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

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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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## September 2013

1. **Freedom of Speech in the Government Workplace**

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   **Date and Time:** Friday September 27, 2013: 2:00 pm EDST Click **HERE** to participate.

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# Case Summaries

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# CASE SUMMARIES

## Circuit Courts of Appeals

## 1st Circuit

**United States v. Gifford, 2013 U.S. App. LEXIS 16714 (1st Cir. N.H. Aug. 13, 2013)**

Police officers executed a search warrant at Gifford's home and uncovered evidence of a marijuana grow-operation. The search warrant affidavit relied on information from an unnamed informant as well as electrical power records for Gifford's home and two nearby homes. The affidavit alleged the electrical usage in these nearby homes was significantly lower than that of Gifford's home, which led police to believe Gifford used high amounts of electricity to power the electrical equipment needed to sustain an indoor marijuana grow-operation.

Gifford moved to suppress the evidence seized at his home, arguing the search warrant affidavit lacked probable cause. The district court agreed and suppressed the evidence. The government appealed.

The court of appeals agreed with Gifford and affirmed the district court.

First, nothing in the search warrant affidavit gave the issuing judge a sufficient basis for determining the informant's reliability. The affidavit did not explain how the informant knew Gifford was operating a marijuana grow-operation, for example, whether the informant had direct, first-hand knowledge of the grow-operation or if he heard about it as hearsay. In addition, the affidavit did not mention any past history with the informant to establish his credibility, and the police did not attempt to corroborate any of the informant's statements.

Second, the court held the search warrant affidavit recklessly omitted material facts. The affidavit failed to mention one of the neighboring homes used in the electricity-usage comparison was mobile home with only 1,392 square feet of heated space, while Gifford's house was a three-bedroom home with a basement and an attic totaling 5,372 square feet. The court found the square footage differential, by itself, was enough to doubt whether the electrical usage at Gifford's home was suspiciously high. In addition, the affidavit failed to mention Gifford operated a horse boarding business out of his home, which could account for an increase in the amount of electricity used.

The court found both omitted facts affected the significance given to the electrical usage information contained in the search warrant affidavit. The court also found the information was recklessly omitted from the search warrant affidavit, as the government was aware of both facts when the affidavit was submitted.

Finally, the court held the omitted information, when included in the affidavit, did not establish probable cause to search Gifford's home.

Click **HERE** for the court's opinion.

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# 2nd Circuit

**United States v. Bernacet, 2013 U.S. App. LEXIS 15822 (2d Cir. N.Y. Aug. 1, 2013)**

Bernacet drove up to a traffic-safety checkpoint at 11:45 p.m. and gave his driver's license to a police officer. A different officer ran Bernacet's license through his agency's computer system, which included information from multiple state and federal databases, and discovered Bernacet was on parole. Based on his twenty years of experience, the officer knew parolees typically had a 9:00 p.m. curfew; therefore, the officer believed Bernacet was in violation of his parole. After the officer arrested Bernacet for violating his parole, he found a handgun in Bernacet's pocket during the search incident to arrest. Bernacet was charged with being a felon in possession of a firearm.

Bernacet argued the search of law enforcement databases at a traffic-safety checkpoint was unreasonable, as it was not closely related to the purpose of the checkpoint.

The court disagreed. The database search took approximately one-minute per motorist and some portion of that time was used to search Department of Motor Vehicle records. Consequently the court held duration of the stop was not significantly increased by searching multiple databases; therefore, using Bernacet's driver's license to search law enforcement databases at the checkpoint was reasonable.

Bernacet also argued the officer lacked probable cause to believe he was violating his parole because the officer had no evidence Bernacet had a curfew as a condition of his parole.

Again, the court disagreed. The officer knew Bernacet was on parole and based on his experience, the officer knew parolees typically had a 9:00 p.m. curfew imposed as a condition of their parole. As a result, when the officer encountered Bernacet at 11:45 p.m. it was reasonable for the officer to believe Bernacet was violating his parole.

Finally, Bernacet argued because New York law prohibits warrantless arrests for parole violations that are not by themselves crimes, such as curfew violations, the handgun found after his arrest should have been suppressed.

The court agreed Bernacet's arrest violated New York law, but stated not every arrest that is illegal under state law violates the United States Constitution. Here, the court noted, the Supreme Court has held "an arrest on probable cause but prohibited by state law" is constitutional. Consequently, because Bernacet's arrest was constitutional, the handgun found during the search incident to arrest was admissible.

Click **HERE** for the court's opinion.

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**United States v. Edelman, 2013 U.S. App. LEXIS 16515 (2d Cir. N.Y. Aug. 9, 2013)**

After his release from state custody, Edelman began serving three years of federal supervised release to which he had been sentenced as part of an unrelated federal conviction. A condition of the supervised release required Edelman to subject himself and his property to a search at any time. Edelman voluntarily signed a waiver agreeing to these terms of the supervised release.

After two months, Edelman left the halfway house where he had been serving his supervised release and never returned.

Following a tip from a confidential informant, federal agents arrested Edelman two months later in the lobby of an apartment complex. The agents took a set of keys from Edelman that opened one of the apartments in the building. The agents learned the apartment had been rented by a woman who had subsequently sublet it to Edelman. With the woman's consent, but without a search warrant, the agents entered the apartment where they found evidence of drug trafficking in plain view. Later that day, the agents returned to the apartment with a search warrant and seized drugs, packaging material and paraphernalia. Edelman was charged with several drug offenses.

Edelman argued the agents violated the *Fourth Amendment* by initially entering his apartment without a search warrant.

The court disagreed, holding Edelman did not have an objectively reasonable expectation of privacy in the apartment. As a condition of his supervised release, Edelman agreed to subject himself and his property to search by federal law enforcement officers. Individuals on supervised release who sign waivers, as Edelman did, are on notice that their expectation of privacy is greatly reduced. Edelman's residence in the apartment began after he escaped from the halfway house in violation of federal law. A person, such as Edelman, whose expectation of privacy is already greatly reduced, cannot increase his legitimate expectation of privacy by escaping.

Click **HERE** for the court's opinion.

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**United States v. Stokes, 2013 U.S. App. LEXIS 17276 (2d Cir. N.Y. Aug. 20, 2013)**

Police officers established probable cause to arrest Stokes for murder. After the officers learned Stokes was staying in a motel, they made plans to arrest him. The lead investigator asked an Assistant District Attorney (ADA) to obtain an arrest warrant; however, the ADA declined. Under New York law, once an arrest warrant is issued, police officers are not allowed to question a suspect without his lawyer present. The ADA believed if the investigator could talk to Stokes outside the presence of a lawyer, Stokes would cooperate in the current case and in an unrelated homicide.

The investigator decided to arrest Stokes without a warrant and assembled a group of officers to go to the motel where the investigator learned Stokes had checked into a room with a female companion. The investigator arrived outside Stokes' room and saw the door ajar. The investigator pushed the door open and called out to Stokes, who answered him. The investigator then entered the room without Stokes' consent and saw Stokes sitting on the bed in his underwear. As the investigator told Stokes to get dressed, he handed Stokes a pair of pants that were lying on top of a gym bag. Once the investigator picked up the pants, he saw the bag was open and that it contained a handgun. The investigator gave the bag to another officer who searched it and found nine firearms and ammunition. Stokes was charged with two federal firearms violations.

Stokes argued the investigator's warrantless entry into his motel room violated the *Fourth Amendment*; therefore, the firearms and ammunition should have been suppressed.

Even if the investigator's entry violated the *Fourth Amendment*, the district court held the firearms and the ammunition were admissible under the inevitable discovery doctrine.

The court of appeals held the district court improperly applied the inevitable discovery doctrine and reversed the denial of Stokes' motion to suppress the evidence.

First, the court had to determine whether suppression of the firearms and ammunition was an appropriate remedy in this case. The court assumed the officers had probable cause to arrest Stokes. While probable cause would have allowed the officers to arrest Stokes without a warrant if they encountered him in a public place, it has long been established that entry into a premises, to include a motel room, to search for or arrest a suspect requires an arrest or search warrant. The investigator testified even though he was familiar with this rule, he deliberately entered Stokes' room without a warrant or consent. Consequently, the court held the exclusion of the firearms and ammunition was appropriate in such a clear case of illegal police conduct.

Next, the court held the district court improperly applied the inevitable discovery doctrine. The inevitable discovery doctrine is an exception to the exclusionary rule, which provides that the fruit of an unlawful search or seizure is admissible at trial if the government can establish the officers would have inevitably obtained the evidence by lawful means, without the constitutional violation.

The court concluded the government failed to prove the officers would have inevitably discovered the firearms and ammunition through a lawful search of Stokes' room.

First, at the time of the investigator's entry, Stokes and his companion, Fulmes, had two days remaining on their room registration. If Fulmes had left the room carrying the gym bag, the officers would have had no basis for stopping or searching her. Second, if Stokes left the room without the gym bag and the officers arrested him, they would have had no basis for searching the room without a warrant. In addition, if the officers had arrested Stokes outside the room, Fulmes would have had the opportunity to check out of the room and remove the gym bag.

Because of the number of possible contingencies, the court concluded the discovery of the firearms and ammunition in Stokes' room pursuant to a lawful search was not inevitable.

Click **HERE** for the court's opinion.

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# 4th Circuit

**United States v. Jackson, 2013 U.S. App. LEXIS 17782 (4th Cir. Va. Aug. 26, 2013)**

Police officers suspected Jackson was selling drugs from his girlfriend's apartment where he regularly stayed. As part of the investigation, officers pulled two bags of trash from a can behind the apartment building. The trashcan was located beyond the apartment's rear patio, sitting partially on a two to three-foot wide strip of grass and partially on a common sidewalk that ran the length of the building.

After recovering items from the trash bags consistent with drug trafficking, the officers obtained a warrant to search the apartment where the officers seized evidence that led to Jackson's conviction for drug trafficking.

Jackson argued the trash pull violated the *Fourth Amendment* because the officers intruded upon the apartment's curtilage when they removed the trash bags from the can located near the rear patio of the apartment.

The court disagreed and held the trashcan was not within the apartment's curtilage. First, the trashcan was located at least twenty feet from the apartment's back door. While a twenty-foot distance is usually not great, in the context of an apartment complex where multiple units shared a common area, it was too far away to be considered part of the curtilage. Second, the trashcan was not located within an enclosure that surrounded the apartment and Jackson did not take any steps to shield the area from view by others. Finally, the trashcan was located in a common area behind the apartment used by all residents of the building.

In addition, Jackson argued the officers violated his reasonable expectation of privacy in the contents of the trashcan because the trashcan was not located at the curb of the public street for collection, but rather behind the apartment building.

Again, the court disagreed. It was not relevant that the trashcan was not at the curb awaiting collection. Jackson could not have a reasonable expectation of privacy in the contents of a trashcan located outside the curtilage of the apartment that was readily accessible to any member of the public.

Click **HERE** for the court's opinion.

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# 5th Circuit

**United States v. Abdo, 2013 U.S. App. LEXIS 17251 (5th Cir. Tex. Aug. 19, 2013)**

After receiving information from employees at a gun store and an army/navy surplus store, police officers believed Abdo planned to detonate a bomb and shoot service members stationed at Fort Hood, Texas. When the officers encountered Abdo they drew their firearms, separated Abdo from the backpack he was carrying, handcuffed him and then placed him in the back of a police car. Abdo admitted to the officers that he planned to attack soldiers at Fort Hood. Abdo was then formally arrested and transported to the jail.

Abdo argued the district court should have suppressed evidence found at the time of his arrest and statements he made to the police. Abdo claimed his detention at gunpoint and placement in a police car in handcuffs was a full arrest rather than a *Terry* stop, which was not supported by probable cause.

The court disagreed. Pointing a firearm and handcuffing a suspect does not automatically convert a *Terry* stop into an arrest. Here, when the officers encountered Abdo, they knew he had purchased shotgun shells, an extended magazine for a handgun and a large amount of gunpowder in a manner that was not consistent with its normal use. The officers also knew Abdo purchased an army uniform and asked for the kind of patches used at Fort Hood. In addition, Abdo was carrying a large, overstuffed backpack on a very hot day and one of the officers had experience with terrorists using similar tactics of concealing explosives in backpacks and obtaining fake uniforms to facilitate an attack. Under these circumstances, the officers acted reasonably in drawing their firearms and handcuffing Abdo while they effected a valid *Terry* stop, which was supported by reasonable suspicion.

Click **HERE** for the court's opinion.

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**United States v. Garza, 2013 U.S. App. LEXIS 17515 (5th Cir. Tex. Aug. 21, 2013)**

While on roving patrol, a Border Patrol agent received a radio broadcast to be on the lookout (BOLO) for a suspicious looking older model pickup truck carrying plywood in the bed, parked at a gas station at the corner of FM 650 and Highway 83 near Fronton, Texas. When the agent arrived at the gas station, he saw a pickup truck matching the BOLO description and got out of his vehicle to talk to the driver, later identified as Garza. As the agent approached, Garza acted nervously, moving fast to replace the gas cap, tensing up and shaking while doing so and then quickly entered the pickup truck. Garza attempted to drive away, but stopped when the agent activated the lights of his patrol car. Garza gave the agent consent to search the pickup truck and the agent found several people concealed underneath the plywood in the back of the truck who admitted they were in the United States unlawfully. The agent arrested Garza.

Based on the totality of the circumstances, the court held the agent had reasonable suspicion to stop of Garza's truck.

First, FM 650 is a well-known smuggling road for narcotics and aliens because it is the only route in an out of Fronton, as this court has noted in the past. Second, the agent had patrolled the border area regularly for over two and a half years and had investigated tips and made arrests in that same area for narcotics violations and alien smuggling. Third, the agent encountered Garza's truck five miles from the border between the United States and Mexico, which supported the reasonable belief the vehicle had recently crossed the border. Fourth, upon arriving at the gas station, the agent knew Garza's vehicle did not belong to a Fronton resident and Garza's nervous, erratic behavior and unprovoked flight supported a finding of reasonable suspicion. Finally, based on his experience, the agent knew smugglers often used plywood to conceal contraband in their trucks.

Click **HERE** for the court's opinion.

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**United States v. North, 2013 U.S. App. LEXIS 17808 (5th Cir. Miss. Aug. 26, 2013)**

As part of a drug trafficking investigation, federal agents obtained a wiretap order on North's cell phone from a federal judge in the Southern District of Mississippi. Information obtained from the interception of North's cell phone on May 9 and 16, 2009, led to North's arrest for possession of cocaine.

Title III of the Omnibus Crime Control and Safe Streets Act of 1986 authorizes the use of wiretap surveillance in criminal investigations. Under Title III, a federal judge may enter an order authorizing the interception of cell phone communications within the territorial jurisdiction of the court in which the judge is sitting. The Fifth Circuit Court of Appeals has held the "interception" includes both the location of a tapped telephone and the original listening post, and that a judge in either jurisdiction has authority under Title III to issue wiretap orders.

North argued the district court in Mississippi lacked territorial jurisdiction to authorize the interception of the cell phone call on May 9, 2009, because when the agents intercepted the call his phone was located in Texas and the government's listening post was located in Louisiana.

The court agreed. The district court located in the Southern District of Mississippi lacked the authority to permit interception of cell phone calls made from Texas at a listening post in Louisiana. In addition, the court held suppression of the information obtained from the May 9, 2009, wiretap was warranted.

North further argued the agents failed to follow the minimization protocols during interception of the May 16, 2009, phone call between North and a female friend who was not under investigation. North claimed the agents conducted uninterrupted monitoring of a one-hour telephone conversation that had no connection to the drug smuggling investigation.

The court agreed and suppressed the evidence obtained from the interception of the phone conversation. The agents were authorized to spot-monitor North's cell phone conversations for no more than two minutes at a time. However, the agents were authorized to continue monitoring if the conversation related to the drug smuggling investigation. The court found the agents did not stop listening when it was made clear the conversation was not criminal in nature and they did not conduct subsequent spot checks by checking on the conversation to determine if it had turned to criminal matters. Rather, the agents listened to the conversation for several minutes before dropping out for less than one minute at a time before resuming their near continuous listening. Under these circumstances, the court held it was not objectively reasonable for the agents to listen for nearly one hour to a conversation that did not turn to criminal matters until the last few minutes.

Click **HERE** for the court's opinion.

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# 6th Circuit

**United States v. Hinojosa, 2013 U.S. App. LEXIS 17634 (6th Cir. Mich. August 23, 2013)**

While patrolling a high-crime, high-drug area, two police officers followed Hinojosa for several blocks until he turned his car into a driveway of a sub-divided house and parked. The officers knew there had been reports of drug manufacturing in one of the apartments in the house. One of the officers approached Hinojosa, who was still seated in his car while the other officer positioned the police car in such a way that it would not have blocked Hinojosa's car from backing down the driveway. As the officer approached Hinojosa's car he held up one hand, signaling Hinojosa that he wanted to talk while keeping his other hand on his duty weapon. When the officer reached Hinojosa's car, he knocked on the driver's side window and asked Hinojosa if he could talk to him. Hinojosa agreed and then gave the officer his driver's license after the officer asked if he had any identification on him. The officer ran checks on Hinojosa's license information and discovered the license had been suspended. Because the officer had seen Hinojosa driving, he arrested Hinojosa for driving with a suspended license. During the search incident to arrest, the officer found a pistol in Hinojosa's waistband. The government indicted Hinojosa for being a felon in possession of a firearm.

Hinojosa moved to suppress the pistol, claiming the officers violated the *Fourth Amendment* by seizing him without reasonable suspicion he was engaged in criminal activity.

The court disagreed, holding Hinojosa's arrest resulted from a consensual encounter with the officers and not a *Fourth Amendment* seizure.

Police officers may approach individuals and ask them questions without having any reasonable suspicion of criminal activity as long as the officers do not convey to the individuals that they are not free to leave.

Here, none of the officers' actions during the encounter with Hinojosa, prior to the arrest, amounted to a *Fourth Amendment* seizure. First, the officer parked the police car so it was not blocking Hinojosa from terminating the encounter and leaving the area. Second, even though the officer's hand was on his gun as he approached Hinojosa, it was reasonable under the circumstances and was neither threatening nor coercive. Third, Hinojosa agreed to discuss some questions with the officer. Finally, the officer asked for Hinojosa's identification, he did not demand it or convey the message that Hinojosa would not be able to leave unless he produced it.

Click **HERE** for the court's opinion.

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**United States v. Booker, 2013 U.S. App. LEXIS 17716 (6th Cir. Tenn. August 26, 2013)**

Police officers arrested Booker for possession of marijuana. At the police station, officers noticed Booker was fidgeting and trying to put his hands in the back of his pants. The officers transported Booker to the jail where they strip searched him because the officers suspected Booker was concealing contraband in his buttocks. When the officers had Booker bend over and spread his buttocks, they saw a small string protruding from Booker's anus. After an officer asked Booker about the string, Booker moved his hand to cover the area and tried to push the object further into his rectum. This led to an altercation that led to Booker being restrained and taken to the hospital.

At the hospital, Booker denied having anything in his rectum and did not cooperate when a doctor attempted a digital rectal examination. The doctor ordered a nurse to administer a muscle relaxant to Booker, who remained uncooperative, but the doctor was able to feel a foreign object inside Booker's rectum. The doctor then directed a nurse to administer a sedative and a paralytic agent and had Booker intubated to control his breathing. While Booker was paralyzed, the doctor removed a rock of crack cocaine from his rectum. Booker remained intubated for one hour, unconscious for twenty to thirty minutes and paralyzed for seven to eight minutes.

The government indicted Booker for possession with intent to distribute crack cocaine. Booker moved to suppress the crack cocaine, arguing his treatment at the hospital violated the *Fourth Amendment*.

The district court concluded the rectal examination was lawful because it was not a search under the *Fourth Amendment* and even if it was, the doctor and the officers acted reasonably.

Booker was convicted and appealed.

The court of appeals reversed Booker's conviction.

The *Fourth Amendment* does not apply to searches or seizures by private citizens. However, in this case, the court held the doctor was considered an agent of the government for *Fourth Amendment* purposes. First, Booker was in police custody when the officers took him to the hospital. Second, the officers knew what the doctor was doing to Booker. Third, the officers knew Booker did not consent to any of the procedures to which he was subjected. Finally, no

reasonable police officer could believe that, without direction from the police, a doctor could lawfully intubate and paralyze a suspect without the suspect's consent.

The court further held the forced paralysis, intubation, and digital rectal examination to which Booker was involuntarily subjected amounted to an unreasonable search in violation of the *Fourth Amendment*. The court noted Booker was subjected to a highly intrusive and dehumanizing procedure while there were less intrusive means available to determine whether Booker was hiding contraband in his rectum.

Finally, the court held suppression of the evidence was warranted.

Click **HERE** for the court's opinion.

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# 7th Circuit

**United States v. Howard, 2013 U.S. App. LEXIS 18185 (7th Cir. Wis. Aug. 30, 2013)**

A police officer had probable cause to arrest Johnson for pistol-whipping a man one week earlier. When the officer saw Johnson and Carthans get out of a van and walk towards an apartment building, the officer got out of his vehicle and drew his gun, believing Johnson could be armed and dangerous. As the officer approached the men, Howard and Williams got out of the van. Until that time, the officer believed only two men had been in the van. The officer turned his gun towards Howard and Williams, who were closer to him, and ordered all four men to the ground.

A back-up officer arrived a few moments later and arrested Johnson, who had blood on his clothing, while the original officer placed Howard in handcuffs and frisked him for weapons. After placing Johnson in his patrol car, the back-up officer noticed Howard and Williams also had blood on their clothing. The back-up officer frisked Howard and while moving his hand over Howard's pocket, he felt what he believed to be a sandwich bag containing drugs. The officer removed the sandwich bag, which contained crack cocaine.

The officers searched the van and found a baseball bat and a gun wrapped in a bloody shirt. A short time later, the officers learned the four men were suspects in an armed robbery that had occurred in a neighboring city less than an hour earlier. Howard, Williams and Carthans were arrested and charged with armed robbery in state court. Howard was also charged in federal court with firearm and drug offenses.

Howard moved to suppress the crack cocaine, arguing his detention and the second frisk that led to the discovery of the drugs violated the *Fourth Amendment* because the officer did not have reasonable suspicion to stop and frisk him.

First, the court held it was reasonable for the officer to briefly detain Howard while arresting Johnson. The officer was alone and attempting to arrest Johnson for a violent crime involving a gun. Even though being ordered to the ground at gunpoint was a substantial infringement on Howard's rights, the officer's interest in ensuring he could safely arrest Johnson without having to worry about others who had just exited the same vehicle with him outweighed this brief intrusion.

Next, the court held the officers established reasonable suspicion to further detain Howard after the officers saw blood on Johnson's, Howard's and Williams' clothing. The officers' suspicion increased after they found the bloody gun in the van in which the men had been riding, and then learned the men were suspects in a recent armed robbery.

Finally, the court declined to decide whether the officer's second frisk of Howard was reasonable. Even if the cocaine had not been found in Howard's pocket during the second frisk, the court held it would have inevitably been discovered in the search incident to his arrest for armed robbery.

Click **HERE** for the court's opinion.

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# 8th Circuit

**United States v. Donnell, 2013 U.S. App. LEXIS 16681 (8th Cir. Minn. Aug. 13, 2013)**

An undercover police officer made a number of controlled purchases of drugs from a person named Roy. The officer suspected after he paid Roy for the drugs, Roy went to Donnell's house, retrieved the drugs, and then gave the drugs to him.

The undercover officer planned to make another drug purchase from Roy while another drug task force agent obtained an anticipatory search warrant for Donnell's residence. An anticipatory search warrant is based upon an affidavit showing that probable cause to believe evidence of a crime will be located at a specific place sometime in the future, upon some triggering event. Here, the search warrant affidavit stated probable cause to search Donnell's residence would exist if three triggering events occurred. First, if law enforcement officers maintained direct visual surveillance of Roy's vehicle from the time the undercover officer gave Roy documented investigative funds for the purchase of marijuana until the time Roy's vehicle arrived at Donnell's residence. Second, if law enforcement officers maintained direct visual surveillance of Roy's vehicle leaving Donnell's residence until Roy met again with the undercover officer. Finally, if the undercover officer confirmed receipt of some form of controlled substance from Roy.

After a magistrate judge issued the anticipatory warrant to search Donnell's house, the undercover officer met with Roy to buy marijuana. When the officer gave Roy marked United States currency, Roy told the officer he needed to obtain the marijuana from his source. While under surveillance, Roy drove to a driveway, which led solely to Donnell's house. The surveillance officers lost sight of Roy's vehicle as it went up the driveway. Approximately six minutes later, the surveillance officers regained sight of Roy's vehicle as it drove back down Donnell's driveway and followed it until Roy met with the undercover officer. After the meeting, the undercover officer confirmed Roy had given him approximately two pounds of marijuana.

Believing the three triggering events had occurred, police officers executed a search of Donnell's house and recovered marijuana, firearms and the marked currency from the undercover officer's drug transaction.

Donnell claimed the search of his home was not supported by probable cause because the required triggering events had not taken place. Specifically, Donnell argued the surveillance

officers' loss of continuing visual contact with Roy's vehicle for six minutes violated the first and second triggering conditions.

The district court disagreed, concluding, "A common sense reading of the warrant only required law enforcement to observe Roy's vehicle leaving the residential property of Donnell, which would include the driveway that exclusively led to Donnell's house."

The court of appeals agreed and found the police officers, satisfied the first and second triggering conditions of the warrant by maintaining visual surveillance of Roy's vehicle leaving Donnell's residence, which included the driveway leading to Donnell's house.

Click **HERE** for the court's opinion.

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**United States v. Stevenson, 2013 U.S. App. LEXIS 16904 (8th Cir. Iowa Aug. 15, 2013)**

In the course of operating its business, AOL, an internet service provider, scans files sent through its network with a tool called the Image Detection and Filtering Process. When the filtering process detects an image containing child pornography, it automatically forwards a report to the National Center for Missing and Exploited Children (National Center).

After AOL's filtering process detected one of its users had emailed images depicting child pornography, it triggered an alert to the National Center. The National Center then passed the information on to police officers in Iowa, who discovered the AOL account belonged to Stevenson.

The officers obtained a warrant, searched Stevenson's home and discovered hundreds of images depicting child pornography on his computers and thumb drives.

Stevenson argued AOL violated the *Fourth Amendment* by scanning his email for child pornography. While AOL is not a government entity, Stevenson argued the United States Code section that requires AOL to report child pornography it discovers to the National Center makes AOL an agent of the government for *Fourth Amendment* purposes.

The district court disagreed and held AOL was a private actor; therefore, it was not bound by the *Fourth Amendment*.

The court agreed. First, nothing in the United States Code requires AOL to scan the email of its users. Second, the reporting requirement, by itself, does not transform an Internet service provider into a government agent for *Fourth Amendment* purposes whenever it chooses to voluntarily scan files sent on its network for child pornography.

Click **HERE** for the court's opinion.

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## 9th Circuit

**U.S. v. Underwood, 2013 U.S. App. LEXIS 16227 (9th Cir. Cal. Aug. 6, 2013)**

Federal and local law enforcement officers suspected Underwood was a courier for a drug trafficking organization that distributed hundreds of thousands of pills of ecstasy per week.

While conducting surveillance, federal agents saw Underwood transfer two large unmarked crates to a vehicle driven by two co-conspirators. The crates were subsequently seized from a drug stash house and found to contain thousands of ecstasy pills.

Three months later, federal agents obtained a federal arrest warrant for Underwood and a federal search warrant for a house where they believed Underwood lived. Once at the house, the agents found Underwood's mother, who told them Underwood lived in a house on Mansa Drive. The agents went to the house on Mansa Drive, arrested Underwood and conducted a protective sweep. During the sweep, agents saw a small amount of marijuana on a table. After Underwood refused to consent to a full search of the house, a federal agent directed a local police officer to obtain a state search warrant for the Mansa Drive house. To assist the local officer, the federal agent emailed the officer a summary of the case against Underwood, which included a copy of the federal search warrant affidavit.

In the state search warrant affidavit, the officer listed his narcotics training and experience and then copied information from the federal search warrant affidavit nearly verbatim. The officer never indicated he was copying directly from the federal affidavit nor did the officer attach the federal affidavit to his affidavit. The state search warrant affidavit alleged Underwood was a courier for an ecstasy trafficking organization, it referenced the transfer of the two crates from Underwood to the co-conspirators three months prior, without mentioning the crates contained ecstasy, and the affidavit stated the officers had found a small amount of "personal-use" marijuana during their protective sweep. Based on the officer's affidavit, a state court judge issued a search warrant for the Mansa Drive house, which resulted in the seizure of thirty-three kilograms of cocaine, $417,000 in cash, 104 ecstasy pills and a written record of drug transactions.

Underwood moved to suppress the evidence seized from his Mansa Drive house, arguing the affidavit supporting the state search warrant lacked probable cause. Underwood also argued the good faith exception to the exclusionary rule did not apply because the affidavit was a "bare bones" affidavit that lacked indicia of probable cause.

The district court agreed and suppressed the evidence seized during the search of Underwood's Mansa Drive home.

The government appealed and the Ninth Circuit Court appeals affirmed the district court's order suppressing the evidence.

A search warrant is supported by probable cause if the issuing judge finds that facts set forth in the affidavit establish a fair probability that contraband or evidence of a crime will be found in a particular place. Conclusions of the affiant unsupported by underlying facts cannot be used to establish probable cause.

In this case, the state search warrant did not give a reasonable judge sufficient basis to believe it was fairly probable that Underwood was an ecstasy courier or that evidence of ecstasy trafficking would be found in the Mansa Drive house. First, even though the affidavit indicated the officers seized a personal-use amount of marijuana from the Mansa Drive house, that fact lacked a nexus with ecstasy trafficking; therefore, it could not support the conclusion that Underwood was an ecstasy trafficker. Second, the fact that federal agents saw Underwood deliver two crates, three months earlier, to two co-conspirators could not support the conclusion that Underwood was a drug courier, as the affidavit did not include any facts to establish the crates contained ecstasy. Third, the affidavit included the officer's conclusions that drug traffickers often kept records of

drug transactions at their residences. The affidavit did not provide any facts to support the conclusion that Underwood was in the business of buying and selling ecstasy. Fourth, probable cause to search the Mansa Drive house could not be established just because the officer stated a federal search warrant had previously been issued in this case for another residence connected to Underwood. The court further held the good faith exception to the exclusionary rule did not apply. The court agreed with Underwood that the affidavit was so deficient that reliance on the search warrant for the Mansa Drive house was unreasonable.

Click **HERE** for the court's opinion.

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