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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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# The Informer – July 2018

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## **FLETC Talks**

A brief review of United States Supreme Court cases involving a variety of Constitutional issues relevant to law enforcement officers.

### **1. Arizona v. Gant (Search Incident to Arrest – Vehicles)**

In Gant, the Supreme Court outlined two situations in which the passenger compartment of a vehicle can be searched incident to arrest. Do you remember what they are?

<https://www.youtube.com/watch?v=p-Ts09utgKQ>

For the court's opinion: <https://www.supremecourt.gov/opinions/08pdf/07-542.pdf>



### **2. Government Employees and Free Speech Rights**

The First Amendment permits, in certain circumstances, government employees, to include police officers, to speak as private citizens on matters of public concern. Click on the link below for a discussion on the limitations a government employer can place on its employees right to free speech under the First Amendment.

[https://www.youtube.com/watch?v=W6EBfL9\\_oPY](https://www.youtube.com/watch?v=W6EBfL9_oPY)



### **3. Minnesota v. Dickerson (Plain-Touch Doctrine)**

When a police officer detects contraband through his or her sense of touch during a lawful Terry frisk, does the Fourth Amendment permit the officer to seize it?

<https://www.youtube.com/watch?v=3s4bDZ83krww>

For the Court's opinion: <https://supreme.justia.com/cases/federal/us/508/366/case.pdf>



### **4. O'Connor v. Ortega (Government Workplace Searches)**

A discussion of government employee Fourth Amendment rights regarding workplace administrative searches involving supervisors investigating suspected violations of agency policy, in comparison to law enforcement officers investigating criminal offenses.

<https://www.youtube.com/watch?v=WeTm3GrzR4Q>

For the Court's opinion: <https://supreme.justia.com/cases/federal/us/480/709/case.html>



# **FLETC Informer Webinar Schedule**

## **1. Kalkines and Garrity Overview (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](mailto:John.Besselman@fletc.dhs.gov))

John Besselman will look at these two important cases and how they affect the government's ability to obtain statements from its employees that may be suspected of criminal activity.

**Tuesday August 7, 2018 – 2:30 p.m. Eastern / 1:30 p.m. Central / 12:30 p.m. Mountain / 1130 a.m. Pacific**

**Thursday August 9, 2018 – 10:30 am. Eastern / 9:30 a.m. Central / 8:30 a.m. Mountain / 7:30 a.m. Pacific**

To participate in either webinar: <https://share.dhs.gov/garrity/>



## **2. United States Supreme Court Update (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](mailto:mary.m.mara@fletc.dhs.gov))

As the Supreme Court recently concluded its 2017-2018 session, it is a good time to see how the Court ruled on key criminal justice issues. This webinar will review five cases in which the Court addressed issues such as: Fourth Amendment searches regarding a person's cell site location information and vehicles located near a residence; the reasonable expectation of privacy a person has in a rental car; and the potential officer liability regarding the use of deadly force.

**Wednesday August 8, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific**

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



## **3. Carpenter v. United States: New Rules on Tracking Suspects (1-hour)**

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

In Carpenter v. United States, decided on June 22, 2018, the Supreme Court explained how the Fourth Amendment applies when the government tracks a suspect's location when it obtains cell site location information (CSLI) from a suspect's cell phone service provider. This webinar will discuss the short-term and long-term implications of the Carpenter decision, including how applications under Section 2703(d) of the Stored Communications Act must be changed immediately and the impact Carpenter might have on other methods law enforcement officers use to track the location of suspects.

**Wednesday August 15, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific**

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



#### **4. Use of Force: Articulation (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](mailto:mary.m.mara@fletc.dhs.gov)).

Knowing when to use force is vital, but if an officer cannot clearly explain later why he or she used force, the officer risks losing the legal battle that may follow. This webinar will help law enforcement officers better articulate facts and understand the legal principles that drive this ever-growing area of concern for the law enforcement community.

**Wednesday August 22, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific**

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



#### **5. Video-Only Surveillance: Refresher / Case Law Update**

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

This webinar will discuss issues that arise when installing a pole camera around a target's home and other legal implications of which law enforcement officers must be aware when utilizing video-only surveillance in other contexts. Mr. Walsh will review appellate court cases that have directly analyzed these issues as well as U.S. Supreme Court cases that might apply in this evolving area of the law.

**Wednesday August 29, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific**

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



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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 5537573 when prompted.**

# CASE SUMMARIES

## Circuit Courts of Appeal

### First Circuit

#### **United States v. Diaz-Jimenez, 2018 U.S. App. LEXIS 15868 (1st Cir. PR June 13, 2018)**

Two armed men entered a bank in San Lorenzo, Puerto Rico and robbed it. After the men left the bank, they drove away in a white van. Police officers quickly determined the identities of the robbers and learned that the men were possibly located at a house in a nearby residential area. As the officers waited down the street for the SWAT team to arrive, one of the robbers, Hector Serrano-Acevedo, drove past their location. The officers stopped Serrano and arrested him.

Approximately thirty minutes later, the SWAT team arrived, went to house, and knocked on the front door. After receiving no answer, the SWAT team opened the door and while remaining outside, called out to the people inside the home. Diaz's wife came out of the house first and was detained. Diaz came out of the house a short time later and was immediately arrested and handcuffed. The SWAT team then conducted a protective sweep of Diaz's house. During the sweep, the officers saw money on top of a bed and inside a toilet. The officers reported what they saw to the lead investigator, who asked Diaz for consent to search the house. Diaz verbally consented, but refused to sign a consent-to-search form. Based on Diaz's consent, officers searched Diaz' house and discovered evidence connecting Diaz to the bank robbery.

The government charged Diaz and Serrano with armed bank robbery.

Diaz filed a motion to suppress the evidence recovered from his house, arguing that the protective sweep conducted by the SWAT team violated the Fourth Amendment. The government argued the officers had reason to believe that a person involved in the robbery was inside Diaz's home when they arrived; therefore, the protective sweep was lawful.

A protective sweep is a quick and limited search of a premises incident to arrest, conducted to protect the safety of the police officers or others. For a protective sweep to be lawful, there must be articulable facts, along with rational inferences drawn from those facts, that would cause a reasonable officer to believe that the area to be swept harbors a person that poses a danger to the officers or others.

As Serrano and Diaz had already been detained at the time of the sweep, and Diaz's wife was outside the house, the court reasoned that the government's argument depended upon the presence of facts which supported a reasonable belief that at the time of the sweep, there was a third bank robber in the house. However, the court found that the government did not provide any facts supporting its position that a third person remained inside the house after Diaz and his wife came out. The lead investigator admitted that during the investigation he had not received any information that suggested the existence of a third bank robber. Instead, the evidence known to the officers consistently established that only two people were involved in the bank robbery. As a result, the court held that any assumption that there was a third bank robber was based purely on unfounded speculation, not articulable facts; therefore, the physical evidence discovered in Diaz's house during the sweep should have been suppressed.

The court further held that Diaz' subsequent consent to search his home was invalid, because it was tainted by the unlawful protective sweep. The Court found that the lead investigator sought and received Diaz's consent immediately after the SWAT team told him that they saw money in the house during the protective sweep, after Diaz was already in handcuffs. The court noted that the government provided no evidence that Diaz would have independently consented to the search if not for the unlawful sweep and the evidence discovered by the officers while conducting it.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/16-2009/16-2009-2018-06-13.pdf?ts=1528923605>

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## **Second Circuit**

### **United States v. Jones, 2018 U.S. App. LEXIS 16409 (2d Cir. CT June 19, 2018)**

After receiving a tip that Jones was involved in drug trafficking, police officers confirmed that he lived in an apartment located in a three-story, multi-family apartment building. While conducting surveillance, officers saw two individuals leaving Jones's building and conducted a traffic stop. During the stop, the officers seized crack cocaine, which they learned was purchased from Jones at his apartment.

A short time later, the officers arrested Jones after he left his building. The officers searched Jones incident to arrest and seized approximately \$4,000 from his person. The officers then obtained a warrant to search Jones's apartment and discovered crack cocaine, marijuana, drug paraphernalia, and ammunition. After searching the apartment, an officer went to the parking lot and located Jones's car. The parking lot was accessible to the tenants of Jones's apartment, as well as to the tenants of another multi-family apartment building next door. The officer looked into the rear window and saw a box of Lawman-brand ammunition. Knowing that Jones was prohibited from possessing ammunition because he was a convicted felon, officers conducted a warrantless search of Jones's car and seized cocaine, a digital scale, firearms, and ammunition.

The government charged Jones with a variety of criminal offenses.

Jones filed a motion to suppress the evidence seized from his car. First, Jones argued that the officers did not have probable cause to search the vehicle; therefore, the automobile exception to the Fourth Amendment's warrant requirement did not apply.

The court disagreed. The officer knew that Jones was a convicted felon who could not legally possess ammunition. As a result, when the officer saw the box of ammunition in the vehicle, the court concluded that the officer had probable cause to believe that Jones's car contained evidence of the crime of possession of ammunition by a felon. Alternatively, even without the officer's observation, the court found that by the time the officers searched Jones's car, they had established probable cause that it contained evidence related to Jones's involvement in drug trafficking.

Next, Jones argued that he had an expectation of privacy in his car, because the parking lot in which it was located was within the curtilage of his home.

Again, the court disagreed. In [Collins v. Virginia](#), the Supreme Court held that the automobile exception does not permit "a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein." First, the court held that the parking lot

was not within the curtilage of Jones's home, because it was a common area accessible to the other tenants of his apartment building and to tenants of a multi-family apartment building next door. Second, the court found that Jones did not have exclusive control over the parking lot, because he did not have the authority to exclude the tenants from using it. Consequently, the court held that Jones did not have a reasonable expectation of privacy when he parked his car there.

Finally, Jones argued that there were no exigent circumstances that justified the warrantless search of his car, because all of the suspects were in custody and the officers had secured the area by the time they searched it.

The court commented that the automobile exception does not have a separate exigency requirement, explaining that it only requires that a car be readily mobile and that probable cause exists to believe that it contains contraband.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca2/16-87/16-87-2018-06-19.pdf?ts=1529418609>

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### **Simon v. City of New York, 893 F.3d 83 (2d Cir. NY 2018)**

An Assistant District Attorney (ADA) obtained a warrant to arrest Simon under the New York State material witness statute. The warrant authorized officers to take Simon into custody and bring her to court on August 11, 2008 at 10:00 a.m. for a hearing to determine if she should be adjudged a material witness. The ADA gave the warrant to two New York City Police Department detectives.

On August 11, 2008, the detectives arrested Simon a little after 10:00 a.m. The detectives transported Simon to their precinct, put her in a small room, and closed the door. Simon remained in the room by herself for most of the day. Late in the afternoon, the detectives took Simon to the courthouse, where she met with the ADA who questioned her briefly about the case he was investigating. After the ADA realized that Simon did not have information pertinent to the case, the detectives told Simon she was free to leave, but that she had to return the next day to answer more questions. The detectives reminded Simon that they still had a warrant for her arrest.

At 9:00 a.m., the next day, the detectives went to Simon's apartment and told her she had to go back to the precinct to answer more questions and again mentioned the arrest warrant. The detectives drove Simon to the precinct and put her in a small room. Simons was questioned about the case throughout the day and was allowed to leave at 5:00 p.m. Over the two days, Simon was held by the ADA and detectives for eighteen hours.

Simon filed a lawsuit under 42 U.S.C. § 1983 claiming the ADA and the detectives (defendants) falsely arrested and imprisoned her in violation of the Fourth Amendment. Specifically, Simon argued that her detention on both days was unlawful, because the material witness warrant required the officers to take her to court on August 11, 2008 at 10:00 a.m. for a hearing.

After the district court granted the defendants qualified immunity, Simon appealed.

The Second Circuit Court of appeals reversed the district court and held that the defendants were not entitled to qualified immunity.

The court found that the warrant directed police officers to arrest Simon “forthwith” and to “bring her before this Court in order that a proceeding may be conducted to determine whether she is to be adjudged a material witness.” The warrant further stated that the proceeding was to take place on August 11, 2008 at 10:00 a.m. The court held that the officers violated the Fourth Amendment by subjecting Simon to a daylong detention at the precinct instead of producing her in court at the appointed time for the hearing.

The court further held that Simon’s daylong detention on August 11, 2008 violated clearly established law. Even though the court could find no prior cases concerning the unlawful detention of a person pursuant to a material witness warrant, the court held it was obvious that “flouting the plain terms of the warrant, as the defendants did here” was unreasonable.

Next, the court held that the detectives seized Simon for Fourth Amendment purposes on August 12, 2008. Although the detectives claimed that Simon voluntarily consented to go back to the precinct with them to answer questions, the court found no reasonable person in Simon’s position would have believed that she was free to refuse to accompany the detectives to the precinct. First, after Simon’s detention on August 11, the detectives reminded Simon that they had a warrant for her arrest and ordered her return the next day. Second, the next morning, the detectives went to Simon’s home, mentioned the arrest warrant, and told Simon that she had to accompany them to the precinct to answer more questions. Because this was seizure and not a consensual encounter, the court concluded that the detectives violated Simon’s Fourth Amendment rights.

Finally, the court held that on August 12, 2008, it was clearly established that securing a person’s presence at a police station with tactics employed by the detectives in this case was equivalent to conducting a formal arrest, for which probable cause to believe a crime has been committed is required. As a result, the court held that the defendants violated Simon’s clearly established Fourth Amendment right to be free from a suspicionless arrest and they violated Simon’s right to have the warrant that was issued for her arrest executed in conformity with its terms.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca2/17-1281/17-1281-2018-06-21.pdf?ts=1529589606>

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## **Fourth Circuit**

### **United States v. Kehoe, 2018 U.S. App. LEXIS 16624 (4th Cir. VA June 20, 2018)**

The Newport News Police Department received two phone calls reporting that a man was drinking at a sports bar while carrying a concealed firearm. The first caller reported he was at the sports bar and that a white male wearing “a blue-and-white striped shirt” had a gun “on his side” “under his shirt” and had been drinking. The caller gave the operator his first name and phone number. The second caller, an off-duty police officer, told the operator that a bartender at the sports bar had called him and stated that a white male was at the bar was “intoxicated” and “carrying a firearm.”

Based on these two phone calls, officers were dispatched to the sports bar, which was located in a “known problem area.” In the past, officers had responded to a number of calls at the bar and surrounding area for incidents involving gunshots, intoxicated individuals refusing to leave the bar, and fights in the parking lot.

At the bar, the officers spoke to a bartender who told them that several patrons had reported that a white male in a blue-and-white striped shirt had a gun. The bartender stated that he had not seen the gun himself, but that he had seen a “bulge.” The bartender told the officers the man was located in the adjacent pool hall area.

The officers went to the pool hall area and saw a man matching the description of the suspect, later identified as Kehoe. When the officers spoke to Kehoe, they noticed his speech was slightly slurred. Because the confined space, loud music, and pool tables made it difficult to have a conversation, the officers asked Kehoe to step outside with them. After Kehoe did not comply, the officers asked Kehoe to stand up and produce identification. When Kehoe stood up, the officers placed their hands on him and steered him toward the exit. Once outside, the officers again noticed Kehoe’s speech was slurred and his eyes were glassy, suggesting that he had consumed alcohol. The officers then handcuffed Kehoe, frisked him, and found a handgun concealed underneath his shirt. The officers arrested Kehoe.

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

Kehoe filed a motion to suppress the gun arguing that the officers lacked reasonable suspicion to believe he was involved in criminal activity when they seized him by placing their hands on him and escorting him out of the bar.

The court found that under Virginia law, to lawfully seize Kehoe, the officers needed reasonable suspicion to believe that while in the bar, Kehoe was carrying a concealed handgun and drinking alcohol. Based on the totality of the circumstances, the court held that when the officers seized Kehoe, they had reasonable suspicion to believe he was involved in criminal activity. First, the officers received a tip from the first 911 caller that a white male wearing a blue-and-white striped shirt was at the bar, carrying a concealed weapon, and drinking. Second, once at the bar, the officers corroborated several key facts from the first caller’s tip before they seized Kehoe. Specifically, the officers learned from the bartender that several patrons had reported that a white man in a blue-and-white striped shirt was carry a concealed weapon. The officers then identified the only man in the bar who matched the description, Kehoe. When the officers spoke to Kehoe, they noticed that his speech was slightly slurred. Finally, the officers knew the bar was located in a known “problem area.”

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca4/17-4536/17-4536-2018-06-20.pdf?ts=1529521229>

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## **Sixth Circuit**

### **United States v. Christian, 2018 U.S. App. LEXIS 17377 (6th Cir. MI June 26, 2018)**

On September 3, 2015, a police officer drafted an affidavit in support of a search warrant for Christian’s residence. The affidavit sought authorization to search the residence for controlled substances, firearms, records relating to trafficking in controlled substances, and cash that might be the proceeds from the sale of controlled substances. A state magistrate judge issued the search warrant and officers executed it on September 4, 2015. The officers seized heroin, cocaine, and marijuana, as well as two firearms from Christian’s residence.

The government charged Christian with several drug-related offenses.

Christian filed a motion to suppress the evidence seized from his residence. Christian argued that the search warrant was not supported by probable cause, because the officer's affidavit contained stale information and it failed to establish a sufficient nexus between the evidence sought and his residence. The district court denied Christian's motion and he was convicted on all counts with which he was charged. Christian appealed the denial of his motion to suppress to the Sixth Circuit Court of Appeals.

To establish probable cause to justify the issuance of a search warrant, the officer seeking the warrant must submit to the magistrate an affidavit that establishes a "fair probability" that contraband or evidence of a crime will be found at the place to be searched at the time the warrant is executed. This requires a nexus or connection between the place to be searched and the evidence sought.

Here, the court held that the search warrant affidavit failed to establish probable cause to believe that evidence sought by the officers would be located at Christian's residence; therefore, the district court should have suppressed the evidence seized by the officers.

First, in his affidavit, the officer stated that prior search warrants were issued for Christian's residence in 2009 and 2011 for drugs and that Christian had drug-related convictions, the most recent being from 2011. However, the court concluded that even if these facts support the conclusion that Christian was engaged in drug sales at his residence at some point, there was no evidence to suggest that these sales were continuous when the search warrant was sought and executed in September 2015.

Second, in his affidavit the officer stated that Christian sold drugs to a confidential informant (CI) during a controlled buy at his residence eight months prior to the execution of the search warrant. However, the affidavit provided very little detail regarding the controlled buy. For example, the affidavit did not: 1) state whether the officers observed the buy, 2) identify the type or amount of the controlled substance purchased, 3) indicate how the purchase was initiated, 4) reveal how the CI had purchased drugs from Christian previously, 4) or disclose whether the CI saw large quantities of drugs in Christian's possession or in the residence. As a result, the court held that a single controlled buy of an unknown quantity of an unknown drug by a CI with an unknown relationship to Christian did not establish that Christian was engaged in protracted or continuous drug trafficking.

Third, in his affidavit the officer stated he had received information from several debriefs of subjects who stated that Christian was large scale drug dealer who had sold them drugs at his residence within the last four months. The court found that this statement provided no indication as to the veracity or reliability of the information received from these subjects or provide any factual basis by which the magistrate could assess their reliability or veracity.

Finally, in his affidavit the officer stated that while conducting surveillance on September 3, 2015, officers seized drugs from a person who was seen "walking away from the area" of Christian's residence. The court found that the officer's use of the term "in the area" was a vague description that did not place the person at Christian's residence. The court noted that without a direct statement that the officers saw the person entering or leaving Christian's residence, or even at the residence, the court was not going to read this fact into the affidavit.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/17-1799/17-1799-2018-06-26.pdf?ts=1530037822>

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## **Eighth Circuit**

### **United States v. Pulido-Ayala, 892 F.3d 315 (8th Cir. MO 2018)**

Police officers set up a ruse checkpoint to investigate drug trafficking on Interstate 70. Immediately before an exit ramp, the officers placed several signs that announced a fictitious drug checkpoint located a quarter-mile ahead. During this time, an officer saw a car abruptly change lanes without using a turn signal and exit the highway after passing the checkpoint sign. The driver failed to obey the stop sign at the top of the exit ramp and immediately returned to the highway, travelling in the opposite direction, away from the fictitious checkpoint.

A police officer stopped the car for two traffic violations and brought the driver, Pulido, back to his patrol car. In the meantime, another officer remained near the car and spoke with the passenger, Sandoval. A few minutes later, an officer arrived with a drug-dog, which he planned to walk around the exterior of Pulido's car. However, before doing so, the officer asked Sandoval whether he wished to remain in the car during the dog sniff or get out. Sandoval exited the car, leaving the passenger-side door open.

The officer brought the dog to the rear of Pulido's car and when he signaled the dog to begin his sniff, the dog immediately pulled the officer toward the open passenger-side door. The dog then jumped into the car through the open door and alerted to the presence of drugs at the fender area. The officer pulled the dog out of the car and attempted to walk him around Pulido's car again; however, the dog jumped back into the car through the open door and alerted at the same location. Officers searched Pulido's car and found three kilograms of cocaine inside the fender.

The government charged Pulido with a drug-related offense.

Pulido filed a motion to suppress the evidence seized from his car. Pulido argued that officer conducted an unlawful search of his car when he allowed the drug-dog to enter it through the open door.

The court recognized that the use of a drug-sniffing dog around the exterior of a vehicle that has been lawfully stopped does not violate the Fourth Amendment. The court also noted that police officers generally cannot search the interior of a vehicle unless they have probable cause to believe that the vehicle contains contraband or evidence of a crime. Finally, the court found that while a drug-dog is an instrumentality of the police and thus subject to the same Fourth Amendment requirements, it is foreseeable that trained canines will react instinctively to the scent of drugs inside a vehicle.

However, the court did not determine whether the drug-dog instinctively jumped into Pulido's car or not. Instead, the court held that the officers had probable cause to search the Pulido's car under the automobile exception to the Fourth Amendment's warrant requirement before the dog entered it. Given the strong reaction of the drug dog while he was outside the car, together with Pulido's suspicious reaction to the drug checkpoint, the court concluded that the officers had probable cause to believe that Pulido's car contained contraband the moment before the dog crossed the threshold into the interior of the car.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-1371/17-1371-2018-06-05.pdf?ts=1528212626>

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**United States v. Tuton, 2018 U.S. App. LEXIS 17176 (8th Cir. AR June 25, 2018)**

A police officer stopped a commercial bus for following another vehicle too closely. The officer knew that the particular bus line was popular along the U.S.-Mexico border and that drug traffickers stored drugs in unlabeled, apparently abandoned luggage to keep police from linking a bag to a passenger if drug were discovered in the luggage. While talking with the driver, the officer noticed that his hands were trembling and that he appeared to be nervous. The officer found this odd, because he believed that professional drivers typically interacted more comfortably with law enforcement and regulatory authorities than average drivers. The driver told the officer that he was transporting four passengers from southern Texas to Milwaukee; however, the passenger manifest indicated the passengers were travelling to Chicago. Along with this inconsistency, the officer thought it was suspicious that the bus company would undertake a costly cross-county trip with only four passengers.

After asking the bus driver about the presence of contraband on the bus, the officer obtained consent from the bus driver to search the bus's luggage compartment. Inside the luggage compartment, the officer saw five or six bags with name tags and a black bag with no apparent markings or name tag. The officer opened the black bag, reached inside, and felt what he believed was a false bottom. While trying to access the hidden compartment, the officer saw a name tag bearing Tuton's name concealed beneath the bag's collapsed handle. The officer stopped searching the bag, requested a canine unit, entered the bus, and questioned Tuton.

A few minutes later, an officer arrived with a drug dog. Although the dog sniffed the individual bags in the luggage compartment, he did not alert on any specific bag. Instead, the dog provided an alert which caused the officer to believe that drugs were located somewhere in the luggage compartment. The officers searched all of the bags in the luggage compartment and found eight pounds of cocaine in Tuton's bag after breaking through the false bottom.

The government charged Tuton with possession with intent to distribute cocaine.

Tuton filed a motion to suppress the evidence found in his bag, claiming the officer committed several Fourth Amendment violations. The district court denied Tuton's motion to suppress and he appealed to the Eighth Circuit Court of Appeals.

First, the court held that the officer lawfully expanded the traffic stop when he asked the bus driver about the presence of contraband on the bus and if he could search the bus. The court added that Tuton had no authority to object to the bus driver's consent to search the bus and that Tuton was not seized during the search, as "he made the decision to ride the bus to its destination."

Second, the court did not decide whether the officer's initial search of Tuton's bag, in which he discovered the false bottom was unlawful. Instead, the court concluded that even if the officer acted unreasonably by opening what he believed to be abandoned property, stopping his search and requesting the canine unit after discovering his mistake was reasonable. Citing [Utah v. Strieff](#), the court added that "all the evidence suggests that the [mistake] was an isolated instance of negligence that occurred in connection with a bona fide investigation." In these circumstances, the court held that exclusionary rule did not require the suppression of the evidence subsequently discovered in Tuton's bag based on the drug dog's alert.

Third, the court held that the drug dog's alert established probable cause to search the bags in the luggage compartment. The court found that the dog and his handler had completed a 320-hour training course the previous year, the dog had earned a high accuracy rating for positive and negative alerts, and had trained in various environments.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-1493/17-1493-2018-06-25.pdf?ts=1529940652>

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## **Tenth Circuit**

### **United States v. Latorre, 893 F.3d 744 (10th Cir. WY 2018)**

Officer Weidler, an Illinois state trooper who supervised the state police's aviation unit, used a radar system to monitor an aircraft that was flying through Illinois airspace without an active transponder. Later that day, Officer Weidler identified the registered owner of the plane as Bruce Latorre from California. Officer Weidler learned from the United States Customs Air and Marine Operations Center (AMOC) that the AMOC had a record of previous cases involving Latorre and that the AMOC's database alerted whenever Latorre's aircraft was identified on radar. Officer Weidler also discovered that Latorre has previous arrests for distribution and possession of marijuana, distribution of controlled substances, and weapons offenses.

The next day, Officer Weidler learned that Latorre's plane had landed in Buffalo, New York, where it remained overnight before it took off the next morning. Officer Weidler tracked Latorre's airplane as it flew through Illinois heading west.

On the third day of the investigation, Officer Weidler learned that Latorre's plane, still flying west, would likely land at the airport in Evanston, Wyoming to refuel. Officer Weidler contacted officers in Wyoming and told them of his investigation into Latorre's flight. Officer Mathson arrived at the Evanston airport and followed Latorre from the airport lobby to his aircraft. Near the aircraft, Officer Mathson pulled his shirt and coat back to reveal his badge and gun and asked to see Latorre's aircraft registration and pilot's license. During an ensuing conversation with Officer Mathson and other officers that had arrived, Latorre consented to a search of his aircraft. Officer Mathson searched Latorre's aircraft and found a vacuum-sealed bag containing \$519,935 in cash. In subsequent interviews, Latorre admitted his role in a conspiracy in which he transported marijuana to New York and brought money back to California.

The government charged Latorre with trafficking marijuana.

Latorre filed a motion to suppress the evidence seized from his aircraft, arguing that Officer Mathson did not have reasonable suspicion to detain him at the Evanston airport.

The court disagreed, concluding that three factors, taken together, supported reasonable suspicion to suspect that Latorre was involved in criminal activity: Latorre's unusual travel itinerary, the lack of an active transponder on Latorre's aircraft, and Latorre's criminal history.

First, Latorre flew from California to New York where he spent one night. Latorre then embarked on the two-day flight back to California the next morning. The court held that traveling a long distance and staying only one night at his destination contributed to a finding of reasonable suspicion.

Second, Latorre embarked on two cross-country flights without an active transponder on his aircraft. The court recognized that transponders add a level of safety for pilots, as they transmit the aircraft's altitude to air traffic control to prevent collisions with other aircraft. The court found that flying without an active transponder contributes to reasonable suspicion, because it demonstrates an interest in avoiding detection at the risk of increased danger.

Third, the officers knew that Latorre had previous arrests for distribution and possession of marijuana, distribution of controlled substances, and weapons offenses.

Although Officer Weidler established reasonable suspicion to stop Latorre, he did not perform the actual stop, Officer Mathson did. However, the court held that Officer Weidler's reasonable suspicion was imputed to Officer Mathson through the collective knowledge doctrine; therefore, Officer Mathson's detention of Latorre was lawful.

The court further held that Latorre voluntarily consented to the search of his aircraft. First, although Officer Mathson pulled his coat behind his badge and firearm and displayed them to Latorre, Officer Mathson never touched his firearm. Second, Latorre's subsequent conversation with the officers took place in the public lobby of the airport, the officers wore plainclothes, and they did not display their weapons. Third, the officer did not threaten Latorre or make him any promises in exchange for his cooperation. Fourth, when Latorre gave consent, he was not handcuffed. Finally, there was no evidence that the officers coerce Latorre's consent to search his plane with a show of authority and one of the officers told Latorre that he was free to leave at any time. Under these circumstances, the court held that a reasonable person would believe he was free to leave or to deny the officers' request to search.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/17-8066/17-8066-2018-06-21.pdf?ts=1529596862>

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## **Eleventh Circuit**

### **United States v. Obando, 891 F.3d 929 (11th FL Cir. 2018)**

Crew members aboard a Marine Patrol Aircraft saw the crew of the *Siempre Malgarita*, a 32-foot "go-fast" vessel, throwing packages into the water. The *Siempre Malgarita* was located in international waters approximately 208 nautical miles off the coast of Guatemala. A nearby United States Coast Guard cutter, the *Edmonton*, launched a small vessel and recovered the packages, which tested positive for cocaine.

The *Edmonton* then launched a second vessel to intercept the *Siempre Malgarita*. The guardsmen boarded the *Siempre Malgarita* and encountered Obando and two other crewmen. When the guardsmen tried to determine the nationality of the *Siempre Malgarita*, none of the crewmen made a verbal claim of nationality or registry for the vessel. In addition, the crewmen could not produce documents establishing nationality or the identity of the homeport of the vessel or its last port of call. When asked, one of the crew members told the guardsmen that "he did not know" the vessel's nationality. The guardsmen noticed a flag painted on the hull of the vessel, which they believed to be a Columbian flag. However, when they asked one of the crewmen about the flag, he claimed that it was the flag of Ecuador, which is similar in appearance to the Columbian flag.

The Coast Guard contacted the government of Ecuador which could not confirm the nationality or registry of the *Siempre Margarita*. Consequently, the guardsmen determined that the *Siempre Margarita* was a vessel without nationality subject to the jurisdiction of the United States under the Maritime Drug Law Enforcement Act and arrested the crewmembers for drug-related offenses.

The Maritime Drug Law Enforcement Act grants the United States extraterritorial jurisdiction over “vessels without nationality.” The Act states that a vessel is “without nationality” if the person in charge of the vessel fails to make a claim of nationality or registry for that vessel upon request by an officer of the United States. One of the ways for a person in charge of a vessel to make a claim of nationality or registry is by “flying its nation’s ensign or flag.” If the person in charge of a vessel in international waters makes a claim of foreign nationality that is affirmed by the asserted nation, the United States generally must obtain consent from that nation before exercising jurisdiction.

In this case, Obando and the other crew members filed a motion to dismiss the charges, claiming that the United States lacked jurisdiction under the Maritime Drug Law Enforcement Act. Specifically, they argued that the Columbian flag painted on the side of the *Siempre Margarita* was a claim of Columbian nationality that obligated the Coast Guard to ask Columbian officials whether the vessel was registered there and whether Columbia consented to the exercise of jurisdiction by the United States.

The court held that the painted flag on the side of the *Siempre Margarita* was not a valid assertion of nationality under the Maritime Drug Law Enforcement Act. The court found that the ordinary meaning of the word “flying” requires a flag to be capable of freely moving in the air. In addition, the court noted that a maritime treatise, maritime etiquette, and other federal statutes concerning the display of flags “clearly imply that a flag flies only when hoisted in the air.”

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca11/17-11202/17-11202-2018-06-01.pdf?ts=1527877889>

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### **Manners v. Cannella, 891 F.3d 959 (11th Cir. FL 2018)**

Officer Cannella saw a car disregard a stop sign and decided to conduct a traffic stop. Officer Cannella got behind the car, driven by Manners, and activated his emergency lights and siren. Even though Manners knew a police officer was ordering him to stop, he drove approximately three blocks and pulled into a gas station. Once stopped, Manners exited his car and confronted Officer Cannella, who told Manners to get back inside his car. After Manners refused repeated orders to get back into his car, Officer Cannella told Manners that he was under arrest. As Officer Cannella attempted to handcuff Manners, a physical struggle ensued between the men. During the struggle, both men fell back into Manners’s car. Officer Cannella tried to pull Manners out of the vehicle, but Manners continued to resist him. At the time of the incident, Manners was 6 feet 2 inches tall and weighed 240 pounds while Officer Cannella was 5 feet 10 inches tall and weighed 215 pounds. A short time later, Officer Sabillon arrived on scene, saw Manners fighting with Officer Cannella, and deployed her taser against Manners. Afterward, both officers gained control of Manners and handcuffed him.

Manners went on trial on charged of battery on a law enforcement officer and resisting a police officer; however, a he was acquitted on both counts by a jury.

Manners subsequently sued Officers Cannella and Sabillon, claiming the officers used excessive force in arresting him in violation of the Fourth Amendment and for false arrest under Florida law.

The district court held that the officers were entitled to qualified immunity, finding that the officers did not violate any of Manners's clearly established constitutional rights. Manners appealed.

The Eleventh Circuit Court of Appeals agreed with the district court, holding that the officers were entitled to qualified immunity. First, the court held that Officer Cannella had probable cause to arrest Manners for fleeing or attempting to elude a law enforcement officer under Florida law. In this case, Manners's failure to stop when he reasonably and practicably could have, and when he knew Officer Cannella was ordering him to stop, provided probable cause for Officer Cannella to arrest him.

Second, the court applied the factors outlined by the U.S. Supreme Court in [Graham v. Connor](#) and held that the officers' use of force against Manners was objectively reasonable. The court found that the first [Graham](#) factor, the severity of the crime, favored Manners, as Officer Cannella initially saw Manners disregard a stop sign.

However, the court added that the second [Graham](#) factor, the immediacy of the threat, favored the officers. The court concluded that a reasonable officer on the scene could believe that Manners posed a threat to Officer Cannella when Manners, who was physically larger than Officer Cannella, moved back into his car and tried to escape the officer's grasp. In addition, when Officer Sabillon arrived and saw Manners struggling with Officer Cannella, she could have reasonably believed that Manners posed a threat to him.

The court held that the third [Graham](#) factor, resisting arrest, strongly favored the officers. Manners refused to be handcuffed and struggled with Officer Cannella's initial efforts and later with Officer Sabillon's efforts to arrest him for at least three minutes. During this time, the court concluded that it was reasonable for the officers to strike Manners and deploy a taser against him. The court added that video evidence clearly showed that the officers stopped using force against Manners once he was handcuffed and subdued.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/17-10088/17-10088-2018-06-04.pdf?ts=1528146056>

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**United States v. Morales, 2018 U.S. App. LEXIS 17885 (11th Cir. FL June 29, 2018)**

Officers suspected that Morales was selling drugs out of a house in Miami Gardens, Florida. Two officers went to the house where they encountered Berta Lang. Lang did not speak English, so one of the officers spoke to her in Spanish. The officer told Lang they were conducting a criminal investigation and asked her if she lived in the house. Lang told the officer she did, along with her daughter, Morales, and the couple's two small children. The officer asked Lang if she had access to the entire house, including her daughter's and Morales's room and Lang responded that she did. Lang told the officer that she went into the couple's room to clean it and take care of the kids. The officer told Lang that she had the right to refuse consent at any point, but Lang stated that she had "nothing to hide." Lang initially gave the officer verbal consent to search the house and a short time later, she signed a consent-to-search form. Although the consent-to-search form

was in English, the officer explained it to her in Spanish and told her a second time that she had the right to refuse consent.

Officers searched the closet in Morales's bedroom and found several handguns and ammunition in a duffel bag. The officers arrested Morales, who had remained outside the house speaking with some other men while the officers spoke to Lang, obtained her consent, and searched the house.

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

Morales filed a motion to suppress the evidence seized from the duffel bag in his bedroom closet, which the district court denied. Morales appealed.

Morales argued that the Lang did not voluntarily consent to the search of the house.

The court disagreed. First, there were only two officers inside the house and they did not draw their guns, raise their voices, or handcuff Lang. Second, the officers did not threaten or intimidate Lang to obtain her consent to search. Third, the officers testified that Lang fully cooperated and that she was very calm and professional when she spoke to them. Finally, the officer made sure that Lang understood that she had the right to refuse consent, first when he obtained her verbal consent and again when she signed the consent-to-search form.

Morales also argued that even if Lang's consent to search was voluntary, it was not valid because he was a physically present co-occupant, who was intentionally denied an opportunity to refuse the officers' entry and search of the house.

When people share a dwelling, a co-occupant can generally give valid consent if that person has "joint access or control" over the area to be searched. However, the consent of one co-occupant is not valid if another co-occupant is physically present and objects to the search. Because he was a physically present co-occupant, Morales argued that the officers were required to ask him for his consent to enter and search his house.

Again, the court disagreed. When the officers arrived, Morales was not present at the door when they spoke with Lang. Instead, Morales remained outside the house and was not involved in the conversation between the officers and Lang. In addition, there was nothing to indicate that the officers removed Morales from the doorway so that he could refuse consent to search. The court concluded that Morales was nothing more than a "potential objector," and that the officers did not have a duty to ask him whether he objected to the search. Consequently, the court held that Lang's consent was sufficient to allow the officers to search the house after she stated that she lived in the house and that she had access to the entire house, including Morales's bedroom to clean it and take care of the children.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/16-16507/16-16507-2018-06-29.pdf?ts=1530289842>

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