

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 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) 267-3429 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 <http://www.fletc.gov/legal>.

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CASE SUMMARIES

United States Supreme Court

Connick v. Thompson, 2011 U.S. LEXIS 2594, March 29, 2011

The Court held that a district attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train its prosecutors based on a single *Brady* violation.

Click [HERE](#) for the court's opinion.

Tolentino v. New York, 2011 U.S. LEXIS 2593, March 29, 2011

The court dismissed the case it had originally agreed to hear on November 15, 2010. As a result, the lower court's opinion was affirmed. Tolentino claimed that the officer conducted an illegal traffic stop, and that his identity and driving record that the officer obtained because of the stop should have been suppressed. The lower court held that even if the traffic stop was illegal, the fact that the officers learned the driver's name and obtained his driving record could not be suppressed as fruit of the illegal stop.

Click [HERE](#) for the court's opinion.

Circuit Courts of Appeals

1st Circuit

U.S. v. Battle, 2011 U.S. App. LEXIS 4012, March 3, 2011

Battle dated Fonseca for one month and occasionally stayed overnight at her apartment. After Battle confronted Fonseca's ex-boyfriend with a gun, she told Battle to leave the apartment and not to come back. A few days later the ex-boyfriend found a gun belonging to Battle that was left behind in the apartment. The next day while Fonseca was at work, the ex-boyfriend, who had unlimited access, allowed the police to enter the apartment. The officers found Battle inside the apartment and retrieved a gun from under the couch where he was sitting. After obtaining a search warrant that referenced the gun, officers found another gun, ammunition and cocaine.

The court held that Battle did not have a reasonable expectation of privacy in Fonseca's apartment; therefore, he did not have standing to object to the officers' warrantless entry into the apartment or to the seizure of the gun from under the couch.

Although Battle may have exhibited a subjective expectation of privacy in Fonseca's apartment, that expectation was objectively unreasonable because he did not have permission to be present

there. An overnight guest may have a reasonable expectation of privacy in a home, but that expectation of privacy is lost when he does not have permission to be present anymore. Battle enjoyed certain privileges while he dated Fonseca, but she revoked those privileges when she ordered Battle out of her home twelve days before the officers entered and searched it.

Click [HERE](#) for the court's opinion.

McInnis v. State of Maine, 2011 U.S. App. LEXIS 4384, March 7, 2011

A probation officer authorized state law enforcement officers to arrest McInnis, without a warrant, for violating the terms of his probation and to conduct a warrantless search of his house for drugs. The probation officer did not know that McInnis's probation period had expired. McInnis's original sentence had been reduced, but never entered into the probation department's records.

The court held that the officers were entitled to qualified immunity. The officers reasonably relied on the probation officer's assertion that McInnis violated his probation when they arrested him. There was also evidence that McInnis possessed drugs inside the house. An informant told police that he saw the drugs and the officers knew that McInnis's probation had been revoked in the past for possession of drugs.

Click [HERE](#) for the court's opinion.

U.S. v. Werra, 2011 U.S. App. LEXIS 5741, March 22, 2011

Officers had an arrest warrant for Daley. A confidential informant told them that she had recently seen Daley at a nearby house where she thought Daley was "staying". The officers went to the house and spoke to Cicerano. Cicerano, who lived in the house with several others, including Werra, told the police they could not enter without a warrant. The officers pushed past him into the entry foyer and told him to bring everyone in the house down to the foyer. The officers testified that Cicerano had invited them into the house, but the court credited Cicerano's contrary account of their entry. When Werra came into the foyer, the officers frisked him and found a gun in his front pants pocket. The officers arrested him for being a felon in possession of a firearm. The police eventually found Daley in the house and arrested her.

The government compared the living arrangements of the various individuals in the house to individuals who live in a multi-unit apartment building. The government argued that Werra could not challenge the officers' entry into, or continued presence in the house because he lacked a reasonable expectation of privacy in a common area such as the foyer.

The court held that Werra had a subjective expectation of privacy in the foyer of the house. Werra established that he believed the entire house, not just the third floor, served as his home.

The court held that Werra's expectation of privacy was objectively reasonable. A resident of a single-family structure, who shares living arrangements, as the tenants in this house did, could reasonably expect his right to privacy to begin at the front door; therefore, he could challenge the officers' forcible, warrantless entry into the house.

In order to enter the house lawfully to execute the arrest warrant for Daley, the officers had to establish they had a reasonable belief that she lived there and that she was home at the time. The court held that the information provided by the confidential informant was not sufficient to support a reasonable belief that Daley lived at the house. Even if it were sufficient, the court held that the officers had no reason to believe that Daley would be home when they entered. The officers had no information about Daley's schedule or routine that would enable them to know when she was home and when she was away.

Click [HERE](#) for the court's opinion.

2nd Circuit

U.S. v. Hotaling, 2011 U.S. App. LEXIS 3812, February 28, 2011

The defendant created child pornography images by taking the heads of minor females that he "cut" from their original non-pornographic photographs and superimposing them over the heads of images of nude and partially nude adult females engaged in sexually explicit conduct.

The court held that "morphed" child pornography that utilizes the face of a child and the body of an adult is not protected expressive speech under the *First Amendment*, therefore the defendant's indictment under *18 U.S.C. § 2256(8)(C)* was constitutional.

Click [HERE](#) for the court's opinion.

U.S. v. Clark, 2011 U.S. App. LEXIS 4506, March 8, 2011

The court held that the totality of the circumstances permitted the issuing judge to find it probable that Clark was dealing drugs from somewhere within the multi-occupancy dwelling. However, it did not provide a substantial basis to conclude that Clark controlled the various residential units in that multi-occupancy dwelling to the extent that there was probable cause to believe evidence of his criminal conduct could be found throughout the building. Search warrants for multi-occupancy dwellings must establish probable cause for each unit to satisfy the particularity requirement of the *Fourth Amendment* to protect against overbroad searches.

The court ruled that the good faith exception to the exclusionary rule applied, and as a result, Clark's motion to suppress the evidence seized from the invalid search should have been denied. The issuing judge did not abandon his neutral and detached judicial role in mistakenly finding probable cause to support the warrant, the warrant was not invalid on its face and the warrant affidavit was not completely bare bones. The warrant affidavit stated that the premises to be searched was a multi-family dwelling, provided sufficient details to permit the issuing judge to find probable cause to believe that Clark was dealing drugs from somewhere in the dwelling, and stated facts that tried to establish Clark's control over the entire dwelling.

Click [HERE](#) for the court's opinion.

3rd Circuit

U.S. v. Miknevich, 2011 U.S. App. LEXIS 3824, March 1, 2011

The court held that probable cause existed to search the Miknevich's computer for child pornography solely based on a sexually explicit file name and its related electronic identification, or SHA1 value, which the court equated to a digital fingerprint.

Although probable cause was established in this case based on the highly descriptive file name and SHA1 value, the court commented, "it remains better practice for an applicant seeking a warrant based on images of alleged child pornography to append the images or to provide a description of the images sufficient to enable the magistrate to determine independently whether probable cause exists."

Click [HERE](#) for the court's opinion.

Lamont v. State of New Jersey, 2011 U.S. App. LEXIS 4104, March 4, 2011

Quick stole a car and after a police chase abandoned it and fled into a densely wooded area. Back-up officers arrived shortly after 10:00 p.m. to help search for him. The officers located Quick, and from a distance of five to eight feet, with guns drawn and flashlights trained on him, ordered him to both show his hands and to freeze. Quick pulled his right hand out of his waistband as if he were drawing a pistol. Three officers opened fire. They shot continuously for ten seconds and fired thirty-nine rounds. At some point Quick turned away from the officers and eleven of the eighteen bullets that struck Quick hit him from behind. It could not be determined when during the shooting the fatal bullets struck Quick. The officers discovered that Quick did not have a gun in his right hand, but rather a crack pipe.

The court held that the officers were entitled to qualified immunity for their initial use of deadly force. An officer who uses deadly force in the mistaken belief that a suspect is armed will be forgiven as long as the mistake is reasonable and the circumstances otherwise justify the use of such force. Quick stood with his right hand concealed in his waistband, apparently clutching an object. He then suddenly pulled his right hand out of the waistband in a movement described as being similar to that of drawing a gun. At that point, the officers were justified in opening fire. An officer is not constitutionally required to wait until he sets eyes upon a weapon before employing deadly force to protect himself against a fleeing suspect who moves as though to draw a gun.

In situations where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force no longer exists. Although Quick's weaponless right hand was fully visible immediately after the officers began firing, they continued to fire for approximately ten seconds, shooting a total of thirty-nine rounds. The court held that a reasonable jury could conclude that the officers should have recognized that Quick was unarmed and stopped firing at him after he turned away from them, no longer posing a threat, therefore, they were not entitled to qualified immunity. It may be that the officers were justified in their use of force at all times, but it will be up to a jury to make that decision.

Click [HERE](#) for the court's opinion.

U.S. v. Kennedy, 2011 U.S. App. LEXIS 5137, March 16, 2011

In deciding the issue for the first time, the court held that the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there are extraordinary circumstances that suggest an expectation of privacy. No extraordinary circumstances existed here; therefore, Kennedy did not have *Fourth Amendment* standing to challenge the search of the rental car.

The 4th, 5th, 6th and 10th circuits agree. The 8th and 9th circuits disagree.

Click [HERE](#) for the court's opinion.

4th Circuit

U.S. v. Blauvelt, 2011 U.S. App. LEXIS 4593, March 9, 2011

The court held that there was ample evidence in the search warrant application for the magistrate to find probable cause that Blauvelt's home and computer contained child pornography.

The investigating officers corroborated the ex-girlfriend's information by viewing the images of child pornography Blauvelt sent as well as the inbox for his email account to which she still had access. Officers viewed Blauvelt's email inbox and saw that the digital picture files had been sent from the same cell phone account that the ex-girlfriend identified as belonging to Blauvelt.

Click [HERE](#) for the court's opinion.

9th Circuit

U.S. v. Cotterman, 2011 U.S. App. LEXIS 6483, March 30, 2011

In deciding the issue for the first time, the court held that the seizure of a laptop computer that began at the border and ended two days later in a government forensic laboratory, one hundred seventy miles away, fell within the border search doctrine.

The Supreme Court has recognized that the government possesses inherent authority to seize property at the international border without reasonable suspicion, probable cause or a warrant, in order to prevent the introduction of contraband into the country. Despite its name, a border search need not take place at the actual international border. The border search doctrine applies to searches that occur hundreds or thousands of miles from the physical border.

Additionally, the court stated that the border search doctrine is not so rigid as to require the government to equip every entry point, no matter how desolate or infrequently traveled, with inspectors and sophisticated forensic equipment capable of searching whatever property an individual may wish to bring into the United States. As long as property has not been officially cleared for entry into the United States and remains in the control of the government, any further search is simply a continuation of the original border search.

While the initial seizure and preliminary search of Cotterman's computer was a valid border search, the court stated that the continued detention of the computer could have become unreasonable under the *Fourth Amendment* if the government retained it beyond the time reasonably required to conduct a complete forensic search.

In this case, the government detained Cotterman's computer for forty-eight hours. The court held that this was reasonable since the complexity of Cotterman's computer, specifically password-protected files, required the government to transport it to a forensic computer laboratory so an adequate search could be conducted.

Click [HERE](#) for the court's opinion.

10th Circuit

Howards v. McLaughlin, 2011 U.S. App. LEXIS 4974, March 14, 2011

Secret Service agents arrested Howards for assaulting the Vice President after he touched the Vice President's right shoulder with his hand during a public appearance. The agents turned Howards over to the local Sheriff's Department. Howards was ultimately charged with harassment, in violation of Colorado state law. The state prosecutor subsequently dismissed the charges and no federal charges were ever filed.

Howards sued four Secret Service agents claiming that they unlawfully arrested him in violation of his *First* and *Fourth* Amendment rights.

As to the *Fourth Amendment* claim, the court held that the agents were entitled to qualified immunity because there was probable cause to arrest Howards for lying to them in violation of *18 U.S.C. § 1001*. At the time of his arrest, Howards had already falsely claimed that he had not touched the Vice President. The facts, as they were known to the agents at the time, objectively justified the arrest under *§ 1001*, despite the fact the agents based the arrest on another charge.

As to the *First Amendment* claim, the court held that two agents were not entitled to qualified immunity. The court concluded that Howards had presented enough evidence to allow a jury to find that the agents arrested him in retaliation for comments he made about the Vice President.

The *First Amendment* prohibits government officials from subjecting individuals to retaliatory actions, to include arresting them, for speaking out. Howards provided facts that suggested two agents might have been substantially motivated by his speech when they arrested him. One agent overheard Howards say into his cell phone, "I'm going to ask him how many kids he's killed today." The agent admitted that the comment disturbed him and that it was not healthy nor quite right for someone to make such a comment about the Vice President. When the second agent found out about Howards's comment, he became visibly angry and admitted that he considered the cell phone conversation when he decided to arrest Howards.

The court held that the remaining two agents were entitled to qualified immunity for the *First Amendment* claim because Howards offered no evidence that they participated in the decision to arrest him. These agents had no contact with Howards until after his arrest.

Click [HERE](#) for the court's opinion.
