**Department of Homeland Security**
**Federal Law Enforcement Training Center**
Legal Training Division

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# 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

# Circuit Courts of Appeals

## 1st Circuit

***U.S. v. Pires,*** 2011 U.S. App. LEXIS 7019, April 6, 2011

To prove attempted receipt of child pornography in violation of *18 U.S.C. § 2252(a)(2)*, the government must establish that the defendant intended to receive child pornography and that he took a substantial step toward receiving it. The government does not have to prove that the defendant knew that the downloaded file actually contained child pornography, but only that he believed the file contained such images.

The court held that the government established that the defendant was attempting to acquire child pornography. The defendant told two officers that he deliberately used search terms associated with child pornography, that he had an interest in child pornography, that he had previously downloaded and viewed child pornography in the past, and the title of the file in question was highly suggestive of child pornography.

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

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***U.S. v. Hughes,*** 2011 U.S. App. LEXIS 7338, April 8, 2011

The court held that the defendant's interview was non-custodial; therefore, no *Miranda* warnings were required. The interview took place in the defendant's house after the officers went there to conduct a "knock and talk" interview. There were four officers present, but only two participated in the interview, and there was never any show of force toward the defendant. Only two officers carried visible weapons, which remained in their holsters for the entire visit. The officers did not make any physical contact with the defendant, and the atmosphere was non-confrontational and relaxed throughout the interview. The interview took place in the late morning and the defendant was appropriately dressed. The totality of the circumstances established that the defendant's freedom of movement was not restrained to such a degree that a reasonable person in his position would have thought that he was under arrest.

The court held that the defendant voluntarily made incriminating statements to the officers. The officers did not make any promises or threats to the defendant, the length of the interview was reasonable and the tone cordial. The defendant was mature, had taken some college courses and had a respectable employment history. After the defendant suffered a panic attack, the officers stopped their questioning and summoned medical assistance. They did not resume questioning the defendant until after an EMT advised them that the defendant's condition had stabilized.

Finally, the court declined to rule on whether or not the defendant voluntarily consented to a search of his computer. Instead, the court held that the inevitable discovery doctrine applied. The defendant's voluntary confession gave the officers probable cause to obtain a warrant to

search the house and his computer. Additionally, the defendant voluntarily gave the officers videotapes containing child pornography prior to the discussion about a consent search. The discovery of the child pornography would have occurred regardless of the defendant's consent.

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

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***U.S. v. Dancy,*** 2011 U.S. App. LEXIS 7556, April 13, 2011

The court held that the officers had reasonable suspicion to stop Dancy and investigate his involvement in a recent shooting. Dancy fit the description of the shooter and the clothes he was wearing. The officers found Dancy in a bar one block from where the shooting occurred, a few minutes after the shooting. Finally, Dancy tried to move away from the officers after he saw them enter the bar.

The court also held that the officers were justified in frisking Dancy when he put his hand in his pocket in a way, which suggested to an experienced officer that he was putting his hand on a gun, as the officers approached him.

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

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## 3rd Circuit

***U.S. v. Warren,*** 2011 U.S. App. LEXIS 8169, April 21, 2011

The defendant claimed that the officer provided him a deficient *Miranda* warning because it failed to advise him of his right to an attorney after questioning had begun. As part of his *Miranda* warnings, the officer told the defendant, "You have the right to an attorney. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish."

While at a loss to understand why the officer recited the *Miranda* warnings from memory instead of reading them from a card, since the questioning occurred in the police station where a *Miranda* card should have been readily available, the court held that the warning adequately conveyed to the defendant his rights under *Miranda*.

The court concluded that the words the officer used put the defendant on notice that his right to an attorney, whether he hired one or had one appointed, became effective before he answered any questions and that nothing in the words the officer used indicated that counsel's presence would be restricted after questioning began.

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

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## 5th Circuit

***U.S. v. Curtis,*** 2011 U.S. App. LEXIS 5002, March 11, 2011

In July 2007, officers obtained an arrest warrant for Curtis after he made a false statement on a credit application he submitted to a car dealership. When the officers arrested Curtis he was driving his vehicle and talking on his cell phone. After he pulled over, Curtis placed the cell phone on the car's center console. An officer took the phone out of the car and began looking at the text messages on it. Later, while Curtis was being processed at the jail the officer resumed looking at the text messages on the cell phone.

The court held that the search of the cell phone was constitutional since it took place incident to a lawful arrest and it was within Curtis's reaching distance when the officers arrested him. The court followed *U.S. v. Finley, 477 F.3d 250 (5th Cir.)*, which held that the police could search the contents of an arrestee's cell phone incident to a valid arrest when it is recovered from the area within an arrestee's immediate control.

Curtis argued that the officer's search of the cell phone was unlawful in light of the Supreme Court's holding in *Gant*, decided in 2009, which held in part that the police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of arrest."

The court refused to apply the rule announced by *Gant* to a search incident to arrest that occurred before *Gant* was decided. Additionally, the court stated that even if it had ruled the search of the cell phone was unlawful, it would have refused to suppress the text messages under the good-faith exception to the exclusionary rule. The court noted that the good-faith exception applies to searches that were legal at the time they were conducted, but later determined to be unconstitutional by a subsequent change in the law.

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

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***U.S. v. Winkler,*** 2011 U.S. App. LEXIS 8445, April 25, 2011

The court held that the evidence overwhelmingly established Winkler knowingly received child pornography, even though the videos were located in the temporary storage of his computer hard drive. This was not a case where a computer was infected with child pornography that belonged to a person who did not intend to access such material. The evidence established that Winkler repeatedly paid for members-only child pornography sites, and the only way the child pornography files could have been copied to the cache was by Winkler's decision to click and watch the videos. Additionally, Winkler had downloaded dozens of images of child pornography and he kept a catalogue of child pornography links on his computer.

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

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## 7th Circuit

***U.S. v. Cuevas-Perez,*** 2011 U.S. App. LEXIS 8675, April 28, 2011

Officers suspected that the defendant was involved in a drug distribution operation. Without obtaining a warrant, an officer attached a GPS tracking device to the defendant's Jeep while it was parked in a public area. The GPS device sent the officer text message updates of its location every four minutes. The defendant went on a road trip and the officer monitored the defendant's location, until the batteries in the GPS device began to run low after approximately sixty hours. Other officers located Cuevas-Perez's vehicle, conducted a traffic stop and eventually found heroin hidden inside it.

The court held that GPS tracking is not a search under the *Fourth Amendment* and refused to suppress the contraband recovered by the officers. GPS surveillance utilizes technology to substitute for an activity, specifically, following a car on a public street, which is not a search under the *Fourth Amendment*.

The court did not explicitly reject the reasoning outlined by the District of Columbia Circuit in *U.S. v. Maynard, 615 F.3d 544 (D.C. Cir. 2010)* which held that continuous GPS tracking for twenty-eight consecutive days constituted a search. The court noted in this case that the GPS tracking covered a single trip, was not lengthy, and it did not risk exposing the intimate details of the defendant's life for a long period.

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

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## 9th Circuit

***U.S. v. Ewing,*** 2011 U.S. App. LEXIS 7065, April 7, 2011

An officer stopped a car for having an expired registration. While he was standing by the car, the officer saw folded United States currency partially hidden between the weather stripping on the passenger-side door and the window. The officer removed the bills and after examining them, determined that they were counterfeit since the serial numbers on some of the bills were identical.

The defendant argued that he had a reasonable expectation of privacy in the information concealed inside the folded bills and that the officer unlawfully removed, unfolded and examined the bills.

The court held that the removal of the bills and their examination by the officer was valid under the automobile exception to the warrant requirement. The officer identified several factors that reasonably caused him to suspect that the money was related to drug trafficking and that a search of the car would reveal evidence of a crime. Before removing the bills, the officer learned that one of the occupants was on parole. Additionally, this person was nervous and spoke loudly and rapidly which indicated that he was under the influence of a stimulant. Finally, the bills were located in a place that suggested an effort to conceal their presence and the officer knew that drug couriers used door compartments and similar hiding places to transport contraband and cash.

Although the bills were not drug proceeds, the totality of the circumstances justified the officer's belief that they were, and that there was a fair probability that a search of the car would yield evidence of a crime.

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

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***U.S. v. Bibbins,*** 2011 U.S. App. LEXIS 8001, April 20, 2011

To obtain a conviction for resisting a government employee engaged in an official duty under *36 C.F.R. § 2.32(a)(1),* the government must prove that the defendant willfully resisted the efforts of the employee. Here, there was substantial evidence to show that Bibbins willfully resisted the Park Rangers when they arrested him. First, Bibbins refused to comply with the Rangers' commands to raise his hands above his head. Bibbins then tensed his arms and made fists, jerked his right arm out of the officers' grip, did not get on the ground when ordered to do so, and rotated his body to the right when the Rangers tried to handcuff him. Bibbins finally complied with all of the Rangers' instructions once he fell to the ground after being tased in two places in his back.

The court also affirmed Bibbins's conviction for having an obstructed license plate on the pickup truck that he was towing behind his motor home. The court held that the pickup truck qualified as a motor vehicle even though it was being towed at the time Bibbins was cited for obstructing the license plate's visibility.

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

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