Department of Homeland Security
Federal Law Enforcement Training Center
Legal Division

October 2006

The Federal Law Enforcement -Informer-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

Welcome to the first 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 Robert Cauthen at (912) 267-2179 or robert.cauthen@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting the Legal Division web page at: http://www.fletc.gov/legal.

This edition of *The Informer* may be cited as "10 INFORMER 06".
(The first number is the month and the last number is the year.)

The Quarterly Review is now The Informer.

This monthly publication will keep you informed of the very latest developments in case law, statute and rule changes. The Informer will continue to bring you news and articles of interest and practical import to Federal Law Enforcement officers and agents.

Join The Informer E-mail Subscription List

It's easy! Click HERE to subscribe.

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

PodCasts		4th Amendment Roadmap Hot Issues

4th AMENDMENT ROADMAP A step by step guide to searches	HOT ISSUES Supreme Court cases and emergent issues
Posted Now • **Introduction to 4th Amendment Searches** • **Who is a Government Agent?**	**Posted Now** • **Consent Searches – GA v. Randolph** • **Anticipatory Warrants – US v. Grubbs**
To be added soon • **Reasonable Expectation of Privacy 1 and 2** • **Probable Cause 1 and 2** • **What is a Search Warrant?** • **Search Warrant Service 1 and 2**	**To be added soon** • **GPS Tracking**
Click **HERE** to download or listen	

New Legal Division Web Site Format

The format of our web site has changed. Please bear with us as we work out the kinks. We value and sincerely solicit your comments and suggestions. E-mail them to robert.cauthen@dhs.gov

Coming in the November Issue

The annual
Supreme Court Preview

A summary of Criminal Law cases to be decided in the 2007 Term.

*****

CIRCUIT COURTS OF APPEALS
CASE SUMMARIES

1st CIRCUIT

U.S. v. Cotto, 456 F.3d 25, August 2, 2006

Bartering drugs for firearms constitutes "use" of the firearms under 18 U.S.C. § 924(c)(1)(A).

The 3rd, 4th, 5th, 8th, and 9th Circuits agree. (cites omitted).

The 6th, 7th, 11th, and D.C. Circuits disagree. (cites omitted)

Click **HERE** for the full opinion.

* * * *

2nd CIRCUIT

MacWade v. Kelly, 2006 U.S. App. LEXIS 20587, August 11, 2006

New York City's program of random, suspicionless subway baggage searches is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a "special need"; (2) that need is weighty; (3) the program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree.

Click **HERE** for the full opinion.

* * * *

3rd CIRCUIT

U.S. v. Hull, 456 F.3d 133, July 28, 2006

Looking at this issue for the first time, the Court decides:

Mere "possession" of a pipe bomb does not qualify as a "Federal crime of violence" under 18 U.S.C. § 842(p)(2)(A). Since § 842(p) does not define "Federal crime of violence," refer to 18 U.S.C. § 16 for its definition. Under § 16(a), "use" requires the "active employment" of force, and therefore a degree of intent higher than negligence. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Simply "possessing" a pipe bomb is not an "offense that naturally involves a person acting in

disregard of the risk that physical force might be used against another in committing the offense."

See *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

Click **HERE** for the full opinion.

* * * *

U.S. v. Mosley, 454 F.3d 249, July 21, 2006

Looking at this issue for the first time, the Court decides:

A traffic stop is a seizure of everyone in the stopped vehicle. Thus passengers in an illegally stopped vehicle have "standing" to object to the stop, and may seek to suppress the evidentiary fruits of that illegal seizure under the "fruit of the poisonous tree doctrine." When a vehicle is illegally stopped, no evidence found during the stop may be used against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged (attenuation, independent source, inevitable discovery).

The 1st, 5th, 7th, 8th, 9th, and 11th Circuits agree (cites omitted)**.**

Click **HERE** for the full opinion.

* * * *

U.S. v. Delfin-Colina, 2006 U.S. App. LEXIS 24046, September 22, 2006

Looking at this issue for the first time, the Court decides:

The *Terry* reasonable suspicion standard applies to routine traffic stops despite language in *Whren v. U.S.*, 517 U.S. 806 (1996), that suggests that the decision to stop an automobile is reasonable only where the police have probable cause to believe that a traffic violation has occurred. A traffic stop will be deemed a reasonable "seizure" when an objective review of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop.

The 2nd, 6th, 8th, 9th, 10th, and 11th Circuits agree (cites omitted).

Click **HERE** for the full opinion.

* * * *

4th CIRCUIT

U.S. v. Moye, 454 F.3d 390, July 24, 2006

"Constructive possession" means that the defendant exercised, or had the power to exercise, dominion and control over the item. The possession can be shared with others. Mere presence at the location where contraband is found is insufficient to establish possession. There must be some action, some word, or some conduct that links the individual to the items, shows some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander.

Click **HERE** for the full opinion.

* * * *

U.S. v. Hurwitz, 459 F.3d 463, August 22, 2006

A supporting affidavit or document may be read together with (and considered part of) a search warrant that otherwise lacks sufficient particularity. It is sufficient either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself.

The 6th Circuit agrees (cite omitted)**.**

The 1st, 3rd, 8th, 9th, 10th, and D.C. Circuits require that the warrant both reference the document and that the document accompany the warrant (cites omitted)**.**

Click **HERE** for the full opinion.

* * * *

5th CIRCUIT

U.S. v. Brathwaite, 2006 U.S. App. LEXIS 19162, July 31, 2006

Looking at this issue for the first time, the Court decides:

When a person invites a confidential informant into his home, he forfeits his privacy interest in those activities that are exposed to the informant. Video recording what transpires in the informant's presence inside the home does not violate the Fourth Amendment or Title III.

Click **HERE** for the full opinion.

* * * *

U.S. v. Barrera, 2006 U.S. App. LEXIS 22638, September 5, 2006

An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is "reason to believe" the suspect is within. "Reasonable belief" embodies the same standards of reasonableness as probable cause but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances. Like "reasonable suspicion" or "probable cause," "reasonable belief" is not a finely-tuned standard. The terms are commonsense, non-technical concepts that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. "Reasonable belief" can only be ascertained through a weighing of the facts.

See ***U.S. v. Pruitt*, 6th Circuit** (below).

Click **HERE** for the full opinion.

* * * *

6th CIRCUIT

U.S. v. Pruitt, 458 F.3d 477, August 11, 2006

An arrest warrant is sufficient to enter a residence if the officers, by looking at common sense factors and evaluating the totality of the circumstances, establish a "reasonable belief" that the subject of the arrest warrant is within the residence at that time. The "reasonable belief" standard is less than probable cause.

The 9th Circuit disagrees (cites omitted).

See ***U.S. v. Barrera*, 5th Circuit** (above).

Click **HERE** for the full opinion.

* * * *

7th CIRCUIT

U.S. v. Rosby, 454 F.3d 670, July 19, 2006

"Materiality" is an element of the mail-fraud offense under 18 U.S.C. §1341. *Neder v. U.S.*, 527 U.S. 1 (1999). Reliance is not an element nor is it an aspect of the "materiality" element in mail-fraud prosecutions.

Click **HERE** for the full opinion.

U.S. v. McDonald, 453 F.3d 958, July 17, 2006

Looking at this issue for the first time, the Court decides:

An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law. Unlike a mistake of fact, a mistake of law, no matter how reasonable or understandable, cannot provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The good faith exception will also not apply.

The 5th, 9th, 10th, and 11th Circuits agree (cites omitted).

The 8th Circuit disagrees (See ***U.S. v. Washington*** (below).

Click **HERE** for the full opinion.

* * * *

U.S. v. Haddad, 2006 U.S. App. LEXIS 23413, September 14, 2006

For the defense of entrapment, a defendant must present sufficient evidence upon which a rational jury could infer that the government induced the crime and that the defendant lacked predisposition to engage in the crime. Only then does the burden of defeating the entrapment defense shift to the government.

Click **HERE** for the full opinion.

* * * *

8th CIRCUIT

U.S. v. Washington, 455 F.3d 824, August 1, 2006

To justify a traffic stop, police must objectively have a reasonable basis for believing that the driver has breached a traffic law. If an officer makes a stop based on a mistake of law, the mistake of law must be "objectively reasonable." The officer's subjective good faith belief about the content of the law is irrelevant. Officers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable.

See ***U.S. v. McDonald,*** **7th Circuit** (above)**.**

Click **HERE** for the full opinion.

* * * *

U.S. v. Hudspeth, 459 F.3d 922, August 25, 2006

The consent of one who possesses common authority over the premises or effects is valid against the absent person who does not expressly refuse consent. The consent of one does not overcome the express refusal by another who is physically present. The consent of one also does not overcome the express refusal by another who is not physically present. When one co-occupant expressly denies consent to search, police must get a warrant.

Click **HERE** for the full opinion.

* * * *

U.S. v. Francis, 2006 U.S. App. LEXIS 22810, September 8, 2006

Constructive possession of a firearm by an employee of a business that deals in firearms may be established by knowledge of the location of the weapons, close physical proximity, and unfettered access. Infrequent handling of the weapons is immaterial. Increased evidence of knowledge and control is necessary for a finding of constructive possession in an employee / employer context.

Click **HERE** for the full opinion.

* * * *

U.S. v. Martinez, 2006 U.S. App. LEXIS 23087**,** September 11, 2006

A crime victim's identification of the defendant is admissible unless it is based upon a pretrial confrontation between the witness and the suspect that is both impermissibly suggestive *and* unreliable. An identification is unreliable if its circumstances create a very substantial likelihood of irreparable misidentification. Police need not limit themselves to station house line-ups when an opportunity for a quick, on-the-scene identification arises. Such identifications are essential to free innocent suspects and to inform the police if further investigation is necessary. Absent special elements of unfairness, prompt on-the-scene confrontations do not violate due process.

Click **HERE** for the full opinion.

* * * *

9th CIRCUIT

U.S. v. Ziegler, 456 F.3d 1138, August 8, 2006

Social norms suggest that employees are not entitled to privacy in the use of workplace computers, which belong to their employers and pose significant dangers in terms of diminished productivity and even employer liability. Thus, in the ordinary case, a

workplace computer simply does not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.

Click **HERE** for the full opinion.

* * * *

U.S. v. Cortez-Rivera, 454 F.3d 1038, July 24, 2006

Where a defendant moves to suppress evidence found during a border search and alleges that the search caused damage to his vehicle, the burden is on the defendant to prove by a preponderance of the evidence the existence of this damage, and that it affected the safety or operability of the vehicle. Then the burden shifts to the government to demonstrate that it had reasonable suspicion to conduct the search.

Click **HERE** for the full opinion.

* * * *

U.S. v. Johnson, 459 F.3d 990, August 29, 2006

Looking at this issue for the first time, the Court decides:

There is no "innocent possession" defense that would excuse a defendant for being a felon in possession of a firearm if he had obtained it innocently and his possession was transitory.

The **1st, 4th, 6th, 7th, and 11th Circuits agree** (cites omitted).

The **D.C. Circuit disagrees** (cite omitted).

Click **HERE** for the full opinion.

* * * *

U.S. v. Arellano-Ochoa, 2006 U.S. App. LEXIS 22466, August 31, 2006

Opening a screen door to knock when the inner door is closed is not a Fourth Amendment intrusion. When the inner door is closed, people understand that visitors will need to open the screen door, and have no expectation to the contrary.

Opening a closed screen door when the inner door is open is a Fourth Amendment intrusion. Where the solid door is open so that the screen door is all that protects the privacy of the residents, opening the screen door infringes upon a reasonable and legitimate expectation of privacy.

Asking a person their name and place of birth are questions "attendant to arrest and custody" and do not require *Miranda* warnings.

Click **HERE** for the full opinion.

* * * *

U.S. v. Washington, 2006 U.S. App. LEXIS 22681, September 6, 2006

Questions about an arrested defendant's name, date of birth, address, and medical condition are routine booking questions even if the identification may help the prosecution of that person for a crime. The identification of oneself is not self-incriminating.

Questions about an arrested defendant's gang affiliation and gang moniker are routine booking questions where officers routinely obtain such information for other officers to ensure prisoner safety.

Agreeing to listen without an attorney present after receiving *Miranda* warnings allows agents to describe the evidence against the person. Moreover, even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case.

Click **HERE** for the full opinion.

* * * *

10th CIRCUIT

U.S. v. Al-Rekabi, 454 F.3d 1113, July 18, 2006

The bedrock of constructive possession - whether individual or joint, whether direct or through another person - is the *ability to control* the object. It has nothing to do with a *right to control.*

There is a "necessity defense" to firearms possession offenses. The necessity defense may excuse an otherwise unlawful act if the defendant shows that (1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm.

(Editor's note – This is distinguished from the "innocent possession" defense. See ***U.S. v. Johnson*, 9th Circuit** above.)

Click **HERE** for the full opinion.

11th CIRCUIT

U.S. v. Taylor, 458 F.3d 1201, July 28, 2006

The "Knock and Talk" exception to the Fourth Amendment's probable cause and warrant requirement allows entry upon private land to knock on a citizen's door for legitimate police purposes unconnected with a search of the premises. Absent express orders from the person in possession, an officer may walk up the steps and knock on the front door of any man's castle, with the honest intent of asking questions of the occupant just as any private citizen may. Also, an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.

Click **HERE** for the full opinion.

* * * *

U.S. v. Stallings, 2006 U.S. App. LEXIS 22728, September 7, 2006

The Federal Sentencing Guidelines provide that, if a dangerous weapon (including a firearm) was possessed during a drug-trafficking offense, then a defendant's offense level should be increased by two levels, unless it is clearly improbable that the weapon was connected to the offense. The government must show that the firearm had some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. Although experience has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade, the mere fact that a drug offender possesses a firearm does not necessarily give rise to the firearms enhancement. The government must show some nexus beyond mere possession between the firearms and the drug crime.

Click **HERE** for the full opinion.