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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 – February 2016

## Case Summaries



### Circuit Courts of Appeals

#### Second Circuit

**United States v. Allen:** Whether officers violated the *Fourth Amendment* when they arrested the defendant inside his home without an arrest warrant.....6

#### Fourth Circuit

**Estate of Armstrong v. Village of Pinehurst:** Whether officers used excessive force by deploying a taser against Armstrong while attempting to execute an involuntary commitment order.....7

#### Fifth Circuit

**United States v. Garcia-Lopez:** Whether it was reasonable for officers to lift a mattress from a bed while conducting a protective sweep.....9

**United States v. Weast:** Whether an officer violated the *Fourth Amendment* by using peer-to-peer software, without a warrant, to identify the defendant’s IP address, and to download files the defendant made available for sharing.....9

#### Sixth Circuit

**Kent v. Oakland County:** Whether an officer used excessive force by deploying his taser against Kent, and whether a second officer had the opportunity and means to prevent the first officer from deploying his taser against Kent.....10

#### Seventh Circuit

**United States v. Hamad:** Whether county Department of Revenue agents conducted a lawful warrantless administrative inspection of the defendant’s business.....11

#### Eighth Circuit

**United States v. Daniel:** Whether officers conducted a lawful warrantless search of the defendant’s vehicle under the automobile exception to the warrant requirement.....12

**United States v. Janis:** Whether a Native American tribe's public safety officers were federal officers for purposes of the federal officer assault statute, *18 U.S.C.S. § 111*.....13

**United States v. Welch:** Whether the failure of agents to provide a copy of a search warrant to the defendant within the time provided in *Federal Rule of Criminal Procedure 41* required the suppression of evidence obtained under the warrant.....14

**United States v. Jackson:** Whether a drug-dog’s alert, by itself, established probable cause to search the defendant’s aircraft.....15

#### Tenth Circuit

**United States v. Fager:** Whether an officer established reasonable suspicion the defendant was armed and dangerous to support a *Terry* frisk.....16

## **FLETC Informer Webinar Series** (Calendar View)

### **1. Exigent Circumstances: Part II (Destruction Exigency)**

In this two-hour webinar, Bruce-Alan Barnard continues his discussion of the exigent circumstances exception to the *Fourth Amendment's* warrant requirement, focusing on the destruction exigency.

**Dates and Times:** Wednesday March 2, 2016 2:30 p.m. EST

Thursday March 10, 2016 2:30 p.m. EST

To join this webinar on either date: <https://share.dhs.gov/informer>



### **2. Search and Seizure Update**

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This course will review and analyze current federal cases involving *Fourth Amendment* searches and seizures.

**Date and Time:** Tuesday March 29, 2016 2:30 p.m. EST

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



### **3. Exigent Circumstances: Part III (Hot Pursuit and Other Exigencies)**

In this two-hour webinar, Bruce-Alan Barnard continues his discussion of the exigent circumstances exception to the *Fourth Amendment's* warrant requirement, focusing on Hot Pursuit and other exigencies.

**Date and Time:** Tuesday March 22, 2016 2:30 p.m. EDT

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



### **4. Indian Law Basics – Part I: Indian Civil Rights Act (TLOA/VAWA)**

50 minute webinar with a question and answer session to follow, presented by Robert Duncan, Attorney-Advisor- Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

**Date and Time:** Wednesday March 2, 2016 1:00 p.m. EST

To join this webinar: <https://share.dhs.gov/indianlaw/>



**5. Indian Law Basics – Part II: Indian Law History Pre-M’Intosh**

50 minute webinar with a question and answer session to follow, presented by Robert Duncan, Attorney-Advisor- Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

**Date and Time: Wednesday March 9, 2016 1:00 p.m. EST**

**To join this webinar: <https://share.dhs.gov/indianlaw/>**



**6. Indian Law Basics – Part III: The “Cherokee Cases” and Plenary Power**

50 minute webinar with a question and answer session to follow, presented by Robert Duncan, Attorney-Advisor- Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

**Date and Time: Wednesday March 16, 2016 1:00 p.m. EDT**

**To join this webinar: <https://share.dhs.gov/indianlaw/>**



**7. Indian Law Basics – Part IV: Jurisdictional Challenges**

50 minute webinar with a question and answer session to follow, presented by Robert Duncan, Attorney-Advisor- Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

**Date and Time: Wednesday March 23, 2016 1:00 p.m. EDT**

**To join this webinar: <https://share.dhs.gov/indianlaw/>**



**8. Indian Law Basics – Part V: Major Crimes**

50 minute webinar with a question and answer session to follow, presented by Robert Duncan, Attorney-Advisor- Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

**Date and Time: Wednesday March 30, 2016 1:00 p.m. EDT**

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# FLETC Informer Webinar Schedule – March 2016

Sun	Monday	Tuesday	Wednesday	Thursday	Friday	Sat
		1	2 1:00 pm EST Indian Law: Part I <a href="https://share.dhs.gov/indianlaw">https://share.dhs.gov/indianlaw</a> 2:30 pm EST Exigent Circumstances II <a href="https://share.dhs.gov/informer">https://share.dhs.gov/informer</a>	3	4	5
6	7	8	9 1:00 pm EST Indian Law: Part II <a href="https://share.dhs.gov/indianlaw">https://share.dhs.gov/indianlaw</a>	10 2:30 pm EST Exigent Circumstances II <a href="https://share.dhs.gov/informer">https://share.dhs.gov/informer</a>	11	12
13 Daylight Savings Time Begins	14	15	16 1:00 pm EDT Indian Law: Part III <a href="https://share.dhs.gov/indianlaw">https://share.dhs.gov/indianlaw</a>	17	18	19
20	21	22 2:30 pm EDT Exigent Circumstances III <a href="https://share.dhs.gov/informer">https://share.dhs.gov/informer</a>	23 1:00 pm EDT Indian Law: Part IV <a href="https://share.dhs.gov/indianlaw">https://share.dhs.gov/indianlaw</a>	24	25	26
27	28	29 2:30 pm EDT Search and Seizure Update <a href="https://share.dhs.gov/informer">https://share.dhs.gov/informer</a>	30 1:00 pm EDT Indian Law: Part V <a href="https://share.dhs.gov/indianlaw">https://share.dhs.gov/indianlaw</a>	31		

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7. Meeting rooms will be open at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

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# CASE SUMMARIES

## Circuit Courts of Appeal

### Second Circuit

#### United States v. Allen, 2016 U.S. App. LEXIS 1467 (2d Cir. Vt. Jan. 29, 2016)

Police officers established probable cause that Allen had assaulted an individual two days earlier, and without first obtaining an arrest warrant, went to Allen's apartment to arrest him. The officers knocked on the apartment door and Allen answered it, speaking to the officers for five or six minutes. During this time, Allen remained inside the threshold of his apartment while the officers stood outside on the sidewalk. The officers eventually told Allen that he was under arrest and that he had to accompany them to the police station to be processed for the assault. Allen asked the officers if he could put on a pair of shoes first, and tell his daughter that he would be leaving with the officers. The officers told Allen he could do so, but only if the officers accompanied him, which they did. Once inside Allen's apartment, the officers saw drug paraphernalia in plain view and Allen gave the officers several bags of marijuana that he had in his pocket. Based on these facts, the officers obtained a warrant to search Allen's apartment. While executing the warrant, officers found a handgun. The government later charged Allen with being a felon in possession of a firearm.

Allen filed a motion to suppress the handgun and statements he made to the officers inside his apartment. Allen argued the officers violated the *Fourth Amendment* when they arrested him inside his home without an arrest warrant.

In *Payton v. New York*, the United States Supreme Court held that police officers violated the *Fourth Amendment* by physically entering a home without a warrant to effect an arrest. Since *Payton*, it has been well-settled that police officers may only physically enter a home to effect a warrantless arrest with either valid consent or exigent circumstances.

However, the 5th, 7th and 11th Circuits have interpreted *Payton* narrowly, concluding there is no *Payton* violation unless police officers physically cross the threshold and enter the home. In contrast, the 6th, 9th and 10th Circuits have held that police officers may violate *Payton* without physically entering the home. In those cases, the courts held that it is the location of the arrested person, not the arresting officers that determines whether an arrest occurs within a home. The courts recognized that police officers could remain outside the home while engaging in conduct that would amount to "constructive" or "coercive" entry. Those courts reasoned that when officers engage in actions to coerce the occupant outside of the home, they accomplish the same effect as an actual entry into the home, which would trigger the requirements of *Payton*.

It was against this backdrop that the 2nd Circuit had to decide whether *Payton* permitted warrantless "across the threshold" arrests where the police officers summoned the suspect to the front door of his home.

The court concluded that where police officers have summoned a suspect to the door of his home, and the suspect remains inside the home, the officers may not effect a warrantless "across the threshold" arrest unless exigent circumstances are present.

Here, it was undisputed that the officers told Allen he was under arrest while he was inside his home. The officers then took control of Allen's subsequent movements, further asserting their power over him inside his home. Although Allen had no obligation to open the door to speak to the officers, the court held that it was reasonable for him to do so, and it did not mean that Allen had forfeited the *Fourth Amendment* protections of the home.

In addition, the court noted the officers established probable cause to arrest Allen two days before they went to his home, which was ample time to obtain an arrest warrant. The court concluded any problems in effecting the arrest were caused by the officers failing to obtain a warrant and instead going to Allen's home planning to arrest him without a warrant.

For the Court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/13-3333/13-3333-2016-01-29.pdf?ts=1454079606>

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## **Fourth Circuit**

### **Estate of Armstrong v. Village of Pinehurst, 2016 U.S. App. LEXIS 380 (4th Cir. N.C. Jan. 11, 2016)**

Police officers were dispatched to execute an involuntary commitment order that was in the process of being completed, and return Armstrong to the hospital after Armstrong walked out during a mental health evaluation. Three officers located Armstrong near an intersection outside the entrance to the hospital, approached him and engaged in a conversation with him. As soon as the officers learned the commitment order was complete, they surrounded Armstrong and approached him. Armstrong immediately sat down on the ground and wrapped himself around a four-by-four post that was supporting a stop sign. The officers tried to pry Armstrong's arms and legs off the post, but he was wrapped too tightly and the officers could not move him. The officers told Armstrong they had a commitment order and that if he did not let go of the post, he would be tased. After Armstrong refused to let go of the post, one of the officers deployed his taser in drive-stun mode five separate times over a period of approximately two minutes against Armstrong. Instead of having the desired effect; however, the tasing increased Armstrong's resistance. At this point, two hospital security officers arrived and assisted the three police officers in pulling Armstrong off the post and laying him face down on the ground. The officers cuffed Armstrong's hands behind his back and then placed him in leg shackles after he continued to kick at the officers. Once Armstrong was restrained, the officers left him face down in the grass while they collected themselves. Armstrong's sister, who witnessed the incident asked the officers to check on Armstrong after she noticed he was not moving. The officers immediately checked Armstrong, who did not appear to be breathing. The officers performed CPR and had Armstrong transported to the hospital where he later died.

Representatives of Armstrong's estate sued the officers pursuant to *42 U.S.C. § 1983*, claiming the officers used excessive force when they seized Armstrong while attempting to execute the involuntary commitment order.

First, the court concluded the officers used unreasonably excessive force, in violation of the *Fourth Amendment*, when they removed Armstrong from the post.

While the court recognized that non-compliance with a police officer's lawful order justifies some use of force, the level of force that is justified depends on the risk posed by the non-

compliant individual. In addition, the court noted that deploying a taser is a serious use of force, and that Fourth Circuit case law makes it clear that tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser. Finally, the court stated that “even non-compliance with police directives and non-violent physical resistance do not necessarily create a continuing threat to the officers’ safety.”

Applying these principles as well as the factors outlined in *Graham v. Connor* to the facts of the case, the court concluded the officers’ use of force was not objectively reasonable. Specifically, the court found that Armstrong was not suspected of any criminal activity, he was stationary, non-violent and surrounded by police officers. Even though Armstrong would not allow the officers to pull his arms from around the post and refused to comply with orders to let go, a reasonable officer would have perceived a “static stalemate,” and not immediate danger justifying the deployment of a taser. Consequently, the court held that immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response to Armstrong’s degree of resistance.

Second, while “the officers were treading close to the constitutional line,” the court held they were entitled to qualified immunity because Armstrong’s right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established at the time of the incident. At the time, case law held that it was unreasonable to tase suspects after they had been secured, but in this case the officers did not tase Armstrong after he was secured.

Nevertheless, the court took the opportunity to clarify when the deployment of a taser constitutes excessive use of force, stating,

A taser, like “a gun, a baton, . . . or other weapon,” is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance -- even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force.

Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such taser use violates the *Fourth Amendment*.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca4/15-1191/15-1191-2016-01-11.pdf?ts=1452542430>

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## **Fifth Circuit**

### **United States v. Garcia-Lopez, 809 F.3d 834 (5th Cir. Tex. January 11, 2016)**

Two police officers went to Garcia-Lopez's home to serve an arrest warrant on his son, Yonari. Garcia-Lopez told the officers that Yonari was not at home and then consented to the officers' request to search the residence for him. As the officers entered the home, they saw a light in a distant room and then the door shut. When the officers asked if anyone else was in the home, Garcia-Lopez told the officers that his other son, Ivan, was home. The officers went to Ivan's bedroom, and found the door locked. The officers ordered Ivan to open the door, which he did, and the officers entered. Ivan asked the officers if he could sit back down on his bed and finish his dinner, which had been interrupted. The officers allowed Ivan to do so and began to walk around the room. The officers saw two bullet-proof vests on Ivan's bed, which was comprised of a mattress and box spring sitting flush to the floor. Knowing that Ivan was a convicted felon, the officers arrested him for being a felon in possession of body armor in violation of *18 U.S.C. § (g)(1)*. The officers then resumed their search for Yonari and lifted the mattress from Ivan's bed, finding a short barrel shotgun and two rifles. The government indicted Ivan for several counts of being a felon in possession of a firearm.

Ivan argued the sawed off shot gun and rifles should have been suppressed because it was unreasonable for the officers to lift the mattress from his bed without consent or probable cause.

The court disagreed, holding the protective sweep exception supported the warrantless mattress search. A protective sweep is limited to a visual inspection of those places in which a person might be hiding and can last no longer than necessary to dispel the reasonable suspicion of danger, or no longer than it takes to complete the arrest and depart the premises.

Here, it was undisputed the officers were lawfully in Ivan's bedroom with a valid warrant for his brother's arrest. Once inside the bedroom, the officers testified they became suspicious after Ivan immediately requested to sit back down on his bed. As a result, the court concluded it was reasonable for the officers to believe that Yonari might have concealed himself beneath the mattress in a hollowed out box spring. Once the officers lifted the mattress, and dispelled their suspicion that Yonari was concealed underneath it, they made a lawful plain view seizure of the firearms.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/14-41392/14-41392-2016-01-11.pdf?ts=1452558630>

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### **United States v. Weast, 2016 U.S. App. LEXIS 1232 (5th Cir. Tex. Jan. 26, 2016)**

A police officer used peer-to-peer file sharing software to search for computer users sharing child pornography. After the officer located an IP address whose user appeared to be sharing child pornography, the officer used the peer-to-peer software to download six files shared by the user. The files had been stored on a computer that the user had nicknamed "Chris." The officer issued a subpoena to the internet service provider (ISP) and discovered the IP address was registered to Larry Weast. Officers executed a search warrant at Weast's residence where they found his son, Chris. The officers seized a computer hard drive belonging to Chris Weast that contained child pornography. The government charged Weast with possession and receipt of child pornography.

Weast filed a motion to suppress the evidence found on his hard drive, arguing the officer violated the *Fourth Amendment* by using peer-to-peer software, without a warrant, to identify Weast's IP address, and to download files that Weast made available for sharing.

The court disagreed, holding that Weast did not have a reasonable expectation of privacy in his IP address. In a case of first impression, the court followed the 3rd, 4th, 8th and 10th circuits, which have held that subscriber information provided to an internet provider, including IP addresses, is not protected by the *Fourth Amendment's* privacy expectation because it is voluntarily conveyed to third parties.

The court further held that by making child pornography files publicly available by downloading them into a shared folder accessible through a peer-to-peer file-sharing network, Weast eliminated any reasonable expectation of privacy he might have had in those files. This holding is consistent with holdings in similar cases from the 6th, 8th and 9th circuits. For these reasons, the court concluded the officer did not violate the Fourth Amendment when he accessed Weast's IP address and shared files.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/14-11253/14-11253-2016-01-26.pdf?ts=1453833055>

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## **Sixth Circuit**

### **Kent v. Oakland County, 810 F.3d 384 (6th Cir. Mich. Jan. 6, 2016)**

Michael Kent, a physician, was caring for his father who suffered from a number of serious health problems. On September 1, 2013, Kent checked on his father and discovered that his father was no longer breathing, he had no pulse and that his pupils were fixed and dilated. Kent's wife called the non-emergency dispatch and reported the natural death of Kent's father. Approximately twenty-minutes later, Deputy Lopez and Firefighter-EMT Oryszczak arrived at Kent's house and were directed to an upstairs bedroom. EMT Oryszczak told Kent that in the absence of proper do-not-resuscitate paperwork, his emergency responder's protocol required him to attach an Automated External Defibrillator (AED) "to determine if there were signs of life" and "do everything they could for the patient." At this point, Kent began to yell at EMT Oryszczak and Deputy Lopez, telling them that they were not going to assault his dead father. Kent also told them that his mother, as the medical proxy for his father, could tell them what his father's wishes were. Deputy Maher arrived around this time and saw that Kent was gesturing with his hands and flailing his arms in the air. As the situation deteriorated, the deputies asked Kent to go downstairs and talk with them, but Kent refused, and demanded that the deputies leave his house. Deputy Lopez then pulled out his taser and told Kent that if he did not calm down, Lopez would tase him. Kent, who was standing with his hands raised in the air and his back to the wall told Deputy Lopez, "Go ahead and tase me, then." Deputy Lopez deployed his taser in dart-mode, striking Kent in the stomach and chest. Kent fell to the floor, and after the five-second tase cycle, Deputy Maher ordered Kent to present his hands for handcuffing. Kent complied. Although the deputies told Kent that he was not under arrest, Kent remained handcuffed, with the taser probes still attached, during fifteen to twenty minutes of questioning by another deputy who had arrived. EMTs then removed the probes, dressed

Kent's wounds and Deputy Maher removed the handcuffs. During this time, an EMT conducted an AED assessment on Kent's father and pronounced him dead.

Kent sued Deputies Lopez and Maher under *42 U.S.C. § 1983*, claiming the deputies violated his *Fourth Amendment* rights and under state law for assault and battery. Specifically, Kent claimed that Deputy Lopez's use of the taser constituted excessive force, and that Deputy Maher failed to intervene and prevent Deputy Lopez's use of excessive force.

The court held Deputy Lopez was not entitled to qualified immunity. The court found that Kent's actions did not constitute an immediate threat to the officer's safety that justified Deputy Lopez's deployment of the taser against him. While Kent might have prevented the EMT from fulfilling his perceived duties and refused the deputies' orders to calm down, it was undisputed that Kent was unarmed, and he made no evasive movements to suggest that he had a weapon. In addition, Deputy Lopez tased Kent while Kent had his hands raised in the air and his back against the bedroom wall. As a result, the court concluded Deputy Lopez's deployment of his taser against Kent was objectively unreasonable under the circumstances.

The court further held in September 2013 it was clearly established that to tase an individual who refused to comply with officers' commands to calm down and yelled at emergency responders, but was never told he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased, constituted excessive use of force.

Concerning Deputy Maher, the court concluded she was not entitled to qualified immunity. The court found that Deputy Maher was in the bedroom for the majority of the incident, she communicated with Deputy Lopez at the situation developed, and she was facing Kent when she heard Deputy Lopez warn Kent that he would use the taser. Consequently, the court concluded Deputy Maher had the "opportunity and the means to prevent" Deputy Lopez from deploying his taser against Kent.

Finally, the court denied Deputies Lopez and Maher qualified immunity on Kent's state law assault and battery claims.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-2519/14-2519-2016-01-06.pdf?ts=1452101438>

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## **Seventh Circuit**

### **United States v. Hamad, 809 F.3d 898 (7th Cir. Ill. January 4, 2016)**

Cook County Department of Revenue agents used an intern to make an undercover purchase of cigarettes from Hamad's convenience store. At the time, a properly-taxed pack of cigarettes in Chicago cost \$8 or \$9; however, the intern purchased a pack of cigarettes for \$6. When the agents examined the pack of cigarettes they determined it did not bear the required Cook County tax stamp. Pursuant to a county ordinance that taxes and regulates the sale of cigarettes, the agents and the intern then entered Hamad's store, identified themselves and went behind the counter to examine the cigarette inventory to determine if there were additional unstamped packs. Behind the counter, the agents found approximately 1,500 loose hydrocodone pills in a candy jar and a handgun concealed in a velvet bag. After Hamad was arrested, he made several

incriminating statements. The government charged Hamad with being a felon in possession of a firearm.

Hamad argued that the sale of an unstamped pack of cigarettes was insufficient justification for the warrantless search of his convenience store by the agents.

The court disagreed. Business owners have a reasonable expectation of privacy in commercial property with respect to traditional police searches as well as administrative inspections designed to enforce regulatory statutes. However, in this case, the county cigarette ordinance authorized the warrantless administrative search of Hamad's store. In addition, Hamad's store was subject to the administrative search exception to the *Fourth Amendment's* warrant requirement because his store sold cigarettes, whose sale has been closely regulated in Chicago for over 100 years. Finally, the county cigarette ordinance provided a constitutionally adequate substitute for a warrant because it limited the time of an inspection to regular business hours, and it limited the inspections to cigarettes, their packaging, and the tax stamps. The court noted the inspection of Hamad's store occurred during regular business hours and immediately after the purchase of a pack of unstamped cigarettes.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/14-3813/14-3813-2016-01-04.pdf?ts=1451941239>

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## **Eighth Circuit**

### **United States v. Daniel, 809 F.3d 447 (8th Cir. Mo. January 5, 2016)**

Two patrol officers saw a man standing outside a vehicle engage in what appeared to be a hand-to-hand drug transaction with a man sitting in the back of the vehicle in a location the officers considered a "high narcotics" area. The officers drove around the corner and ran a computer check on the vehicle's license plate. The check revealed that the vehicle was registered to Brian Daniel, a man for whom there were two outstanding arrest warrants. In addition, the physical description of Daniel matched the man sitting inside the vehicle. The officers returned and approached Daniel as he was walking away from the vehicle. After Daniel gave the officers his name and date of birth, the officers confirmed this information matched the two outstanding arrest warrants. As the officers prepared to arrest Daniel, he threw a plastic baggie to the ground. The officers recovered the baggie, which contained illegal drugs. After handcuffing Daniel, the officers smelled the odor of fresh marijuana emanating from Daniel's vehicle. The officers searched the vehicle and recovered a loaded handgun, marijuana and drug paraphernalia. The government charged Daniel with being a felon in possession of a firearm.

Daniel argued the evidence seized from his vehicle should have been suppressed because the officers did not establish probable cause to support a warrantless search under the automobile exception to the *Fourth Amendment's* warrant requirement.

The court disagreed. First, the officers saw Daniel engage in what appeared to be a hand-to-hand drug transaction from inside his vehicle. Second, the officers then recovered a baggie of drugs that Daniel discarded outside the vehicle. Finally, the officers smelled the odor of marijuana emanating from Daniel's vehicle. The court concluded these facts gave the officers probable cause to believe the vehicle contained marijuana or other evidence of drug-related activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1135/15-1135-2016-01-05.pdf?ts=1452014714>

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**United States v. Janis, 810 F.3d 595 (8th Cir. S.D. January 15, 2016)**

Officer Mousseau, an officer of the Oglala Sioux Tribe (OST) Department of Public Safety (DPS), responded to a report that individuals, including Janis, were consuming alcohol at a home on the Pine Ridge Indian Reservation. At the time, tribal law prohibited alcohol consumption on the Pine Ridge Reservation. An altercation ensued, and Janis was eventually arrested after he repeatedly pushed, hit and attempted to kick Officer Mousseau. The government charged Janis with assault of a federal officer, in violation of *18 U.S.C. § 111*.

Janis appealed his conviction, arguing that the trial court improperly ruled that OST public safety officers, such as Mousseau, are “federal officers” under *18 U.S.C. § 111* when these officers are enforcing tribal laws.

The court disagreed. The Indian Law Enforcement Reform Act provides the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA), “shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country.” The statute permits the BIA to enter into agreements with tribal agencies that allow those agencies to “aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the secretary to enforce tribal laws.” When acting under the authority of such an agreement, “a person who is not otherwise a Federal employee shall be considered to be . . . an employee of the Department of the Interior only for purposes of . . . section 111 . . . of Title 18.” In addition, the Eighth Circuit Court of Appeals has held the plain meaning of these provisions is that tribal officers are afforded the same protections under *18 U.S.C. § 111* that Congress has afforded BIA employees, regardless of whether the officer is enforcing tribal, state or federal law.

Here, the court held the agreement between the OST DPS and BIA required the OST DPS “to provide for the protection of lives, and property for persons visiting or residing within the . . . Pine Ridge Indian Reservation. The agreement also required the OST DPS “to assist the BIA and other federal, tribal and state law enforcement official in the investigation of tribal, state or federal offenses.” In return, the BIA agreed to reimburse the OST DPS for the expenses it incurred. Consequently, because OST public safety officers operated pursuant to this agreement, the district court correctly concluded those officers are afforded the same protection under *18 U.S.C. § 111* that Congress has afforded BIA employees.

Janis also claimed the district court improperly determined as a matter of law that Officer Mousseau was a federal officer at the time of the incident with Janis.

The court agreed, holding the jury should have determined whether Officer Mousseau was employed as a public safety officer and whether she was acting in that capacity at the time of the incident. However, overwhelming evidence admitted at trial, including a stipulation by Janis, demonstrated that Mousseau was in fact an OST public safety officer, and therefore a federal officer. The court concluded in light of this overwhelming evidence that a rational jury still would have found Janis guilty.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3888/14-3888-2016-01-15.pdf?ts=1452875464>

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**United States v. Welch, 2016 U.S. App. LEXIS 976 (8th Cir. Neb. January 21, 2016)**

The FBI began an investigation into a computer server in Nebraska that was hosting child-pornography websites. One of the websites, PedoBook, operated on a clandestine network, accessible only with special software and designed to obscure a user's identity. This prevented FBI agents from discovering the Internet Protocol (IP) addresses of PedoBook users. Instead of shutting the server down, the FBI sought to install software on the server that would circumvent this network, providing agents with information about any user who accessed certain content on PedoBook. This information included the user's IP address, the date and time the user accessed the content, and his or her computer's operating system. The FBI obtained a Network Investigative Technique (NIT) warrant to install its software on the server in November 2012, and kept the website in operation for approximately three weeks, collecting information on several PedoBook users. Based on this information, the FBI obtained Welch's IP address. In December 2012, the FBI received subscriber information for that IP address from an ISP, revealing Welch's name and address in Florida. The FBI obtained a warrant to search that address which they executed on April 9, 2013. At that time, the agents arrested Welch and provided him notice of the NIT warrant shortly thereafter.

Welch filed a motion to suppress evidence obtained as a result of the NIT warrant. Welch argued that the failure of the agents to provide a copy of the NIT warrant to him within the time allowed under *Federal Rule of Criminal Procedure 41(f)(1)(C)* violated his rights under the *Fourth Amendment*.

*Federal Rule of Criminal Procedure 41(f)* requires that a copy of an executed search warrant be provided to the owner of the property seized. However, *Rule 41 (f)(3)* allows a delay in providing the warrant if authorized by statute. *Title 18 U.S.C. § 3103a(b)* allows a delay in providing the warrant under certain circumstances for thirty days or to a later date, and officers may seek extensions. The NIT warrant provided that because immediate notification might have an adverse impact on the investigation, notice to Welch could be delayed by thirty days.

Welch argued that the thirty-day period began to run from the date the government received the subscriber information for Welch's IP address from his ISP in December 2012. Because Welch did not receive notice of the NIT warrant until April 2013, he argues the delay of approximately 122 days was well past the 30 days provided for in the warrant.

The government argued that *Rule 41(f)(1)(C)* did not apply to the NIT warrant because it merely collected information and did not seize property in which Welch had a possessory interest. The government also argued that Welch had no reasonable expectation of privacy in his subscriber information.

First, the court assumed with deciding, that *Rule 41* applied to the NIT warrant. Second, the court held that *18 U.S.C. § 3103a(b)* clearly states that the delay in notification of the warrant runs from the date of the execution of the warrant. Third, the FBI executed the NIT in November 2012, but did not notify Welch until April 2013, more than thirty-days later. Fourth, the FBI did not request permission from the magistrate judge to delay notice to Welch beyond

thirty-days. As a result, the court concluded the government failed to provide Welch proper notice of the NIT warrant under *Rule 41*.

However, the court explained that a procedural rule violation does not automatically render a search and seizure unreasonable under the *Fourth Amendment*. For Welch to prevail, in addition to the *Rule 41* violation, Welch was required to show he was prejudiced by the violation or that the investigators recklessly disregarded proper procedure.

The court found the NIT warrant indicated that a thirty-day delay in notice had been granted, but the warrant did not specify whether that period ran from the execution of the warrant or from identification of an individual. Because the warrant application specifically requested delayed notification until an individual was identified, it appeared to the court that the government's delay was a good-faith application of the warrant, rather than a deliberate violation of *Rule 41*. The court further held there was no evidence that the *Rule 41* violation prejudiced Welch because the government could have easily obtained extensions to delay notice if it had requested them.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1993/15-1993-2016-01-21.pdf?ts=1453393843>

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**United States v. Jackson, 2016 U.S. App. LEXIS 1350 (8th Cir. Mo. Jan. 28, 2016)**

Jackson's small aircraft diverted from its original flight plan and landed at the downtown airport in Kansas City. Homeland Security agents, finding this suspicious, contacted the Airport Police who brought a drug-detection dog to conduct a sniff around Jackson's plane. After the dog alerted to the presence of narcotics near both wings of Jackson's aircraft, agents began to draft an affidavit for a search warrant.

In the meantime, Drug Enforcement Administration (DEA) agents located Jackson at a nearby hotel. The agents knocked on Jackson's door, but received no answer. The agents then called Jackson's room. Jackson answered, saying he would come to the door, but he never did. Several hours later, the agents arrested Jackson as he attempted to leave his room and transported him back to the airport.

A few hours later, agents at the airport obtained the search warrant and found marijuana concealed in Jackson's plane.

First, Jackson filed a motion to suppress the marijuana, arguing the drug dog's alert did not establish probable cause to search his aircraft.

The court disagreed. In *Florida v. Harris*, the United States Supreme Court held that evidence of a drug-dog's satisfactory performance in a certification or training program can by itself, "provide sufficient reason to trust" the dog's alert." Here, the court found the search warrant affidavit provided sufficient facts to establish the dog's reliability. First, the affidavit stated an established company trained the dog alongside her handler. Second, the dog's training lasted four-weeks, including operations in buildings, lockers, luggage, automobiles, and open areas. Finally, the affidavit noted that the dog was certified with a 97 percent accuracy rate in detecting illegal drugs. As a result, the court held the drug-detection dog was reliable, and that her alert, by itself, established probable cause to believe Jackson's plane contained illegal drugs.

In addition, the court found that other facts supported a finding of probable cause. For example, Jackson was a licensed pilot for less than one month, and he had purchased his aircraft only months before. Jackson had flown a non-commercial aircraft a long distance at night and he deviated from his flight plan, which the court found suspicious for a new pilot. Finally, Jackson's evasive behavior when the agents encountered him at the hotel supported a finding of probable cause.

Jackson also claimed that his arrest in the hotel room and his subsequent detention awaiting the search warrant were illegal; therefore, the marijuana seized from his aircraft should have been suppressed as the "poisonous fruit" of his arrest.

The court disagreed. The court held the marijuana discovered in Jackson's aircraft was seized because of the search warrant, which was based on information obtained before Jackson's arrest and detention.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/14-3756/14-3756-2016-01-28.pdf?ts=1453998656>

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## **Tenth Circuit**

### **United States v. Fager, 2016 U.S. App. LEXIS 995 (10th Cir. Kan. January 21, 2016)**

An officer stopped Fager's car around 8:00 p.m. for a turn signal violation near an apartment complex in a high-crime area. The officer approached the passenger-side of the car and encountered Fager, the driver, and Walls, who was in the front passenger's seat. The officer noticed Fager's eyes were watery, his speech was soft, and an unopened can of beer sat in the center console of the vehicle. In addition, Walls continually leaned forward in a way that he made the officer believe that he was trying to obstruct the officer's view of Fager. After the officer received identification from both men, he discovered that Walls had several outstanding arrest warrants, but he was not told the nature of the warrants. After a back-up officer arrived, the original officer directed Fager to exit his vehicle. After the officer determined Fager was not impaired, he asked Fager for consent to search his vehicle. Fager consented. Because it was cold, the officer gave Fager the option to sit inside the officer's patrol car instead of standing outside. Fager agreed. The officer then told Fager he wanted to pat him down to make sure Fager did not possess any weapons. Fager did not say anything, but he positioned himself for a pat-down. The officer conducted a pat-down search and found a firearm in the waistband of Fager's pants. The officer arrested Fager, who was charged with being a felon in possession of a firearm.

Fager filed a motion to suppress the firearm, arguing the officer's pat-down was not supported by reasonable suspicion that Fager was armed and dangerous.

The court disagreed, holding the totality of the circumstances supported reasonable suspicion for the officer to believe Fager might be armed and dangerous. First, while conducting their search of Fager's car, the officers would have had to turn their backs on Fager. The court noted that Eighth Circuit case law had held that when an officer must "turn his or her back to a defendant," little is required beyond this concern to support the officer's reasonable suspicion. Second, Walls, a man with several outstanding arrest warrants was still at the scene, and it was reasonable for the officer to believe that Fager and Wall could have mounted a joint attack



against the officers. Third, Walls had been acting suspiciously when the officer initially approached the vehicle by blocking his view of Fager. Finally, the stop occurred in a high-crime area at nighttime. Under these circumstances, the court concluded the officer was justified in frisking Fager.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/15-3104/15-3104-2016-01-21.pdf?ts=1453395655>

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