry was of no legal consequence. The *Glassel* case casts doubt on the authority of an informant to make a plain view seizure.

"Contemplated use of this (informant technique) should include consideration of whether Federal or State privacy laws may limit or prohibit its application."

Embezzlement and Lack of Intent

In at least two recent cases which involved employees turning company records over to the Government, employers have characterized the takings as thefts.[41] This raises the question of whether the employee-informant or the police officer directing the source can be criminally liable for the conduct. This article has already examined the issue of whether an employee who has access to and control over documents in connection with his employment violates the fourth amendment by making those documents available to the police upon request of an officer. A majority of decisions supports the proposition that no violation of the fourth amendment occurs in this situation. However, there remains the question of whether a violation of applicable larceny or embezzlement statutes has occurred.

Embezzlement is generally taken to be the fraudulent or felonious conversion of property which has rightfully come into possession of the converter.[42] Embezzlement can occur when the defendant has been entrusted with the possession of the property in question.[43] One who has mere custody of property, as distinguished from legal possession, and feloniously appropriates the property to his own use is guilty of larceny. Possession sufficient for purposes of the distinction between embezzlement and larceny may exist where the accused is given considerable control over the property converted.[44] In the hypothetical case, B clearly had access to and control over the incriminating documents by virtue of an employment relationship, and thus any contemplated criminal action against B would take the form of an embezzlement charge. As a general rule, in order to constitute embezzlement, there must be criminal intent. Ordinarily, there can be no embezzlement of property belonging to another without a fraudulent intent.[45] Such intent has been held essential even though the statute defining the offense fails to declare it.[46] In the hypothetical case, B's intent was limited to assisting law enforcement in ferreting out criminal conduct, and B had no personal intent to deprive A of his property fraudulently. Given the foregoing, the likelihood of there being a successful prosecution against B or the police officer for embezzlement is remote.

Federal-State Statutes May Bar Use of Procedure

In 1978, the U.S. Congress enacted into law the Right to Financial Privacy Act,[47] which restricts the right of employees in certain institutions covered by the act, such as banks, to turn over to Federal officers customer records covered in the act, unless the officer had legitimate authority under the act to obtain them. Similarly, other Federal statutes, such as the Federal Privacy Act of 1974 [48] and the Tax Reform Act of 1976,[49] might operate to restrict or eliminate use of the investigative technique outlined in this article. States may have similar statutes prohibiting unauthorized dissemination of information in the possession of certain State agencies and private employers as well. Consideration of the investigative technique described in this article must include an analysis of whether any Federal or local statute exists which might limit or prohibit its use.

Preference for a Search Warrant

Use of an informant to seize documents should be reserved for special situations. For example, where police have strong suspicion but lack probable cause, they might consider the procedure described herein. However, it should not be viewed as a routine alternative to a search warrant. The warrant should be obtained unless there is a compelling need for law enforcement to proceed without one.

Use of an informant to acquire some documents would be appropriate for the limited purpose of establishing probable cause to support issuance of a search warrant for a larger volume of incriminating records. This approach also could be of assistance when police possess probable cause to seize only a limited amount of records pursuant to a warrant but suspect the scope of the crime to be much broader. Premature execution of a search warrant in this instance could result in several undesirable consequences:

1) Alerting suspects to the presence of an informant in their midst, thus prompting them to become more circumspect and clandestine in their illegal activity;
2) Causing the removal or destruction of valuable evidence; and
3) Placing the safety of the informant in jeopardy.

Use of the informant technique will allow police the luxury of developing the case with the assistance of a well-placed source of information. It could result in penetration to the core of a pervasive conspiracy and may well lead to the identification of well-insulated conspirators and to the location of additional important evidence.

Finally, the decision to employ an informant for the purpose described above will also be affected by the risk of disclosing his identity at a future legal proceeding. An informant who plays a critical role in the seizure of evidence may be required to subsequently testify as to his role in an investigation.[50]

Summary

1) As a general rule, an employer has a reasonable expectation of privacy from direct warrantless police intrusion into his business premises for the purpose of searching for incriminating records. Ordinarily, police cannot use an informant to accomplish what they themselves are prohibited from doing. However, the result is different when an employer has given to an employee access to and control over incriminating records. The employer has no reasonable expectation of privacy with respect to records he voluntarily exposes to the employee. The employer is held to have misplaced trust in the employee and to have assumed the risk that the employee might furnish the records to the police. In that event, no search takes place and the fourth amendment is inapplicable.

2) An alternative argument can be made that the employee has common authority over the incriminating records, sufficient to allow a consent to their seizure by police.

3) A separate argument involves the authority of an employee-informant to make a plain view seizure. This argument has inherent problems, namely, the inadvertent discovery requirement of the plain view doctrine and the questionable authority of an informant to seize evidence in plain view.

4) Lawful use of this investigative tool presupposes that an employee-informant has lawful access to and control over the records. If an employee enters a safe within the exclusive control of an employer to obtain the records, such conduct would likely violate the fourth amendment.

5) Successful prosecution of an informant or an officer for embezzlement is remote, since neither has the requisite intent to commit the offense.

6) Contemplated use of this procedure should include consideration of whether Federal or State privacy laws may limit or prohibit its application.

7) This technique should be reserved for extraordinary cases and not used as a routine substitute for a search warrant.

8) Because of the complex legal issues associated with this procedure, officers should discuss its possible use with the prosecutor or police legal adviser before adopting it as part of their investigative strategy. **FBI**

Footnotes

[25] *Supra* note 23, at 290, note 3.
[26] 415 U.S. 164 (1974).
[27] *Id.* at 171, note 7.
[28] 375 Mass. 115, 375 N.E. 2d 706 (1978).
[29] 155 F.2d 631 (2d Cir. 1946), *cert. denied,* 329 U.S. 742 (1946).
[30] 527 F.2d 1091 (10th Cir. 1976), *cert. denied,* 429 U.S. 962 (1976).
[31] 619 F.2d 1254 (8th Cir. 1980).
[32] 456 F. Supp. 51 (E.D. Va. 1978), aff'd. on other grounds, 629 F.2d 908 (4th Cir. 1980).
[33] 403 U.S. 443 (1971).
[34] 621 F.2d 251 (6th Cir. 1980), *cert. denied,* 68 L.Ed.2d 244 (1981).
[35] Joseph R. Davis,"The Plain View Doctrine," *FBI Law Enforcement Bulletin,* vol. 48, No. 10, October 1979.
[36] *Supra* note 33, at 471, note 27.
[37] *Supra* note 35.
[38] 488 F.2d 143 (9th Cir. 1973), *cert. denied,* 416 U.S. 941 (1974).
[39] 391 U.S. 585 (1968).
[40] *Supra* note 38, at 145.
[41] *Supra* note 23; *Knoll Associates* v. *F.T.C.,* 397 F.2d 530 (7th Cir. 1968).
[42] 26 Am.Jur.2d 549.
[43] *Id.* at 552.
[44] *Id.* at 554.
[45] *Id.* at 570.
[46] *Id.*
[47] 12 U.S.C. Secs. 3401–3422.
[48] 5 U.S.C. Sec. 552a. The Federal Privacy Act of 1974 was enacted by Congress in order to protect the privacy of individuals identified in information systems maintained by Federal agencies. The act regulates the collection, maintenance, use, and dissemination of information related to individuals by such agencies.
[49] 26 U.S.C. Sec. 6103(i)(1). As part of this act, Congress established a detailed procedure for Federal officers to follow in obtaining tax return information in nontax-related criminal investigations.
[50] *See Roviaro* v. *United States,* 353 U.S. 53 (1957).