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

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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 Center's 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 Center. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List; have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting the Legal Division web page http://www.fletc.gov/training/programs/legal-division/the-informer .

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Free FLETC Informer Webinar Series Schedule

The FLETC Informer Webinar Series continues in April and May with the following webinars scheduled:

1. **Best Law Enforcement Practices for eDiscovery in Criminal Investigations and Prosecutions**

   Presented by Robert Cauthen, FLETC Legal Division
   50-minute webinar – Choose one of two sessions.

   Dates and Times: Wednesday, April 24, 2013: 2:30 pm EDST Click **HERE** to register.

   Wednesday, May 1, 2013: 2:30 pm EDST Click **HERE** to register.

2. **Government Workplace Searches**

   Presented by John Besselman, FLETC Legal Division
   50-minute webinar – Choose one of two sessions.

   Dates and Times: Thursday, April 25, 2013: 2:30 pm EDST Click **HERE** to register.

   Tuesday, April 30, 2013: 11:00 am EDST Click **HERE** to register.

3. **Canines, Cops, and Curtilage – Using Drug Dogs After *Florida v. Jardines***

   Presented by Bruce-Alan Barnard, FLETC Legal Division
   50-minute webinar – Choose one of three sessions

   Dates and Times: Monday, May 6, 2013: 12:30 pm EDST Click **HERE** to register.

   Monday May 13, 2013: 2:30 pm EDST Click **HERE** to register.

   Tuesday May 14, 2013: 4:30 pm EDST Click **HERE** to register.

4. **Search Incident to Arrest – Digital Devices in a Post-*Gant* World**

   Presented by Mikell Henderson, FLETC Legal Division
   50-minute webinar – Choose one of two sessions

   Dates and Times: Friday, May 17, 2013: 3:30 pm EDST Click **HERE** to register.

   Wednesday, May 22, 2013: 12:30 pm EDST Click **HERE** to register.

If there are any specific legal topics that you would like to see offered in future FLETC Informer webinars, please let us know!

Address any inquiries to lgdwebinar@fletc.dhs.gov

CASE SUMMARIES

United States Supreme Court

Florida v. Jardines, 2013 U.S. LEXIS 2542 (U.S. 2013)

The police received an anonymous tip from a person who claimed Jardines was growing marijuana in his house. After conducting surveillance on the house for fifteen minutes, two police officers approached Jardines' house with a drug-detection dog. The dog alerted to the presence of drugs while on the front porch and after sniffing at the base of the front door. Based upon this information, officers obtained a warrant to search Jardines' house where they seized live marijuana plants and equipment used to grow those plants.

At trial, Jardines moved to suppress the marijuana plants and related equipment, arguing the dog-sniff constituted an unreasonable search. The Florida Supreme Court held the sniff-test conducted by the drug-dog was a substantial government intrusion into Jardines' house and constituted a *Fourth Amendment* search, requiring suppression of the evidence the officers had seized.

The United States Supreme Court agreed and held the government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the *Fourth Amendment*.

First, as the Supreme Court recently articulated in *U.S. v. Jones*, when the government obtains information by physically intruding on persons, houses, papers or effects, a *Fourth Amendment* search has occurred. Here, the police officers were gathering information on Jardines' front porch, clearly part of the curtilage of the house, which is afforded the same *Fourth Amendment* protections as the rest of the house.

Second, the police officers gathered information, in the form of the drug dog's alert, by physically entering and occupying the curtilage of the house without Jardines' explicit or implicit permission to be there. The courts have held homeowners implicitly permit visitors to approach their houses by walking up to the front door, knocking promptly, and waiting briefly for a response. As a result, a police officer may approach a home and knock just as any private citizen might do. However, introducing a trained police dog to explore the area around the home, hoping to discover incriminating evidence is different. It is not reasonable to believe a homeowner's implicit invitation for visitors to approach his front door extends to police officers wishing to approach the front door to conduct a search with a drug-dog.

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

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Millbrook v. United States, 2013 U.S. LEXIS 2543 (U.S. 2013)

Millbrook sued the United States under the Federal Tort Claims Act (FTCA) alleging three Correctional Officers subjected him to a sexual assault and battery while he was an inmate at a federal prison.

Under the FTCA, the United States is not liable for intentional torts committed by its employees, except for certain intentional torts committed by investigative or law enforcement officers acting within the scope of their employment.

In an unpublished opinion, the Third Circuit Court of Appeals affirmed the district court's dismissal of Millbrook's claim because he did not allege the officers' conduct occurred during a search, seizure of evidence or course of an arrest for a violation of federal law.

In a unanimous opinion, the Supreme Court reversed the Third Circuit, holding the law enforcement provision to the FTCA applies to all conduct of law enforcement officers within the scope of their employment, not just to their investigative or law enforcement activities. The court held there was no basis for concluding a law enforcement officer's intentional tort must occur in the course of executing a search, seizing evidence or making an arrest in order to subject the federal government to liability.

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

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Circuit Courts of Appeals

1st Circuit

United States v. Sparks, 2013 U.S. App. LEXIS 6045 (1st Cir. Mass. Mar. 26, 2013)

Federal agents suspected Sparks was involved in three bank robberies. In December 2009, the agents, without a warrant, placed a global positioning satellite (GPS) tracker on a car used by Sparks. The agents used the tracker to locate the car near the scene of a bank robbery. After losing sight of the car, the agents used the tracker to re-locate it and attempted to conduct a traffic stop. The car crashed and Sparks and another occupant fled on foot. The agents searched the car and found evidence related to the bank robbery.

Sparks moved to suppress the evidence obtained as a result of the placement of the GPS tracker on the car. The district court denied this motion, holding the agents' use of the GPS tracker was not a search under the *Fourth Amendment* while Sparks was traveling on public roads.

After the district court denied Sparks' motion to suppress, the United States Supreme Court decided *U.S. v. Jones*, which held "the government installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" for *Fourth Amendment* purposes.

The court of appeals found that even if the agents' use of the GPS tracker violated the *Fourth Amendment* in light of *Jones,* suppression of the evidence would be improper because the good-faith exception to the exclusionary rule applied. When the agents installed and monitored the

GPS tracker in December 2009, binding precedent in the First Circuit allowed the agents to install and monitor a GPS tracker as they did. The agents' reliance on clear and settled circuit precedent to install a GPS tracker and monitor it for one week was objectively reasonable.

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

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2nd Circuit

Winfield v. Trottier, 2013 U.S. App. LEXIS 4635 (2d Cir. Vt. Mar. 6, 2013)

Officer Trottier stopped Winfield for speeding. During the stop, Winfield gave Trottier consent to search her car. Trottier, who admitted he was not looking for anything in particular, found an envelope, opened it and read the document that was inside. After finishing the search and finding nothing, Trottier issued a speeding citation and allowed Winfield to leave.

Winfield sued Trottier, claiming he violated the *Fourth Amendment* by reading her mail.

The district court held Trottier was not entitled to qualified immunity.

The court of appeals held Winfield's consent to search her car did not extend to Trottier's reading the document inside the envelope. The *Fourth Amendment* specifically protects the right of the people to be secure in their papers. The court noted, reading a person's personal mail is a far greater intrusion than a search for contraband because it can invade a person's thoughts. Given this greater intrusion, a reasonable person would not assume giving consent to a general search of a car would include consent to search a person's personal papers. Once Trottier opened the envelope and failed to discover large sums of money or contraband, he should have moved on to search the rest of the car. Trottier exceeded the scope of Winfield's consent when he read the letter and violated her *Fourth Amendment* right to be free from unreasonable searches.

However, the court of appeals held Trottier was entitled to qualified immunity because the right he violated was not clearly established at the time of the incident.

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

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Carroll v. County of Monroe, 2013 U.S. App. LEXIS 4940 (2d Cir. N.Y. Mar. 12, 2013)

Police officers assigned to a narcotics enforcement team executed a no-knock warrant for Carroll's house. After a battering ram was used to break through the front door, the first officer into the house shot and killed Carroll's dog, which charged at him while barking and growling.

Carroll sued the officers, claiming the shooting of her dog was an unconstitutional seizure in violation of the *Fourth Amendment*. Carroll argued the officers, knowing she had a dog, should have formulated a plan to secure the dog by non-lethal means.

After a two-day trial, the jury returned a verdict in favor of the officers.

While the unreasonable killing of a companion animal constitutes an unconstitutional seizure of personal property under the *Fourth Amendment*, in some circumstances it is reasonable for an officer to shoot a dog he believes poses a threat to his safety or the safety of others.
Based upon the evidence presented at trial, the court of appeals found that no amount of planning or training would have changed the outcome in the case. Carroll did not offer evidence to establish a non–lethal means of controlling her dog would have allowed the officers to escape the fatal-funnel inside the doorway and effectively execute the no-knock warrant. Consequently, the jury could have reasonably found the officer would still have needed to shoot Carroll's dog, even if the officers had developed a non-lethal plan to restrain it.

In addition, there was sufficient evidence for the jury to find the officer reasonably feared for his safety when Carroll's dog aggressively approached him in the entryway, and the jury was entitled to believe the officer's testimony that non-lethal methods would not have controlled the dog.

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

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6th Circuit

United States v. Kinison, 2013 U.S. App. LEXIS 5344 (6th Cir. Ky. March 19, 2013)

Lauren Omstott told the police her boyfriend, Kinison, had been sending her text messages describing his desire to get them both involved with a group that allegedly adopted children and then allowed others to engage in sex with those children. Omstott consented to a search of her cell phone, and an officer downloaded over sixteen hundred pages of text messages, corroborating Omstott's claims. In one of the text messages, Kinison admitted to viewing child pornography videos on the internet. When asked about this text message, Omstott told the officers Kinison was viewing the videos on his home computer. The officers conducted a records check and verified Kinison's address. Shortly afterward, the officers obtained a warrant to search Kinison's house. While the officers were executing the warrant, Kinison drove up in his car. The officers saw Kinison's cell phone in plain view in the vehicle's console and obtained a warrant to search his car and seize the phone. A forensic examination of Kinison's computer revealed images and videos of child pornography.

The district court granted Kinison's motion to suppress, finding the search warrant affidavit failed to establish probable cause to search Kinison's house and car.

The court of appeals reversed, holding the search warrant affidavit provided the magistrate with a substantial basis for believing evidence of child pornography would be found in Kinison's home and car.

First, Omstott was a credible witness. She met with the officers three times and subjected herself to prosecution if she made false statements to them. In addition, some of the text messages she voluntarily provided to the officers, subjected her to potential criminal prosecution based upon their content. The court noted, such admissions of crime establish indicia of credibility.

Second, the court found there was a nexus between the place to be searched, Kinison's house and car, and the evidence sought, child pornography, on Kinison's computer and phone. The

language of the text messages clearly indicated Kinison's interest in joining a group that sexually abused children and that he had viewed child pornography videos on the internet. The fact Kinison would be viewing child pornography at home is consistent with the court's prior rulings that child pornography crimes are generally carried out in the secrecy of the home.

Finally, because the text messages to Omstott were sent from a phone, there was probable cause to believe evidence of child pornography would be found in Kinison's car after the officers saw a cell phone in plain view in his car.

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

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7th Circuit

Engel v. Buchan, 2013 U.S. App. LEXIS 4648 (7th Cir. Ill. Mar. 5, 2013)

Engel was released from prison after the Missouri Supreme Court vacated his conviction based upon the State's failure to disclose exculpatory evidence in violation of *Brady v. Maryland*. Engel subsequently sued Buchan, a former federal agent, under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*. Engle claimed Buchan framed him by fabricating evidence, manipulating witnesses and then suppressing this evidence in violation of *Brady*.

Buchanan argued Engel could not sue him for monetary damages under *Bivens* for a *Brady* violation.

First, the court held a *Bivens* cause of action is available for a *Brady* violation committed by a federal law enforcement officer in connection with a state criminal prosecution.

Second, the court held Engel's complaint contained sufficient factual allegations to state a plausible claim for violation of his due process rights under *Brady*.

Third, because the *Brady* right was clearly established at the time of the alleged violation, Buchanan was not entitled to qualified immunity.

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

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Kristofek v. Village of Orland Hills, 2013 U.S. App. LEXIS 6073 (7th Cir. Ill. Mar. 11, 2013)

Officer Kristofek arrested an individual for several traffic violations. While Kristofek was filling out the arrest paperwork at the police station, he was ordered to release the individual because he was the son of a former mayor of a nearby town, and to delete any information concerning the arrest from the computer. Kristofek disagreed with what he believed was political corruption, and expressed his concerns to fellow officers, his supervisors and eventually made a report to the Federal Bureau of Investigation (FBI). When the police chief found out about this conduct, he fired Kristofek.

Kristofek sued the chief and the village, claiming he was fired in retaliation for voicing his concerns over alleged corruption in the department, in violation of the *First Amendment*.

A *First Amendment* retaliation claim by a public employee requires, at a minimum, the speech being retaliated against involves a matter of "public concern."

The district court dismissed the lawsuit, holding Kristofek's speech did not involve a matter of public concern because his sole motive in reporting the incident was to protect himself from potential civil and criminal liability.

The court of appeals disagreed and reversed the dismissal of Kristofek's lawsuit against the chief. After he was told to release the individual because of his political connections, Kristofek told his deputy chief the unequal application of the law due to political considerations was improper and possibly illegal. While Kristofek may have been trying to protect himself by reporting the incident, it was plausible he was also motivated to help the public. Any reasonable person would understand a report to the FBI could result in changes to police practices within the department.

The court of appeals also reversed the dismissal of Kristofek's lawsuit against the village. To hold the village liable for the chief's actions, Kristofek had to establish the chief was the person with final policymaking authority for the village regarding hiring and firing within the police department. The court held Kristofek made a plausible claim the chief had at least *de facto* authority to set policy for hiring and firing. Kristofek's lawsuit suggested the chief was fully in charge of the police department and that his hiring and firing decisions were not reviewed.

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

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8th Circuit

Burlison v. Springfield Public Schools, 708 F.3d 1034 (8th Cir. Mo. March 4, 2013)

Police officers arrived at a public high school to conduct a sweep of randomly selected areas in the building with a drug-dog. The sweep was conducted in accordance with the school district's standard operating procedures in an effort to combat the drug problem at the school. One of the areas to be swept was a science classroom. The officers directed all students and the teacher to leave the room, and to leave all backpacks, purses and personal belongings behind. Afterward, the officers spent five minutes in the classroom, however, the drug-dog did not alert to anything. The officers testified they did not search any students' possessions during this time.

Burlison brought a lawsuit on behalf of her son, C.M., claiming the school district, superintendent, principal and sheriff violated her son's *Fourth Amendment* rights by separating him from his backpack during the drug-dog sweep.

The court held the school district, officials and sheriff were entitled to qualified immunity.

Even if C.M.'s backpack was seized when the officers directed him to leave it in the classroom while the sweep occurred, the court concluded the seizure was part of a reasonable procedure to maintain the safety and security of the students at the school. In addition, C.M.'s rights were not violated by his brief separation from his backpack because he normally would not have been able to access or move it during class time without permission.

In addition, the school district and its officials established a need for drug-dog sweeps as there was substantial evidence showing there were drug problems in the schools within the district. The procedures used by the school district and police officers to conduct the sweeps reasonably addressed the concerns over drug usage in school in a manner that was minimally intrusive to the students and their belongings.

Finally, the sheriff was not liable because he did not participate in the sweep and there was no evidence he failed to train or supervise the officers who conducted it.

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

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United States v. Beard, 2013 U.S. App. LEXIS 4716 (8th Cir. Ark. Mar. 8, 2013)

A State Trooper discovered more than one hundred eighty pounds of raw marijuana in Beard's car after pulling him over for a traffic violation.

Beard argued the search violated the *Fourth Amendment* because the trooper did not have a lawful reason for the traffic stop.

The court disagreed. First, the trooper's description of Beard's erratic driving gave him reasonable suspicion Beard had violated Arkansas traffic laws. As a result, the trooper lawfully stopped Beard's car. Second, the trooper's search of the car and seizure of the marijuana was lawful under the automobile exception because the trooper immediately smelled raw marijuana after Beard rolled down his car window.

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

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United States v. Havlik, 2013 U.S. App. LEXIS 6186 (8th Cir. Ark. Mar. 28, 2013)

The Federal Bureau of Investigation (FBI) learned of Havlik's possible involvement in a child pornography ring during an investigation of commercial child pornography websites. The FBI forwarded Havlik's name to the United States Postal Inspection Service. A Postal Inspector sent Havlik a solicitation letter in which he posed as a distributor of child pornography, and invited Havlik to request a catalog. Havlik requested a catalog and afterward returned an order form for the purchase of three child pornography videos.

Postal Inspectors arranged for a controlled delivery of the child pornography videos to Havlik's post office and obtained a search warrant for his residence. After Havlik returned home with the videos, police officers entered his property and ordered him to the ground. When Havlik did not comply an officer forced him to the ground and handcuffed him. An emergency medical technician examined Havlik, who was complaining of chest pains, and then an officer read Havlik his *Miranda* rights. When the officer informed Havlik of his right to counsel, Havlik replied, "I don't have a lawyer. I guess I need to get one, don't I?" The officer continued by advising Havlik an attorney would be appointed for him if he could not afford one. Havlik responded, "I guess you better get me a lawyer then." The officer continued reading the *Miranda* rights but stopped when Havlik again complained of chest pains. After a brief medical examination, a Postal Inspector read Havlik his *Miranda* rights, Havlik waived his rights and made incriminating statements.

Havlik claimed the Postal Inspector violated the rule of *Edwards v. Arizona* by continuing to question him after he invoked his right to counsel. In addition, Havlik claimed he was entrapped by the government.

When a suspect requests counsel during an interrogation, police must cease questioning until counsel has been made available or the suspect reinitiates communication with the police. However, a suspect must articulate his request for counsel sufficiently clearly so a reasonable police officer would understand the statement to be a request for an attorney. In addition, there is no requirement an officer must ask clarifying questions when a suspect makes an ambiguous statement regarding counsel.

The court of appeals found Havlik's statement, "I don't have a lawyer. I guess I need to get one, don't I?" was insufficient to trigger the officer's obligation to stop questioning. A reasonable officer could have understood Havlik's statement to be a request for advice about whether to seek counsel, rather than a request for counsel.

The court also found Havlik's statement, "I guess you better get me a lawyer then." was not significantly different from the statement, "maybe I should talk to a lawyer," which the Supreme Court found to be an ambiguous request for counsel in *Davis v. United States*.

Because Havlik's statements were not an unequivocal or unambiguous request for counsel, and the officers were not required to ask clarifying questions, there was no violation of the *Edwards* rule when the Post Inspector subsequently obtained a *Miranda* waiver from Havlik and questioned him.

The court further ruled the facts surrounding Havlik's waiver and statements to the Postal Inspector established he made them voluntarily. Despite the presence of a team of law enforcement officers on the property, only three were involved in questioning Havlik. In addition, three different medical specialists evaluated Havlik and he signed the *Miranda* waiver after the last specialist concluded he had "calmed down" and was not seriously injured.

The court held the government did not entrap Havlik. When government agents offer a subject the opportunity to commit a crime, and the subject promptly accepts the offer, there is no entrapment. Here, the Postal Inspector sent Havlik one solicitation letter inviting him to request a catalog of child pornography. Havlik promptly requested a catalog and the Postal Inspector complied with that request. In addition, the government introduced evidence of Havlik's predisposition to commit child pornography related offenses. The Postal Inspector sent Havlik the solicitation letter after the FBI discovered Havlik's name in customer records of a company that processed credit cards for commercial child pornography websites. In addition, during the execution of the search warrant, the officers found multiple VHS tapes containing child pornography Havlik obtained from sources other than the government.

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

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United States v. Hager, 2013 U.S. App. LEXIS 6294 (8th Cir. N.D. Mar. 29, 2013)

State Police officers investigating Mueller for child pornography offenses discovered he had sent electronic images of his daughters to Hager. Federal agents applied for a warrant to search

Hager's residence for copies of the images of Mueller's daughters, and for the metadata, to aid the state officers in their case against Mueller. The magistrate judge issued a warrant authorizing the agents to search Hager's residence for, and the seizure of "sexually suggestive images depicting Mueller's minor daughters wherever they may be stored or found." During the search of Hager's residence, federal agents found over seven hundred VHS tapes. Hager told the agents he used a WebTV connection to copy information from the Internet to VHS tapes. One of the agents contacted an Assistant United States Attorney and who told the agent the VHS tapes were within the scope of the search warrant. Agents seized the tapes and upon viewing, they found child pornography. The agents stopped viewing the tapes and obtained an additional warrant.

Hager argued the first warrant authorized only a search for the metadata of the sexually suggestive images of Mueller's daughters and not a search of the VHS tapes because the VHS tapes could not contain metadata.

The court disagreed, holding the agents did not exceed the scope of the search warrant because it authorized the agents to search for and seize the images of Mueller's daughters "wherever they may be stored or found." Even though the agents sought to examine any metadata from the Mueller images, they sought to recover the metadata in addition to, not to the exclusion of, the images themselves.

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

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9th Circuit

United States v. King, 2013 U.S. App. LEXIS 4730 (9th Cir. Cal. Mar. 8, 2013)

Police officers believed King was involved in a homicide. When they checked his criminal history, the officers learned he was on felony probation. A term of King's probation allowed officers to search King's premises, without a warrant, any time of the day or night with or without probable cause. Based on this authority, officers searched King's residence and found an unloaded shotgun under his bed. The government indicted King for being a felon in possession of a firearm.

King argued the search of his residence, without any suspicion he was involved in criminal activity, violated the *Fourth Amendment*.

The court noted the judge who sentenced King determined it was necessary to condition King's probation on his acceptance of the suspicionless search provision. The probation order clearly expressed this provision, and King knowingly accepted it. As a result, the court held a suspicionless search conducted pursuant to a suspicionless-search condition of an individual's probation agreement does not violate the *Fourth Amendment*.

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

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United States v. Cotterman, 2013 U.S. App. LEXIS 4731 (9th Cir. Ariz. Mar. 8, 2013)

Cotterman and his wife were driving home to the United States from Mexico when they reached a port of entry in Arizona. During primary inspection by a border agent, the Treasury

Enforcement Communication System (TECS) returned a hit indicating Cotterman had previous convictions for sex offenses involving children, and that he was potentially involved in child sex tourism. Based upon this information, Cotterman and his wife were referred to secondary inspection. The border agents called the contact person listed in the TECS entry, and following their conversation, believed the hit to reflect Cotterman's involvement in some type of child pornography offense. The border agents learned the TECS hit was part of Operation Angel Watch, which was aimed at combatting child sex tourism by identifying registered sex offenders who travel frequently outside the United States. The border agents were advised to review any computers or cameras for evidence of child pornography. The agents searched two laptop computers and three digital cameras they found in Cotterman's vehicle and discovered personal photographs along with several password-protected files. Afterward, the border agents seized Cotterman's laptops and transported them to a forensic examiner, located approximately one hundred seventy miles away. Two days later, the forensic examiner discovered images of child pornography within the unallocated space and password protected files on Cotterman's computers.

Cotterman argued the warrantless search of his computers violated the *Fourth Amendment*.

The district court suppressed the child pornography evidence. A three-judge panel of the Ninth Circuit Court of Appeals reversed the trial court. (See **4 Informer 11**) Subsequently, a majority of the Ninth Circuit Court of appeals judges ordered a rehearing in front of all of the Ninth Circuit Court of Appeals judges.

First, the court held the forensic examination of Cotterman's computers was not an extended border search. An extended border search is a search away from the border, where entry into the United States is not apparent, and requires the officers have a reasonable certainty of a recent border crossing and reasonable suspicion of criminal activity. Here, Cotterman was stopped and searched at the border. The border search of Cotterman's computers was not transformed into an extended border search simply because the devices were transported and examined at a location away from the border.

Second, the court held the forensic examination of Cotterman's computers required a showing of reasonable suspicion. After the initial search at the border, a forensic examiner made copies of the computers' hard drives and performed examinations that took several days before the child pornography evidence was discovered. An exhaustive forensic search of a copied computer hard drive intrudes upon privacy and dignity interests to a far greater degree than a cursory search at a border. The court determined that applying reasonable suspicion, as the standard, would not impede law enforcement's ability to monitor and secure our borders, or to conduct appropriate searches of electronic devices.

Finally, the court held the border agents had reasonable suspicion to conduct their initial search at the border and subsequent forensic examination of Cotterman's computers. Cotterman's TECS alert, prior child-related convictions, frequent travels, crossing from a country known for sex tourism, and collection of electronic equipment along with the parameters of the Operation Angel Watch program, gave rise to reasonable suspicion of criminal activity.

In addition, the existence of password-protected files was relevant in assessing the reasonableness of the scope and duration of the search of Cotterman's computers. After Cotterman failed to provide the agents with the passwords to the protected files, it took the forensic examiner days to override the computer security and open the image files of child

pornography. Consequently, the scope and manner of the search was reasonable under the *Fourth Amendment*.

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

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10th Circuit

United States v. Barajas, 2013 U.S. App. LEXIS 4475 (10th Cir. Kan. Mar. 4, 2013)

During an investigation into a drug trafficking organization, federal agents engaged in wiretap surveillance and global positioning satellite (GPS) pinging of cell phones used by members of the organization, to include Barajas. Under the court orders that authorized the wiretaps, agents were also authorized to conduct the GPS pings, where the agents would contact the service provider, and the service provider would give the agents the current GPS coordinates of the particular cell phone, within a certain radius.

At trial, the government introduced conversations recorded during the wiretaps and GPS data obtained from pinging Barajas' cell phones.

Barajas argued the affidavits in support of the wiretaps did not establish necessity for the wiretaps as required under *Title III*. Barajas also argued GPS pinging should not have been covered by the wiretap orders because there was no probable cause in the affidavits to support the search for GPS data.

First, the court held the government satisfied the necessity requirement in its affidavits requesting the wiretaps. In each affidavit, the agent explained why traditional investigative techniques such as confidential sources and visual surveillance were ineffective, and why other techniques like trash searches and search warrants would prove ineffective if tried. The court commented the government was not required to exhaust all other conceivable investigative procedures before resorting to wiretapping. In addition, the need for the government to discover the size and scope of a criminal conspiracy often justifies the authorization of wiretaps.

Second, the court was not convinced Barajas' use of the cell phones for criminal activity was enough to authorize the agents access to the GPS data. Without an explanation of how Barajas' location would reveal information about the workings of the conspiracy, the court was reluctant to find probable cause existed to obtain to the GPS data. However, the court held it did not have to resolve this issue as the good-faith exception applied.

The court held the affidavit in support of the wiretap order established a minimally sufficient nexus between the illegal activity and the place to be searched. The government knew a person known only as "Samy" was using the cell phones for criminal activity. The government did not know "Samy's" identity; therefore, access to the GPS data would help the government identify him. Further, because the area of electronic law is very much unsettled, there is no reason to believe the government cannot obtain GPS data though a wiretap order. Assuming that pinging is a search, the standard needed to obtain GPS data is probable cause, the same standard needed to obtain a wiretap order.

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

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United States Court of Appeals for the Armed Forces

United States v. Cote, 2013 CAAF LEXIS 265 (C.A.A.F. Mar. 8, 2013)

A State Police officer conducting an online child pornography investigation requested assistance from a federal agent in identifying an individual associated with a particular IP address. After the agent determined the IP address was registered to Cote, he obtained a warrant from a federal magistrate judge on July 1, 2008 to search Cote's dormitory room at Minot Air Force Base, North Dakota. The warrant stated any electronic devices or storage media seized under the warrant must be searched within ninety days, unless "for good cause demonstrated, such date is extended by an order of the Court."

On July 2, 2008 the agents searched Cote's dormitory room and seized, among other things, an external hard drive. The State Police were unable to access the hard drive because it was broken, and sometime after August 18, 2008 the case was transferred to the Air Force. Ninety days after the issuance of the warrant, Cote's hard drive had not been searched, and no extension had been requested.

On September 8, 2009, more than one year after the judge issued the search warrant, agents with the Air Force Office of Special Investigations (AFOSI) submitted a request to the Defense Computer Forensics Laboratory (DCFL) to determine if they could repair Cote's hard drive. The DCFL repaired the hard drive, which contained evidence of child pornography. Cotes filed a motion to suppress all evidence recovered from the hard drive because it was discovered after the ninety-day period specified in the warrant had expired.

After the military judge granted Cote's motion to suppress, the government appealed to the U.S. Air Force Court of Criminal Appeals (CCA). The CCA agreed with the military judge that the DCFL search of the hard drive violated the ninety-day time limit in the search warrant, but held the military judge incorrectly concluded the violation required suppression of the evidence. Cote was convicted of possession of child pornography based on solely on the evidence found on the external hard drive. Cote appealed the CCA's ruling that the evidence recovered from his hard drive was admissible.

The Court of Appeals for the Armed Forces (CAAF) concluded the ninety-day limitation in the search warrant reflected a judicial determination that under the circumstances of this case, ninety days was a reasonable period in which to conduct the search of Cote's hard drive. In addition, the judge established a procedure to extend the search period if the Government found they were unable to meet the ninety-day limitation. Consequently, the CAAF held the Government's violation of the warrant's time limits constituted more than a *de minimis* violation of the search warrant and resulted in an unreasonable search. As a result, the CAAF reversed Cote's conviction and dismissed the child pornography charge.

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

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