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# THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW  
ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or [FLETC-LegalTrainingDivision@dhs.gov](mailto:FLETC-LegalTrainingDivision@dhs.gov). You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting <https://www.fletc.gov/legal-resources>.

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# The Informer – April 2018

## Case Summaries

### United States Supreme Court

**Kisela v. Hughes:** Whether an officer was entitled to qualified immunity in a lawsuit where the plaintiff claimed the officer violated the Fourth Amendment by using excessive force when he shot her.....6

**United States v. Microsoft:** Whether a warrant issued under § 2703 of the Stored Communications Act required Microsoft to produce the contents of a customer’s email account stored on a server outside the United States.....7

### Circuit Courts of Appeals

#### First Circuit

**United States v. Favreau:** Whether officers developed reasonable suspicion to extend the duration of a traffic stop .....8

**United States v. Delima:** Whether the government satisfied the necessity requirement under 18 U.S.C. § 2518(1)(c) to obtain three separate wiretap authorizations.....9

#### Second Circuit

**United States v. Haak:** Whether the defendant’s incriminating statements were made after receiving a false promise of immunity from an officer or otherwise obtained involuntarily.....10

#### Third Circuit

**Haberle v. Troxell:** Whether an officer or the municipality was liable for money damages after a mentally disturbed man committed suicide.....11

#### Fourth Circuit

**United States v. Bowman:** Whether an officer unlawfully prolonged the duration of a traffic stop to investigate whether the defendant was transporting drugs.....12

#### Fifth Circuit

**United States v. Molina-Isidoro:** Whether the warrantless search of the defendant’s cell phone was lawful under the government’s border search authority.....14

**Hernandez v. Mesa:** Whether federal courts have the authority to create an implied cause of action under Bivens for an alleged use of excessive force where a Border Patrol agent shot across the border killing a Mexican citizen (remanded from the U.S. Supreme Court) .....14

**United States v. Mendez:** Whether the defendant’s post-Miranda statements to officers were sufficiently attenuated from his detention during an unlawful stop.....16

**United States v. Perales:** Whether an officer’s failure to return the defendant’s identification prior to asking for consent to search his vehicle rendered his consent involuntary.....17

**Sixth Circuit**

**United States v. Tagg**: Whether visiting a website containing child pornography established probable cause to believe the defendant had child pornography on his computer.....18

**Seventh Circuit**

**United States v. Rodriguez-Escalera**: Whether a state trooper established reasonable suspicion to extend the duration of a traffic stop.....19

**United States v. Leonard**: Whether the presentment of the wrong search warrant to the owner of the premises invalidated the search and whether evidence discovered in two trash pulls established probable cause to search the defendant’s house.....21

**Eighth Circuit**

**United States v. Hampton**: Whether the defendant invoked his right to counsel when he told officers, “I haven’t even gotten a chance to get a lawyer or anything.” .....22

**Ninth Circuit**

**Thompson v. Copeland**: Whether an officer was entitled to qualified immunity in a lawsuit alleging excessive force where the officer pointed his gun at the plaintiff’s head.....22

**Eleventh Circuit**

**United States v. Vergara**: Whether the warrantless forensic searches of the defendant’s cell phones was lawful under the government’s border search authority.....23

**United States v. Johnson**: Whether an officer was justified in conducting a Terry frisk and whether the officer exceeded the scope of the frisk by removing a round of ammunition from the defendant’s pocket.....24



**FLETC Informer Webinar Schedule**

**1. Section 2703 (d) of the Stored Communications Act (1-hour)**

Presented by Patrick Walsh, Attorney-Advisor / Branch Chief, Federal Law Enforcement Training Centers, Glynco, Georgia

This webinar will focus on § 2703(d) court orders, the process under the Stored Communications Act that permits law enforcement officers to obtain, among other things, a suspect’s historical cell phone and email account information. Mr. Walsh will discuss the legal standard to obtain a 2703(d) court order, what information can be obtained, as well as the pending Supreme Court case, Carpenter v. United States, and how the Court’s ruling might affect § 2703(d) orders in the future.

Wednesday May 9, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12pm Pacific

To participate in this webinar: <https://share.dhs.gov/walsh/>



## **2. Video Recording Police (1-hour)**

Presented by Joe Haefner, Associate Chief Counsel, Federal Law Enforcement Training Centers, Artesia, New Mexico and Henry McGowen, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico

This webinar will focus on the 1st Amendment rights of citizens to record law enforcement officers engaged in their official duties and address critical questions in this area: What are the legal limitations? Under what conditions can law enforcement prevent such recording without violating a person's Constitutional rights? What are the potential consequences for violating a person's 1st Amendment rights?

Wednesday May 16, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



## **3. Clery Act Reporting Requirements (1-hour)**

Presented by Robert Duncan, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act, is a federal statute that requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. The act has been amended to include requirements for an annual security report (due by October 1 of each year), a crime log, timely warnings, and collection of crime statistics. This webinar will address common compliance questions from a law enforcement viewpoint (e.g. issuing a timely warning during active threat events) and is suitable for college police departments (public, private, tribal) as well as state/local/tribal officers with Title IV-funded schools in their response area. University/college/agency administrators and attorneys are welcome to attend.

Wednesday May 23, 2018 – 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



## **4. Qualified Immunity (1-hour)**

Presented by Johnnie Story, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Glynco, Georgia

This webinar will discuss the protection federal officers have when sued for Constitutional Torts. Mr. Story will discuss an office's qualified immunity from civil liability, how an officer asserts qualified immunity, and current case law where courts have evaluated the application of qualified immunity.

Wednesday May 30, 2018 - 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: <https://share.dhs.gov/walsh/>



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# CASE SUMMARIES

## United States Supreme Court

### **Kisela v. Hughes, 2018 U.S. LEXIS 2066 (April 2, 2018)**

In May 2010, a person called 911 and reported that a woman was hacking a tree with a kitchen knife. When Officer Kisela and another officer responded, they were flagged down by the 911 caller. The caller gave the officers a description of the woman and told them the woman had been acting erratically. During this time, a third officer arrived.

A short time later the three officers saw a woman, later identified as Susan Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, later identified as Amy Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking the tree earlier. Hughes walked toward Chadwick and stopped approximately six feet from her.

All three officers drew their guns and twice Hughes was ordered to drop the knife. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Officer Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Afterward, the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. Less than a minute had elapsed from the time the officers saw Chadwick until the time Officer Kisela shot Hughes.

Hughes sued Officer Kisela under Rev. Stat. § 1979, and 42 U.S.C. § 1983, claiming that Kisela had used excessive force in violation of the Fourth Amendment.

The District Court granted Officer Kisela qualified immunity, but the Ninth Circuit Court of Appeals reversed. Officer Kisela appealed to the United States Supreme Court.

The Court reversed the Ninth Circuit Court of Appeals and held that Officer Kisela was entitled to qualified immunity. An officer is entitled to qualified immunity when his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In this case, the court did not decide whether Officer Kisela violated the Fourth Amendment when he shot Hughes; however, even assuming a Fourth Amendment violation occurred, the Court concluded that Officer Kisela did not violate clearly established law.

Although a plaintiff is not required to provide case law that is directly on point for a right to be clearly established, an officer cannot violate a clearly established right unless the right was sufficiently defined so that a reasonable officer in the defendant's shoes would have understood that he was violating it. The Court noted that it has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality." The Court added that the general rules set out in Tennessee v. Garner and Graham v. Connor do not by themselves create clearly established law outside an "obvious case." Instead, the Court reiterated that specificity is important in the Fourth Amendment context, as it is sometimes difficult for an officer to determine how the relevant legal doctrine concerning excessive force will apply to the situation facing the officer.

When Officer Kisela encountered Hughes, he suspected that Hughes was the woman the 911 caller had seen hacking a tree with a large kitchen knife. In addition, Hughes was within striking distance of Chadwick; ignored the officers' commands to drop the knife; the officers were separated from Hughes and Chadwick by a chain-link fence; and the situation unfolded in less than a minute. Based on these facts, Officer Kisela testified that he shot Hughes because he believed that Hughes posed a threat to Chadwick. The court concluded that this was far from an "obvious case" in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment. The Court added that the none of the cases relied upon by the Ninth Circuit Court of Appeals supported the denial of qualified immunity for Officer Kisela and stated that the Ninth Circuit's reliance on one case in particular was so erroneous that it "does not pass the straight-face test."

For the court's opinion: [https://www.supremecourt.gov/opinions/17pdf/17-467\\_bqm1.pdf](https://www.supremecourt.gov/opinions/17pdf/17-467_bqm1.pdf)

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### **United States v. Microsoft Corp., 2018 U.S. LEXIS 2495 (Apr. 17, 2018)**

The government obtained a warrant issued under § 2703 of the Stored Communications Act (SCA) that directed Microsoft to seize and produce the contents of an email account that it maintained for a customer who used the company's electronic communications services. The government then served the warrant on Microsoft at its headquarters in Redmond, Washington.

Microsoft provided the government the customer's non-content related information that was located on a server in the United States. However, Microsoft determined that to comply fully with the warrant, it would need to access customer content stored and maintained on a server located in Ireland. Microsoft refused to provide the government this data and filed a motion to quash the warrant. Microsoft argued that a warrant issued under the SCA could not require it to produce data that was stored on servers located outside the United States.

The government argued Microsoft was required to produce the data, pursuant to the warrant, no matter where the data was located, as long as Microsoft had custody and control of the data.

The Second Circuit Court of Appeals held that § 2703 of the SCA does not authorize a United States court to issue and enforce an SCA warrant for the contents of a customer's electronic communications stored on servers located outside the United States. Consequently, the court held the SCA warrant in this case could not lawfully compel Microsoft to produce the contents of a customer's email account stored on servers located in Ireland. The government appealed.

The Supreme Court granted certiorari and heard oral argument on February 27, 2018.

On March 23, 2018, Congress enacted and the President signed into law the Clarifying Lawful Overseas Use of Data Act (CLOUD Act) that directly addressed the issue before the Court in this case. The CLOUD Act contains a provision that requires email service providers to disclose emails within their "possession, custody, or control," even when those emails are located outside the United States. Soon thereafter, the government obtained, pursuant to the CLOUD Act, a new § 2703 warrant covering the information requested in the initial § 2703 warrant at issue in this case. In light of these facts, the Court concluded that there was no longer a "live" dispute between the United States and Microsoft on the legal question the Court agreed to review. As a result, the Court directed the lower court to dismiss the case as moot.

For the court's opinion: [https://www.supremecourt.gov/opinions/17pdf/17-2\\_1824.pdf](https://www.supremecourt.gov/opinions/17pdf/17-2_1824.pdf)

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# Circuit Courts of Appeal

## First Circuit

### United States v. Favreau, 2018 U.S. App. LEXIS 7413 (1st Cir. ME Mar. 23, 2018)

A police officer, who was aware of Favreau's reputation as a drug dealer, received a tip from an informant that Favreau possessed a vehicle that contained a secret compartment in which drugs could be hidden. While conducting surveillance of Favreau's house in an unmarked police car, the officer saw Favreau get into a car and drive away. The officer followed Favreau along with a K-9 officer who was driving a marked police cruiser. While following Favreau, the officers noticed that Favreau engaged in counter surveillance tactics designed to elude police officers that might be following him. After the officers saw Favreau make a turn without signaling, the officer in the marked cruiser activated his blue lights and siren. Favreau did not immediately pull over, which was another violation, but instead turned down another street before pulling over.

While discussing the traffic violations, the officers noticed Favreau was extremely nervous. Favreau told the officers he knew the officers had been following him and indicated that his driving maneuvers had been made with the police consciously in mind. During the encounter, the officers frisked Favreau and discovered \$400 in cash. In addition, when the officers asked Favreau where he was going, Favreau told the officers he was going home, which they suspected was a lie.

After completing the traffic stop, the K-9 officer walked his drug-dog around Favreau's car several times, which took approximately three minutes. After the dog alerted to the presence of drugs, the officers searched the car and found a hidden compartment that contained cocaine.

The government charged Favreau with several drug-related offenses.

Favreau filed a motion to suppress the evidence seized from his car arguing that the officers unreasonably prolonged the duration of the traffic stop.

The court disagreed. First, the court stated that while the officers' primary interest in Favreau was his possible illegal drug activity and not his bizarre driving or traffic infractions, their ulterior motive was irrelevant. Second, the officers were justified in stopping Favreau for his erratic driving and traffic violations. Third, during the interview, Favreau admitted that his erratic driving was an attempt to evade the officers. Fourth, during the stop Favreau was extremely nervousness and lied to the officers about where he was going. Finally, the officers knew that Favreau had a reputation as a drug dealer and knew that his car might contain a secret compartment to conceal drugs. Based on these facts, the court held that the officers established reasonable suspicion to detain Favreau at the conclusion of the traffic stop. The court further held that the additional three-minute period of detention until the drug-dog alerted was reasonable. Finally, the court concluded that after the drug-dog's alert, the officers had probable cause to search Favreau's car under the automobile exception to the Fourth Amendment's warrant requirement.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-1261/17-1261-2018-03-23.pdf?ts=1521838807>

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**United States v. Delima, 2018 U.S. App. LEXIS 7547 (1st Cir. ME Mar. 26, 2018)**

During the investigation of a drug-trafficking organization, federal agents applied for and obtained three separate wiretap authorizations from the district court in Vermont. Through the wiretaps, agents learned that Delima and his brother were involved in manufacturing and using fraudulent credit cards.

When agents executed a search warrant at the apartment of one of Delima's associates in Maine, they recovered various equipment used to manufacture fraudulent credit cards as well as computer files that contained hundreds of stolen credit card numbers.

The government charged Delima with conspiracy to commit access-device fraud.

Delima filed a motion to suppress all evidence obtained through the wiretaps, arguing that the government had failed to demonstrate necessity under 18 U.S.C. § 2518(1)(c).

Under 18 U.S.C. § 2518(1)(c), wiretap applications must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." To satisfy this "necessity" requirement, the government demonstrated that it "has made a reasonable, good faith effort to run the gamut of normal investigative procedures before resorting to means so intrusive as electronic interception of telephone calls."

The court held that the affidavits in support of the three wiretap applications stated why each of the investigative techniques that had been employed up to that point would have been ineffective in achieving the goals of the investigation, which were also set forth in the applications. For example, the affidavit in support of the first wiretap application stated that the use of confidential informants would have been fruitless because the informants were low-level "runners" who did not have access to information pertinent to the investigation's goals, that controlled drug purchases and pole cameras would not help to identify the leaders of the conspiracy, and that interviewing members of the conspiracy might compromise the investigation by alerting the suspects.

The court further held that the affidavits in support of the second and third wiretap applications properly described why additional wiretaps were necessary to accomplish the investigation's goals and why traditional investigative techniques would not be sufficient. For example, the second wiretap application explained that wiretaps on two additional phones were necessary to determine, among other things, the organization's source for heroin and cocaine base, its trafficking and money-laundering methods, its use of firearms in furtherance of the conspiracy, and the extent of the organization's distribution network. Finally, in the third wiretap application, the government targeted a phone that members of the conspiracy used for internal communications, whereas prior wiretaps had primarily targeted phones used by the suspects to communicate with customers.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-1132/17-1132-2018-03-26.pdf?ts=1522096206>

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## **Second Circuit**

### **United States v. Haak, 884 F.3d 400 (2d Cir. NY 2018)**

Local police officers working on a joint federal-state task force were investigating the death of James Forness from an apparent overdose of heroin laced with fentanyl. After reviewing text messages on Forness' cell phone, officers identified Haak as Forness' likely drug supplier. As a result, an officer contacted Haak and asked him to come to the police station. Haak voluntarily drove to the police station and was interviewed by two officers. Even though Haak was not in custody, the officers advised him of his Miranda rights. The interview was held in a standard interview room, lasted just over thirty minutes, and was video recorded. Both officers spoke to Haak in a conversational tone and both officers were dressed in casual street clothes with no weapons visible. During the interview, Haak was not handcuffed or otherwise restrained and was not arrested at the end of the interview.

Approximately five minutes into the interview, Haak admitted that he supplied the drugs that killed Forness. Afterward, one of the officers told Haak that he would be "walking out" of the station at the end of the interview, but emphasized that Haak needed to "get on board" and cooperate with the officers so they could prevent future heroin-related deaths. The officer made other statements requesting Haak's cooperation and specifically told Haak, "either you can get on board, put the team jersey on here, play for this team, or you can be on the losing team." Haak then identified two of his drug suppliers and over the next few days, working under the direction of the officers, arranged for two controlled purchases of heroin.

Six days after the interview, a federal complaint was filed charging Haak and one of his suppliers with drug-related offenses. Nine months later, a federal grand jury indicted Haak for fentanyl possession and distribution resulting in death.

Haak filed a motion to suppress his statements to the officers. Haak claimed that his statements were coerced by the threat of prosecution if he did not cooperate with the officers.

The district court held that the officer made an implied promise of immunity to Haak when the officer told Haak that in exchange for his cooperation, he would not be charged. As a result, the district court suppressed Haak's statements, concluding that the officer's promise of immunity overbore Haak's will and rendered his statements involuntary. The government appealed.

The Third Circuit Court of Appeals reversed, holding that the district court improperly suppressed Haak's statements.

First, the court held that Haak's initial statements, made before the alleged promise of immunity, approximately five minutes into the interview, were voluntary. The officer told Haak that cell phone records along with the text messages from Forness' phone established that Haak was Forness' drug supplier. In response, Haak nodded his head in agreement and twice again after the officer commented about text messages discovered on Forness' phone. The court found there was nothing in these exchanges to indicate that Haak's responses to the officer's statements were involuntary.

Second, the court held that Haak's will was not overborne by a false promise of immunity from the officer. The officer repeatedly emphasized to Haak that he was not being arrested and that Haak would be "walking out of" the station, which is what occurred. The court found that viewed in this context, the officer's statements were most reasonably understood to communicate that the

officer had no present intent to arrest Haak, not that he was promising him immunity from prosecution. The court noted that the decision not to arrest a suspect at a particular time does not prevent a suspect's future prosecution. The court further added there is nothing improper when an officer truthfully tells a suspect that he will be prosecuted to the full extent of the law if he chooses not to cooperate. In addition, the court found that the officer's "team" reference could not imply a promise of immunity because the analogy is routinely used to refer to individual who cooperate, the vast majority of whom do not receive immunity.

Finally, the court held that there was no other evidence to support Haak's claim that his will was overborne by the officer's conduct. Haak voluntarily went to the police station, and even though he was not in custody, the officer advised Haak of his Miranda rights. The interview lasted just over thirty minutes, Haak was not handcuffed, and nothing about the officers' demeanor, dress, or conduct established Haak's will was overborne.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca2/16-3876/16-3876-2018-03-07.pdf?ts=1520440209>

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## **Third Circuit**

### **Haberle v. Troxell, 2018 U.S. App. LEXIS 6926 (3d Cir. PA Mar. 20, 2018)**

Timothy Nixon suffered from a variety of mental health issues. In May 2013, Nixon was living with Nicole Haberle when he had a serious mental health episode involving severe depression. Nixon called Haberle, told her that he was suicidal, and then broke into a friend's home and took a handgun. Afterward, Nixon went to his cousin's apartment.

Fearing for Nixon's life, Haberle called the Borough of Nazareth Police Department and reported the incident. Officer Troxell obtained a warrant for Nixon's arrest and went to the cousin's apartment with other officers to arrest Nixon. Upon arriving at the apartment, some of the officers suggested setting up a perimeter and asking the Pennsylvania State Police to send crisis negotiators. Other officers suggested asking Haberle to help communicate with Nixon. Officer Troxell refused those suggestions and told the other officers that he was immediately going to the apartment because "that is how we do things in Nazareth." Officer Troxell went to the apartment, knocked on the door, and identified himself as a police officer. Nixon then committed suicide by shooting himself.

Haberle sued Officer Troxell, claiming that his actions constituted an unlawful seizure in violation of the Fourth Amendment as well as a state-created danger in violation of the Due Process Clause of the Fourteenth Amendment. Haberle also sued the Borough of Nazareth, claiming the Borough violated the Americans with Disabilities Act (ADA).

First, the court held that Officer Troxell's actions did not constitute an unlawful seizure. Whether or not well advised, and despite his crudely expressed intentions, Officer Troxell merely knocked on the door and announced his presence. The court concluded that this, by itself, was not enough to violate the Fourth Amendment. The court added that even if a seizure had occurred, it would have been lawful because Officer Troxell had a valid warrant for Nixon's arrest.

Next, the court held that Officer Troxell's actions did not cause a state-created danger. The Due Process Clause of the Fourteenth Amendment, requires the government to protect individuals

against dangers, which includes self-inflicted injury that the government creates. Under the state-created danger doctrine, a plaintiff must establish, among other things, that a state actor acted with a conscious disregard of a great risk of harm to an individual. Here, the court found that Officer Troxell's decision to ignore the advice of other officers fell beneath the threshold of conscious disregard of a great risk of harm to Nixon. According to the court, the fact that Officer Troxell chose to immediately knock while other officers counseled waiting manifested only a disagreement over how to manage a risk, not a disregard of it.

Finally, the court concluded that it is possible for police officers to violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee's disability; therefore, subjecting the arrestee to discrimination. The court added that this position is supported by other federal circuits, and even though there is some disagreement concerning the point during a law enforcement encounter at which the ADA applies to police conduct, no court of appeals has held that the ADA does not apply at all. However, even though the ADA generally applies in the arrest context, the court held that Haberle's claim for money damages against the Borough failed as a matter of law because Haberle did not allege that the Borough acted with deliberate indifference to the risk of an ADA violation. Specifically, Haberle did not claim that the Borough was aware that its existing policies made it substantially likely that disabled individuals would be denied their federally protected rights under the ADA.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/16-2074/16-2074-2018-03-20.pdf?ts=1521565208>

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## **Fourth Circuit**

### **United States v. Bowman, 884 F.3d 200 (4th Cir. NC 2018)**

A patrol officer received a tip that two men suspected of transporting methamphetamine were possibly driving an older model, red Lexus in the area. At approximately 3:40 a.m., the officer saw an older model red Lexus and followed it. The officer stopped the vehicle for weaving over the fog line and speeding. The officer spoke with the driver, Bowman, who appeared to be nervous when he gave the officer his driver's license and registration. The officer also noticed that the passenger, Alvarez, appeared to be nervous. Inside the vehicle, the officer saw an energy drink, food and food wrappers, in the front seat, and a suitcase and loose items of clothing in the backseat. The officer believed the presence of these items suggested that Bowman and Alvarez could have been travelling for a long period of time.

The officer directed Bowman to sit in his patrol car while he ran a check on Bowman's driver's license and registration. While the officer processed Bowman's information, he asked Bowman where he and Alvarez had come from and where they were going. Bowman told the officer that he was going home after having picked up Alvarez from Alvarez's girlfriend's house. Bowman was unable to give the officer the girlfriend's address, but he told the officer that he had entered the address into the Lexus' GPS.

The officer also asked Bowman how he was employed, and Bowman told the officer that he was a welder, but that he was currently laid off from work. When the officer asked Bowman if he had any prior speeding violations, Bowman told the officer he had one prior ticket while driving a different vehicle that he had purchased online and added that he liked to buy cheap cars from Craigslist. The officer found it suspicious that Bowman was driving a Lexus and admitted that

he recently bought another car from Craigslist. Based on his experience, the officer knew that drug traffickers often used multiple, different vehicles to transport narcotics.

The officer issued Bowman a warning for the traffic violations and then completed the stop by returning Bowman's driver's license and registration and shaking his hand. As Bowman began to exit the patrol car, the officer asked if he could speak with Bowman further. Bowman agreed and remained in the patrol car. The officer again asked Bowman where he had been that evening. Bowman reiterated that he had picked up Alvarez from Alvarez's girlfriend's house, but that he could not remember exactly where she lived. The officer then told Bowman that he was going to ask Alvarez some questions, and Bowman said, "okay." As the officer was getting out of the patrol car, he told Bowman, "just hang tight right there, okay," to which Bowman replied, "oh, okay."

The officer asked Alvarez questions about where he and Bowman had been that morning. Alvarez gave an inconsistent story, telling the officer they had been visiting friends in Georgia. The officer went back to his patrol car and after Bowman repeated that he and Alvarez had come from the home of Alvarez's girlfriend, the officer asked if there was any methamphetamine in the Lexus. Bowman denied there was any methamphetamine in the vehicle and refused to give the officer consent to search it. The officer contacted a K-9 officer who walked his drug-sniffing dog around the Lexus. After the dog alerted to the presence of drugs, the officer searched the Lexus and found methamphetamine, digital scales, and ammunition.

The government charged Bowman with possession with intent to distribute methamphetamine. Bowman filed a motion to suppress the evidence discovered in his vehicle, arguing that the officer unlawfully prolonged the duration of the traffic stop without consent or reasonable suspicion.

The court agreed. It was undisputed that the initial traffic stop was complete when the officer issued Bowman a warning citation, returned his documents, and shook his hand. It was also undisputed that Bowman consented to the officer's request to answer additional questions, which the officer did for approximately 40 seconds. However, the court concluded that this brief consensual encounter became a Fourth Amendment seizure when the officer told Bowman to "hang tight" in the patrol car while the officer questioned Alvarez.

The court further held that Bowman's seizure was not justified by reasonable suspicion. The court concluded that the totality of the circumstances, notably Bowman and Alvarez' nervousness, an energy drink, food wrappers, a suitcase, loose clothing, Bowman's uncertainty about the address of Alvarez's girlfriend, and Bowman's vehicle purchases did not provide reasonable suspicion to believe Bowman was engaged in criminal activity. As a result, the court held that the officer unreasonably prolonged the duration of the traffic stop; therefore, the district court should have suppressed the evidence recovered from Bowman's vehicle.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/16-4848/16-4848-2018-03-01.pdf?ts=1519938045>

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## **Fifth Circuit**

### **United States v. Molina-Isidoro, 884 F.3d 287 (5th Cir. TX 2018)**

Molina attempted to enter the United States at a border crossing in El Paso, Texas. Customs and Border Protection officers detected anomalies while x-raying Molina's suitcase and referred her to a secondary inspection area. When officers searched Molina's suitcase, they found a hidden compartment that contained over four kilograms of methamphetamine.

While questioning Molina, federal agents conducted a manual search of Molina's phone, looking at the Uber and the WhatsApp apps. On WhatsApp, the agents found a conversation between Molina and another person concerning the details of her trip. After the search, the agents kept Molina's phone, but did not conduct a forensic search of it.

The government charged Molina with two drug offenses.

Molina filed a motion to suppress the evidence obtained from the search of her cell phone. Molina argued that the warrantless search of her cell phone, incident to her arrest, was unlawful.

First, the court declined to adopt a general rule concerning how the government's border search authority applies to modern technology, such as cell phones or other electronic devices. Second, the officers lawfully scanned and searched Molina's suitcase, in which the methamphetamine was discovered, during a lawful border search. Third, the agents reasonably relied in good faith on this broad border-search authority to search the apps on Molina's cell phone. Fourth, while the Supreme Court in [Riley v. California](#) held that the traditional search-incident-to-arrest rationale did not apply to cell phones generally, the Court left open the possibility that "other case-specific exceptions may still justify a warrantless search of a particular phone." Consequently, in this case, the court found that "it was reasonable for the agents to continue to rely on the robust body of pre-[Riley](#) case law that allowed warrantless searches of computers and cell phones." Fifth, the court recognized that no post-[Riley](#) decision issued before or after the search in this case has required a warrant for a border search of an electronic device. Finally, only two of the many federal cases addressing border searches of electronic devices have ever required any level of suspicion. In those cases, the court noted that they both required only reasonable suspicion and that was for more intrusive forensic searches.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-50070/17-50070-2018-03-01.pdf?ts=1519950616>

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### **Hernandez v. Mesa, 2018 U.S. App. LEXIS 7161 (unpublished) (5th Cir. TX Mar. 20, 2018)**

A United States Border Patrol Agent, Jesus Mesa, Jr., standing in the United States, shot and killed Sergio Hernandez Guereca, a fifteen-year old Mexican citizen, standing in Mexico. Hernandez's parents (plaintiffs) filed a lawsuit against Agent Mesa under [Bivens](#), alleging that Agent Mesa violated their son's rights under the Fourth and Fifth Amendments. Specifically, the plaintiffs alleged that Agent Mesa violated the Fourth Amendment by using excessive force against Hernandez, and the Fifth Amendment by depriving Hernandez of due process.

The Fifth Circuit Court of Appeals, sitting en banc, without deciding the issue, assumed that the plaintiffs could sue Agent Mesa under [Bivens](#). However, the court then held that the plaintiffs failed to state a claim for a violation of the Fourth Amendment because Hernandez was a Mexican

citizen who had no “significant voluntary connection to the United States” and “was on Mexican soil at the time he was shot.” Consequently, the court dismissed the plaintiff’s Fourth Amendment excessive force claim.

The court further held that Agent Mesa was entitled to qualified immunity on the plaintiffs’ Fifth Amendment due process claim. Again, the court did not decide whether the plaintiffs could sue Agent Mesa under Bivens. Instead, the court granted Agent Mesa qualified immunity, finding that at the time of the shooting it was not clearly established that shooting across the United States border into Mexico and injuring someone with no significant connection to the United States was unlawful.

Significantly, the Fifth Circuit Court of Appeals dismissed the lawsuit without deciding whether the plaintiffs had stated a valid constitutional claim under the Fourth or Fifth Amendments and whether they could sue Agent Mesa under Bivens. Hernandez appealed to the Supreme Court.

The Supreme Court vacated the Fifth Circuit Court of Appeal’s judgment and remanded the case on June 26, 2017. In part, the Court found that the Fifth Circuit should determine whether the plaintiffs have the right to sue Agent Mesa for the alleged Fourth and Fifth Amendment violations under Bivens, as no federal statute authorizes an action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. To determine this issue, the Court directed the Fifth Circuit Court of Appeals to apply the facts of the case to the two-prong test the Court outlined in Ziglar v. Abbasi, decided on June 19, 2017. In Abbasi, the Court noted that it does not favor judicially implied causes of action, such as Bivens, because under the separation of powers principle, Congress is in a better position to create express causes of action. Going forward, the Court commented that lower courts should determine if a case “is different in a meaningful way” from prior Bivens cases and if any “special factors” are present that would preclude extending Bivens.

On remand, the Fifth Circuit Court of Appeals dismissed the lawsuit against Mesa. First, the court held that this was not a typical excessive force case against a federal law enforcement officer. The court found that the transnational aspect of the facts presented a meaningful difference that would present a “new context” for a Bivens claim. Because Hernandez was a Mexican citizen with no ties to the United States, and his death occurred on Mexican soil, the existence of any Constitutional rights he might have had raises novel and disputed issues. In addition, the court recognized that there has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil.

Although the “newness” of this “new context,” by itself, warranted the dismissal of Hernandez’s claim, the court further added that several “special factors” existed that precluded the court from extending Bivens in this area. The court found that judicially creating a cause of action in this transnational context would increase the likelihood that Border Patrol agents would “hesitate in making split second decisions.” The court also noted that extending Bivens in this context risked interference with foreign affairs and diplomacy in general. Finally, the court noted that Congress’ failure to provide causes of action in other related legislation was intentional and represented Congress’ refusal to create private rights of action against federal officials for injuries to foreign citizens on foreign soil. The court concluded by stating that it “is not credible that Congress would favor judicial invention of those rights.”

For the court’s opinion: <http://www.ca5.uscourts.gov/opinions/pub/12/12-50217-CV1.pdf>

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**United States v. Mendez, 2018 U.S. App. LEXIS 7498 (5th Cir. TX Mar. 23, 2018)**

Police officers obtained a no-knock warrant to search Mendez's house for drugs. Mendez was a known gang member with an extensive criminal history, who the officers considered armed, dangerous, and unstable. Unable to secure a SWAT team to assist in the execution of the warrant, officers decided to surveil Mendez's house and execute the warrant after he left.

After Mendez and his girlfriend left the house, officers entered the house and began to search it. In the meantime, an officer in a marked police car was directed to conduct a traffic stop on Mendez. The officer stopped Mendez less than one minute after he left his house, approximately a half-mile away. During the stop, an officer searched Mendez's car and found a loaded revolver in a purse located on the front, passenger-side floorboard. The officer drove Mendez back to his house after the other officers secured it.

While searching Mendez's house, officers discovered loose ammunition and an empty Glock pistol case. After completing the search, the officers arrested Mendez for being a felon in possession of ammunition and transported him to the police station. An officer advised Mendez of his Miranda rights, which he waived. Mendez claimed ownership of the revolver discovered in the purse and told officers where to find a Glock pistol and some ammunition in his house. Officers returned to Mendez's house and found the Glock pistol and ammunition.

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

Mendez filed a motion to suppress the revolver, his statements to the officers, and the Glock pistol and ammunition found during the second search. The district court held that the initial stop of Mendez nearly a half-mile from his home was unlawful under Bailey v. United States and suppressed the revolver. However, the district court found that Mendez's lawful arrest for being a felon in possession of ammunition was attenuated from his initial unlawful detention; therefore, Mendez's subsequent statements to the officers at the police station and the evidence discovered during the second search of his house was admissible. Mendez appealed to the Fifth Circuit Court of Appeals.

First, the court held that Mendez's post-Miranda statements were voluntary. The court found that there was no evidence of physical coercion during the 90-minute interview. In addition, Mendez was handcuffed in the front rather than from behind, he was allowed to take breaks, and was offered water.

Next, the court held that Mendez's post-Miranda statements were sufficiently attenuated from the initial traffic stop and search of his car.

When applying the attenuation doctrine, the court evaluates the connection between an officer's unlawful conduct and the subsequent discovery of evidence. Factors a court will consider to determine whether challenged custodial statements are the fruit of an unlawful arrest include:

1. Whether the suspect was provided Miranda warnings,
2. How much time elapsed between the unlawful arrest and the discovery of the evidence,
3. Whether any intervening circumstances were present, and
4. The purpose and flagrancy of the officer's misconduct.

In this case the court held that the first factor favored the government, as Mendez was provided Miranda warnings, which he waived. The court found that the second factor favored Mendez, as



only a few hours elapsed between the traffic stop and Mendez's statements to the officers. The court held that the third factor favored the government, as Mendez's lawful arrest for being a felon in possession of ammunition was a critical intervening event between the unlawful stop and his subsequent statements. Finally, the court held that the unlawful stop was not purposeful and flagrant, but instead motivated by legitimate safety concerns. The officers had planned to enter Mendez's house with a SWAT team while Mendez was there. When that plan failed, the officers decided it would be safest to wait for Mendez to leave, because they knew that Mendez was armed, dangerous, and unstable and the officers stopped him as soon as they could after he left his house.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/16-41057/16-41057-2018-03-23.pdf?ts=1522072815>

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**United States v. Perales, 2018 U.S. App. LEXIS 8112 (5th Cir. TX Mar. 30, 2018)**

A police officer saw a pickup truck operating with a non-functioning brake light. A computer check of the vehicle's license plate indicated the truck might not be insured. The officer conducted a traffic stop and asked the driver, Perales, for his identification and proof of insurance. Perales gave the officer his identification, but he could not readily locate his insurance card. Eventually, Perales looked in the glove compartment, which was empty except for the insurance documents. The officer noticed the insurance policy had been purchased the day before and that it was only valid for thirty days. Based on his experience, the officer knew that it was common for drug traffickers to be unfamiliar with the location of insurance documents and for the interior of their vehicles to lack signs of personalization. In addition, the officer knew it was common for drug traffickers to get a 30-day liability insurance policy so that if the vehicle was seized carrying contraband, the trafficking organization would not lose money from having purchased a longer policy.

After receiving Perales' identification and insurance paperwork, the officer asked Perales to exit his truck and accompany him to his patrol car. The officer had Perales sit in the front passenger seat of the patrol car while he began his computer checks. During this time, the officer asked Perales several questions about his ownership of the truck and his travel plans. At some point, the officer became suspicious because Perales gave him inconsistent or deceptive answers to his questions. While the officer waited for the computer checks to come back, he asked Perales for consent to search his pickup truck. Perales consented. At the time of the request, the officer had not yet returned Perales' driver's license or issued him a citation. Perales remained seated in the unlocked patrol car while the officer and a second officer, who had been riding in the back seat of the patrol car during the stop, searched the pickup truck. The officers found almost three kilograms of cocaine concealed in the engine compartment of the vehicle.

The government charged Perales with drug-related offenses.

Perales filed a motion to suppress the cocaine discovered in his truck, claiming that he did not voluntarily consent to the search of his vehicle. Specifically, Perales argued that the officer's failure to return his identification documents prior to asking for consent to search constituted coercion that rendered his consent involuntary.

The court disagreed. A police officer's failure to return identification documents prior to requesting consent to search does not automatically render a person's consent involuntary. Instead, an officer's retention of identification documents is one factor a court considers when

determining whether an officer used coercion to obtain consent. In this case, the officer's initial stop was justified and during the stop the officer was allowed to examine Perales' driver's license and registration and to conduct computer checks. Approximately ten minutes elapsed between the officer's initial encounter with Perales and when he asked Perales for consent to search his pickup truck. Although it was not clear at what point the computer checks were completed, it was clear that they were not completed when the officer asked Perales for consent to search. The court held there was nothing improper about the officer asking Perales for consent to search before the computer checks were completed. In addition, the court added that Perales did not argue the ten minutes that elapsed before the officer asked for consent to search was unreasonable.

The court further held that the officer's interaction with Perales was cordial and he did not use verbal threats or intimidation to obtain Perales' consent. In addition, the court found that placing Perales in the front seat of his patrol car while he ran the computer checks did not constitute coercion.

Finally, the court held that the second officer's presence did not create a coercive environment as he did not exit the patrol car during the traffic stop or otherwise interact with Perales before searching his vehicle.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-40005/17-40005-2018-03-30.pdf?ts=1522431081>

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## **Sixth Circuit**

### **United States v. Tagg, 2018 U.S. App. LEXIS 7603 (6th Cir. MI Mar. 27, 2018)**

Police officers obtained a warrant to search Tagg's residence for child pornography. In the affidavit in support of the warrant, officers explained how they identified the IP address that accessed a child pornography website and they connected the IP address to Tagg's residence. The officers also outlined Tagg's internet browsing history, which Tagg did not dispute. Specifically, the affidavit stated that: (1) Tagg spend around five hours logged into Playpen, a known child pornography website (which also contained legal child erotica) under the pseudonym "derpderk." (2) Tagg opened the website's "index" and browsed them for topics of interest to him. (3) Tagg clicked on the "Pre-Teen Videos" entry in the index. (4) After browsing that topic, Tagg viewed a collection of pages under the heading "Girls HC"-which, in the pornography world, means explicit, penetrative sexual acts. (5) Tagg then accessed a message board "video collection clow85." (6) On other occasions, Tagg accessed pages with sexually suggestive titles involving children. The affidavit, did not however, state whether Tagg actually viewed or downloaded any illegal files.

The magistrate judge approved the warrant, which indicated that the officers had established probable cause that Tagg violated 18 U.S.C. § 2252(a)(5) (access of a website with the intent to view child pornography) and that evidence of the crime would be found at Tagg's residence. The officers searched Tagg's home and found over 20,000 files of child pornography on his personal computers.

The government charged Tagg with receiving and possessing child pornography.

Tagg filed a motion to suppress the evidence seized by the government. Tagg argued that the search warrant was defective because the affidavit did not allege that he viewed child pornography. In addition, Tagg claimed that the use of a computer to allegedly commit a crime did not automatically justify a search of his home.

The district court held that the warrant to search Tagg's home was invalid. Specifically, the court held that the officers did not establish probable cause to search Tagg's home for child pornography because the affidavit in support of the warrant did not state that Tagg actually clicked on or viewed any files containing child pornography. The court further held that the good-faith exception did not apply because the officers acted recklessly and because no reasonable officer could have relied on the warrant. The government appealed.

The Sixth Circuit Court of Appeals reversed. The court reminded the district court that in [District of Columbia v. Wesby](#), the Supreme Court held that "probable cause deals with probabilities and depends on the totality of the circumstances," and that probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." The court also added that in [Wesby](#), the Supreme Court found that "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." Finally, the court also reminded the district court that it has repeatedly held that "visiting or subscribing to a website containing child pornography creates a reasonable inference that the user has stored child pornography on their computer." The court added the fact that a website contains both legal and illegal material, while relevant, does not automatically negate probable cause. Against this backdrop, the court concluded that the facts articulated in the officers' affidavit established probable cause to believe that Tagg had accessed Playpen with the intent to view child pornography.

Next, the court also stated that it has previously addressed the Fourth Amendment's nexus requirement as applied in the digital age. Probable cause to believe a person committed a crime does not justify a search of his or her residence unless some independent evidence exists that links the residence to the crime. However, the court has held that a nexus exists when law enforcement connects the IP address used to access a website to the physical location identified by the warrant. In this case, the officers explained how they linked the IP address used to access Playpen to the residence listed on the warrant. The court concluded that this was enough to establish a nexus between child pornography and Tagg's residence.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/17-1777/17-1777-2018-03-27.pdf?ts=1522168219>

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## **Seventh Circuit**

### **United States v. Rodriguez-Escalera, 884 F.3d 661 (7th Cir. IL 2018)**

A state trooper patrolling on Interstate 70 saw a vehicle abruptly switch lanes in front of a truck without using a turn signal and conducted a traffic stop. As the trooper approached the vehicle, he smelled the scent of air fresheners and noticed several air vent clip-in air fresheners, which he had been trained to associate with drug traffickers. The driver, Moran, gave the trooper her driver's license and accompanied him to his patrol car. The trooper had Moran sit in his patrol car while he went back to ask Rodriguez, the passenger, for his identification. As Rodriguez retrieved his information, the trooper asked him where he and Moran were going. Rodriguez told the trooper they were traveling to Pennsylvania.

The trooper went back to his patrol car and spoke to Moran, who told him that she and Rodriguez were driving from Los Angeles to New York for vacation. The officer knew that Los Angeles was a drug-distribution point. Within eleven minutes, the trooper had all of the information he needed to issue traffic citations to Moran.

Having become suspicious of the couple's travel plans, the trooper decided to have a drug-detection dog sniff Moran's vehicle. However, the officer could see from his in-vehicle computer that his department's K-9 unit was occupied with another traffic stop. Before he started writing the citations, the trooper asked Moran for more details about the couple's trip. When the trooper asked Moran about the conflicting travel stories, Moran told the trooper that she told Rodriguez they were going to Pennsylvania. Moran added that she wanted the visit to New York City to be a surprise. The trooper eventually heard on the radio that the K-9 unit was available and on the way to his location. As soon as the K-9 officer arrived, the trooper handed Moran her citations, driver's license, and other documents. At this point, thirty-three minutes had elapsed since the trooper stopped Moran.

Although the drug-dog did not alert to the presence of drugs, the trooper remained suspicious. He returned to his patrol car, where Moran was still detained, and resumed questioning her. Moran denied that she had anything illegal in her car and eventually consented to a search.

The trooper and the K-9 officer searched Moran's car and found over seven pounds of methamphetamine and \$28,000 cash inside two pieces of luggage. Rodriguez claimed ownership of the drugs and Moran claimed ownership of the cash.

The government charged Rodriguez and Moran with possession of methamphetamine with intent to distribute. Both filed motions to suppress the drug evidence seized from Moran's vehicle, claiming that the trooper detained them beyond the time necessary to complete the traffic stop.

After considering the trooper's testimony and the video and audio recordings of the traffic stop, the district court refused to credit the trooper's explanations for his delay. Instead, the court determined that the trooper intentionally prolonged the stop to give the K-9-unit time to arrive. As a result, the district court held that the trooper unreasonably extended the duration of the stop and suppressed the evidence seized from Moran's vehicle as fruit of an unlawful seizure.

The government appealed, arguing that the trooper established reasonable suspicion that justified extending the duration of the stop.

The Seventh Circuit Court of Appeals disagreed. When the trooper requested the dog sniff, he knew that the couple was coming from Los Angeles, that Moran had a few air fresheners in the car, that the couple did not have concrete travel arrangements, and that Moran claimed she was surprising Rodriguez with a trip to New York. The court found that the presence of air fresheners in Moran's car and the fact that she was from the Los Angeles area could apply to a very large category of innocent travelers. In addition, the court noted that Moran and Rodriguez did not act suspiciously nervous and that Moran explained the initial discrepancy in the couple's travel stories. While the court recognized that an officer does not need to rule out a suspect's explanation for conduct that appears to be suspicious at first, a court may consider how facts later obtained confirm or dispel that initial suspicion. Finally, the court added that no criminal history, tips, or surveillance supported the trooper's suspicions. Based on these facts, the court concluded that the trooper did not establish reasonable suspicion of criminal activity during the stop. Consequently, the court held that it was unreasonable to detain Moran and Rodriguez beyond the time needed to

complete the original purpose of the traffic stop because the only on-duty K-9 was busy with another stop.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/17-2334/17-2334-2018-03-07.pdf?ts=1520449228>

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**United States v. Leonard, 884 F.3d 730 (7th Cir. IL 2018)**

A confidential source told police officers that Courtney Watson was selling illegal drugs from the home she shared with her husband, Stephen Leonard. Based on the tip, officers on two occasions, one week apart searched sealed trash bags left in a public alley outside the home. Both times the trash bags contained indicia of residency and tested positive for cannabis. Two days after the second positive test, officers obtained a warrant to search Watson's home.

Police executed the warrant the next day, but the supervising officer who had a copy of the warrant had to leave the scene before Watson arrived home to meet with the officers. When Watson arrived home and asked to see the warrant, one of the remaining officers went back to the police station to get another copy. However, the copy of the warrant shown to Watson was not the correct one. Nonetheless, the officers searched Watson's home and, in addition to drugs, found a handgun. Leonard admitted he owned the gun.

The government charged Leonard with possession of a firearm by a convicted felon. Leonard filed a motion to suppress the gun. First, Leonard argued that the search was invalid because the officers did not present the proper warrant to Watson before the search.

The court disagreed. The Seventh Circuit has held that nothing in the Fourth Amendment requires the search warrant be shown to the person whose premises is being searched. The court reasoned that if warrant presentation is not required at all, it follows that, as long as a valid warrant exists, inadvertent presentation of the wrong warrant will not invalidate the search.

Second, Leonard argued that the search warrant was not supported by probable cause.

Again, the court disagreed. As an initial matter, the court found that Watson and Leonard had no reasonable expectation of privacy in the trash placed in the public alley for collection. Next, the court concluded that two trash pulls taken a week apart, both testing positive for cannabis, and containing indicia of residency, were sufficient by themselves to establish probable cause for a search warrant. Because of this finding, the court did not determine if the information from the confidential source was credible or if Watson's criminal history was relevant to establish probable cause.

Finally, Leonard filed a motion to compel the government to disclose the identity of the confidential source.

The court held that the government was not required to disclose the identity of the confidential informant because the informant's identity was not essential to the "fair determination" of Leonard's case.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca7/17-1924/17-1924-2018-03-08.pdf?ts=1520544629>

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## **Eighth Circuit**

### **United States v. Hampton, 2018 U.S. App. LEXIS 7092 (7th Cir. IL Mar. 21, 2018)**

Officers arrested Hampton for a variety of crimes and transported him to the police station. As the officers were about to interview him, Hampton objected to the interview being videotaped and said, “I haven’t even gotten a chance to get a lawyer or anything.” One of the officers turned off the video recorder and then explained to Hampton why they wanted to record the Miranda process and the interview. In addition, the officers discussed between themselves whether Hampton had invoked his right to counsel. After the officers decided that he had not, they advised Hampton of his Miranda rights. Hampton waived his rights, agreed to have the interview recorded, and confessed to several crimes.

Before trial, Hampton filed a motion to suppress his confession. Hampton claimed that the district court should have suppressed his confession because he invoked his right to counsel when he said, “I haven’t even gotten a chance to get a lawyer or anything.”

During a custodial interrogation, if a suspect invokes his right to counsel, the officers must stop the interrogation. To invoke the right to counsel, the suspect must make a clear and unambiguous statement. Specifically, a suspect must articulate his desire to have counsel present sufficiently clearly so that a reasonable officer would understand the statement to be a request for an attorney.

In this case, the court held that Hampton’s statement did not clearly show a present desire to consult with counsel. The Seventh Circuit has found such intent only when the suspect uses specific language, which constitutes more than an observation. The court found that Hampton’s statement was not specific or action-oriented, but instead only an observation that he had not gotten a lawyer. The court added that a suspect’s potential desire to consult with legal counsel is not invocation of the right to counsel.

The court also noted that after Hampton’s ambiguous statement about not having talked to a lawyer, the officers did not immediately resume questioning, but instead they took extra precautions. The officers explained to Hampton his rights and tried to clarify his intent, which the Supreme Court has identified as “good police practice.”

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca7/16-4094/16-4094-2018-03-21.pdf?ts=1521666027>

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## **Ninth Circuit**

### **Thompson v. Copeland, 2018 U.S. App. LEXIS 6191 (9th Cir. WA Mar. 13, 2018)**

In December 2011, Deputy Copeland stopped Lawrence Thompson for committing several traffic violations. During the stop, Copeland learned that Thompson had a suspended license, that Thompson was a convicted felon, and that Thompson’s most recent felony conviction was for possessing a firearm. Copeland decided to arrest Thompson for driving with a suspended license and to impound Thompson’s car.

Copeland had Thompson exit his car and frisked him for weapons. Finding none, Copeland called for back-up and had Thompson sit on the bumper of Copeland’s patrol car, approximately 10-15

feet away. While conducting an inventory search of Thompson's car, Copeland saw a loaded revolver sitting in an open garbage bag on the rear passenger-side floorboard. After seeing the gun, Copeland signaled to the back-up officer who was watching over Thompson and then drew his gun. Thompson claimed that Copeland pointed his gun at Thompson's head, demanded Thompson surrender, and threatened to kill him if he did not. Copeland directed Thompson to get on the ground, facedown, so that he could be handcuffed. Thompson complied and was handcuffed without incident. Copeland arrested Thompson for being a felon in possession of a firearm.

Thompson sued Deputy Copeland and the county under 42 U.S.C. § 1983 claiming that Copeland violated his Fourth Amendment rights. Specifically, Thompson alleged that Copeland used excessive force in pointing his gun at Thompson's head and threatening to kill him. Deputy Copeland countered by arguing that he was entitled to summary judgment based on qualified immunity.

First, accepting Thompson's version of the incident as it was required to do, the court concluded that Deputy Copeland's use of force in arresting Thompson was not objectively reasonable. The court found that Thompson complied with all of the officer's directions during the stop. The court also found that Thompson would have had to travel 10-15 feet, past the back-up officer, to access the gun in his car. Finally, the court noted that Thompson was not armed, as Copeland had already frisked him for weapons and found none. While appreciating the concern for officer safety, the court held that where an officer has an unarmed felony suspect under control, where the officer easily could have handcuffed the suspect, and where the suspect is not in close proximity to an accessible weapon, pointing a gun at the suspect's head constituted excessive force.

Even though the court determined that Deputy Copeland used excessive force, the court held that he was still entitled to qualified immunity. The court found that Thompson's right not to have a gun pointed at him under the circumstances here was not clearly established at the time of the incident. Specifically, the fact that: (1) Copeland was conducting a felony arrest at night, (2) Thompson was not handcuffed, (3) Thompson stood six feet tall and weighed two hundred and sixty-five pounds, which was taller and heavier than Copeland, and (4) Thompson had a prior felony conviction for unlawfully possessing a firearm, distinguished this case from prior Ninth Circuit decisions. Consequently, the court concluded that a reasonable officer in Deputy Copeland's position would not have known that he was violating the constitution by pointing a gun at Thompson. The court concluded by stating that "going forward, however, the law is clearly established in this scenario."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/16-35301/16-35301-2018-03-13.pdf?ts=1520960514>

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## **Eleventh Circuit**

### **United States v. Vergara, 2018 U.S. App. LEXIS 6413 (11th Cir. FL March 15, 2018)**

Vergara, a United States citizen, arrived in Tampa, Florida on a cruise ship from a vacation in Cozumel, Mexico. Before his return, U.S. Customs and Border Protection (CBP) had identified Vergara based on his prior conviction for possession of child pornography, placing him on a list of the day's "lookouts." Individuals on the list are subjected to secondary screening at the border, which involves additional questioning and screening.

When Vergara arrived, a CBP officer escorted him to the secondary inspection area. In Vergara's luggage the officer found two cell phones, a Samsung phone and an iPhone. Vergara had a third cell phone, an LG phone on his person. When the officer found the Samsung phone, he asked Vergara to turn the phone on and then looked through the phone for about five minutes. After the officer found two child pornography videos, he contacted a special agent from the Department of Homeland Security.

After viewing the video and interviewing Vergara, the agent decided to have all three phones forensically examined. The forensic examination of the Samsung and LG phones conducted that day revealed more than 100 images and videos of child pornography.

The government charged Vergara with child-pornography related offenses.

Vergara filed a motion to suppress the evidence discovered on his cell phones. Vergara argued that [Riley v. California](#), decided by the Supreme Court in 2014, required the agent to obtain a warrant before conducting forensic searches of his cell phones.

In [Riley](#), the Supreme Court held the search incident to arrest exception did not apply to an arrestee's cell phone. However, the Court explained that other case-specific exceptions might still justify a warrantless search of a cell phone.

Searches at the border, from before the adoption of the Fourth Amendment, have been considered reasonable solely because the person or item in question had entered into the United States from outside. In addition, "the Supreme Court has consistently held that border searches never require probable cause or a warrant. Courts only require officers establish reasonable suspicion of criminal activity at the border for "highly intrusive searches of a person's body such as a strip search or an x-ray examination." In this case, the court held that the warrantless forensic searches of Vergara's phones required neither a warrant nor probable cause and the [Riley](#) decision did not change this rule.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/16-15059/16-15059-2018-03-15.pdf?ts=1521138712>

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### **United States v. Johnson, 2018 U.S. App. LEXIS 7159 (11th Cir. FL March 22, 2018)**

At approximately 4:00 a.m., police received a 911 call about a possible burglary in progress at a multi-family duplex located in a high-crime area. The caller reported that a person was breaking into a neighbor's house through a back window. The caller described the person as a black male wearing a white shirt.

Within five minutes of receiving the call, officers arrived and saw Johnson coming from the back of the duplex. Johnson, a black male, was wearing a white shirt and the officers did not see anyone else in the area. The officers drew their firearms and handcuffed Johnson. One of the officers told Johnson that he was being detained and then frisked him. The officer felt a piece of material that felt like nylon as well as a hard, oval-shaped object that the officer immediately recognized to be ammunition. The officer reached into Johnson's front pocket and removed a black nylon pistol holster and one round of .380 caliber ammunition. Within 15 to 20 minutes after seizing the ammunition from Johnson's pocket, officers found two pistols on the ground near the area where the officers first saw Johnson. After the officers discovered the firearms had been reported



stolen, they transported Johnson to the police station. Johnson told the officers that he and his brother had purchased the firearms “off the street.”

The government charged Johnson with being a felon in possession of a firearm and ammunition.

Johnson filed a motion to suppress the evidence seized from his pocket. The district court denied the motion and Johnson appealed.

Although Johnson conceded that the officers had reasonable suspicion to conduct a Terry stop, Johnson argued that the officers were not justified in conducting a Terry frisk.

The court disagreed. Once an officer has stopped an individual, he may conduct a frisk for weapons if the officer “reasonably believes that his safety, or the safety of others, is threatened.” The court added that in determining whether a frisk is justified, Terry does not require “definitive evidence of a weapon or absolute certainty that an individual is armed.”

In this case, the officers received a report of a suspected burglary around 4:00 a.m. in a high-crime area by a black male wearing a white shirt. In addition, Johnson fit the description of the suspect and was the only person in the area. Based on these facts, the court concluded that the officers were justified in conducting a Terry frisk after detaining Johnson.

Next, Johnson argued that the officer exceeded the scope of a Terry frisk by reaching into his pocket and removing the holster and ammunition.

The purpose of a Terry frisk is not to discover evidence of a crime but to ensure officer safety during an investigation. The Seventh Circuit has repeatedly affirmed that a Terry frisk may continue when an officer feels a concealed object that he reasonably believes may be a weapon. The court emphasized that the pat down and feeling of an object in a suspect’s pocket is limited to determining if the object is a weapon. However, the court also recognized that during a lawful frisk for weapons, an officer may seize an object deemed to be contraband if the incriminating nature of the object is immediately apparent to the officer.

In this case, the government conceded that the round of ammunition, by itself, did not constitute a weapon. The government also conceded that when the officer felt the round of ammunition in Johnson’s pocket, he did not believe it was contraband, as the officer did not know Johnson was a felon at the time.

Based on these facts, the court held that a single round of ammunition, without facts supporting the presence, or reasonable expectation of the presence, of a firearm, was not sufficient to justify the seizure of the bullet and the holster from Johnson’s pocket. As a result, the court concluded the ammunition and holster should have been suppressed by the district court.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca11/16-15690/16-15690-2018-03-22.pdf?ts=1521736240>

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