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Date and Time: Wednesday April 20, 2016 2:30 p.m. EDT

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The Fifth Amendment and Compelling Unencrypted Data, Encryption Codes and/or Passwords

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Part 1 of 2

The headlines come more and more frequently. “A first: San Francisco to feature encrypted Wi-Fi service.” “Encryption prevents FBI from cracking San Bernardino attackers’ phone.” “Apple refuses to comply with court order to help FBI investigate San Bernardino terrorists.” “Newest Androids will join iPhones in offering default encryption, blocking police.” “Microsoft to encrypt data in its services in bid to prevent snooping.” “Day of commercially available quantum encryption nears.” “Terrorists used encrypted apps to plan, coordinate Paris attacks.” “White House and Department of Homeland Security Want a Way Around Encryption.” “Justice asks for \$38M to build encryption-breaking tools.”

Increasingly, in the course of criminal investigations, law enforcement is stymied by password protection and encrypted data and communications. Lawfully seized computers, storage media, and other electronic devices are of little help when searches of them are blocked by password protection and/or the data is encrypted and law enforcement does not possess the passwords or encryption codes. When technology cannot break these barriers, how does law enforcement gain access to the data in a form that can be understood and used as evidence?

Part 1 of this article will look at the Fifth Amendment Self-Incrimination Clause and three United States Supreme Court decisions that form the underpinnings of the legal analysis concerning documents and data on electronic devices. Part 2 will discuss federal case law governing whether, and if so how, the government can compel a suspect or defendant to disclose a password or encryption code or produce an unencrypted version of data already lawfully in the government’s possession.¹

THE BASIC FIFTH AMENDMENT PROTECTION AGAINST COMPELLED SELF- INCRIMINATION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand juryNor shall any person be subject for the same offense to be twice put in jeopardy of life and limb, nor **shall be compelled in any criminal case to be a witness against himself**, nor

¹ This article will not address whether third parties, such as technology companies or internet service providers (ISPs) can be compelled to give the government access to another’s password protected devices and files and unencrypted data.

be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.²

A reading of this clause of the Fifth Amendment reveals four key words or phrases that comprise components to the protection against compelled self-incrimination.

1. “Compelled” – Was there coercion or compulsion on the part of the government or was the disclosure voluntary?
2. “Criminal case” – Is the person subject to potential criminal prosecution?
3. “Witness” – Is the information or the communication sought testimonial in character?
4. “Against himself” – Is the information or the communication sought incriminating in nature?

All of these components must be present at the same time before the protection is triggered. The absence of any one of these components means there is no basic Fifth Amendment protection against compelled self-incrimination, and the government can compel a person to provide incriminating information.³

WHEN DOES THE PROTECTION EXIST?

The plain meaning of the clause is that the government cannot compel a defendant to take the witness stand during his criminal prosecution and answer its questions. But the protection has evolved over time to become “the right to remain silent.”⁴

The clause speaks to a “criminal case,” but there need be no ongoing criminal investigation or prosecution. The protection is available even during the course of non-criminal, civil or administrative matters, investigations, and proceedings. The protection exists any time there is the potential for future criminal prosecution. It is available any time a person’s statements and/or evidence derived therefrom could be used against him or her in a criminal case.⁵

WHAT IS PROTECTED?

Witnesses testify. Therefore, the word “witness” in the constitutional text limits the protection to those communications that are “testimonial” in character. “Testimonial evidence” is that which is communicative in nature. In other words, it discloses ideas, information, data, concepts, knowledge, and thoughts. Typically this occurs through the spoken or written word, such as in a confession or an admission.⁶ But acts, conduct, and gestures can also be testimonial

² United States Constitution, Amendment 5 (bold added).

³ *Hiibel v. Sixth Judicial District of Nevada*, 542 U.S. 177, 124 S. Ct. 2451 (2004).

⁴ Interestingly, simply remaining silent is not enough to invoke the protection. *Salinas v. Texas*, 570 U.S. ____, 133 S. Ct. 2174 (2013).

⁵ Those subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial. *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285 (1985); *United States v. Blue*, 384 U.S. 251, 86 S. Ct. 1416 (1966); *Leyra v. Denno*, 347 U.S. 556, 74 S. Ct. 716 (1954); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S. Ct. 921 (1944). See also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 103 S. Ct. 608 (1983) (Blackmun, J., concurring in judgment); *Williams v. United States*, 401 U.S. 646, 91 S. Ct. 1148 (1971) (Brennan, J., concurring in result).

⁶ *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966).

when they imply assertions of fact, or reveal thoughts, beliefs, and/or knowledge of facts. For example, nodding your head up and down when asked “Did you do it?” communicates a “yes” response. Pointing to the dresser when asked “Where’s the gun?” communicates knowledge of the weapon, knowledge of its location, and access to it.

Testimonial evidence obtained in violation of the Fifth Amendment, as well as any evidence derived therefrom, is inadmissible in a criminal trial.⁷

WHAT IS NOT PROTECTED?

The protection is also often called “the privilege against self-incrimination,” which is really a misnomer. People are compelled to incriminate⁸ themselves often. “The privilege against *testimonial* self-incrimination” is a more accurate description. The protection applies only to “testimonial evidence” as described above. It does not apply to “nontestimonial evidence,” evidence utilized primarily to identify people and connect them to the crime, such as fingerprints⁹, blood, urine, DNA, hair samples, speaking certain words, handwriting samples, lineups, photo arrays, and show-ups.¹⁰ Such evidence can be extraordinarily incriminating, and it may be protected by the Fourth Amendment or the Fifth Amendment Due Process Clause, but a person can be compelled to provide it over an objection based on the Self-Incrimination Clause. Likewise, real, tangible evidence is not protected by the Self-Incrimination Clause.¹¹ That said, the protection against compelled self-incrimination may apply to the act of producing non-testimonial evidence.¹²

DOCUMENTS AND WRITINGS

What about documents and writings? They almost certainly communicate ideas, information, data, concepts, or beliefs, and they certainly could be extraordinarily incriminating. Are documents and writings protected by the Fifth Amendment protection against compelled self-incrimination?

⁷ *United States v. Pantane*, 542 U.S. 630, 124 S. Ct. 2620 (2004) confirmed the derivative use doctrine but refused to extend it to a technical violation of *Miranda*.

⁸ Incriminating has been defined as “any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Kastigar v. United States*, 406 U.S. 441, 445, 92 S. Ct. 1653 (1972).

⁹ Some devices employ biometric security systems that require a fingerprint or a retina scan to allow access. Whether a person will be protected by the Fifth Amendment against being compelled to unlock such devices by providing a finger print or retina scan remains to be seen. See *Virginia v. Baust*, 89 Va. Cir. 267 (Oct. 28, 2014), holding that a defendant could not be compelled to provide the passcode that would unlock his phone, but could be compelled to provide his thumbprint, which would accomplish the same purpose. See also *Maine v. Trant*, 2015 Me. Super. LEXIS 272 (2015).

See *Maine v. Trant*, 2015 Me. Super. LEXIS 272 (2015).

¹⁰ *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764 (1973); *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951 (1967); *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966); *Holt v. United States*, 218 U.S. 245, 31 S. Ct. 2 (1910).

¹¹ *Pantane*, supra.

¹² *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569 (1976); *United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237 (1984); *United States v. Hubble*, 530 U.S. 27, 120 S. Ct. 2037 (2000).

In the course of an investigation, law enforcement obtains documents and writings in a number of different ways such as pursuant to a search warrant, by consent, or under the plain view doctrine. Those methods are not a Fifth Amendment self-incrimination issue because there is no coercion or compulsion.

Documents and writings are also acquired through administrative, grand jury, and court subpoenas. When properly issued and served, these subpoenas command compliance. When such subpoenas command the production of documents and writings, can they be defeated by a self-incrimination objection? Three United States Supreme Court cases shed light on the answer.

***Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569 (1976)**

In this case, a taxpayer got personal tax returns and related documents from his accountant and gave them to his attorney. When the government subpoenaed them from the attorney, the attorney raised two objections – attorney-client privilege and the client’s privilege against self-incrimination.

The Supreme Court held that so long as the government does not seek to compel the defendant to restate, repeat, or affirm the truth of the contents, documents that are previously, voluntarily created are not protected by the Fifth Amendment privilege against self-incrimination because they were not compelled in their creation. They do not constitute compelled testimonial evidence. However, the Court also held that the compelled act of production of the documents is testimonial and is protected by the Fifth Amendment privilege against self-incrimination if doing so concedes the existence, possession and control, and authenticity of the documents.

In examining whether the government may compel the production of documents over a self-incrimination objection, the Court established what is called the “foregone conclusion” doctrine. If the government can already show the existence, location, and authenticity of the documents with “reasonable particularity,” compliance with the subpoena and production of the documents is not “testimonial” because the government already knows everything that would be revealed through the act. Compelled production of the documents adds nothing to the sum total of the government’s information. In other words, the act is not a question of testimony, but of surrender.

***United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237 (1984)**

Eight years after *Fisher*, the Court again took up this issue. During the course of an investigation into the awarding of county and municipal contracts, five grand jury subpoenas were issued and served on the sole proprietor of five different businesses. The respondent moved to quash the subpoenas, asserting that the documents themselves were protected under the Fifth Amendment and that the act of producing them would be testimonial and, therefore, also protected by the Fifth Amendment.

The Court again held that so long as the government does not seek to compel the defendant to restate, repeat, or affirm the truth of their contents, documents that are previously, voluntarily created are not protected by the Fifth Amendment privilege against self-incrimination

regardless of how incriminating the documents may be because they were not compelled in their creation.

The Court also reiterated its previous holding that the compelled act of production of the documents may be protected by the Fifth Amendment privilege against self-incrimination. In Footnote 13 of the decision, the Court suggested the government could attempt to overcome the “act of production” protection by establishing the “foregone conclusion” doctrine. The Court stated in dicta that the government, if it chose, could on remand overcome such protection by a grant of immunity under 18 U.S.C. §6002.¹³

***United States v. Hubble*, 530 U.S. 27, 120 S. Ct. 2037 (2000)**

Independent Counsel Ken Starr was appointed by the United States Attorney General to conduct an investigation into, among other matters, then President Bill Clinton’s involvement with several businesses. Out of that investigation, Webster Hubble, former partner of Mrs. Clinton in the Rose Law Firm and former United States Associate Attorney General was indicted for mail fraud and tax evasion concerning his billing practices at the Rose Law Firm. As part of a plea agreement to that indictment, Mr. Hubble agreed to provide information about matters relating to the investigation of the President.

Later, a grand jury subpoena duces tecum was issued and served on Mr. Hubble commanding him to produce law office records and documents. Mr. Hubble appeared and invoked his Fifth Amendment privilege against self-incrimination, whereupon Mr. Starr produced a court order that directed Mr. Hubble to respond to the subpoena and granted him immunity pursuant to 18 U.S.C. §6002 against the government’s use and derivative use of compelled testimony. Mr. Hubble then delivered the specified documents. Mr. Hubble was subsequently indicted again for various wire and mail fraud and tax crimes. The district Court dismissed the indictment, finding a violation of the immunity previously granted. The court of appeals vacated the dismissal and sent the case back to the district Court to determine whether the government could to a reasonable certainty establish the “foregone conclusion” doctrine. The government acknowledged on remand that it could not meet that burden.

The Supreme Court held that the Fifth Amendment privilege against self-incrimination protects against being compelled to disclose the existence, location, and authenticity of potentially incriminating documents. The subpoenas that were issued cast a net that would catch everything. In other words, the “foregone conclusion” doctrine did not apply because the government could not identify the files, describe what they were, whether they even existed, or whether Mr. Hubble knew of them or had possession or access to them. Mr. Hubble’s response would have filled in the blanks. The only way the government could have determined which documents, if any, were evidence of a crime was through derivative use of their production by Mr. Hubble. The immunity pursuant to 18 U.S.C. §6002 bars it. Obtaining, identifying, and then offering the documents under those circumstances is a “derivative use” prohibited by the granted immunity.

¹³ In Footnote 17, the Court hinted at the scope of protection afforded by immunity granted under the statute in the “act of production” context.

THE TAKEAWAYS

These three Supreme Court cases tell us several very important rules regarding issuing subpoenas for the production of documents during the course of a criminal investigation.

1. So long as the government does not seek to compel the defendant to restate, repeat, or affirm the truth of their contents, documents that are previously, voluntarily created are not protected by the Fifth Amendment privilege against self-incrimination regardless of how incriminating the documents may be because they were not compelled in their creation. Such documents do not constitute compelled testimonial evidence.
2. The compelled act of production of the documents is testimonial and is protected by the Fifth Amendment privilege against self-incrimination, if doing so concedes the existence, possession and control, and authenticity of the documents.
3. If the government can already show the existence, location, and authenticity of the documents with “reasonable particularity,” compliance with the subpoena and production of the documents is not “testimonial” because the government already knows everything that would be revealed through the act. The “foregone conclusion” doctrine.
4. The government may also overcome the “act of production” protection by issuing immunity under 18 U.S.C. §6002.
5. If compliance with the subpoena is the only way the government can identify the files, describe what they are, whether they even exist, or whether the defendant knows of them or has possession or access to them (in other words, essentially establish the “foregone conclusion” doctrine) then use of the documents produced is “derivative” of the production and, therefore prohibited by the scope of the immunity granted.

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

Stamps v. Town of Framingham, 2016 U.S. App. LEXIS 2026 (1st Cir. Mass. Feb. 5, 2016)

Officers obtained a warrant to search an apartment where Stamps lived with his wife; his stepson; Joseph Bushfan, and another man named Dwayne Barrett. The warrant was issued on probable cause that Bushfan and Barrett were selling crack cocaine out of the apartment. The officers also suspected a third man, known to be an associate of Bushfan and Barrett, might be in the apartment. The officers believed all three men had ties to Boston gangs and their collective criminal histories included armed robberies, armed assaults and cocaine related charges. Prior to the execution of the warrant the SWAT officers received a briefing in which they were told that Stamps was likely to be in the apartment, that he was 68 years old, and that his criminal record only consisted of “motor vehicle” charges. Stamps was not suspected of being involved in any criminal activity at the apartment, nor any other crime and had no history of possessing a weapon. The officers were told Stamps posed no known threat to the officers executing the warrant.

Just after midnight on January 5, 2011, eleven SWAT team members entered Stamps’ apartment to execute the search warrant. Two officers encountered Stamps in a hallway and ordered him to “get down.” Stamps complied by lying down on his stomach with his hands raised near his head. At this point, Officer Duncan was directed to assume control of Stamps while the initial officers continued to search and clear the apartment. Duncan pointed his rifle at Stamps’ head while Stamps remained prostrate on the hallway floor. During this time, the rifle’s safety was off and Duncan had his finger on the trigger. While Stamps remained lying on his stomach, unarmed and fully compliant, Duncan accidentally pulled the trigger of his rifle and shot Stamps in the head. Stamps was transported to the hospital and pronounced dead.

Stamps’ wife and son sued Duncan under 42 U.S.C. § 1983, claiming Duncan violated the *Fourth Amendment* by using excessive force to unreasonably seize Stamps when he shot Stamps in the back of the head.

Duncan argued he was entitled to qualified immunity. First, Duncan claimed that an accidental or unintentional shooting does not violate the *Fourth Amendment*. Second, even if his actions violated the *Fourth Amendment*, Duncan claimed the law was not clearly established that pointing a loaded rifle at another person’s head with the safety off and his finger on the trigger violated the *Fourth Amendment*.

The court disagreed. To prevail on an excessive force claim, a plaintiff must first establish a *Fourth Amendment* seizure occurred and then show the seizure was unreasonable. Here, both parties agreed Stamps was seized under the *Fourth Amendment* when he complied with the officers’ commands to get down on the floor in the hallway and remained lying on his stomach while Duncan pointed his rifle at Stamps’ head. The court noted that even if Duncan shot Stamps accidentally, the unintentional or accidental use of deadly force after a person has been seized may violate the *Fourth Amendment* if the officer’s actions that resulted in the injury were

objectively unreasonable. In this case, the court concluded a reasonable jury could find Duncan's actions leading up to the shooting were objectively unreasonable and that Duncan used excessive force in violation of the *Fourth Amendment*.

Next, the court held that at the time of the shooting the state of the law was clear such that a reasonable officer in Duncan's position would have understood that pointing his loaded rifle at the head of a prone, non-resistant individual, with the safety off and a finger on the trigger, constituted excessive force in violation of the *Fourth Amendment*. Consequently, the court denied Duncan qualified immunity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/15-1141/15-1141-2016-02-05.pdf?ts=1454702411>

United States v. Constant, 2016 U.S. App. LEXIS 3964 (1st Cir. Me. Feb. 29, 2016)

After Adam Dennis was involved in an argument with a man outside his sister's apartment, someone discharged a firearm into the apartment. Officers interviewed Dennis, who described the individual with whom he had argued as a "black guy" with "dreadlocks" who was wearing a baseball hat and jewelry. After receiving information from other witnesses, officers suspected Constant might be the shooter. The officers located Constant, a black male with long dreadlocks, and arrested him on an outstanding warrant on an unrelated matter. Constant denied shooting into the apartment, but admitted holding the firearm for another person.

An officer later met with Dennis who agreed to view a photo array in an attempt to identify the person who shot into the apartment. Just before Dennis viewed the array, the officer removed Constant's photograph from one folder and placed it without apparent concealment into a second folder as Dennis watched closely. The officer then removed six photographs from the second folder, placing them on a table, and centering Constant's photograph directly in front of Dennis. Dennis viewed the array for a few seconds, then singled out Constant's photograph and stated, "I'm guessing it's him, that would be the one I'd be putting my money on, either him or him," as he pointed to another photograph. The officer tapped Constant's photograph with his finger and asked Dennis, "So you think it's him right here?" Dennis replied, "Yeah." The officer had Dennis sign and date Constant's photograph, and told Dennis the person he chose was the suspect the officers had in custody. The officer had videotaped the entire photo array process and interview with Dennis.

The government indicted Constant for being a felon in possession of a firearm.

Constant moved to suppress Dennis' in-court identification of Constant as the man with whom he had argued on the night of the shooting. Constant claimed the officer's photo array procedure violated Constants' right to due process.

The court disagreed. While it was undisputed the identification procedure used in this case was impermissibly suggestive, the United States Supreme Court has held witness identifications that follow impermissibly suggestive police conduct are not automatically suppressed. Whether the identification evidence must be suppressed is determined by the reliability of the identification, notwithstanding the suggestive actions of the police. The Court outlined five factors to be considered when trying to determine the reliability of such an identification following impermissibly suggestive police conduct: (1) the opportunity of the witness to view the

criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

In this case, the court concluded Dennis' identification of Constant was reliable, and the admission of this identification evidence did not violate Constant's due process rights. First, the court noted Dennis had a significant, face-to-face, five to ten minute conversation with the suspect less than twenty-four hours before he viewed the array, which included Constant's photograph. Next, the court recognized that Dennis clearly hesitated to pick Constant as the person with whom he had argued, even with the officer's impermissibly suggestive behavior. However, the court found it significant the entire photo array procedure containing all of the suggestive conduct had been recorded and viewed by the jury. As a result, the court concluded the jurors' ability to see for themselves the entire identification procedure, including the officer's suggestive conduct allowed them to assess Dennis' reliability.

Finally, the court found the evidence in the case, other than Dennis' identification, strongly implicated Constant, and Constant's motive to falsely admit possession of the firearm was "thin."

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca1/14-1066/14-1066-2016-03-03.pdf?ts=1457015405>

Fourth Circuit

United States v. Robinson, 2016 U.S. App. LEXIS 3122 (4th Cir. W. Va. Feb. 23, 2016)

A police department received an anonymous phone call reporting that a black male had loaded a gun in a 7-Eleven parking lot and then concealed the gun in his pocket before leaving in a car. A few minutes later, an officer stopped a car matching the description of the vehicle from the anonymous tip. Robinson, a black male, was a passenger in the car. The officer ordered Robinson out of the car, frisked him, and discovered a pistol in the pocket of Robinson's pants. The officer subsequently learned Robinson had a felony conviction and the government charged Robinson with being a felon in possession of a firearm.

Robinson filed a motion to suppress the gun, arguing the frisk was unlawful.

To conduct a lawful *Terry* frisk, an officer must have reasonable suspicion that a person is both armed and presently dangerous. While both sides agreed the anonymous tip established Robinson was armed, the court concluded that fact by itself did not automatically create reasonable suspicion of dangerousness sufficient to justify a *Terry* frisk.

The government conceded none of the conduct reported in the anonymous tip, specifically that a man had loaded a gun in the parking lot of a 7-Eleven parking lot and then concealed it in his pocket before leaving in a car, was illegal under West Virginia law. On the contrary, it is legal to carry a gun in public under *W. Va. Code § 61-7-3*, and it is legal to carry a concealed firearm with a permit under *W. Va. Code § 61-7-4*. Further, the court noted it is relatively easy to obtain a concealed carry permit under this provision. As result, the court concluded that in West Virginia "there is no reason to think that public gun possession is unusual, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who

poses no danger to the authorities.” As a result, the court held in states like West Virginia, which broadly allow the possession of firearms in public, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that a person is dangerous for *Terry* purposes. Where the state legislature has made it lawful for individuals to carry firearms on public streets, “we may not make the contrary assumption that those firearms inherently pose a danger justifying their seizure by law enforcement officers without consent.” While the court recognized recent legal developments regarding gun possession have made police-work more difficult and dangerous, several states, but not West Virginia, have enacted “duty to inform” laws which require individuals carrying concealed weapons to disclose that fact to the police if they are stopped.

Next, the court noted that even if reasonable suspicion that a person is armed does not automatically justify a *Terry* frisk, officers are allowed to consider this fact along with the other surrounding circumstances to determine if a frisk is justified. However, in this case, the court held that there were no other circumstances, when combined with the fact that Robinson was armed, that would have caused the officer to believe Robinson was dangerous and justify the frisk in which the gun was discovered.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4902/14-4902-2016-02-23.pdf?ts=1456255820>

Sixth Circuit

United States v. Houston, 813 F.3d 282 (6th Cir. Tenn. February 8, 2016)

A local Sheriff’s Department informed agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that Rocky Houston was a convicted felon who openly possessed firearms at his residence. Houston and his brother, Leon, lived on a family farm in a rural area. ATF agents first attempted to conduct drive-by surveillance; however, the rural nature of the area did not allow them to observe the farm for any length of time. As a result, at the direction of the ATF, and without a warrant, the utility company installed a surveillance camera on a public utility pole located approximately 200 yards from Leon’s trailer. The agents trained the camera primarily on Leon’s trailer and a nearby barn because they understood Houston spent most of his time in those areas. In addition, an agent testified that the view the camera captured was identical to what the agents would have observed if they had driven down the public roads surrounding the farm. The agents monitored the camera without a warrant for ten weeks. At Houston’s trial for being a felon in possession of a firearm, footage from the warrantless use of the camera was introduced to show Houston possessing firearms on seven dates during the ten-week surveillance.

Houston argued the video footage obtained from the pole camera should have been suppressed, as it was an unreasonable warrantless search under the *Fourth Amendment*.

The court disagreed. First, the court held there was no *Fourth Amendment* violation because Houston had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole that captured the same views that anyone could see when passing by on the public roads. The court reiterated the ATF agents only observed what Houston made public to any person traveling on the roads surrounding the farm. Second, the court held the use of the pole camera for ten-weeks did not violate the *Fourth Amendment*

because in a situation like this the government is allowed to use technology to more effectively conduct its investigations. While the ATF could have stationed agents around-the-clock to observe Houston's farm in person, the fact they instead used a camera to conduct the surveillance did not make the surveillance unconstitutional. Finally, even if the ATF could not have conducted in-person surveillance for the full ten-weeks for logistical reasons, the length of time the agents used the camera was permissible because any member of the public driving on the roads bordering Houston's farm during the ten-weeks could have observed the same views captured by the camera.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/14-5800/14-5800-2016-02-08.pdf?ts=1454954476>

United States v. Tessier, 2016 U.S. App. LEXIS 2757 (6th Cir. Tenn. February 18, 2016)

Tessier was on probation for a 2011 Tennessee felony conviction for sexual exploitation of a minor. Tessier's probation order contained, among other things, the following "standard" search condition that applies to all probationers in Tennessee: "I agree to a search, without a warrant, of my person, vehicle, property, or places of residence by any Probation/Parole officer or law enforcement officer at any time." In addition, Tessier signed the probation order immediately below the following, bolded language, **"I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME."**

As part of a general sweep called "Operation Sonic Boom," local police officers searched all residences of known sex offenders in the county. Without any suspicion that Tessier was engaged in criminal activity, officers entered Tessier's residence without a warrant and seized his laptop computer. An officer then searched the laptop and found child pornography.

The government charged Tessier with possession of child pornography.

Tessier argued the search of his residence and computer violated the *Fourth Amendment*. Although Tessier signed the probation order in which he agreed to the warrantless search provision, he claimed the government needed to establish reasonable suspicion before subjecting him to a warrantless search under the order.

The court disagreed, holding that a probationer whose probation order contains a search condition may be subjected to a search without reasonable suspicion of criminal activity. The court adopted the district court's finding that it was reasonable to conclude the search conditions in the probation order would further two primary goals of probation - rehabilitation and the protection of society from future criminal violations. In addition, the court agreed with the district court that the State's interest in protecting its young was paramount, and that child pornography was a serious crime.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-5284/15-5284-2016-02-18.pdf?ts=1455811279>

Seventh Circuit

United States v. Thompson, 811 F.3d 944 (7th Cir. Wis. February 1, 2016)

A confidential informant (CI) working for a drug task force went to Thompson's apartment to purchase crack cocaine. The informant was equipped with two hidden audio-video recording devices. When the CI arrived at the apartment, Thompson invited him inside. After the CI gave Thompson \$400, Thompson turned and walked across the room to what the CI thought was the bathroom. Thompson cracked open the door, reached inside, and a person inside the bathroom handed an item to Thompson. Thompson walked back to the CI and handed him a sandwich baggie, which Thompson said was "twelve." The CI left the apartment and gave the baggie to the officers. The hidden audio-video recorders captured the transaction between the CI and Thompson.

The government charged Thompson with distribution of crack cocaine.

Thompson filed a motion to suppress the video recordings taken by the CI inside his apartment. First, under the trespass theory articulated by the United Supreme Court in *U.S. v. Jones*, Thompson argued the CI exceeded the scope of his license, or permission to be in the apartment as an invitee when he recorded videos of the encounter.

The court disagreed. The court commented that it is firmly established the government may use confidential informants, and that a CI's failure to disclose his true identity does not render a defendant's consent to the CI's presence invalid. Similarly, when a CI discovers information from a location where he is lawfully entitled to be, the use of a recording device to accurately capture the events does not invalidate a defendant's consent to the CI's presence, or otherwise constitute an unlawful search. Here, Thompson invited the CI into the apartment to engage in a drug transaction. The fact that the CI recorded his observations on video did not transform this consensual encounter into a search for *Fourth Amendment* purposes.

Alternatively, Thompson argued that making the videos constituted a *Fourth Amendment* search because he had a reasonable expectation of privacy in the information captured by the recordings, and he had not voluntarily disclosed that information to the CI.

Again, the court disagreed. In agreeing with the 2nd, 5th, and 9th Circuits, the court held making a covert video recording does not violate a person's reasonable expectation of privacy. The court reiterated the expectation of privacy does not extend to "what a person knowingly exposes to the public, even in his own home," nor does a person have a privacy interest in what he voluntarily discloses to an informant. Consequently, once Thompson invited the CI into his apartment, he "forfeited his privacy interest in those activities that were exposed to the informant." In conclusion, the court added in identical circumstances, an audio-only recording taking by the CI would not have transformed his actions into a search either.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2008/15-2008-2016-02-01.pdf?ts=1454365852>

United States v. Paniagua-Garcia, 2016 U.S. App. LEXIS 2800 (7th Cir. Ind. Feb. 18, 2016)

While traveling on an interstate highway, an officer passed a car driven by Paniagua. The officer saw Paniagua holding a cell phone in his right hand with his head bent toward the phone. Believing Paniagua was “texting” while driving, a violation of Indiana state law, the officer stopped Paniagua. Paniagua told the officer he had not been texting while driving, but rather searching for music on his phone. Paniagua eventually consented to a search of his car and the officer discovered five pounds of heroin concealed in the spare tire in the car’s trunk. An examination of Paniagua’s cell phone revealed it had not been used to send a text message when the officer saw him holding it just before the stop.

The government charged Paniagua with possession with intent to distribute heroin.

Paniagua argued the heroin should have been suppressed because the officer only discovered it after an illegal stop. Specifically, Paniagua argued the government failed to establish the officer had probable cause or reasonable suspicion to believe he was violating the “no-texting” law when the officer stopped him.

The court agreed. *Indiana Code § 9-21-59(a)* prohibits sending or receiving text messages or emails while operating a motor vehicle. However, the court noted all other uses of cellphones by drivers in Indiana are lawful, such as making and receiving phone calls, inputting addresses, reading driving directions and maps with GPS applications, reading news and weather programs, surfing the internet, playing video games, and playing music or audio books. Here, the officer failed to explain what created the appearance Paniagua was texting while driving as opposed to using his cellphone for any one of the multiple other lawful uses of a cell phone by a driver.

The court commented that § 9-21-59(a) is nearly impossible to enforce because of the difficulty in distinguishing texting from other lawful uses of cellphones by drivers when officers glance into the driver’s side of a moving automobile. The court contrasted § 9-21-59(a) with the Illinois “hands-free” law, 625 ILCS 5/12-610.2 which prohibits drivers from using cell phones, without the use of some type of hands-free device or technology, and its more realistic enforceability.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca7/15-2540/15-2540-2016-02-18.pdf?ts=1455836446>

Eighth Circuit

United States v. Quinn, 812 F.3d 694 (8th Cir. Mo. February 4, 2016)

Around 2:30 a.m., officers responded to a report of a wreck involving a stolen car. Several men fled the scene, but one man was captured shortly afterward. The man told the officers that one of the other suspects might have a handgun. The other suspects were described as white males, with one wearing a blue hooded sweatshirt, and the other wearing a white t-shirt and having a long ponytail. In addition, the officers found ammunition in the wrecked car.

An officer responding to the radio call to look for the suspects positioned himself in the area that was in the suspects’ direction of flight. Approximately forty-minutes later, the officer saw

a man emerge from an alley who began to walk in a direction away from where the stolen car had been recovered. The man was in his mid-twenties, wearing a dark t-shirt, and he constantly looked over his shoulder toward the officer's police car. The officer approached the man, later identified as Quinn, and detained him in handcuffs. While the officer waited for one of the officers who had witnessed the suspects flee to arrive, and possibly identify Quinn, the officer discovered Quinn had an outstanding arrest warrant for a probation violation. The officer arrested Quinn and discovered a handgun during the search incident to arrest.

The government charged Quinn with being a felon in possession of a firearm.

Quinn filed a motion to suppress the handgun, arguing the officer did not have reasonable suspicion to stop him; therefore, the handgun was discovered during an unlawful seizure.

The court disagreed, arguing the officer established reasonable suspicion to support a *Terry* stop of Quinn. First, the officer stopped Quinn a few blocks from the location where the stolen car was recovered approximately forty-minutes after the officers saw suspects flee the crime scene. Second, Quinn partially matched the description of one of the suspects whom officers had observed fleeing toward the location where Quinn was detained. Third, the officer saw Quinn emerge from an alley and walk away from the direction of the crime scene. Fourth, the stopped occurred late at night when few pedestrians were around. Finally, Quinn acted suspiciously when he saw the officer by constantly looking over his shoulder toward the officer's direction. The court concluded these factors, when taken together, gave the officer reasonable suspicion to stop Quinn.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1750/15-1750-2016-02-04.pdf?ts=1454601667>

United States v. Sanford, 813 F.3d 708 (8th Cir. Iowa February 16, 2016)

In the early morning hours, an employee of a nightclub called the police department and reported a patron at the bar threatened "to do something to somebody" when the bar closed. The caller did not give further information about the threat, but described the patron as a black male with dreadlocks who was wearing a white shirt and blue shorts. Officers knew the nightclub was located in a high crime area, and that officers had responded to a high volume of calls at the nightclub in the past for fights, stabbings, and shootings.

When an officer arrived, he saw a black male with dreadlocks, wearing a white shirt and blue shorts walking towards a parked car in an alley halfway down the block from the nightclub. The officer saw the man, later identified as Sanford, walk around the parked car and open the passenger's side door. The officer called out to Sanford, but Sanford leaned into the car. As he approached the car, the officer saw Sanford reaching for the console with his left hand while concealing an item below the seat in his right hand. The officer drew his firearm and ordered Sanford to show his hands and exit the car. After Sanford complied, the officer recognized Sanford from previous encounters. Based on these previous encounters, the officer knew Sanford had a criminal history that included criminal convictions for burglary and weapons charges. The officer handcuffed Sanford and frisked him for weapons. After finding no weapons on Sanford, the officer searched the passenger compartment of the car where he found a loaded handgun under the passenger seat.

The government charged Sanford with being a felon in possession of a firearm.

Sanford filed a motion to suppress the handgun recovered from the car. Sanford argued the officer exceeded the scope of a valid *Terry* stop; therefore, turning his detention into a de facto arrest that was lacking probable cause.

The court disagreed. A de facto arrest occurs when an officer's conduct is more intrusive than necessary to achieve the purpose of a *Terry* stop. For example, a *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if the officer's use of force is unreasonable under the circumstances. In this case, the court held the scope and means of the officer's *Terry* stop was not more intrusive than necessary; therefore, the stop did not amount to a de facto arrest. First, it was reasonable for the officer to search for a weapon based on the time, location, and circumstances surrounding the report of the incident at the nightclub. Second, Sanford's concealment of an unknown object under the seat of the car supported the officer's decision to order Sanford out of the car. Third, after Sanford exited the car, the officer recognized Sanford from prior encounters and chose to detain Sanford in handcuffs while he searched the car for weapons. The court concluded this was reasonable under the circumstances, as the officer knew Sanford's criminal history that included weapons charges. In addition, if he were released, Sanford would have been able to return to the car and gain access to the object he concealed under the seat.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1501/15-1501-2016-02-16.pdf?ts=1455640248>
