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

February 2021

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 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 of the *The Informer* by visiting https://www.fletc.gov/informer.

This edition of *The Informer* may be cited as 2 INFORMER 21.

The Informer – February 2021

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FLETC Informer Webinar Schedule – March 2021

1. Understanding Consent Searches (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.

When a law enforcement officer obtains valid consent to search a given area or object, neither a search warrant, probable cause, nor reasonable suspicion of criminal activity is required. In situations where officers have some evidence of illegal activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only way to obtain evidence of a crime. This webcast will discuss the requirements for conducting valid consent searches.

Tuesday, March 9, 2021: 1:30 p.m. Eastern / 12:30 p.m. Central / 11:30 a.m. Mountain / 10:30 a.m. Pacific

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

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2. Warrantless Searches of Vehicles and the Fourth Amendment (1-hour)

Presented by Mary M. Mara, Attorney Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

When may law enforcement officers search a vehicle in accordance with the Fourth Amendment? Where can they look and what are they authorized to look for? This webinar will examine each of these critical questions with respect to Terry frisks, searches incident to arrest, warrantless vehicle searches under Carroll v. United States, 267 U.S. 132 (1925), consent searches, and inventory searches of vehicles.

Wednesday, March 10, 2021: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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

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3. Understanding the Inventory Search (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.

The inventory search is an effective means for government agencies to protect themselves from dangers, real and imagined. This little corner of the Fourth Amendment search warrant exception arena includes some straightforward and simple rules. This webcast is designed to make sure agencies that seize personal items know what those rules are and why they exist.

Tuesday, March 16, 2021: 1:30 p.m. Eastern / 12:30 p.m. Central / 11:30 a.m. Mountain / 10:30 a.m. Pacific

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

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4. Government Workplace Searches (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.

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

Thursday, March 18, 2021: 1:30 p.m. Eastern / 12:30 p.m. Central / 11:30 a.m. Mountain / 10:30 a.m. Pacific

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

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5. Kalkines – Garrity Overview (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.

This webinar will examine 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, March 23, 2021: 1:30 p.m. Eastern / 12:30 p.m. Central / 11:30 a.m. Mountain / 10:30 a.m. Pacific

To participate in this webinar: https://share.dhs.gov/fletclgd0124/

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To Participate in a FLETC Informer Webinar

1. Click on the link to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account, click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.

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Police Legal Advisor Training Program (V_LG_PLATP-2101))

March 22, 24, 29, and 31, 2021:
3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12:00 p.m. Pacific (2-hours)

Presented by Mary M. Mara, Robert J. Duncan, and Arie J. Schaap, Attorney Advisors / Senior Instructors, Federal Law Enforcement Training Centers, Artesia, New Mexico.

Police legal advisors play an incredibly vital role in law enforcement. Police agencies rely upon their legal advisors to provide accurate and timely advice on a wide variety of issues facing law enforcement today. If you are a police legal advisor looking to enhance your understanding of critical issues confronting the agency you represent, please join us in our virtual Police Legal Advisor Training Program classroom for two hours each day from 3:00 p.m. - 5:00 p.m., EST on Monday, March 22, Wednesday, March 24, Monday, March 29, and Wednesday, March 31, 2021. The training is **FREE** and may satisfy continuing legal education requirements in your state. Check with your state bar association for more information on CLE credits.

Phase I: Monday, March 22 and Wednesday, March 24, 2021

3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12:00 p.m. Pacific (2-hours)

A review of Fourth Amendment standards governing searches, seizures and the use of force. What do we need to know as police legal advisors?

Every search, seizure and use of force by law enforcement must comply with the "reasonableness" requirement of the Fourth Amendment. Police legal advisors must therefore have a comprehensive and up-to-date understanding of this constitutional provision and its impact on the day-to-day activities of law enforcement officers and the agencies they represent. In Phase I of this program, we will review the Fourth Amendment's reasonableness requirement and examine how recent case law emerging on this topic may affect both the day-to-day operations of a law enforcement agency and its long-term policy and training considerations. Topics covered include:

A. A review of the legal standards of reasonable suspicion and probable cause;
B. A look at misdemeanor and felony arrests made with and without a warrant;
C. Warrant requirements; and
D. Warrantless searches.

To Register for the Police Legal Advisor Training Program: https://sass.fletc.dhs.gov/fast/

Please email: **FLETCAdmissions@fletc.dhs.gov** for any registration-related issues and Robert Duncan at **robert.duncan@fletc.dhs.gov** for any course-content related questions.

Phase II: Monday, March 29 and Wednesday, March 31, 2021

3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12:00 p.m. Pacific (2-hours)

Introduction to civil rights litigation against law enforcement officers, supervisors and the governmental units that employ them.

Civil lawsuits filed against police officers, their supervisors and the governmental units that employ them are common. Police legal advisors must understand the various legal theories underlying these claims and have a firm understanding of defenses that are available in defense of these claims. In Phase II of the Police Legal Advisor Training Program, we will examine the elements of claims brought against officers under 42 U.S.C. 1983 and Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) and review current standards governing the defense of qualified immunity.

A. Identify the elements, applicability, and scope of 42 U.S.C. 1983 and Bivens claims;
B. A look at legal standards governing the use of deadly force;
C. Legal issues surrounding the use of intermediate weapons; and
D. Qualified immunity: legal requirements and current state of the law surrounding this defense.

To Register for the Police Legal Advisor Training Program: https://sass.fletc.dhs.gov/fast/

Please email: FLETCAdmissions@fletc.dhs.gov for any registration-related issues and Robert Duncan at robert.duncan@fletc.dhs.gov for any course-content related questions.

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FLETC Office of Chief Counsel Podcast Series

1. **Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:**

- A Flash History of the Fourth Amendment
- What is a Fourth Amendment Search?
- What is a Fourth Amendment Seizure?
- Fourth Amendment Levels of Suspicion
- Stops and Arrests
- Plain View Seizures
- Mobile Conveyance (Part 1 and Part 2)
- Exigent Circumstances
- Frisks
- Searches Incident to Arrest (SIA)
- Consent (Part 1 and Part 2)
- Inventories
- Inspection Authorities

2. **Fifth and Sixth Amendment Series – A 10-Part podcast series that covers the following Fifth and Sixth Amendment topics:**

- What's in the Fifth Amendment?
- Right Against Self-Incrimination
- Kalkines / Garrity
- Miranda – The case
- Miranda – Custody
- Miranda – Interrogation
- Miranda – Waiver
- Miranda – Invocation of Rights
- Miranda – Grab Bag of Issues
- Sixth Amendment – Right to Counsel

Click Here: https://leolaw.podbean.com/

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CASE SUMMARIES

Circuit Courts of Appeals

First Circuit

United States v. Mumme, 985 F.3d 25 (1st Cir. 2021)

Agents from Homeland Security Investigations (HSI) notified Maine State Police Detective Tupper (Det. Tupper) that they had evidence indicating that Ryan Mumme had wired money to individuals suspected of producing child pornography. As a result, Det. Tupper and two HSI agents traveled to Mumme's home to try to interview him about these transactions.

Mumme's home was located at the corner of a paved road and a dirt road. The officers parked along the side of the dirt road near a recreational vehicle ("RV") which was parked on the lawn next to Mumme's house. Beyond where the RV was parked was the end of the dirt road and a grassy field. Det. Tupper walked on a path through the bushes to the front door and knocked, but no one answered. A man then approached the officers from the direction of the RV. He identified himself as Chris Mumme, the defendant's father. While the officers were speaking with Mumme's father, Mumme drove past them on the dirt road and parked in the field about twenty yards beyond the house and the RV.

Det. Tupper walked past Mumme's father and approached Mumme, who was standing near the back of his truck in the field. Det. Tupper told Mumme why the officers were there and began to ask Mumme about his wire transfers. After Mumme refused to allow the officers to search his electronic devices, Det. Tupper told Mumme that he had two options: 1) Mumme could voluntarily turn over his electronic devices to the officers; or, 2) the officers could seize Mumme's house and apply for a warrant to search it for his electronic devices. Det. Tupper told Mumme that under either option, the officers would have to apply for a separate warrant before they could search Mumme's electronic devices. When asked what seizing and securing the house would entail, Det. Tupper told Mumme that he would be prevented from entering his house while the search warrant was being sought. When Mumme stated that he "should probably get a lawyer," Det. Tupper responded, "that's your call" and "it makes no difference to me." After securing, the house, Mumme asked Det. Tupper if he could go in and make a phone call. Det. Tupper told Mumme no. Mumme never stated that the reason he needed to go in the house to use the phone was to call an attorney. Det. Tupper did not tell Mumme that he could not contact his lawyer or use a cell phone or some other telephone to make a phone call, but just that he could not go into the house. Det. Tupper testified at the suppression hearing that he would not allow Mumme back into the house because he was concerned about officer safety and that Mumme might try to destroy evidence.

After telling Mumme he could not go back into the house, Det. Tupper asked if there was anyone else in the house and explained that he was going to make arrangements for other officers to come secure the home. At that point, Mumme said "[y]ou know what never mind[,] [g]o ahead and go get the computer." Mumme then allowed the officers into the home to seize his computer and hard drive. After gathering those devices, Det. Tupper reiterated that "I'm going to seize these today, apply for a search warrant tomorrow, if it's rejected, you get the stuff back . . . untouched" and "if

it's not rejected . . . then we're gonna process them and if there's nothing on them, you get 'em back." Det. Tupper also stated that "[i]f there's child pornography on it, we'll give you the opportunity to explain it, put it in the proper context, and we'll go from there." Subsequently, a Maine state district court issued a warrant to search Mumme's electronic devices, which revealed images and videos of child pornography.

The government charged Mumme with possession of child pornography. Mumme filed a motion to suppress the evidence discovered on his electronic devices, which the district court denied. On appeal, Mumme claimed that: 1) his consent to allow the officers to enter his home to seize his electronic devices without a warrant was not voluntary, particularly in light of the officers' threat to obtain a warrant and not to allow him back into his home until they did so; and, 2) the officers unconstitutionally intruded onto the curtilage of the home to question him, which rendered his consent involuntary.

The First Circuit Court of Appeals disagreed. First, the court held that Mumme's consent to enter his home and seize his electronic devices was voluntary. The fact that Det. Tupper told Mumme that he would apply for a search warrant did not invalidate Mumme's consent to enter his home and to seize his electronic devices. The court found that the officers made no misrepresentations to Mumme about already having a warrant to search the home or to seize his devices, nor did they tell Mumme that they would, for certain, obtain a search warrant. Instead, the officers told Mumme they would apply for a warrant if he did not consent, and that a judge could reject the warrant application. In addition, the officers told Mumme that if he did not consent to the seizure of his electronic devices, and a judge ultimately rejected a search warrant for those devices, the officers would return the devices to him "untouched." The court concluded that the officers simply conveyed to Mumme accurate information based on their reasonable belief regarding their lawful authority. Under these circumstances, the court held that the officers' statements of their intent to obtain a search warrant did not render Mumme's consent involuntary.

The court further held that the officers' statements of their intent to secure the home while they applied for a search warrant and their refusal to allow Mumme to enter the house to make a phone call did not render Mumme's consent involuntary. The court rejected Mumme's argument that the officers were required to allow him back into the house while being accompanied by an officer or that the officers were required to offer Mumme alternate ways to contact an attorney. The court added that even assuming Mumme intended to call a lawyer from inside the house, the officers did not prevent him from contacting his attorney through an alternative method, such as a cell phone. Finally, the court noted that Mumme clearly knew that he could refuse consent, as he initially did refuse to allow the officers into his house to seize his electronic devices and he also refused to consent to a warrantless search of those devices after the officers seized them.

Second, the court held that the officers did not unlawfully enter onto the curtilage of Mumme's home without a warrant when they obtained his consent to enter his house and seize his electronic devices.

The Supreme Court has held that "the area immediately surrounding and associated with the home [or curtilage] is regarded as part of the home for Fourth Amendment purposes." However, areas of private property outside the curtilage are considered "open fields." The Fourth Amendment does not prohibit law enforcement officers from entering private property and conducting investigations on open fields. In U.S. v. Dunn, the Supreme Court identified four factors in determining whether an area falls within the curtilage of a home or is considered open fields: 1) the proximity of the area claimed to be curtilage to the home; 2) whether the area is included

within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and, (4) the steps taken by the resident to protect the area from observation by people passing by.

In this case, the court held that the officers spoke with Mumme and obtained his consent outside the curtilage of his home. First, the field was not immediately next to Mumme's home but was separated from the home by trees and foliage. Second, the property was not enclosed by a fence and there was a completely unobstructed view of the field from the public dirt road and the main paved road, as well as from the adjacent residence. Finally, there was no evidence to establish that the field was closely tied to the home itself. As a result, the court held that the officers' physical intrusion onto the field to talk to Mumme did not violate the Fourth Amendment. The court added that even if the field was within the curtilage of Mumme's home, the officers had an "implied license" to approach Mumme and request an opportunity to speak with him, as when officers approach a house in an attempt to conduct a "knock and talk."

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/19-1983/19-1983-2021-01-13.pdf?ts=1610564404

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Alasaad v. Mayorkas, 2021 U.S. App. LEXIS 3586 (1st Cir. Feb. 9, 2021)

The plaintiffs are ten U.S. citizens and one lawful permanent resident who alleged that U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE") officers searched their electronic devices on one or more occasions during warrantless border searches. In their lawsuit, the plaintiffs claimed that the CBP and ICE policies (the Policies) concerning the searches of electronic devices at the border violated the Fourth and First Amendments.

The CBP Policy distinguishes between "basic" and "advanced" searches. The policy defines an "advanced search," sometimes referred to as a "forensic search," as "any search in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents." A "basic search" is any non-advanced search, and the policy states that a basic search may be performed "with or without suspicion." For both basic and advanced searches, the CBP policy only allows officers to search "information that is resident upon the device," and devices must be disconnected from the Internet before a search is performed. In addition, the CBP Policy states that "[a]n Officer may detain electronic devices . . . for a brief, reasonable period of time to perform a thorough border search." The plaintiffs did not argue that there were any meaningful differences between the CBP and ICE policies.

First, the plaintiffs argued that the border search exception, upon which the Policies were based, did not extend to the warrantless search of electronic devices in light of the Supreme Court's holding in Riley v. California. In Riley, the Supreme Court held that the search incident to arrest exception to the warrant requirement did not extend to the search of cell phones.

The First Circuit Court of Appeals disagreed. First, the court explained that Riley did not create a rule to effect that the government must always obtain a warrant before accessing the contents of an electronic device. Second, Riley, by its own terms, applies to searches incident to arrest and not border searches, which are separate types of searches that are justified for entirely different reasons. Finally, the court noted that other federal circuits that have faced this question have agreed that Riley does not mandate a warrant requirement for border searches of electronic

devices, whether basic or advanced. Consequently, following the Fourth, Ninth, and Eleventh Circuits, the court held that neither a warrant nor probable cause is required for a border search of electronic devices.

Next, the plaintiffs argued that basic border searches of electronic devices under the Policies are non-routine searches that require reasonable suspicion.

Again, the court disagreed. In U.S. v. Montoya de Hernandez, the Supreme Court held that agents may perform "routine" searches at the border without reasonable suspicion. However, the First Circuit requires that certain, "non-routine" searches, such as strip searches or body cavity searches, must be supported by reasonable suspicion.

Here, the court noted that under the Policies, basic border searches require an officer to manually examine the contents of the traveler's electronic device, thereby limiting the quantity of information available during a basic search. In addition, the CBP Policy only allows searches of data resident on the device and does not allow the government to view deleted or encrypted files. As a result, the court agreed with the holdings of the Ninth and Eleven Circuits and held that basic border searches are routine searches that do not need to be supported by reasonable suspicion.

Third, the plaintiffs argued that border searches of electronic devices "must be limited to searches for contraband." This argument was premised on plaintiffs' claims that the border search exception: 1) extends only to searches aimed at preventing the importation of contraband or entry of inadmissible persons; and, 2) covers only searches for contraband itself, rather than for evidence of border-related crimes or contraband.

The court disagreed. The court held that routine and non-routine searches under the border search are not limited to searches for contraband itself. The court recognized that "searching for evidence is vital to achieving the border search exception's purposes of controlling who and what may enter the country." The court specifically found that advanced border searches of electronic devices may be used to search for contraband, evidence of contraband, or for evidence of activity in violation of the laws enforced or administered by CBP or ICE. The court acknowledged that its holding was contrary to the Ninth Circuit's holding in United States v. Cano, in which the court held that the border search exception "is restricted in scope to searches for contraband."

Fourth, the plaintiffs argued that the Policies violated the Fourth Amendment because they did not impose an effective limit on the duration of electronic device detentions by the government. The court held that the Policies permit the detention of an electronic device for a "reasonable period," which is the constitutional standard as determined by the Supreme Court.

Finally, the court held that the Policies do not violate the First Amendment as they legitimately serve the government's "paramount interests" in protecting the border.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/20-1077/20-1077-2021-02-09.pdf?ts=1612926005

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Fourth Circuit

United States v. Myers, 986 F.3d 453 (4th Cir. 2021)

A police officer was conducting surveillance at a bus station in Norfolk from which a local company operated an inexpensive bus service between Norfolk and New York City. In the past, buses from this company had been used to transport drugs from New York City and the department's interdiction unit has made drug seizures from this location.

At 11:30 p.m., a bus arrived and the officer saw 20 to 30 passengers disembark, including the defendant, later identified as Sheldon Myers. Myers stuck out to the officer, as he had no bag, backpack, or luggage, as might be expected for a person travelling from New York but was instead carrying only a "dark" unidentifiable "object" in his hand. The officer saw Myers look around and make a call on a cell phone. A few minutes later, a car arrived and Myers got in the passenger seat. The officer notified other officers and instructed them to follow the vehicle to see if they could establish probable cause to justify a vehicle stop.

While following the vehicle, the officers noticed that the driver took an "illogical", circuitous route to gain access to an interstate highway. The officers found the vehicle's overall course to be suspicious, suggesting that its occupants might have known that they were being followed. The officers eventually stopped the vehicle for speeding and a possible window-tint violation. As two officers approached the car, they smelled the odor of marijuana. Based on that smell, the officers searched the vehicle and its occupants, the driver and Myers. The officers found a blue, graham cracker box on the floorboard behind the front passenger seat. Inside the box, the officers found a substance in a vacuum-sealed plastic bag, which field tested positive for fentanyl. The officers also found three cell phones, one in the driver's seat and two in the glove box, and a loaded handgun in trunk. The driver claimed ownership of the cellphones and firearm. The officers searched Myers and found a cell phone and approximately $1,800 in cash. However, neither the driver nor Myers claimed ownership of the drugs. The officers arrested both men for a drug offense based on the seizure of the fentanyl.

The government charged Myers with conspiracy to distribute and possession with intent to distribute fentanyl. Myers filed a motion to suppress the drugs, alleging a variety of Fourth Amendment violations. After the district court denied the motion to suppress, Myers pleaded guilty, reserving his right to appeal the court's ruling on this motion.

On appeal, Myers claimed that the officers did not establish probable cause to arrest him for possession of fentanyl. Specifically, Myers argued that because the driver admitted to ownership of the gun discovered in the trunk and three of the cell phones, and because "drugs and guns go hand in hand," the officers did not have any facts that would cause them to believe that he had anything to do with the fentanyl.

The Fourth Circuit Court of Appeals disagreed. To be reasonable under the Fourth Amendment, an arrest of an individual must be supported by probable cause to believe that the individual has committed or is committing a crime. To establish probable cause, the court will review the totality of the circumstances, which includes all of the relevant facts known to the arresting officer and the inferences that may be drawn by the officer. The court will also consider an officer's practical experience and the inferences the officer may draw from that experience.

Here, the court found that facts known to the officers and the inferences that they could draw in light of their practical experience – 21 years and 16 years, respectively – began with the

surveillance of the bus stop in Norfolk. At the time of arrest, the court held that the officers knew that: 1) the bus stop, which served ongoing bus service between Norfolk and New York, functioned as an entry point for drugs, as the officers had often seized drugs there on previous occasions; 2) when Myers exited the bus he had no luggage but carried only a "dark object;" 3) Myers made a cell phone call and was soon picked up by another person in a car; 4) the car traveled an unusually circuitous route, suggesting to the officers following the vehicle that the occupants knew that they were being followed; 5) when the officers searched the vehicle and the occupants they found a loaded handgun, four cell phones, over 300 grams of fentanyl, and approximately $1,800 in cash on Myers's person; and, 6) neither the driver nor Myers claimed ownership of the fentanyl.

Based on these facts and reasonable inferences drawn from them, the court found that a reasonable officer could conclude: 1) that a crime, possession of fentanyl, was being committed in his presence, and, 2) that the driver and Myers were involved in a common enterprise. The court reasoned that Myers and the driver knew each other or had a preexisting arrangement with each other, as the vehicle picked up Myers shortly following his call and there was no indication of a ride-sharing arrangement. In addition, the vehicle smelled of marijuana, the driver drove in a manner suggesting that he knew they were being followed, and both men denied ownership of the fentanyl, which was readily accessible to both of them.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/18-4940/18-4940-2021-01-26.pdf?ts=1611689428

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Eighth Circuit

United States v. Stephen, 984 F.3d 625 (8th Cir. 2021)

In February 2018, Vaughn Ellison was remodeling the house of his friend and former brother-in-law, Gregory Stephen. While using the bathroom, Ellison noticed a USB drive (the "USB") on the toilet tank. Because Ellison had recently researched hidden recording devices following a break-in, Ellison recognized the USB to be a hidden camera. Curious and concerned as to why there was a hidden camera in the bathroom, and what it had recorded, Ellison took the USB home but did not view its contents until the next day.

When Ellison viewed the USB's contents, he found at least fifty videos depicting children secretly recorded in various stages of undress. The following evening, Ellison told his girlfriend what he had seen on the USB and the couple discussed what he should do with it. Ellison decided not to contact law enforcement at that time. However, Ellison changed his mind and contacted Monticello Police Chief Smith the next day and the two discussed what Ellison had found on the USB. Chief Smith asked Ellison to give him the USB, and the next day Ellison dropped off the USB at the police department. Chief Smith then sought the Iowa Division of Criminal Investigation's (the "DCI") assistance.

Two days later, the DCI took possession of the USB, obtained a search warrant for the device, and viewed its contents. Afterward, the DCI agents obtained a warrant to search Stephen's home. Inside Stephen's home, agents found more secret recording devices and a hard drive containing approximately 400 visual depictions of nude minor boys, including some images of Stephen molesting unconscious victims.

The government charged Stephen with numerous offenses relating to the exploitation of children and child pornography. Stephen filed a motion to suppress the evidence related to those offenses, which was denied by the district court. On appeal to the Fourth Circuit Court of Appeals, Stephen claimed that his Fourth Amendment rights were violated when: 1) Ellison took and searched the USB; 2) when Chief Smith took the USB before obtaining a search warrant; and, 3) when the DCI searched the USB. Stephen further argued that because of these violations, evidence found on the USB and in his home, as well as statements he made to law enforcement, should have been suppressed as fruit of the poisonous tree.

First, the Fourth Circuit Court of Appeals recognized that the Fourth Amendment does not apply to private-citizen searches "unless the private citizen is acting as a government agent." To determine whether a private citizen should be deemed an agent of the government depends upon the degree of the government's participation in the private party's search. In resolving this question, courts have typically considered: 1) whether the government knew of, and acquiesced in, the citizen's conduct; 2) whether the citizen intended to assist law enforcement; and, 3) whether the citizen acted at the government's request.

In this case, Stephen conceded two of the three factors, admitting that law enforcement neither knew that Ellison took or searched the USB nor requested him to do so. The court added that even if Ellison had an intent to assist law enforcement, it would not be enough to establish that he was a government agent. The court noted that Stephen cited no case where the court has found government agency based solely on a private citizen's intent to assist law enforcement. Accordingly, the court concluded that a person's "bare intent" to help law enforcement, without more, is insufficient to transform a private citizen into a government agent under the Fourth Amendment.

Alternatively, the court found that Stephen's argument failed because Ellison's actions did not establish an intent to help law enforcement. First, Ellison testified that he took and searched the USB because he was "curious" and "concerned" about its use and contents. The court found that curiosity and concern for others does not support a finding that Ellison took the USB or viewed its contents with the intent to help law enforcement. In addition, the court found that waiting two days after viewing the USB's contents and seeking his girlfriend's advice before contacting Chief Smith, did not suggest that Ellison's primary motive was to help law enforcement.

Next, the court held that Chief Smith did not violate the Fourth Amendment by asking Ellison to bring the USB to the police station and giving it to him without first obtaining a search warrant. First, when Ellison told Chief Smith what he had seen on the USB, the chief had probable cause to believe that the USB contained contraband. The court concluded that the need to prevent the destruction or loss of evidence justified Chief Smith's seizure of the USB until a warrant could be obtained to search it.

Finally, the court held that DCI did not violate the Fourth Amendment by exceeding the scope of the warrant by viewing the USB's contents. Stephen argued that the search warrant limited the DCI to "extracting and cloning" data from the USB. In this case, the search warrant authorized law enforcement to conduct "[a] complete forensic examination of [the USB]" . . . "which may include extracting and cloning data." The court held that the "ordinary reading of this phrase clearly authorized law enforcement to view the USB's contents."

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/19-1966/19-1966-2021-01-04.pdf?ts=1609777814

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Ninth Circuit

United States v. Dixon, 984 F.3d 814 (9th Cir. 2020)

Officer Eduard Ochoa began surveilling Howard Dixon, a suspect in a recent shooting. During this time, Officer Ochoa saw Dixon driving a blue Honda minivan, which he parked at an apartment complex. Afterward, Officer Ochoa learned that Dixon was under federal supervision for a felony conviction and that he was subject to a suspicionless search condition.

During a subsequent surveillance at the apartment complex, Officer Ochoa and other officers saw Dixon walking toward the blue minivan carrying two garbage bags. Officer Ochoa instructed the officers to detain Dixon, prompting Dixon to drop both garbage bags and a set of keys on the ground. Officer Ochoa used one of the keys that Dixon had dropped to unlock the blue Honda minivan. Inside the vehicle, officers found a backpack containing marijuana.

At trial, Dixon filed a motion to suppress the evidence seized from the minivan. The district court denied Dixon's motion. The district court held that the insertion of the key into the minivan's lock was not a search under the Fourth Amendment and that possession of a key that fit the minivan's lock amounted to probable cause to believe that Dixon exercised control of the minivan. As a result, the search of the minivan was lawful under the terms of Dixon's supervised release, as Dixon was subject to a warrantless, suspicionless search of his "vehicle, or any other property under his control." Dixon appealed.

To determine whether a Fourth Amendment violation occurred, a court must determine: 1) whether the government conduct at issue constituted a search under the Fourth Amendment; and, 2) whether that search was reasonable.

The Ninth Circuit Court of Appeals disagreed with the district court and held that inserting the key into the minivan's lock was a search under the Fourth Amendment. In U.S. v. Jones, the Supreme Court held that a Fourth Amendment search occurs when the government intrudes upon private property for the purpose of obtaining information. In Jones, the Court noted that the Fourth Amendment protects not only reasonable expectations of privacy, but also against physical intrusions by law enforcement into constitutionally protected areas: persons, houses, papers, and effects.

Since Jones, the Supreme Court reaffirmed this trespass-based search definition in Florida v. Jardines. In Jardines, the Court held that officers could not "invade the curtilage around a home to gather information without a warrant because they had no explicit or implicit license to physically intrude into that constitutionally protected area."

Applying the principles from Jones and Jardines to this case, the court held that when Officer Ochoa inserted the key into the minivan's lock, an "effect," he physically intruded onto a constitutionally protected area. This physical intrusion was done for the express purpose of obtaining information, specifically to learn whether Dixon exercised control over the minivan. Consequently, the insertion of the key into the minivan's lock constituted a search within the meaning of the Fourth Amendment.

The court added that its decision was consistent with other federal courts, which (since Jones and Jardines) have similarly concluded that such physical intrusion constitutes a search. For example,

in U.S. v. Bain, the First Circuit held that testing a key in an apartment door lock to see if it fit constituted a search under Jardines. In U.S. v. Richmond, the Fifth Circuit held that an officer pushing his finger against the defendant's tire to learn what was inside constituted a search under Jones. In Taylor v. City of Saginaw, the Sixth Circuit held that the city's chalking of tires to determine how long a vehicle had been parked in the same location constituted a search under Jones. Finally, in Schmidt v. Stassi, the district court in the Eastern District of Louisiana held that an officer's collection of DNA from the defendant's car door while it was parked was a search under Jones.

Next, the court had to determine the reasonableness of Officer Ochoa's search. It was undisputed that by the terms of his federal supervised release, Dixon was subject to a warrantless, suspicionless search of his "vehicle, or any other property under his control." However, before officers could conduct a warrantless search under this condition, they needed to have a sufficient "degree of knowledge" that the search condition applied to the blue Honda minivan. At this point, the court recognized that it had never determined what level of suspicion was required by law enforcement officers to determine whether a vehicle was subject to a warrantless search condition. The court noted that previous Ninth Circuit decisions concerning this issue had been limited to a parolee's residence and required law enforcement officers to have probable cause to believe that the parolee is a resident of the house to be searched. Seeing no reason to "depart from this standard with respect to a supervisee's vehicle," the court held that before conducting a warrantless search of a vehicle pursuant to a supervised release condition, law enforcement officers must have probable cause to believe that the supervisee owns or controls the vehicle to be searched.

The court concluded by stating that based on the testimony given in the district court, it could not determine if the probable cause standard connecting Dixon to the blue minivan was met. The court found that there were "highly contested factual disputes as to whether Officer Ochoa had probable cause to believe that the particular minivan into which he inserted the key was owned or controlled by Dixon. Consequently, the court remanded the case to the district court to conduct an evidentiary hearing to determine this issue in light of the principles from Jones and Jardines.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/19-10112/19-10112-2020-12-31.pdf?ts=1609437790

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District of Columbia Circuit

United States v. Jenkins, 984 F.3d 1038 (D.C. Cir. 2021)

On September 2, 2017, officers with the Metropolitan Police Department (MPD) were called to investigate a shooting in which one person was killed and two others were wounded. The investigation revealed that two vehicles, a black Chrysler Crossfire and a white Infiniti SUV drove over three miles in tandem to the area, arrived shortly before shots were fired, and left immediately afterwards, driving rapidly back the same way they came.

Based on information from a license plate reader and security cameras near the scene of the shooting, detectives determined the registered owners of both vehicles. On October 10, 2017, the suspected driver of the Crossfire was arrested in Texas. The next day, MPD detectives located the Crossfire in a parking lot and discovered three bullet holes in it. Five days later, detectives interviewed the registered owner of the Infiniti, Tyrhonda Webster, who stated that her brother, DeAngelo Jenkins, was the exclusive driver of the vehicle.

On October 24, 2017, detectives saw the Infiniti parked on a public street. The detectives seized the Infiniti, which was taken to the D.C. Department of Forensic Sciences while detectives applied for a search warrant. Upon execution of the search warrant on October 25, 2017, detectives found a loaded handgun, Jenkins's driver's license, and a notice of infraction that he had received in Montgomery County on September 21, 2017. Officers arrested Jenkins on a separate warrant on November 9, 2017. During the search incident to arrest of Jenkins, officers seized a loaded handgun and crack cocaine.

The government charged Jenkins with drug and firearm offenses. Jenkins filed a motion to suppress the evidence seized from the Infiniti and from his person. Jenkins argued that the seizure of the Infiniti on October 25, fifty-two days after the shooting, was unlawful because probable cause to believe that the vehicle was connected to the shooting was stale by that date. Consequently, Jenkins argued that evidence seized during his arrest were fruits of the unlawful seizure of the Infiniti.

The court disagreed. First, the court found that eyewitness statements, information from the license plate reader, and security cameras established probable cause to believe that the Infiniti and the Crossfire contained evidence concerning the shooting. In addition, the court stated that probable cause was bolstered by the fact that the suspected driver of the Crossfire was arrested in Texas after the shooting, supporting the inference that he could have been trying to avoid the police or reprisal from others. Similarly, the bullet holes in the Crossfire indicated that the vehicle had been near gunfire, potentially on the night of the shooting. Although the arrest and bullet strikes alone would not have established probable cause to search the Infiniti, the court noted that those facts added to the totality of the circumstances that must be considered when making a probable cause determination.

Next, the court held that there was probable cause to support the seizure of the Infiniti fifty-two days after the shooting. To determine if probable cause exists, the court stated "it is not simply a matter of counting days; a wide range of factual circumstances may be relevant to the inquiry," such as the nature of the crime, whether the item to be seized is perishable, and the place to be searched.

Applying these factors, the court held that the information obtained by the detectives during their investigation was sufficient to establish probable cause to seize the Infiniti despite the passage of time. While the defendant focused on the firearm recovered from the Infiniti, claiming that a person who participated in a fatal shooting would be unlikely to retain the murder weapon for long, the court added that a murder weapon was not the only type of relevant evidence that might be found. For example, as the recovered Crossfire exemplified, some types of evidence are not easily removed from a vehicle, like bullet holes. The court noted that even outwardly innocuous evidence such as a driver's license or gas receipts might indicate who operated the Infiniti, and paper records or a cell phone might contain evidence related to the shooting but be less likely to be discarded within a matter of weeks.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/cadc/19-3023/19-3023-2021-01-08.pdf?ts=1610119841

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