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THE FEDERAL LAW ENFORCEMENT -INFORMER-

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In This Issue

Article

Midnight at the Crossroads of Good and Evil:
Ethical Considerations for Criminal Investigators

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Click Here

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Case Summaries

United States Supreme Court

Click Here

Circuit Courts of Appeals

Click Here

1st Circuit **2nd Circuit** **3rd Circuit** **5th Circuit**

7th Circuit **8th Circuit** **9th Circuit** **10th Circuit**

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Midnight at the Crossroads of Good and Evil:
Ethical Considerations for Criminal Investigators

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> *The Tonight Show is on TV, but the volume is muted. So, you pay no attention as the screen shows Jay's audience emitting howls of silent laughter during his interview of some movie star or comedian. You're fatigued right down to the bone. You've worked more than a double shift today – first as the Team Leader for a search warrant in a massive child pornography case, second for custodial questioning of one of the defendants arrested at the scene of that search warrant, and finally, reviewing numerous documents, including numerous case reports, in a massive conspiracy and financial fraud case in which you will be testifying as the government's case agent at the trial commencing at 9:00 a.m. tomorrow morning. Many of the documents were part of the discovery package provided by your Assistant United States Attorney (AUSA) to the defense attorney.*
>
> *After finishing the review of the discovery documents, you open a file containing miscellaneous documents that you previously reviewed and determined not to be relevant or discoverable. Idly thumbing through them, thinking about your testimony tomorrow, you find that stuck to the back of one of the documents is a letter-size page that you do not immediately recognize. It appears to be an unsigned "memorandum to the file." At the bottom are the handwritten initials of your Confidential Informant (CI) and a date nearly two years before he became your CI in this case. In it is outlined a business plan that you recognize as the foundation of the fraudulent scheme for which you and the AUSA sought the indictment of the defendant using the CI as a "whistleblower" witness. Reading it, your feelings of anger begin to mount as you realize that if what is in the memo is true your CI was not just a "whistleblower" but also a co-conspirator. In fact, the memo makes your CI seem more like the primary driving force behind the conspiracy than the defendant going on trial in the morning.*
>
> *You get a tight feeling in your gut and feel beads of sweat forming on the back of your neck. Sitting back in your chair and putting your fists to your forehead, you scream, "what the heck is this ?" just as the digital clock on your desk turns from "11:45 p.m." to "11:46 p.m."*

What is the criminal investigator's ethical duty when it comes to the discovery portion of a criminal case? How far and how wide must he or she search for evidence that might assist the criminal defendant in defending against the government's case? Must particular evidence be

clearly exculpatory of the defendant in order to be discoverable under *Brady v. Maryland,* 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 152 (1972)? Is the government's obligation to share information triggered merely because the defense attorney might possibly find the information helpful? What should the criminal investigator do in a situation, such as presented in the above hypothetical, where he or she has mistakenly failed to turn over discoverable material?

These and other related questions will be discussed in this writing. The goal is to assist the criminal investigator in identifying and meeting each of his or her discovery-related duties to the Assistant United States Attorney who is prosecuting the case.

Federal Rule of Criminal Procedure

Rule 16(a) of the Federal Rules of Criminal Procedure sets forth the categories of information and materials that the government must disclose or make available to the defendant, if so requested by the defendant. Those categories are as follows:

- **Defendant's Oral Statements:** the substance of any relevant oral statement, and any written record of any oral statement, made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial;

- **Defendant's Written Statements:** any relevant written or recorded statement by the defendant that is within the government's possession, custody, or control, or about which the attorney for the government knows or, through due diligence, could know;

- **Grand Jury Transcript:** the transcript of the defendant's testimony before the grand jury relating to the charged offense;

- **Criminal Indices:** Defendant's prior criminal record;

- **Evidentiary Items:** books, papers, documents, data, photographs, tangible objects, buildings or places, or copies thereof, of any item within the government's possession, custody, or control that-

    - the government intends to use at trial;
    - is material to preparing the defense; or
    - was obtained from or belongs to the defendant;

- **Results of Scientific Testing:** reports of any scientific test or experiment within the government's possession, custody, or

control, or, with due diligence, the attorney for the government would be aware exists;

- **Expert Witness Evidence:** a written summary of any expert testimony, including testimony concerning the defendant's mental condition that the government intends to offer during its case-in-chief. Such summary must include the expert witness's qualifications as well as any opinions, and the bases for those opinions that the expert will offer at trial.

Every district court has what is, in essence, a "standing discovery order." Such an order, which is issued by a United States Magistrate Judge at a defendant's arraignment, incorporates the requirements of Rule 16 and imposes them on the parties in writing. Though not included within the list of discovery materials in Rule 16, there are at least two other types of evidence that the court's standing discovery order will require the government to provide to the defense in discovery; (1) *Brady* material; and (2) *Giglio* Material.

***Brady* Material**

In *Brady v. Maryland,* 373 U.S. 83 (1963), Brady and Boblit were convicted in separate trials of first-degree murder and sentenced to death. At his trial, Brady admitted participating in the crime but claimed that Boblit did the actual killing. During closing argument, Brady's attorney conceded Brady's guilt of first-degree murder but asked that the jury return a verdict "without capital punishment." Prior to trial, Brady's attorney had asked the prosecutor to allow him to examine Boblit's extrajudicial statements. Though the government disclosed several such documents to Brady's attorney, it withheld the one in which Boblit admitted the actual killing. The jury convicted Brady and Boblit and both were sentenced to death. The Maryland Court of Appeals affirmed those verdicts and sentences.

Brady's attorney thereafter learned of Boblit's admission to being the actual killer. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial on the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession could have reduced Brady's offense below murder in the first degree.

The U.S. Supreme Court found that suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 86-88. The court went on to hold, therefore, that Brady was entitled to be re-sentenced after the court and jury were able to consider the withheld evidence; however, the court also found that Brady was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment was affirmed.

The *Brady* decision is grounded in the Due Process Clause of the Constitution; and its essential purpose is to protect a defendant's right to a fair trial by ensuring the reliability of any criminal

verdict against him. See *United States v. Bagley*, 473 U.S. 667, 675 (1985). Thus, a *Brady* violation occurs where the government suppresses any material evidence that could reasonably undermine confidence in a guilty verdict. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). S*ee also United States v. Agurs*, 427 U.S. 97, 112 (1976) (holding that *Brady's* materiality standard "reflects our overriding concern with the justice of the finding of guilt").

That said, it is well settled that the government is under no affirmative duty to take action to discover information, which it does not possess, nor to search for exculpatory evidence for the defendant. *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991; *United States v. Badonie*, 2005 U.S. Dist. LEXIS 21928, at *2 (D.N.M. Aug. 29, 2005). On the other hand, the government may not avoid its *Brady* obligations by shrouding itself in ignorance nor ignore the reasonable likelihood that exculpatory evidence exists within the possession of any of its agencies. *E.g., Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

Giglio Material

In *Giglio v. United States*, 405 U.S. 150 (1972), Giglio was indicted for passing forged money orders and sentenced to five years' imprisonment. The government's key trial witness against Giglio was Robert Taliento who identified Giglio as the instigator of the scheme. Defense counsel vigorously cross-examined Taliento, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency. Taliento insisted, however, "nobody told me I wouldn't be prosecuted [in this case]." Moreover, during his closing argument, the Assistant U.S. Attorney told the jury "[Taliento] received no promises that he would not be indicted." Following his conviction, Giglio filed an appeal to the Second Circuit Court of Appeals. While his appeal was pending, defense counsel discovered that a second Assistant U.S. Attorney, the one who had presented the case to the Grand Jury for indictment, in fact had promised Taliento that he would not be prosecuted if he testified for the Government. Based on that newly discovered information, defense counsel moved for a new trial. The trial court denied that motion, which denial was later affirmed by the Second Circuit Court of Appeals.

The Supreme Court reversed finding that the Government's case, from indictment to trial, depended almost entirely on Taliento's testimony. Accordingly, Taliento's credibility as a witness was an important issue in the case; evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility; and the jury was entitled to know of it. Whether the government's nondisclosure was a result of negligence or design was irrelevant, the Court said. As the spokesperson for the Government, it is that office's responsibility to ensure that a promise to a witness made by one prosecutor is made known to other prosecutors on the case and, most importantly, to defense counsel for use in cross-examining the witness as to his motive in testifying.

Lessons from *Brady* and *Giglio*

Brady and *Giglio* individually and collectively teach several invaluable lessons to the criminal investigator. First, any information or evidence in the prosecution's possession that under any circumstances could support or assist the defense case must be disclosed. Similarly, the government's responsibility extends to materials or information in the possession of other

government agencies of which the prosecutor should be reasonably aware. The only exceptions to the rule of disclosure is where the trial judge has been allowed to review the information or materials in question and has found that they are not subject to the government's discovery obligations.

Second, as evident from the facts of *Brady*, the government's discovery obligation also applies to information that, if known to the Court, might result in the imposition of a lesser sentence. Thus, particularly in the federal sentencing system that is significantly controlled by the U.S. Sentencing Guidelines, the government, including the criminal investigator on the case, must ensure that defense counsel is provided any evidence that could result in a lesser sentence computation under those Guidelines.

Third, the government is certainly free to call any witness to testify in support of its prosecution. Part of the cost of doing so, however, is assuring that the defense attorney is provided all information that is within the possession or control of the government, which is relevant to the credibility of a government witness. A textbook example of *Giglio* material would be any agreement between the government and the witness, whether written or oral, under which the witness may obtain a benefit in exchange for cooperating with the government in its case.

Another example of *Giglio* material, one that would not necessarily leap to the mind of a case agent, is that certain materials or information in the personnel file of a government agent may be subject to disclosure if that agent is called as a government witness. For example, an agent may have been the subject of an agency's internal investigation, which revealed that the agent knowingly provided materially false information or knowingly withheld materially relevant information from those investigating the matter. If so, and if the agency's investigation demonstrates such to have occurred, the prosecutor must turn over the portion of the agent's personnel file pertaining to the negative findings against that agent.

Over and over you silently ask yourself how in the world you could have missed this. A few other agents assisted you in working up the case, but it has been your name on the case file since the beginning. You were the agent who presented the matter to the U.S. Attorney's Office, who took the lead in de-briefing the CI, and who assured the AUSA that copies of all materials in your file that were subject to the Court's Standing Discovery Order had been provided to the AUSA for forwarding to the defense attorney.

Leaning forward in your chair you look with disbelief at the memo. It is stained with something and sticky to touch – probably why it was stuck to the back of another page. You know you have never seen it before and no one has ever mentioned anything to you about the memo, or its contents.

"Who could have put this in my file," you ask yourself. "And who else knows about it?" Finally, the question that looms largest in your head, "what do I do now?"

The clock on your desk turns from 11:55 p.m. to 11:56 p.m.

Possible Consequences for Non-Compliance with Discovery Obligations

Failure of the government to meet its discovery obligations, even in the absence of any intentional withholding of discoverable information, triggers the District Court's broad discretion to sanction the government for violating its discovery order. *United States v. Ivy*, 83 F.3d 1266, 1280 (10th Cir.), *cert. denied*, 117 S. Ct. 253 (1996). Under Rule 16, sanctions may include prohibiting the disobedient party from introducing evidence not disclosed earlier. *See United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988). Even where Rule 16 would not ordinarily be applicable, for example, disclosure of a list of non-expert witnesses and their testimony, a defendant's pre-arrest statements to an undercover agent, the court has discretion to exclude evidence as a sanction for violation of the court's discovery order. *See United States v. Russell*, 109 F.3d 1503, 1510-11 (10th Cir. 1997). Thus, at or during the trial, the possible sanctions for discovery violations could include a mistrial, exclusion of evidence, exclusion of the testimony of a witness, dismissal of a count or counts in the indictment, or the imposition of a lesser sentence. After trial, they might include the granting of a motion for new trial by the district court, reversal of a conviction by the appellate court, and, if the government's violation was determined by the Court to have been intentional, the possibility that a retrial would be prohibited under the double jeopardy clause. *See Arizona v. Washington*, 546 F.2d 829 (9th Cir. 1976).

In short, there are no options in the world of discovery in a criminal case other than strict adherence to Federal Rule of Criminal Procedure 16 and the trial district's Standing Discovery Order. Moreover, even if those rules did not exist, even if nothing specifically required the government to disclose what the prosecutor or case agent deemed to be marginally relevant evidence that might help the defense, the Supreme Court has noted that prosecutors, and by extension government agents, are subject to constraints and responsibilities that do not apply to those who do not represent the government. *See, e.g.*, Berger v. *United States*, 295 U.S. 78, 55 S. Ct. 629 (1935). While lawyers representing private parties must do everything ethically permissible to advance their clients' interests, the attorneys and agents representing the government in criminal cases serve truth and justice first. Their job is not just to win, but to win fairly, while always staying well within the rules. *See* Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel,* 34 Stan. L. Rev. 1133, 1141 (1982).

As U.S. Supreme Court Justice William O. Douglas once observed, "the function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting). The words engraved on the wall above the Great Hall at the Department of Justice also come to mind: ***The Government Wins When Justice Is Done.***

Where the government strays from that responsibility, no ensuing outcome can meet the foregoing standards. So, faced with the question of whether to pursue a strategy that, in foresight or hindsight, is born of deceit, or the possible perception of deceit, the government prosecutor and agents must visibly and unhesitatingly refuse.

"Who else could possibly know about this? What to do now?" Over and over your inner voice asks the same questions. No easy answers follow the question. Slowly, you reach out towards your brief case to retrieve your cell phone. Picking it up, you start to hit the speed dial for your AUSA. Hesitating, you think, "maybe I should call in the morning." After hesitating a few seconds, you sigh, dial the number, and listen to the rings from the other end. A voice half-filled with sleep and the other half filled with annoyance answers the phone. "What?" your AUSA asks grumpily. "You'd better wake up." Your voice sounds hollow to you - like it is coming from a long way away. "There's been a discovery glitch. You probably want to wake up defense counsel, too." The clock on your desk turns from 11:59 p.m. to 12:00 a.m.

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CASE SUMMARIES

United States Supreme Court

Michigan v. Bryant, 2011 U.S. LEXIS 2411, February 28, 2011

The Court held that the officers could testify as to what a dying shooting victim told them about the identity of the shooter, his description and the location of the shooting without violating the defendant's rights under the *Confrontation Clause*. The victim's statements were admissible because their primary purpose was to enable the police to respond to an ongoing emergency. Although the shooting was over, an emergency still existed when the police found the victim because they did not know why, when, or where the shooting had occurred. The police asked the victim the type of questions necessary to assess the situation, the threat to their own safety and possible danger to the victim and public.

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

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Circuit Courts of Appeals

1st Circuit

U.S. v. Polanco, 2011 U.S. App. LEXIS 2411, February 9, 2011

An undercover officer bought heroin from Contreras at the food court at a mall. Contreras had arrived with Polanco, and after the sale, they left in Polanco's car. A week later the undercover officer arranged to meet Contreras to buy more heroin. Polanco and Contreras drove to the meeting location in Polanco's car again. Contreras called the undercover officer and told him "I have the stuff; you better come and get it." Officers arrived and arrested both men, but they did not find any heroin on them. The officers drove Polanco's car to their office, conducted a warrantless search of it, and found heroin in a hidden compartment. Based on this discovery the officers obtained a search warrant for Polanco's apartment where they found more heroin, drug paraphernalia, and some of the marked currency from the previous drug deal.

The court held that the officers' warrantless search of Polanco's car was lawful under the automobile exception to the warrant requirement. At the time of the search, the officers had probable cause to believe that Polanco's car contained evidence of a crime. Additionally, the court reiterated that as long as the officers had probable cause it did not matter that they moved the car and searched it at their office or that they had time to obtain a warrant before they conducted their search.

The court disagreed with Polanco's assertion that the United States Supreme Court's holding in *Arizona v. Gant* limited the automobile exception. *Gant* dealt exclusively with the search incident to arrest doctrine in the vehicle context. Nothing in *Gant* changed the automobile exception, and every circuit that has considered the issue has ruled this way.

The Fourth, Fifth, Seventh, Eighth, and D.C. circuits agree.

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

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2nd Circuit

Costello v. City of Burlington, 2011 U.S. App. LEXIS 2831, February 14, 2011

Costello was street preaching at the top of his voice at an outdoor pedestrian mall and a storeowner called the police claiming that he was causing a disturbance. The responding officer issued Costello a written warning pursuant to a noise control ordinance that prohibits "any person to make or cause to be made any loud or unreasonable noise." Costello sued, claiming the noise control ordinance violated his *First Amendment* right to free speech.

Initially the court noted that it is undisputed that Burlington's noise control ordinance is content neutral in that it does not attempt to limit the content or substance of the speech in question.
The court held that the officer's enforcement of the noise control ordinance as to Costello did not burden substantially more speech than necessary to achieve Burlington's goal of preventing excessive noise. Costello's raised voice was heard more than three hundred and fifty feet away,

dominated the area and was not drowned out by any competing ambient noise. Additionally, Costello's noise impinged on the use of the neighborhood by others with equal claim such as residents in adjacent apartments, storeowners, and their customers, all of whom may have wanted to work, think, shop or dine in a quiet environment.

Finally, the officer clearly told Costello that he was not requiring him to be completely silent, only that he must lower his voice. This provided Costello an adequate alternative channel to continue preaching in the area.

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

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3rd Circuit

U.S. v. Stabile, 2011 U.S. App. LEXIS 1945, February 1, 2011

United States Secret Service agents and Sheriff's Department investigators, suspecting that Stabile had passed counterfeit checks, went to his house to question him. Debbie Deetz answered the door and gave the agents consent to search the house. Deetz showed the agents around the house and consented to the seizure of six computer hard drives and several DVDs bearing sexually suggestive labels that caused the agents to believe they contained child pornography. While the agents were conducting their search, Stabile arrived home and attempted to revoke Deetz's consent to the search the house. The agents left shortly thereafter; however, Stabile did not request that they return the hard drives or DVDs.

The USSS agents took Stabile's computer hard drives to their office and the deputies took the DVDs back to the sheriff's department. An immediate examination of the DVDs revealed that they did not contain child pornography, but this was not communicated to the USSS agents.

The USSS case agent did not apply for a warrant to search the hard drives for three months because shortly after their seizure he was assigned to a protective detail. Eventually the USSS agent obtained a state search warrant, which authorized a search of the hard drives for evidence of financial crimes and possession of child pornography. Before the search of the hard drives occurred, the USSS agent learned that the DVDs, which were the sole basis for their application to search for child pornography, did not contain child pornography. The forensic agent was told to conduct a forensic examination of the hard drives, but to confine his search for evidence of financial crimes and not child pornography.

During his search of one of the hard drives, the forensic agent discovered a folder entitled "Kazvid." The agent understood this folder to reference "Kaaza," a peer-to-peer file sharing program, which based on his experience could contain evidence of any type of crime. The agent highlighted the "Kazvid" folder, which allowed him to view a list of file names contained in the folder. The agent saw a list of file names with file extensions indicating video files and file names suggestive of child pornography. Although the agent believed that these files contained child pornography, and not evidence of financial crimes, he opened twelve different video files from within the "Kazvid" folder. After confirming that these files contained child pornography, the agent contacted a prosecutor and stopped his search of the hard drive.

The USSS agent obtained a federal search warrant for child pornography for that particular hard drive only. The federal search warrant was based solely on the sexually suggestive names on the

files in the "Kazvid" folder and not on the contents of the twelve files that the forensic agent had viewed. The search warrant affidavit did not mention that the forensic agent had opened any files in the "Kazvid" folder.

During the execution of the federal search warrant, a different forensic agent found numerous child pornography files on the hard drive he examined. However, by mistake, the federal search warrant authorized the search of one of the other hard drives seized by the agents and not the hard drive the original forensic agent had examined which contained the "Kazvid" folder.

Stabile filed a variety of motions seeking to suppress evidence discovered by the agents.

The court held that the investigators' warrantless search of the house did not violate the *Fourth Amendment* because Deetz voluntarily consented to the search. Deetz had authority to consent to a search of the house, because as a co-habitant, she used the property along with Stabile and exercised joint access and control over the house. Deetz's mistaken belief that she was married to Stabile did not change the analysis because an unmarried cohabitant has authority to consent to a search of shared premises.

The court found that Deetz had the authority to consent to the seizure of the six computer hard drives. The hard drives were not password protected and they were located in common areas of the home where she had access to them.

Stabile argued that even if Deetz voluntarily consented to the search and seizure of the hard drives, the seizure of six entire hard drives was unreasonable. He claimed that in addition to containing information potentially relating to financial crimes, the hard drives contained a great deal of unrelated personal information. The court held that the seizure of the six entire hard drives was reasonable. First, Deetz did not limit the scope of her consent to search them in any way. Second, a broad seizure was required because evidence of financial crimes could have been found in any location of the six hard drives, and this evidence very likely would have been disguised or concealed somewhere on the hard drive. Third, an on-site search of the hard drives would not be practical since computer searches are time consuming and require a trained forensic investigator and a controlled environment.

The court held the three-month delay in obtaining the state search warrant was reasonable under the circumstances since the lead case agent was assigned to a Secret Service Detail protecting the President and other officials shortly after seizing the hard drives. Additionally, Stabile did not request the return of the hard drives until eighteen months after their seizure, and Deetz had obtained a replacement computer for Stabile to use for his work the day after the hard drives were seized.

The court held that forensic agent's decision to open the "Kazvid" folder and view the file names during the execution of the state search warrant was objectively reasonable under the *Fourth Amendment* because criminals can easily alter file names and file extensions to conceal contraband. The forensic agent engaged in a focused search to ensure that he complied with the state search warrant and followed procedures, such as imaging the hard drive, checking for corrupted files, and conducting a "hash value analysis" to ensure that he did not conduct a general search. The court noted it was irrelevant that the agent may have suspected that the "Kazvid" folder contained child pornography. The "Kazvid" folder required further investigation because it could have contained evidence of financial crimes.

Once the forensic agent lawfully opened the "Kazvid" folder, the court held that the file names were in plain view so that any screen print he made of them constituted a valid seizure. First, the forensic agent lawfully opened the "Kazvid" folder. Second, the incriminating nature of the evidence, the file names, was immediately apparent. Finally, the forensic agent had a lawful right to access the hard drive because the state search warrant authorized a search of it for evidence of financial crimes.

The court declined to decide whether the plain view doctrine applied to the examination of the contents of the individual video files because the independent source doctrine applied to their contents. Even assuming the original forensic agent illegally viewed the contents of the files, it did not taint the warrant application the USSS agent presented to the magistrate because it did not mention the contents of the "Kazvid" folder, but only the sexually suggestive names of the files within it, which the forensic agent lawfully viewed.

Finally, the court held that the inevitable discovery doctrine applied to the evidence discovered during the federal search warrant. Even though the agents made mistakes, proper execution of procedures would have uncovered evidence of child pornography. Additionally, the fact that the agents attempted to secure state and federal search warrants at every step of the search indicated that there would be little deterrence benefit gained by suppressing the evidence.

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

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5th Circuit

U.S. v. Wright, 2011 U.S. App. LEXIS 3493, February 23, 2011

The court held that Wright was not immune from prosecution under the Controlled Substances Act, *21 U.S.C. § 885(d)* for his attempt to purchase narcotics while employed by the sheriff's department as a jailer. As a deputy sheriff jailer, he was not authorized under Louisiana law to engage in his own rogue narcotics investigations and possess controlled substances outside the scope of his job duties.

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

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7th Circuit

U.S. v. Slone, 2011 U.S. App. LEXIS 3438, February 22, 2011

An undercover DEA agent drove a tractor-trailer filled with marijuana to a warehouse. The agent communicated to his surveillance team that some of the marijuana had been loaded into a Ford Explorer. The surveillance agents saw a Dodge truck pull in behind the Explorer as it left the warehouse. The surveillance agents followed both vehicles for twenty minutes. During this time, the Dodge truck remained behind the Explorer, even after it made multiple turns on several roads including a multi-lane highway. The occupants in the Dodge truck continually checked their rearview mirrors while talking on a cell phone. The agents stopped both vehicles and arrested all the vehicles' occupants for conspiracy to distribute marijuana. A search of the

Dodge truck, Slone's vehicle, revealed a large quantity of cash and a cell phone. On the ride to jail, Slone made several unsolicited incriminating statements. Slone argued that the agents did not have probable cause to arrest him, therefore, the physical evidence and statements should have been suppressed as fruit of the poisonous tree.

The court held that the agents had probable cause to arrest Slone for being part of a drug conspiracy because of the extended, coordinated activity that the officers saw between him and the driver of the Explorer. Slone followed the Explorer for an improbably long time, making a series of turns on roads where cars often change relative position, while checking the mirrors and talking on a cell phone. It was reasonable for the agents to think that Slone was conducting counter surveillance or security for the marijuana in the Explorer.

The court held that the search of Slone's vehicle was a valid search incident to arrest under *Gant*. The officers had reason to believe that evidence related to the offense for which Slone was arrested would be found in the passenger compartment of his vehicle. Since the agents arrested Slone while he was conducting counter surveillance or security operations in a drug trafficking conspiracy they could have reasonably expected to find money, cell phones, maps, drawings or other evidence linking the occupants of the Dodge truck to the crime.

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

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8th Circuit

U.S. v. Harris, 2011 U.S. App. LEXIS 3751, February 25, 2011

The court held that the photographic line-up used in this case was not impermissibly suggestive. The detective had significant experience in preparing photographic line-ups, and after obtaining a picture of Harris from a previous arrest, he entered Harris' physical characteristics into a computer program that randomly selected photographs of other individuals with similar characteristics. The detective considered the background color of each photograph and while no two photographs had identical backgrounds, each one had similar backgrounds. The slight variation in color in the backgrounds of the photographs did not create an impermissible suggestion to the witnesses that Harris was the person the police suspected.

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

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U.S. v. Faulkner, 2011 U.S. App. LEXIS 3770, February 25, 2011

The court found that the officer did not have probable cause or reasonable suspicion to stop Faulkner's car because there was no traffic violation, so the stop was improper. However, the arrest of Faulkner on the outstanding federal arrest warrant was an intervening circumstance that purged the taint of the unjustified stop; therefore, the drugs found in the vehicle and Faulkner's incriminating statements were admissible.

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

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9th Circuit

U.S. v. Krupa, 2011 U.S. App. LEXIS 2338, February 7, 2011

A woman contacted the military police after her ten-year-old daughter and five-year-old son, who were living on base with her ex-husband, had not arrived at the train station as previously arranged. Military police went to the home and discovered that the father, a service member, was out of the country. Krupa, a civilian, told police that he was taking care of the children while their father was away. The home was in disarray and police were concerned when they saw thirteen computer towers and two laptops in the home. Krupa gave the officers consent to seize the computers.

The next day, during the forensic examination of one of the computers, the investigator found an image he suspected to be child pornography along with a sexually suggestive website label. However, before the investigator could finish searching all of the computers he was hospitalized. The next day Krupa revoked his consent to search the computers. The investigator obtained a search warrant and eventually found twenty-two images of child pornography.

The court held that the magistrate could have reasonably determined there was probable cause to support the issuance of a search warrant. An image of a nude teenager, with its tag "www.nudeteens.com" was strong supporting evidence that the fifteen computers found in the home were being used for criminal purposes. Additionally, two young children were living in the disheveled residence with Krupa, who was a civilian with no apparent connection to the military.

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

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U.S. v. Flyer, 2011 U.S. App. LEXIS 2362, February 8, 2011

The court reversed Flyer's convictions for attempted transportation and shipping of child pornography, holding that *18 U.S.C. § 2252 (a)(1)* required actual transportation of child pornography across state lines. A defendant's mere connection to the Internet does not satisfy the jurisdictional requirement where there is undisputed evidence that the files in question never crossed state lines.

The government conceded that the two files that the officer downloaded from the defendant's computer did not travel across state lines; therefore, the officer's intrastate download of files from Flyer's computer could not by itself provide sufficient evidence to convict Flyer of attempting to cause those files' interstate or foreign movement.

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

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U.S. v. Valdovinos-Mendez, 2011 U.S. App. LEXIS 2894, February 15, 2011

The defendant was convicted of illegally re-entering the United States following removal, in violation of *8 U.S.C. § 1326*. He argued that admission into evidence of a certificate of non-existence of record (CNR) and certain documents from his Alien Registration File (A-file) violated his rights under the *Sixth Amendment's Confrontation Clause*. He also argued that

admission of testimony from an A-file custodian regarding the absence of any record of the defendant's applying for permission to re-enter the United States violated the best evidence rule.

The government conceded that the admission of the CNR at trial violated the defendant's right to confrontation. However, the court found that the admission of this evidence was harmless because the CNR was cumulative of other evidence that demonstrated the defendant's lack of permission to re-enter the United States.

The court held that admission of the documents from the defendant's A-file did not violate the defendant's *Sixth Amendment* rights because the documents were non-testimonial in nature.

The court held that the testimony of the agent as to her search of the databases, and the absence of any record of the defendant applying for permission to re-enter the United States, did not violate the best evidence rule. The best evidence rule applies when the contents of a writing are sought to be proved, not when records are searched and found not to contain any reference to the designated matter. Here, the agent testified only to the absence of records, not to the contents of records sought to be proved. Additionally, public records are an exception to the hearsay rule and under the *Federal Rules of Evidence* testimony from a qualified agent is permitted to show that a diligent search failed to disclose the record, report, statement or data compilation. As public records, the Central Index System (CIS) and the Computer Linked Applications Information Management System (CIMS) databases are self-authenticating.

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

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10th Circuit

U.S. v. Davis, 2011 U.S. App. LEXIS 3753, February 25, 2011

The court held that the officers had reasonable suspicion to detain Davis at the conclusion of the traffic stop in order to conduct a canine sniff. The officers' reasonable suspicion of illegal activity was based on the inconsistent travel plans provided by Davis and the driver, their abnormal nervousness, and Davis's prior history of drug trafficking.

The court also held that Davis voluntarily consented to a search of the vehicle. Initially Davis refused to consent to a search of the vehicle. After the officer requested a canine unit, Davis asked the officer how long it would take for the canine unit to arrive compared with the time it would take the officers to search the vehicle if he consented. After the officer told Davis it would take thirty minutes for the canine unit to arrive, but he could search the vehicle in five to ten minutes, Davis consented. The officer inquired to confirm that Davis was consenting to a search of the vehicle, and David confirmed his consent. The officer obtained Davis's consent voluntarily and not through coercion or force.

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

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