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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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The Informer – February 2015

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Remember the First Amendment – So Smile . . . You May Be on Candid Camera

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The Candid Camera television program began with a little jingle, “When the least expected, you’re elected, you’re the star today . . .” The program caught ordinary people on camera in some of life’s less than ordinary, embarrassing situations. Candid Camera was funny, and *the stars* seemed to take it in good fun. The same has not always been true for police officers caught on camera by private citizens. Officers have seized recording devices and even arrested the people recording them. But their embarrassment was not so much being caught on the camera; it was the subsequent lawsuit for civil rights violations.¹

To start, the *First Amendment* provides that Congress shall make no law abridging the freedom of speech or of the press.² Freedom of expression prohibits the government from limiting the *pot* of information from which the public may draw. And anyone - a professional journalist or a citizen journalist with no training - may add to the pot.³ Notably, the assassination of President John F. Kennedy and the beating of Rodney King were recorded by bystanders. More and more, scenes on the evening news are coming from people with a ready cell phone or digital camera who just happened to be there.

The right to make audiovisual recordings of public officials is highest in public forums. Public forums are public places like city streets, sidewalks, and parks - - places where the people have traditionally exercised *First Amendment* freedoms.⁴ The right could be described this way: The people have a qualified right to openly record police officers performing their

¹ Constitutional tort claims may be brought against a law enforcement officer under two separate, but related, bases. *Title 42 U.S.C. § 1983* allows plaintiffs to sue public officials acting under color of state [local, territorial, or District of Columbia] law. *Section 1983* was enacted in April 1871 in the wake of the American Civil War as part of the Civil Rights Act of that era. Noticeably absent was any mention of federal officials – acting under color of federal law. Federal officials remained immune from suit under § 1983 until June 1971. Just a couple of months after § 1983’s 100th Anniversary, the Supreme Court decided *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). In *Bivens*, the Court created an analogy to § 1983. The so called *Bivens* Analogy allows plaintiffs to sue federal officials, acting under color of federal law, for certain Constitutional violations.

² The *First Amendment* provides in part that “Congress shall make no law . . . abridging the freedom of speech, or the press...” *Title 42 U.S.C. § 1983* is authority to sue state and local officers for *First Amendment* violations. See for example *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014)(city police officers were sued under §1983 after the plaintiff was arrested for attempting to make an audio visual recording of a traffic stop) and *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)(city police officers were similarly sued after the plaintiff was arrested for recording an officer effecting an arrest in a public park.) The Supreme Court has assumed, without deciding, that the *Bivens* Analogy allows *First Amendment* claims against federal officers. See *Wood v. Moss*, 572 U.S. ___, 134 S. Ct. 2056, 2066 (2014).

³ The *First Amendment* extends further than the text’s proscription on laws abridging the freedom of speech, or of the press, and encompasses a range of conduct related to the gathering and dissemination of information. See *Gericke*, 753 F.3d at 7 (the Constitution protects the right of individuals to videotape police officers performing their duties in public); *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012)(audio and audio visual recordings are media of expression commonly used for the preservation and dissemination of information and are included within the free speech and free press guaranty); and, *Glik*, 655 F.3d at 82.

⁴ See *McCullen v. Coakley*, 573 U.S. ___, 134 S. Ct. 2518 (2014).

duties in public forums when the officers are speaking at a volume audible to the unassisted ear. One example might be recording a police officer effecting an arrest in a public park. Another might be filming a traffic stop from a sidewalk.⁵

If someone is in a public forum, he probably has a right to record the sights and sounds around him. That would include a citizen standing on a public sidewalk and photographing the exterior of a government building. As a result, an officer who seizes the recording device of a person filming the exterior of a federal courthouse may face the same predicament as another officer who seizes the recording device of someone filming the officer.⁶

But I don't like it... No doubt, the officers involved in these lawsuits did not like it, either. Bystanders videotaping a traffic stop or arrest may be distracting. And after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City and other terrorist attacks, someone standing on a sidewalk and photographing the bland exterior of a public building may seem suspicious. Still, this is what separates the United States from police states. Our system of government expects law enforcement officers to endure significant burdens caused by citizens exercising their First Amendment rights. Even provocative and challenging speech, along with videotaping, falls within the protection of the First Amendment. Name calling, questioning an officer's authority, or telling the officer, "You'll be on the evening news" - that all goes with the job.⁷

But there must be exceptions... Obviously there are - exceptions. An order to stop recording can be constitutionally imposed when an officer can reasonably conclude that the filming is subject to a reasonable time, place, or manner restriction. *Reasonable?* For one, an officer may have a reasonable expectation of privacy in what is being said. The federal wiretap statute for example would prohibit someone from using a sensitive audio recording device, like a parabolic microphone, to eavesdrop on the conversation of an officer and witness after the two separated themselves from the crowd and made other reasonable efforts to keep their conversation private.⁸

Even an open recording may be subject to a reasonable restriction. Since officers can control the movements of the occupants of a car during a traffic stop, ordering a passenger to get back in the car may be reasonable despite the passenger's objection that "I can't put you on the evening news from back there." Some traffic stops, particularly when the detained individual is armed, might justify a safety measure - - for example, a command that bystanders disperse. And a preexisting statute, ordinance, or other published restriction may limit where someone

⁵ See *Gericke*, 753 F.3d 1; *Glik*, 655 F.3d 78; and *ACLU*, 679 F.3d 583.

⁶ See for example, Federal Protective Service Information Bulletin (Report Number HQ-IB-012-2010) dated August 2, 2010 construing 41 C.F.R. § 102-74.420 not to prohibit individuals from photographing the exterior of federal buildings from publicly accessible places. This article focuses on recordings made on traditional public forums, not those made on government property. Government installations and other property that are not by tradition or designation forums for public communication are non-public forums, and the government can regulate speech, so long as the regulation is reasonable and not an effort to suppress expression merely because public officials oppose the speakers' views. See for example *Greer v. Spock*, 424 U.S. 828 (1976)(a military installation is a non-public forum).

⁷ See *Gericke*, 753 F.3d at 8 (a right to film police activity carried out in public, including a traffic stop, remains unfettered unless a reasonable restriction is imposed or in place)(citations omitted).

⁸ The federal government and nearly all states have statutes addressing wiretapping and eavesdropping protecting conversational privacy. See for example the Omnibus Crime Control and Safe Streets Act of 1968, *Title 18 U.S.C. §§ 2510-2520* (2006).

can record. Imagine a curious onlooker who illegally parks his car beside the road and starts filming.⁹

And the person photographing the federal building ...? Obviously, a police officer has the same rights as a private citizen. The officer can approach and ask questions, just like anyone else. The officer can also effect a temporary, investigative seizure that is reasonable under the Fourth Amendment if the officer can articulate facts that criminal activity is afoot. With probable cause, even more intrusive measures can be taken. The suspect may be arrested and a warrant issued to search the recording device.¹⁰

Quite simply, it is *reasonableness* that separates law enforcement in the United States from law enforcement in police states. And reasonableness always depends on the officer's ability to articulate facts that justify the measures taken. Absent those facts, all the officer can do is smile for the camera.

⁹ See *Gericke*, 753 F.3d at 8 (discussing some reasonable time, place, or manner restrictions for traffic stops).

¹⁰ See Federal Protective Service Information Bulletin cited previously for guidance for Federal Protective Service officers encountering individuals taking photographs of the exterior of federal buildings.

CASE SUMMARIES

United States Supreme Court

Dep't of Homeland Sec. v. MacLean, 574 U.S. ___, 2015 U.S. LEXIS 755 (U.S. Jan. 21, 2015)

In July 2003, the Department of Homeland Security issued a confidential advisory concerning a potential hijacking plot. The Transportation Security Administration (TSA) then briefed all air marshals, including MacLean, about the plot. A few days after the briefing, MacLean received a text message from the TSA canceling all overnight missions from Las Vegas until early August. MacLean, who was stationed in Las Vegas, told his supervisor and the DHS Inspector General's office he believed the cancellation of overnight missions would jeopardize public safety. When MacLean did not receive a satisfactory response, MacLean told a reporter about the canceled missions. The reporter published a story about the TSA's decision to cancel overnight missions, which led several members of Congress to criticize the TSA. Within twenty-four hours, the TSA reversed its decision and put air marshals back on overnight flights. After the TSA discovered MacLean was the reporter's source of information, he was fired for violating a TSA regulation concerning the disclosure of sensitive security information (SSI) without authorization.

MacLean challenged his firing before the Merit Systems Protection Board (MSPB), arguing his disclosure was protected under the Whistleblower Protection Act of 1989 (WPA) because he reasonably believed the leaked information disclosed a substantial and specific danger to public health or safety. The MSPB ruled against MacLean, finding he did not qualify for protection under the WPA because his disclosure was "specifically prohibited by law," as it violated the TSA regulation prohibiting the unauthorized disclosure of SSI.

On appeal, the Court of Appeals for the Federal Circuit vacated the decision by the MSPB and the government appealed to the United States Supreme Court.

First, the Supreme Court held the exemption from protection under the WPA for disclosures "specifically prohibited by law" does not apply to disclosures prohibited solely by TSA regulations. Instead, the exemption for disclosures "specifically prohibited by law" requires the underlying prohibition, such as the unauthorized disclosure of SSI in this case, to be contained in the language of a statute.

Second, the court held the Aviation and Transportation Security Act of 2001 (ATSA), which authorized the TSA to create regulations, did not specifically prohibit MacLean's disclosure of information to the reporter. Instead, the court found the ATSA authorized the TSA to "prescribe regulations." Therefore, by its own terms, the ATSA did not prohibit anything.

Click [HERE](#) for the court's opinion.

Circuit Courts of Appeal

Second Circuit

Coggins v. Buonora, 2015 U.S. App. LEXIS 487 (2d Cir. N.Y. Jan. 13, 2015)

Coggins sued Buonora under 42 U.S.C. § 1983 claiming Buonora and another officer conspired to knowingly falsify and omit material facts from police reports, as well as lie to the district attorney and grand jury, which resulted in the malicious prosecution of Coggins.

Even though Buonora admitted he lied to the grand jury, Buonora claimed he was entitled to absolute immunity for any act associated with his perjury.

In *Rehberg v Paulk*, the United States Supreme Court held grand jury witnesses, including law enforcement officers, have “absolute immunity from any § 1983 claim based on the witness’ testimony,” even if that testimony is perjurious. However, the Supreme Court suggested this absolute immunity does not extend to activity a witness conducts outside the grand jury room.

In this case, the court held Buonora was not entitled to absolute immunity because Coggins’ suit was not based on Buonora’s perjurious grand jury testimony. Instead, Coggins’ allegations were based on Buonora’s police reports, the statements of another officer, Buonora’s statements to the district attorney and police radio transmissions. Because these facts existed before Buonora perjured himself before the grand jury, the court found Coggins had the ability to prove his allegations without relying on Buonora’s grand jury testimony.

The court further held Buonora was not entitled to qualified immunity because the alleged falsification of evidence and the related conspiracy, if true, constituted a violation of clearly established law and no objectively reasonable officer could have thought otherwise.

Click [HERE](#) for the court’s opinion.

United States v. Broughton, 2015 U.S. App. LEXIS 780 (unpublished) (2d Cir. N.Y. Jan. 20, 2015)

Broughton arrived at John F. Kennedy International Airport on a flight from Jamaica. Before Broughton reached the airport’s customs checkpoint, a uniformed Customs and Border Protection (CBP) officer randomly selected her for an examination of her luggage. When the officer examined Broughton’s luggage in an open area, just beyond the customs checkpoint, the officer found a woman’s wedge-heeled shoe that was very heavy. When the officer probed the shoe, he discovered a white powdery substance inside the heel of the shoe. The officer moved Broughton to the CBP’s private search area, where a field test of the white substance found in the shoe tested positive for cocaine. The officer then arrested Broughton. A further search of Broughton’s luggage uncovered three additional shoes containing cocaine.

While Broughton’s luggage was being examined in the private search area, she told CBP officers the shoes did not belong to her, but rather to a friend with whom she was travelling. After the officer arrested Broughton, she said her friend might have “some kind of connection with drugs and shoes.”

After Broughton's arrest, Homeland Security Investigations (HSI) agents arrived to interview her. One of the agents advised Broughton of her *Miranda* rights, which she waived. The interview lasted for approximately fifteen minutes. The agents then took Broughton to their offices to conduct a follow-up interview. During the two interviews, Broughton made incriminating statements to the agents.

Broughton argued she was in custody for *Miranda* purposes when the CBP officer escorted her to the private search area. As a result, Broughton claimed her un-*Mirandized* statements to the CBP officer should have been suppressed.

The court disagreed. The court noted that a reasonable traveler arriving at an American airport will expect some constraints as well as questions concerning his or her authorization to enter the country. Here, the CBP officer was engaged in a routine aspect of border control, examining Broughton's luggage, when he encountered the suspicious shoe. When the officer discovered the white powdery substance, he escorted Broughton, without placing her in handcuffs, to a more private part of the airport. It was only after the officer confirmed the substance in the shoe was cocaine and he arrested Broughton that she was in custody for *Miranda* purposes.

The court added that even if Broughton was in custody when she made all three statements to the CBP officers, *Miranda* was not required because the officers did not "interrogate" Broughton. Instead, the court concluded Broughton voluntarily and spontaneously made statements regarding her friend's ownership of the shoes.

The court further held Broughton's statements to the HSI agents were admissible, as they were voluntarily made after a valid waiver of her *Miranda* rights.

Click [HERE](#) for the court's opinion.

Fourth Circuit

United States v. Hill, 2015 U.S. App. LEXIS 499 (4th Cir. W. Va. Jan. 13, 2015)

Barker was serving a term of supervised release in connection with a federal drug conviction. One of the terms of his supervised release required Barker to allow probation officers to visit him at home at any time and seize contraband in plain view. Officers obtained a warrant to arrest Barker for violating a term of his supervised release and went to his apartment to arrest him. When the officers arrived at Barker's apartment, they arrested Barker and conducted a protective sweep. During the sweep, the officers encountered Hill and Dunigan, and discovered they were on supervised release. During the sweep, the officers saw needles, pills, packaging for synthetic marijuana and drug paraphernalia. After Barker, Hill and Dunigan were arrested for violating the terms of their supervised releases, and the protective sweep had ended, the officers conducted a walk-through of the apartment looking for other evidence of supervised release violations. After the walk-through, the officers brought in a drug dog that alerted to the presence of drugs in the ceiling. The officers removed a ceiling tile and found a plastic bag tucked inside the ceiling. The officers stopped the search, obtained a warrant, searched the bag and discovered controlled substances.

Barker, Hill and Dunigan were charged with a variety of federal drug offenses.

The defendants filed a motion to suppress the evidence, arguing that once the protective sweep ended, the officers needed a warrant to search the apartment further.

The court agreed. The supervision condition to which the defendants agreed required them to submit to a probation officer's visit and allowed the officer to confiscate contraband in plain view. None of the conditions of the defendants' supervised releases authorized warrantless searches. Consequently, the court concluded law enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless the officers have a warrant supported by probable cause.

The government argued the officers would have sought a warrant to search the apartment based on their observations during the protective sweep, even if they had not conducted the walk-through and dog sniff. As a result, the government claimed the evidence should have been admitted against the defendants.

The court declined to determine the issue and remanded the case to the district court to determine whether the information obtained from the illegal walk-through and dog sniff affected the officer's decision to seek the search warrant.

Click [HERE](#) for the court's opinion.

Covey v. Assessor of Ohio County, 2015 U.S. App. LEXIS 1113 (4th Cir. W. Va. Jan. 26, 2015)

Crews, a field deputy for the county assessor's office entered Covey's property to collect data to assess the value of the property for tax purposes. Despite seeing "No Trespassing" signs, Crews continued up the driveway to Covey's house. In doing so, Crews was in violation of a state regulation that prohibits tax data collectors from entering property that is posted with "No Trespassing" signs. After finding no one home, Crews opened the front door and left a pamphlet inside the house. Crews then walked around the side of the house onto a basement patio where he saw marijuana plants. Crews left Covey's property and contacted local law enforcement officers.

After receiving Crews' report, a local officer and a federal agent went to Covey's house to investigate. The officers walked directly to patio area where they encountered Covey. The officers seized Covey and escorted him to their car. The officers went back to the patio area, opened the basement doors, leaned inside, took photographs, and seized marijuana from the patio area.

Although Covey later pled guilty in state court to manufacturing marijuana, he sued Crews as well as the state and federal law enforcement officers under *42 U.S.C. § 1983* and *Bivens* for conducting an unreasonable search and seizure at his home.

First, Crews argued he did not violate the *Fourth Amendment* because he entered Covey's property for a legitimate governmental interest. The court noted Crews' violation of the state regulation prohibiting data collectors from entering property where "No Trespassing" signs are posted did not amount to a per se violation of the *Fourth Amendment*. However, the court concluded that what began as a regulatory violation by Crews, turned into a potential *Fourth Amendment* violation when Crews dropped the pamphlet inside Covey's home and then

walked around the curtilage to the patio area. As a result, the court held Covey alleged a plausible claim that Crews conducted an unreasonable search of his home and curtilage.

Second, the court found the officers were not conducting a valid knock and talk when they went onto the patio area of Covey's home. Under the knock and talk exception to the *Fourth Amendment's* warrant requirement, officers may approach the front door of a home without a warrant and attempt to make contact with someone inside the home. However, an officer may bypass the front door when circumstances reasonably indicate the officer might find the homeowner somewhere else on the property. In this case, however, the court held nothing in Covey's complaint suggested the officers had reason to believe Covey was in the patio area before proceeding there. Consequently, the court concluded Covey plausibly alleged the officers violated the *Fourth Amendment* by entering and searching the curtilage of his home without a warrant.

Third, the court held the officers were not entitled to qualified immunity because at the time of the incident it was clearly established that curtilage is entitled to the same level of *Fourth Amendment* protection as the rest of the home. In addition, Covey sufficiently alleged the officers violated clearly established law by proceeding directly to the patio area where they suspected marijuana would be found, without any reason to believe they would find Covey there.

Finally, the court directed the district court to determine if Covey's guilty plea to manufacturing marijuana barred his § 1983 and *Bivens* claims against the officers.

Click [HERE](#) for the court's opinion.

Fifth Circuit

Trent v. Wade, 2015 U.S. App. LEXIS 391 (5th Cir. Tex. Jan. 9, 2015)

At approximately 2 a.m. while on patrol, Officer Wade saw two all-terrain vehicles (ATVs) racing on a closed portion of a highway. Wade attempted to conduct a traffic stop, but the drivers of the ATVs fled. Wade pursued one of the ATVs to Trent's house. At Trent's house, the driver parked the ATV in the carport and fled into the house. Wade parked his patrol car next to the ATV, opened the unlocked door to Trent's house and entered the home without first knocking or announcing his presence. Inside the home, Wade eventually encountered Trent and discovered that Trent's son was the driver of the ATV. Wade arrested the son, and had the ATV towed from Trent's property and impounded.

Trent sued Wade under 42 U.S.C. § 1983 claiming Wade violated the *Fourth Amendment* by failing to knock and announce his presence before entering Trent's home. Wade argued that he lawfully entered Trent's house while in hot pursuit of Trent's son.

The court explained the hot pursuit exception gives an officer the authority to carry out a warrantless search or seizure in a home. However, the knock and announce rule, on the other hand, does not focus on the lawfulness of the search or seizure, but rather on the method of an officer's entry into a home. To justify a no-knock entry, an officer must have a reasonable suspicion that knocking and announcing would be dangerous or futile. Futility justifies a no-knock entry only when the officer has a reasonable suspicion that the occupants of the home

are already aware of the officer's presence. In this case, while it was clear that Trent's son was aware of Wade's presence in the house, a question of fact remained as to whether Wade had reasonable suspicion to believe the other potential occupants of the home were aware of Wade's entry. Specifically, the court found a genuine issue of material fact existed as to whether "a reasonable officer would have taken into account that other residents could have been asleep at 2:00 a.m.," a circumstance that would necessitate "some manner of forewarning prior to entry." Consequently, the court denied Wade qualified immunity.

Trent also claimed Wade's warrantless seizure of the ATV from his carport violated the *Fourth Amendment*.

Under Texas law, Wade was authorized to seize the ATV as contraband property "used in the commission of a felony." In addition, Wade was lawfully on Trent's property when he seized the ATV. However, the court noted it remains an unresolved issue in the Fifth Circuit whether the *Fourth Amendment* allows the warrantless seizure of a vehicle from private property when state law designates that vehicle as forfeitable contraband. Because the law is not clearly established in this area, the court held Wade was entitled to qualified immunity for seizing Trent's ATV.

Click [HERE](#) for the court's opinion.

United States v. Montgomery, 2015 U.S. App. LEXIS 1291 (5th Cir. Tex. Jan. 27, 2015)

An officer stopped Montgomery in front of his house for a traffic violation. During the stop, the officer attempted to frisk Montgomery, but Montgomery resisted by pushing the officer's hands away from his pockets. The officer eventually frisked Montgomery and felt a bulge in his pocket. The officer asked Montgomery what the bulge was, and Montgomery told the officer it was cocaine. The officer removed the cocaine, *Mirandized* Montgomery and arrested him.

Approximately thirty minutes after the stop, Montgomery consented to a search of his house. The search took approximately twenty-five minutes to complete, and during this time, officers allowed Montgomery to enter the house to obtain medicine. In addition, Montgomery repeatedly asked the officers for his cell phone so he could erase "naked pictures" that he did not want his father to see. An officer brought Montgomery his cell phone and agreed to help Montgomery erase the images from the phone. With Montgomery's consent, the officer pushed a button on the phone that caused an image to appear, which the officer believed was child pornography. The government indicted Montgomery for possession of child pornography.

Montgomery argued the evidence discovered on his cell phone should have been suppressed. Specifically, Montgomery claimed the seizure of the cocaine that led to his arrest was discovered after an unlawful *Terry* frisk, which tainted his consent to search his cell phone.

The court held the evidence discovered on Montgomery's cell phone was obtained with Montgomery's consent, which the officers obtained after several independent acts of freewill on Montgomery's part that purged the taint of any alleged *Fourth Amendment* violation. Without deciding the issue, the court held that even if the *Terry* frisk was unlawful, Montgomery repeatedly requested that the officers access his cell phone to remove images he

wanted to conceal from his father. There was no evidence suggesting the officers requested to search the cell phone or that they were otherwise interested in its contents. In addition, Montgomery was *Mirandized* before his phone was searched, the officers knew Montgomery had a criminal history, and the officers allowed Montgomery to retrieve medicine from his house. The court concluded these facts supported the belief that Montgomery's consent to search his cell phone was sufficiently detached from his arrest to purge any taint. Finally, the court found the *Fourth Amendment* violation alleged by Montgomery was not flagrant.

Click [HERE](#) for the court's opinion.

Sixth Circuit

United States v. Gatson, 2015 U.S. App. LEXIS 653 (6th Cir. Ohio Jan. 15, 2015)

Byrd, a school bus driver, reported that she saw a man soliciting young girls near the bus depot. Byrd described the man as a black male with medium-toned skin and short hair. Byrd also stated the man was driving a black GMC SUV. A few minutes later, officers saw a dark grey GMC SUV with a black male with short hair and medium-brown skin sitting in the driver's seat, parked one block from the bus depot. The officers approached the SUV and spoke to the driver, Gatson, who admitted he had been talking to young girls. When one of the officers asked Gatson for identification, Gatson tried to push something between the driver's seat and the center console. The officers ordered Gatson out of the vehicle and recovered a pistol from the space between the driver's seat and center console. The government charged Gatson with two federal firearms offenses.

Gatson moved to suppress the pistol, arguing the stop, which led to the discovery of the pistol, violated the *Fourth Amendment*.

The court disagreed, finding the officers had reasonable suspicion to conduct a *Terry* stop. Even though the officers never spoke to Byrd, the officers knew her name and that she drove a school bus. These facts enhanced the credibility of Byrd's claim she had seen a man soliciting young girls. In addition, the officers saw a dark-colored GMC SUV less than a block from where Byrd had seen such a vehicle driven by a man matching the description given by Byrd. The court concluded these facts were enough to provide the officers reasonable suspicion Gatson had been engaged in criminal activity.

The court further held the officers did not exceed the scope of the *Terry* stop when they ordered Gatson out of his vehicle and searched it. The court ruled the district court did not improperly conclude that the officers' testimony was more credible than Gatson's testimony.

Click [HERE](#) for the court's opinion.

Seventh Circuit

United States v. Webster, 2015 U.S. App. LEXIS 74 (7th Cir. Ind. Jan. 5, 2015)

Officers detained Webster and Jones in the caged back seat of a squad car while they sought a warrant to search a residence from which the men had just fled. An officer activated an internal video camera in the car to record all conversations in the squad car. While the officer was out of the car for approximately eight-minutes, Webster engaged in conversation with Jones and placed several phone calls, which were audible in the recording. At trial, the district court allowed the government to enter the eight-minute excerpt of the recording into evidence against Webster.

On appeal, Webster argued recording his conversation with Jones, and his phone calls while in the back of the squad car violated the *Fourth Amendment*.

The court disagreed. For Webster to prevail, the court noted Webster had to establish he had a reasonable expectation of privacy in the conversations that took place in the squad car. The court added, a reasonable expectation of privacy exists when the defendant manifests a subjective expectation of privacy and society recognizes that expectation to be reasonable. Here, the court assumed Webster exhibited a subjective expectation of privacy because he did not engage in any conversation while the officer was seated in the front of the squad car, but only spoke when the officer was not present. However, the court found Webster's expectation of privacy was not one that society was prepared to find reasonable. In a case of first impression, the court followed the 1st, 4th, 5th, 8th, 10th and 11th circuits and held there is no reasonable expectation of privacy in a conversation that occurs in a squad car. Given the nature of the vehicle, and the visible presence of electronics capable of transmitting any internal conversations, the expectation that a conversation within the vehicle is private is not an expectation society would recognize to be reasonable. As a result, the court held the officer did not violate the *Fourth Amendment* when he recorded Webster's conversations.

The court noted its ruling reflected the layout and equipment of a squad car, and expressed no opinion as to conversations that occur in other vehicles such as patrol wagons or squadrols, which contain separate compartments for prisoners that are physically separated from the front portion of the vehicle where the officers ride.

Click [HERE](#) for the court's opinion.

United States v. Barta, 2015 U.S. App. LEXIS 1382 (7th Cir. Ill. Jan. 28, 2015)

Barta was convicted of conspiracy to commit bribery based on an undercover government sting operation that turned into an agreement between Barta and his co-defendants to bribe a fictional county official in California to obtain a government contract at a hospital.

The court reversed Barta's conviction, holding the government entrapped Barta.

Entrapment is a defense to criminal liability when the defendant is not predisposed to commit the charged crime, and the government's conduct induced the defendant to commit the crime. In this case, the government conceded Barta was not predisposed to commit the charged crime. Therefore, to overcome Barta's entrapment defense, the government had to establish there was no government inducement. Inducement means government solicitation of the

crime plus some “other governmental conduct” that creates a risk that a person who would not commit the crime, if left alone, would do so only because of the government’s efforts. Other governmental conduct includes, repeated attempts at persuasion, fraudulent representations, promises of reward beyond that inherent in the commission of the crime and pleas based on sympathy or friendship.

Here, the court found the cumulative effect of the government’s tactics directed at Barta amounted to inducement. First, the government repeatedly attempted to persuade Barta by frequently emailing and calling him, even though Barta did not respond to these communications. Second, the government invented false deadlines for Barta to commit to the deal, and invented false problems with the hospital. Third, as the sting operation progressed, the government significantly “sweetened” what would have already been an attractive financial deal to Barta and his co-defendants. Finally, the government pressed Barta to make a deal that it had reason to believe Barta would be making primarily to benefit one of his less fortunate friends. The court concluded the presence of these factors established the government induced Barta to commit a crime the government conceded Barta was not predisposed to commit.

Click [HERE](#) for the court’s opinion.

Eighth Circuit

United States v. Gunnell, 2015 U.S. App. LEXIS 426 (8th Cir. Mo. Jan. 12, 2015)

Federal agents suspected Gunnell was a methamphetamine dealer. After the agents saw Gunnell riding a motorcycle, they contacted a local officer and asked him to “develop probable cause” to stop Gunnell so officers could search Gunnell and his motorcycle.

Later that day, the officer saw Gunnell leave an apartment building with a blue bag that he placed in the right saddlebag on his motorcycle. Gunnell got on the motorcycle and drove down the street, followed by the officer. The officer stopped Gunnell for speeding after he observed Gunnell driving ten miles per hour over the speed limit. Gunnell did not have his driver’s license with him, so the officer took Gunnell’s information verbally to conduct a record check. Approximately five minutes later, a K-9 officer arrived with his drug dog, Raider, who alerted to the right rear area of the motorcycle where Gunnell had placed the blue bag. Officers searched Gunnell’s motorcycle and found the blue bag, which contained one pound of methamphetamine and drug paraphernalia. The government charged Gunnell with possession with intent to distribute methamphetamine.

Gunnell argued the traffic stop initiated by the officer violated the *Fourth Amendment*.

The court disagreed. Even if the officer’s primary intent was to stop Gunnell in order to further a drug investigation, the traffic violation provided probable cause to support the stop. The court added, “any ulterior motivation” on the officer’s part “is irrelevant.”

The court further held the officer did not unlawfully extend the duration of the stop while waiting for the K-9 officer to arrive. There was undisputed testimony that it took the K-9 officer approximately five minutes to arrive once his presence was requested. In addition,

when the K-9 officer arrived, the officer was still running Gunnell's information through the computer and had yet to complete tasks related to the purpose of the original stop.

Finally, the court held Raider's alert on Gunnell's motorcycle was reliable even though the K-9 officer and Raider had not undergone drug detection training as a pair, but rather, received certification individually before being paired to work in the field. In this case, the K-9 officer and Raider had each undergone a 13-week training program before receiving their certifications to work as a drug-detection team. Once paired together, they had additional training every week, and they had been working as a team for approximately six-weeks before Gunnell's traffic stop.

Click [HERE](#) for the court's opinion.

United States v. Patrick, 2015 U.S. App. LEXIS 1003 (8th Cir. Ark. Jan. 23, 2015)

Federal agents had an outstanding warrant to arrest Barefield, but could not locate him. A confidential informant (CI) contacted the agents and agreed to arrange a meeting with a person the CI believed was Barefield. The CI told the agents Barefield would be driving a gold colored car with a dented passenger-side door, and would have a plastic water bottle containing drugs. At the appointed time, a gold colored car with a dented passenger-side door arrived at the meeting location and parked near the CI. A few minutes later, the car drove away; however, the agents were not able to positively identify the driver as Barefield. The agents contacted a local officer who conducted a traffic stop on the car. When the officer removed the driver from the car, he saw a clear water bottle in the center console, which appeared to have a leafy substance floating in it. After the driver was secured in the officer's patrol car, the agents arrived and searched the car for drugs. The agents saw the water bottle in the center console and discovered the top of the bottle could be removed to access packages of marijuana and fake cocaine inside. The agents also seized a digital scale from the glove box. The agents eventually discovered the driver of the car was Broderick Patrick, not Barefield. The government indicted Patrick for possession with intent to distribute marijuana.

Patrick moved to suppress the evidence seized during the stop, arguing the traffic stop and search of his car violated the *Fourth Amendment*.

The court disagreed. Even though the CI mistakenly identified the driver as Barefield, the court found the CI's willingness to arrange the meeting, and his accurate description of the car and water bottle, supported a reasonable belief that his information was credible. Even disregarding the misidentification of the driver, the court concluded the other information provided by the CI established probable cause to believe the driver of the car, whoever it might be, had committed a crime. Therefore, the court held the officer was justified in conducting a traffic stop on the gold colored car.

The court further held the search of Patrick's car was lawful because when the officer removed Patrick from the car, he saw what appeared to be drugs in the water bottle located in the center console. In addition, the officers were entitled to search Patrick's car incident to his arrest, as it was reasonable for the officers to believe the car contained evidence related to Patrick's arrest for possession of marijuana.

Click [HERE](#) for the court's opinion.

Tenth Circuit

United States v. Gilmore, 2015 U.S. App. LEXIS 696 (10th Cir. Colo. Jan. 16, 2015)

On a January day, in Denver, Colorado, a parking lot attendant reported that a man staggered into the lot who appeared to be extremely intoxicated. Officers arrived and encountered the man, later identified as Gilmore. Gilmore was unsteady on his feet, staring blankly into the air, and having difficulty focusing on the officers. When the officers asked Gilmore what he was doing in the parking lot, Gilmore mumbled an incoherent answer. The officers believed Gilmore was a candidate for protective custody under Colorado's Emergency Commitment statute due to his apparent level of intoxication. Before placing Gilmore in a police car for transport, one of the officers frisked Gilmore and felt the butt of a handgun under Gilmore's coat. The officer lifted the coat, saw a pistol, and seized it from Gilmore's waistband. The officers arrested Gilmore who was indicted for being a felon in possession of a firearm.

Gilmore argued the frisk was unlawful because the officers did not have reasonable suspicion to believe he was armed and dangerous.

Under the community caretaking exception to the *Fourth Amendment's* warrant requirement, officers may seize a person without a warrant to ensure the safety of the public and /or the individual, regardless of any suspected criminal activity. The Tenth Circuit has recognized the community caretaking exception allows officers to perform investigatory seizures of intoxicated persons. To justify a seizure of a person for intoxication by alcohol, an officer must have probable cause to believe an intoxicated person is a danger to himself or others.

In this case, the court concluded the totality of the circumstances could have led a reasonable officer to conclude Gilmore was a danger to himself because he appeared to be severely intoxicated to the point of impairment. In addition, the court found the neighborhoods surrounding the parking lot had a high concentration of gang members and that officers had made numerous contacts with individuals possessing illegal weapons in those neighborhoods. As a result, the court concluded a reasonable officer could have believed Gilmore might be harmed if he wandered disoriented into one of these neighborhoods. Finally, while the court determined Gilmore was dressed appropriately, the court found the officers could have reasonably believed that if Gilmore were to become unconscious in a remote area or fail to find shelter when the temperature dropped that evening, he might suffer serious injury or death.

Once the officers established probable cause to believe Gilmore was a danger to himself, the court held the officers were allowed to conduct a frisk before taking Gilmore into protective custody.

Click [HERE](#) for the court's opinion.

Eleventh Circuit

United States v. Holt, 2015 U.S. App. LEXIS 1473 (11th Cir. Fla. Jan. 30, 2015)

Holt and several co-defendants were convicted of several drug-related crimes. At trial, the government introduced into evidence large amounts of cash that had been seized from Holt's vehicle during two different traffic stops, as well as evidence obtained from a GPS tracker.

The first stop occurred when an officer pulled Holt over for speeding. During the stop, the officer recognized Holt from when the officer worked in the narcotics unit. In addition, when the officer requested Holt's driver's license, the officer noticed Holt was nervous, breathing heavily, sweating profusely and failed to maintain eye contact. Based on Holt's behavior, the officer requested a canine unit to respond to the scene. While the officer was completing the paperwork associated with the stop, the canine unit arrived. After the canine alerted on the front passenger door of Holt's car, the officer search the glove box and found over \$45,000 in cash, which he seized.

The second stop occurred when an officer pulled Holt over because his tag lights were not working properly. During the stop, the officer spoke with Holt and his passenger separately concerning their travel plans. After both men gave the officer different accounts of their plans, the officer requested a canine unit. While the officer was completing his paperwork associated with the stop, the canine unit arrived. The canine alerted to the car's driver's side door, where the officer found over \$31,000 in cash, which he seized.

Holt argued the district court should have suppressed the currency seized during the traffic stops because the officers unreasonably prolonged those stops to allow time for the canine units to arrive.

The court disagreed. In both stops, the canine units arrived while the officers were still conducting routine records checks and preparing the traffic citations. Therefore, the court concluded the use of the canines to sniff the exterior of the vehicles during the stops did not violate the *Fourth Amendment*.

The court further held that in both stops, the officers had developed reasonable suspicion to believe Holt might be transporting illegal drugs or currency by the time the canine units arrived.

Finally, the court held the evidence obtained from the warrantless installation and monitoring of a GPS tracker was admissible. In this case, the warrantless use of a GPS tracker occurred in September 2011, several months before the United States Supreme Court ruled in *U.S. v. Jones* that the warrantless use of a GPS tracker constituted a *Fourth Amendment* search. As a result, even if *Jones* applied, the court held the officers acted in good faith reliance on pre-*Jones* case law that allowed the warrantless installation and monitoring of a tracking device.

Click [HERE](#) for the court's opinion.
