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The Federal Law Enforcement -Informer-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

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CASE SUMMARIES

United States Supreme Court

Egbert v. Boule, 2022 U.S. LEXIS 2829, 596 U.S. ___ (2022)

Robert Boule is a United States citizen who lives in Blaine, Washington. The rear of Boule's property abuts the Canadian border. Boule markets his home as a bed-and-breakfast, which is named, "Smuggler's Inn." Boule's business model included hosting "guests" at the Inn who had unlawfully entered the United States. Boule would also pick up Canada-bound guests and drive them to the Inn. Either way, Boule would charge for his shuttle service and require guests to pay for a night of lodging even if they never intended to stay at the Inn. Meanwhile, Boule would inform federal law enforcement if he was scheduled to lodge or transport persons of interest. United States Border Patrol agents would then arrest the guests. Boule estimated that over the years, the government paid him over $60,000 for his services.

On March 14, 2014, Boule informed Border Patrol Agent Erik Egbert that a Turkish national had scheduled transportation to Smuggler's Inn later that day. Agent Egbert grew suspicious, as he could think of no legitimate reason a person would travel from Turkey to stay at a bed-and-breakfast on the border in Blaine. Later that afternoon, Agent Egbert observed one of Boule's vehicles, a black SUV with the license plate "Smugler," returning to the Inn. Agent Egbert suspected that Boule's Turkish guest was a passenger and followed the SUV into the driveway so he could check the guest's immigration status.

According to Boule, he instructed Agent Egbert to leave his property, but Agent Egbert declined. Instead, Boule claims, Agent Egbert lifted him off the ground and threw him against the SUV. After Boule collected himself, Agent Egbert allegedly threw him to the ground. Agent Egbert then checked the guest's immigration paperwork, concluded that everything was in order, and left.

Boule lodged a grievance with Agent Egbert's supervisors, alleging that Agent Egbert had used excessive force and caused him physical injury. Boule also filed an administrative claim with Border Patrol pursuant to the Federal Tort Claims Act (FTCA).

According to Boule, Agent Egbert retaliated against him while those claims were pending by reporting Boule's "SMUGLER" license plate to the Washington Department of Licensing for referencing illegal conduct, and by contacting the Internal Revenue Service and prompting an audit of Boule's tax returns. Ultimately, Boule's FTCA claim was denied, and, after a year-long investigation, Border Patrol took no action against Agent Egbert for his alleged use of force or acts of retaliation.

In January 2017, Boule sued Agent Egbert in his individual capacity in Federal District Court, alleging a Fourth Amendment violation for excessive use of force and a First Amendment violation for unlawful retaliation under Bivens v. Six Unknown Federal Narcotics Agents. The district court declined to extend a Bivens remedy to Boule's claims and entered judgment for Agent Egbert. Boule appealed. The Ninth Circuit Court of Appeals reversed the district court, holding that Boule had Bivens remedies available to him under the facts of this case. Agent Egbert appealed, and the Supreme Court granted certiorari, agreeing to hear the case.

In Bivens, decided in 1971, the Supreme Court held that it had the authority to create a cause of action under the Fourth Amendment against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations. Over the following decade, the Court twice again created new causes of action under the Constitution. First, in 1979, the Court held that a woman discharged from employment by a United States Congressman had a right of action, arising directly under Fifth Amendment due process clause, to recover damages for the Congressman's alleged sex discrimination. Next, in 1980, the Court held that the mother of a deceased inmate had a right of action under the Eighth Amendment against federal prison officials for failing to give her son competent medical attention. However, since these cases, the Court has declined 11 times to create a similar cause of action for other alleged constitutional violations.

While the Court was not willing to "dispense with Bivens altogether," in recent opinions, it has "emphasized that recognizing a cause of action under Bivens is a judicially disfavored activity." In Ziglar v. Abbasi, decided in 2017, the Court noted that it does not favor judicially-created or implied causes of action, such as Bivens, because, under the separation of powers principle, Congress is in a better position to create express causes of action. Going forward, the Court stated that the analysis of a proposed Bivens claim proceeds in two steps. First, a court asks whether the case presents a new Bivens context, *i.e.,* is it meaningfully different from the three cases in which the Court has implied a damages action. Second, even if so, are there any "special factors" present that would preclude extending Bivens. The Court added, "this two-step inquiry often resolves to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." In addition, the Court noted that "a court may not fashion a Bivens remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure."

Applying the facts of this case to the principles outlined in Ziglar, the Court reversed the Ninth Circuit Court of Appeals concluding that the court "plainly erred when it created causes of action for Boule's Fourth Amendment excessive-force claim and First Amendment retaliation claim.

Concerning Boule's Fourth Amendment claim, the Court held that the risk of undermining border security provided reason to hesitate before extending Bivens into this field. In Hernandez v. Mesa, decided by the Court in 2020, the Court declined to create a damages remedy for an excessive-force claim against a Border Patrol agent because regulating the conduct of agents at the border unquestionably has national security implications. These national security implications constituted "special factors" that Congress, not the courts, were better suited to address. Consequently, the court concluded that permitting a lawsuit against a Border Patrol agent "presents national security concerns that foreclose Bivens relief."

Next the Court found that Congress has provided alternative remedies for individuals in Boule's position. Specifically, 8 U. S. C. 1103(a)(2) provides that the U.S. Border Patrol is statutorily obligated to control, direc[t], and supervis[e] . . . all employees. In addition, 8 CFR 287.10(a)-(b) provides that Border Patrol must investigate "[a]lleged violations of the standards for enforcement activities and accept grievances from [a]ny persons wishing to lodge a complaint." The court noted that Boules took advantage of these grievance procedures, which resulted in a year-long internal investigation into Agent Egbert's conduct.

Finally, the Court held there was no cause of action for Boule's First Amendment retaliation claim. The Court concluded that Boule's retaliation claim presents a new Bivens context and found that there "are many reasons to think that Congress is better suited to authorize a damages remedy."

For the Court's opinion: https://www.supremecourt.gov/opinions/21pdf/21-147_g31h.pdf

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Denezpi v. United States, 2022 U.S. LEXIS 2834, 596 U.S. ___ (2022)

Merle Denezpi and V. Y., both members of the Navajo Nation, traveled to Towaoc, Colorado, a town within the Ute Mountain Ute Reservation. While the two were alone at a house belonging to Denezpi's friend, Denezpi barricaded the door, threatened V. Y., and forced her to have sex with him. After Denezpi fell asleep, V. Y. escaped from the house and reported Denezpi to tribal authorities.

An officer with the federal Bureau of Indian Affairs filed a criminal complaint against Denezpi that charged Denezpi with three crimes: assault and battery, in violation of 6 Ute Mountain Ute Code §2 (1988); terroristic threats, in violation of 25 CFR §11.402; and false imprisonment, in violation of 25 CFR §11.404. The officer filed the complaint in a CFR court, a court which administers justice for Indian tribes in certain parts of Indian country "where tribal courts have not been established." Denezpi pleaded guilty to the assault and battery charge, and the prosecutor dismissed the other charges. The Magistrate sentenced Denezpi to time served, 140 days of imprisonment.

Six months later, a federal grand jury in the District of Colorado indicted Denezpi on one count of aggravated sexual abuse in Indian country, an offense covered by the federal Major Crimes Act, 18 U.S.C. §§2241(a)(1), (a)(2), 1153(a). Denezpi filed a motion to dismiss the indictment, arguing that the Double Jeopardy Clause prohibited the consecutive prosecution. The district court disagreed and denied the motion. After a jury convicted Denezpi, the District Court sentenced him to 360 months of imprisonment. Denezpi appealed and the Tenth Circuit Court of Appeals affirmed the district court.

Denezpi appealed to the Supreme Court which granted certiorari and agreed to hear the case. Denezpi argued that the prosecutors in CFR courts exercise federal authority because they are subject to the control of the Bureau of Indian Affairs; therefore, he was prosecuted twice by the United States, in violation of the Double Jeopardy Clause. The Court disagreed, affirming the Tenth Circuit Court of Appeals.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Clause, by its terms, does not prohibit twice placing a person in jeopardy "for the same conduct or actions." Instead, it prohibits successive prosecutions "for the same offence." The Court explained that an offense is defined by the law which, in turn, is defined by the sovereign that makes it.

The Court found that Denezpi's single act violated two laws: the Ute Mountain Ute Code's assault and battery ordinance and the United States' aggravated sexual abuse in Indian country statute. The Ute Mountain Ute Tribe exercised its "unique" sovereign authority in adopting the tribal ordinance while Congress exercised the United States' sovereign power in enacting the federal criminal statute. Consequently, the two laws, defined by separate sovereigns, constituted separate offenses. Because Denezpi's second prosecution did not place him in jeopardy again "for the same offence," that prosecution did not violate the Double Jeopardy Clause.

The Court added that, even if it accepted Denezpi's argument that the Federal Government prosecuted his tribal offense, the Double Jeopardy Clause did not bar the Federal Government

from prosecuting him under the Major Crimes Act as well. The Court added, "the Clause does not ask who puts a person in jeopardy. It zeroes in on what the person is put in jeopardy for: the "offence," . . . or violation of a law. We had seen no evidence that "offence" was originally understood to encompass both the violation of the law and the identity of the prosecutor."

For the Court's opinion: https://www.supremecourt.gov/opinions/21pdf/20-7622_ljgm.pdf

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Circuit Courts of Appeals

Fifth Circuit

United States v. Martinez, 25 F.4th 303 (5th Cir. 2022)

On March 12, 2019, a United States Postal Inspector was contacted by a postal employee at the United States Postal Facility (USPS) facility in El Centro, California, regarding two suspicious packages. The postal employee informed the Inspector that: (1) two men paid the postage fees for the packages with cash; (2) the information on the shipping labels was handwritten; (3) the handwriting on the shipping labels for the two packages appeared identical, as though the same person filled out both shipping labels, yet the purported senders' names on the labels were different; (4) both packages were being sent to the same area, Shreveport, Louisiana, but to different addresses there; and (5) one of the men paying the postage fees appeared to be anxious or nervous and did not engage the postal employee in conversation. Based on this information, the Inspector requested that the packages be forwarded to him at the San Diego field office for further investigation.

On March 14, 2019, the Inspector received the packages. He examined the outside of the packages and observed that the size, shape, and appearance of the packages were consistent with USPS drug package profile characteristics. Utilizing the USPS database, the Inspector learned that someone with an Internet Protocol ("IP") address originating in Mexico was tracking both packages. Specifically, from the time the packages were intercepted, there were several attempts to track both packages from the same Mexican IP address. Through his experience and training, the Inspector knew that drug traffickers use the USPS because the tracking website allows them to search for their packages.

The Inspector also used a database to check the names and addresses written on the shipping labels of the two packages. Although the database was able to locate the addresses, it was unable to associate the names to those addresses. This information indicated to the Inspector that that the names provided on the labels did not receive mail at, and were not otherwise associated with, the addresses. From his experience, the Inspector knew that persons using the USPS system to ship controlled substances will enter false or fictitious sender names and/or sender addresses in order to avoid detection by law enforcement. They will also use recipient names not associated with the destination address.

Based on these facts, on March 20, 2019, the Inspector contacted a border patrol officer to perform a canine sniff of the packages. The Inspector was unable to arrange for a canine examination prior to that date because he had to work on other cases, and he missed work due to illness. The dog alerted to both packages, indicating that the odor or aroma of one or more controlled substances emanated from the packages.

After the canine examination, the Inspector was again required to work on other cases. He began drafting the affidavits in support of search warrants for the two packages on March 22, 2019. The following Monday, however, the Inspector missed work due to illness. When the Inspector returned to work the next day, he finished the search warrant applications and sent them to the United States Attorney's Office. He obtained search warrants for the packages on March 28, 2019, and searched the packages the next day. The Inspector discovered 2,222 grams of methamphetamine inside.

After Gilbert Martinez was identified as one of the men who mailed the packages at the USPS facility in El Centro, he was charged with two drug-related offenses. Martinez filed a motion to suppress the packages and their contents, arguing the following: (1) the postal employee did not have reasonable suspicion to detain the packages; and (2) the delay between the detention of the packages and their search was unreasonable under the Fourth Amendment. The district court denied the motion and, upon conviction, Martinez appealed.

If the government has reasonable suspicion that a package sent via the USPS contains contraband or evidence of criminal activity, the package may be detained without a warrant. In addition, the Fifth Circuit Court of Appeals has recognized that certain traits are commonly encountered in the vast majority of the illicit mailings of drugs. In this case, the postal employee observed several drug package profile characteristics, including: (1) the information on the shipping labels was handwritten; (2) the postage fees were paid in cash, allowing the sender to remain anonymous or avoid detection by law enforcement; (3) the Southern District of California is known as a source region for controlled substances; and (4) at least one of the men mailing the packages appeared to be anxious or nervous. Finally, although the handwriting on the shipping labels for the two packages appeared identical, as though the same person filled out both shipping labels, the purported senders' names on the labels were different. Based on these factors, the court concluded the postal employee had reasonable suspicion to detain the packages.

Next, the court held that the delay between the detention of the packages and their search was reasonable. The court noted there is no bright-line rule regarding how long a package may be detained lawfully prior to obtaining a search warrant; however, the detention of mail could, at some point, become unreasonable under the Fourth Amendment. Relevant factors in determining reasonableness include investigatory diligence, the length of detention, and whether there are circumstances beyond the investigator's control.

In this case, the court held that the eight-day delay in obtaining the canine sniffs was reasonable because the Investigator was diligent in his investigation of the packages after receiving them. During this time, the Investigator examined the names and addresses on the packages and ran database checks on this information. In addition, it was undisputed that during those eight days, which included a weekend, the Inspector was required to work on other cases and missed work due to illness.

The court further held that the additional eight-day delay between the establishment of probable cause and obtaining the search warrants was reasonable. The court found that, during this period, the Investigator was diligent in drafting the applications for the search warrants after the canine alerted to the packages, that he was required to work on other cases, he took a sick day, and the delay included a weekend.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca5/21-30068/21-30068-2022-02-01.pdf?ts=1643761816

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Seventh Circuit

United States v. Smith, 32 F.4th 638 (7th Cir. 2022)

On June 18, 2018, at approximately 9:00 p.m., Chicago police officers Steven Holden and Dimar Vasquez pulled over a vehicle for running a red light. Officer Vasquez spoke with the driver, Dalon Naylor, while Officer Holden went to the passenger side of the vehicle, where he encountered Leamon Smith, seated in the front passenger seat.

As Smith handed over his driver's license, Officer Holden commented that Smith was "shaking like a leaf." Officer Holden asked Smith to step outside and directed him to the back of the car. Smith complied but immediately rested the front of his pelvis against the car, even though he had not been asked to do so. Officer Holden asked Smith to take a half-step away from the car and performed the first of three pat-downs.

The first pat-down focused on "hot spots," including Smith's waistband, front pockets, and lower leg, but not his groin area. Although Officer Holden did not find anything, he placed Smith in handcuffs and told him that he was simply being detained. Still suspecting that Smith might be hiding something in his pants, Officer Holden told Smith if he had something, "we can work with it." Smith replied that he had, "really nothing."

Next, Officer Holden asked Smith to walk from the back of Naylor's car to the front of the police car while he entered their names in a law-enforcement database. Officer Holden later testified that Smith "had that side-to-side walk, as if he was holding something in his crotch area and he was trying to walk around it or hold it in place." Smith then rested his pelvis against the front of the police car. After running the name check, Officer Holden asked Smith to walk from the police car back to Naylor's car, where Smith again rested his pelvis on the car without prompting. Officer Holden offered to uncuff one of Smith's hands so that Smith could retrieve whatever he was hiding, but Smith declined.

Meanwhile, Officer Vasquez was conducting a consent search of Naylor's car. Approximately six and a half minutes after the first pat-down, Officer Holden performed the second pat-down by jiggling Smith's pant legs. Nothing fell out. Officer Holden then asked Smith to walk back to the police car one more time. Officer Holden observed that Smith was walking with an exaggerated limp and asked if he was injured. Smith responded that he had been in a car accident and injured his right leg. Officer Holden later testified that Smith's more-pronounced limp was consistent with an item having "dropped" from his crotch.

About one minute after the second pat-down, Officer Holden conducted the third, and final, pat-down, this time focusing on Smith's groin area. Officer Holden felt a hard metal object, which he removed from Smith's underwear and determined to be a loaded handgun.

The government charged Smith with being a felon in possession of a firearm. Smith filed a motion to suppress the firearm, arguing that Officer Holden violated the Fourth Amendment because none of the pat-downs were supported by reasonable suspicion to believe that he was armed and dangerous. The district court denied the motion and, upon conviction, Smith appealed.

On appeal, Smith conceded that the traffic stop itself was lawful and that Officer Holden had reasonable suspicion to conduct the initial pat-down. However, Smith argued that the second and

third pat-downs lacked reasonable suspicion and were based on no more than a hunch that Smith was hiding something.

To justify a pat-down of the driver or a passenger during a traffic stop, "the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." In addition, "it is not necessarily unreasonable for police to frisk a person more than once." The reasonableness of subsequent frisks depends on whether the officer has reasonable suspicion to believe that the person, at the moment the officer frisked him, was a threat to the safety of the officer. Consequently, what happens between each frisk is crucial to determine their reasonableness.

In this case, the Seventh Circuit Court of Appeals held that the second pat-down was reasonable. Officer Holden had seen Smith walk twice between the cars, repeatedly rest his pelvis against the cars, as if to prop something up, and continued to appear unusually nervous. The court concluded that an officer in those circumstances could reasonably infer that Smith was hiding a weapon in his pants. The court added that the second pat-down was also tailored to the situation and minimally invasive, as Officer Holden's body-cam video shows that he simply shook Smith's pant legs to see if something would fall out.

The court rejected Smith's contention that Officer Holden could not have actually believed he was hiding a weapon because, before the second pat-down, Officer Holden offered to uncuff one of Smith's hands so he could retrieve whatever was in his pants. In Smith's view, no reasonable officer would uncuff a person who the officer believed was armed and dangerous.

The court rejected Smith's argument for two reasons. First, Officer Holden did not need to be certain that Smith was hiding a weapon as opposed to drugs or other contraband before conducting the second pat-down, "what matters is whether a reasonable officer would fear for his safety at that moment in time." Second, even if Officer Holden suspected that Smith was merely hiding drugs, an officer's subjective beliefs are irrelevant to the reasonable suspicion inquiry; courts ask whether, in light of the facts available to the officer at the time, a reasonable officer would have believed that the person was armed and dangerous.

The court then held that the third pat-down, which occurred after Officer Holden asked Smith to walk from Naylor's car to the police car, was reasonable. The court concluded that Smith's exaggerated limp elevated Officer Holden's suspicions and that Officer Holden did not have to accept Smith's story that he had injured his leg in a car accident.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/21-1266/21-1266-2022-04-22.pdf?ts=1650645019

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Ninth Circuit

Estate of Aguirre v. County of Riverside, 29 F.4th 624 (9th Cir. 2022)

On April 15, 2016, Sergeant Dan Ponder of the Riverside County Sheriff's Department received radio reports that someone in Lake Elsinore, California, was destroying property with a bat-like object, and had threatened a woman with a baby.

Upon arriving, Sergeant Ponder exited the patrol car with his gun drawn, motioned for Najera to back away, and demanded that he drop the stick. Najera did not drop it, and by some accounts

verbally refused to do so. Sergeant Ponder next tried to pepper-spray Najera, but the spray blew back in Sergeant Ponder's face, and Najera appeared largely unaffected.

At this point, Sergeant Ponder pointed his gun at Najera and again ordered him to drop the stick, but Najera did not comply. By some eyewitness accounts, Najera next retrieved a baseball bat from nearby bushes and advanced quickly toward Sergeant Ponder with at least one weapon raised. Other witnesses stated that Najera stood still, holding a single stick pointed down. Whichever the case, Ponder, without issuing a warning, shot Najera six times from no more than fifteen feet away. Najera died.

Sergeant Ponder claimed that Najera stood facing him during all six shots, but the coroner's report found that Najera died from two shots to his back. The bullet paths suggested that Najera had turned away from Sergeant Ponder and was falling to the ground when the bullets struck.

Three of Najera's children (the Plaintiffs) sued Sergeant Ponder and Riverside County under 42 U.S.C. § 1983, alleging among other things, that Sergeant Ponder used excessive force in violation of the Fourth Amendment by shooting Najera. The district court denied Sergeant Ponder qualified immunity and he appealed.

When a defendant (officer) appeals the denial of qualified immunity, the appellate court must determine: (1) whether there has been a violation of the constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct. In addition, when making this determination, the court is bound to "view the facts in the light most favorable" to the plaintiff. This means that the court must accept the plaintiff's version of the events as being true. Finally, if there are factual disputes as to what transpired during an encounter between an officer and a suspect, it is the role of the jury, not the court, to determine which side to believe.

In this case, the Ninth Circuit Court of Appeals affirmed the district court's denial of qualified immunity to Sergeant Ponder. First, a key disputed fact was whether Najera was facing Sergeant Ponder and coming "on the attack," as Sergeant Ponder claimed or whether Najera was turned away from the officer, as indicated by the coroner's report. Next, although eyewitnesses agree that Najera was holding at least one bat-like object when he was shot, it was disputed how he held that object. Specifically, nothing in the record suggested that Najera was threatening bystanders or advancing toward them when Sergeant Ponder shot him. Based on the Plaintiff's account of the incident, Najera presented no threat to Sergeant Ponder or anyone else when he was shot; therefore, the district court properly found that Officer Ponder's conduct was not objectively reasonable, and his use of excessive force violated the Fourth Amendment.

Next, the court concluded that in April 2016, clearly Ninth Circuit case law put Sergeant Ponder on notice that it was unlawful for a police officer to use "deadly force against a non-threatening individual, even if the individual is armed, and even if the situation is volatile." The court recognized that Sergeant Ponder entered a "potentially volatile" situation when he responded to the calls about Najera, and acknowledged the difficulties that Sergeant Ponder and other officers face when responding to tense and often explosive situations. Nevertheless, even in such situations, officers must not use deadly force against non-threatening suspects, even if those suspects are armed.

In conclusion, the court noted that Sergeant Ponder's response to these clearly established principles was to repeat his assertion that Najera posed an immediate threat to the officer or bystanders at the time of his death. However, the court reiterated that Sergeant Ponder could neither rewrite the facts to his own liking nor ignore the disputed evidence, as the court could not

assume the jury's role to resolve the disputed question whether Najera presented an immediate threat.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/19-56462/19-56462-2022-03-24.pdf?ts=1648141252

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United States v. Rosenow, 33 F.4th 529 (9th Cir. 2022)

Yahoo and Facebook are electronic communication service providers (ESPs) that provide online private messaging services. These services allow users to share instant messages, images, and videos that only the sender and recipient can see. Both companies have policies governing user privacy, which include provisions regarding their procedures to conduct internal investigations when allegations arise suggesting that child pornography might exist on their platforms.

The Protect Our Children Act of 2008 requires ESPs to report "any facts or circumstances from which there is an apparent violation of" specified criminal offenses involving child pornography. ESPs report to the National Center for Missing and Exploited Children (NCMEC), a non-profit organization that is statutorily required to operate the "CyberTipline," which is an online tool that gives ESPs "an effective means of reporting internet-related child sexual exploitation." The NCMEC is required to make every "CyberTip" it receives available to federal law enforcement. ESPs that fail to report "apparent violation[s]" of the specified criminal statutes involving child pornography face substantial fines.

In 2014, Yahoo filed a CyberTip with the NCMEC after an internal investigation revealed that one of its users, Carsten Rosenow, utilized Yahoo's online messaging service to communicate with sellers of child-exploitation content from the Philippines. The Yahoo investigation revealed that Rosenow was a "buyer" who regularly communicated with "sellers" about his child sex tourism in the Philippines. In addition to filing the CyberTip, Yahoo notified the Federal Bureau of Investigation (FBI) and Homeland Security Investigations (HSI) about its report. In response, the FBI requested that Yahoo preserve Rosenow's communications. Under the Stored Communications Act, an ESP, upon receiving a preservation request "shall take all necessary steps to preserve records and other evidence in its possession" for up to 180 days "pending the issuance of a court order or other process."

After the government learned that Rosenow had a Facebook account under a different name, an FBI agent sent preservation requests and administrative subpoenas to Facebook, requesting that Facebook provide Rosenow's "basic subscriber information and IP log-in information" for both of his identified user accounts. The subpoena indicated that the case involved "child safety." Because Facebook automatically reviewed user accounts whenever a subpoena indicated a child safety concern or suggested that child exploitation materials might exist, the agent's subpoena triggered Facebook's review of Rosenow's account activity, including his "messages, timelines, photos, IP addresses, and machine cookies." Facebook discovered child-exploitation content that violated its terms of use, immediately disabled Rosenow's accounts, and filed two CyberTips with the NCMEC. The NCMEC forwarded Facebook's CyberTips to the FBI. The CyberTips showed that Rosenow had sent three files that Facebook classified as "child pornography" and provided excerpts from Rosenow's conversations negotiating sex acts with three underage girls in the Philippines. When the agent submitted her subpoena to Facebook, she did not know that it would trigger Facebook's automatic internal searches. However, the agent acknowledged that, because

she submitted this subpoena, she received information from the NCMEC about Rosenow's Facebook account that she could not otherwise have obtained without a warrant.

In July 2017, the agent prepared affidavits seeking search warrants for Rosenow's person, baggage, and home, relying almost exclusively on evidence in Yahoo's and Facebook's CyberTips. The warrants sought evidence of child pornography offenses and child sex tourism. Two days later, the FBI arrested Rosenow when he returned from a trip to the Philippines. The FBI's searches of Rosenow's electronic devices revealed a significant amount of child pornography.

The government charged Rosenow with several criminal offenses related to child-exploitation and child pornography. Rosenow filed a motion to suppress the evidence seized from his electronic devices. The district court denied the motion and, upon conviction, he appealed.

First, Rosenow argued that the evidence discovered by Yahoo and Facebook was obtained in violation of the Fourth Amendment because they were acting as government agents when they searched his online accounts. Specifically, Rosenow claimed that provisions in the Stored Communications Act and the Protect Our Children Act transformed the Yahoo and Facebook private searches into governmental action.

The Ninth Circuit Court of Appeals disagreed. While the Stored Communications Act makes it unlawful to conduct unauthorized searches of stored electronic communications, it specifically excludes searches conducted by ESPs. The court commented that this exception makes sense, otherwise, ESPs would be unable to ensure that user content does not violate the ESPs own terms of use. Although the Fourth Amendment protects files stored with an ESP, the ESP can search through all of the stored files on its server and disclose them to the government without violating the Fourth Amendment.

In addition, the court found that the Protect Our Children Act (the Act) does not require an ESP to search their users' content. Specifically, the Act provides that this statute "shall not be construed to require" an ESP to "monitor" users or their content or "affirmatively search, screen, or scan for" evidence of criminal activity. Although the Act requires ESPs to report when they discover evidence of child pornography, case law is clear that a private actor does not become a government agent by simply complying with a mandatory reporting statute. As a result, the court held that under both the Stored Communications Act and the Protect Our Children Act, Yahoo and Facebook are free to choose not to search their users' data; therefore, when they do search, they do so of their own volition and not as agents of the government.

Second, Rosenow argued that, even if federal law did not transform the searches performed by Yahoo and Facebook from private searches into governmental action, there still was sufficient government involvement in those searches to trigger Fourth Amendment protection.

Again, the court disagreed. The government's knowledge of a private search, by itself, does not turn that search into one protected by the Fourth Amendment. Here, the FBI knew about Yahoo's ongoing internal investigations into the use of its platform for sexual exploitation of children in the Philippines; however, as the district court found, there was no evidence that "law enforcement was involved in or participated" in Yahoo's investigations, or that "law enforcement sought or received any assistance from Yahoo's personnel in conducting its investigation outside of legal process." For its part, the court noted that Facebook was not as proactive in searching Rosenow's accounts in the same way that Yahoo was, but it nevertheless acted on its own volition when conducting its searches.

In addition, the court concluded that Yahoo and Facebook's intent in searching Rosenow's account was to further their own "legitimate, independent motivations." The district court found that both companies had legitimate business reasons for purging child pornography and exploitation from their platform, and they acted in furtherance of those reasons when they investigated Rosenow. The court added that as long as a legitimate, independent motivation is established, "that motivation is not negated by any dual motive to detect or prevent crime or assist the police, or by the presence of the police nearby during the search."

Third, Rosenow argued that he had a right to privacy in his digital data and that the government's preservation requests constituted an unlawful seizure of his property.

A "seizure" of property requires "some meaningful interference [by the government,] with an individual's possessory interests in [his] property." The court held that the preservation requests did not meaningfully interfere with Rosenow's possessory interests in his digital data because they did not prevent Rosenow from accessing his account, nor did they provide the government with access to any of Rosenow's digital information without further legal process.

Finally, Rosenow argued that the subpoenas issued by the government under 18 U.S.C. § 2703(c)(2) to Facebook for Rosenow's basic subscriber and IP information were unlawful searches because they were issued without a warrant supported by probable cause.

Again, the court disagreed. It is well settled that a defendant has no expectation of privacy in IP addresses or basic subscriber information because Internet users "should know that this information is provided to, and used by, Internet service providers for the specific purpose of directing the routing of information." The Ninth Circuit has analogized IP addresses and email "to/from lines" to the information people put on the outside of mail, which the Supreme Court has long held can be searched without a warrant because it "is voluntarily transmitted to third parties," and, therefore, there is no legitimate expectation of privacy in such information. This basic information differs from the content of email messages and other private communications, which are analogous to the sealed contents of mail, which the government does need a warrant to search.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/20-50052/20-50052-2022-04-27.pdf?ts=1651079061

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Tenth Circuit

Wilkins v. City of Tulsa, 33 F.4th 1265 (10th Cir. 2022)

On February 5, 2017, at approximately 12:30 a.m., three police officers were dispatched to a Tulsa car dealership parking lot. When the officers arrived, they discovered Ira Wilkins asleep in the driver's seat of his vehicle. The vehicle was running, and the radio was playing loudly. The officers claimed that they smelled alcohol on his person, but Wilkins stated that he had not consumed any alcohol. The officers ordered Wilkins out of the vehicle because they thought he was committing the crime of being in "actual physical control of a vehicle" while intoxicated. When Wilkins exited the vehicle, Officer Will Mortenson handcuffed Wilkins's arms behind his back, and then began to search him.

About one minute into the search, Officer Mortenson forced Wilkins against the vehicle. Wilkins asked Officer Mortenson what he was doing and asked why he was "bending his wrists." Officer

Mortenson laughed and said, "I'm going to bend a lot more if you keep acting like that." At some point, the three officers forced Wilkins to the ground, facedown on his stomach. Officers Mortenson and Rangel were on top of Wilkins while Officer Emberton held his legs. Wilkins repeatedly said, "Please, man," and told the officers, "you're breaking my f---ing wrists." Approximately 30 seconds later, Officer Edel Rangel instructed Officer Mortenson to use pepper spray on Wilkins. Without warning, Officer Mortenson deployed pepper spray in Wilkins's face and stopped when Officer Rangel said, "That's enough." Afterward, Officer Mortenson completed the search of Wilkins. Officer Rangel's body camera captured footage of the incident.

Wilkins was charged with assault and battery upon a police officer, actual physical control of a vehicle while intoxicated, and resisting arrest. All charges were later dismissed.

Wilkins sued the officers under 42 U.S.C. § 1983 alleging that the officers used excessive force in violation of the Fourth Amendment when they forced him to the ground, sat on top of him, and pepper sprayed him. Wilkins also sued the City of Tulsa alleging a link between the deprivation of his constitutional rights and Tulsa Police Department policies, practices, or customs.

The district court granted the officers qualified immunity, holding that they did not use excessive force against Wilkins and dismissed the case against the City on the municipal liability claim because there was no constitutional violation. Wilkins appealed.

In Graham v. Connor, the Supreme Court identified three non-exclusive factors to evaluate whether a use of force was excessive: (1) "the severity of the crime at issue;" (2) "whether the suspect poses an immediate threat to the safety of the officers or others;" and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." In this case, applying the Graham factors, the Tenth Circuit Court of Appeals held that even assuming the officers acted reasonably when they forced Wilkins to the ground, a reasonable jury could find that the officers' use of pepper spray was objectively unreasonable. The court analyzed the officers' conduct collectively because they did not seek an individualized analysis as to their liability and because they "engaged in a group effort."

First, the court held that the officers suspected Wilkins of committing the crime of actual physical control of a motor vehicle while intoxicated, a misdemeanor in Oklahoma. Tenth Circuit case law provides that "the first Graham factor may weigh against the use of significant force if the crime at issue is a misdemeanor." As a result, the court held that this factor weighed against "the use of anything more than minimal force."

Second, the court held that the second factor weighed against the officers because Wilkins did not pose an immediate threat after the takedown. Specifically, Wilkins was facedown on his stomach, handcuffs secured his arms, officers were on him, Officer Emberton held his legs, and he did not resist. In addition, during the nearly 30 seconds preceding the pepper spray, Wilkins said "please, man," "you're breaking my f--ing wrists," and "I'm not doing nothing to you." Based on these facts, the court held that Wilkins did not present an immediate threat when Officer Mortenson sprayed him with pepper spray.

Third, the court concluded that, under the third factor, no force was justified after the takedown based on resistance or attempt to flee. According to the officers, Wilkins resisted while on the ground by grabbing Officer Mortenson's fingers and attempting to stand." Wilkins denied this and the body camera video did not blatantly contradict Wilkins's claim. As a result, the court was bound to credit Wilkins's version of the incident at this stage of the case and find that Wilkins was effectively subdued and not resisting when Officer Mortenson sprayed him. The court noted

that, at trial, the jury would have to decide whether Wilkins actually resisted the officers while on the ground or whether the officers' use of pepper spray was unreasonable under the Fourth Amendment.

Finally, the court held that on February 5, 2017, it was clearly established in the Tenth Circuit that force against a subdued suspect who does not pose a threat violates the Fourth Amendment. Consequently, the court found that on the date of the incident, a reasonable officer would have known that use of pepper spray on Wilkins when he was facedown, handcuffed, legs secured, and not resisting was unconstitutional.

Concerning Wilkins's municipal liability claim against the City of Tulsa, the court remanded this part of the case to the district court, as it originally declined to review the issue after incorrectly determining that the officers were entitled to qualified immunity.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/21-5052/21-5052-2022-05-03.pdf?ts=1651591873

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Eleventh Circuit

United States v. Woodson, 30 F.4th 1295 (11th Cir. 2022)

Joseph Woodson preyed on adolescent girls by infiltrating their social media accounts, locking them out of their accounts, and then demanding that the girls produce and send him pornographic material to get their accounts back. Some of Woodson's victims eventually reported his crimes to law enforcement. Once they did, police officers linked the IP address associated with the Woodson's extortion messages to a physical address in Virginia, where Woodson lived with his family.

When officers executed a search warrant at the Woodson family townhouse, they handcuffed Woodson and escorted him into the living area, where he was joined by his mother, his brother, Brandon, and his sister. Approximately twenty-minutes later, while officers were still executing the search warrant, a detective arrived to interview the suspects. Not knowing who was responsible for the messages from the traced IP address, the detective asked to interview Brandon, and then Woodson, and both agreed.

The detective wanted to conduct the interviews outside the home to have some privacy while the search continued. Because the weather was cold, he proposed sitting in the police van parked in front of the residence. After quickly determining that Brandon was not responsible for the extortion messages, the detective interviewed Woodson, who went unhandcuffed with the detective to the police van without protest. Woodson sat in the front passenger seat, with the interviewing detective in the driver's seat and a second detective in the back seat. The detective told Woodson immediately that he was not under arrest, that he was not charged with a crime, and that they were talking voluntarily. He did not, however, read the Miranda warnings. During the interview, Woodson confessed that he had taken over the Snapchat accounts of about 20 girls and demanded but claimed that his demands for pornography were made at the direction of another person. After the interview, the officers escorted Woodson back into the townhouse.

Several months later, officers arrested Woodson and the government charged him with several child pornography-related offenses. Prior to trial, Woodson filed a motion to suppress his

statements from the interview, arguing that they were the result of a custodial interrogation that required Miranda warnings. The district court denied the motion, holding that Woodson was not in custody for Miranda purposes when he made the statements. After the jury convicted Woodson on all counts, he appealed the denial of his suppression motion.

A person is entitled to Miranda warnings only when he is in custody during questioning. In the Miranda context, a person is in custody when he finds himself in "circumstances that are thought generally to present a serious danger of coercion." To evaluate the issue of coercion, the court will ask, "whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." To answer that question, the court will examine "all of the circumstances surrounding the interrogation," including the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints, and whether the person was released after the interview.

After analyzing the circumstances surrounding Woodson's interview, the Eleventh Circuit Court of Appeals concluded that a reasonable person in his position would have felt free to terminate the interview and leave. First, the court found that, most important, was the explicit advice Woodson received at the beginning of the interview: that he was not under arrest, that he was not charged with a crime, and that the conversation was voluntary. Second, the court noted that Woodson was not handcuffed during the interview, and he sat in the front passenger seat, not in the back seat, where arrestees are typically placed. Third, that nothing indicated that the vehicle's doors were locked, and the van had no insignia, radio, cage, bar, or other "trappings" of a typical police vehicle. Finally, while Woodson was briefly handcuffed and detained in the living area of his home, the court found that these facts did not render the subsequent interview custodial. Given these facts, the court held that a reasonable person in Woodson's position would have felt free to terminate the interview and walk away.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/20-10443/20-10443-2022-04-13.pdf?ts=1649881836

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