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The Federal Law Enforcement -Informer-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

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The Punch You Don't See – Whether the Americans with Disabilities Act Applies to Arrests

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An old boxing adage states, "It's the punch you don't see that knocks you out." The Supreme Court *may*[1] decide this term whether the United States Court of Appeals for the Ninth Circuit delivered one to the City of San Francisco. The question: Whether the Ninth Circuit correctly decided that Title II of the Americans with Disabilities Act (ADA) required two of the city's police officers to provide *accommodations* to an armed, violent, and mentally ill suspect in the course of bringing her into custody.[2]

The suspect, turned plaintiff in this case is Teresa Sheehan. Sheehan lived in a group home along with other people suffering from mental illness. Sheehan was not taking her medications and her mental health had deteriorated to the point where she was a threat. "Get out of here!" Sheehan shouted after a social worker entered her room, "You don't have a warrant! I have a knife and I'll kill you if I have to." The threat was relayed to the police and two officers responded to the home to take Sheehan into custody. The officers knocked on Sheehan's door, announced themselves as police, entered, and received the same *greeting* as the social worker: "Get out!" Sheehan was not kidding. She indeed had a knife, which she raised over her head, while walking toward the officers, repeating, "I'll kill you!" The officers backed out of Sheehan's room, closing the door behind them. With Sheehan inside her room, alone, and the officers outside in the relative safety of the hallway, they had options. One option was to wait. Maybe after back-up arrived, the officers could safely talk Sheehan out of the room. The other option was to go back inside the room and take Sheehan into custody themselves. The officers chose the second option. When the officers opened the door, Sheehan charged at them with the knife. When pepper spray failed to stop the threat, the officers shot Sheehan. Miraculously, Sheehan survived and this lawsuit ensued.

Last month's issue of The Informer covered Sheehan's suit against *the officers*, and whether the Ninth Circuit properly denied the officers qualified immunity from Sheehan's *Fourth Amendment* claim.[3] In addition to that claim, the court will also decide whether Sheehan can sue *the city* under Title II of the ADA.[4]

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[1] The Supreme Court may delay the question about whether the federal ADA applies to arrests because it was not properly briefed at the March 23rd oral arguments on Sheehan. Justice Antonin Scalia accused the city attorney for San Francisco of "bait and switch" by leading the Court to believe that she would argue that the ADA does not apply *at all* to arrests, but then changed her argument that the ADA "only applies when a threat [posed a disabled person] has been eliminated." Justice Scalia suggested that the Court might appoint someone else to argue the real issue.

[2] *San Francisco v. Sheehan*, 743 F.3d 1211, cert. *granted*, 135 S.Ct. 702 (2014).

[3] See 3 Informer 15 (https://www.fletc.gov/the-informer)

[4] Sheehan sued the officers in their individual capacities for a Fourth Amendment violation and the City of San Francisco under the ADA. Title II of the ADA provides that "no qualified individual shall, by reason of such disability, be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." Title 42 U.S.C. § 12132. The officers cannot be sued under the ADA. Individuals in their personal capacities are not subject to suit under Title II, which provides redress only from public entities. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 484 (8th Cir. 2010).

The Ninth Circuit believed the same facts could support both claims. "It is undisputed that Sheehan had a disability," the Ninth Circuit stated, "and the officers knew it at the time they encountered her." From there, the Court turned to what it believed supported Sheehan's ADA claim:

> Sheehan asserts that the city [through the two officers] failed to provide a reasonable accommodation when the officers forced their way back into her room without taking her mental illness into account. She asserts that the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation. We acknowledge that the officers were forced to make split-second decisions. A reasonable jury nevertheless could find that the situation had been defused sufficiently, following the [officers'] initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employee less confrontational tactics …"

If those facts were true, the Ninth Circuit believed that Sheehan was *denied the benefits of the services, programs, or activities of a public entity* under the ADA.[5]

To be fair, the city cannot say Sheehan's claim was totally unexpected. While the Ninth Circuit had not previously addressed whether the ADA applies to arrests, other circuits had. The Ninth Circuit sided with the other circuits that held the ADA applies broadly to *anything a public entity does.* [6] Like the other circuits, the Ninth Circuit also agreed the exigencies of an arrest determine the reasonableness of an accommodation. In this case, with Sheehan alone and behind her door, the court believed the officers could have provided Sheehan an accommodation by possibly taking a deep breath, and thinking of another way to get her out of the room.

Still, not every circuit agrees the ADA applies to arrests. Calling an arrest a *service, program, or activity* requiring accommodations seems to be a stretch of the statutory language. In addition, the fact that law enforcement officers already have a lot on their mind in potentially life threatening situations is a bit of an understatement. Requiring officers to factor in when an accommodation is reasonable could very well pose a risk that Congress did not intend. The Fifth Circuit held the ADA simply does not apply to arrests or other on-the-street responses made by law enforcement, at least, not before the scene is safe.[7]

The Supreme Court will merely draw another line between conduct deserving civil liability, and not. The safest prediction in *Sheehan* is that *Sheehan type* cases will happen again. How to truly win these cases will be left to training. The public outcry over Columbine, Sandy

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[5]The officers disagreed with some of the facts alleged by Sheehan. However, in deciding whether to dismiss the case or to allow it to go forward, the Ninth Circuit was required to accept her version of the facts as true. A trial would decide whether she could prove those facts by a preponderance of the evidence.

[6]*Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007)(the exigent circumstances presented by criminal activity go more to the reasonableness of the requested ADA accommodation than whether the ADA applies in the first instance); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10 th Cir. 1999)(a broad rule categorically excluding arrests from the scope of Title II … is not the law); *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009)(reserving judgment on whether the ADA applies, but finding the officers used reasonable accommodations anyway); *Tucker v. Tennessee*, 539 F.3d 526, 534 (6 th Cir. 2008).

[7] *Hainze v. Richards*, 207 F.3d 795, 801 (5 th Cir. 2000)(Title II does not apply to an offer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life).

Hook, and the Washington Navy Yard shootings was the catalyst behind active shooter training - - training that has strived to create the file in the officer's brain to recognize facts and ask certain questions: "Where is the suspect? And, who else is inside?" Getting less press, but happening at least as often are cases where suspects barricade themselves behind closed doors and promise serious consequences when *anyone* comes inside. "Does the suspect pose a danger to anyone else?" would be just as important to know. And if *not*, why not wait - - and see if the passage of time will defuse the situation? These cases pose as much of an officer safety issue as a legal one, and predictable is preventable. It's the punch you don't see that knocks you out.

The Supreme Court heard oral arguments in *Sheehan* on March 23, 2015. The court's decision is pending.

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VAWA 2013 Extends Criminal Jurisdiction to Indian Tribes Against Non-Indian Offenders: A Decision Thirty-Seven Years in the Making

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On March 6, 1978 in *Oliphant v Suquamish Indian Tribe*[1], the United States Supreme Court decided that absent congressional authorization, Indian Tribes do not have criminal jurisdiction over non-Indian offenders. Specifically, the Court held that an early version of the Indian Civil Rights Act (ICRA) extended its guarantees only to "American Indians," rather than to "any person." Although ICRA provided protection to "any person," the Court held the purpose of that language was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians."[2] The Court noted the wording was not intended to give Indian tribes criminal jurisdiction over non-Indians, but instead, merely demonstrated Congress' desire to extend the Act's guarantees to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or Act of Congress.[3]

On March 7, 2015 the provisions of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) went into effect. In that act, Congress has authorized Indian tribes criminal jurisdiction over non-Indian offenders by amending the language of the Indian Civil Rights Act.[4] Congress has done so clearly, without need for judicial interpretation.

Indian tribes who choose to participate in the legislation will now have jurisdiction over crimes of domestic violence. Crimes of domestic violence include dating violence, domestic violence and violations of protection order(s). The term "dating violence" is defined as violence committed by a person who is, or has been in a social relationship of a romantic or

[1] 435 U.S. 191 (1978)
[2] Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 10 (1966).
[3] *Oliphant*, 435 U.S. at 196.
[4] 25 U.S.C. § 1301 et. seq.

intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

The term "domestic violence" is defined as:

> Violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

The term "protection order" is defined as:

> Any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a *pendente lite* order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of the person seeking protection.[5]

Congress recognized that the powers of self-governance include the inherent power to prosecute all persons for the crime of domestic violence occurring on tribal land.[6] Indian tribe jurisdiction is concurrent with the jurisdiction of the United States, states, or both, over the same conduct.

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one of two categories. The first category is domestic violence and dating violence. The second category is violations of protection orders. To qualify, the violation of the protection order must occur in the Indian country of the participating tribe. Further, the violation must be of an order that prohibits violence, threatening acts, harassment, sexual violence, or contact or communication with another person. Prior to the enforcement of said action, the tribe must show that the person to whom the enforcement is attempted had notice of the protective order and an opportunity to be heard.[7]

There are exceptions to the tribe's exercise of jurisdiction. One exception is when the victim and perpetrator are non-Indian. In addition, the tribe is excluded from exercising jurisdiction unless it can show the person has a significant relationship with the tribe. A significant relationship exists when the defendant:

- Resides in the Indian country of the participating tribe,
- Is employed in the Indian country of the participating tribe; or

[5] 25 U.S.C. § 1304 (a)
[6] 25 U.S.C. § 1304 (b)
[7] 18 U.S.C. § 2265 (b)

- Is a spouse, intimate partner, or dating partner of
    - a member of the participating tribe; or
    - an Indian who resides in the Indian country of the participating tribe.

Notice also that crimes of sexual violence may not be prosecuted unless the tribe can establish a domestic or dating relationship.

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant all applicable rights under this Act if a term of imprisonment of any length may be imposed. All rights described in 25 USC § 1302(c) must be followed. These rights include:

- The right to a court appointed licensed attorney;
- To require the judge presiding over the proceedings to have sufficient legal training to preside over criminal cases and is a licensed attorney;
- Prior to charging the defendant, make publicly available the criminal laws, rules of evidence , and rules of criminal procedure of the tribal government; and
- To maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Further, the defendant has:

- The right to a trial by an impartial jury that is drawn from sources that reflect a fair cross section of the community; and does not systematically exclude any distinctive group in the community, including non-Indians;
- And all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

The application for writ of habeas corpus is also made applicable to non-Indians charged in tribal court. A person who has filed a petition for a writ of habeas corpus in a court of the United States under 25 USC § 1303 may petition that court to stay further detention of that person by the participating tribe. A court shall grant a stay if the court:

- Finds there is a substantial likelihood that the habeas corpus petition will be granted; and
- After giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 25 USC § 1303.

VAWA 2013 also added the following provision to 18 USC § 2265 regarding tribal court jurisdiction and protective orders:

> A court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe or otherwise within the authority of the Indian tribe.

Prior to March 7, 2015, three tribes were granted the new jurisdiction as part of a 2014 pilot project authorized by VAWA. Those tribes, the Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, and the Tulalip Tribes, had to submit applications laying out their proposed codes and procedures, and were approved by the U.S. Attorney General. To date, these tribes have charged 26 offenders.[8]

Also, on March 6, 2015, Acting Associate Attorney General Stuart Delery allowed two tribes to move forward immediately with the new jurisdiction. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Sisseton Wahpeton Oyate of the Lake Traverse Reservation are both large tribes in rural areas with larger populations. Other large rural tribes interested in implementing the new authority can look to these tribes for guidance.[9]

On March 6, 1978, the Supreme Court of the United States ruled that only through clear action of Congress could an Indian Tribe have jurisdiction over non-native offenders. On March 7, 2015, almost thirty years to the date, Congress has acted, and now tribes have received the power, recognized as inherent in their power of self-governance, to prosecute all crimes of domestic violence occurring on tribal land.

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[8] Bendery, Jennifer "*At Last, Violence Against Women Act Lets Tribes Prosecute Non-Native Domestic Abusers." HuffingtonPost.com.* March 6, 2013.
[9] *Id.*

CASE SUMMARIES

United States Supreme Court

Grady v. North Carolina, 2015 U.S. LEXIS 2124 (U.S. Mar. 30, 2015)

A North Carolina state trial court ordered Grady to participate in a satellite-based monitoring (SBM) program as a recidivist sex offender for the rest of his life. Grady argued the monitoring program, under which he would be forced to wear a tracking device at all times, would violate his *Fourth Amendment* right to be free from unreasonable searches and seizures. The North Carolina Court of Appeals rejected Grady's argument, holding the state's system of nonconsensual satellite-based monitoring did not constitute a *Fourth Amendment* search.

The United States Supreme Court disagreed. In *U.S. v. Jones*, the court held a *Fourth Amendment* search occurs when the government obtains information by physically intruding upon a constitutionally protected area. Here, the court concluded the SBM program was clearly designed to obtain information by physically intruding on a person's body. As a result, ordering Grady to participate in the SBM program constituted a *Fourth Amendment* search.

However, the court noted its decision did not determine the constitutionality of the SBM program, as the *Fourth Amendment* only prohibits unreasonable searches and seizures. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. Consequently, the court remanded the case to the state court where Grady will be able to argue that mandatory participation in the SBM program violates his right to privacy, while the state can argue that mandatory participation is reasonable in order to track the movements of a recidivist sex offender.

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

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Circuit Courts of Appeal

First Circuit

United States v. Molina-Gomez, 2015 U.S. App. LEXIS 4611 (1st Cir. P.R. Mar. 20, 2015)

Molina arrived at the airport in Puerto Rico after a trip to Columbia with a carry-on bag, a laptop computer and a Play Station gaming system. Because this was Molina's third trip to Columbia, a known drug source of illegal drugs, in four months, a Customs and Border Protection (CBP) officer referred Molina to secondary inspection. After initially questioning Molina, the officer suspected Molina might be involved in drug smuggling. The officer escorted Molina to a small windowless room where Molina remained for approximately two-

hours. During this time, the officer asked Molina about his trip to Columbia and drug trafficking in general.

In the meantime, other CBP officers were inspecting Molina's laptop, Play Station and cell phones. Although the officers found no drugs, they found no data on the computer after they turned it on. In addition, a review of Molina's phones revealed text messages from numerous individuals concerning money transactions. Suspecting that Molina was smuggling drugs, the officers sent his laptop and Play Station to the CBP Forensic Lab. Approximately three weeks later, a forensic chemist discovered heroin concealed in sophisticated compartments of both items. Federal agents arrested Molina when he appeared to pick up his property.

Molina argued the search of his laptop and Play Station constituted a non-routine and unreasonable border search.

The court disagreed. Without deciding whether the search was routine or non-routine, the court held the officers were justified to search Molina's electronics because the officers established reasonable suspicion that Molina might be smuggling drugs. First, the officers knew Molina had traveled to Columbia three times in the last four months. Second, Molina gave odd and suspicious answers to the officers' routine questions. Third, Molina's laptop was operational, yet it contained no data. Finally, Molina's phones contained text messages concerning prior and future money transactions. The court further held the detention of Molina's property for twenty-two days before conducting the search was reasonable under the circumstances.

Molina also argued the additional questioning conducted by the officer in the small windowless room violated his *Fifth Amendment* rights because he was not given his *Miranda* warnings prior to being questioned.

The court agreed, concluding that Molina's two-hour detention in a small, windowless room while being asked questions about potential illegal drug activity went beyond a routine Customs inspection to determine whether Molina should be admitted into the United States. Therefore, the court held Molina was in-custody for *Miranda* purposes. In addition, the officer's questions to Molina constituted "interrogation," because the officers focused on Molina's involvement with drug smuggling. As a result, the court held Molina's statements regarding drug activity should have been suppressed.

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

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United States v. Hufstetler, 2015 U.S. App. LEXIS 4612 (1st Cir. N.H. Mar. 20, 2015)

Officers arrested Hufstetler and his girlfriend, Sheena, for bank robbery. While interrogating Hufstetler, the officers confronted him with evidence obtained during the investigation and told Hufstetler they believed he was guilty. During the interrogation, the officers also told Hufstetler that he had the opportunity to explain Sheena's role in the robbery, and that they knew Hufstetler was concerned about the consequences she was facing. After Hufstetler expressed concern for Sheena, the officers told him the information he provided could either help her or hurt her. The officers consistently told Hufstetler that he needed to tell the truth; however, the officers also told him that they lacked the authority to make any guarantees or

promises in exchange for his cooperation. Hufstetler eventually confessed, taking full responsibility for the robbery.

Prior to trial, Hufstetler moved to suppress his confession. Hufstetler claimed it was only after the officers convinced him that Sheena's freedom hinged on his willingness to cooperate that he finally confessed.

The court disagreed, holding Hufstetler's confession to the officers was obtained voluntarily. Although the officers' statements were difficult for Hufstetler to accept, the court held the officers never lied, exaggerated the situation or conditioned either his or Sheena's release on Hufstetler's willingness to speak. Instead, the officers truthfully told Hufstetler that Sheena was a suspect and unless new information became known to discount her participation in the robbery, she would continue to face criminal charges. In addition, the court noted the officers emphasized to Hufstetler that they could not and would not promise Hufstetler anything in exchange for his confession.

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

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Second Circuit

United States v. Raymonda, 2015 U.S. App. LEXIS 3141 (2d Cir. N.Y. Mar. 2, 2015)

A cybercrimes investigator discovered a user at a particular IP address had accessed 76 images from a website, the majority of which were thumbnail images of child pornography. In addition, the IP log suggested all 76 images were accessed over a period of seventeen seconds and showed no user requests for any full-sized versions of the thumbnail images.

Six months later, investigators identified Raymonda as the individual who lived at the address associated with the IP address. Three months later, a federal agent applied for a warrant to search Raymonda's computers for evidence of child pornography. In his affidavit, the agent did not attach the full IP log to his warrant application nor state that the time stamps on the IP log only covered a period of seventeen seconds. In addition, the agent stated that individuals who have a sexual interest in children commonly hoard images of child pornography and retain those images for many years. A magistrate judge issued the warrant and agents found over 1,000 images of child pornography on Raymonda's computers. The government charged Raymonda with receiving and possessing child pornography.

Raymonda argued the child pornography discovered on his computers should have been suppressed because the evidence that a user with his IP address accessed images of child pornography nine months earlier was too stale to suggest that pornographic images would still be found on his computers at the time of the search.

The court recognized the determination of staleness in child pornography investigations is unique. In certain circumstances, courts have inferred a suspect was a hoarder of child pornography based upon a single incident of possession or receipt of such materials. For example, where the suspect's access to the pornographic images depended on a series of complicated steps, courts have found this suggested a willful intention to view the files. However, in those instances, the inference that a suspect was a collector of child pornography did not proceed solely from evidence of the suspect's one-time access to child pornography.

Instead, it proceeded from circumstances suggesting the suspect had accessed those images willfully and deliberately, actively seeking them out to satisfy a preexisting predilection. Such circumstances, the court noted, tend to negate the possibility that a suspect's "brush" with child pornography was a purely negligent or inadvertent encounter.

In this case, the court found it was not enough for the agent to apply for a warrant based on nine-month old evidence that Raymonda had accessed thumbnail images of child pornography on one occasion for seventeen seconds. Instead, it was necessary to show Raymonda accessed the images under circumstances sufficiently deliberate or willful to suggest he was an intentional collector of child pornography. Here, the agent's affidavit contained no evidence suggesting Raymonda had deliberately sought to view those thumbnails or that he discovered them while searching for child pornography. In addition, there was no evidence Raymonda saved the thumbnails to his hard drive or that he even saw all of the images, many of which may have downloaded in his browser outside his immediate view. The information in the agent's affidavit was equally consistent with an innocent user inadvertently stumbling upon a child pornography website and promptly closing the browser window. Consequently, the court held the evidence suggesting Raymonda accessed child pornography on one occasion, without any indication he deliberately intended to access those images, did not support an inference that he was a hoarder of child pornography sufficient to create probable cause to believe that child pornography would be found on his computers nine months later.

However, the court further held the good faith exception to the exclusionary rule applied. The court found any errors in the agent's affidavit supporting the warrant application were neither intentionally false, nor grossly negligent. As a result, the agents were entitled to rely in good faith on the warrant and the evidence against Raymonda should not have been suppressed.

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

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United States v. Foreste, 2015 U.S. App. LEXIS 3766 (2d Cir. Vt. Mar. 11, 2015)

A Massachusetts State Trooper pulled over a car for speeding. During the stop, the trooper encountered Cesar, the driver and Foreste, the passenger. After the Trooper asked Cesar for the registration, Foreste gave the trooper an expired rental agreement. Suspecting the car might be stolen, the trooper contacted a trooper in Vermont, seeking information he might have on Cesar and Foreste, as both men were from Vermont. While waiting for this information, the trooper contacted a representative from the rental car company who stated there was no problem with the expired rental agreement as long as the car was ultimately returned. The trooper issued Cesar a ticket for speeding and let the men go. The stop lasted approximately twenty-two minutes.

After the men left, the Vermont trooper contacted the Massachusetts trooper with information concerning Foreste. The Vermont trooper discovered Foreste was a known cocaine and oxycodone dealer who transported large quantities of drugs from New York City to Vermont in rental cars. Approximately thirty-minutes later, the Vermont trooper saw Foreste's rental car at a rest stop in Vermont. The trooper followed the car and conducted a traffic stop after Cesar rolled through a stop sign. While speaking with the men, the trooper saw what he believed to be marijuana "chafe" on Cesar's pants and a white residue around Foreste's nostrils, which he deemed consistent with someone who had nasally ingested cocaine or other powdered narcotics. An officer with a drug-sniffing dog arrived thirty-minutes later. The dog

alerted to the presence of narcotics, and a subsequent search revealed unlawful prescription pills in the car. The trooper arrested Foreste and found over 600 oxycodone pills hidden in Foreste's underwear during the search incident to arrest. Foreste was indicted for possession with intent to distribute oxycodone.

Foreste argued the drug evidence should have been suppressed because the combined duration of the two traffic stops was unreasonable. Foreste argued that combining the duration of the stops was appropriate because the troopers were working together and each detained him as part of a joint drug investigation.

The court disagreed. The court found each stop was justified by a separate traffic violation and probable cause. However, more importantly, the court held independent reasonable suspicion justified the extension of each stop for further investigation. The Massachusetts trooper stopped Foreste and Cesar for speeding and extended the duration of the stop to sort out the expired rental agreement and make a brief call to the Vermont trooper. The Massachusetts trooper suspected the rental car might be stolen and she took a reasonable amount of time, twenty-two minutes, to dispel that suspicion. The Vermont trooper stopped Foreste and Cesar for running a stop sign and extended the duration of the stop after he saw what he believed to be marijuana "chafe" on Cesar's pants and cocaine residue on Foreste's nostrils. The court found the forty-minute duration of the stop was within the range other courts have found reasonable for similar canine investigations.

It is worth noting, while it did not happen in this case, the court was concerned about the intrusiveness of successive investigations based on the same reasonable suspicion. The court concluded that where the same suspicion justifies successive investigations and the officer conducting the subsequent investigations is aware of the prior investigation and the suspicion that supported it, the investigations' duration and scope must be both individually and collectively reasonable under the *Fourth Amendment*.

Finally, while the court upheld the validity of both traffic stops, it held the district court improperly denied Foreste's discovery motion to compel the government to provide the field performance records for the drug-sniffing dog. While the government provided the dog's certification records and some training records, the court held the dog's field performance records were relevant to determine whether the dog's alert on the car was sufficiently reliable to establish probable cause it contained drugs. As a result, the court remanded the case so the district court could reconsider Foreste's motion to suppress solely on the ground that the dog's alert was not reliable.

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

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Fifth Circuit

United States v. Ortiz, 2015 U.S. App. LEXIS 4401 (5th Cir. Tex. Mar. 18, 2015)

Ortiz went to a gun store and purchased a rifle and one box of ammunition for $2,100 in cash. Ortiz completed the required ATF form 4473, which warned that it was illegal to purchase a firearm for another person, also known as a straw purchase. After buying the rifle, Ortiz asked Hernandez, the store employee, if the store had any more rifles similar to the one just purchased. After Hernandez showed Ortiz a second rifle, Ortiz left the store to get more cash

from an ATM. Suspecting Ortiz was engaged in a straw purpose, Hernandez contacted an agent with the Bureau of Alcohol, Tobacco and Firearms, (ATF) and gave the agent a description of Ortiz's car and license plate number.

A short time later, Ortiz returned to the store and bought the second rifle, completing another ATF Form 4473. When Ortiz left the store, an ATF agent saw Ortiz place two rifle bags into his car. The agent followed Ortiz to a gas station, and along with a second agent who had joined the surveillance, pulled up next to Ortiz with guns drawn and ordered Ortiz out of his car. After seeing no immediate threats, the agents holstered their weapons and spoke to Ortiz. One of the agents told Ortiz that he was not under arrest and asked Ortiz questions about the rifles he had just purchased. Ortiz admitted he had purchased the rifles for someone else.

After several other agents arrived, one of the agents decided to frisk Ortiz. The agent handcuffed Ortiz, after telling Ortiz he was not under arrest and frisked him. After approximately ten-minutes, the handcuffs were removed and an agent asked Ortiz to get into the agent's car so they could talk. During the conversation, which lasted approximately twenty-minutes, Ortiz answered detailed questions concerning the purchases of the rifles. At no time did the agents provide Ortiz *Miranda* warnings. During this time, an agent seized the rifles from Ortiz's car based on Hernandez's tip and Ortiz's statements.

At trial, Ortiz argued the rifles seized from his car should have been suppressed because the officers did not have reasonable suspicion to stop him and there was no legal basis for the warrantless search of his car.

The court disagreed, holding there was reasonable suspicion of criminal activity based on Hernandez's tip to the ATF agent. First, Hernandez had worked at the gun store for almost two years and had received training on identifying straw purchases. Second, Hernandez believed it was suspicious for Ortiz to insist on paying cash for two rifles, not purchase sights, and only purchase one box of ammunition. Finally, there was no reason to suspect Hernandez had an ulterior motive for contacting the ATF, and the agents corroborated some of Hernandez's information. As a result, the agents were justified in stopping Ortiz.

The court concluded Ortiz's statements provided probable cause to believe his car contained two rifles unlawfully purchased for someone else. Consequently, the court held the warrantless search of Ortiz's car for the rifles was justified under the automobile exception to the *Fourth Amendment's* warrant requirement.

Ortiz also argued the incriminating statements he made to the agents should have been suppressed because they were the result of custodial interrogation, and he had not been provided *Miranda* warnings.

The court disagreed. The court held Ortiz was not in custody for *Miranda* purposes when he made his statements to the agents; therefore, no *Miranda* warnings were required. First, the agents told Ortiz he was not under arrest before questioning him. Second, the agents questioned Ortiz in a public location and the tone of the questioning was not accusatory. Third, the handcuffing was brief and did not occur until later in the encounter when an agent decided to frisk Ortiz and the handcuffs were removed before Ortiz spoke to the agents the second time.

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

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Sixth Circuit

Wesley v. Campbell, 2015 U.S. App. LEXIS 3239 (6th Cir. Ky. Mar. 2, 2015)

A seven-year old male student told Campbell that Wesley, a school counselor, had sexually assaulted him in Wesley's office. Campbell, a social worker, contacted Detective Rigby who initiated an investigation. Several weeks later, Campbell concluded the student's allegations were substantiated and drafted a "substantiated investigation notification letter," which affected Wesley's ability work as a teacher. Wesley filed an appeal to Campbell's administrative finding. After learning of Wesley's appeal, and approximately three months after the alleged incident, Detective Rigby drafted an affidavit and obtained a warrant for Wesley's arrest. Rigby based her affidavit entirely on allegations made by the student. After the student refused to cooperate with the prosecution's investigation, the government dismissed the charges against Wesley. One year later, an administrative hearing officer reversed Campbell's finding of substantiated abuse.

Wesley sued Detective Rigby for unlawful arrest, claiming the student's uncorroborated statements did not establish probable cause to arrest him. Wesley also sued Rigby for retaliatory arrest, claiming her decision to arrest him was in retaliation for his decision to appeal the social worker's finding of substantiated abuse.

The court held Officer Rigby was not entitled to qualified immunity because the student's uncorroborated allegations were legally insufficient to establish probable cause. Specifically, the court found Rigby waited almost three months after the student made his allegations before seeking a warrant for Wesley's arrest, then Rigby omitted from her arrest warrant affidavit a number of material facts, which she knew demonstrated the unreliability of the student's allegations. First, the student was seven-years old and suffered from a history of serious psychological and emotional disturbances. Second, Wesley's office, where the alleged abuse occurred, was located at the center of the school's "administrative hub," within the line of sight of other adult staff members. Third, the student's accounts of the alleged abuse were inconsistent. Fourth, a medical examination of the student showed no evidence of sexual abuse. Finally, Rigby's investigation failed to uncover any evidence corroborating any aspect of the abuse claimed by the student. The court concluded Rigby's decision to withhold evidence of the student's unreliability demonstrated a "deliberate or reckless disregard for the truth" given that a reasonable officer would have recognized the importance of the child's reliability when deciding whether probable cause existed to arrest Wesley. The court further held it was clearly established that "police officers cannot, in good faith, rely on a judicial determination of probable cause when that determination was premised on an officer's own material misrepresentations to the court."

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

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Pollard v. City of Columbus, 2015 U.S. App. LEXIS 3538 (6th Cir. Ohio Mar. 5, 2015)

Officers knew a warrant had been issued for Bynum's arrest for forcible rape, assault with a deadly weapon, burglary, and kidnapping. While conducting surveillance, officers saw Bynum leave an apartment, get into a car and drive away. When officers attempted to

conduct a traffic stop, Bynum refused to stop and led the officers on a high-speed chase on I-70 east. Bynum drove for some time before eventually crossing the median and driving against the traffic on I-70 west. Bynum drove his car head-on into a tractor-trailer and came to a stop. After the collision, the officers were informed over their radios that the driver of the car had a concealed-carry permit. When the officers surrounded Bynum's car, Bynum appeared to be unconscious. At some point, Bynum regained consciousness and reached toward the floorboard of his car. The officers ordered Bynum to show his hands, but instead, Bynum extended his arms, clasped his hands into a shooting posture and pointed at the officers. An officer yelled at Bynum to "drop it," however, Bynum responded by reaching down into the car again before assuming the same shooting posture. In response, two officers shot Bynum. After the three second volley, officers approached Bynum, who again reached down into the car and then pointed his hands at the officers in the same shooting posture. Officers fired a second volley of shots at Bynum, killing him. In total, the officers fired 80 shots at Bynum, of which, 23 struck him. No gun was recovered from Bynum's car.

Bynum's mother, Pollard, sued, claiming the officers' use of force was excessive.

The court disagreed, holding the officers were entitled to qualified immunity. The court found the totality of the circumstances gave the officers probable cause to believe Bynum posed a threat of death or serious injury to them. First, the officers knew an arrest warrant had been issued for Bynum concerning a number of violent offenses. Second, Bynum was so determined to avoid arrest that he led officers on a high-speed chase, which ended when Bynum seemed to intentionally drive head-on into a tractor trailer rather than surrender. Finally, the officers only shot Bynum after he made sudden gestures with his hands that suggested he was pointing a weapon at the officers. As a result, the court held the use of deadly force against Bynum was objectively reasonable. That Bynum was unarmed and did not have a concealed-carry permit was not relevant because when the officers shot Bynum; neither of these facts was known to them.

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

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United States v. Winters, 2015 U.S. App. LEXIS 5143 (6th Cir. Tenn. Mar. 31, 2015)

An officer stopped a rental car for speeding. When the officer spoke to the driver, Harris, she appeared to be nervous and trembled as she produced her license. The passenger, Winters, gave the officer the rental contract for the car. The officer noticed the car had been rented by a third party and that neither Harris nor Winters was an authorized driver. The officer spoke to Harris and Winters separately, and each gave the officer conflicting stories concerning their travel plans. After the officer issued Harris a warning ticket, he told the pair he was going to deploy his drug-sniffing dog around their car. Four minutes after issuing Harris the warning ticket, the dog alerted to the presence of drugs in the car. The officer searched the car and found one kilogram of heroin in Winters' bag which was located on the back seat. The government indicted Winters for possession with intent to distribute heroin.

Winters argued the officer violated the *Fourth Amendment* by unreasonably extending the duration of the traffic stop to conduct the dog sniff.

The court disagreed. When the officer issued Harris the warning ticket, the original purpose of stop was complete. However, by this time, the court concluded the officer had reasonable

suspicion to detain the car for a dog sniff based on Harris' and Winters' nervousness, their inconsistent stories concerning their travel plans and the fact that neither individual was listed on the rental agreement. Consequently, the court held the four-minute delay to deploy the drug-sniffing dog, which was already on the scene, was reasonable. In addition, the court held once the dog alerted to the presence of drugs in the car, the officer was entitled to search the interior of the car, to include Winters' bag.

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

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Seventh Circuit

United States v. Reichling, 2015 U.S. App. LEXIS 4991 (7th Cir. Wis. Mar. 27, 2015)

Officers began an investigation after a fourteen-year-old female victim ended a two-year online Facebook relationship with a man, later identified is Reichling. During this time, the victim sent Reichling over three hundred naked pictures of herself from her cell phone. When the victim tried to end the relationship, Reichling threatened to show the pictures he already possessed to others if she stopped. In addition, Reichling sent the victim threatening and harassing text messages from his cell phone.

Officers established the IP address associated with the Facebook account was linked to Reichling's parents' residence and the threatening text messages were sent from a cell phone number registered to Reichling. Further investigation revealed Reichling either lived in his parents' residence or in a trailer on an adjacent property owned by the defendant's brother. A state court judge issued a warrant to search both locations, for among other things, "images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and /or enticement of children," as well as all "computers, cell phones, cameras, and digital storage devices including hard drives, thumb drives and videotapes."

Reichling eventually pled guilty to producing "a visual depiction of a minor engaged in sexually explicit conduct onto a Maxell VHS tape."

Reichling argued the search warrant affidavit, which detailed a largely online relationship between himself and the victim, failed to establish probable cause to seize digital and non-digital storage devices, including the VHS tape found at his home.

The court disagreed. When issuing search warrants, the issuing judge is allowed to draw reasonable inferences concerning where the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense. In addition, a judge may consider what "is or should be common knowledge." When the search warrant was issued in this case, the court held it was or should have been common knowledge to judges that images sent via cell phone or Facebook accounts may be readily transferred to other storage devices such as hard drives, thumb drives or VHS videotapes. As a result, the court concluded the search warrant affidavit established probable cause to believe images of the victim, Facebook messages, and text messages would be found in Reichling's parents' residence and the adjacent trailer. Given the large number of images involved, the duration of Reichling's interest in the victim, and the way various storage media work together, it was reasonable for

the issuing judge to authorize the officers to search any computer or storage device in which images might be found.

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

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Eighth Circuit

U.S. v. Corrales-Portillo, 2015 U.S. App. LEXIS 3633 (8th Cir. Iowa Mar. 9, 2015)

After officers with the Des Moines, Iowa Police Department arrested an individual on drug charges, the man agreed to cooperate with the officers as a confidential informant (CI) with an ongoing narcotics investigation. The CI, who had not previously cooperated with the department, provided detailed information about his drug supplier, later identified as Jose Corrales-Portillo. Specifically, the informant told the officers Jose obtained drugs in Arizona, transported them to a location in Nebraska, and then brought the drugs to Des Moines. This information corroborated information the officers had discovered earlier in the investigation. A short time later, the CI, in the presence of officers, made a recorded call and texted the defendant to arrange the purchase of three pounds of methamphetamine.

The following week, the CI told the officers Jose was in Nebraska and that he would deliver the drugs to Des Moines later that day. The CI contacted officers throughout the day, forwarding Jose's text messages to them, as well as telling the officers the time and place of the meeting with Jose. In addition, the CI told the officers he expected Jose to be driving a blue truck with Arizona or Nebraska license plates and that the drugs would be located in the truck's gas tank.

The officers conducted surveillance of the meeting location and saw Jose arrive in a blue truck with Nebraska license plates. After a brief conversation in which Jose introduced his brother Ismael to the CI, the brothers agreed to follow the CI to another location to unload the drugs. As the brothers drove away, officers conducted a traffic stop. Once stopped, a drug-sniffing dog alerted to the presence of drugs in the truck. Officers conducted a warrantless search and found three pounds of methamphetamine and eleven pounds of heroin hidden in the truck's gas tank. The government charged the brothers with three federal drug offenses.

Ismael appealed the district court's denial of his motion to suppress the drugs, arguing the officers lacked reasonable suspicion to conduct the traffic stop because the CI had no prior track record at the department and the officers failed to corroborate independently the information the CI provided.

The court disagreed, holding the totality of the circumstances sufficiently established the CI's reliability and provided the officers reasonable suspicion to stop the truck. By the time the officers made the stop, they were aware of the CI's basis of knowledge and had corroborated the vast majority of the information he had provided. First, the initial information provided by the CI matched information already known to the officers. Second, the CI allowed the officers to record the telephone call to his supplier, which set up the drug buy. Third, on the day the drugs arrived, the CI frequently updated the officers with details about the meeting, including the time, location and method of exchange. Fourth, the CI forwarded Jose's text messages and other instructions directly to the officers. Fifth, the CI accurately predicted Jose

would be driving a blue truck with either Nebraska or Arizona license plates. Finally, the drugs were located in the truck's gas tank, as stated by the CI.

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

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United States v. Bearden, 2015 U.S. App. LEXIS 4193 (8th Cir. Mo. Mar. 17, 2015)

Officers were attempting to locate an address in a rural area in connection with an identity theft investigation; however, the sparsely populated and heavily wooded area made it difficult to see houses from the road. Unable to locate the address, the officers drove down a driveway through a wooded area to request assistance from the homeowner. The officers followed the circular driveway around the house and parked near the front entrance of the house. When the officers got out of their car, they smelled a strong odor of marijuana and encountered the homeowner, White. After White told the officers he did not know any of his neighbors, the officers left.

Later that day, officers returned to White's house to conduct a knock and talk interview concerning the odor of marijuana the officers had previously smelled on the property. After no one answered the front door, the officers decided to apply for a search warrant. Approximately thirty-minutes later, two officers who had remained at White's property to secure it, saw a man, later identified as Bearden, drive out of the woods from behind White's house on an all-terrain vehicle (ATV). Bearden told the officers he rented the adjoining property from White, and he was returning White's ATV, which he had borrowed. The officers detained Bearden in handcuffs after they saw a large knife on his belt. The officers also noticed Bearden smelled strongly of mothballs. Bearden consented to a search, and in his pocket an officer found a note containing directions about water and fertilizer, an empty gallon-sized zip baggie and keys to an outbuilding. The officers detained Bearden, who told the officers he had "personal use" marijuana at his house. After Bearden gave the officers consent to search his house, they found a small amount of marijuana and drug paraphernalia there. The officers eventually obtained warrants to search Bearden's and White's property, where they found hundreds of marijuana plants growing in two outbuildings. Bearden and White were then arrested.

First, Bearden argued the officers violated the *Fourth Amendment* when they entered White's property; therefore, any evidence obtained on White's property could not be admissible against him.

The court held Bearden did not have standing to challenge any evidence seized from White's property, as Bearden presented no evidence to establish he had an expectation of privacy in White's property. Instead, when the officers first questioned White, he denied knowing Bearden, and when the officers questioned Bearden, he characterized White only as his landlord.

Second, even if Bearden had standing, the court held on both occasions the officers lawfully drove up White's driveway and entered White's curtilage without a warrant. Officers are allowed to enter private property to make contact with a homeowner as long as they restrict their movements to those areas generally made accessible to visitors, such as driveways and walkways. In this case, on their first visit, the officers drove up White's driveway and talked with White while remaining on the driveway. On the officer's second visit, they drove up

White's driveway and went to the front door of White's house to conduct a knock and talk interview.

Bearden further argued the officers detained him without reasonable suspicion to believe he was involved in criminal activity.

The court disagreed. When the officers encountered Bearden on White's property, they were in the process of requesting a search warrant for the property, which they believed was being used to cultivate marijuana. Bearden arrived from the back of the property, where the officers suspected the marijuana grow operation was located and Bearden smelled strongly of mothballs and had a large knife hanging off his belt. In addition, the officers found a suspicious note in Bearden's pocket regarding fertilizer, indicating Bearden might be involved in the suspected grow operation. As a result, the court concluded the officers had a reasonable, articulable suspicion that Bearden was involved in criminal activity and his detention was lawful.

The court further held Bearden's consent to search his home was obtained voluntarily. Even though Bearden had been handcuffed for fifteen minutes, and had not been provided *Miranda* rights, the officers testified Bearden was not threatened, punished, intimidated, or promised anything for his consent to search his house. In addition, the court noted Bearden had four prior felony convictions, which suggested his familiarity with legal procedure, *Miranda* warnings, and his right to refuse consent.

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

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United States v. Turner, 2015 U.S. App. LEXIS 4295 (8th Cir. Mo. Mar. 18, 2015)

During the investigation of a drug-distribution conspiracy involving Corey and Donald Turner, the government obtained multiple Title III wiretap orders for some of the defendants' phones, as well as separate traditional warrants for Precise Locator Information (PLI) for cell phones used by J.L. Turner and Woods. In this case, PLI was referred to as the physical location of a phone based on longitude and latitude or some other points of reference. In addition, on one occasion the government applied for both a Title III wiretap order and a traditional warrant for the seizure of PLI from Corey Turner's phone using the same application.

First, Corey Turner moved to suppress the evidence obtained from J.L. Turner's and Woods' cell phones obtained from the PLI warrants. The court held Turner did not have standing to object to the seizure of this PLI evidence because he did not own, use or possess these cell phones. Without establishing that he had a reasonable expectation of privacy in these phones or their locations, Turner could not challenge the seizure of the PLI obtained from them.

Second, Donald Turner moved to suppress all evidence seized as a result of the Title III wiretap orders issued during the investigation. Turner argued the government failed to meet the "necessity" requirement to justify the issuance of the orders.

Every application for a wiretap under Title III requires the government to include a "full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or too dangerous."

In this case, the court found the affidavits in support of the application for each Title III wiretap orders outlined the investigative techniques law enforcement had used to obtain evidence to include: interviews with confidential sources, use of confidential informants to make controlled buys of drug from members of the conspiracy, physical surveillance and the limited use of pole cameras and GPS devices.

The court also found the affidavits also described techniques unlikely to be successful or too dangerous to undertake under the circumstances. For example, the affidavit explained that the use of undercover agents would not likely "further the objectives of the investigation" and might place an undercover agent in danger, because those involved in the conspiracy were either part of the Turner family or close friends, making it difficult to infiltrate the organization. In addition, the affidavits also explained that those involved in the conspiracy were closely monitoring their surroundings and were possibly using surveillance cameras of their own; therefore, the agents could not obtain desired information through physical surveillance, trash searches and the use of additional pole cameras. Finally, the affidavits stated members of the conspiracy had taken to driving rental or borrowed vehicles when purchasing drugs to avoid being tracked, which hampered the ability to obtain information by attaching GPS devices to their vehicles. Consequently, the court concluded the information included in the government's affidavits satisfied the "necessity" requirement to obtain the Title III orders.

Third, Corey Turner argued that the combined Title III wiretap order and PLI warrant that used a joint application was unlawful because it did not meet the procedural requirements of *Federal Rule of Criminal Procedure 41*. As a result, Turner argued any PLI evidence seized from his cell phone under this "combination order" should have been suppressed.

The court disagreed. First, the court noted that a request for a Title III wiretap order and a request for a traditional warrant could be included in the same application. Next, the court concluded that a substantial number of *Rule 41's* procedural requirements for preparing, executing, and returning a warrant for a tracking device were not followed with respect to the seizure of PLI from Turner's cell phone. However, because Turner did not claim that the government acted in reckless disregard of *Rule 41* when it failed to seek a separate warrant or follow the execution and return requirements of *Rule 41*, the court held suppression of the PLI evidence was not the proper remedy.

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

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United States v. Evans, 2015 U.S. App. LEXIS 4694 (8th Cir. Mo. Mar. 23, 2015)

Crime scene investigators recovered an identification card bearing the name Acie Evans on the ground by a broken window where a sexual assault suspect had entered a house. A short time later, officers at the crime scene saw a man matching the photograph on the identification card slowly drive past the house. Officers followed the car to an apartment complex and made contact with the driver, who had entered one of the apartments. The officers identified the man as Acie Evans and discovered that Evans' driver's license had been suspended. The officers then arrested Evans for driving without a license.

After Evans' arrest, the manager of the apartment complex told the officers she wanted Evans' car removed from the property. Officers towed Evans' car to the police station and

conducted an inventory search of the vehicle pursuant to department's policy. During the search, an officer found a loaded pistol in the center console. During subsequent questioning about the pistol, Evans made incriminating statements regarding his ownership of the weapon. The government indicted Evans for being a felon in possession of a firearm.

Evans argued the pistol and his statements should have been suppressed because the officers did not follow the department's towing policy and because the officers conducted the inventory search with an investigatory motive or as a pretextual search for criminal evidence in the sexual assault case.

The court disagreed. First, the court held the decision to tow Evans' car was consistent with the department towing policy because the car was parked on private property, Evans was under arrest, and the apartment manager requested the officers remove the car from the property. Second, an investigatory motive does not render an inventory search invalid unless that motive is the only reason for conducting the search. In this case, the court held the officers followed standardized procedure when conducting the inventory search and that Evans provided no evidence to establish the inventory search was a pretext for further investigation of the sexual assault case.

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

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United States v. Gonzalez, 2015 U.S. App. LEXIS 4703 (8th Cir. Iowa Mar. 23, 2015)

On March 19, after being alerted by a driver, a United Parcel Service (UPS) employee opened a suspicious package sent by Tony Young, addressed to Cesar Gonzalez. Inside the package, the UPS employee found a large stack of cash wrapped in foil. After consulting a local police officer, UPS sent the package to its intended recipient, Gonzalez.

On March 22, at the same UPS facility, the same employee saw a package from Gonzalez addressed to Young. The employee contacted an officer, who told the employee to hold the package while he arranged for a drug detection dog to conduct a sniff of the package. The dog handler told the UPS employee to place Gonzalez's package in a line with three similar packages, without telling him or the other officer which one came from Gonzalez. The drug detection dog alerted on the fourth package, which was the package sent by Gonzalez. The officers obtained a warrant, searched the package and discovered over seven ounces of methamphetamine. The government indicted Gonzalez for conspiracy to distribute methamphetamine.

Gonzalez argued the March 19 package search and the March 22 package seizure violated the *Fourth Amendment*, and the alert by the drug detection dog did not establish probable cause to obtain a warrant to search the second package.

The court disagreed. The *Fourth Amendment* protects against unreasonable searches and seizures conducted by the government. In this case, the search on March 19 was conducted by a UPS employee acting as a private person. The police did not direct the UPS employee to open Young's package on March 19 and inspect its contents. The UPS employee only contacted the police after making the independent decision to search the contents of the package. As a result, the private search by the UPS employee did not implicate the *Fourth Amendment*.

The court further held the seizure of Gonzalez's package on March 22 was reasonable. The UPS employee removed the package from the ordinary delivery stream at 7:00 a.m., and by 10:30 a.m., the dog sniff was complete. The court concluded the three and one half hour detention of the package did not violate the *Fourth Amendment*.

Finally, the court held the alert by the drug detection dog established probable cause to obtain a warrant to search the package. The government presented a comprehensive list of the dog's qualifications to include its initial certification, recertification and in-service training completed by the dog and its handler. In addition, the court found the dog' alert was reliable because a UPS employee created the package line up outside the presence of the dog and its handler and the dog consistently alerted on only one package.

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

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Ninth Circuit

United States v. Zaragoza-Moreira, 2015 U.S. App. LEXIS 4320 (9th Cir. Cal. Mar. 18, 2015)

A Customs and Border Protection (CBP) officer found two packages of drugs taped to the defendant's body at port of entry during a secondary inspection. Following her arrest, a Homeland Security Investigations (HSI) agent interviewed the defendant. The defendant told the agent she had been coerced by individuals belonging to a drug cartel to smuggle the drugs into the United States. The defendant told the agent that during the 40-minutes she waited in the pedestrian line, she attempted to make herself "obvious" and draw attention to herself, so CBP officers would notice there was something wrong with her. Following the interview, the agent drafted a criminal complaint charging the defendant with smuggling drugs into the United States. In her probable cause statement, the agent stated the defendant admitted to attempting to smuggle drugs into the United States; however, the agent did not mention the defendant's claims of coercion or the defendant's alleged conduct while waiting in the pedestrian line. Five days later, the defendant's attorney sent a letter to the Assistant United States Attorney (AUSA) requesting the government preserve all videotape evidence from the port of entry relating to the defendant's arrest.

After the government indicted the defendant 11 weeks later, the defendant's attorney filed a motion to compel discovery and preserve the video recordings from the port of entry on the date of the defendant's arrest. The government informed the court that the requested video footage had been destroyed after it had been automatically recorded over approximately 30-45 days after the defendant's arrest. The defendant argued the government's failure to preserve the video footage violated the defendant's due process right to present a complete defense to the charges against her. As a result, the defendant claimed the indictment should have been dismissed.

The court agreed. First, the court found the video footage was potentially useful evidence to support the defendant's claim that she only attempted to smuggle the drugs into the United States because she was coerced and under duress. Duress is a defense that allows a jury to excuse the defendant's conduct even though the government proves the defendant violated the law. Here, the court determined the destroyed video footage might have shown the

defendant's behavior and supported her claim that she tried to make herself "obvious" to the CBP inspectors while waiting in line at the port of entry.

Second, the court held the HSI agent who interviewed the defendant was aware of the existence of the video footage and its possible usefulness to support the defendant's claim of duress. Throughout the interview, the defendant repeatedly told the agent she had been coerced to smuggle the drugs and that she had repeatedly tried to get the attention of the CBP officers. In addition, the agent admitted she was aware that a defendant who is threatened or coerced to commit a crime has a possible defense to that crime, and that she had the ability to review and preserve the video footage from the port of entry, but failed to do so.

Finally, the court was disturbed by the fact that the agent's probable cause statement supporting the criminal complaint, which she presented to the magistrate judge, did not include any reference to the defendant's claims of duress.

The court concluded the agent knew of the potential usefulness of the video footage and acted in bad faith by failing to preserve it. As a result, the court held the defendant's due process rights were violated and ordered dismissal of the indictment.

While the AUSA's failure to notify HSI of the defendant's letter requesting to preserve the video was not addressed by the district court, the Ninth Circuit Court of Appeals stated that it should have been. The court cautioned when the government fails to comply with preservation requests and allows evidence to be destroyed; it likely violates the discovery disclosure requirements under *Fed. R. Crim. P. 16*. The court found the government's failure to take action in response to defense counsel's preservation letter "particularly disturbing."

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

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Eleventh Circuit

United States v. Hollis, 2015 U.S. App. LEXIS 3833 (11th Cir. Ala. Mar. 12, 2015)

Officers were searching for Hollis based on an outstanding arrest warrant for a parole violation. After the officers learned Hollis might be located in an apartment, which was a known "drug house," the officers approached the front door and knocked. When Hollis looked out a window, the officers recognized him, then identified themselves and ordered Hollis to open the door. After waiting for a brief period, the officers used a battering ram to open the door, entered the apartment and arrested Hollis. Once inside the apartment, officers conducted a protective sweep and found marijuana on a dresser in the bedroom and on the kitchen counter as well as loaded firearms under a bed. The officers then obtained a warrant to search the apartment and discovered large quantities of cocaine, marijuana, cash and scales. A federal grand jury indicted Hollis on a variety of drug and firearm offenses.

Hollis moved to suppress the evidence found in the apartment, arguing the officers conducted an illegal warrantless search of the apartment in violation of the *Fourth Amendment*.

The court disagreed. An arrest warrant implicitly carries with it the limited authority to enter a dwelling in which the suspect lives to effect an arrest when there is reason to believe the suspect is inside. Although the officers did not believe the apartment was Hollis' dwelling, that fact was irrelevant as Hollis could have no greater right of privacy in another's home than

in his own. In addition, while it is possible for officers to violate the *Fourth Amendment* rights of a third party when they execute an arrest warrant for another person in the third party's home, Hollis, the subject of the arrest warrant cannot challenge the execution of that warrant and the later discovery of evidence in the third party's home.

The court further held the marijuana found on the dresser and kitchen counter and the firearms located under the bed were seized in plain view during a valid protective sweep of the apartment. The court held the officers were entitled to sweep the apartment to ensure it did not contain anyone who could harm them, as the apartment was a known drug house with a high level of activity at all hours of the day.

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

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Valderrama v. Rousseau, 2015 U.S. App. LEXIS 4116 (11th Cir. Fla. Mar. 16, 2015)

Office Rousseau stopped Garcia's car after he saw a pedestrian approach the car and hand the passenger, Valderrama a metallic object that appeared to be a weapon. Officer Smith arrived to provide back up and as she approached Garcia's car, she saw Valderrama throw what appeared to be a crack pipe out the window. Officer Rousseau approached the car with his firearm drawn and directed Garcia and Valderrama to show their hands. Garcia complied and raised his hands while Valderrama's hands remained "on his knees or against his stomach." Rousseau then fired a shot at Valderrama, striking him in the groin. When Officer Smith heard the gunshot, she directed Valderrama to get out of the car, which he did. Smith and Rousseau spoke about the shooting and discussed that Valderrama was bleeding. Rousseau began to search Garcia's car, but he found no weapons. Smith called police dispatch three and one half minutes after the shooting and requested an ambulance. Instead of reporting a gunshot wound, Smith reported Valderrama's injury as a laceration. As a result, given the relatively minor injuries associated with lacerations, the fire and rescue dispatch assigned the call the lowest priority. The ambulance arrived eleven minutes later. If Smith had reported Valderrama's injury as a gunshot wound, the ambulance request would have received the highest priority, and an ambulance would have arrived within four minutes of Smith's call.

Officer Gonzalez arrived on the scene two to three minutes after the shooting and contacted Rousseau's supervisor shortly before Smith called dispatch to request the ambulance. At some point after the shooting, Rousseau went back to his patrol car to speak with Timothy Burney. Rousseau had arrested Burney earlier in the evening and Burney was seated in the backseat of Rousseau's car. Burney claimed that Rousseau offered to drop the charges against him if Burney would say that he saw Valderrama holding a shiny object when Rousseau shot him.

Valderrama filed suit against Rousseau, Smith and Gonzalez alleging excessive use of force, and unlawful arrest in violation of the *Fourth Amendment*, as well as deliberate indifference to his serious medical need, in violation of the *Fourteenth Amendment*.

The district court denied Rousseau's request for qualified immunity on Valderrama's excessive use of force claim, which Rousseau did not appeal.

The district court also denied Rousseau's and Smith's requests for qualified immunity on Valderrama's claim for false arrest. However, on appeal, the court reversed, finding there

was undisputed evidence the officers had probable cause to arrest Valderrama for possession of drug paraphernalia. Officer Smith stated she saw Valderrama throw a small glass pipe out of the car window as she approached and Valderrama later admitted he had thrown a crack pipe out of the passenger side window of the car. Once the officers established probable cause, the court found there could be no violation of the *Fourth Amendment* for unlawful arrest.

Finally, the district court denied Rousseau's, Smith's and Gonzalez's requests for qualified immunity on Valderrama's claim that the officers violated the *Fourteenth Amendment* by acting deliberately indifferent to his serious medical need.

The court agreed in part, holding a reasonable jury could find that Rousseau and Smith were deliberately indifferent to Valderrama's serious medical need. First, both officers knew Valderrama had suffered a gunshot wound. Second, after the shooting, Rousseau admitted that instead of immediately calling an ambulance, he and Smith stopped to talk about the shooting and the extent of Valderrama's injuries. Third, Smith falsely reported Valderrama's injury as a laceration instead of a gunshot wound, which delayed the arrival of the ambulance by seven minutes. Finally, after the shooting, Rousseau searched Garcia's car in violation of agency policy and offered to drop criminal charges against Burney in exchange for his cooperation. Consequently, the court held a reasonable jury could conclude that Rousseau and Smith delayed seeking medical care for Valderrama while they attempted to come up with a story to justify Rousseau's use of deadly force against Valderrama.

The court further held at the time of the incident it was clearly established that intentionally delaying medical care for an arrestee that has an urgent medical condition constituted deliberate indifference

Finally, regarding Officer Gonzalez, the court reversed the district court, and held that he was entitled to qualified immunity. First, Gonzalez did not arrive until after the shooting. Second, there was no evidence to suggest Gonzalez was aware that Rousseau and Smith had failed to immediately report the incident as a shooting. Third, there was no evidence that Gonzalez knew Smith lied about Valderrama's injuries when requesting the ambulance causing the delay in Valderrama's medical care.

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

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