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Legal Issues When Using or Encountering 21st Century Technology in Criminal Investigations

A panel discussion with:

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Introductory Facts:

A regional task force made up of state, local and federal agencies is investigating the potential terrorist cells. Persons associated with the cells are believed to be conducting identity theft as a means of raising funds for terrorist activities. Others associated with the cells are believed to be actively planning future acts of terrorism. A residence in the community has been identified as possibly the “hub” for local terror related activity. The investigation has prompted active surveillance of persons known to frequent this residence.

During one such active undercover surveillance a subject is followed after he leaves the local airport, having returned from a trip out of the area. He is viewed carrying only a backpack and getting into a car at the airport parking lot. The car has out-of-state plates, and is registered to a car rental company.

While observing the car leave the parking lot, agents see an On-Star antenna on the roof and a GPS navigation device stuck to the windshield. The driver appears to be using a Bluetooth headset in his left ear. While conducting the moving surveillance, agents observe the driver texting on a smart phone. This is a cell phone believed to have been previously utilized by the subject, for which provider information and the cell phone number has been secured by agents.

The driver pulls into a gas station/convenience store parking lot and backs into a corner, where he remains in the car for approximately 35 minutes. He alternately texts and talks on his cellular device, while at other times he watches people pumping gas and going into and out of the store. It appears he may be using a laptop while watching people pump gas. He leaves the station without making any purchases.

The subject ultimately drives to the residence of concern. He does not drive a direct route, but instead circles around various roads and doubles back on his route, sometimes stopping abruptly at yellow lights or cutting across two lanes to make a sharp turn.

1. Assume the agents decide to stop the driver for a moving vehicle violation. During the stop, a warrant check confirmed he was wanted on an outstanding warrant for theft of government computers and he is removed from the car, arrested and placed in the rear of a patrol car. As he is removing the subject from the car, the officer saw a laptop computer with a government property tag on the front seat. Can they search:

- a. Passenger area of the car - Yes () No ()

b. Backpack - Yes () No ()

c. Cell phone - Yes () No ()

d. iPad™ - Yes () No ()

e. SIM card and SD memory card discovered in the backpack -
Yes () No ()

f. GPS Navigation device - Yes () No ()

g. Trunk - Yes () No ()

Facts, continued.

Assume no traffic stop or arrest was made. When the subject arrives at the residence, he does not park there, but instead he parks in a strip mall parking lot around the corner and walks the short distance to the residence, carrying his back pack. He is seen dialing a

number on his smart phone and then talking using his Bluetooth ear device. He meets another man about halfway to the residence, and they begin walking together. While walking, he removes what appears to be an iPad™ from his backpack to show the other man something.

They enter the residence, which is surrounded by a chain link fence. The residence has both an attached garage and unattached structure that appears to contain a workshop. The door to the unattached structure closes shortly after both men enter the residence.

There is a roofless storage area in the back yard of the residence surrounded on all sides by a tall solid fence. During a drive-by a week or so ago, an agent saw someone carrying a propane tank toward that storage area. He was unable to view what was actually contained in the area.

2. The agents have the capacity to intercept the Bluetooth signal.
a. May agents intercept his Bluetooth transmissions without a court order?-Yes ()
No ()

b. Does it matter whether the subject is on the street or in the residence?- Yes ()
No ()

3. a. Once the driver leaves his vehicle unattended in the strip mall parking lot, can agents surreptitiously install a GPS tracking device on it without a warrant? - Yes () No ()

b. If the device is installed, may it be monitored without court order? –
Yes () No ()

Facts, continued.

The residence has a large picture window opening into what appears to be an in-house office and work area. The residence itself is sited such that it, the garage, and the workshop can be easily viewed by a pole camera. The task force has such a camera, which is state-of-the art with very strong zooming capacities as well as low light enhancement capabilities.

4. Regarding the residence, can the agents:

a. Install a pole camera to observe the home and both garages? –

Yes () No ()

b. Can the pole camera be used to zoom in on documents or the iPad™ inside the residence visible through the picture window for the agents to read? -

Yes () No ()

c. Can the low light enhancement capacity be used to view activity through the picture window at night when lights in the residence are off? - Yes ()

No ()

d. Can agents request an overflight of the residence to photograph the property from above? - Yes () No ()

e. Can they look up the residence on “Google Earth” and download the satellite image for comparison? - Yes () No ()

Facts, continued.

By reason of the investigation, probable cause is developed to arrest the subject and the man in the house on various criminal charges. For safety purposes, the arrest is planned at the mall shopping center’s parking lot when the two men walk to the car parked there.

The two men leave the subject residence and walk to the car parked at the shopping center. The arrest team moves in, and the subjects offer active physical resistance, yelling “This is an illegal arrest, we are doing nothing wrong!” A crowd grows and is watching the event.

Several crowd members are either taking pictures or videos of the actions, using their cell phones. A “ride along” police trainee takes out her personal cell phone and also begins videoing the event. The active resistance results in the use of a Taser™ by one of the team members on one of the subjects. When Tased, the subject falls and hits his head on a broken piece of pavement, resulting in a head wound that is bleeds profusely. Fire/Rescue is called. After the subjects are in custody, one officer suggests that the members of the crowd who took pictures or videos had no right to do so because he often works undercover and fears compromising his identity. He suggests the phones from the crowd members still present be impounded so the pictures and videos can be erased.

5. Can the cell phones be impounded? - Yes () No ()

6. Can the officers require the owners of the phones to erase their photos and videos in the officers’ presence? - Yes () No ()

7. Does the video taken by the trainee have any legal significance? –
Yes () No ()

Facts, continued.

Returning to earlier facts, assume that prior to installing a GPS tracking device on the subject’s car, he returns to the mall parking lot and drives off. Visual contact with the vehicle is lost when the following agent is cut off by traffic. The agents now want to “ping” the subject’s cell phone to triangulate his location in an attempt to re-establish the surveillance.

8. What legal process, if any, is required to conduct the real-time “ping” of the subject’s cell phone?
