
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 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 – March 2020

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Cybercrime & Technical Investigations Training Conference 2020

The Federal Law Enforcement Training Centers (FLETC) Glynco, Georgia cordially invites you to attend the third FLETC CyberCrime & Technical Investigations Training Conference (CYCON-2020) September 9-11, 2020. The goal of the conference is to foster education and awareness of current threats and innovations which impact how law enforcement investigate cybercrime and how they conduct technical investigations. Attendees will experience exhibits, lectures, demonstrations, and hands-on labs. Last held in 2018, CYCON-2018 provided 70 break-out training sessions from FLETC and industry professionals with 77 representatives from more than 40 companies in attendance. There is no cost to attendees or vendors for participation; however, attendees, vendors, and agencies are responsible for all travel, lodging, and meal costs.

For additional details concerning attendee registration, conducting a presentation for CYCON-2020, or conducting a vendor product demonstration please see the FLETC CYCON-2020 website:

<https://www.fletc.gov/cybercrime-and-technical-investigations-training-conference>



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Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:

A Flash History of the Fourth Amendment
What is a Fourth Amendment Search?
What is a Fourth Amendment Seizure?
Fourth Amendment Levels of Suspicion
Stops and Arrests
Plain View Seizures
Mobile Conveyance (Part 1 and Part 2)

Exigent Circumstances
Frisks
Searches Incident to Arrest (SIA)
Consent (Part 1 and Part 2)
Inventories
Inspection Authorities

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FLETC Informer Webinar Schedule

1. Law Enforcement Report Writing (1-hour)

Presented by Mary M. Mara, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

The importance of a well-written police report cannot be overstated; it represents an officer's first, best, and sometimes only opportunity to clearly and plainly set forth all of the relevant facts of a case as well as the factors that went into the officer's decision-making process. While a well-written police report provides a solid foundation for subsequent criminal and civil litigation, a poorly written report can undermine an officer's credibility, sabotage criminal prosecution, and expose the officer and his or her department to scrutiny, criticism, and protracted civil litigation. This webinar will review the significance of effective report writing and offer tips to improve this critical skillset.

Wednesday, April 15, 2020: 3 p.m. EST / 2 p.m. CST / 1 p.m. MST / 12 p.m. PST

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



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CASE SUMMARIES

Circuit Courts of Appeal

United States Supreme Court

Hernandez v. Mesa, 140 S. Ct. 735 (2020)

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 v. Six Unknown Fed. Narcotics Agents](#), 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 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.

The court held that the “newness” of this “new context,” by itself, warranted the dismissal of Hernandez’s claim. The court further added that several “special factors” existed which 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.”

Hernandez appealed and the Supreme Court granted certiorari on May 28, 2019. The issue before the Court was:

Whether the federal courts can and should recognize a claim for damages under Bivens when a plaintiff plausibly alleges that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy.

On February 25, 2020, the Supreme Court affirmed the Fifth Circuit Court of Appeals, holding that Bivens does not extend to claims based on a cross-border shooting. In a 5-4 opinion, Justice Alito acknowledged that the case was “tragic” but noted that Congress, not the courts, should decide whether to allow a plaintiff to bring a lawsuit for money damages against a federal official in this context. In reaching its decision, the court also considered: 1) the potential effect extending Bivens would have on foreign relations; 2) the risk of undermining border security; 3) and the fact that other federal statutes that created a cause of action for persons injured by government officers do not allow claims for injuries that occur outside the United States.

For the court’s opinion: https://www.supremecourt.gov/opinions/19pdf/17-1678_m6io.pdf

Third Circuit

United States v. Baxter, 951 F.3d 128 (3d Cir. 2020)

Steven Baxter mailed two packages from South Carolina to St. Thomas, United States Virgin Islands. Upon arrival in St. Thomas, U.S. Customs and Border Protection (CBP) agents opened the packages. In the first package, the agents discovered the unassembled parts of a gun and one round of ammunition. In the second package, the agents discovered a gun and ammunition. The government charged Baxter with two counts of illegal transport of a firearm under 18 U.S.C. § 922 (a)(5).

Baxter filed a motion to suppress the firearms, arguing that CBP's warrantless searches of the packages were not valid under the border-search exception to the Fourth Amendment. The district court agreed and suppressed the firearms.

The district court recognized that in [United States v. Hyde](#), the Third Circuit Court of Appeals held that the border-search exception to the Fourth Amendment applied to persons and items entering the United States from the Virgin Islands. However, the district court held that the border-search exception did not extend to similar inspections of persons or items entering the Virgin Islands from the United States mainland. The government appealed.

The Third Circuit Court of Appeals reversed the district court. In [Hyde](#), the court held that the United States has an interest in regulating commerce to enforce its customs border with the Virgin Islands. Applying this reasoning, the court concluded that the government's interest applies to goods and currency both entering and leaving the mainland by crossing the customs border. As a result, the court held that the border-search exception applies regardless of a packages' direction of travel. The court noted that its holding was consistent with every circuit that has considered the issue, the 1st, 2nd, 4th, 5th, 6th, 8th, 9th, and 11th circuits. Consequently, the court held that the searches of Baxter's packages were routine customs searches that were reasonable under the border-search exception to the Fourth Amendment.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/18-3613/18-3613-2020-02-21.pdf?ts=1582308007>

Sixth Circuit

United States v. Ramamoorthy, 949 F.3d 955 (6th Cir. 2020)

Prabhu Ramamoorthy, an Indian citizen and H-1B visa holder living in the United States, took a redeye flight leaving Las Vegas on January 2, 2018 and landing in Detroit in the early hours of January 3. Ramamoorthy sat between his wife and another woman, Laura. According to Laura, she initially slept on the flight, but suddenly awoke to find her pants unbuttoned and unzipped and Ramamoorthy shoving his fingers into her vagina. Laura left her seat and reported the incident to the flight attendants.

Upon landing, the flight crew escorted Ramamoorthy off the plane. Two airport police officers met Ramamoorthy in the jetway and arrested him after a brief interview. The officers took Ramamoorthy to the airport police station where two FBI agents interviewed him for just over one hour. Before asking Ramamoorthy any questions about the flight, the agents provided him with a written Miranda form. Ramamoorthy read his right out loud, discussed them with the agents for approximately ten minutes, and signed the form. Ramamoorthy then told the agents that he had tried to put his fingers inside Laura's pants.

The government charged Ramamoorthy with one count of sexual abuse in violation of 18 U.S.C. § 2242(2). Ramamoorthy filed a motion to suppress his statements to the FBI agents. He claimed that he did not knowingly and intelligently waive his Miranda rights because he did not speak English fluently and did not understand that his statements to the agents would be admissible in court. The district court denied Ramamoorthy's motion and he appealed.

Statements made in response to custodial police interrogation must be suppressed unless the suspect first waives his Miranda rights “voluntarily, knowingly, and intelligently.” To determine whether a Miranda waiver is valid, the court examines the totality of the circumstances surrounding the waiver.

In this case, the Sixth Circuit Court of Appeals found that Ramamoorthy signed a written waiver form that listed his Miranda rights. Before signing, the agents asked him to read each line of the form out loud and write his initials next the line if he understood it, which he proceeded to do. At several points, the agents offered explanations of the rights Ramamoorthy had just read out loud. Ramamoorthy also asked questions about the meaning of his rights, which the agents answered. The agents discussed Ramamoorthy’s rights with him for approximately ten minutes before he signed the waiver form. In addition to these facts, the court reviewed a video of the interview in which Ramamoorthy appeared to understand English and was heard speaking English clearly. As a result, the court held that Ramamoorthy voluntarily, knowingly, and intelligently waived his Miranda rights.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca6/19-1033/19-1033-2020-02-07.pdf?ts=1581098500>

Eighth Circuit

United States v. Hoeffener, 950 F.3d 1037 (8th Cir. 2020)

A police officer conducted a child pornography “Internet undercover operation” using a software program called Torrential Downpour. Torrential Downpour is a law enforcement proprietary software program configured to search the BitTorrent peer-to-peer file sharing network for Internet Protocol (IP) addresses associated with individuals offering to share or possess files known to law enforcement to contain images or videos of child pornography. Torrential Downpour cannot access non-public areas or unshared portions of an investigated computer, nor can it override settings on a suspect’s computer.

During the investigation, the officer connected to a computer with an IP address in the St. Louis area that contained files with videos or images suspected of containing child pornography. After downloading the suspected files, the officer discovered two images that contained child pornography. The officer determined that the IP address belonged to Roland Hoeffener and obtained a warrant to search Hoeffener’s house, computers, and other related electronic devices for images, videos, and other evidence of child pornography. A forensic examination of Hoeffener’s computer revealed over 7,365 image files and 460 video files of child pornography.

The government charged Hoeffener with several child pornography-related offenses. Hoeffener filed a motion to suppress the evidence discovered on his computer. Hoeffener claimed that he had a legitimate expectation of privacy in the use of his computer and the warrantless search that occurred while he was not actively sharing data with others violated the Fourth Amendment.

The court disagreed. The court found that witness testimony established that Torrential Downpour searches for download candidates in the same way that any other public user of the BitTorrent network conducts a search. In addition, the court added that Torrential Downpour only searches for information that a user has already made public by the use of the uTorrent software. Finally, the court cited several cases in which the Eighth Circuit Court of Appeals has held that a defendant

has no legitimate expectation of privacy in files made available to the public through peer-to-peer file-sharing networks. The court held that Hoeffener’s attempt to distinguish BitTorrent software from other peer-to-peer programs did not change the fact that he allowed public access to the files on his computer. Consequently, the court held that the district court properly denied Hoeffener’s motion to suppress.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/19-1192/19-1192-2020-02-24.pdf?ts=1582561834>

United States v. Williams, 2020 U.S. App. LEXIS 5965 (8th Cir. MO Feb. 27, 2020)

Police officers responded to a 911 call reporting a burglary at Kelvin Williams’ house. When officers arrived, they heard a home security siren blaring and they saw broken windows on the main and storm doors, blood on the porch floor and on a window shade stuck through the broken glass. The officers also saw footprints on the front door, which was ajar.

The officers entered the house and began a protective sweep to look for intruders or victims. While conducting their sweep, officers saw drugs, firearms, and drug paraphernalia on the floor in a hallway near a bedroom. In the basement, officers saw a bag containing a white powdery substance hanging out a hole in the wall. After finding no one in the house, the officers seized the drugs, firearms, and drug paraphernalia they had observed during the sweep.

The government charged Williams with drug and firearm offenses. Williams filed a motion to suppress the evidence seized from his house. Williams conceded that exigent circumstances justified the officers’ warrantless entry and protective sweep of his house. However, Williams claimed that after the officers determined no one was in the house, the exigency had ended and the officers were required to leave the evidence they had discovered during the sweep.

The court disagreed. During a valid protective sweep, police officers may seize an item that is in plain view if the incriminating nature of the item is immediately apparent. In this context, immediately apparent means that “the police have probable cause to believe an item is incriminating.”

In this case, the court held that the officers observed incriminating items during a lawful protective sweep of Williams’ house. The court noted that the officers had to step over drugs, drug paraphernalia, and two firearms lying on the floor. In addition, the officers saw a bag containing a white powdery substance protruding from a hole in the basement wall. Consequently, the court held that the officers lawfully seized the evidence from Williams’ house under the plain view doctrine.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-1445/18-1445-2020-02-27.pdf?ts=1582821045>

McGuire v. Cooper, 2020 U.S. App. LEXIS 7032 (8th Cir. NE Mar. 6, 2020)

On February 10, 2013, Cory Cooper was a deputy sheriff employed by the Douglas County, Nebraska Sheriff’s Office. While acting within the scope of his employment that night, Cooper approached Kyle Worland’s truck parked at Zorinsky Lake Park in Omaha, Nebraska. After

Cooper smelled marijuana he saw a mason jar containing marijuana on the center console. Cooper seized the jar and directed the passenger, Megan McGuire to exit the truck and accompany him to his patrol car. Cooper asked McGuire what she was willing to do to keep her boyfriend out of jail and eventually sexually assaulted her. Afterward, Cooper released McGuire and she ran back to Worland's truck and the couple drove away.

McGuire reported the incident to the Omaha Police Department on February 14, 2013. One week later, the Omaha Police Department contacted the Douglas County Sheriff's Office to inform Sheriff Timothy Dunning that it was investigating an alleged sexual assault committed by one of his officers. The Sheriff's Office did not commence its own investigation.

In early April 2013, a deputy sheriff reported that Cooper had a "suspicious interaction" with a woman for whom an arrest warrant had been issued. Cooper was placed on limited duty and the Sheriff's Office commenced its own investigation. The Sheriff's Office investigation revealed that Cooper had run a record check on Worland and McGuire and that the GPS in Cooper's car placed Cooper at Zorinsky Lake Park on February 10, 2013 at the time of McGuire's assault. Cooper was terminated on May 13, 2013.

In June 2013, Cooper was charged with first degree sexual assault. Cooper eventually pled no contest and was found guilty of third degree assault and attempted tampering with evidence. Cooper was sentenced to consecutive terms of six months imprisonment on each count.

At the time of the incident with McGuire, the Douglas County Sheriff's office did not have a policy of reviewing employees' behavior to determine those at risk for sexual misconduct and did not have a comprehensive policy addressing sexual misconduct. However, the Sheriff's Office had implemented a citizen complaint process where citizens could submit complaints for review. Since Sheriff Dunning's appointment in 1995, there had been at least fifteen complaints of sexual misconduct by deputies employed by the Sheriff's Office.

McGuire filed suit against Sheriff Dunning in his individual capacity under 42 U.S.C. § 1983 alleging several constitutional violations for his failure to adequately train and supervise Deputy Cooper. Sheriff Dunning claimed that he was entitled to qualified immunity because all of the reported incidents of prior sexual misconduct by deputies employed by the Sheriff's Office was not sufficient to provide notice that an on-duty deputy might sexually assault a member of the public like Cooper did. The district court disagreed and denied qualified immunity. Sheriff Dunning appealed.

The Eight Circuit Court of Appeals reversed the district court and held that Sheriff Dunning was entitled to qualified immunity.

Even without being a direct participant in a constitutional violation, a supervising officer may still face personal liability for failing to train and supervise subordinates. To establish a claim for failing to supervise Deputy Cooper, McGuire was required to establish, among other things, that Sheriff Dunning had received notice of a similar acts of sexual misconduct committed by his subordinates in the past.

In this case, the court concluded that the prior instances of sexual misconduct were not "similar in kind or sufficiently egregious in nature" to demonstrate a pattern of sexual assault against members of the public by deputies in the Douglas County Sheriff's Office. In order to establish a pattern, McGuire was required to establish that the other instances of sexual misconduct were "very similar" to Deputy Cooper's misconduct in this case. The court found that the prior

instances of sexual misconduct by deputies in the Sheriff's Office were not similar enough to put Sheriff Dunning on notice that a deputy might use his position and authority to separate a woman from her boyfriend at the park and coerce her to engage in sexual contact with him. The court added, "a reasonable officer in Sheriff Dunning's position would not have known that he needed to more closely supervise his deputies, including Cooper, or they might sexually assault a member of the public."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-2809/18-2809-2020-03-06.pdf?ts=1583512228>

District of Columbia Circuit

United States v. Cooper, 949 F.3d 744 (D.C. Cir. 2020)

The government opened an investigation after a postal inspector detected what appeared to be fraudulent tax returns being sent through the mail. As part of the investigation, federal agents executed a search warrant at Tarkara Cooper's house in the District of Columbia. Approximately one hour into the search, two agents began interviewing Cooper in her living room. At some point during the questioning, Cooper admitted her role in receiving fraudulent U.S. Treasury checks, which she turned over to her uncle in exchange for payment.

Prior to trial, Cooper filed a motion to suppress her statements to the agents. Cooper claimed that before questioning her, the agents were required to provide her Miranda warnings. The district court denied Cooper's motion, holding that during the interview, she was not in custody for Miranda purposes. Cooper appealed.

A suspect is in custody for Miranda purposes if the circumstances surrounding the questioning "present a serious danger of coercion." In addition, not all restraints placed on a person's freedom of movement amount to custody for purposes of Miranda. Instead, the court must determine whether the environment in which the questioning occurs "presents the same inherently coercive pressure as the type of station house questioning" that occurred in Miranda.

In this case, the court held that the evidence supported the conclusion that Cooper was not in custody when she admitted her participation in the fraudulent tax return scheme with her uncle. First, the agents questioned Cooper in her living room. When an interview takes place in a suspect's home, that fact usually weighs against finding the kind of custodial situation that requires a Miranda warning. Second, before the interview began, the agents told Cooper that she was the subject of an investigation and described "the voluntary nature of the interview." Third, the agents asked Cooper if she would agree to answer their questions and she agreed. Fourth, the agents did not brandish weapons, no handcuffs were used, and the agents employed a "professional and cordial tone." Finally, Cooper never asked to end the questioning and when the interview was over the agents left without arresting Cooper. The court held that these facts did not constitute an environment that presented a meaningful danger of coercion. As a result, the court concluded that Cooper was not in custody for Miranda purposes; therefore, the agents were not required to provide her Miranda warnings.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/cadc/17-3057/17-3057-2020-02-11.pdf?ts=1581436852>
