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# 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](mailto: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>.

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By Henry W. McGowen, Attorney Advisor / Senior Instructor, Office of Chief Counsel, Legal Division, Artesia, New Mexico.

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## FLETC Informer Webinar Series

### 1. Thursday July 6, 2017 (1:00 p.m. Mountain Daylight Time)

**Live Webinar:** Foreign Nationals and Law Enforcement Officers (1-hour)

Presented by Henry W. McGowen – Attorney-Advisor / Senior Instructor  
Federal Law Enforcement Training Centers, Artesia, New Mexico.

This webinar will discuss issues law enforcement officers face when they encounter foreign national suspects, to include diplomats and those without diplomatic status.

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



### 2. Tuesday July 11, 2017 (1:00 p.m. Eastern Daylight Time)

**Live Webinar:** The Law on Drones in the United States (2-hours)

Presented by Robert H. Cauthen, Attorney-Advisor / Assistant Division Chief,  
Federal Law Enforcement Training Centers, Glynco, Georgia.

To participate in this webinar: <https://share.dhs.gov/informer>



### **3. Wednesday July 26, 2017 (11 a.m. Mountain Daylight Time)**

**Live Webinar:** Advanced Affidavit Writing (1-hour)

Presented by Michelle M. Heldmyer, Attorney-Advisor / Senior Instructor,  
Federal Law Enforcement Training Centers, Artesia, New Mexico.

This webinar will review the components of search warrant and arrest warrant affidavits, while providing practical tips and guidance on how law enforcement officers can work effectively with their prosecutors to draft these documents.

To participate in this webinar: <http://share.dhs.gov/artesia/>



### **4. Wednesday July 26, 2017 (1:30 p.m. Mountain Daylight Time)**

**Live Webinar:** The Assimilative Crimes Act (ACA) and the Violence Against Women Reauthorization Act of 2013 (VAWA) (1-hour)

Presented by Robert Duncan, Attorney-Advisor / Senior Instructor,  
Federal Law Enforcement Training Centers, Artesia, New Mexico.

To participate in this webinar: <http://share.dhs.gov/indianlaw/>



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### **Virtual Symposium – July 24 and 25, 2017**

The Federal Law Enforcement Training Centers and partner organizations are sponsoring an interactive virtual continuing legal education (CLE) training conference to develop and enhance knowledge of agency/component missions, emerging areas of law, and new developments in training. The virtual conference will be held on July 24 and 25, 2017, from 10:30 a.m. EDT to 4:00 p.m. EDT and can be accessed by visiting <http://share.dhs.gov/symposium>. Registration is not required. Attendees with a HSIN login may use existing credentials. Attendees without a HSIN login may log in as a guest. Please contact Tammy Fields at [tammy.fields@fletc.dhs.gov](mailto:tammy.fields@fletc.dhs.gov) or Robert Duncan at [robertduncan@fletc.dhs.gov](mailto:robertduncan@fletc.dhs.gov) for more information.



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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.

# Foreign Nationals: What Law Enforcement Needs to Know

By  
Henry W. McGowen  
Attorney Advisor / Senior Instructor  
Office of Chief Counsel  
Federal Law Enforcement Training Centers  
Artesia, New Mexico

## *Introduction*

Do you ever come into contact with non-U.S. citizens in your line of work? Millions of foreign nationals are in the U.S. right now, so chances are if you have not, you will. The United States is a desirable destination for a great number of people around the world. While working overseas before joining FLETC, I discovered almost everyone I met wanted to visit the U.S.; some even wanted to move here. People come to our country for a variety of reasons: business, tourism, diplomatic missions, family visits, American citizenship, and even some involved in criminal activity. While most foreign nationals in the U.S. are law-abiding, some do get into trouble (some by accident and some on purpose). Those of us working in the U.S. criminal justice system – Federal, State and Tribal – need to know what to do with these individuals when they break the laws of our country.

Generally, we may encounter two main categories of foreign national suspects: those with diplomatic status and those without. And as you might guess, different rules apply to each category of suspect. This article explores some important rules for both diplomats and non-diplomats.

In order to know how to handle different foreign national suspects, let's first look at where these rules came from. Two international conventions address these types of foreign visitors: the Vienna Convention on Diplomatic Relations<sup>1</sup> (dealing as you might suspect with diplomats) and the Vienna Convention on Consular Relations<sup>2</sup> (dealing with all other foreign nationals). Both were written and adopted under the umbrella of the United Nations. The U.S. has signed both and, as such, have agreed to abide by their terms.

## *Dealing with Diplomats*

We all have heard of diplomatic immunity (which is great to have if you can get it!); however, you may have wondered where it came from and why special rules apply to diplomats. The Vienna Convention on Diplomatic Relations was adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna, Austria. The requirements of this convention entered into force in the U.S. in 1972.<sup>3</sup>

We have sent diplomats around the world to represent the U.S. in foreign relations with other nations. They need protection from interference with their role as representatives of the U.S. through detentions, arrests or prosecutions. In turn, we offer the same protection to diplomats from other countries working in the U.S.

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<sup>1</sup> [http://legal.un.org/avl/pdf/ha/vcdr/vcdr\\_e.pdf](http://legal.un.org/avl/pdf/ha/vcdr/vcdr_e.pdf).

<sup>2</sup> [http://legal.un.org/avl/pdf/ha/vccr/vccr\\_e.pdf](http://legal.un.org/avl/pdf/ha/vccr/vccr_e.pdf).

<sup>3</sup> This was followed up with the Diplomatic Relations Act in 1978, which codified these issues (22 U.S.C. § 245).

If you encounter a foreign national whom you reasonably suspect is committing a crime, you first need to determine whether s/he has diplomatic immunity. If the suspect is a diplomat and can communicate with you, s/he will let you know. Do not take their word for it though; you must confirm it. They should have diplomatic documents, including possibly a diplomatic passport and an official document recognizing their diplomatic status from our State Department. Additionally, you can call the State Department's DSS Command Center at (571) 345-3146 to verify the information.<sup>4</sup> If the suspect does in fact have diplomatic immunity, then the following rules apply.

You may *detain* the diplomat until you verify his/her status. You are not, however, permitted to *arrest* or charge the individual, no matter how serious the crime. Do not handcuff unless the diplomat poses an immediate safety threat. Do not search or frisk the person, his/her vehicle, or personal belongings unless it is necessary for officer safety. It is good to investigate the situation and prepare a report. You need to make a record of what occurred; why you stopped them, and what steps were taken. This is also important for your protection in case questions are ever raised about why you stopped that ambassador. Records of police encounters can be reviewed by the State Department if questions ever arise about the incident.

Officers may stop and cite diplomats for moving traffic violations; this is not considered detention or arrest. However, a diplomat may not be compelled to sign, or even pay, the citation. You may ask, what is the point of citing them if they do not have to pay the fine? If nothing else, a written record should be made as to why you stopped the diplomat for the same reason you want to make a record of your other encounters with diplomats.

### *And Now Everyone Else*

Most foreign nationals in the U.S. have no diplomatic status. For these foreign nationals who commit crimes while in the U.S., rules formalized in the Vienna Convention on Consular Relations (VCCR) apply. The VCCR was adopted in 1963, also in Vienna, Austria, and signed by the U.S. in 1969. The VCCR covers a much broader range of topics than just foreign nationals behaving badly; however, for our purposes here we will just address this aspect.<sup>5</sup>

If you encounter a suspect whom you think may be a foreign national, you are allowed to ask about the person's citizenship for purposes of complying with the VCCR. Some 5th Amendment concerns have been raised about whether asking about citizenship without first giving Miranda warnings could amount to an interrogation for 5th Amendment purposes. This is a separate issue from asking about their legal status in the U.S. Therefore, simply asking about citizenship does not encroach into this area of the law and is considered permissible.

When you detain or arrest foreign suspects, you need to advise them of their right to have consular officials from their country notified of their situation. Additionally, foreign suspects must be allowed reasonable access to consular and/or legal officials from their country while in custody. The courts are also required to advise foreign national arrestees of these rights.

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<sup>4</sup> There are various levels of diplomatic immunity; for purposes of this article we will deal with full immunity. You can refer to the State Department's manual, "Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities" for further information on this; link listed below in footnote 8.

<sup>5</sup> See Article 36 of the Vienna Convention on Consular Relations, 1963.

A quick word on “detention,” as that may have caught your attention. This term is included in the VCCR along with “arrest.”<sup>6</sup> Some countries use the term “detention” differently than in the U.S., i.e. suspects may be locked up and held for several days without formal charges; they are only being “detained” while an investigation ensues to determine whether there is enough evidence to formally arrest and charge them. This can be particularly true for foreign nationals who may flee to their home country if released. For application of the VCCR, this term has been interpreted in the U.S. as an *extended* detention. In other words, if a suspect is detained for several hours and not allowed access to a phone or other forms of communication, then we need to inform her/him of the right to contact a consular office from their country. Such notification is not required during the typical brief detention, such as a Terry stop.

In addition, you need to determine if the foreign national is from a country that *must* be notified that their citizen has been detained/arrested. The U.S. has agreements with some countries that make this mandatory, regardless of the suspect’s wishes. The U.S. has agreements with other countries however where reporting is discretionary. A list of these countries can be found in the State Department’s manual on Consular Notification and Access.<sup>7</sup>

Whether or not a foreign national is legally in the U.S. does *not* affect the notification requirements of the VCCR. Either way, these rights apply. Similarly, we need to remember that foreign nationals are entitled to the usual Constitutional safeguards, such as protections against unreasonable search and seizure, and Miranda warnings for custodial interrogation.

### *Conclusion*

The United States is party to many international conventions and treaties. The two mentioned here only cover part of the landscape of international commitments related to our criminal justice system. You can find more information in two very useful documents published by the State Department.<sup>8</sup> They provide practical information for law enforcement and other criminal justice actors dealing with foreign nationals. Also, I will be offering a webinar on this topic in early July. Please feel free to join me as we take a more in depth look at this category of suspect and how we handle them. With more and more people coming in and out of the U.S. due to political upheavals, economic migration and the increasing effects of globalization, these issues will only be increasing. Tune in and let’s discuss how we can prepare for it.

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<sup>6</sup> See Article 36, Vienna Convention on Consular Relations, link provided in footnote 1.

<sup>7</sup> The link to this manual is the second one listed below in footnote 8.

<sup>8</sup> <https://www.state.gov/documents/organization/150546.pdf> and [https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA\\_Manual\\_4th\\_Edition\\_August2016.pdf](https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf)

# CASE SUMMARIES

## United States Supreme Court

### Cty. of Los Angeles v. Mendez, 2017 U.S. LEXIS 3396 (U.S. May 30, 2017)

Los Angeles County Deputies Conley and Pederson were part of a team of police officers that went to a residence owned by Paula Hughes to search for Ronnie O'Dell, a wanted parolee. Deputies Conley and Pederson were assigned to clear the rear of Hughes' property and cover the back door of Hughes' residence. The deputies were told that a man named Mendez lived in the backyard of Hughes' residence with Jennifer Garcia. Deputies Conley and Pederson went through a gate and entered the backyard where they saw a small plywood shack. The deputies entered the shack without a search warrant, and without knocking and announcing their presence. Inside the shack, the deputies saw the silhouette of a man pointing, what appeared to be a rifle, at them. Deputies Conley and Pederson fired fifteen shots at the man, later identified as Mendez. Mendez and Garcia both sustained gunshot wounds. The deputies later discovered that Mendez had been pointing a BB gun that he kept by his bed to shoot rats inside the shack.

Mendez and Garcia (Mendez) sued Conley, Pederson and the Los Angeles County Sheriff's Department under *42 U.S.C. § 1983* alleging that the deputies committed three violations of the Fourth Amendment. First, Mendez claimed that the deputies executed an unreasonable search by entering the shack without a warrant (the "warrantless entry claim"). Second, Mendez claimed that the deputies performed an unreasonable search because they failed to announce their presence before entering the shack (the "knock and announce claim"). Finally, Mendez claimed that the deputies used excessive force by discharging their firearms after entering the shack (the "excessive force claim").

The district court found Deputy Conley liable on the warrantless entry claim, concluding that entry into the shack was not supported by exigent circumstances or another exception to the warrant requirement. The court found both deputies liable on the knock and announce claim. Finally, the court held that the deputies did not use excessive force in violation of the Fourth Amendment, as it was reasonable for the deputies to mistakenly believe Mendez's BB gun was a rifle. Nonetheless, the court held that the deputies were liable for the shooting under the Ninth Circuit's provocation rule and awarded approximately four million dollars in damages. The provocation rule states,

"Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."

The district court held that because the officers violated the Fourth Amendment by entering the shack without a warrant, which proximately caused the injuries to Mendez and his wife, it was proper to hold the officers liable for their injuries under the provocation rule.



On appeal, the Ninth Circuit Court of Appeals reversed the district court and held that the deputies were entitled to qualified immunity on the knock and announce claim. However, the court agreed with the district court and held that the warrantless entry of the shack violated clearly established law, but was attributable to both deputies. Finally, the court applied the provocation rule and held the deputies liable for their use of force finding that the officers had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law.

Los Angeles County and the deputies appealed, and the United States Supreme Court agreed to hear the case. The issue before the Court was whether the Ninth Circuit's provocation rule was in conflict with [Graham v. Connor](#) regarding the manner in which a claim of excessive force against a police officer should be determined under *42 U.S.C. § 1983*.

The Supreme Court held that the Fourth Amendment provides no basis for the provocation rule. The Court stated that a different Fourth Amendment violation, such as the unlawful entry into the shack, could not transform a later, reasonable use of force into an unreasonable seizure. The Court noted that the provocation rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist. The Court emphasized the exclusive framework for analyzing excessive force claims is set out in [Graham](#). If there is no excessive force claim under [Graham](#), there is no excessive force claim at all. Once a use of force is deemed reasonable under [Graham](#), it may not be found unreasonable by reference to some separate constitutional violation.

The Court added that to the extent a plaintiff has other Fourth Amendment claims, such as Mendez's claim that the deputies violated the Fourth Amendment by unlawfully entering his shack, those claims should be analyzed separately. The Court remanded the case to the Ninth Circuit Court of Appeals suggesting that the court "revisit the question whether proximate cause permits respondents" (Mendez) "to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."

For the Court's opinion: [https://www.supremecourt.gov/opinions/16pdf/16-369\\_09m1.pdf](https://www.supremecourt.gov/opinions/16pdf/16-369_09m1.pdf)

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**Honeycutt v. United States, 2017 U.S. LEXIS 3556 (U.S. 2017)**

Terry Honeycutt managed sales and inventory for a hardware store owned by his brother, Tony Honeycutt. After observing several "edgy looking folks" purchasing an iodine-based water-purification product known as Polar Pure, Terry Honeycutt contacted the local police department to inquire whether the iodine crystals in the product could be used to manufacture methamphetamine. An officer confirmed that individuals were using Polar Pure for this purpose and advised Honeycutt to cease selling it if the sales made Honeycutt "uncomfortable." Notwithstanding the officer's advice, the store continued to sell large quantities of Polar Pure. Although each bottle of Polar Pure contained enough iodine to purify 500 gallons of water, and despite the fact that most people have no legitimate use for the product in large quantities, the brothers sold as many as 12 bottles in a single transaction to a single customer. Over a 3-year period, the store grossed roughly \$400,000 from the sale of more than 20,000 bottles of Polar Pure.

Following an investigation, a federal grand jury indicted the Honeycutt brothers for various offenses relating to their sale of iodine while knowing or having reason to believe it would be

used to manufacture methamphetamine. In addition, the government sought forfeiture money judgments against each brother pursuant to *21 U.S.C. §853(a)(1)* in the amount of \$269,751.98, which represented the hardware store's profits from the sale of Polar Pure. *Title 21 U. S. C. §853(a)(1)*, mandates forfeiture of “any proceeds the person obtained, directly or indirectly, as the result of” drug distribution.

Tony Honeycutt pleaded guilty and agreed to forfeit \$200,000 under *§853(a)(1)*. Terry Honeycutt went to trial and was convicted of conspiracy to distribute iodine knowing that it would be used to manufacture methamphetamine.

Although the government conceded that Terry Honeycutt had no controlling interest in the store and did not personally benefit from the sales of Polar Pure, the government asked the district court to hold him jointly and severally liable for the profits from the illegal sales of Polar Pure. Consequently, the government sought a money judgment of \$69,751.98, against Terry Honeycutt, the amount of the conspiracy profits outstanding after Tony Honeycutt's forfeiture payment.

The district court declined to enter a forfeiture judgment, finding that Terry Honeycutt was a salaried employee who had not personally received any profits from sale of Polar Pure. The government appealed.

The Sixth Circuit Court of Appeals reversed. The court held, as co-conspirators, the brothers were “jointly and severally liable for any proceeds of the conspiracy.” As a result, the court concluded that each brother bore full responsibility for the entire forfeiture judgment. Terry Honeycutt appealed and the United States Supreme Court agreed to hear the case to resolve a disagreement among the Courts of Appeals regarding whether joint and several liability applied under *21 U.S.C. §853*.

The Supreme Court held that forfeiture pursuant to *Title 21 U.S.C. §853(a)(1)* is limited to property the defendant, himself, actually acquired as the result of the crime. In this case, the government conceded that Terry Honeycutt had no ownership interest in his brother's store and did not personally benefit from the Polar Pure sales. Consequently, because Terry Honeycutt never obtained tainted property as a result of the crimes for which he was convicted, he could not be ordered to forfeit any money under *§853(a)(1)*.

For the Court’s opinion: [https://www.supremecourt.gov/opinions/16pdf/16-142\\_7148.pdf](https://www.supremecourt.gov/opinions/16pdf/16-142_7148.pdf)

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### **Hernandez v. Mesa, 2017 U.S. LEXIS 4059 (U.S. 2017)**

A United States Border Patrol Agent, Jesus Mesa, Jr., standing in the United States, shot and killed Sergio Hernandez Guereca, a fifteen-year old Mexican citizen, standing in Mexico. Hernandez’s parents (plaintiffs) filed a lawsuit against Agent Mesa under Bivens, alleging that Agent Mesa violated their son’s rights under the Fourth and Fifth Amendments. Specifically, the plaintiffs alleged that Agent Mesa violated the Fourth Amendment by using excessive force against Hernandez, and the Fifth Amendment by depriving Hernandez of due process.

The Fifth Circuit Court of Appeals, sitting en banc, without deciding the issue, assumed that the plaintiffs could sue Agent Mesa under Bivens. However, the court then held that the plaintiffs failed to state a claim for a violation of the Fourth Amendment because Hernandez was a Mexican citizen who had no “significant voluntary connection to the United States” and “was on Mexican

soil at the time he was shot.” Consequently, the court dismissed the plaintiff’s Fourth Amendment excessive force claim.

The court further held that Agent Mesa was entitled to qualified immunity on the plaintiffs’ Fifth Amendment due process claim. Again, the court did not decide whether the plaintiffs could sue Agent Mesa under Bivens. Instead, the court granted Agent Mesa qualified immunity, finding that at the time of the shooting it was not clearly established that shooting across the United States border into Mexico and injuring someone with no significant connection to the United States was unlawful.

Significantly, the Fifth Circuit Court of Appeals dismissed the lawsuit without deciding whether the plaintiffs had stated a valid constitutional claim under the Fourth or Fifth Amendments and whether they could sue Agent Mesa under Bivens.

The Supreme Court vacated the Fifth Circuit Court of Appeal’s judgment and remanded the case. First, the Court found that the Fifth Circuit should determine whether the plaintiffs can sue Agent Mesa for the alleged Fourth and Fifth Amendment violations under Bivens. In Ziglar v. Abbasi, decided on June 19, 2017 the Supreme Court provided guidance on how the lower courts should determine whether a plaintiff can bring a lawsuit under Bivens. The Court suggested that the Fifth Circuit might be able to resolve the Bivens questions in this case in light of the guidance provided in Abbasi.

The court further held that the Fifth Circuit Court of Appeals erred in granting Agent Mesa qualified immunity on the plaintiffs’ Fifth Amendment claim. The Fifth Circuit held that at the time of the shooting, Hernandez was “an alien who had no significant voluntary connection to . . . the United States.” However, the Court found that it was undisputed that Hernandez’s nationality and the extent of his ties to the United States were unknown to Agent Mesa at the time of the shooting. As a result, the Court concluded it was not proper to grant Agent Mesa qualified immunity based on those facts.

For the Court’s opinion: [https://www.supremecourt.gov/opinions/16pdf/15-118\\_97bf.pdf](https://www.supremecourt.gov/opinions/16pdf/15-118_97bf.pdf)

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# Circuit Courts of Appeal

## **First Circuit**

### **United States v. Almonte-Báez, 2017 U.S. App. LEXIS 8472 (1st Cir. Mass. May 12, 2017)**

While investigating a drug trafficking ring, officers learned that two members of the ring planned to rob Medina because Medina received bulk drug shipments every week. The officers knew that Medina had a prior conviction for a drug offense and that he had sold heroin to a confidential informant a few months earlier. In an effort to prevent the robbery, the officers attempted to locate Medina.

While conducting surveillance, officers saw Medina leave an apartment building on Cedar Street carrying a large trash bag and get into a car. The officers followed Medina and stopped him after he committed a traffic violation. During the stop, the agents searched the car and found over \$370,000 in the trash bag. When questioned, Medina could not explain why he was transporting such a large amount of cash.

The officers went back to the building on Cedar Street and confirmed that Medina rented an apartment there. The officers went to Medina's apartment, knocked on the front door, and announced their identity. The officers heard the sound of someone inside the apartment running toward the back of the apartment. Concerned that the person inside the apartment was trying to escape or destroy evidence, the officers decided to enter the apartment. When the officers noticed that the front door was sealed shut, they moved to a side door, broke it down, and entered the apartment. Inside the apartment, the officers detained Baez, who was attempting to flee out the back door. While conducting a protective sweep, the officers saw heroin, packaging material, and scales in plain view. Based on these observations, the agents obtained a warrant to search the apartment and seized approximately 20 kilograms of heroin.

The government charged Baez with two drug offenses. Baez filed a motion to suppress the evidence seized from the apartment. Baez argued that the officers' warrantless entry into the apartment violated the Fourth Amendment; therefore, the evidence observed in plain view should have been suppressed, along with the evidence seized under the search warrant.

In affirming the district court, the court held that exigent circumstances justified the officers' warrantless entry into the apartment. The exigent circumstances exception to the Fourth Amendment's warrant requirement requires law enforcement officers to:

1. Establish probable cause that contraband or evidence of a crime will be found on the premises; and
2. To show that an exigency, such as the imminent loss of evidence, existed.

In this case, the court held that the officers established probable cause that contraband or evidence of a crime would be located in the apartment. First, the officers knew that Medina rented the apartment and reasonably suspected that he received weekly heroin shipments at that address. Second, earlier that day officers saw Medina carrying a large trash bag that contained hundreds of thousands of dollars out of the apartment. Third, Medina could not explain to the officers why he was transporting such a large quantity of cash. Fourth, the officers knew that Medina had a

prior conviction for a drug offense and that he had sold heroin to a confidential informant a few months earlier.

Next, the court held that the officers established the potential for the destruction of evidence located inside the apartment. First, when the officers knocked on the door and identified themselves, they heard someone inside the apartment running away from the door. Second, the officers saw that the front door was sealed shut. Third, the officers knew that drugs can be flushed down a toilet or washed down a drain. Given what the officers knew and what they reasonably suspected, the court held that the officers had reason to believe that the person inside the apartment was trying to destroy evidence.

Because the officers' warrantless entry to the apartment was supported by exigent circumstances, the court held that the evidence observed in plain view along with the evidence seized pursuant to the search warrant was admissible at trial.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-2367/15-2367-2017-05-12.pdf?ts=1494621004>

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**United States v. Diaz-Rosado, 2017 U.S. App. LEXIS 8728 (1st Cir. P.R. May 18, 2017)**

Officer Mendez arrested Diaz for carjacking and transported him to the police station where he advised Diaz of his Miranda rights verbally and in writing. After Diaz signed the Miranda-rights form, he told Officer Mendez that he wanted to tell him something. Officer Mendez told Diaz that if he had anything to say that he should write it on the reverse side of the Miranda-rights form. Diaz subsequently wrote and signed a statement in which he confessed to the carjacking.

Prior to trial, Diaz filed a motion to suppress his written confession. Diaz argued that his confession was not voluntary because he was under the influence of controlled substances when he made it.

For a suspect's confession to be found involuntary, there must be some coercive police activity, even if only in the form of a custodial interrogation. In this case, Diaz never claimed that Officer Mendez subjected him to a custodial interrogation or otherwise coerced him into confessing. Instead, Diaz told Officer Mendez that he wanted to tell him something, and Officer Mendez simply told Diaz that if he had something to say, to write it down on the back of the Miranda-rights form. In addition, the court commented that Diaz cited no case law that requires the suppression of a volunteered confession solely because the suspect was under the influence of a controlled substance at the time of the confession. Instead of arguing for suppression, the court noted that Diaz could have argued to the jury that his confession was not credible because he made it while under the influence of controlled substances.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1010/15-1010-2017-05-18.pdf?ts=1495134004>

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**United States v. Ramdihall, 2017 U.S. App. LEXIS 8727 (1st Cir. Me. May 18, 2017);**  
**United States v. Hillaire, 857 F.3d 128 (1st Cir. Me. May 18, 2017)**

Ramdihall and Hillaire were convicted in federal court in the District of Maine for conspiracy to possess and use counterfeit access devices with intent to defraud. The government's case against the defendants was based upon evidence seized from their car during three different traffic stops. On appeal, the defendants challenged the district court's denial of their motion to suppress evidence discovered during two of the traffic stops.

The first stop occurred in Kittery, Maine. At approximately 1:30 a.m., an employee of a 7-Eleven told a police officer that he was concerned about people in the 7-Eleven who were buying thousands of dollars' worth of gift cards with other gift cards. The employee identified the car in the parking lot that belonged to the people buying the gift cards. The officer approached the car and asked the defendants if they knew the woman inside the store. Hillaire told the officer the woman was with them, but he denied knowing anything about using gift cards to purchase gift cards. Ramdihall also denied knowing anything about gift cards and told the officer they had stopped to get gas even though he could not explain why he was not parked at a gas pump. While talking to the defendants, the officer saw electronic devices in boxes in the car near Hillaire's feet.

When the woman returned to the car, she told the officer that she was using the gift cards to buy new gift cards so she could go shopping because the gift cards that she had sometimes did not work. When the officer asked about shopping, neither the woman nor the defendants could name the stores they had visited. At 1:55 a.m., the officer contacted a detective and called him to the scene because he suspected the defendants might be engaged in fraud. Sometime afterward, Ramdihall gave consent to search the trunk of the car. Inside the trunk, the officers found a large number of laptop computers and other electronic devices. The officers asked the three individuals to whom the equipment belonged. After no one claimed ownership, the officers seized the items and allowed Ramdihall, Hillaire, and the woman to leave at 3:17 a.m.

Ramdihall argued that the duration of the traffic stop was unreasonably long and became an unlawful seizure as it progressed.

The court disagreed. By 1:55 a.m., the officer had established reasonable suspicion to believe the defendant was involved in criminal activity. Although the 82-minute seizure was lengthy, the court held that Ramdihall could not show that this amount of time was longer than reasonably necessary for the officers to investigate the possible illegal activity in which they believed he was engaged.

The court further held that Ramdihall voluntarily consented to the search of the car. A person who is lawfully detained may still voluntarily give consent to a search. Here, the court noted that the officers did not handcuff Ramdihall nor did they display or draw their weapons, and the questioning that occurred was "mild" in nature.

The second stop occurred during a traffic stop on Interstate 70 in Ohio. A state trooper stopped Ramdihall for speeding. Hillaire was a passenger in the vehicle. When the trooper asked to see Ramdihall's license and registration, Ramdihall "surreptitiously" opened the center console then closed it very quickly, during which time the trooper saw a plastic baggie inside. Ramdihall told the trooper that the bag contained tobacco. During this time, the trooper learned that the car was a rental that had been leased by an absent third party. The trooper also learned that Ramdihall and Hillaire were driving to Columbus, Ohio from New York, but there was no visible luggage in

the car. Finally, Ramdihall told the trooper they planned to stay in Columbus for a few days and appeared to be surprised when the trooper told him that the rental agreement expired the next day.

When the trooper went back to his vehicle to write a speeding ticket, he called a K-9 unit to the scene. The trooper finished writing his ticket at 10:40 a.m., and the K-9 unit arrived at 10:46 a.m. At 10:49 a.m., the K-9 alerted to the presence of narcotics. The troopers searched the vehicle and found a bundle of seventeen credit cards in Hillaire's name under the spare tire cover in the trunk. The troopers swiped the credit cards' magnetic strips through a card reader. The troopers discovered that the information recorded on some of the cards' strips did not match the numbers and expiration dates on the front sides of those cards, indicating that those cards were counterfeit. The troopers later found tobacco in the baggie in the center console and a small amount of marijuana in the passenger's side of the car.

First, Ramdihall argued that after the trooper completed the traffic ticket at 10:40 a.m., the trooper detained him without reasonable suspicion until 10:46 a.m., to allow the K-9 unit to arrive.

The court agreed with the district court, which found that the trooper established reasonable suspicion to justify the additional six-minute delay after he completed the traffic ticket based on the following facts: (1) the trooper's observation of the plastic baggie in the center console; (2) the manner in which Ramdihall opened and closed the center console; (3) the fact that the car was a rental and the renter was not present, which the trooper testified was an indicator of drug trafficking; (4) the defendants' "dubious" explanation for why they were driving to Columbus; (5) the inconsistency between Ramdihall's claim that the defendants would be in Columbus for several days and the fact that the rental was due to expire the next day; and (6) the absence of visible luggage in the car, despite Ramdihall's claim that the men had been driving for several days.

Next, Ramdihall and Hillaire argued that the warrantless swiping of the credit cards through the credit card reader violated the Fourth Amendment.

Again, the court disagreed. The only evidence presented on the matter in the district court established that the magnetic strips on the back of credit cards contain only the card number and expiration date, which are routinely given to retailers and are visible on the front of the card. In a footnote, the court cited two cases in which the Sixth and Eighth Circuits have held that there is no reasonable expectation of privacy in the strips on the back of credit cards.<sup>1</sup>

For the court's opinions: <http://cases.justia.com/federal/appellate-courts/ca1/15-1841/15-1841-2017-05-18.pdf?ts=1495134005> and <http://cases.justia.com/federal/appellate-courts/ca1/15-1692/15-1692-2017-05-18.pdf?ts=1495134004>.

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<sup>1</sup> See United States v. Bah, (8 INFORMER 15 ) and United States v. DE L'Isle, (7 INFORMER 16).

## **Second Circuit**

### **United States v. Lyle, 856 F.3d 191 (2d Cir. N.Y. May 9, 2017)**

Police officers noticed a knife clipped to Lyle's pants as Lyle exited a car. When the officers asked Lyle about the knife, Lyle told them that he was legally permitted to carry the knife to perform his job. When the officers asked Lyle about the car, Lyle initially denied driving the car, but later admitted to the officers that he had been driving it. The officers asked Lyle for identification and Lyle produced a driver's license with the expiration date scratched off. The officers confirmed that Lyle's driver's license was suspended, that the vehicle Lyle was driving was a rental car, and that Lyle was not an authorized driver under the rental agreement. Lyle told the officers that his girlfriend had rented the car and given him permission to drive it. The officers arrested Lyle for driving with a suspended license and for possessing an illegal knife. The officers denied Lyle's request to allow his girlfriend to come and pick up the car and impounded it. At the police station, officers conducted an inventory search and found over one pound of methamphetamine and approximately \$39,000 in cash in the trunk of the car.

The government charged Lyle with several drug-related offenses.

Lyle filed a motion to suppress the evidence discovered during the inventory search.

The court held that Lyle had no reasonable expectation of privacy in the rental car; therefore, he did not have standing to object to the inventory search.

First, the court noted that the Second Circuit has not addressed the issue of whether an unauthorized driver of a rental car has a reasonable expectation of privacy in the car. The majority of the circuits that have considered the issue have concluded that an unauthorized driver of a rental car lacks a legitimate expectation of privacy in the car, unless some extraordinary circumstances exist.<sup>1</sup> A minority of circuits have held that an unauthorized driver has a reasonable expectation of privacy in a rental car if the authorized driver gave him or her permission to use the car.<sup>2</sup> Finally, the Sixth Circuit has refused to adopt either position. Instead, the Sixth Circuit examines the totality of the circumstances to determine if an unauthorized driver has a reasonable expectation of privacy in a rental car.

Next, the court concluded that it did not need to decide the issue of whether Lyle had a reasonable expectation of privacy in the car. In addition to being an unauthorized driver, Lyle was also an unlicensed driver; therefore, Lyle should not have been driving any car because his license was suspended. A rental company that knew this fact would not have given Lyle permission to drive its car nor allowed another renter to do so. Under these circumstances, the court held that Lyle did not have a reasonable expectation of privacy in the rental car.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-958/15-958-2017-05-09.pdf?ts=1494340213>

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<sup>1</sup> 3rd, 4th, 5th, and 10th Circuits.

<sup>2</sup> 8th and 9th Circuits.



**United States v. Ulbricht, 2017 U.S. App. LEXIS 9517 (2d Cir. N.Y. May 31, 2017)**

A jury convicted Ulbricht a/k/a Dread Pirate Roberts (DPR) of drug trafficking and other crimes related to his creation and operation of Silk Road, an online marketplace whose users primarily purchased and sold illegal goods and services. On appeal, Ulbricht argued, among other things, that evidence introduced against him at trial should have been suppressed because the government obtained it in violation of the Fourth Amendment.

After Ulbricht became a primary suspect in the government's investigation of Silk Road, the government obtained five "pen/trap" orders under *Title 18 U.S.C. §§ 3121-3127*. The orders authorized the government to collect internet protocol (IP) address data for Internet traffic to and from Ulbricht's home wireless router and other devices that regularly connected to Ulbricht's home router. In each order, the government specified that it did not seek to obtain the contents of any communications. Instead, the government sought to collect only "dialing, routing, addressing, and signaling information" that was similar to data captured by "traditional telephonic pen registers and trap and trace devices." Ulbricht claimed that the pen/trap orders violated the Fourth Amendment because he had a reasonable expectation of privacy in the IP address routing information that the orders allowed the government to collect.

The court joined the other circuits that have considered this issue and held that collecting IP address information, without content, is "constitutionally indistinguishable" from the use of pen registers and trap and trace devices to collect telephone dialing information.<sup>1</sup> As a result, the court held that the pen register and trap and trace orders did not violate the Fourth Amendment.

Ulbricht also argued that the warrants authorizing the search and seizure of his laptop computer as well as his Facebook and Google accounts violated the Fourth Amendment's particularity requirement.

To satisfy the Fourth Amendment's particularity requirement, a warrant must:

1. Identify the specific offense for which the government has established probable cause;
2. Describe the place to be searched; and
3. Specify the items to be seized by their connection or nexus to the crimes for which the government has established probable cause.

The court held that the warrants authorizing the government to search the defendant's laptop computer as well as his electronic media accounts did not violate the Fourth Amendment's particularity requirement. First, the warrants explicitly incorporated by reference an affidavit listing the crimes charged, which included narcotics trafficking, computer hacking, money laundering, and murder-for-hire offenses. The affidavit also described the workings of Silk Road, the role of DPR in operating the site, and included information that established probable cause to believe that Ulbricht and DPR were the same person. Second, the warrants described the places to be searched. Third, the warrants listed the information to be seized and described how this information was connected to the offenses for which Ulbricht was charged.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-1815/15-1815-2017-05-31.pdf?ts=1496241010>

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<sup>1</sup> 3rd, 4th, 6th, 8th, and 9th Circuits.

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## **Fifth Circuit**

### **United States v. Wallace, 857 F.3d 685 (5th Cir. Tex. May 22, 2017)**

A confidential informant (CI) told a police officer that Wallace, a wanted fugitive, was living in Austin. The CI also gave the officer Wallace's cell phone number. After the officer confirmed that Wallace had an outstanding arrest warrant, he obtained a Ping Order for Wallace's cell phone under the federal pen-trap statute, *Section 2703(d) of the Stored Communications Act*, and state law. The Ping Order allowed officers to obtain real-time GPS location (prospective cell site data) of Wallace's cell phone from AT&T. The officers used this information to locate and arrest Wallace. When the officers arrested Wallace, they found a pistol and ammunition on the ground near him, as well as ammunition in his pocket.

The Government charged Wallace with being a felon in possession of a firearm.

Wallace filed a motion to suppress the evidence. First, Wallace argued that the Ping Order was invalid because the government failed to show that it sought an order to obtain information relevant to an "ongoing criminal investigation," as required by the federal pen-trap statute and the Texas Code of Criminal Procedure. Wallace claimed that the phrase "ongoing criminal activity" implied "new criminal activity," and did not cover the arrest warrant for his probation violation.

The court concluded that even if the Ping Order was issued in violation of the pen-trap statute or state law, Wallace was not entitled to suppression of the evidence as neither the pen-trap statute nor the Texas Code of Criminal Procedure provides for suppression of evidence as a remedy for a violation.

Wallace also argued that the government violated the Fourth Amendment by obtaining his prospective cell site data by obtaining a §2703(d) court order based upon "specific articulable facts," instead of a search warrant based upon probable cause.

The court disagreed. The court found little distinction between historical cell site data and prospective cell site data. In this case, the court held that the information the government requested was, in fact, a stored historical record because it was received by the cell phone service provider and stored, if only momentarily, before being forwarded to the officers. The court then concluded that like historical cell site information, prospective cell site data is not covered by the Fourth Amendment.<sup>1</sup> Consequently, the court concluded that it is constitutional to authorize the collection of prospective or historical cell site information under §2703(d) if an application meets the lesser "specific and articulable facts" standard, rather than the Fourth Amendment's probable cause standard.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/16-40702/16-40702-2017-05-22.pdf?ts=1495495848>

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<sup>1</sup> In *U.S. v. Skinner*, the Sixth Circuit, the only appellate court to address the issue to date, held that obtaining prospective cell site data is not a Fourth Amendment search. The court reasoned that when a person voluntarily uses a cell phone, he has no reasonable expectation of privacy in the GPS data and location of his cell phone. See: [9 INFORMER 12](#).

## **Sixth Circuit**

### **United States v. Dunning, 857 F.3d 342 (6th Cir. Ky. May 18, 2017)**

A police officer used a computer program that is part of a law enforcement software package known as the Child Protection System (CPS), to search for internet protocol (IP) addresses that had recently shared child pornography on a peer-to-peer (P2P) file-sharing network. The CPS software locates specified files on public P2P networks and records the IP addresses that have downloaded and made available for sharing files containing child pornography. When the software finds shared materials on these public networks, it logs the date, time hash values, file name, and IP address. After the officer received a CPS report, he obtained a warrant to search Dunning's residence for evidence of child pornography. During the search, officers seized numerous electronic devices, which contained thousands of images of child pornography.

The government indicted Dunning for knowingly receiving and possessing child pornography.

Dunning filed a motion to suppress the evidence seized by the officers. Dunning argued that the search warrant application was not supported by probable cause because the officer did not have the source code for the CPS software, which rendered any information in the CPS report unreliable.

The court disagreed. First, the court reiterated that along with the First Circuit, it has rejected the argument that a higher degree of certainty is required when the government uses software to locate IP addresses. Second, the officer established that he was trained to use, and had previously used software to investigate child pornography crimes. Third, the officer identified and confirmed that the files containing child pornography had been shared by Dunning's IP address on various dates. Finally, the court noted that the CPS software merely records information it finds on public P2P networks, automating law enforcement's task of searching those public networks, a task that could be done in real-time using publicly available tools.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-5164/16-5164-2017-05-18.pdf?ts=1495134052>

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## **Seventh Circuit**

### **United States v. Radford, 856 F.3d 1147 (7th Cir. Ill. May 22, 2017)**

A uniformed police officer boarded an Amtrak train in Galesburg, Illinois to conduct a voluntary interview of Radford, whom he suspected might be transporting illegal drugs. The officer knocked on the door to Radford's roomette, which measured 3 ½ feet by 6 ½ feet, and Radford, without having to stand, opened the door. The officer identified himself and told Radford that he was doing "security checks" to "check for people transporting illegal narcotics on trains." The officer requested Radford's identification and train ticket. Radford handed the officer her identification and told him that she had an electronic train ticket, which was on her phone. After examining Radford's identification, the officer asked her a series of security questions and then asked Radford if she was transporting any illegal narcotics. After Radford replied, "no," the officer asked her if he could search her luggage. Radford told the officer, "I guess so. You're just doing your job." The officer asked Radford to step out of the roomette so he could search her

luggage and Radford complied. The officer searched Radford's purse and makeup bag and found 707 grams of heroin.

The government charged Radford with possession with intent to distribute heroin. Radford filed a motion to suppress the evidence, arguing that the officer only discovered the heroin after he had unlawfully seized her. Radford claimed that she was intimidated by the officer because the roomette was small; the officer was in uniform and armed; the officer was white and she was black, and the officer did not tell Radford that she had a right to refuse to answer his questions or consent to a search of her bags.

The court disagreed. First, the officer did not enter the roomette until Radford consented to the search of her bags. Second, the officer's uniform and firearm established his identity as a police officer. Third, there cannot be a rule that a police officer is forbidden to speak to a person of another race. Finally, because the officer did not threaten to arrest Radford, there was no need to tell Radford that she did not have to answer his questions or consent to a search. As a result, the court held that the officer did not seize Radford when he questioned her.

Radford further argued that she did not voluntarily consent to a search of her bags.

Again, the court disagreed. The court concluded that Radford's response "I guess so," to the officer's request to search her bags was the same as answering, "yes." In addition, the court noted that there was no other evidence to indicate that Radford's response was not voluntary.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/16-3768/16-3768-2017-05-22.pdf?ts=1495467059>

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## **Ninth Circuit**

### **S. B. v. County of San Diego, 2017 U.S. App. LEXIS 8452 (9th Cir. Cal. May 12, 2017)**

On August 24, 2013, three deputies went to David Brown's residence after family members reported that Brown, who had mental health issues, had been acting aggressively that day, and had warned that "someone was gonna get hurt" if he did not get alcohol. The deputies discovered that Brown was under the influence of Valium and had been drinking and taking medications all day. When Deputies Moses and Vories entered the house, they did not see Brown, but heard cabinets and drawers in the kitchen area opening and closing. After announcing their presence, Deputies Moses and Vories entered the kitchen from different sides of the wall that separated the kitchen and the living room. At this point, the deputies saw Brown, who had kitchen knives sticking out of his pockets. Deputy Moses pointed his gun at Brown and ordered him to raise his hands. Although Brown appeared to be under the influence, he eventually raised his hands to his shoulders, and complied when Deputy Moses ordered him to drop to his knees.

While Deputy Moses covered Brown at gunpoint, Deputy Vories and Deputy Billieux, who had now entered the kitchen, moved towards Brown to handcuff him. According to Deputy Moses, as soon as this occurred, Brown looked at Deputy Vories, lowered his arm, and told Deputy Vories to get away from him. Brown reached back, produced a knife with a six-to-eight-inch blade, moved as if he were going to get up, and pointed the knife at Deputy Vories. Believing that Deputy Vories was in imminent danger, Deputy Moses shot Brown three or four times, less than one second after Brown grabbed the knife, killing him.

The plaintiffs sued Deputy Moses and the County of San Diego claiming that Deputy Moses used excessive force in violation of the Fourth Amendment when he shot and killed Brown.

Deputy Moses filed a motion for summary judgment based on qualified immunity, which the district court denied after a hearing, which included testimony from Deputies Moses, Vories, and Billieux. Specifically, the district court found three material factual inconsistencies in the deputies' testimony, which it concluded needed to be resolved by a jury. First, whether Brown was on his knees or attempting to stand when he grabbed the knife and was shot. Second, whether Deputy Moses could see the other deputies clearly when he fired his weapon. Finally, whether Deputy Vories was three to five feet or six to eight feet from Brown when Brown grabbed the knife. Depending on how a jury resolved these inconsistencies, the district court held that a reasonable juror could conclude that Deputy Moses used excessive force when he shot Brown. Deputy Moses appealed.

The Ninth Circuit Court of Appeals reversed the district court, holding that Deputy Moses was entitled to qualified immunity. To determine whether an officer is entitled to qualified immunity, the court considers: (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct.

First, the court agreed with the district court that a reasonable juror could find a Fourth Amendment violation based on the inconsistencies from the deputies' testimony.

However, the court disagreed with the district court and held that it was not clearly established on August 24, 2013 that using deadly force in this situation, even viewed in the light most favorable to the plaintiffs, would constitute excessive force under the Fourth Amendment. The court noted that the general use of force principles outlined in [Graham v. Connor](#) and [Tennessee v. Garner](#) do not by themselves create clearly established law outside an obvious case. Instead, a court must "identify a case where an officer acting under similar circumstances as [Moses] was held to have violated the Fourth Amendment." Here the court could not find such a case, and this case did not involve an "obvious" or "run-of-the-mill" violation of the Fourth Amendment under [Graham](#) and [Garner](#).

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/15-56848/15-56848-2017-05-12.pdf?ts=1494608643>

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## **Tenth Circuit**

### **United States v. Morgan, 855 F.3d 1122 (10th Cir. Okla. May 2, 2017)**

At approximately 10:30 p.m., a police officer stopped a man for riding a bicycle against traffic and not using a bicycle headlight. As the officer approached the man, he saw the man move his hands towards his pants pockets. The officer ordered the man to keep his hands out of his pockets and asked him for identification. The man told the officer that he had done nothing wrong and had no identification. The man eventually told the officer that his name was Stanford Wallace, and gave the officer a birthdate and social security number. During this time, the officer noticed that as the man sat on his bicycle he kept his head and body straight forward, not making eye contact.

After the officer ran the man's information through police databases, he received back a "no result" response. A "no result" response means that no match exists for the information entered, which caused the officer to believe that the man had lied about his identity. The officer called for backup, reapproached the man, and asked him to step off his bicycle. The man refused to get off his bicycle and after backup officers arrived, he refused a second request to get off the bicycle, reaching for his front pants pocket instead. Believing that the man might be grabbing for a concealed weapon, the officers tackled him to the ground. Once on the ground, the man concealed his arms under his stomach, preventing the officers from handcuffing him. After the man refused to show his hands, one of the officers deployed his taser against him. The officers then handcuffed and frisked the man, finding a loaded handgun in his front pants pocket. The officers transported the man to the station where they identified him by his fingerprints as Philip Morgan.

The government charged Morgan with being a felon in possession of a firearm and ammunition.

Morgan filed a motion to suppress the firearm, arguing the officer exceeded the scope of the traffic stop by asking him for identification, then ordering him off his bicycle, and finally by taking him to the ground and deploying his taser against him.

The court disagreed. First, there was no dispute that the officer lawfully stopped Morgan after he saw Morgan violate the traffic laws by riding his bicycle against traffic and failing to use a headlight in the dark.

Second, as part of the lawful stop, the court held that the officer was authorized to request Morgan's identification even though Morgan was not required to have a driver's license to ride his bicycle. In addition, when Morgan gave the officer a false name, he delayed the officer's ability to learn his true identity. As a result, the officer could not immediately write a citation and complete the stop. The court concluded that Morgan was responsible for extending the duration of the stop, not the officer.

Third, the court held that the officer did not violate the Fourth Amendment by ordering Morgan to get off his bicycle. The court saw little difference between the officer ordering Morgan off his bicycle and when an officer orders a driver to step out of an automobile during a traffic stop, which is allowed under the Fourth Amendment.

Fourth, the court held that after Morgan disobeyed earlier commands not to reach inside his pants pocket, it was reasonable for the officers to tackle him to the ground to protect their own safety.

Finally, once on the ground, the court found that the officers were justified in deploying a taser against Morgan after he refused their commands to remove his hand from beneath himself.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/16-5015/16-5015-2017-05-02.pdf?ts=1493740858>

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## **Eleventh Circuit**

### **Jones v. Fransen, 2017 U.S. App. LEXIS 8816 (11th Cir. Ga. May 19, 2017)**

Jones' ex-girlfriend called 911 and reported that Jones had broken into her apartment and was carrying a television to his car, which was parked at her apartment complex. Officers Towler and Ross responded as well as Officer Fransen and his police-canine, Draco. Once on scene, the

officers believed that Jones had fled down a ravine into an area with heavy vegetation. Officer Fransen issued a “canine warning” and after receiving no response, entered the ravine with Draco to find Jones. Officers Ross and Towler provided backup. At some point Officer Fransen released Draco who located Jones. When Officer Fransen reached Jones, Draco was attached to Jones’ arm. According to Jones, Draco attacked him while he was lying motionless on the ground, and Draco refused to release his bite when Officer Fransen tried to pull him from Jones’ arm. Jones also claimed the other officers did nothing to protect him from Draco’s attack. As a result of this incident, Jones claimed that he suffered significant injury to his arm.

Jones sued Officers Fransen, Ross, Towler, Canine Draco, Gwinett County, and the Gwinett County Sheriff in his official and personal capacities.

First, Jones sued Officer Fransen under *42 U.S.C. § 1983* alleging an excessive use of force, in violation of the Fourth Amendment, and Officers Ross and Towler under *§ 1983* for failing to intervene and stop the canine attack.

The court held that the officers were entitled to qualified immunity. Without deciding whether the officers violated Jones’ constitutional rights, the court held that at the time of the incident it was not clearly established that the officers’ conduct violated the Fourth Amendment. Although there is case law in the Eleventh Circuit concerning police-canine bites, the court found that none of the cases involved a factual scenario that was similar enough to this case to have put the officers on notice that their actions violated a clearly established right.

In addition, the court held that the officers’ actions in this case were not so obviously unconstitutional that it would have been readily apparent that their conduct was unlawful, even in the absence of case law. When Jones fled, he led the officers into physically challenging terrain and he did not respond to Officer Fransen’s K-9 warnings. Consequently, a reasonable officer faced with this situation could have been concerned, at the time Draco was released, about entering the heavy brush to apprehend Jones and being met by a potential ambush.

Second, Jones sued Gwinnett County and the Gwinnett County Sheriff, in his official capacity, for negligence. The court held that the defendants were entitled to sovereign immunity, and dismissed this claim.

Third, Jones sued Officers Fransen, Towler, Ross and the sheriff, in their personal capacities, for negligence. The court held that the defendants were entitled to official immunity as provided in the Georgia constitution because Jones set forth no facts suggesting that the officers “acted maliciously or with an actual intent to cause harm.” As a result, the court dismissed this claim.

Finally, Jones sued “Officer K-9 Draco” for negligence in his individual capacity. The court dismissed this claim because under Georgia law only a “person” may be held liable for negligence, and as defined in the negligence statute, the word “person” does not include dogs.<sup>1</sup>

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca11/16-10715/16-10715-2017-05-19.pdf?ts=1495222278>

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<sup>1</sup> Similarly, the Seventh Circuit rejected the idea that a dog could be sued under *42 U.S.C. § 1983*.