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

September 2016

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. 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 – September 2016

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FLETC Informer Webinar Series

1. Protective Sweeps

2-hour webinar presented by Bruce Barnard, FLETC Legal Division. This webinar will explore in-depth the warrantless "protective sweep" doctrine as it has evolved from *Maryland v. Buie*. We will discuss the rule generally, and then look at differences in the application of the doctrine in different situations by reviewing cases from the various circuits.

Date and Time: Wednesday September 28, 2016 2:30 p.m. EDT

To join this webinar: https://share.dhs.gov/informer

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2. Law Enforcement Legal Refresher Training

1-hour webinar presented by Bruce Barnard, FLETC Legal Division. This webinar focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated legal refresher training requirements.

Date and Time: Thursday September 29, 2016 11:30 a.m. EDT

To join this webinar: https://share.dhs.gov/informer

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

1 ½ - hour webinar presented by Bob Cauthen, Assistant Chief, FLETC Legal Division. This webinar will examine the Fifth Amendment Self-Incrimination Clause and three United States Supreme Court decisions that form the underpinnings of the legal analysis concerning documents and data on electronic devices and then cover federal case law analyzing whether, and if so how, the government can compel a suspect or defendant to disclose a password or encryption code or produce an unencrypted version of data already lawfully in the government's possession.

Date and Time: Tuesday, October 4, 2016 2:00 p.m. EDT

To join this webinar: https://share.dhs.gov/informer

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Join us every Wednesday from 11:45 a.m to 12:15 p.m. (EDT) for:

Bruce's Brownbag Webinar!

Each week, Bruce Barnard selects a very recent Federal case that is "hot off the press" and discusses the impact and possible lessons learned for law enforcement officers. This webinar series is intentionally offered over the lunch break, so pack your lunch on Wednesday, eat at your desk, and join us for an interesting discussion on cases involving the legal aspects of law enforcement. **The site is always running and you can download slides and recordings of previous webinars in the archives on the site.** We hope to see you every Wednesday!

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FLETC Informer Webinar Series

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8. Training certificates will be provided at the conclusion of each webinar.

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Young, 2016 U.S. App. LEXIS 15275 (1st Cir. Me. Aug. 19, 2016)

Officers obtained an arrest warrant for Young. The officers went to three different residences, but did not locate Young. The officers then obtained information from an informant who stated if Young was not at any of the three residences already checked, then "he had to be back with his former girlfriend." The officers determined Young's former girlfriend was named "Jen," who lived in an apartment located on Walnut Street.

The officers went to the apartment building on Walnut Street and saw a car parked outside that they knew belonged to Jennifer Coleman. The officers knew Coleman previously lived with Young at a different location. Two officers entered the building, went to Coleman's apartment, and knocked on the door. When Coleman's daughter opened the door, the officers asked to speak to her mother. When Coleman got to the door, the officers had, without consent, stepped inside the apartment. After Coleman told the officers that Young was present, the officers walked past Coleman, without her consent, and entered a bedroom where they saw Young. The officers arrested Young and eventually seized cocaine and a firearm located in the bedroom.

Young argued the officers' initial entry into Coleman's apartment violated the *Fourth Amendment* because the officers did not have a reasonable belief that he resided at Coleman's apartment and that he was present when they entered it.

The court agreed. In *Payton v. New York* the United States Supreme Court held that police officers attempting to execute an arrest warrant have limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is inside the dwelling. In this case, the court concluded the officers did not establish a reasonable belief that Young resided at Coleman's apartment. The information obtained from the informant that Young "had to be back with his former girlfriend" was insufficient to support a reasonable suspicion that Young was living with Coleman, as it was not based on any actual, present knowledge of Young's whereabouts.

Even if the officers had a reasonable belief that Young resided at Coleman's apartment, the court found there was nothing to indicate that the officers reasonably believed Young was present when they entered the apartment. The presence of Coleman's car in front of the apartment building indicated that Coleman might be inside the apartment, not Young. In addition, the officers did nothing to confirm Young's presence such as conducting surveillance or placing a telephone call to the apartment. As a result, the court held the evidence seized from Coleman's apartment should have been suppressed.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-1495/15-1495-2016-08-19.pdf?ts=1471636806

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Second Circuit

United States v. Caraballo, 2016 U.S. App. LEXIS 13870 (2d Cir. Vt. Aug. 1, 2016)

Officers arrested Melissa Barratt for distribution of drugs. At the time, Barratt told the arresting officers she was extremely afraid of Caraballo, with whom she worked dealing drugs. Barratt told the officers Caraballo would "kill her" if he knew she cooperated with the officers and that Caraballo was a violent person with access to firearms. Even though the officers attempted to have Barratt cooperate with them in their ongoing investigation against Caraballo, she refused.

Two months later, officers discovered Barratt's deceased body in a wooded area with a single gunshot wound to the back of her head. The officers suspected Caraballo in Barratt's homicide. In addition, the officers were concerned for the safety of undercover officers and confidential informants who had infiltrated Caraballo's organization within the last two months. Consequently, the officers believed it was necessary to locate Caraballo immediately.

The officers knew Caraballo's cell phone numbers and considered applying for a warrant to have Sprint, the cell phone provider, "ping" or track Caraballo's location through the global positioning system (GPS) of his two phones. While the officers believed they could obtain a warrant within a matter of hours, the officers knew, based on experience, that it could take Sprint several days or weeks to provide the GPS information requested in the warrant. Believing an emergency existed that involved a serious threat of death or serious bodily injury, the officers consulted with the county's state attorney who agreed. As a result, the officers requested Sprint ping Caraballo's cell phones without first obtaining a warrant.

Sprint pinged Caraballo's phones and relayed location information obtained from one of the phones to the officers. Over the next ninety minutes, Sprint pinged Caraballo's phone several times, allowing the officers to locate Caraballo as he drove in his car. After locating Caraballo, the officers conducted a brief visual surveillance before they initiated a traffic stop and arrested him.

Caraballo filed a motion to suppress evidence recovered following his arrest. Caraballo argued that the pinging of his cell phone constituted a warrantless *Fourth Amendment* search.

Without deciding whether the warrantless pinging of Caraballo's cell phone constituted a *Fourth Amendment* search, the court concluded that exigent circumstances justified the officers in pinging Caraballo's cell phone to determine his location.

First, when officers arrested Barratt, she told the officers she was afraid of Caraballo and feared that he would kill her if she cooperated with the officers. Barratt also told the officers Caraballo had violent tendencies and access to firearms. Consequently, when Barratt was found dead with a gunshot wound to the head, it was reasonable for the officers to link Caraballo to Barratt's death. Second, Barratt's death suggested that the officers' investigation of Caraballo's drug operation had been discovered, and the safety of undercover officers and confidential informants could be in jeopardy. Third, the officers did not have a reasonable opportunity to obtain a warrant for the search. Finally, the degree of intrusion into Caraballo's privacy was very slight. The pinging of Caraballo's cell phone occurred for less than two-hours, and when the officers located and identified Caraballo, the pinging immediately stopped.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/12-3839/12-3839-2016-08-01.pdf?ts=1470061805

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United States v. Cunningham, 2016 U.S. App. LEXIS 16086 (2d Cir. N.Y. Aug. 31, 2016)

Two officers in an unmarked police car conducted a traffic stop after they saw a car illegally run a stop sign. As the car pulled over, the officers saw the driver's arm move up and down in the middle console area. When the officer approached the car, he saw the driver, Cunningham, holding a cell phone in his right hand to the side of his head. The officer ordered Cunningham to put down the phone, but Cunningham did not immediately comply. The officer then asked Cunningham to produce his driver's license and registration, and again, Cunningham failed to comply immediately. When Cunningham fumbled around the center console, then reached for the glove compartment, the officer ordered Cunningham out of the car. Cunningham immediately exited the car, and the officer asked him if he had any weapons. Cunningham told the officer he had a knife in his pocket. The officer frisked Cunningham and seized a legal pocketknife from Cunningham's pocket.

In the meantime, as the other officer approached the car, he saw Cunningham pick up the cell phone from the console area. However, the officer noticed that the passenger, Scott, was sitting in an unnatural position that he felt was designed to obstruct the officer's view into the car. The officer then ordered Scott out of the car, frisked him, but did not discover any weapons. The first officer then returned to Cunningham's car, searched the passenger compartment, and found a firearm. The officers arrested Cunningham and Scott.

Cunningham filed a motion to suppress the firearm, arguing the officer's warrantless search of his car violated the *Fourth Amendment*.

The court agreed. Police officers are allowed to search the passenger compartment of an automobile, limited to those areas where a weapon might be located, if the officers have reasonable suspicion to believe the suspect is dangerous and might gain immediate control of a weapon. Here, the court found it was not reasonable for the officers to believe that Cunningham and Scott posed an immediate danger to them. First, although the officers saw Cunningham reach toward the center console area, when they encountered him, they saw that Cunningham was holding a cell phone. Second, Cunningham's failure to immediately comply with the officer's initial commands, by itself, did not establish that he or Scott were dangerous. Finally, when asked, Cunningham admitted he had a knife in his pocket, and the officer retrieved a lawful folding pocketknife from him. The court concluded the totality of the circumstances did not support a finding that Cunningham and Scott were dangerous; therefore, the warrantless search of their car violated the *Fourth Amendment*.

Click for the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/14-4425/14-4425-2016-08-31.pdf?ts=1472653811

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Sixth Circuit

United States v. Doxey, 2016 U.S. App. LEXIS 15184 (6th Cir. Mich. August 18, 2016)

Doxey was on parole for a drug offense. As a parolee in Michigan, Doxey was subject to a warrantless search if an officer had reasonable suspicion to believe that Doxey was violating the terms and conditions of his parole.

After receiving a tip from a confidential informant (CI) that Doxey was dealing heroin, officers conducted surveillance on him. During this time, officers saw Doxey engage in an apparent hand-to-hand drug transaction from his vehicle. The officers also knew Doxey had a suspended driver's license and could not lawfully drive a vehicle. The officers stopped Doxey and interviewed him. Based on Doxey's behavior during the encounter, the officers suspected Doxey was hiding drugs in his rectum.

The officers transported Doxey to the police station for a search. Doxey voluntarily pulled his pants and underwear down, but became combative when the officers tried to examine him. After the officers restrained Doxey they saw the corner of a clear plastic baggie protruding from Doxey's buttocks. One of the officers then "flicked" the baggie out from in-between Doxey's buttocks. It was later confirmed that the baggie contained eight grams of heroin.

Doxey filed a motion to suppress the heroin, arguing the warrantless invasive search by the officers violated the *Fourth Amendment*.

The court disagreed, holding the officers established reasonable suspicion that Doxey was violating the terms and conditions of his parole; therefore, he was subject to a warrantless search. First, the officers received information from a CI that Doxey was dealing heroin. The officers corroborated that information by conducting surveillance of Doxey, where they saw him engage in an apparent hand-to-hand narcotic transaction with another person. Second, after the transaction, the officers saw Doxey violate the law by driving with a suspended license.

Next, the court held the manner in which the officers conducted the search was reasonable. Even though the officer's flicking the baggie from in-between Doxey's buttocks was an invasion of privacy beyond that caused by a visual search, the court noted the baggie was removed from in-between Doxey's buttocks without any intrusion into his anal cavity, and without any injury, harm or pain to Doxey in a private environment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/14-2600/14-2600-2016-08-18.pdf?ts=1471548637

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D.E. v. Doe, 2016 U.S. App. LEXIS 15670 (6th Cir. Mich. August 25, 2016)

While driving in Michigan, nineteen-year old D.E. took a wrong turn and inadvertently ended up at the international border with Canada. When D.E. told the toll-booth operator of his mistake, the operator directed him to turn around, without crossing the border, and merge into a lane of traffic containing motorists arriving from Canada. The operator gave D.E. a laminated card to present at the Customs and Border Protection (CBP) booth, which indicated that D.E. was being allowed to turn around without entering Canada, and that D.E. was subject to inspection and search by a CBP official. At the primary inspection booth, D.E. presented the laminated card to a CBP officer and was directed to a secondary inspection area. At the secondary inspection area, two

CBP officers searched D.E.'s car and found marijuana and drug paraphernalia. The CBP officers detained D.E. in a jail cell for approximately one-hour before a local police officer arrived to take him into custody.

D.E. filed a lawsuit against several CBP officers, claiming that they violated his *Fourth Amendment* rights by detaining him and searching his car. Specifically, D.E. argued that international travel is required for officers to conduct suspicionless searches at the border; therefore, because he never crossed the border, CBP officers unlawfully searched him and his car.

The court dismissed D.E.'s lawsuit, holding the CBP officers' actions were lawful under the border-search exception to the *Fourth Amendment's* warrant and probable cause requirements. First, the Supreme Court has held that routine searches at the border do not require a warrant or any level of suspicion, regardless of whether the motorist intends to cross the border or has mistakenly arrived at the border. Second, that D.E. subjectively did not intend to cross the border is irrelevant as well. There is no reliable way for the CBP officers to tell the difference between a motorist who has just crossed the border and a "turnaround" motorist who is at the border area by mistake. The court commented that it would be "dangerous and quite stupid" for CBP officers to assume that every traveler who claims to be at the border by mistake, or who presents an easily fabricated laminated card, is telling them the truth.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/15-2128/15-2128-2016-08-25.pdf?ts=1472144638

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Seventh Circuit

United States v. Caira, 2016 U.S. App. LEXIS 15098 (7th Cir. Ill. Aug. 17, 2016)

Over a three-month period, emails were sent from gslabs@hotmail.com to an email address associated with a foreign website that sold chemicals used to make the illegal drug, ecstasy. An agent with the Drug Enforcement Administration (DEA), who had been monitoring the website, sent an administrative subpoena to Microsoft Corporation, the owner of the web-based email service for @hotmail.com email addresses. The subpoena requested, among other things, the internet protocol (IP) address associated with the computer that accessed the gslabs@hotmail.com account. After Microsoft provided the requested information, the DEA learned the IP address associated with the Hotmail account was assigned to Anna Caira, the defendant's wife. The DEA's investigation culminated with Frank Caira being charged with a federal drug violation.

Caira filed a motion to suppress the information obtained from the administrative subpoena, arguing that the DEA's request was a "search" under the *Fourth Amendment*, and that a warrant was required. Specifically, Caria argued that IP addresses reveal information about a computer user's physical location, and people have a reasonable expectation of privacy in their physical location.

The court disagreed. In what has become known as the third-party doctrine, the Supreme Court has held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Here, the court noted that Caira shared his IP address with a third party, Microsoft. Every time Caira logged in to his email account he sent Microsoft his IP address so that Microsoft could send back information to be displayed at Caira's physical location. Because Caira voluntarily shared his IP address with Microsoft, the court reasoned he had no reasonable

expectation of privacy in it. Consequently, the DEA did not conduct a *Fourth Amendment* search when it subpoenaed information from Microsoft that included Caira's IP address.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-1003/14-1003-2016-08-17.pdf?ts=1471453445

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Eighth Circuit

United States v. Zamora-Garcia, 2016 U.S. App. LEXIS 13986 (8th Cir. Ark. Aug. 2, 2016)

An officer stopped Garcia's car after he saw something dragging underneath it. When the officer told Garcia of the dragging part, the officer noticed Garcia was extremely nervous and that Garcia's hands shook when he gave the officer his driver's license. After verifying Garcia's license, the officer asked Garcia for consent to search the car, which Garcia granted. When the officer opened the trunk, he saw the carpet had been glued to the floor. As a former automobile mechanic, the officer knew that car manufacturers generally do not adhere carpets to a vehicle's trunk in this manner. Instead, the officer suspected that the car had been altered to contain a hidden compartment. The officer also saw a large sum of cash in a bag under the luggage in the trunk. The officer then crawled underneath Garcia's car and saw a metal box had been welded to the underbody of the car, spanning the car's entire width. Unable to find a trapdoor to gain entry into this compartment, the officer decided to move the search to police headquarters. Garcia responded, "Okay," and "That's fine." After asking which officer he should follow, as another officer had arrived on scene, Garcia drove his car to headquarters.

Upon arrival at headquarters, the officers continued to search for the compartment's trapdoor. The officers eventually drilled a hole through the floor of the trunk into the hidden compartment. When the officers removed the drill bit, it was covered with green cellophane and a white, crystal-like power. The officers located the trapdoor a short time later, pried it open, and discovered fourteen one-pound cellophane bags of methamphetamine. The government charged Garcia with possession with intent to distribute methamphetamine.

Garcia argued that the officers exceeded the scope of his initial consent when they had him drive his car to police headquarters to continue their search.

The court noted that the district court found the officer requested, rather than demanded, that Garcia allow the officers to conduct a more thorough search at headquarters. When Garcia responded "Okay," and "That's fine," and then asked which officer he should follow, the court concluded that Garcia's consent to the continued search of his car at police headquarters was voluntary.

Next, the court recognized that Garcia's general consent to search his car did not allow the officers to drill through the floor of the trunk. The court found that "cutting" or "destroying" an object during a search requires either explicit consent for the destructive search or probable cause. In this case, because Garcia did not explicitly consent to drilling into the car's trunk, the officers had to establish probable cause to drill into the trunk to reach the hidden compartment. Probable cause to search exists when a reasonable person believes that contraband or evidence of a crime is present in the place to be searched.

The court held the officers established probable cause to believe that contraband would be present in the hidden compartment. First, the existence of the welded metal compartment, itself suggested the car was used for some illegal activity. Second, the officer drew from his twenty-eight years of patrol experience and his prior work as an automobile mechanic to conclude that the compartment served no lawful purpose. Third, the Eighth Circuit has repeatedly cited the existence of a hidden compartment in a vehicle as a significant factor supporting probable cause to conduct a destructive search. Fourth, the officer observed that Garcia was extremely nervous and his hands shook as he retrieved his driver's license from his wallet. Finally, the officer found a large sum of money in the trunk of Garcia's car.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2994/15-2994-2016-08-02.pdf?ts=1470150073

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United States v. Bailey, 2016 U.S. App. LEXIS 14391 (8th Cir. Minn. Aug. 5, 2016)

An officer stopped the car in which Bailey was a passenger after he saw Bailey was not wearing a seatbelt. When the officer approached the car, Bailey got out and ran. The officer chased Bailey who had jumped over a fence into a yard. The officer eventually arrested Bailey after he found Bailey hiding behind a garage. The officer placed Bailey in the back of his patrol car, which was equipped with an internal audio-video recording device that recorded Bailey's actions and words.

While Bailey and the officer sat in the patrol car, a man approached the officer and told him that his grandchildren had just found a gun in his yard. The officer went with the man and realized the yard where the children found the gun was the same yard through which he had chased Bailey. After the officer exited the patrol car, the recording device captured Bailey saying, "Damn, they found that gun" and several other incriminating statements.

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

Bailey filed a motion to suppress the statements he made while in the patrol car after the officer left the vehicle. First, Bailey argued his statements were inadmissible because the officer did not advise him of his *Miranda* rights before he made the statements.

The court disagreed. *Miranda* warnings are required only when police interrogate a defendant that is in custody. Interrogation occurs when there is express police questioning or the functional equivalent of question. The functional equivalent of questioning are words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Here, Bailey made the incriminating statements after the man told the officer about the gun found in his yard. The court held there was no evidence that the man was acting in concert with the officer in an attempt to engage in the functional equivalent of questioning of Bailey. As a result, the court concluded the man's statement to the officer was not an interrogation of Bailey; therefore, Bailey was not entitled to *Miranda* warnings.

Next, Bailey argued that the officer sought to elicit incriminating statements by leaving him alone in the patrol car near the crime scene, with the audio-video recording device turned on.

Again, the court disagreed. Even though the officer might have expected that Bailey might say something if left alone, the court found the officer's act of leaving Bailey alone in the back of the patrol car did not constitute interrogation.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3591/15-3591-2016-08-05.pdf?ts=1470411082

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United States v. Faler, 2016 U.S. App. LEXIS 14575 (8th Cir. Iowa Aug. 9, 2016)

The manager of an apartment complex called 911 and requested that police remove Faler from the complex because he was not a registered resident, and because the manager believed him to be a danger to the children in the complex. After verifying the manager's information from the 911 call and discovering that Faler was a registered sex offender, officers went to the apartment where Faler was living with Michael Parks.

An officer knocked on the door and Parks answered. Parks initially denied that Faler was in the apartment. However, as the officers continued talking with Parks, Faler stepped out from a back room and into view of the officers. One of the officers then asked Parks, "Mind if we come in?" In response, Parks opened the door wider, and moved out of the way. The officers entered the apartment where they interviewed Faler. The officers arrested Faler after they determined he was in violation of his sex offender registration requirements. As the officers were escorting Faler to their patrol car, Faler asked the officers to retrieve his medication from a backpack in the apartment. Inside the backpack, officers found pictures of Faler with little boys in "compromising positions," and a thumb drive. Officers obtained a warrant, searched the thumb drive, and discovered videos and images of Faler sexually abusing children.

The government charged Faler with production of child pornography.

Faler filed a motion to suppress the evidence found in his backpack, claiming the officers violated the *Fourth Amendment* by entering the apartment without Parks' consent. Faler argued it was only because of this unlawful entry that the officers arrested him and eventually discovered evidence in his backpack.

The court disagreed. Officers may enter a residence if they receive voluntary consent from a person, such as Parks, who has authority over the residence. In addition, voluntary consent may be express or implied. To determine if a person has impliedly consented, the court must determine if a person's actions would have caused a reasonable person to believe that he consented. In this case, when Faler came out of a back room and into the officers' view, Parks motioned toward Faler and stepped aside so the officers could enter the apartment. The court noted that in other cases the Eighth Circuit has held that gestures and actions like those made by Parks in response to the officer's request constituted implied consent. Consequently, the court concluded the officer's entry into the apartment was lawful, as was the discovery of the evidence in the backpack.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3725/15-3725-2016-08-09.pdf?ts=1470756655

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United States v. Fields, 2016 U.S. App. LEXIS 14576 (8th Cir. Mo. Aug. 9, 2016)

Officers were conducting surveillance at the funeral of the victim of an unsolved homicide at the request of the victim's family. After the funeral ended, a plainclothes officer saw four men get out of vehicle and enter the funeral home. The men exited after a few minutes and walked back to the parked vehicle. A few minutes later, Fields and one of the men walked back to the funeral

home and went inside again. Fields and the man exited after a few minutes and stood on opposite sides of the doorway, outside the funeral home, for approximately fifteen minutes. A funeral home employee telephoned one of the officers and told the officer that the family did not know the two men and were afraid for their safety. In response, a uniformed officer approached Fields and saw a bulge on Field's right hip consistent with a gun. The officer asked Fields if he was armed and Fields responded, "Yes" and nodded in the direction of the bulge. The officer handcuffed Fields, frisked him, and seized a loaded handgun from his waistband. The government charged Fields with being a felon in possession of a firearm.

Fields argued the firearm should have been suppressed. Fields claimed the officer did not have reasonable suspicion he was engaged in criminal activity to justify the *Terry* stop which led to the discovery of the firearm in his waistband.

The court disagreed. The court found the actions of the four men suspicious, especially at a funeral for the victim of an unsolved homicide where the victim's family requested a police presence and the family did not know the identities of the men. In addition, when the officer approached Fields, he saw a bulge on Field's hip consistent with a concealed firearm. Under these circumstances, the court held the officer had reasonable suspicion to conduct a *Terry* stop of Fields. After Fields admitted to the officer that he was armed, the court held it was reasonable for the officer to frisk Fields to retrieve the firearm.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2276/15-2276-2016-08-09.pdf?ts=1470756650

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United States v. Camberos-Villapuda, 2016 U.S. App. LEXIS 14831 (8th Cir. S.D. Aug. 12, 2016)

Officers received a tip that someone would be delivering drugs to a home in a particular neighborhood. In response, officers conducted surveillance of the area. While walking down an alley in the neighborhood, an officer heard a grinding noise coming from the backyard of a residence. From the alley, the officer saw a man, later identified as Camberos, using a flashlight to work under a vehicle. The officer watched Camberos for approximately fifteen to twenty minutes, as he appeared to be grinding on an area underneath the passenger side of the car. During this time, the officer saw Camberos enter the home briefly, and then return to work on the vehicle. Based on his training and experience, the officer suspected Camberos was constructing a hidden compartment in which drugs and firearms could be concealed.

The officer walked onto the property with three back-up officers and approached Camberos. When an officer asked Camberos what he was doing, Camberos denied that he was working on the vehicle. However, Camberos later claimed that he was repairing the vehicle's wheel bearings. Camberos also told the officers that he did not know who owned the vehicle. The officers checked the vehicle's license plates and determined that Camberos was not the registered owner. Camberos also told the officers that he had not been inside the house and did not know who lived there. Camberos then told the officers that no one was inside the house, but later said that other people were inside.

At that point, one of the officers looked underneath the vehicle and found a hidden compartment in the area where Camberos had been working. Also, because of Camberos' conflicting accounts as to whether or not other people were inside the house, the officers decided to secure the

residence. The officers entered the house and saw methamphetamine and drug paraphernalia. After securing the house, the officers obtained a warrant to search the house and discovered firearms, methamphetamine, and a large amount of cash. The government charged Camberos with conspiracy to distribute methamphetamine.

Camberos argued that the officers violated the *Fourth Amendment* when they entered his property without a warrant, looked around and under his vehicle, and then entered his house.

The court disagreed. In order to claim a valid *Fourth Amendment* violation, a person must demonstrate that he possessed a legitimate expectation of privacy in the locations searched. When a person voluntarily abandons his interest in property, however, he relinquishes any expectation of privacy and may not challenge a search of that property based on an alleged violation of the *Fourth Amendment*.

In this case, the court held that Camberos voluntarily abandoned his interests in the vehicle and the house. Camberos denied owning the vehicle, told the officers he did not know who owned it, and offered conflicting accounts as to whether he was working on it. In addition, Camberos corroborated Camberos' statement about the vehicle by determining that it was registered to someone else. Concerning the house, Camberos told the officers he did not live there, he had not been inside, and did not know who lived there.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3313/15-3313-2016-08-12.pdf?ts=1471015903

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United States v. Rodriguez, 2016 U.S. App. LEXIS 15649 (8th Cir. Neb. Aug. 25, 2016)

Officers went to Rodriguez's house to conduct a knock and talk interview because they suspected he was growing marijuana inside the house. When the officers knocked on the front door, Rodriguez opened the door and stepped outside onto the porch. One of the officers introduced himself and asked Rodriguez if they could step inside the house so the officers could ask him some questions. When Rodriguez asked the officer what he wanted to discuss, the officer told Rodriguez they were conducting an investigation related to the manufacturing of marijuana and that if nothing was going on inside the house, the officers would leave. Rodriguez did not verbally respond to the officer's comments, but instead immediately turned and entered the house. The officers followed Rodriguez inside, and Rodriguez did not object to their entry. Once inside the house the officers smelled the overwhelming odor of marijuana. When the officers conducted a protective sweep of the house, they saw marijuana plants, bags of marijuana, and an AK-47. The officers then obtained a warrant to search Rodriguez's house and seized over twenty firearms and evidence of a marijuana-growing operation. The government charged Rodriguez with a variety of firearm and drug offenses.

Rodriguez filed a motion to suppress the evidence seized from his house. Rodriguez argued he did not consent to the officers' warrantless entry and there was no lawful justification for the protective sweep.

The district court agreed and suppressed the evidence, concluding that Rodriguez did not consent to the officers' entry. Consequently, the court did not determine whether the protective sweep was lawful. The government appealed.

The Court of Appeals reversed the district court concerning issue of Rodriguez's consent. First, the court noted that a person may give valid consent to search as long as the consent is given voluntarily. In addition, consent may be expressly given or implied by the person's words, gestures, or conduct. Here, the court held it was reasonable for the officers to believe Rodriguez consented to their entry based on his behavior. Although Rodriguez did not expressly consent to the officers' entry, verbally or non-verbally, he did not try to close the front door or protest when the officers followed him into the house. In addition, when the officer asked Rodriguez if they could step inside the house to speak, Rodriguez immediately opened the door wider with one hand and walked inside with his back to the officers. The court concluded an objectively reasonable officer could interpret that series of actions as an invitation to enter.

Because the district court never determined whether the protective sweep was lawful, the Court of Appeals remanded the case for the district court to decide that issue.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2723/15-2723-2016-08-25.pdf?ts=1472139060

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United States v. Arnold, 2016 U.S. App. LEXIS 16087 (8th Cir. Ark. Aug. 31, 2016)

Police officers developed reasonable suspicion that Johnson, a suspect in two armed bank robberies, was fleeing from the second robbery in gray Ford Taurus. Officers located the Taurus and followed the vehicle as it exited an interstate highway. At the same time, other officers blocked the road in front of the Taurus with marked police cars. The Taurus and a black Honda that had been travelling in front of the Taurus were stopped at the roadblock. The officers confronted Johnson who told them that the occupants of the black Honda were also involved in the bank robbery. The Honda contained two occupants, a female driver and the defendant, Arnold. Within five or six minutes of stopping the black Honda, the officers suspected Arnold and the female driver were involved in the second robbery with Johnson. In addition, the officers discovered that Arnold had an outstanding arrest warrant. The officers arrested Johnson, Arnold, and the female driver. The officers later searched the female and discovered she had $3,200 in her possession.

The government charged Arnold and Johnson with conspiracy to commit bank robbery.

Arnold filed a motion to suppress the cash found on the female driver of the Honda and statements he made to the officers after his arrest. Arnold argued the officers violated the *Fourth Amendment* because they did not have reasonable suspicion or probable cause to stop the black Honda.

The court held the police roadblock was reasonable under the *Fourth Amendment*, even when at the time of the stop, the officers did not have individualized suspicion the occupants of the black Honda were involved in criminal activity. First, the officers had reliable information that implicated Johnson in two armed bank robberies, indicating that he was fleeing from the second robbery. Second, the officers knew the roadblock was likely to be effective because they had a description of Johnson's vehicle and knew the route he was travelling. Third, the public interest advanced by the roadblock outweighed Arnold's individual *Fourth Amendment* interests. Finally, only five or six minutes elapsed from the time Arnold was stopped at the roadblock until the officers identified him as a suspect in the second bank robbery and discovered the existence of an outstanding warrant for his arrest.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3697/15-3697-2016-08-31.pdf?ts=1472657460

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Tenth Circuit

United States v. Ackerman, 2016 U.S. App. LEXIS 14411 (10th Cir. Kan. Aug. 5, 2016)

Ackerman's internet service provider (ISP), AOL, uses an automated filter designed to prevent the transmission of child pornography. After AOL's filter identified one of four images attached to an email sent by Ackerman as child pornography, AOL forwarded a report to the National Center for Missing and Exploited Children (NCMEC) through an online cyber tip line as required by federal law. AOL's report included Ackerman's email and the four attached images. AOL did not open Ackerman's email or any of the attached images.

A NCMEC analyst opened Ackerman's email, viewed each of the attached images and confirmed that all four images appeared to be child pornography. NMEC contacted law enforcement and the government subsequently charged Ackerman with possession and distribution of child pornography.

Ackerman argued the warrantless search of his email and attachments by the NCMEC analyst violated the *Fourth Amendment*.

The first issue before the court was whether the *Fourth Amendment* applied to NCMEC. The *Fourth Amendment* protects against unreasonable searches conducted by the government or its agents, not private parties.

The court held that NCMEC qualified as a governmental entity for *Fourth Amendment* purposes. Even though NCMEC is incorporated, its two primary authorizing statutes, *18 U.S.C. § 2258A and 42 U.S.C. § 5773(b)*, mandate its collaboration with federal, state, and local law enforcement agencies in over a dozen different ways. For example, ISPs are required to forward emails suspected of containing child pornography to NCMEC, and NCMEC is required to maintain a CyberTipline to receive such emails. NCMEC is then allowed to review the emails and is required to report possible child sexual exploitation violations to the government.

Next, the court had to determine whether a *Fourth Amendment* search occurred. It was undisputed that NCMEC opened Ackerman's email and viewed each of the four attached images. However, the government argued NCMEC's warrantless search followed a lawful private search by AOL; therefore, any expectation of privacy Ackerman had in the email or attachments no longer existed.

The court disagreed. First, the court held the private-search doctrine did not apply. Here, AOL never opened Ackerman's email or any of the attached images. AOL's filter simply determined the hash value on one of the attached images matched the hash value of a known child pornography image. When NCMEC opened Ackerman's email and viewed all four attached images, it exceeded the scope of any search conducted by AOL. Second, the court questioned the continued viability of the private-search doctrine in light of the United States Supreme Court decision in *United States v. Jones*.

Finally, the court noted the district court did not determine whether the third-party doctrine applied. The Supreme Court has held that individuals do not have a reasonable expectation of privacy in materials they share with third parties such as banks or telephone companies. However,

lower courts have only begun to consider whether the third party doctrine should be extended to emails where the subscriber relies on a commercial ISP to deliver them. Consequently, the court remanded the case to the district court to determine if Ackerman had a reasonable expectation of privacy in emails he sent through AOL.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/14-3265/14-3265-2016-08-05.pdf?ts=1470420071

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Vasquez v. Lewis, 2016 U.S. App. LEXIS 15424 (10th Cir. Kan. Aug. 23, 2016)

Officers in Kansas stopped Vasquez's car because they could not read Vasquez's temporary tag, which was taped to the inside of the car's tinted rear window. After issuing Vasquez a warning, the officers requested consent to search Vasquez's car. When Vasquez refused, the officers detained Vasquez for approximately fifteen-minutes until an officer with a drug dog arrived. The officers eventually searched Vasquez's car but did not discover any illegal items.

Vasquez filed a lawsuit against the officers arguing they violated his *Fourth Amendment* rights by detaining him and searching his car after he refused consent to search.

The officers filed a motion for summary judgment based on qualified immunity. The district court granted the officers' motion, holding that the officers did not violate clearly established law. Vasquez appealed.

The Tenth Circuit Court of Appeals reversed the district court. First, the court stated that it has repeatedly admonished law enforcement that once an officer has been assured that a temporary tag is valid, he should explain to the driver the reason for the initial stop and allow the driver to continue on his way without requiring the driver to produce his license and registration.

Second, the court noted the officers argued the following factors justified their warrantless search of Vasquez's car:

> (1) Vasquez was driving alone late at night; (2) he was travelling on I-70, "a known drug corridor"; (3) he was from Colorado and was driving from Aurora, Colorado, "a drug source area"; (4) the back seat did not contain items the officers expected to see in the car of someone moving across the country; (5) the items in his back seat were covered and obscured from view; (6) he had a blanket and pillow in his car; (7) he was driving an older car, despite having insurance for a newer one; (8) there were fresh fingerprints on his trunk; and (9) he seemed nervous.

The court found it troubling that the officers relied heavily on Vasquez's status as a resident of Colorado, because Colorado is known to be home to medical marijuana dispensaries, to establish justification for the search. The court agreed with other circuits that have concluded the state of residence of a detained motorist is an "extremely weak factor at best because interstate motorists have a better than equal chance of traveling from a source state to a demand state." In addition, the court cautioned officers that:

> It is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate.

Finally, the court held that Vasquez's conduct and the circumstances surrounding the stop did not create reasonable suspicion, and the officers violated the Fourth Amendment when they searched Vasquez's car.

The court further held that at the time of the incident it was clearly established that the officers' conduct violated the *Fourth Amendment*. In 1997, the court ruled that officers under very similar circumstances did not have reasonable suspicion to detain a motorist after issuing a warning. In fact, the court commented that one of the officers sued in the 1997 case was one of the officers in the present case.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/14-3278/14-3278-2016-08-23.pdf?ts=1471968062

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Eleventh Circuit

United States v. Phillips, 2016 U.S. App. LEXIS 15419 (11th Cir. Fla. Aug. 23, 2016)

A Florida court issued a civil writ of bodily attachment against Phillips for unpaid child support that ordered the police to take Phillips into custody and "confine him in the county jail." Two days later an officer saw Phillips on a street corner. As the officer approached Phillips to arrest him, Phillips reached down toward his waistband. The officer immediately grabbed Phillips' hand and felt a metal bulge in his waistband. The officer searched Phillips and removed a loaded handgun from his waistband. The government indicted Phillips for being a felon in possession of a firearm.

Phillips filed a motion to suppress the firearm. Phillips claimed the officer had no authority to conduct the search incident to arrest, which led to the discovery of the firearm. Specifically, Phillips argued that a civil writ of bodily attachment is not equivalent to a criminal arrest warrant for purposes of the *Fourth Amendment*.

The court disagreed. The *Fourth Amendment* does not require warrants to be based on probable cause of a crime, as opposed to a civil offense. As a result, the court concluded that a writ of bodily attachment is a "warrant" for *Fourth Amendment* purposes; therefore, the officer could arrest Phillips based solely on the civil writ of bodily attachment for unpaid child support. Because the officer legally arrested Phillips, he could seize the firearm from Phillips' waistband as part of a search incident to arrest.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/14-14660/14-14660-2016-08-23.pdf?ts=1471966290

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