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ENFORCEMENT OFFICERS AND AGENTS

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# The Informer – April 2017

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By Robert Cauthen, Assistant Division Chief, Office of Chief Counsel/Legal Division, Federal Law Enforcement Training Centers, Glynco, Georgia

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

## Case Law Update

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On March 20, 2017, the United States Court of Appeals for the Third Circuit became the second federal circuit to weigh in on when and how the government can compel a suspect/defendant to provide an encryption code or password, or provide an unencrypted version of lawfully seized digital data. *United States of America v. Apple Mac Pro Computer, John Doe, et.al*, 851 F.3d 238.<sup>1</sup>

The March<sup>2</sup> and April<sup>3</sup> 2016 editions of *The Informer* included a two-part article on this issue. Part 1 examined the Fifth Amendment Self-Incrimination Clause and three United States Supreme Court decisions that form the underpinnings the legal analysis concerning documents and data on electronic devices. Part 2 discussed federal case law analyzing and applying the principles specifically to compelling a password, encryption code, and/or an unencrypted version of data already lawfully in the government's possession.

### **FACTS**

During an investigation into Doe's access to child pornography over the internet, the Delaware County, Pennsylvania, Criminal Investigations Unit executed a valid search warrant at Doe's residence and seized an Apple iPhone 5S and an Apple Mac Pro Computer with two attached Western Digital External Hard Drives, all of which had been protected with encryption software. Police subsequently seized a password-protected Apple iPhone 6 Plus as well.

Agents from the Department of Homeland Security then applied for a federal search warrant to examine the seized devices. Doe voluntarily provided the password for the Apple iPhone 5S, but refused to provide the passwords to decrypt the Apple Mac Pro computer or the external hard drives. Despite Doe's refusal, forensic analysts discovered the password to decrypt the Mac Pro Computer, but could not decrypt the external hard drives. Forensic examination of the Mac Pro revealed an image of a pubescent girl in a sexually provocative position and logs showing that the Mac Pro had been used to visit sites with titles common in child exploitation. The Forensic examination also disclosed that Doe had downloaded thousands of files known by their "hash"

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<sup>1</sup> The court's decision may be found at [http://law.justia.com/cases/federal/appellate-courts/ca3/15-3537/15-3537-2017-03-20.html?utm\\_source=summary-newsletters&utm\\_medium=email&utm\\_content=seoreportad&utm\\_campaign=20170321-u-s-court-of-appeals-for-the-third-circuit-3455075830](http://law.justia.com/cases/federal/appellate-courts/ca3/15-3537/15-3537-2017-03-20.html?utm_source=summary-newsletters&utm_medium=email&utm_content=seoreportad&utm_campaign=20170321-u-s-court-of-appeals-for-the-third-circuit-3455075830)

<sup>2</sup> <https://www.fletc.gov/sites/default/files/3Informer16.pdf>

<sup>3</sup> <https://www.fletc.gov/sites/default/files/4Informer16.pdf>

values to be child pornography, which had been stored on the encrypted external hard drives. Doe provided the password to access the iPhone 6 Plus, but did not grant access to an application on the phone which contained additional encrypted information. Forensic analysts concluded that the phone's encrypted database contained approximately 2,015 image and video files.

Doe's sister, who had lived with Doe during 2015, told investigators that that Doe had shown her hundreds of images of child pornography, including "videos of children who were nude and engaged in sex acts with other children," on the encrypted external hard drives.

A federal magistrate judge issued an order pursuant to the All Writs Act requiring Doe to produce his iPhone 6 Plus, his Mac Pro computer, and his two attached external hard drives in a fully unencrypted state (the "Decryption Order"). Doe did not appeal the Decryption Order. Instead, he filed with the magistrate judge a motion to quash the Government's application to compel decryption, arguing that his act of decrypting the devices would violate his Fifth Amendment privilege against self-incrimination.

The magistrate judge denied Doe's Motion to Quash and directed Doe to fully comply with the Decryption Order, acknowledging Doe's Fifth Amendment objection but holding that, because the Government possessed Doe's devices and knew that their contents included child pornography, the act of decrypting the devices would not be testimonial for purposes of the Fifth Amendment privilege against self-incrimination. (Essentially, the magistrate judge concluded that the Government had established the "foregone conclusion" doctrine.) Doe did not appeal the Magistrate Judge's denial order.

Approximately one week later, Doe produced the Apple iPhone 6 Plus, including the files on the secret application, in a fully unencrypted state by entering three separate passwords on the device. The phone contained adult pornography, a video of Doe's four-year-old niece in which she was wearing only her underwear, and approximately twenty photographs, which focused on the genitals of Doe's six-year-old niece. Doe, however, stated that he could not remember the passwords necessary to decrypt the hard drives and entered several incorrect passwords during the forensic examination. The Government remains unable to view the decrypted content of the hard drives without his assistance.

The magistrate judge granted the Government's Motion for Order to Show Cause Why Doe Should Not Be Held in Contempt, finding that Doe willfully disobeyed and resisted the Decryption Order. Based on the evidence presented at the hearing, the magistrate judge found that Doe remembered the passwords needed to decrypt the hard drives but chose not to reveal them because of the devices' contents. The magistrate judge ordered Doe to appear before the District Court to show cause as to why he should not be held in civil contempt.

The district court granted the Government's motion to hold Doe in civil contempt and remanded Doe to the custody of the United States Marshals to be incarcerated until he fully complies with the Decryption Order. Doe appealed the district court's order.

On appeal, Doe challenged the government's use of the All Writs Acts to enforce its search warrant and contended that the Decryption Order violated his Fifth Amendment privilege against self-incrimination.

## **HOLDING**

The Third Circuit affirmed the District Court’s civil contempt order and incarceration of Doe until he decrypts the data on the hard drives.

### 1. The All Writs Act.

The Third Circuit held that “the Magistrate Judge had subject matter jurisdiction under Federal Rule of Criminal Procedure 41 to issue a search warrant and therefore had jurisdiction to issue an order under the All Writs Act that sought ‘to effectuate and prevent the frustration’ of that warrant.” “When law enforcement could not decrypt the contents of those devices, and Doe refused to comply, the Magistrate Judge issued the Decryption Order pursuant to the All Writs Act. The Decryption Order required Doe to ‘assist the Government in the execution of the...search warrant’ by producing his devices in ‘a fully unencrypted state.’ ... the Decryption Order here was a necessary and appropriate means of effectuating the original search warrant.”

### 2. The Fifth Amendment Self-Incrimination Clause.

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court stated that “[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced.” 425 U.S. at 410. The act of production may, therefore, be testimonial and protected by the Fifth Amendment. In *Fisher*, the Court also articulated the “foregone conclusion” rule, which acts as an exception to the otherwise applicable act-of-production doctrine. Under this rule, the Fifth Amendment does not protect an act of production when any potentially testimonial component of the act of production—such as the existence, custody, and authenticity of evidence—is a “foregone conclusion” that “adds little or nothing to the sum total of the Government’s information.” 425 U.S. at 411. For the rule to apply, the Government must be able to “describe with reasonable particularity” the documents or evidence it seeks to compel. *United States v. Hubbell*, 530 U.S. 27, 30 (2000).

The Third Circuit concluded that the Government had provided evidence amply supported by the record sufficient to establish the “foregone conclusion” doctrine.

- a. The Government had lawful custody of the devices which were seized pursuant to a valid search warrant.
- b. Prior to the seizure, Doe possessed, accessed, and owned all of the devices.
  - 1) Doe did not dispute their existence or his ownership of the devices.
  - 2) Doe’s sister stated that he had in her presence opened the devices, accessed the data by entering passwords from memory, and shown her images.
  - 3) Doe had provided the Government with access to the data on some of the devices by entering multiple passwords from memory.

- c. There are images on the devices that constitute child pornography.
- 1) The investigation led to the identification of Doe as a user of an internet file sharing network that was used to access child pornography.
  - 2) Forensic analysis showed that the Mac Pro had been used to visit sites common in child exploitation.
  - 3) Doe's sister stated that he had shown her hundreds of pictures and videos child pornography images from the devices.
  - 4) Forensic analysis showed that Doe had downloaded thousands of files known by their "hash" values to be child pornography.

Based on that record, the Third Circuit held that since the act of producing the decrypted data would not be protected testimonial evidence, the Decryption Order did not violate Doe's Fifth Amendment privilege against self-incrimination.

### **TAKE-AWAYS**

The Third Circuit is only the second federal circuit court to address this issue. It is the first to uphold the use of the All Writs Act to compel unencrypted data and the first to apply the "foregone conclusion" doctrine to overcome a defendant's assertion of "act of production" privilege under the Fifth Amendment.<sup>4</sup>

For criminal investigators, this decision demonstrates and emphasizes the critical importance of establishing the "foregone conclusion" doctrine by gathering facts that establish the suspect's ownership of, possession of, access to, and/or use of the device, knowledge of the contents on the device, knowledge that the data is password protected or encrypted, and the ability to decrypt the contents. The court must be convinced to a reasonable certainty that the act of production protection will add nothing to what the government already knows and can prove.

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<sup>4</sup> In *In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011: U.S. v. John Doe*, 670 F.3d 1335 (11th Cir. 2012), the government used a grand jury subpoena to compel the defendant to provide the unencrypted data. The district court held Doe in civil contempt and ordered him incarcerated. The Eleventh Circuit reversed the order. It adopted the "foregone conclusion" analysis but concluded that the government had failed to establish it and, therefore, the act of producing the unencrypted data was protected by the Fifth Amendment privilege.

# CASE SUMMARIES

## Circuit Courts of Appeal

### Second Circuit

#### United States v. Schaffer, 851 F.3d 166 (2d Cir. N.Y. Mar. 15, 2017)

Schaffer sexually assaulted a fifteen-year-old girl during a job interview. Several days after the assault, a counselor from the girl's school notified the police department about the incident. As part of the investigation, law enforcement officers used the girl's email account to arrange for another meeting between Schaffer and the girl. However, on the day of the meeting, nine federal agents arrived at Schaffer's office building with a warrant to conduct a search of the premises.

When the agents encountered Schaffer, they did not handcuff him or draw their firearms, and Schaffer agreed to speak with the agents. Two agents interviewed Schaffer who was allowed to drink coffee and smoke cigarettes freely. At one point, Schaffer asked the agents if he should have an attorney present. The agents told Schaffer that he had a right to have an attorney present, but told him that he would have to decide for himself whether or not to exercise that right. At no point afterward, did Schaffer request an attorney. However, Schaffer asked the agents twice during the interview if he could leave to collect some money from an attorney located down the street. Schaffer claimed he needed the money to purchase medication, but he never claimed that there was a medical emergency, which required him to purchase the medicine. In addition, Schaffer never claimed that the attorney represented him. The agents denied both requests, telling Schaffer that it would create a security issue because the agents conducting the search had placed boxes of evidence on the floor by the threshold of the doorway. During the course of an approximately one-hour interview, Schaffer made incriminating statements to the agents.

At the end of the interview, after consulting with the United States Attorney's Office, the agents arrested Schaffer.

Prior to trial, Schaffer filed a motion to suppress the statements he made to the agents during the interview. Schaffer claimed that he made the statements during a custodial interrogation without having first been advised of his Miranda rights. Specifically, Schaffer argued that he was in custody for Miranda purposes because the agents twice denied his requests to leave the office.

The court noted that a suspect is in "custody" for Miranda purposes if two conditions are met. First, a reasonable person must believe that he is not free to terminate the encounter with the police. Second, a reasonable person must believe that his freedom of movement has been "curtailed to a degree associated with a formal arrest." The court emphasized that while the first condition, a seizure, is necessary for a suspect to be in custody, not every seizure constitutes custody for Miranda purposes.

In this case, the court found that Schaffer was not in custody when the agents interviewed him; therefore, the agents were not required to advise Schaffer of his Miranda rights. When the agents initially encountered Schaffer, they did not handcuff him or have their weapons drawn. The agents told Schaffer that he was not under arrest and Schaffer voluntarily agreed to speak with the agents. Two agents then interviewed Schaffer for approximately one-hour, in the familiar surroundings



of his office, and allowed Schaffer to drink coffee and smoke cigarettes during the interview. In addition, there was no evidence that Schaffer asked for an attorney or that the agents denied a request for an attorney. Most significantly, the court held that the agents' denial of Schaffer's requests to leave the office did not create a custodial situation, as a reasonable person in Schaffer's position would not have believed that being prohibited from leaving his office during an ongoing search was equivalent to a formal arrest. Instead, the court found that a Schaffer would have considered the restriction on his freedom of movement to be a "sensible precaution" designed to protect the integrity of an ongoing search.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-2516/15-2516-2017-03-15.pdf?ts=1489588205>

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### **Third Circuit**

**United States v. Apple Mac Pro Computer, 851 F.3d 238 (3d Cir. Pa. Mar. 20, 2017)**

(See Article: [The Fifth Amendment and Compelling Unencrypted Data, Encryption Codes, and/or Passwords - Case Law Update](#), page 4).

For the Court's opinion: <http://cases.justia.com/federal/appellate-courts/ca3/15-3537/15-3537-2017-03-20.pdf?ts=1490029205>

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### **Fourth Circuit**

**United States v. Hill, 2017 U.S. App. LEXIS 5537 (4th Cir. Va. Mar. 30, 2017)**

Two officers patrolling in a marked police car stopped a car for speeding and for crossing the yellow, double-solid line marker in the center of the roadway. The driver gave Officer Taylor his identification, but the passenger, Hill, was only able to provide his name to the officer. Officer Taylor returned to the police car where he entered the names of the driver and Hill into the Department of Motor Vehicles (DMV) and the National Crime Information Center (NCIC) databases. After approximately three minutes, the NCIC database returned an "alert" which notified Officer Taylor that both men had been associated with drug trafficking and were "likely armed." Officer Taylor also discovered the driver had a suspended operator's license. At this point, Officer Taylor began writing two summonses for the driver, one for reckless driving and one for driving with a suspended operator's license. Officer Taylor also requested a K-9 unit be sent to the scene. Officer Taylor then interrupted writing the summonses and entered the men's names into an additional computer database known as PISTOL, which tracks every person who has had prior contacts with the Richmond police. Officer Taylor spent approximately three to five minutes reviewing the information from the PISTOL database and then resumed writing the two summonses.

During this time, Officer McClendon remained standing next to the car speaking with Hill. During their conversation, Hill told Officer McClendon that he possessed a firearm. Officer McClendon immediately shouted "gun," and Officer Taylor returned to the car and assisted Officer McClendon in securing Hill and recovering the firearm. In the meantime, the K-9 unit had arrived, but the officer and his drug-detection dog remained in their car. Approximately 20 minutes elapsed from the time the officers initiated the traffic stop until Officer McClendon shouted "gun."

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

Hill filed a motion to suppress the firearm and the statements he made during the traffic stop. Hill claimed that Officer Taylor's decisions to request a K-9 unit and to search the PISTOL database unlawfully extended the duration and scope of the traffic stop, in violation of the Fourth Amendment. In addition, Hill claimed that Officer McClendon's decision to talk with him and the driver, rather than to assist Officer Taylor with searching the databases and writing the summonses, contributed to the unlawful extension of the stop.

A traffic stop constitutes a Fourth Amendment seizure. To satisfy the reasonableness requirement of the Fourth Amendment, a traffic stop must be justified at its inception, and the officers' actions during the stop must be reasonably related to the reason for the stop. Because Hill conceded the initial stop was valid, the court focused on the reasonableness of the officers' actions once they encountered the driver and Hill.

The court recognized that an officer may engage in certain safety measures during a traffic stop, but generally must focus his attention on the initial reason for the stop. In addition, an officer may engage in "ordinary inquiries incident to the traffic stop," such as inspecting a driver's identification and license to operate a vehicle, verifying the registration of a vehicle and existing insurance coverage, and determining whether the driver is subject to outstanding warrants. Finally, an officer may also engage in other investigative techniques unrelated to the reason for the traffic stop or the safety of the officers as long as these unrelated actions do not prolong the duration of the stop beyond the time necessary to deal with the traffic infraction.

Applying these principles, the court held that the officers did not unreasonably extend the duration of the traffic stop. Both officers testified that it usually takes about 10 minutes to write two summonses, and Officer Taylor testified that it took about 8 additional minutes to search the DMV, NCIC and PISTOL databases. While the court noted that Officer Taylor could have completed the summonses by relying solely on the DMV and NCIC databases, his decision to check the PISTOL database did not violate Hill's Fourth Amendment rights. Consequently, the court found that the officers directly accounted for 18 minutes of the 20-minute stop. The court added the 2-minute time difference between the estimated time required to complete the officers' activities and the total length of the stop did not support a finding that the officers unreasonably extended the duration of the stop.

In addition, the court noted that Officer Taylor had not yet finished writing the summonses when Officer McClendon yelled, "gun," and that the drug-detection dog was still in the K-9 officer's car at this time. As a result, the court found that the presence of the K-9 unit on the scene did not extend the duration of the stop.

Finally, the court held that Officer McClendon's decision to stand by the car and talk to Hill, instead of assisting Officer Taylor in the database searches was reasonable and did not extend the duration of the stop.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/15-4639/15-4639-2017-03-30.pdf?ts=1490898625>

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## **Fifth Circuit**

### **Surratt v. McClarin, 851 F.3d 389 (5th Cir. Tex. Mar. 14, 2017)**

Officers arrested Surratt for a traffic violation, and placed her in the back of a patrol car. The officers also arrested Garza, a passenger in Surratt's car, on outstanding traffic warrants, and seated her in the back of the patrol car next to Surratt. Both women were handcuffed and secured in the patrol car with seatbelts. Prior to the stop, the officers had reason to believe that Surratt was in possession of narcotics.

The officers returned to Surratt's vehicle to retrieve the women's personal belongings, briefly leaving Surratt and Garza alone and unsupervised in the back of the patrol car. During this time, Surratt freed her right hand from her handcuffs, pulled a small baggie of narcotics from underneath her skirt, and placed it in her mouth.

When the officers returned to the patrol car a few minutes later, they suspected that Surratt was concealing something in her mouth. After Surratt refused an order to open her mouth, one of the officers pressed his forearm against Surratt's left jawline and neck while the other officer pressed his thumb into the back of her right jawline to try to force Surratt to open her mouth. Surratt struggled with the officers and refused their repeated commands to open her mouth. It took the officers nearly a minute to release Surratt from her seatbelt, pull her over Garza, and get her completely outside the patrol car. By this time, Surratt was unresponsive and having a seizure. The officers saw that Surratt had stopped breathing and called for an ambulance. Eventually, a first responder arrived and used forceps to remove the plastic baggie from Surratt's throat. Surratt was transported to the hospital and placed on life support. Surratt died thirteen days later as a "result of complications of asphyxia due to airway obstruction by plastic bag."

Surratt's sister sued the officers, and the City of Sherman for, among other things, excessive use of force in violation of the Fourth Amendment.

Courts use a two-prong analysis to determine whether a defendant is entitled to qualified immunity. The court must decide whether the plaintiff has alleged a violation of a constitutional right and whether the defendant, police officer, acted objectively unreasonably in light of "clearly established" law at the time of the incident.

In this case the court assumed, without deciding the issue, that the officers' conduct violated Surratt's constitutional rights. However, the court also held that Surratt's sister failed to demonstrate that the officers acted objectively unreasonably in light of clearly established law at the time of the incident. The court noted that the plaintiff failed to cite any Fifth Circuit case where a similarly situated officer was found to have violated the Fourth Amendment. Rather, the court found that Fifth Circuit precedent supported the officers' use of force against Surratt. In a previous case, the court found that officers acted reasonably when they applied pressure against a suspect's jaw and nose in an attempt to pry his mouth open to keep the suspect from swallowing narcotics. Finally, the court recognized that "previous law has provided no guidance regarding what is precisely reasonable and what is unreasonable regarding the use of force to an individual's throat where the individual appears to be concealing something in their mouth." As a result, the court concluded that the officers were entitled to qualified immunity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/16-40486/16-40486-2017-03-14.pdf?ts=1489534235>

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**United States v. Escamilla, 2017 U.S. App. LEXIS 5485 (5th Cir. Tex. Mar. 29, 2017)**

Border Patrol agents patrolling a privately owned ranch, approximately 30 miles from the Mexican border, encountered two pickup trucks traveling in tandem that had activated a sensor designed to detect illegal entry into the ranch. The legitimate traffic traveling through the ranch primarily consisted of oil industry workers in company trucks, and the area where the sensor was activated was at a location where a vehicle should not be. In addition, the agents knew that smugglers commonly traveled in tandem and drove vehicles that resembled official oil company vehicles, commonly referred to as “clone vehicles.”

When the agents activated their lights to stop the trucks, one stopped and the other sped away. Agents approached the stopped truck and encountered the driver, Escamilla, who was nervous and could not give a clear answer as to why he was driving across the ranch. The agents also noticed that Escamilla wore a shirt that looked similar to a work uniform, but it lacked oil company logos or decals, and Escamilla’s truck was unusually clean and contained no tools or other objects that work trucks usually carry. Finally, the agents checked the truck’s registration, which came back to a residential address, which was not common, as company trucks are usually registered to a business.

Escamilla consented to a search of his truck, but the agents did not find anything in the truck’s fuel cell, which appeared to be inoperable and out of place. One of the agents then asked Escamilla for consent to search Escamilla’s phone. Escamilla consented and handed his phone to the agent. The agent examined the phone and saw that it was a simple flip phone containing only three numbers, two of which were saved under a single letter, rather than a proper name. After searching the phone, the agent handed it back to Escamilla because he was “done with it.”

Escamilla then agreed to follow the agents to the ranch’s main gate and allow a Border Patrol dog to sniff his truck. According to the handler, the dog “alerted, but nothing solid,” which indicated that drugs may have been in the truck recently. In the meantime, the agents heard over their radios that the truck, which had been traveling in tandem with Escamilla, had rammed a gate and crashed. Agents searched that truck and found marijuana and heroin inside it. At this point, the agents arrested Escamilla, based on his connection to the other truck.

The agents transported Escamilla to a Border Patrol station where they met an agent with the Drug Enforcement Administration (DEA). The Border Patrol agents told the DEA agent that Escamilla had consented to a search of his phone, and then gave Escamilla’s phone to the DEA agent. The DEA agent manually searched Escamilla’s phone to determine its number so he could request its call records from AT&T. The agent eventually received the call records, which were later admitted into evidence against Escamilla at trial.

Before Escamilla was transported to jail, the DEA agent asked Escamilla to claim his property from the items the Border Patrol agents had taken from him. Escamilla claimed his driver’s license and some jewelry. When an agent asked Escamilla about the cell phone that had been searched by the agents, Escamilla said the phone was not “his.”

Several days later, the DEA agent used a forensic examination program to conduct a more thorough search of Escamilla’s phone. This search confirmed the phone’s contact number that the agent had already learned from his previous manual search.

After the government charged Escamilla with drug possession and conspiracy, Escamilla filed a motion to suppress the phone, its contact number, and all evidence recovered from it. Escamilla claimed the Border Patrol's initial stop was not justified; however, if the stop was ruled to be justified, Escamilla claimed that the agents unreasonably prolonged its duration. Finally, Escamilla claimed that the three warrantless searches of his phone violated the Fourth Amendment.

First, the court held that the Border Patrol agents lawfully stopped Escamilla because they had reasonable suspicion to believe that he was involved in criminal activity. Specifically, the stop occurred 30 miles from the Texas-Mexico border, Escamilla's truck was detected by sensors in an area not typically used by legitimate ranch traffic traveling in tandem with another truck, Escamilla's truck lacked the usual markings of an oil company vehicle, and the truck was registered to a residential address rather than a business.

Second, the court held that the officers did not unreasonably prolong the duration of the stop. After stopping Escamilla, the court commented that the agents "continued to amass suspicion that he was involved in smuggling."

Third, the court held that the first search of Escamilla's phone by the Border Patrol agent was lawful, because Escamilla voluntarily consented to its search. The uncontested evidence established that the agent asked Escamilla, "do you mind if I look through your phone?" and then Escamilla handed it to him.

Fourth, the court held that the DEA agent's manual search of Escamilla's phone at the Border Patrol station violated the Fourth Amendment. Escamilla consented to the first search of the phone when he handed it to the Border Patrol agent. However, after examining the phone, the agent gave the phone back to Escamilla upon "being done with it." The court concluded that a reasonable person in Escamilla's position would have believed that his consent to search the phone would have ended at this point. The DEA agent's search of Escamilla's phone, several hours after Escamilla had been arrested, was a second, distinct search. Consequently, the court held that agent was required to have a warrant, an exception, or consent from Escamilla again, before he could lawfully examine the phone. Because the agent did not have a warrant, an exception, or obtain Escamilla's consent, the court held that the evidence discovered by the agent as the result of this search should have been suppressed.<sup>1</sup>

Finally, the court held the DEA agent's warrantless forensic search of Escamilla's phone several days after his arrest was lawful. When Escamilla expressly disclaimed ownership of the phone, he effectively abandoned the phone and any reasonable expectation of privacy in it. As a result, the court found that Escamilla did not have standing to challenge the agent's forensic search of the phone.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/16-40333/16-40333-2017-03-29.pdf?ts=1490830233>

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<sup>1</sup> Although this evidence was admitted at trial, the court held the district court's error was "harmless," as the government had lawfully obtained the same evidence by other means.

## **Sixth Circuit**

### **United States v. Luck, 852 F.3d 615 (6th Cir. Tenn. Mar. 31, 2017)**

Federal agents obtained a warrant to search Luck's home for evidence of child pornography. At the time, Luck was 21 years old and lived with his parents. When the agents arrived, they told Luck and his parents they were free to leave while the agents executed the warrant, but that they would like to ask them some questions. Luck and his parents agreed to answer the agents' questions. After answering some general questions, Luck admitted he had used a peer-to-peer network, which agents knew was a type of computer program that had been used to download and share pornographic material from the house. When the agents heard this, they asked to speak with Luck privately, offering to spare Luck from having to answer embarrassing questions in front of his parents. Luck and his parents agreed, and he and two agents went into a nearby bedroom.

Once the questioning resumed, Luck eventually told the agents he had downloaded and viewed child pornography. Luck then agreed to dictate a statement to the agents, which included the same incriminating statements. Before Luck dictated his statement, the agents told Luck that any statement he made was voluntary and that he did not have to give a statement. After Luck reviewed the agent's transcription of his statement for accuracy, Luck signed the statement.

The government charged Luck with offenses related to the distribution and possession of child pornography.

Luck filed a motion to suppress his statements to the agents, claiming that he was subject to custodial interrogation without first being advised of his Miranda rights. Luck also claimed that his statements were involuntary under the Due Process Clause.

The court disagreed. Law enforcement officers are required to advise a person of his Miranda rights before engaging in "custodial interrogation." A person is in custody for Miranda purposes if his freedom of movement is restrained to the degree associated with a formal arrest. Here, the court concluded that Luck was not in custody for Miranda purposes. First, the agents questioned Luck in his own home. Second, the interview only lasted one hour. Third, during the interview, the agents spoke to Luck in a calm, conversational manner, never becoming aggressive or brandishing their weapons. Fourth, Luck voluntarily accompanied the agents to the bedroom for the interview. Fifth, during the interview the agents kept the door open and did not block the exit. Finally, although the agents did not tell Luck he was free to leave, the agents did inform Luck that he did not have to provide a statement. Taken together, the court found that nothing about the objective circumstances of the interview indicate that a reasonable person in Luck's position would have believed that he was under arrest or otherwise not free to leave.

The court further held that Luck's statement to the agents was voluntary. Luck claimed that he was under the influence of sleep medications during the interview, which rendered him vulnerable to the agents' questions and created a coercive environment. However, the agents testified that Luck did not appear to be under the influence of any drugs, alcohol or medication, as he provided clear statements and spoke in complete sentences. Even if Luck had suffered some degree of impairment, the court noted that impairment, by itself, is never enough to render a confession involuntary under the Due Process Clause; some element of police coercion is always necessary. Here, the court found that the agents spoke in conversational tones, did not threaten Luck, and told Luck that he did not have to provide a statement if he did not want to.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-5746/15-5746-2017-03-31.pdf?ts=1490985087>

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## **Eighth Circuit**

### **United States v. Ortega-Montalvo, 850 F.3d 429 (8th Cir. Mo. Mar. 8, 2017)**

Federal agents received information that Ortega, a Mexican citizen, had illegally re-entered the United States after having been convicted of aggravated assault for shooting a police officer. The agents determined that Ortega was living in an apartment and went there to arrest him. When the agents knocked on the apartment door, an Hispanic male, later identified as Maldonado, answered the door. The agents identified themselves and displayed their badges. After the agents discovered that Maldonado did not speak English, an agent fluent in Spanish asked for consent to enter the apartment. Maldonado consented. When asked if anyone else was present in the apartment, Maldonado told the agents that his friend was there and pointed to the back of the apartment. With guns drawn, the agents conducted a protective sweep and knocked on a locked bedroom door. A man opened the door, and the agents immediately recognized the man as Ortega. The agents handcuffed and arrested Ortega. After completing their sweep, the agents obtained Ortega's consent to search his bedroom. In Ortega's bedroom, the agents seized three identification documents.

The government charged Ortega with illegally re-entering the United States.

Ortega filed a motion to suppress the evidence seized from his bedroom.

First, Ortega argued that Maldonado did not voluntarily consent to the agents' entry into the apartment.

The court disagreed. When the agents encountered Maldonado, they introduced themselves, showed Maldonado their badges, and requested in Spanish to enter the apartment. The agents' guns remained holstered, and they did not raise their voices. In addition, the agents did not threaten Maldonado or make any promises or misrepresentations to obtain his consent. Consequently, the court held that Maldonado voluntarily consented to the agents' entry into the apartment.

Second, Ortega argued that even if Maldonado's consent to enter the apartment was voluntarily, the agents' protective sweep exceeded the scope of his consent.

Again, the court disagreed. Protective sweeps are allowed under the Fourth Amendment when an officer has facts that would warrant a reasonable officer in believing that "the area to be swept harbors an individual posing a danger to those on the arrest scene." The court also recognized that protective sweeps need not always occur in conjunction with an arrest where "a reasonable officer could conclude that it was necessary for his safety to secure the premises before obtaining a warrant." In this case, the court held that articulable facts warranted the agents' protective sweep. Agents went to Ortega's apartment after discovering he was in the country illegally. From their briefing, the agents knew Ortega had a prior conviction for aggravated assault on a police officer. Finally, the agents learned from Maldonado that Ortega might be present in the apartment. The court concluded that these facts were "sufficient to alert the agents as to the possibility that the apartment harbored dangerous individuals."



Third, Ortega argued that he did not voluntarily consent to the search of his bedroom.

Although he was under arrest, the court held there was no evidence that Ortega was threatened, coerced, or promised anything by the agents to obtain his consent. The court further held that the agents' failure to tell Ortega he had the right to refuse consent to the search did not make Ortega's consent involuntary. As a result, the court found that Ortega voluntarily consented to the search of his bedroom.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1899/16-1899-2017-03-08.pdf?ts=1488990646>

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**United States v. Stegall, 850 F.3d 981 (8th Cir. Ark. Mar. 13, 2017)**

Officers responded to a 911 call regarding a road rage incident where the driver of a silver sport utility vehicle (SUV) pulling a jet ski brandished a gun at the 911 caller. Officers located the SUV parked and unoccupied in the parking lot of a shopping center. While the officers searched the parking lot for the driver, a witness told the officers that she saw the driver get out of the SUV, go to the rear of the vehicle, and put something in the back of it. The officers eventually located Stegall, who admitted he was the driver of the SUV, and that he was involved in a road rage incident earlier that day. Stegall denied that he brandished a gun at the 911 caller; however, he told the officers he "probably" had a firearm in his vehicle. The officers detained Stegall and contacted the 911 caller who came to the scene. The caller immediately identified Stegall as the driver of the SUV who brandished a firearm at him. The officers arrested Stegall for making a terroristic threat, a violation of state law. The officers handcuffed Stegall and placed him in the back of a patrol car.

With Stegall in custody, the officers searched his SUV. In the rear hatch area of the vehicle, officers found a handgun lodged between the back row of seats and the rear cargo floorboard. The officers also found an AR-15 rifle with an unusually short barrel. The government later charged Stegall with possession of an unregistered short-barreled rifle in violation of federal law.

Stegall filed a motion of suppress the evidence the officers seized from his vehicle.

The district court denied Stegall's motion. The court held the warrantless search of Stegall's SUV constituted a valid search incident to arrest because the officers had a reasonable basis to believe the vehicle contained evidence relevant to the crime of arrest, making a terroristic threat. Stegall appealed.

In [Arizona v. Gant](#), the Supreme Court held that officers may search a vehicle incident to arrest only if: (1) the arrestee is unrestrained and within reaching distance of the passenger compartment when the search begins, or (2) if it is reasonable to believe the vehicle contains evidence of the crime for which the suspect was arrested.

Here, the court held the warrantless search of Stegall's SUV was reasonable under the second part of [Gant](#) because the officers had a reasonable basis to believe that Stegall's SUV contained evidence relevant to the crime for which he was arrested. First, Stegall confirmed that he was the driver of the SUV involved in an earlier road rage incident. Second, Stegall told the officers he "probably" had a firearm in his vehicle. Third, the 911 caller positively identified Stegall as the driver who brandished a gun at him. Fourth, a witness saw Stegall concealing something in the rear hatch of his SUV.



Stegall also claimed that the hatchback area of his SUV was functionally the same as the trunk of car; therefore, the officers could not search that area incident to his arrest.

Again, the court disagreed. Even if searches under the second part of Gant are limited to the passenger compartment, the court held that the hatchback or rear hatch area of a vehicle is part of the passenger compartment.<sup>2</sup>

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-2549/16-2549-2017-03-13.pdf?ts=1489419045>

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**United States v. Evans, 851 F.3d 830 (8th Cir. Mo. Mar. 23, 2017)**

A woman contacted the police department and reported that she had been raped the previous evening and that she was sitting in a car outside the apartment building where the rape occurred. Before officers arrived at her location, the victim called the police department back and reported that her attacker had just exited a bus and was now sitting at a bus stop near her location. While the victim stated the man at the bus stop resembled her attacker, at various times during the call, the victim expressed some uncertainty concerning the identification.

When the officers arrived, the victim told them she met the attacker online the day before, exchanged some text messages, and then later arranged to see him in-person to “hang out.” The victim told the officers her attacker identified himself to her as Octavio or Octovi, and that they met inside the front door of his apartment building. The attacker told the victim they could not go to his apartment, because he was married, so the couple instead went to a stairwell where he frequently went to smoke. The victim told the officers that when they got to the stairwell, the attacker raped her. The victim told the officers she could not see the attacker's face very well, but that she saw a scar on his abdomen above his navel. The victim also told the officers that the attacker had tattoos in his neck and possibly on his hands, but she was unable to see them clearly because the lighting was poor and the attacker's hands were covered by clothing.

In the meantime, other officers detained the man at the bus stop, later identified as Evans, who denied raping the victim. Evans denied having a scar on his abdomen, and allowed an officer to examine him. According to the officer, he observed a vertical scar on Evans' abdomen. Evans told the officer the mark on his abdomen was a healed insect bite, but the officer did not believe him. In addition, it was undisputed that Evans had no tattoos on his hands or neck. The officers eventually arrested Evans for rape. During the search incident to arrest, the officers found a handgun in Evans' jacket pocket along with two keys.

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

Evans filed a motion to suppress the evidence seized by the officers, which was granted by the district court. The district court held the officers lacked probable cause to arrest Evans for rape; therefore, the evidence seized during the search incident to arrest should be suppressed. Significantly, the district court found that the mark on Evans' abdomen, which the officers described as a scar, was slight skin discoloration and that the small mark above his navel might

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<sup>2</sup> In addition to the 8th Circuit, the 1st, 6th, 9th, and 10th Circuits have held that the “passenger compartment” includes the rear hatch area of an SUV.

be several hair follicles instead of a scar. The district court also found that the officers' concerns about the victim's credibility indicated a lack of probable cause.

The government appealed to the Eighth Circuit Court of Appeals.

The court held that the district court did not err in finding that the officers lacked probable cause to arrest Evans for rape. First, the victim's identification of Evans as the perpetrator was not sufficient to establish probable cause. While the fact that Evans matched the victim's description of her attacker's height, build, and shoes may have provided some evidence to support a finding of probable cause, Evans presence near the location of the rape twelve hours later, while waiting for a bus transfer, did not by itself, incriminate him. Second, Evans' responses to the officers' questions were not incriminating or suspicion-raising in nature. Third, the fact that Evans did not have a scar on his abdomen or tattoos on his hands or neck constituted significant evidence to establish that Evans was not the attacker. Fourth, the officers did not check whether Evans had a phone matching the number believed by the victim to be her attacker's. Finally, the officers did not check whether Evans' keys would open the door to the apartment building where the rape occurred, nor did they ask the manager of the apartment building whether anyone named Octavio or Octovi lived there. As a result, the court affirmed the district court's suppression of the firearm evidence on the grounds that the officers lacked probable cause to arrest Evans. The court expressed no opinion on the question of whether a rape had occurred.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1485/16-1485-2017-03-23.pdf?ts=1490283049>

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### **United States v. Jackson, 852 F.3d 764 (8th Cir. N.D. Mar. 27, 2017)**

Jackson stabbed Smith to death during an argument. After the stabbing, Jackson went to his girlfriend's apartment, where a friend then braided and cut Jackson's long hair. As is tradition in his culture, Jackson then gave the braid to his brother to give to their mother. A short time later, police arrived at the apartment and arrested Jackson. The officers arrested Jackson on federal warrants for violations of his supervised release from a 2011 conviction as well as on tribal charges. A tribal officer read Jackson his Miranda warnings and transported him to jail.

Approximately 4 ½ hours later, two agents with the Federal Bureau of Investigation (FBI) and an agent with the Bureau of Indian Affairs (BIA) interviewed Jackson. One of the agents asked Jackson for information about his family, address, and date of birth, which Jackson provided. When one of the other agents then asked Jackson about the stabbing, Jackson told the agent that he would prefer to have an attorney present to discuss the matter. According to the agent, Jackson then "voluntarily blurted out" that he had been "slamming meth," that he had been up for several days since his birthday, and that the only sleep he had was in the jail just prior to the interview.

Following these statements, Jackson pulled his knees to his chest and clutched his arms around them. In an attempt to determine Jackson's mental and physical state, the agents asked Jackson about medications and allergies and asked Jackson to rate his well-being on a scale of one to ten. Jackson told the agents that he was not taking any prescription medications, had no allergies, and rated his well-being at a level three. One of the agents asked Jackson when he last cut his hair.

Jackson told the agent that he did not know.<sup>3</sup> The agent claimed he asked this question because Jackson's shirt had a substantial amount of hair on it, and the agents were trying to determine if Jackson knew the date. Near the end of the interview, the conversation turned to the outstanding federal warrants, and Jackson told the agents that he wanted an attorney. The agents stopped questioning Jackson.

Jackson filed a motion to suppress his statements to the agents. Jackson claimed the agents' questions at the jail constituted interrogation after he had invoked his right to counsel, in violation of Miranda.

First, the district court held that Jackson's statements concerning his drug use and lack of sleep were volunteered. Volunteered statements are not considered interrogation; therefore, the court held these statements were not obtained in violation of Miranda. The court of appeals found that the district court committed no error in crediting the agent's testimony over Jackson's testimony that he did not volunteer these statements.

Next, the court held that the agents' questions concerning prescription medications, allergies, and well-being were not interrogation, under Miranda. First, the court found that these questions were not reasonably likely to elicit incriminating responses. Second, because Jackson had already voluntarily disclosed that he had been awake for several days and using drugs, the agents' follow-up questions did not constitute interrogation, as such limited questioning relating to concerns about Jackson's health were not an attempt to get Jackson to incriminate himself.

Finally, the court held that the agent's question regarding Jackson's last haircut crossed the line into improper interrogation. The agent testified that prior to interviewing Jackson, he had gone to the apartment where Jackson was arrested. At the apartment, the agent stated there was "discussion about recently cut hair," and the agents learned that the murder suspect had received a haircut that evening at the apartment. Because the agents had prior knowledge about the murder suspect having recently cut his hair, they should have known that the question regarding Jackson's last haircut "was reasonably likely to elicit an incriminating response" from Jackson regarding the murder.

Although the court held that the district court improperly admitted Jackson's response to the agent's question regarding the last time he cut his hair, the error was harmless as there was substantial other evidence that suggested Jackson's memory of the incident was unreliable.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-2433/16-2433-2017-03-27.pdf?ts=1490628650>

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<sup>3</sup> The haircut question and Jackson's answer were brought out several times at trial: during the agent's direct examination, Jackson's cross examination, and the government's closing argument. At closing, the government relied on this exchange to challenge the "credibility of the defendant's testimony" at trial, arguing that if Jackson was "that lacking in memory" on the night of the incident such that he could not remember a haircut that occurred hours earlier, then "you have reason to question how a year-and-a-half later, when he's on the witness stand, he's able to give you all of those details."

## **Ninth Circuit**

### **United States v. Job, 851 F.3d 889 (9th Cir. Cal. Mar. 14, 2017)**

In October 2012, two officers went to a residence looking for Richard Elliott. When the officers arrived at the home, they saw two men open the garage door. Both men looked very surprised to see the officers and appeared to be nervous. In addition, one of the men, later identified as Job, was wearing a baggy shirt, which concealed his waistband and baggy cargo shorts, with the pockets appearing “to be full of items.” Concerned for their safety, one of the officers handcuffed and frisked Job. During the frisk, the officer felt a hard tube-like object with a bulbous end in Job’s left cargo pocket. Based on his experience, the officer recognized the object as an illegal glass pipe. The officer removed the pipe, which “contained a burnt white residue.” The officer also found \$1450 in cash and Job’s car keys in his pockets. The officer arrested Job for possession of narcotics paraphernalia.

After arresting Job, the officers searched his car, which was located in the driveway. Inside Job’s car, the officers found methamphetamine and drug paraphernalia. At some point during the encounter, the officers discovered that Job was currently on probation with a Fourth Amendment waiver.<sup>4</sup>

In December 2012, officers obtained a search warrant for Job’s residence, based in part on intercepts from a wiretap of another individual, whom the officers suspected was a drug trafficker. While executing the warrant, the officers seized methamphetamine, marijuana, and drug paraphernalia. The government subsequently charged Job with drug-related offenses.

Job filed a motion to suppress the evidence found on his person and in his car in October. The district court held that Job’s Fourth Amendment search waiver provided a justification for these searches and denied Job’s motion. Job appealed.

The Ninth Circuit Court of Appeals reversed the district court. First, the court noted it was undisputed that the officers were unaware of Job’s Fourth Amendment search waiver when they stopped him and frisked him. While the district court did not determine when the officers became aware of the search waiver, the district court based its decision solely on the fact that Job was subject to a Fourth Amendment search waiver at the time of the searches. The Ninth Circuit Court of Appeals held this was in error. Ninth Circuit case law requires police officers to know about the existence of a probationer’s Fourth Amendment search waiver before they can use such a waiver to justify a warrantless search of a probationer. Even if the officers were aware of Job’s Fourth Amendment search waiver, the court added that such waivers are limited to individuals on probation for violent felonies. While the parties disputed whether Job was on probation for a felony or a misdemeanor, it was irrelevant, as it was undisputed that Job was on probation for a nonviolent offense.

On appeal, the government argued for the first time that the officers had other lawful reasons to justify stopping and frisking Job, independent of the Fourth Amendment search waiver. First, the government claimed the officers conducted a valid Terry stop.

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<sup>4</sup> While on probation for a state drug offense, Job was required to "submit person, property, place of residence, vehicle, [and] personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by a probation officer or other law enforcement officer." It is unclear when, if ever, the officers learned the precise scope of Job's search waiver.

The court disagreed. The fact that Job's pants appeared to be "full of items" and he appeared to be nervous did not support the conclusion that Job was engaged in criminal activity.

Next the government argued that the stop and frisk were valid as a protective sweep. Again, the court disagreed. A protective sweep is a quick and limited search of premises, incident to an arrest, conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case, the government did not establish that the officers were at the home pursuant to an arrest warrant, or that this was Richard Elliot's home. In addition, the protective sweep would have been limited to a visual inspection for persons and would not have allowed the officers to frisk Job.

Because the government failed to establish a justification for the warrantless stop and subsequent frisk, the court concluded that the search of Job's person was unlawful. As a result, the court held that the evidence discovered during the frisk should have been suppressed.

The court held that the warrantless search of Job's car under the Fourth Amendment search waiver was not justified for the same reasons the stop and frisk were not justified. On appeal, the government argued for the first time that the search of Job's car was justified under the automobile exception to the warrant requirement.

The court disagreed. The automobile exception allows the police to conduct a warrantless search of a vehicle if there is probable cause to believe the vehicle contains evidence of a crime. However, the only evidence that supported probable cause to believe Job's car contained contraband was the glass pipe that was seized from Job's person. Because the court held that the glass pipe was unlawfully seized, the court concluded the glass pipe could not provide the probable cause to justify the warrantless search of Job's car.

Job also filed a motion to suppress the evidence seized during the search of his house in December.

The court held the search warrant obtained by the officers was supported by probable cause; therefore, the search of Job's home and the seizure of the drug evidence in December was lawful. Although the search warrant affidavit did not specifically claim that Job was trafficking in drugs, the affidavit provided facts sufficient to support the conclusion that Job was in the business of "buying and selling" methamphetamine.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca9/14-50472/14-50472-2017-03-14.pdf?ts=1489510942>

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