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This edition of *The Informer* may be cited as "1 INFORMER 13".  
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# **E-Discovery in Federal Criminal Investigations and Prosecutions**

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We now live in a digital world with a proliferation of electronic devices, electronically stored information (ESI), electronic communications, (e-communications), and social media. It is estimated that over 90% of all new information is created and stored electronically. In addition, people are certainly more likely to communicate by e-mail, text message, social media, instant messaging, short message service, and pin-to-pin than ever before.

This digital world has had an enormous impact on criminal investigations and prosecutions. Criminals have gone digital, and so have officers and investigators. First, as criminal evidence, ESI – phone calls, text messages, e-mails, internet use, and electronic data – has become a significant part of every kind of crime. Second, law enforcement investigative reports and memoranda are increasingly digital in form. Agencies are issuing laptops, tablets, smart phones, and other electronic devices to their officers and investigators for use in conducting investigations, taking statements, and communicating with each other, informants, witnesses, and prosecutors. Officers and investigators are also increasingly using their personal electronic devices for official work purposes. “Bring Your Own Device” programs and policies are now being developed and implemented in many agencies. In addition, the clear trend in our courts is electronic filings instead of hard copy documents for search and arrest warrants, affidavits, and court orders.

## **The Benefits and Risks**

There are real benefits to the use of ESI and e-communications. For instance:

Speed – e-mail is faster than standard mail.

Efficiency – ESI and e-communications create an instant record of the information that is mobile, requires very little physical storage space, and is easily converted into different forms. An enormous amount of data can be stored on a very small flash drive.

Ease of sharing – huge amounts of information can be encrypted and securely shared with an unlimited number of people through the use of large contacts lists, or by using email functions such as “Reply All,” or “Forward.”

However, those benefits come with risks.

Speed is a benefit, but it is also a potential risk. Formal communications and documents take time to compose and can be reviewed and edited. E-communications are often hastily prepared,

quickly sent, and may not be as complete as formal documents. In addition, for e-communications, “sent” is almost the equivalent of “received” with no time for intervening clarification.

Misinterpretation is a substantial problem. The language and style of e-communication is typically much more abbreviated and is markedly different from formal and face-to-face communication. It has been argued that approximately 80% of what is communicated during face-to-face conversations is through the human interaction – the tone, the inflection, the facial expressions, and the body language – not the actual words that are spoken. With e-communications, this is absent and context can be lost. What may actually be understood and proposed as humorous by the sender and receiver may not read the same to others. Words can take on completely different meanings when stripped of those human factors.

Below is an illustration of this danger.

Consider an e-mail or text message with this sentence in it: I didn’t say he did that. What does it mean? Can that same sentence, those same words, mean completely different things?

What if it were spoken this way – **I** didn’t say he did that.

Or spoken this way – I **DIDN’T** say he did that. Or perhaps this way – I didn’t **SAY** he did that.

Or maybe this way – I didn’t say **HE** did that. Or even this way – I didn’t say he did **THAT**.

Arguably, those same words could reasonably carry five, and possibly more, different meanings when stripped of the speaker’s tone, inflection, and facial expressions. If that one sentence is isolated from one e-mail in a long string of e-mails, all context is lost.

The sheer volume of ESI and e-communications and the potential problematic nature of e-communications present distinct challenges for law enforcement officers.

### **Taking Advantage of the Technology While Minimizing the Risks**

When conducting criminal investigations and prosecutions, recognize, understand, and appreciate defense counsel is entitled to a great amount of the information and substance gathered and communicated. Federal Rule of Criminal Procedure 16 lists specific items and categories of information discoverable by the defense upon request. These include defendant statements, documents and items, reports of examinations and tests, and summaries of expected expert testimony along with the bases and reasons for the expert’s opinion. The Jencks Act, found at 18 U.S.C. Section 3500, and Federal Rule of Criminal Procedure 26.2 require disclosure of the prior statements of government witnesses. The 1963 Supreme Court case of Brady v. Maryland mandates that the government disclose exculpatory, material evidence in its possession. The 1972 Supreme Court case of Giglio v. United States requires the government to disclose evidence in its possession that could affect the credibility of its witnesses.

For investigations, creating, obtaining, seizing, and maintaining ESI is primarily a function of case organization and management. There are numerous software systems that perform well, and agencies typically pick one that fits their kind of cases best. For prosecutions, there are a number of presentation software systems that perform well, and prosecution offices typically pick one that fits best.

The creation, capture, storage, and disclosure of e-communications during the course of an investigation and prosecution of a federal criminal case is another matter. It can be a huge, costly undertaking to find and assemble all of the case related e-communications. However, it is critical that all e-communications deemed discoverable be turned over to the defense in full compliance with the government's obligations. The guiding principle is this: Any potentially discoverable information and communication should be preserved and delivered to the prosecutor.

### **Best Practices**

There are some best practices for how e-communications should and should not be used during the investigation and prosecution of a federal criminal case and how to capture and store these communications to ensure the government meets its discovery obligations. These best practices recognize the scope of the issue, define terms, and set out the responsibilities of all those involved in the investigation and prosecution of federal criminal cases.

### **Who Needs To Employ Them?**

When federal criminal cases originate from federal investigations, the federal officers, agents, and Assistant U.S. Attorneys participating in the investigation and prosecution need to have a system in place that captures, stores, and discloses all potentially discoverable e-communications.

A large number of cases prosecuted in federal criminal court come out of investigations, initial contacts, or incidents between state and local, territorial, and tribal officers and the defendants. It is essential those officers also take appropriate steps to ensure the capture, storage, and disclosure of all potentially discoverable e-communications. It is crucial to identify all those involved in the case in a carefully considered effort to locate discoverable information. In this effort, it is clearly better to err on the side of inclusion.

### **“E-Communications”**

As mentioned above, e-communications include e-mail, text messages, instant messages, short message service – for example, tweeting – pin-to-pin, social networking sites, bulletin boards, and blogs. E-communications can be broken down into three categories – Substantive, Logistical, and Privileged.

## **Substantive Communications**

These include e-communications that contain:

- Factual information about investigative activity,
- Factual information from interviews or interactions with victims, witnesses, potential witnesses, informants, cooperators, and experts,
- Factual discussions about the merits of evidence, and/or
- Factual information regarding the credibility or bias of witnesses.

## **Logistical Communications**

These include e-communications that contain:

- Travel information,
- Dates, times, locations of hearings or meetings, and those that
- Transmit reports.

Generally, purely logistical communications are not discoverable.

## **Privileged Communications**

These include e-communications that contain:

- Attorney-client privileged communications,
- Attorney work product communications,
- Deliberative process communications, and
- Protected communications, which are those covered by Federal Rule of Criminal Procedure 16(a)(2).

Generally, as long as any discoverable facts contained in privileged e-communications are disclosed in other materials, the privileged and protected e-communications are not discoverable.

## **Drafting and Using E-Communications During and as Part of an Investigation and Prosecution**

First, think about whether e-communication is appropriate to the circumstances or whether an alternative form of communication, such as a formal report or telephone call, is a better choice. Do not send substantive, case-related e-communications unless absolutely necessary and only to those with a need to know. For example, an e-mail may be appropriate when the recipient is in a time zone that makes coordinating a telephone call almost impossible. Texting may be the better choice when one is worried about being overheard. When using e-communications, notify recipients of any restrictions on forwarding and sharing. Do not use personally-owned electronic devices, personal e-mail accounts, or personal social networking sites to transmit case related information unless absolutely necessary. Do not post case-related or sensitive agency information on a non-agency website or social networking site. Typically, logistical information is better suited for e-communications.

Second, think about the content of any e-communication before using it. All control over e-communications is lost once they are sent or posted. There is no way to guarantee they will remain private. Those to whom it is sent and “friends” on social media sites can share it with anyone they want. There are many examples of embarrassing and damaging e-mails and social media postings displayed in court and in the media. One should consider how such an e-mail or social media posting would look in the newspaper, sound on television, or be perceived during cross-examination on the witness stand.

The principle is simple. Be professional, especially with non-law enforcement personnel. When sending substantive e-communications, write them like a formal report with accurate and complete facts. Avoid witticism, careless commentary, opinion, and over familiarity. They should reflect an arms-length relationship with non-law enforcement witnesses. Limit e-communications to a single case. Also, tell non-prosecution team members that e-communications are a record and they may be disclosed to the defense.

Finally, figure out in advance how and where to preserve potentially discoverable e-communications. Talk to the prosecutors about their policies to determine how to handle e-communications. Figure out the plan; put the plan in place; and use the system from start to finish.

The goal is to reduce the amount of case related e-communications to just those that are appropriate, which should reduce the time and costs of managing discovery and ensure full compliance. Remember and appreciate the guiding point is any potentially discoverable information and communication should be preserved and delivered to the prosecutor.

### **Preserving E-Communications**

Each person who is the creator, sender, forwarder, or the primary addressee in the “To” line of an e-communication needs to preserve it. If none of the above applies, for example, with an e-mail from a witness to a third party, each person who is a secondary recipient in the “cc” or “bcc” lines needs to preserve it. Admittedly, this will preserve multiple copies of the same email, but it will also ensure that every e-communication is preserved.

### **What to Preserve**

Preserve all potentially discoverable e-communications, including attachments and threads of related e-communications. For e-mails, this includes communications, which are located in the “Inbox,” “Sent Items,” and “Deleted Items” folders.

### **“All Potentially Discoverable E-Communications”**

Potentially discoverable e-communications include all substantive e-communications created or received during the investigation and prosecution. It includes all e-communications sent to or received from non-law enforcement potential witnesses regardless of content. It also includes e-communications that contain both potentially privileged and unprivileged substantive information. If not sure, one should err on the side of preservation. Purely logistical e-communications need not be preserved.

## **When to Preserve**

Preserve as soon as possible, but no later than 10 days after the e-communication is sent or received. Make sure preservation occurs before agency or department systems automatically delete the e-communications because of storage limitations or retention policies.

## **Where to Preserve**

E-communications should be placed in secure permanent or semi-permanent storage location associated with the particular investigation and prosecution. For e-mails create a specific folder to which they can be moved. E-communications can also be printed and the hard-copy placed in the criminal case file.

## **How to Preserve**

Preserve e-communications in their native e-format. Otherwise, they should be printed and preserved.

## **Special Circumstances**

It is the responsibility of each person involved in the case to make available to the prosecutor all potentially discoverable e-communications so that the prosecutor can review them to determine what should be produced in discovery. Let the prosecutor know if there are e-communications that deserve especially careful scrutiny because disclosure could

- Affect the safety of any person,
- Reveal sensitive investigative techniques,
- Compromise the integrity of another investigation, or
- Reveal national security information.

## **The Goal**

The goal of these best practices is to reduce the volume of potentially discoverable e-communications and establish a system to manage them. Establishing a system to organize and preserve e-communications reduces the time and costs of managing discovery and ensures full compliance with the government's ethical and legal discovery obligations.

# CASE SUMMARIES

## Circuit Courts of Appeals

### 1<sup>st</sup> Circuit

#### United States v. Jones, 700 F.3d 615 (1st Cir. Me. 2012)

Police officers received an anonymous call from a person who claimed to have recently used and purchased cocaine from five individuals at a nearby house. The caller gave the officers the street address and claimed the occupants of the house were armed with handguns. The caller also described a silver car parked outside the house that supposedly had cocaine inside it. Officers conducted surveillance on the house and a silver Toyota parked a short distance down the street. During this time, officers established the house and the silver Toyota were owned by individuals who were connected to past drug activity.

Four men eventually came out of the house, got into the silver Toyota and drove away. The officers conducted a traffic stop and approached the car with their guns drawn. The officers forcibly removed Jones from the front passenger seat after he refused their commands to exit the vehicle. Once Jones was secured, an officer conducting a visual search for weapons noticed that Jones' pants had slid down around his buttocks and a corner of a plastic bag was sticking out of the waistband of his underwear. From experience, the officer knew suspects often hid drugs in this manner. The officer removed the bag, which contained cocaine.

First, the court held the officers sufficiently corroborated the anonymous tip and established reasonable suspicion to stop the silver Toyota. When the officers stopped the silver Toyota, they had verified a connection between the house and the car and that the house and the car were occupied and owned by individuals previously implicated in illegal drug activity. This information allowed the officers to suspect the individuals were involved in criminal activity and warranted further investigation.

Second, the court held the manner in which the officers conducted the stop was reasonable, in light of their legitimate safety concerns; therefore, the stop did not escalate into a de facto arrest requiring probable cause. Police officers conducting *Terry* stops are entitled to take reasonable measures to protect their safety and taking such measures does not transform a *Terry* stop into an arrest. Here, based on the information known to them, it was reasonable for the officers to believe the stop involved armed drug traffickers. Consequently, the use of multiple officers, drawn weapons and handcuffs did not turn the *Terry* stop in to a de facto arrest.

Finally, the court held the district court correctly ruled the drugs seized from Jones were in plain view when the officer saw the corner of a plastic bag protruding from his underwear and removed it.

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

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**United States v. Infante, 2012 U.S. App. LEXIS 25308 (1st Cir. Me. Dec. 11, 2012)**

Infante called 911 and requested an ambulance, telling the dispatcher he had severed the tip of his finger and seriously cut his hand when a hand-held propane tank exploded inside his house. Ten minutes later Infante called 911 to report he was driving to the hospital because the ambulance was taking too long to arrive. Infante saw the responding paramedics on his way to the hospital and pulled over to allow them to render aid. When the paramedics asked him what had happened, Infante told them he was inside his house, filling a butane lighter, when it exploded. The paramedics bandaged Infante's finger and hand and treated shrapnel-type wounds on his chest, but Infante refused to allow them to transport him to the hospital, insisting to drive himself.

In the meantime, firefighters were dispatched to Infante's house based on his initial report of a propane explosion. A firefighter looked through a window, saw a trail of blood on the floor, and then crawled through the unlocked window into the house. The firefighter unlocked the front door to allow the other firefighters to enter so they could search for the source of the explosion. The firefighters followed the blood trail to the cellar where they discovered marijuana plants, growing equipment and three pipe bombs.

After the discovery at Infante's house, investigators went to the hospital to interview him. Before the interview, the investigators did not inform Infante of his *Miranda* rights, but did tell him the interview was voluntary, he was not under arrest and he did not have to talk to them. Infante spoke to the investigators, and in two separate interviews, he made incriminating statements.

The court held the firefighters' warrantless entry into Infante's house and search of the cellar fell within the emergency exception to the *Fourth Amendment's* warrant requirement. After Infante reported a propane gas explosion inside his house and the paramedics saw that he suffered from injuries consistent with an explosion, the firefighters had probable cause to believe a secondary explosion from escaping gas could occur. After entering Infante's house, the firefighters limited the scope of their search for the explosion's origin to cellar because they saw the blood trail leading there. The evidence recovered from the cellar was observed by the firefighters in plain view.

The court also held Infante was not in custody when the investigators interviewed him at the hospital; therefore, he was not entitled to *Miranda* warnings. Based on the circumstances, the court found a reasonable person in Infante's position would have felt free to terminate the interviews and ask the investigators to leave. The investigators told Infante each interview was voluntary, he did not have to talk to them and he was not under arrest or in custody. In addition, the investigators did not impede hospital personnel from coming and going freely into Infante's room, the investigators were in plainclothes, their weapons remained in their holsters, the atmosphere was non-confrontational and the interviews were relatively short.

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

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## 2<sup>nd</sup> Circuit

### United States v. Murphy, 2012 U.S. App. LEXIS 24904 (2d Cir. N.Y. Dec. 4, 2012)

A police officer put ruse drug-checkpoint signs on the side of an interstate highway just before an exit. The officer stopped a car driven by Michael Webster, claiming Webster failed to use his turn signal when he got off the highway at that exit. After returning Webster's documents and issuing a warning, the officer obtained Webster's consent to search the car. The officer found cocaine in a hidden compartment in the trunk and arrested Webster and his passenger Michael Murphy. The officer advised Webster and Murphy of their *Miranda* rights, and then told them, "You can decide at any time to give up these rights, and not talk to us, okay." Murphy told the officer he understood, but Webster never indicated if he understood or had even heard the officer's *Miranda* warnings. Both men subsequently denied knowing about the hidden compartment or the cocaine.

First, the district court found the officer's testimony that he saw Webster commit a traffic violation was not credible; therefore, it held the officer had unlawfully seized the defendants. The court concluded this was a proper finding by the district court.

Next, the court held Webster's subsequent consent to search the car was tainted by the unlawful seizure; therefore, the district court properly suppressed the drugs found in the trunk. Less than one minute elapsed between the end of the unlawful seizure, when the officer returned Webster's documents, and when Webster gave the officer consent to search the car. In addition, the officer did not tell Webster the stop was over, he was free to go or he did not have to consent to a search. The court stated a reasonable person would not have felt free to go at that time. The court also noted the district court questioned the officer's motivation for the traffic stop, when it commented that the officer appeared to tailor his testimony in an attempt to justify the stop and search.

Finally, the court agreed with the district court, which held Murphy had not knowingly waived his *Miranda* rights because the officer's *Miranda* warning confused the waiver of rights with the exercise of rights. The officer's statement strongly suggested Webster and Murphy would waive their rights to silence and counsel by not talking to him. While slight deviations from the standard *Miranda* warnings will not automatically invalidate a defendant's waiver of his rights, in this case, the substance of the warnings was confusing enough to cast serious doubt on whether Murphy understood his rights.

As to Webster, the officer testified he did not know whether Webster heard the *Miranda* warnings he read. The government argued Webster's waiver of his *Miranda* rights should be inferred based solely on the fact the officer read the warnings in a clear voice while standing near him. Although a defendant's waiver may be implied through his silence, along with an understanding of his rights and some conduct indicating a waiver, the court held the government must do more than show that a *Miranda* warning was given and the individual later made a statement. Here, the government could not establish that Webster understood the *Miranda* rights given by the officer, incorrect as they were; therefore, Webster could not validly waive them.

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

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**United States v. Ferguson, 2012 U.S. App. LEXIS 25046 (2d Cir. N.Y. Dec. 6, 2012)**

Police officers arrested Ferguson in front of his apartment less than an hour after he had fired a pistol into the air during an argument with two women. Ferguson was not armed when the officers arrested him. At the police station, without providing *Miranda* warnings, another officer questioned Ferguson about the location of the firearm. Ferguson told the officer the firearm was at his sister's apartment and then accompanied officers there to recover it.

Ferguson argued the officer should have provided him with *Miranda* warnings before questioning him about the firearm.

The court disagreed. Even though the officer did not provide Ferguson with *Miranda* warnings, his questions fell within the scope of the public safety exception to the *Miranda* requirement. Under this exception, the concern for public safety may justify an officer's failure to provide *Miranda* warnings before he asks questions designed to locate an abandoned weapon. Here, Ferguson had reportedly discharged a firearm; however, the officers did not recover a firearm when they arrested him less than an hour later. Not knowing where Ferguson had gone during that time, the officers had an objectively reasonable need to protect the public from the possibility that he had hidden the firearm in a public place. In addition, the officer's questions were not investigatory in nature or asked in such a way as to obtain testimonial evidence, but rather they were supported by a genuine concern for public safety.

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

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**4<sup>th</sup> Circuit**

**United States v. Brown, 701 F.3d 120 (4th Cir. Va. 2012)**

Police officers established files containing child pornography had been downloaded to an IP address registered to a private ambulance company. The officers focused their investigation on Brown and another employee after they discovered the pair were always on duty when the child pornography was downloaded. The officers obtained a warrant to search the company's computers but did not locate any child pornography on them. During the execution of the search warrant, Brown and the other employee returned from a call. An officer seized a laptop computer that Brown had in the ambulance with him. The officer obtained a warrant to search Brown's laptop, which contained videos and images of child pornography.

The court held the officer's warrantless seizure of Brown's laptop did not violate the *Fourth Amendment*. Based on their investigation, the officers had probable cause to believe any computer used by either Brown or his co-worker during their shifts at the ambulance company contained child pornography, to include Brown's laptop, which he possessed during his work shift. Under the exigent circumstances exception to the *Fourth Amendment's* warrant requirement, it was reasonable for the officers to seize Brown's laptop computer to prevent either it or its contents from being destroyed until a search warrant could be obtained.

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

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**United States v. Ayesh, 2012 U.S. App. LEXIS 25813 (4th Cir. Va. Dec. 18, 2012)**

The U.S. State Department hired Ayesh, a resident of Amman, Jordan, to work as the shipping and customs supervisor at the U.S. Embassy in Baghdad, Iraq. During this time, Ayesh diverted United States funds intended for shipping and customs clearance vendors to his wife's bank account. Once U.S. officials figured out Ayesh's scheme, they arranged for him to come to the United States under the pretext of attending a training seminar. Federal agents arrested Ayesh after he retrieved his checked luggage from the baggage claim area at the airport. During an interview that lasted approximately five hours, Ayesh confessed to the agents.

Ayesh claimed his confession was involuntary and coerced because he made it during a lengthy interview after traveling from Jordan for nineteen hours without sleep or food.

The court disagreed. Ayesh was fluent in written and spoken English and he declined the agents' offer of a translator. Ayesh then initialed each of his *Miranda* rights on the Advice-of-Rights Form and signed the form indicating he understood his rights and that he was waiving them. In addition, Ayesh never told that agents he was fatigued or needed sleep and he did not appear to be either physically or mentally tired. When Ayesh requested a break, one was provided, and the agents offered him food and drink on several occasions. Ayesh freely and voluntarily confessed to the agents.

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

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**United States v. Lawing, 2012 U.S. App. LEXIS 26642 (4th Cir. N.C. Dec. 31, 2012)**

A confidential informant (CI), in the presence of police officers, made a recorded phone call to a person identified as "Drew" in which Drew agreed to drive to the CI's house and deliver crack cocaine within twenty minutes. The CI gave the officers a physical description of Drew, the car he would be driving and the route he would take to the CI's house. About twenty minutes later an officer in a marked patrol car conducted a traffic stop on a car that fit the description provided by the CI, driven by a man fitting Drew's description, one half mile from the CI's house. The officer obtained a driver's license from the driver which bore the name Lawing, not Drew. Other officers arrived, seized Lawing's cell phone and called the number the CI had previously used to call Drew. Lawing's cell phone rang. Officers then searched the car but did not find any crack cocaine. However, the officers found two shotgun shells in the glove box lying on top of an identification card with Lawing's picture on it. Lawing was charged with possession of ammunition by a convicted felon.

The court held the officer had reasonable suspicion to stop Lawing's car because he corroborated the CI's description of Drew and his car as well as the time and circumstances surrounding the intended cocaine delivery.

The court also held the officers were justified in seizing Lawing's cell phone to see if it rang when they called the number the CI had used to place the crack cocaine order with Drew. Even though Lawing provided a driver's license that did not bear the name Drew, the totality of the circumstances provided the officers with reasonable suspicion to take minimal steps to determine whether Lawing was Drew.

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

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## **5<sup>th</sup> Circuit**

### **United States v. Rodriguez, 2012 U.S. App. LEXIS 25081 (5th Cir. Tex. Dec. 7, 2012)**

Rodriguez and Izquierdo were arrested at a checkpoint after Border Patrol agents found over forty-five kilograms of marijuana in a concealed compartment in the cab of their tractor-trailer after a drug-dog alerted on the vehicle. Neither man claimed ownership of the marijuana, however, both were convicted of possession with intent to distribute marijuana and conspiracy.

Rodriguez argued his mere presence in the truck did not establish probable cause to arrest him and that the warrantless search of the contents of his cell phone constituted an unlawful search incident to his arrest.

The court disagreed with both arguments. First, the court noted the Supreme Court, in [Maryland v. Pringle](#), allowed the warrantless arrest of all the passengers in a car in which drugs were found when none of the passengers claimed ownership of the drugs. Here, it was reasonable for the Border Patrol agents to believe either or both men had knowledge of, and exercised dominion and control over, the marijuana that was found.

Next, the court cited [U.S. v. Finley](#), where the Fifth Circuit held the search of the contents of a cell phone found on a person incident to his arrest, for evidence of his crime, was permitted. As a result, the court held the warrantless search of the contents of Rodriguez's cell phone, incident to his arrest, was lawful.

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

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## **6<sup>th</sup> Circuit**

### **United States v. Cochrane, 2012 U.S. App. LEXIS 25980 (6th Cir. Ohio 2012)**

In February 2011, police officers stopped Cochrane for a stop-sign violation. A drug-dog alerted on Cochrane's vehicle, the officers searched it, however they did not find any drugs. Five weeks later, the same officers stopped Cochrane because his vehicle did not have a front license plate, as required by Ohio law. One of the officers told Cochrane why he had been stopped, then asked Cochrane if he had any drugs or guns in his vehicle. Cochrane said, "No" to which the officer replied, "You know we're going to want to take a look." Cochrane said to the officer, "Go ahead." The officers searched the vehicle, found a handgun and arrested Cochrane.

Cochrane argued the officers unreasonably prolonged the traffic stop because they focused on searching his vehicle and not on the license plate violation.

The court disagreed. Although the officer asked for Cochrane's driver's license and registration after asking him about the presence of contraband, there is no rule that an officer must ask questions in a certain order. The officer's extraneous questions were brief and reasonable under the circumstances.

The court also held Cochrane voluntarily consented to the search of his vehicle. There was nothing to indicate the atmosphere was coercive. In addition, the officers did not physically threaten or intimidate Cochrane and they had not yet arrested him or threatened to arrest him when he gave consent.

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

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## **7<sup>th</sup> Circuit**

### **Harney v. City of Chicago, 2012 U.S. App. LEXIS 25170 (7th Cir. Ill. Dec. 10, 2012)**

Timothy Harney and Patricia Muldoon sued the City of Chicago and one of its police officers claiming the officer entered their residence and arrested them without a warrant or probable cause in violation of the *Fourth Amendment*.

The court held the officer was entitled to qualified immunity.

First, the officer had probable cause to arrest Harney and Muldoon. The victim told the officer her car had been vandalized and she suspected Harney and Muldoon. The officer saw damage to the victim's car and he reviewed a security camera videotape that showed Harney bending down to examine the tire on the victim's car and Muldoon walking past the victim's car with keys in her hand.

Second, the officer arrested Harney, without a warrant, in a common area in his condominium complex. As long as an officer has probable cause, he may arrest an individual in a public place without a warrant. No reasonable jury could believe the common area constituted the curtilage of the condominium; therefore, the officer was not required to obtain a warrant to arrest Harney.

Finally, after the officer arrested Harney, he told Harney he planned to arrest Muldoon. Harney agreed to get Muldoon and he entered their condominium, with the officer following him. Once inside, the officer arrested Muldoon. The court held Muldoon could not establish the officer's following Harney into their condominium was unreasonable as neither objected to the officer's presence or otherwise indicated they did not consent to him being there.

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

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## **8<sup>th</sup> Circuit**

### **United States v. Farnell, 701 F.3d 256 (8th Cir. Mo. 2012)**

A police officer received a report a bank robbery had occurred earlier that morning. The suspect's vehicle was a white van and the suspect was a heavy-set white male. The officer had previously received two bulletins concerning several other armed bank robberies in the area committed by a heavy-set white male driving a white van. While securing the perimeter of a potential get-away route, the officer saw a white van driven by a heavy-set white male, later identified as Farnell. When the van drove past the officer, the driver held up his hand to conceal his face. The officer conducted a traffic stop and obtained consent to search the van. After finding a handgun, the

officer handcuffed Farnell and placed him in another officer's patrol car. The officer resumed his search of Farnell's van and located evidence connected to the bank robbery.

The court held the officer had reasonable suspicion to stop Farnell. First, the officer was aware of several previous armed bank robberies committed by a heavy-set white male driving a white van. Second, the officer knew a heavy-set white male driving a white van had committed a bank robbery that morning and he saw a person and vehicle fitting these descriptions driving on a road leading away from the bank. Finally, the driver of the van tried to shield his face as he drove past the officer.

The court also held Farnell voluntarily consented to the search of his van. The officer did not threaten Farnell or promise him anything and Farnell was not under the influence of drugs or alcohol.

Finally, after the officer found the handgun in the van, the court held the officer was entitled to go back and continue to search the van. Without deciding whether the officer's subsequent search was a new and separate search or a continuation of the consent search, the court held the automobile exception applied. The officer's discovery of the handgun, along with his previous knowledge concerning the bank robbery suspect and van, gave him probable cause to believe additional evidence of the bank robbery would be found inside the van.

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

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### **United States v. Cotter, 701 F.3d 544 (8th Cir. Mo. 2012)**

Officers responded to a call to check on the welfare of two women at a house where they had received previous complaints of illegal drug activity and stolen vehicles. Once at the house, the officers saw Cotter working on a Cadillac parked in the driveway. One of the officers spoke with one of the women at the house who told the officer she did not know Cotter or anything about the Cadillac. The other officer called-in the license plate number from the Cadillac and was told it was registered to a Chevrolet. Cotter hesitated when the officers asked him for his date of birth and seemed nervous and shaky. One of the officers performed a *Terry* frisk and felt the butt of a handgun tucked into Cotter's front waistband. The officer removed the handgun and arrested Cotter.

Cotter claimed the officers did not have reasonable suspicion to believe criminal activity was afoot or that he was armed and dangerous.

The court disagreed. Although there could be an innocent explanation for each of Cotter's actions, when considered together it was reasonable for the officers to suspect the Cadillac was stolen and Cotter might be armed. As the officers approached him, Cotter was reaching inside the vehicle, which had a license plate registered to a different vehicle, at a house known for illegal drugs and stolen vehicles. In addition, Cotter appeared nervous and shaky and hesitated when the officer asked him for his date of birth.

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

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## **9<sup>th</sup> Circuit**

### **Sims v. Stanton, 2012 U.S. App. LEXIS 24803 (9th Cir. Cal. Aug. 8, 2012)**

Officer Stanton and his partner responded to a radio call regarding an “unknown disturbance” involving a baseball bat. When the officers arrived, they did not see any disturbance, but only three men walking in the street. Two men turned into an apartment complex and the third man, Nicholas Patrick, walked quickly toward Drendolyn Sims home. Patrick was not carrying a baseball bat and there was no indication he had been involved in the disturbance the officers were investigating. Stanton got out of the patrol car and ordered Patrick to stop. Patrick ignored Stanton, opened the gate to Sims’ front yard and entered the front yard with the gate shutting behind him. Believing Patrick was disobeying his lawful order, Stanton kicked open the gate to Sims’ front yard to go after him. Stanton did not realize Sims was standing behind the gate, and when it flew open it hit her in the head. Sims was knocked unconscious and suffered injuries to her head and shoulder.

Sims sued Stanton claiming her *Fourth Amendment* rights had been violated by Stanton’s warrantless entry into her front yard.

First, the court determined Sims’ front yard constituted curtilage because the gate Stanton kicked open was part of a fence made of solid wood, more than six feet tall, that completely enclosed the front yard to Sims’ home. As curtilage, Sims’ front yard was entitled to the same *Fourth Amendment* protections as her home.

Second, the court ruled exigent circumstances did not exist, which would have allowed Stanton to enter Sims’ front yard without a warrant. At best, Stanton had probable cause to believe Patrick had committed a misdemeanor by disobeying his order to stop. The possible escape of a person fleeing from a misdemeanor arrest did not justify Stanton’s warrantless entry into Sims’ front yard. In addition, Stanton’s warrantless intrusion was particularly egregious because it violated the *Fourth Amendment* rights of a person not involved in the initial encounter.

Third, the court ruled the emergency exception did not apply. Even though Stanton was called to investigate a disturbance involving a baseball bat, he did not see Patrick carrying a baseball bat or any other weapon. Once Patrick fled into Sims’ front yard without indicating he would return with a weapon or otherwise threaten Stanton with violence, it was unreasonable for Stanton to believe Patrick posed an imminent threat to himself or anyone else.

The court held the law at the time would have placed a reasonable officer on notice that a warrantless entry into the curtilage of a home constituted an unlawful search, which could not be excused under the exigency or emergency exceptions to the warrant requirements under these circumstances. Consequently, Stanton was not entitled to qualified immunity.

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

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**Coles v. Eagle, 2012 U.S. App. LEXIS 24923 (9th Cir. Haw. Dec. 5, 2012)**

Officer Eagle conducted a traffic stop on a car driven by Coles after he learned it had been reported stolen. Coles eventually pulled over and was approached by Eagle and Officer Robertson, who had arrived on scene. The officers simultaneously ordered Coles to exit the vehicle and keep his hands on the wheel. The officers claimed Coles was making furtive hand movements that did not allow them to see his hands. Coles claimed he moved his hands in an effort to open the car door, but then placed his hands on the steering wheel. Both officers denied Coles ever placed his hands on the steering wheel. Without warning, Eagle then smashed the driver's side window with his baton and both officers pulled Coles out of the car through the window. Coles claimed after the officers removed him from the car they threw him on the ground and repeatedly kicked him and that Eagle struck him with his baton. The officers denied they beat Coles after removing him from the car.

The district court held the force used to break the car window and pull Coles from the car was reasonable and granted the officers qualified immunity, but that the officers were not entitled to qualified immunity for the use of force used once Coles was pulled from the car.

The court of appeals reversed the district court and held the officers were not entitled to qualified immunity for breaking the car window and removing Coles from the car. The court concluded there was a material factual dispute as to whether Coles' hands were on the steering wheel, Coles saying yes, the officers saying no, when they broke the window and pulled him from the car. The district court improperly granted the officers qualified immunity because a reasonable jury could believe Coles' version of the event and find the officers' use of force was not justified.

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

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## **10<sup>th</sup> Circuit**

**United States v. Santistevan, 2012 U.S. App. LEXIS 25715 (10th Cir. Colo. Dec. 17, 2012)**

While driving to the jail to interview Santistevan, an FBI agent received a call from an attorney who advised him she represented Santistevan. The attorney said Santistevan did not wish to speak to the agent, and if he went to the jail Santistevan had a letter for the agent she had drafted. When the agent arrived at the jail, he told Santistevan he had spoken to an attorney who claimed to represent him and then asked Santistevan whether he had a letter. Santistevan gave the agent a letter, which stated in part, "Mr Santistevan does not wish to speak with you without counsel." The agent told Santistevan even though he had been advised by an attorney not to talk to him, it was up to Santistevan whether he wished to talk to the agent or not. Santistevan agreed to talk to the agent without a lawyer present. The agent advised Santistevan of his *Miranda* rights, which he waived, and then Santistevan made several incriminating statements.

The court of appeals agreed with the district court, which held Santistevan had unambiguously invoked his right to counsel when he handed the letter drafted by his attorney to the agent. When Santistevan gave the letter to the agent, the court concluded he ratified the contents of the letter as his own personal communication to the agent. Once Santistevan did this, he effectively invoked his right to counsel and all questioning should have stopped. Because the agent

continued to question Santistevan, the district court properly suppressed the incriminating statements he made to the agent.

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

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**United States v. Jones, 2012 U.S. App. LEXIS 25844 (10th Cir. Kan. Dec. 18, 2012)**

Police officers with the Missouri Highway Patrol were conducting surveillance on a hydroponics store in Kansas City, Missouri because they knew it sold equipment that could be used to grow marijuana. After Jones arrived at the store, one of the officers requested a computer check on his pick-up truck. The officer learned Jones had a Missouri address, his driver's license was suspended in Missouri and he was on parole in Missouri for a drug offense. After Jones left the store, the officers followed him to a house in Kansas City, Kansas. The officers stated they did not realize they had entered the State of Kansas. The officers approached Jones, briefly spoke with him, and then one of the officers asked Jones for his identification. After Jones gave the officer his identification, the officer told Jones he would like to search his house. Without responding, Jones walked with the officers to the back door and they all entered the house. Once inside, Jones stepped into a side room, grabbed a "long gun" and pointed it at one of the officers. Another officer fired his duty weapon at Jones, wounding him. Kansas City, Kansas police officers eventually obtained a search warrant for Jones' house and truck and seized over three hundred marijuana plants.

Jones argued the Missouri officers violated the *Fourth Amendment* when they seized him outside of their jurisdiction and that he had not voluntarily consented to the search of the house.

The court disagreed. Even though the Missouri officers were acting outside their jurisdiction and without authority under Kansas law, their actions did not constitute a *Fourth Amendment* violation. The Missouri officers' encounter with Jones triggered federal legal standards related to the reasonableness of their seizure of Jones. Whether the Missouri officers were acting without authority under Kansas law was irrelevant.

Next, the court determined the officers' interaction with Jones when they first walked up to him until they took his identification was a consensual encounter. Once the officers took Jones' identification, he was seized for *Fourth Amendment* purposes. However, by this time, the officers had established reasonable suspicion to believe he was involved in criminal activity. First, Jones had visited a store the officers knew sold equipment to grow marijuana. Second, the officers knew Jones had a prior drug conviction. Finally, when one of the officers first encountered Jones, he identified himself as a police officer and told Jones he was conducting a drug investigation. He then said to Jones, "I'm here for your marijuana plants," to which Jones responded by saying, "Oh shit." Upon hearing Jones' comment, the officer could have reasonably inferred Jones was concerned about his investigation of marijuana plants because Jones possessed some marijuana plants.

The court then found Jones voluntarily gave the officers consent to enter his house. Jones' non-verbal actions could have been reasonably interpreted by the Missouri officers as communicating Jones' consent to accompany him into his house.

Finally, the court held the information that the Missouri officers obtained during their investigation could lawfully form the basis of the search warrants obtained by the Kansas officers.

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

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## **11<sup>th</sup> Circuit**

### **United States v. Laist, 2012 U.S. App. LEXIS 25317 (11th Cir. Ga. Dec. 11, 2012)**

An FBI agent suspected Laist was involved in the possession and distribution of child pornography so he went to Laist's apartment to conduct a knock and talk interview. During the interview, Laist admitted there was child pornography on his computer and on five external hard drives he owned. Laist accessed the computer and showed the agent an image that appeared to be child pornography. Laist then signed a consent form, which allowed the agent to seize his computer and five external hard drives and search them.

Eight days later, the agent received a letter from an attorney that revoked Laist's consent to search. The agent immediately began to draft a search warrant application and affidavit for Laist's computer and external hard drives. The warrant application and affidavit were submitted to a magistrate judge twenty-five days later. The judge issued the warrant and the subsequent search uncovered thousands of images and videos of child pornography.

Laist argued the evidence discovered on his computer and external hard drives should have been suppressed because the twenty-five day delay in obtaining the search warrant, after he revoked his consent, was unreasonable and therefore violated the *Fourth Amendment*.

The court disagreed. A temporary warrantless seizure supported by probable cause is reasonable as long as the police diligently obtain a warrant in a reasonable amount of time. First, the government clearly had probable cause to believe Laist's computer and external hard drives contained child pornography. Second, the agent acted diligently to obtain a search warrant once Laist revoked his consent as he began drafting the search warrant application and affidavit the same day he received notice of Laist's revocation. In addition, the investigation was complex, taking over a year to conduct and it involved numerous FBI agents. The agent worked closely with the U.S. Attorney's Office and included extensive amounts of non-boilerplate information drafted specifically for this warrant application. Finally, it was clear the agent put a considerable amount of work into the preparation of the search warrant documents. Based on these facts, the court found the twenty-five day delay in obtaining the search warrant to be reasonable.

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

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