
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. 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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FLETC Informer Webinar Schedule

1. **109A Felonies (1-hour)**

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

In the criminal justice system, sexually based offenses are considered especially heinous. When committed in areas of federal jurisdiction, these offenses are known as 109A Felonies (Title 18 United States Code Chapter 109, which includes Sections 2231-2237). This 1-hour webinar will outline the elements of federal sexual offenses and distinguish between acts and contact as defined by 18 U.S.C. Section 2246.

Wednesday February 21, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

******* Please note the updated link for this webinar below and do not use the link provided in the January 2018 issue of The Informer. *******

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2. Juvenile Justice (1-hour)

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

Juvenile matters are usually handled by states, but areas of exclusive federal jurisdiction create unique problems and carry requirements outlined in the Juvenile Justice and Juvenile Law Delinquency Prevention Act. This webinar will explore a series of cases that define due process for juveniles, outline arrest requirements, and discuss best practices for officers in federal jurisdiction that encounter juvenile offenders.

Wednesday March 7, 2018 – 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

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3. Use of Force: Articulation

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

Knowing when to use force is vital, but if an officer cannot clearly explain later why he or she used force, the officer risks losing the legal battle that may follow. This 1-hour webinar will help law enforcement officers better articulate facts and understand the legal principles that drive the ever-growing area of concern for the law enforcement community.

Wednesday March 14, 2018 – 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

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CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Clark, 879 F.3d 1 (1st Cir. ME Jan. 3, 2018)

A police officer stopped a vehicle for erratic driving and for running a red light. Megan Maietta was driving the vehicle and Clark was her sole passenger. The officer received Maietta's driver's license and registration and then asked Clark if he had any identification. Clark told the officer that he did not have a Maine identification, although he had been living in Maine for five years. Clark identified himself as Joseph Leo Clark and volunteered that his birthdate was August 6, 1986. The officer resumed talking with Maietta when Clark interrupted their conversation and told the officer his social security number and his age. The officer heard the first three numbers of Clark's social security number as "256," but recordings of the stop later showed that Clark actually said a number beginning with "257." Clark told the officer that he was twenty-six years old, which was inconsistent with the birthdate he had previously given the officer.

The officer went back to his cruiser and quickly verified Maietta's information, but his database search found no match for Clark. Based on the lack of a match, as well as Clark's failure to have a Maine identification despite having been a resident for five years, the officer suspected that Clark might be trying to conceal his identity. The officer returned to Maietta's vehicle and spent approximately one-minute asking Clark for additional information about where he lived and any past contact he might have had with police. During this time, Clark told the officer that his birthdate was August 25, 1986. Surprised by the different birthdate, the officer asked Clark to confirm the date a third time. Clark told the officer his birthdate was August 5, 1986.

A short time later, the officer received information from another officer that Clark's information was a partial match for a man named Joseph Eugene Clark, who had three active arrest warrants and fit Clark's general description. In addition, the officer was told that Joseph Eugene Clark was known to carry firearms.

When backup officers arrived, they decided to take Clark back to the police station to be fingerprinted to determine his identity. An officer frisked Clark before placing him in a patrol car and felt a bump in Clark's waistband. The officer pulled out the object, which turned out to be two plastic bags of heroin and ecstasy. The officers arrested Clark and transported him to the police station.

The government charged Clark with possession with intent to distribute a controlled substance.

Clark filed a motion to suppress the evidence seized during the frisk. Clark argued that the officer's one-minute period of follow-up questioning after he had already obtained Clark's information unlawfully extended the duration of the traffic stop. Clark further argued that the officer exceeded the proper scope of a Terry frisk when he removed the plastic bags from his waistband.

First, the court found that the officer did not unreasonably extend the duration of the stop by asking Clark one-minute of follow-up questions. The court concluded that the officer asked Clark to repeat his name and date of birth because he reasonably believed that he might have misheard Clark the first time. In addition, the officer asked follow-up questions because he was unable to verify Clark's information, including the information that Clark had provided voluntarily. The court commented that asking a passenger, for one-minute, to confirm identifying information that the passenger volunteered to the officer is "one of these negligibly burdensome precautions justified by the unique safety threat posed by traffic stops."

Second, although the government conceded that the officer exceeded the scope of a Terry frisk, the court held that the inevitable discovery rule applied. A court will apply the inevitable discovery rule to an otherwise unlawful search if:

- 1) The legal means by which the evidence would have been discovered was truly independent,
- 2) The use of the legal means would have inevitably led to the discovery of the evidence, and
- 3) Applying the inevitable discovery rule would not provide an incentive for police misconduct or significantly weaken constitutional protections.

Clark focused his argument on the third prong, as he conceded the officers would have searched him more thoroughly at the police station; therefore, the drugs would have been discovered through independent and lawful means. Clark claimed that the frisk was not performed to protect officer safety, but was performed solely to find identification on him.

The court disagreed. The court noted that the magistrate judge found that the officers frisked Clark because they wanted to find identification and because they had received information that associated Clark with firearms. Consequently, the court found that it was not clearly erroneous for the magistrate judge to find the frisk was motivated in part by legitimate officer safety concerns.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-1125/17-1125-2018-01-09.pdf?ts=1515524405>

United States v. Kennedy, 2018 U.S. App. LEXIS 1735 (1st Cir. MA Jan. 24, 2018)

Police officers received a "Be On the Lookout" (BOLO) bulletin stating that Kennedy was wanted for a larceny that occurred the night before. The officers learned the larceny involved the theft of a safe containing ammunition and possibly weapons, pepper spray, and drugs. In addition, the officers were told that Kennedy might be driving a gray Honda Fit.

Later that day, an officer saw Kennedy driving a gray Honda Fit that matched the description from the BOLO. When Kennedy parked and exited the vehicle, officers arrested him and removed him from the scene. Through the window of the vehicle, an officer saw clutter on the backseat, including duffel bags, garbage bags, backpacks, and clothing. The officer also saw a large, box-shaped object on the backseat, which was

mostly covered by a duffle bag. A small visible portion of the box appeared to be gray and metallic. Believing the object to be the stolen safe, the officers decided to tow the vehicle. Before the officers towed the vehicle, they searched it and found a safe that had been forced open, which contained ammunition and drug paraphernalia.

The government charged Kennedy with being a felon in possession of ammunition.

Kennedy filed a motion to suppress the evidence seized from his vehicle. Kennedy argued that the warrantless search of his vehicle violated the Fourth Amendment because the officers did not have specific information linking the Honda Fit to the larceny.

The court noted that even if Kennedy's argument was true, it was irrelevant. The officers' search was lawful under the automobile exception to the Fourth Amendment's warrant requirement as long as there was probable cause to believe the Honda Fit contained evidence of the larceny. In this case, when the officers searched the vehicle they knew the following: Kennedy was wanted for the theft of a safe containing ammunition and possibly other items that had occurred the previous night; there was clutter in the backseat of the vehicle he had been driving immediately before his arrest, including bags and clothing piled on top of what appeared to be a large, box-shaped item consistent with the size and shape of a safe; and the small portion of the box-shaped item that was exposed appeared gray in color and metallic. Based on these facts, the court concluded there was probable cause to believe the Honda contained evidence of larceny; therefore, the warrantless search was reasonable under the automobile exception.

Kennedy further argued that the passage of ten to twelve hours between the time the larceny was reported and when the officer arrested him rendered any link between the crime and his vehicle stale.

The court disagreed. The items the officers saw when they first looked into the Honda verified the information from the BOLO, which eliminated any concern that the information was stale.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/15-2298/15-2298-2018-01-24.pdf?ts=1516827604>

United States v. Azor, 2018 U.S. App. LEXIS 2096 (1st Cir. ME Jan. 26, 2018)

Pursuant to a wiretap order, task force agents intercepted phone calls in connection with a suspected drug trafficking conspiracy based out of Lewiston, Maine. Agents intercepted several phone conversations between Dastinot and an unidentified person known only as "Cash." During these conversations, Dastinot and Cash discussed a plan in which Cash would take a bus to Boston, Massachusetts and purchase Oxycodone pills. Cash told Dastinot that he would take the 1:50 p.m. bus from Lewiston to Boston, but would return instead to Portland, Maine, so that he would not appear at the Lewiston bus station twice on the same day. In addition, the pair agreed that Dastinot, accompanied by an "elderly" would take Cash to the Lewiston bus station.

After hearing these conversations, agents contacted a Maine State Police Trooper and requested that he conduct surveillance at the Lewiston bus station to watch for Cash. The trooper went to the bus station and saw the 1:50 p.m. bus to Boston parked on the street. The trooper also noticed a truck parked behind the bus that he knew belonged to a woman in her early sixties who was associated with Dastinot. The trooper saw a man he did not recognize exit the truck and get on the Boston-bound bus, which departed a short time later.

Later that night, the trooper went to the bus station in Portland, Maine and waited for the bus from Boston to arrive. During this time, the agents contacted the trooper and told him they received information from the wiretap that indicated the suspect could be on the bus destined for Portland. Although the trooper saw the bus arrive at the station, he was not able to see the passengers disembark from it. However, when the trooper saw the passengers exiting the bus terminal, he saw the same man he had seen in Lewiston exit the terminal and get into a taxi. The man was wearing the same clothing the trooper saw him wearing earlier that day.

The trooper followed the taxi as it drove north towards Lewiston. Because the trooper was not wearing a uniform and was driving an unmarked cruiser, he asked a uniformed officer in a marked cruiser for assistance. The officer followed the taxi for ten miles, waiting for it to commit a traffic violation. The officer eventually pulled the taxi over for speeding. At some point, the officer received a driver's license from the passenger, who told the officer that he had spent the night in Portland and was now going to Lewiston.

Approximately twenty minutes later, a K-9 officer arrived with a drug-sniffing dog. After the dog alerted to the presence of narcotics, the officer ordered the driver and the passenger out of the taxi and frisked the passenger. The officer found a bus ticket showing that the passenger had gone from Boston to Portland only a few hours earlier, and the passenger was not able to explain why he had lied about his trip. The officer searched the taxi and found a plastic bag containing over one thousand Oxycodone pills under the passenger seat. The officer arrested the passenger who confessed that the driver's license was not his and that his real name was Pierre Azor.

The government subsequently charged Azor and several other individuals with a variety of crimes related to drug distribution.

Azor filed a motion to suppress the evidence seized as a result of the stop and search of the taxi. Azor argued that, at the time of the search, law enforcement's observations were not sufficient to corroborate the information obtained over the wiretap, and therefore did not establish probable cause to stop and search the taxi.

The court disagreed. The court held the collective knowledge of the law enforcement officers involved in the investigation established probable cause to stop the taxi and search it. The intercepted phone calls revealed that Cash would be leaving Lewiston on a bus bound for Boston at approximately 1:50 p.m. and return later that same night on a bus to Portland. In addition, before going to the bus station in Lewiston, Cash would meet Dastinot, who would be accompanied by an "elderly," and would give Cash a ride to the bus station. The court noted that at the bus station, the trooper saw a man get out of a truck belonging to a woman in her sixties that the trooper knew was

associated with Dastinot. The trooper then saw the man get on a bus headed for Boston. Later that night, the trooper saw the same man, wearing the same clothes, exit the Portland bus station soon after the bus from Boston arrived. The court held that the man's presence in both of the exact places where Cash stated he would be provided the necessary corroboration that this man was the same person who had spoken to Dastinot earlier on the phone. In addition, the court concluded that the wiretap information was further corroborated when the trooper saw the man get into a taxi and then followed the taxi as it headed for Lewiston.

Azor further argued that the timing of the stop and the behavior of the officers indicated that probable cause to search did not exist. Specifically, Azor claimed that the trooper did not act as if he had probable cause when the trooper did not detain him at the Portland bus station or direct the officer that conducted the traffic stop to detain him. Similarly, Azor argued that the officer who conducted the traffic stop did not act as if he had probable cause because the officer did not immediately arrest him, but instead waited until after the drug-sniffing dog arrived.

Again, the court disagreed. The court stated that law enforcement is not required to arrest a suspect immediately upon development of probable cause. Instead, "when probable cause exists, the timing of an arrest is a matter that the Constitution almost invariably leaves to police discretion." The court found that while the true nature of the traffic stop may have been to further investigate a suspected drug offense, the officer's reliance on a traffic offense to make the stop was irrelevant, as there was probable cause to believe Azor was involved in criminal activity. As a result, the court held that the stop and subsequent search of the taxi were both supported by probable cause.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/15-2056/15-2056-2018-01-26.pdf?ts=1517000404>

Fourth Circuit

United States v. McLamb, 2018 U.S. App. LEXIS 1914 (4th Cir. VA Jan. 25, 2018)

The Federal Bureau of Investigation (FBI) began investigating a child pornography website called "Playpen," which operated as an internet forum for sharing child pornography hosted on The Onion Router (Tor). Tor is an encrypted online network on the dark web that uses a series of relay computers to mask the identity of online users. As a result, Tor obscures how, when, and where users access the internet. At one time, Playpen had over 158,000 total members and nearly 100,000 posts.

After receiving a tip, the FBI seized the Playpen server in February 2015, arrested the administrator of the site, and relocated the website content to servers in a secure government facility in the Eastern District of Virginia. The agents assumed administrative control of the site and while FBI investigators could monitor Playpen traffic, they could not determine who was accessing Playpen because of the Tor encryption technology.

As a result, the FBI applied for a warrant in the Eastern District of Virginia to search computers that accessed Playpen by using a Network Investigative Technique (NIT). The warrant described

the application of the NIT, which sent computer code to Playpen users' computers that instructed the computers to transmit certain information back to the government. The information sent to the government included the computer's Internet Protocol (IP) address, operating system information, operating system username, and its Media Access Control (MAC) address, which is a unique number assigned to each network modem. Although Playpen was hosted in the Eastern District of Virginia, the warrant explained that, "the NIT may cause [a defendant's] computer--wherever located--to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer." A United States magistrate judge in the Eastern District of Virginia issued the warrant. The warrant authorized the use of the NIT for 30 days on any user entering a username and password into the Playpen welcome page.

Just over a week after the NIT went into effect, McLamb entered a username and password into the Playpen welcome page and entered the website, which triggered the NIT. The FBI subsequently obtained a second warrant to physically search McLamb's home and to seize his computer and two hard drives. The government found over 2,700 images and videos of child pornography in McLamb's hard drives and charged him with several child pornography-related offenses.

McLamb filed a motion to suppress evidence of the child pornography found on his hard drive, arguing that the search warrant was invalid. McLamb claimed that the magistrate judge in the Eastern District of Virginia exceeded her statutory authority by issuing the NIT warrant beyond her district court's jurisdictional boundaries. The district court disagreed and denied McLamb's motion. McLamb appealed.

The court found that the First, Eighth, and Tenth Circuits have already considered the same NIT warrant at issue in this case. In each of those cases, the court concluded that even if the NIT warrant violated the Fourth Amendment, the good faith exception, as outlined by the United States Supreme Court in U.S. v. Leon applied; therefore, the evidence seized was admissible against the defendant.

The court then held that the good-faith exception applied in this case as well. The court recognized the boundaries of a magistrate judge's jurisdiction in the context of remote access warrants were unclear at the time of the warrant application. Without judicial precedent to provide guidance, the FBI consulted with attorneys from the Department of Justice Child Exploitation and Obscenity Section. The court found that in such cases, consultation with government attorneys is "precisely what Leon's "good-faith" expects of law enforcement." The court refused to find a warrant invalid where the legality of an investigative technique was unclear and law enforcement sought advice from counsel before applying for the warrant.

Because of concerns with the legality of the NIT and similar remote access investigative programs, the Federal Rules of Criminal Procedure were amended in 2016 to provide an additional exception to the magistrate's jurisdictional limitation by allowing warrants for programs like the NIT.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/17-4299/17-4299-2018-01-25.pdf?ts=1516908619>

Fifth Circuit

United States v. Williams, 2018 U.S. App. LEXIS 1795 (5th Cir. LA Jan. 24, 2018)

Williams was convicted on state charges of distributing marijuana and placed on probation for five years. A condition of Williams' probation required him to submit to warrantless searches of his person and property when the probation officer had reasonable suspicion to believe that Williams was engaged in criminal activity.

During the term of Williams' probation, his probation officer received information from the Drug Enforcement Administration (DEA) that Williams was involved in narcotics trafficking. Based on this tip as well as his knowledge of Williams' prior criminal history, the probation officer decided to conduct a compliance check on Williams. The probation officer called Williams and asked him to come to his office but Williams said he could not leave the car dealership where he worked because he was the only one there. Consequently, the probation officer and other law enforcement officers went to Williams' car dealership.

At the car dealership, the probation officer saw bulges in Williams' pockets. When the probation officer asked Williams about the bulges, Williams told him that he had cash in his pockets. The probation officer Mirandized Williams and then conducted a Terry-style frisk. The probation officer removed wads of cash from Williams' pockets to see if they concealed any weapons in Williams' pockets. When asked about the cash, Williams told the probation officer that he had earned the money, approximately \$10,000 from selling cars. The probation officer thought it was odd that Williams had such a large amount of cash, as Williams had previously reported that he earned \$2,500 per month. While the probation officer searched the car dealership with Williams' consent, a DEA agent asked Williams about the cash found in his pockets. Williams told the agent he received the cash from a person named Twon to buy cars at an auction. When the probation officer learned about this, he became suspicious because of the conflicting accounts Williams provided concerning the cash, and because Twon was a known drug dealer. Afterward, a drug dog alerted to the presence of drug residue on the cash seized from Williams' pockets.

The probation officer then obtained consent to search Williams' mother's home because it was the address listed on the incorporation papers to his business. In an effort to end the ongoing search of his mother's home, Williams voluntarily told the officers, "What you are looking for is at my house. I have a gun and money at my residence." The probation officer went to Williams' house and obtained his consent to search it. The officers found \$2,000 in a closet, \$425,000 in a safe, and a handgun in a nightstand drawer. Williams was arrested and the government charged him with several drug and firearm related offenses.

Williams filed a motion to suppress the evidence the officers seized on the day of his arrest.

As an initial matter, the court recognized that one of Williams' probation conditions allowed his probation officer to conduct warrantless searches of Williams' person and property when the probation officer established reasonable suspicion that Williams was engaged in criminal activity.

Here, the court held that the officer established reasonable suspicion to conduct the Terry-style frisk of Williams at the car dealership because when the officer encountered Williams he saw large visible bulges in Williams' pockets. In addition, the court held that the officer was justified in removing the objects that felt like a wad of folded bills because the bills could have been concealing weapons in Williams' pockets.

Next, the court held that the probation officer established reasonable suspicion that Williams was involved in drug trafficking, which justified the warrantless searches of Williams' mother's home and of Williams' house.

First, the tip from the DEA and the probation officer's past experience with Williams were sufficient to support the decision to search Williams' mother's home. Second, the probation officer's reasonable suspicion was further supported after he seized \$10,000 from Williams' pockets knowing that Williams reported only \$2,500 per month in income. Third, the drug dog alerted to the presence of narcotics on the cash. Fourth, Williams gave conflicting stories concerning the source of the cash. Fifth, Williams stated that the source of the cash was a person named "Twon" who was known by law enforcement as a major drug dealer. Finally, while searching Williams' mother's house, Williams told the officers that he had a gun and additional cash at his house.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-30198/17-30198-2018-01-24.pdf?ts=1516840215>

Eighth Circuit

United States v. Crumble, 878 F.3d 656 (8th Cir. MN 2018)

At approximately 1:28 p.m., police received reports of shots being fired between two vehicles. Dispatch told responding officers that one of the vehicles, a tan Buick, had crashed into a house and its two male occupants had fled on foot. Officers arrived at the scene and found the wrecked Buick with bullet holes along its passenger side and a shot-out rear window. They also saw the Buick's key in its ignition and a handgun on the driver's side floorboard. A witness provided a description of the Buick's occupants and told officers the men fled the scene on foot. Officers found a man, later identified as Crumble, hiding behind a shed a block and a half away. The officers took Crumble into custody and drove him back to the wrecked Buick, where he denied any knowledge of the shooting or the Buick.

An officer searched the Buick later that day and found a cell phone on the driver's seat. The next day, the officer obtained a warrant to search the cell phone for "information as to the second occupant of the Buick or further information related to the crime." In the subsequent search, the officer found a video of Crumble brandishing a handgun similar to the one recovered from the Buick. The video was recorded the same day of the shooting at 1:15 p.m.

The government charged Crumble with being a felon in possession of a firearm. Crumble filed a motion to suppress the evidence recovered from the cell phone. Crumble argued that he had a reasonable expectation of privacy in the cell phone the officers found in the Buick. The district court held that the evidence from the cell phone was admissible because Crumble abandoned the Buick and the phone when he fled the scene of the crash and later denied any knowledge of the vehicle.

Crumble appealed to the Eighth Circuit Court of Appeals. Crumble argued that he fled the scene in an attempt to get away from the shooter in the other vehicle and not to avoid the police. As a result, Crumble claimed that he did not abandon the Buick for Fourth Amendment purposes.

The court disagreed. The court noted that abandonment “does not turn on Crumble’s subjective intent” or why he abandoned the Buick, but rather, “the objective facts available to the investigating officers.” In this case, after the crash, Crumble fled the scene, leaving the Buick wrecked on a stranger’s lawn. The Buick’s key was in the ignition and its back window was shot-out, allowing for easy access to the vehicle and its contents. Later, when the officers brought Crumble back to the Buick, he denied any knowledge of the wrecked vehicle. Based on these facts, the court concluded it was reasonable for the officers to believe that Crumble abandoned the Buick and its contents.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/16-4308/16-4308-2018-01-02.pdf?ts=1514910625>

United States v. Whitewater, 879 F.3d 289 (8th Cir. NE Jan. 3, 2018)

As two men drove home from a party, a car pulled alongside their vehicle and a man in the passenger seat leaned out the window and fired two shots from a handgun into the air. The men recognized the shooter from his neck tattoo and floppy hat with marijuana leaves depicted on it as a person who had been ejected from the party earlier that night. As the men sped away from the shooter’s car, the man in the passenger seat fired several rounds into the back of their vehicle. The victims reported the incident, and the investigating officers developed Anthony Whitewater as a suspect.

Two days after the shooting, the victims provided almost identical descriptions of the shooter to federal agents. The victims described the shooter as a Native American male with dark hair, squinty eyes, and a throat tattoo, who was wearing a black floppy hat with marijuana leaves depicted on it. After an agent pulled images from a database that matched the victims’ description of the shooter, and agent met with the victims and separately conducted a six-photo lineup. Both victims identified Whitewater as the shooter. The government subsequently charged Whitewater with a variety of criminal offenses.

Whitewater filed a motion to exclude evidence of the photo lineup and in-court eyewitness identification by the victims. Whitewater claimed that the photo lineup was impermissibly suggestive because he was the only Native American in the lineup. The district court disagreed. The district court found that to create the photo lineup the agent pulled five images from an online database matching the description of the shooter provided by the victims. Specifically, the district court found that the images in the lineup were all males between twenty to fifty years of age, with dark or olive skin, very short black hair, and neck tattoos. Whitewater appealed.

The Eighth Circuit Court of Appeals affirmed the district court. The court recognized that a photo lineup is not unduly suggestive solely because it does not “depict persons of the same race or ethnic group.” Even if Whitewater was the only Native American in the lineup, the court noted that all of the men featured in the lineup shared similar physical characteristics such that Whitewater’s ethnicity did not isolate him. In addition, while Whitewater claimed that his Native American neck tattoo made him stand out, he pointed to no evidence in the record suggesting that his tattoo was distinctively Native American while the other men’s tattoos were not. Because the identification procedures were not impermissibly suggestive, the court concluded that the district court properly allowed the evidence of the photo line up to be submitted to the jury.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-1258/17-1258-2018-01-03.pdf?ts=1514997038>
