Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

May 2018

The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals 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 Centers. *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 https://www.fletc.gov/legal-resources.

This edition of *The Informer* may be cited as 5 INFORMER 18.

The Informer – May 2018

Case Summaries

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FLETC Talks: Detective McFadden

On October 31, 1963, Detective Martin McFadden of the Cleveland Police Department stopped John Terry and two other individuals, patted down Terry's outer clothing, and discovered a handgun. Unknown to the veteran detective, he had just conducted what would later be determined to be the first legally sanctioned stop and frisk in the 1968 United States Supreme Court landmark decision, Terry v. Ohio.

Click on the link below for a six-minute video in which John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, GA discusses Detective McFadden's observations and what caused him to suspect that John Terry and two other individuals were involved in criminal activity.

https://www.youtube.com/watch?v=AVDy0EZFv3s

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FLETC Informer Webinar Schedule

1. E-Mail and Search Warrants Under the New CLOUD Act (1-hour)

This webinar will cover the law and the practice on how to obtain email search warrants, including the brand new changes to extraterritorial email search warrants under the recently enacted CLOUD Act.

Presented by Patrick Walsh, Attorney-Advisor / Branch Chief, Federal Law Enforcement Training Centers, Glynco, Georgia (patrick.walsh@fletc.dhs.gov)

Wednesday June 6, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12pm Pacific

To participate in this webinar: https://share.dhs.gov/walsh/

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2. Government Workplace Searches (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia (John.Besselman@fletc.dhs.gov)

This webinar will examine how public employees might create a Reasonable Expectation of Privacy in their workplaces (computers, cars, offices, etc.), and, if so, how the government can intrude on that REP. This course is recommended for government supervisors, the IG community, and those whose duties include internal investigations.

Tuesday June 12, 2018 – 10:30am Eastern / 9:30am Central / 8:30am Mountain / 7:30am Pacific

To participate in this webinar: https://share.dhs.gov/govtworksearch/

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3. Fourth Amendment Update (1-hour)

This webinar will highlight new Supreme Court cases from this term and explain how they change the law on Searches and Seizures.

Presented by Patrick Walsh, Attorney-Advisor / Branch Chief, Federal Law Enforcement Training Centers, Glynco, Georgia (patrick.walsh@fletc.dhs.gov)

Wednesday June 13, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12pm Pacific

To participate in this webinar: https://share.dhs.gov/walsh/

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4. Campus Law Enforcement Best Practices: Foreign Nationals (1-hour)

Presented by Henry McGowen, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico (henry.mcgowen@fletc.dhs.gov)

College campuses in the United States today include people from all over the world, both students and non-students alike. Campus law enforcement departments regularly come into contact with these foreign nationals as suspects, witnesses and victims of crime. When they do, they need to know the legal requirements for handling them, outside of potential immigration concerns. Tune into this webinar to find out what you need to know.

Wednesday June 20, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: https://share.dhs.gov/artesia

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5. Surviving Cross-Examination (1-hour)

Presented by Mary M. Mara, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico (mary.m.mara@fletc.dhs.gov)

Cross-examination does not have to be an intimidating experience. This webinar will offer useful tips and information designed to help you not only survive - *but actually thrive* - as a witness during the cross-examination process.

Wednesday June 27, 2018 – 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: https://share.dhs.gov/artesia

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To Participate in a FLETC Informer Webinar

1. Click on the link to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account, click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the event.
6. Even though meeting rooms may be accessed before an event, there may be times when a meeting room is closed while an instructor is setting up the room.
7. **If you experience any technical issues / difficulties during the login process, please call our audio bridge line at (877) 446-3914 and enter participant passcode 232080 when prompted.**

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CASE SUMMARIES

United States Supreme Court

Byrd v. United States, 2018 U.S. LEXIS 2803 (May 14, 2018)

Latasha Reed rented a car in New Jersey while Terrence Byrd waited outside the rental facility. The rental agreement contained a provision which warned Reed that allowing an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form. Reed left the rental facility and gave the keys to the rental car to Byrd.

Byrd got into the car and left by himself for Pittsburgh. In Pennsylvania, a police officer stopped Byrd for a traffic violation. Byrd told the officer the car was rented and gave the officer a copy of the rental agreement. The officer noticed the rental agreement did not list Byrd as the renter or as an authorized driver of the vehicle. During the stop, the officer searched the car and found heroin and body armor in the trunk. The government charged Byrd with two offenses.

Prior to trial, Byrd filed a motion to suppress the evidence discovered in the trunk, arguing that the search violated the Fourth Amendment. The district court denied Byrd's motion. Without deciding whether the search was lawful, the court determined that Byrd had no expectation of privacy because he was not listed on the rental agreement; therefore, he did not have standing to challenge the search of the vehicle.

Byrd appealed to the Third Circuit Court of Appeals, which affirmed the judgment of the district court. Byrd appealed to the Supreme Court.

In a unanimous decision, the Court held "that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." The Court remanded the case to the Third Circuit to determine if, under this rule, Byrd still had no reasonable expectation of privacy in the vehicle because he used Reed to mislead the rental company, knowing that he would not be able to rent the car himself because of his prior criminal history. The court also directed

the Third Circuit to determine whether the officer had probable cause to search the vehicle under the automobile exception. Because the lower courts determined that Byrd did not have a reasonable expectation of privacy in the vehicle, they never reached this issue.

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/16-1371_1bn2.pdf

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Dahda v. United States, 2018 U.S. LEXIS 2806 (May 14, 2018)

Dahda was convicted of conspiracy to distribute marijuana. Much of the evidence against Dahda was obtained through wiretaps of cell phones used by Dahda and four co-conspirators. The wiretap orders were issued by the United States District Court for the District of Kansas. Each wiretap order contained a sentence that authorized a wiretap of cell phones that were located outside Kansas in instances where the government's listening post was also located outside Kansas.

Pursuant to the wiretap orders, the government listened to conversations on cell phones that were located in Kansas from a listening post in Kansas. The government also listened to conversations on cell phones located outside Kansas from the Kansas listening post. However, in one instance, the government listened to conversations on a cell phone that was outside Kansas (in California) from a listening post located outside Kansas (in Missouri).

Prior to trial, Dahda filed a motion to suppress all evidence derived from the wiretaps authorized by the court orders. Dahda argued that the district court in Kansas could not authorize the interception of calls from cell phones located in California by the listening post in Missouri. In response, the government agreed not to introduce any evidence arising from its Missouri listening post. The district court denied Dahda's motion. Dahda appealed to the Tenth Circuit Court of Appeals, which affirmed the district court.

Dahda appealed to the United States Supreme Court. Dahda argued that, even though the government did not use any wiretap information from the Missouri listening post, the court should have suppressed all evidence derived from the wiretap orders. Dahda claimed each order was "insufficient on its face," given the extra sentence authorizing the interception of cell phone calls outside Kansas from a listening post outside Kansas.

In a unanimous decision, the Court held that even assuming that the sentence authorizing wiretaps outside Kansas by a listening post in Missouri was unlawful, none of the unlawfully intercepted communications were introduced at trial. As a result, the Court concluded that the inclusion of this sentence in the wiretap orders had no significant adverse effect upon Dahda. In addition, the Court held that if it were to remove this sentence from the orders, the remainder of each order was itself legally "sufficient on its face."

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/17-43_m648.pdf

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Circuit Courts of Appeal

First Circuit

United States v. Sweeney, 2018 U.S. App. LEXIS 9052 (1st Cir. MA Apr. 11, 2018)

Federal agents obtained an arrest warrant for Sweeney and went to his house to arrest him. When the agents arrived, Sweeney asked the agents why he was being arrested. One of the agents told Sweeney that he was being charged with possession and distribution of child pornography. Sweeney replied, "I don't even own a computer."

At the police station, the agent and a local police officer advised Sweeney of his Miranda rights. When asked if he understood his rights, Sweeney stated that he did. The agent then asked Sweeney to sign a Miranda-waiver form. Sweeney told the agent that he did not have his glasses. The officer offered to stop the questioning to get Sweeney's glasses but Sweeney declined. The agent offered to read the Miranda-waiver form again but Sweeney rejected the offer and signed the form.

Approximately ten minutes into the interview, Sweeney told the agent, "I don't want to dig a hole. I need to speak to a lawyer." The agent told Sweeney that it was his right to talk to a lawyer and offered to end the interview. Sweeney then made another statement about digging himself into a hole and one of the officers asked him, "So are you asking for a lawyer?" Sweeny replied, "Do I need a lawyer?" The agent explained that they could not answer that question and the officer offered Sweeney some time to think about it. The agent and the officer left the room and when they returned, Sweeney told them, "I'm screwed. I need a lawyer." At that point the interview ended.

The government charged Sweeney with several child pornography-related offenses.

Sweeney filed a motion to suppress his statements to the officers. First, Sweeney argued that his statements made to the agents at his home during his arrest were un-Mirandized and therefore involuntary.

The court disagreed. The court held that Sweeney's statement, "I don't even own a computer" was not the product of police interrogation. The court found that Sweeney initiated the conversation by asking the agent why he was being arrested.

Second, Sweeney argued that his Miranda waiver was not voluntary because he could not read the waiver form without his glasses.

Again, the court disagreed. When Sweeney made the comment about not having his glasses, the officer asked Sweeney if he wanted to stop to get his glasses or if he wanted the agent to re-read the Miranda-waiver form to him but Sweeney declined both offers. The court found it significant Sweeney did not claim that he did not understand his rights or that he did not know what rights he was waiving. In addition, Sweeney testified that in the past, he had been arrested, read his Miranda rights, understood them, and had invoked his right to remain silent.

Finally, Sweeney argued that the officers continued to interrogate him after he invoked his right to counsel.

The court held that Sweeney did not invoke his right to counsel until he stated, "I'm screwed. I need a lawyer." Prior to that, when Sweeney stated that he needed to speak to a lawyer to avoid "digging a hole for himself," the agent immediately offered to end the interrogation. Instead, Sweeney, continued to talk unprompted, which created ambiguity as to whether he was invoking his right to counsel. In addition, when the officer asked Sweeney to clarify whether he was requesting counsel, Sweeney asked, "Do I need a lawyer?" The court found that this question made Sweeney's prior statements about counsel even more ambiguous. After Sweeney unambiguously stated, "I need a lawyer," the officers honored this request and stopped the interview.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/17-1325/17-1325-2018-04-11.pdf?ts=1523476805

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United States v. Flores, 2018 U.S. App. LEXIS 10433 (1st Cir. ME Apr. 25, 2018)

A police officer with thirteen years of law enforcement experience, who was a member of a federal drug task force, received information from an informant that a "group of New Yorkers" were distributing cocaine out of a hotel located in Brunswick, Maine. The officer and his partner went to the hotel and spoke with the front-desk manager. Without being prompted, the manager asked the officers if they were there to investigate room 131, as she had noticed an unusual number of visitors coming and going from the room. The manager told the officers the room had been rented by a person who provided a New York address and she gave the officers a description of one of the guests she had seen visiting the room.

While conducting surveillance, the officer saw a vehicle pull into a parking lot. The officer then saw a man fitting the description provided by the manager, later identified as Flores, exit the hotel and get into the back seat of the car. The officer saw Flores exchange something with the front-seat passenger. After the exchange, the officer saw Flores counting money in the back seat and then exit the car. The officer believed that he had witnessed a hand-to-hand drug transaction and that Flores had the proceeds and possibly additional drugs on his person.

A short time later, the officer exited his car and approached an exterior door to the hotel where he saw Flores standing smoking marijuana. The officer entered the hotel and asked Flores if he wanted the outside door held open. Flores declined, telling the officer he had his own keycard for entry. The officer went into the hotel and returned a few minutes later with other officers. The officers identified themselves as police officers, detained Flores, and handcuffed him. The officers questioned Flores, without first giving him Miranda warnings, and learned that he was from New York and that he was staying in room 131. The officers brought Flores into the hotel and as they approached room 131, they thought they heard voices inside the room. The officers entered room 131 to conduct a protective sweep and discovered the voices they heard were coming from the television. While conducting the sweep, the officers saw cash and marijuana in the room. After Flores refused to consent to a full search of room 131, the officers obtained a search warrant. During the ensuing search, the officers found heroin, baggies, and a digital scale.

The government charged Flores with possession of a controlled substance with intent to distribute.

Flores filed a motion to suppress his statements to the officers as well as the evidence seized from room 131. First, the district court held that Flores' initial detention outside the hotel amounted to a lawful de facto arrest supported by probable cause. Second, the court suppressed the statements

Flores made to the officers when they initially detained him outside the hotel. Third, without deciding the issue, the court held that even if the officers' entry to room 131 violated the Fourth Amendment, the search of the room and seizure of evidence was lawful under the independent source doctrine. Flores appealed.

First, the court held that Flores' initial detention was lawful because the officers established probable cause to arrest him. After receiving the tip from the informant, officers went to the hotel, spoke to the manager, and corroborated some of the information provided by the informant. Next, the officers conducted surveillance where they observed a man fitting the description of the individual from room 131 engage in a suspected drug deal in the parking lot. Finally, the officers saw the man, later identified as Flores, standing outside the hotel smoking marijuana.

Next, the court held that even if the initial warrantless entry into room 131 was unlawful, the evidence seized pursuant to the search warrant was admissible under the independent source doctrine. When applying the independent source doctrine, the court will first determine if the decision to obtain a warrant was made independent of evidence discovered during an earlier, unlawful entry. If so, the court will not consider any information in the affidavit that was obtained during the illegal entry and decide if the remaining information established probable cause to search.

The court concluded that after it omitted information obtained during the officers' initial entry into room 131, the affidavit still contained more than enough information to establish probable cause to believe that evidence of drug trafficking would be found in room 131.

First, the officer testified that once he detained Flores in the parking lot, searching room 131 was his next "obvious step," which the court found to be credible. Second, the court noted that before the officers entered room 131, they established probable cause to arrest Flores, whom they reasonably believed was connected to room 131. Finally, the information provided by the informant and the hotel manager's comments about the number of visitors to room 131 made it reasonable for the officers to believe that room 131 was being used as the base for a drug-trafficking operation before they ever entered it.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/17-1510/17-1510-2018-04-25.pdf?ts=1524684605

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Sixth Circuit

United States v. Perkins, 2018 U.S. App. LEXIS 8520 (6th Cir. TN Apr. 4, 2018)

After seizing a package containing methamphetamine addressed to Perkins, federal agents obtained an anticipatory warrant to search Perkins' residence. While a traditional search warrant is issued upon a showing of probable cause, an anticipatory search warrant only becomes valid upon the happening of some future event or triggering condition. In this case, the plan was to have an agent, posing as a FedEx driver, knock on the door of Perkins' residence. According to the warrant, the triggering condition would occur when the agent hand-delivered the package to Perkins. Consequently, after Perkins accepted the package, the agents would search his residence.

A judge issued the warrant, which incorporated the triggering condition; however, the agent posing as the FedEx driver did not read the warrant. Instead, another officer briefed him but left

out the fact that the agent/driver needed to hand-deliver the package to Perkins. As a result, the agent/driver believed that he just needed to deliver the package to someone at the residence to satisfy the triggering condition.

When the agent/driver arrived at Perkins' residence, he delivered the package to a woman who answered the door. After the woman entered the house with the package, agents executed the search warrant. Perkins, who was not home when the package was delivered, arrived at the residence one hour later.

The government charged Perkins with possession with intent to distribute methamphetamine.

Perkins filed a motion to suppress the evidence seized during the search of his residence. Perkins argued the search warrant was invalid because the triggering condition never occurred, as the agent/driver did not hand deliver the package to him. The district court agreed and suppressed the evidence. The government appealed.

The court commented that strict compliance is not always required in determining whether a triggering condition has been satisfied. However, in this case, the court held that requiring hand-delivery to Perkins was the only common sense reading of the warrant's triggering condition. In addition, the court noted that the government drafted the search warrant affidavit that called for the triggering condition to be "delivery to Perkins," and that law enforcement needs "to say what it means and mean what it says" when proposing a triggering condition as part of an anticipatory search warrant. Because law enforcement did not abide by the anticipatory warrant's triggering condition, the court affirmed the district court's suppression of the evidence seized from Perkins' residence.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca6/17-5908/17-5908-2018-04-04.pdf?ts=1523034234

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Eighth Circuit

United States v. Ford, 2018 U.S. App. LEXIS 10415 (8th Cir. IA Apr. 25, 2018)

Officers in a fugitive task force unit had an arrest warrant for Ford. The officers received a tip that Ford was staying at a house owned by a woman named Dawn. In addition, the officers were told that Ford used a cell phone in the southeast bedroom window as a surveillance device when he was home. Finally, the officers were told that Ford had recently been seen with a handgun and might be suicidal. After the officers confirmed that a woman named Dawn lived at the house, they went there to locate Ford.

As the officers approached the house, they encountered a woman outside who indicated that Ford was inside. In addition, the officers saw a cell phone in the window of the southeast bedroom and one of the officers testified that he saw a hand moving the window shade in the southeast bedroom.

The officers entered the house and split up to look for Ford. When one of the officers entered the southeast bedroom, he moved the bed from the wall and then checked the closet for Ford. At the same time, another officer found Ford hiding in the closet of the southwest bedroom. After assisting with the arrest, the first officer returned to the southeast bedroom where, for the first time, he saw a handgun, which had been concealed by the bed he had moved. After Ford was

given Miranda warnings, he admitted the gun was his and that he had thrown it under the bed when he saw the officers approaching the residence.

The government charged Ford with being a felon in possession of a firearm.

Ford filed a motion to suppress the handgun and his statements to the officers. First, Ford claimed that the officers violated the Fourth Amendment by entering the residence without a search warrant.

The court disagreed, holding that the officers did not need a search warrant to enter the house. Instead, the court recognized that an arrest warrant gives officers the limited authority to enter a dwelling in which the suspect lives when (1) the officers have a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe that the suspect is present when the officers enter. In this case, the court held it was reasonable for the officers to believe that Ford was a co-resident of the home and present at the time the officers executed the arrest warrant. First, the officers corroborated the information provided in the tip that the house was owned by someone named Dawn and they saw a cell phone in the southeast bedroom window when they arrived. Second, Dawn indicated that Ford was inside and an officer saw a hand moving the southeast bedroom window shade.

Second, Ford argue that the officers exceeded the scope of their protective sweep incident to his arrest.

The protective sweep doctrine allows officers to make a "quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others." Officers are allowed to look in areas immediately adjoining the place of arrest "in closets and other spaces" from which "an attack could be launched." In addition, officers may sweep beyond these adjoining areas if they have a reasonable belief "that the area searched harbors a person posing a danger to the officer or others." The court added that justification for a protective sweep does not automatically end when the suspect is arrested.

In this case, the court held that the protective sweep was justified. First, the officers had reason to believe that Ford was armed and might be suicidal. Second, it was reasonable for the officer who initially entered the southeast bedroom to move the bed while looking for Ford. Finally, although the gun was not discovered until after Ford's arrest in the southwest bedroom, an officer saw a hand moving the shade in the southeast bedroom window before entering the house. Based on these facts, the court concluded it was reasonable for the officer to return to the southeast bedroom immediately after arresting Ford and seize the gun which was in plain view.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/17-1225/17-1225-2018-04-25.pdf?ts=1524670227

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United States v. Houck, 2018 U.S. App. LEXIS 10531 (8th Cir. MO Apr. 26, 2018)

As part of his work with a Pennsylvania computer-crimes task force, an officer located a computer that was sharing child pornography on a peer-to-peer network. The officer established the IP address of the computer, which he traced to a residence in Pennsylvania belonging to Houck's mother. Officers conducted surveillance on the residence and saw a pickup truck and a fifth-wheel trailer-style RV in the driveway. An officer then applied for a search warrant for the residence, which included a request to search "any vehicles . . . present at the time of execution."

The officer testified that he did not specifically identify the RV in the warrant application because he believed that it fell within the scope of the warrant's authorization to search "any vehicles."

When officers executed the warrant, they saw Houck's pickup truck and RV parked in the driveway. Although the RV was not attached to the pickup truck, it had Missouri license plates, a valid inspection tag, and a vehicle identification number. The officers also noticed that the RV had fully inflated tires and no permanent attachments to the ground. However, the RV was connected to water and electric lines, and there was a satellite dish attached to the roof. An officer estimated that it would have taken approximately thirty minutes to prepare the RV for travel. The officers searched the RV and found a laptop and other electronic devices that contained child pornography.

The government charged Houck with receipt and distribution of child pornography.

Houck filed a motion to suppress evidence seized from his RV.

The district court determined that, while Houck's RV was "readily mobile," it qualified as a residence rather than a vehicle and granted Houck's motion to suppress the evidence seized from it. The government appealed, arguing that the plain language of the warrant authorized the search of the RV, because it was a vehicle located on the premises at the time of the original search.

The court agreed. Although there was some evidence that the RV was being used as a temporary residence, the officers observed the following facts supporting their belief that it was a vehicle: (1) the RV had fully inflated tires, could have been mobile within 30 minutes, and was parked on a driveway with ready access to a roadway; (2) the truck used to tow the RV was parked next to it; (3) the RV, which was parked at a Pennsylvania residence, had Missouri license plates, had a vehicle identification number, and was registered in Missouri; and (4) the RV was not attached to the ground or permanently affixed to any structure. Finally, given that a "vehicle" is commonly defined as "an instrument of transportation or conveyance," it was reasonable for the officers to treat it as such. As a result, the court held that it was reasonable for the officers to believe the RV was a vehicle within the scope of the search warrant and that the district court improperly suppressed the evidence found inside it.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/17-3045/17-3045-2018-04-26.pdf?ts=1524756637

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United States v. Cross, 2018 U.S. App. LEXIS 10961 (8th Cir. IA Apr. 30, 2018)

Andrea Cross called 911 to report a "physical" disturbance between her grandson, Donovan Cross, and his girlfriend at Andrea's home. Andrea told the dispatcher she had left the home and that responding officers should "use the front door" to enter. When officers arrived, they heard a woman inside the house scream and moments later, Cross' girlfriend, Sophia Finauga, exited the house. Finauga was visibly upset and had a bruised eye. One of the officers called to Finauga, but she ran back into the house. Using a loudspeaker, the officers ordered Cross to exit the home. Finauga came out first and then Cross exited the house where the officers arrested him on an outstanding warrant.

As they were leaving, the officers asked Cross if they should lock or shut the front door. Cross told the officers to "leave it alone" in case Finauga went back inside. In the meantime, an officer spoke by telephone with Andrea who told them that Finauga had recently moved back into the

residence with Cross and that Finauga could go into the house "to get her stuff." The officers helped Finauga arrange for her mother to pick her up and asked her if she wanted to collect her belongings from Andrea's home. Finauga said yes and agreed that the two officers should accompany her inside the home.

Finauga went into the bedroom and when she picked up a t-shirt lying on top of a hamper, a handgun fell to the floor, ejecting the gun's loaded magazine. An officer seized the handgun, and after Finauga collected her belongings, he applied for a search warrant. During the search pursuant to the warrant, officers found methamphetamine, drug paraphernalia, and other evidence that connected the handgun to Cross.

The government charged Cross with being a felon in possession of a firearm.

Cross filed a motion to suppress the evidence seized from his home. Cross argued that it was not reasonable for the officers to believe that Finauga had apparent authority to grant the officers consent to enter his house. Cross also argued that Andrea's initial consent to enter the home ended once the domestic disturbance had been resolved.

Officers may enter a home without a warrant if they obtain voluntary consent from a third party who has common authority over the premises. In addition, consent is valid when an officer reasonably relies on a third party's demonstration of apparent authority over the premises. In this case, the court held that the officers had a reasonable belief that Finauga had apparent authority to consent to the officers' entry into the house with her while she collected her belongings. First, after the officers arrived, Finauga exited and reentered the house freely. Second, after the officer arrested Cross, he told the officers to leave the front door open in case Finauga went back inside. Third, Finauga told an officer she had been with Cross for "a while" and confirmed she had personal belongings in the home. Fourth, Finauga had to call her mother to come get her, suggesting she was not a temporary visitor. Fifth, Andrea told an officer that Finauga had recently moved back into the residence and that Finauga could go back into the house to get her belongings. The court added that the officers' entry to accompany Finauga while she collected her belongings was valid because it directly related to the entry that Andrea authorized in her initial call for assistance.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/17-1982/17-1982-2018-04-30.pdf?ts=1525102232

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Tenth Circuit

McCoy v. Meyers, 2018 U.S. App. LEXIS 8943 (10th Cir. KS Apr. 10, 2018)

On March 22, 2011, Hutchinson, Kansas police officers responded to a reported armed hostage situation at a motel. When police officers entered McCoy's room, he pointed a gun at the officers. Officers ordered McCoy to drop the gun and McCoy complied. As an officer pulled McCoy off the bed to arrest him, the officer perceived that McCoy was reaching for his duty weapon and yelled, "He's grabbing my gun." At that point, other officers pulled McCoy to the ground. Once McCoy was on the ground, lying face-down with his hands behind his back, officers hit him in the head, shoulders, and back while another officer rendered him unconscious with a carotid restraint maneuver.

While McCoy was unconscious, the officers handcuffed his hands behind his back, zip-tied his feet together, and moved him from a prone, face-down position into a sitting position. As McCoy regained consciousness, officers again struck him more than ten times on his head, shoulders, back, and arms. McCoy tried to shield himself but could not because he was handcuffed and zip-tied. One of the officers then placed McCoy, who was not resisting, in a second carotid restraint until he lost consciousness again. The officers removed McCoy from the motel room and transported him to the hospital.

McCoy sued three of the officers who participated in his arrest under 42 U.S.C. § 1983. McCoy claimed that the officers violated the Fourth Amendment by using excessive force in arresting him. The officers argued that they were entitled to qualified immunity.

To determine whether the officers were entitled to qualified immunity, the court addressed McCoy's pre-restraint and post-restraint excessive force claims separately.

Concerning the officers' initial use of force, the court held that no reasonable jury could conclude that McCoy was effectively subdued when the allegedly excessive pre-restraint force occurred. As a result, the court found that the officers were entitled to qualified immunity as it was not clearly established that striking McCoy and applying a carotid restraint on him violated his Fourth Amendment rights.

However, the court held that the officers' post-restraint force violated McCoy's clearly established right to be free from the continued use of force after he had been effectively subdued by the officers. In making this determination, the court applied the factors outlined in Graham v. Connor.

The court found that the first Graham factor, the severity of the crime, weighed against McCoy. It was undisputed that McCoy told the officers that he was armed and that he had two hostages before the officers entered the motel room. In addition, McCoy conceded that the officers reasonably suspected him of pointing a gun at the officers and then reaching for the arresting officer's gun.

However, the court held that the second Graham factor, the immediacy of the threat posed by the suspect, favored McCoy. The court found that a reasonable jury could conclude that after McCoy was rendered unconscious, handcuffed, and zip-tied, the officers should have been able to recognize and react to this fact when they decided to use additional force. As a result, the court added that a reasonable jury could conclude that striking McCoy an additional ten times and placing him into a second carotid restraint was unreasonable.

Similarly, the court held that the final Graham factors, the suspect's active resistance and attempt to flee, favored McCoy because McCoy had stopped resisting by the time the officers struck him an additional ten times and applied the second carotid restraint maneuver. The court recognized that while the officers faced a potentially dangerous situation before they subdued McCoy, the officers use of force after McCoy had been subdued and restrained was not justified.

Finally, the court held that preexisting Tenth Circuit precedent made it clear to any reasonable officer that the use of force on effectively subdued individuals violates the Fourth Amendment. As result, the court concluded that it should have been obvious to the officers that continuing to use force on McCoy after he was rendered unconscious, handcuffed, and zip-tied was excessive.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/17-3093/17-3093-2018-04-10.pdf?ts=1523376040

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Eleventh Circuit

United States v. Maxi, 2018 U.S App. LEXIS 8595 (11th Cir. FL 2018)

Officers received information from a confidential informant that drugs were being distributed from a back unit of a duplex. Officers conducted surveillance and saw two men leave the duplex and get into a truck. Officers stopped the truck and spoke with the driver, Markentz Blanc, and the passenger, Espere Pierre. After searching the truck and finding no contraband, the officers let the men leave. When the officers realized that the truck was returning to the duplex, all officers in the area were ordered to go there as well.

At least ten officers had arrived at the duplex by the time Blanc and Pierre returned. An officer detained the men while four or five officers ran to the door at the back of the unit as other officers covered strategic positions surrounding the duplex. The door to the back unit was not visible from the street and to get to it, officers had to pass through a gate in a chain-link fence that surrounded the yard. At least one officer who approached the door had his gun out. The door had an exterior metal security gate, with bars five to six inches apart and with a wooden interior door behind it. An officer reached through the bars and knocked on the wooden door. The officer did not announce that he was a police officer.

Willis Maxi opened the wooden interior door very soon after the officer knocked. Directly behind Maxi, approximately five to ten feet away, the officer saw rocks of crack cocaine and a mixing bowl that contained packaged crack cocaine. The officer ordered Maxi to exit the duplex, but Maxi said he could not leave because the metal security gate was locked. Concerned that Maxi would destroy evidence, officers pried open the metal security gate, pulled Maxi out of the duplex, and handcuffed him. Approximately five officers then conducted a protective sweep of the unit, which took about two minutes. During the sweep, officers saw more packaged crack cocaine, firearms, and a stack of money. After the sweep, the officer exited the unit and applied for a search warrant.

Before the warrant was issued, two officers went back into the duplex and did a "walk-through" of the unit. The officers testified that the search warrant affidavit did not include any of their observations from the walk-through. After the search warrant was issued, the officers went back into the duplex and seized crack cocaine, guns, and some documents.

The surveillance and search of the duplex was the beginning of the investigation into the drug trafficking organization in which Maxi, Blanc, and Pierre were involved. During the course of the investigation, the government obtained evidence against Blanc obtained from wiretaps of his cell phone.

The government later charged Maxi, Blanc, and six other individuals with drug, firearm, and other criminal offenses. Maxi and Blanc filed motions to suppress evidence based on the government's alleged violations of law.

Maxi filed a motion to suppress the evidence seized from the duplex on a variety of Fourth Amendment grounds.

First, Maxi argued that the officers unlawfully entered the curtilage of the duplex when ten officers surrounded the building and then approached the door. The government argued that the officers were allowed to enter the curtilage because they were there to conduct a knock and talk interview.

The knock and talk rule provides that police have an owner's implied permission or license "to approach a home and knock" as any other private citizen is allowed to do. The court added this implied license typically permits a visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then leave, unless invited to remain longer.

In this case, approximately ten officers entered onto the curtilage by going through a gate in the fence, with four or five officers approaching the door and the rest taking up tactical positions around the exterior. The court found that the officers' intrusion onto the curtilage was not limited to the front door. In addition, the court found that the officers' intent in approaching the duplex was not that of an ordinary citizen, but instead their intent was to secure the duplex and detain anyone they found inside. Based on these facts, the court held that the officers' actions did not qualify as a knock and talk; therefore, they did not have a license to enter the curtilage of the duplex.

However, the court found that suppression of evidence was not warranted because the knock and talk violation did not result in the seizure of evidence. The court held that had the officers' conducted a proper knock and talk, there were no facts to suggest that anything would have turned out differently, as Maxi voluntarily opened the door almost immediately after the officer knocked and seemed entirely unaware of the scene developing outside.

Second, Maxi argued that he did not open the door voluntarily.

The court disagreed. The court found that Maxi did not open the door in response to a show of authority by the officers. An officer testified that he knocked once and that none of the officers yelled "police." In addition, the court found that Maxi could not have seen the officers outside because all of the windows were covered.

Third, Maxi claimed that the officers violated the Fourth Amendment when they pried open the metal security gate and arrested him in his home without a warrant.

The court held that Maxi's warrantless arrest was supported by probable cause and exigent circumstances. When Maxi opened the door, the officer saw a large quantity of drugs behind him. The court found there was a risk that the evidence the officer saw would be destroyed if the officers left the duplex to get an arrest warrant. In addition, the officers could not see into the unit's other room, so they did not know if there were others present in the duplex. Consequently, the court concluded that it was objectively reasonable for the officers to believe exigent circumstances existed to justify their warrantless entry and arrest of Maxi.

Fourth, Maxi argued that the officers' protective sweep and the officer's walk-through after the premise had been secured violated the Fourth Amendment.

The court held that even if the protective sweep and walk-through violated the Fourth Amendment, the evidence found inside the duplex was still admissible under the independent source doctrine. The independent source doctrine allows admission of evidence that is discovered by means entirely independent of any constitutional violation. When Maxi voluntarily opened the door, the officer saw drugs in plain view five to ten feet behind him. The court found that there

was no reason to believe that the officers' decision to obtain a warrant was motivated by what they saw during the subsequent protective sweep or walk-through.

Blanc argued that evidence obtained from two wiretaps should have been suppressed because the government did not satisfy the "necessity" requirement. Under 18 U.S.C. § 2518(1)(c), the government's affidavit in support of a wiretap must include "a full and complete statement as to whether or not other investigative techniques have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The court held that the government satisfied the necessity requirement in its affidavit. For example, the affidavit stated that even after using search warrants, confidential sources, pen registers, and visual surveillance, law enforcement had not been able to track drug deliveries. In addition, the affidavit stated that further work with confidential informants or with undercover agents was unlikely to succeed because the organization was led by a small, tight-knit group. Finally, the affidavit stated that the conspirators were using counter surveillance and were wary of police surveillance.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/15-13182/15-13182-2018-04-05.pdf?ts=1522938655

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United States v. Suarez-Plasencia, 2018 U.S. App. LEXIS 9015 (11th Cir. FL April 11, 2018)

On the morning of September 6, 2015, twenty-eight Cuban migrants were found on Loggerhead Key, Florida. Later that day, Suarez's boat broke down on Garden Key, an island three miles east of Loggerhead Key and seventy miles west of Key West, Florida.

When an officer responded to a report of Suarez's beached boat, he located Suarez and the boat. The officer asked Suarez for permission to search his boat and Suarez consented verbally and by signing a consent form. The consent form authorized the officer to perform a "complete" search of the vessel and to seize its contents for any "legitimate law enforcement purpose." Suarez then boarded a ferry to Key West to obtain help with fixing his boat.

The next day, the officer searched Suarez's boat and found a GPS device in a storage compartment. The officer plugged the GPS device into the boat's power source and turned it on. The GPS device showed a waypoint indicating that the boat had been just off Cuba's shore on September 5, 2015. The officer powered off the GPS device and sent it to the Coast Guard for a more thorough analysis. The forensic analysis performed by the Coast Guard indicated that Suarez's boat left Key West around 1:30 a.m. on September 5, arrived off the coast of Cuba at 4:30 p.m. that day, and then reached the vicinity of Loggerhead and Garden Keys in the early morning of September 6.

After interviewing Suarez and conducting further investigation, the government charged Suarez with twenty-eight counts of alien smuggling.

Suarez filed a motion to suppress the GPS evidence, arguing the consent he gave the officer to search his boat did not extend to a search of the GPS device.

The court disagreed. A consent search is reasonable under the Fourth Amendment as long as the search by the officer remains within the scope of the consent given by the suspect. In this case, Suarez signed a consent form that authorized a "complete" search of his boat and the seizure of

the boat's contents for any "legitimate law enforcement purpose." In addition, Suarez did not limit the scope of his consent in any way. As a result, the court held that Suarez's consent to search included the compartment where the officer found the GPS device.

The court further held that the officer did not exceed the scope of Suarez's consent by powering-up the GPS device and examining it. The court concluded that a reasonable person would understand that giving "complete" consent to search his boat for any "legitimate" law enforcement purpose" would include consenting to a search of the GPS device located on the boat. Finally, the court held that Suarez's consent to search extended to the forensic search of the GPS device performed by the Coast Guard.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/16-16946/16-16946-2018-04-11.pdf?ts=1523453430

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