
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. You can join *The Informer* Mailing List, and have *The Informer* delivered directly to you via e-mail by clicking on the link below.

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The Informer – March 2024

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Third Circuit

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FLETC Informer Webinar Schedule: April – May 2024

April 9, 2024, 10:30 – 11:30 (MST) FLETC OCC Informer Webcast Series "**Use of Force and the Duty to Intervene**" presented by Arie Schaap, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Center, Artesia, New Mexico. In this session we will discuss an officer's duty to intervene and how failure to do so can lead to criminal and/or civil liability just like that of the officer committing the unconstitutional conduct. While this duty to intervene is broader than just use of force, the focus of this webinar will be on excessive use of force cases.

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April 17, 2024, 12:30 – 1:30 (MST) FLETC OCC Informer Webcast Series "**Use of Force in an Impaired Driving Case**" presented by Rachel Smith, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Center, Artesia, New Mexico. In this session, we will discuss the legal standard under which a use of force incident will be examined, the significance of an impaired driver in a use of force incident, and how to effectively articulate the need for use of force.

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April 25, 2024, 2:30 – 3:30 FLETC OCC Informer Webcast Series
“Inventories” presented by John Besselman, Senior Advisor for Training,
Federal Law Enforcement Training Center, Glynco, Georgia

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May 17, 2024, 10:30 – 11:30 (MST) FLETC OCC Informer Webcast Series
“**Aerial surveillance and the Fourth Amendment**” presented by Arie Schaap,
Attorney Advisor/Senior Instructor, Federal Law Enforcement Training
Center, Artesia, New Mexico. In this session we will discuss when aerial
surveillance of an individual’s property constitutes a search under the Fourth
Amendment and explore legal issues relating to the technology employed and
the duration of the surveillance.

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CASE SUMMARIES

Circuit Courts of Appeals

Third Circuit

Pinckney v. Meadville Pennsylvania, No. 23-1095 (3rd Cir. 2024)

In this case Kobe Pinkney sued Officer Jared Frum and others for false arrest and malicious prosecution. Officer Frum, in an investigation into an assault, had obtained an arrest warrant for Pinkney based on a witness statement. However, the court found that Officer Frum had misrepresented information in the warrant application, overstating the certainty of the witness, ignoring inconsistencies, and omitting key facts. The court found the Officer had recklessly disregarded the truth, and the misrepresentations and omissions were **deemed material** to the finding of probable cause.

The court concluded that the single witness identification, without more, must have at least basic signs of reliability to amount to probable cause. The court noted that this bar is not high; either corroboration or an appropriate witness interview may suffice. But, based on the facts alleged, neither happened in Pinkney's case. Thus, Officer Frum was found to have violated Pinkney's Fourth Amendment rights by arresting him without probable cause.

Further, the court ruled that Pinkney's right not to be arrested without probable cause was clearly established, as was his right not to be prosecuted without probable cause. Hence, a reasonable officer would have known that Officer Frum's alleged conduct was unlawful. As such, the court affirmed the lower court's decision to **deny Qualified Immunity** and allowed the civil case to proceed.

Court's Analysis:

Police may not fake facts to find probable cause. In Officer Frum's application for an arrest warrant, he allegedly turned a shaky witness statement into a

confident identification and left out evidence that undermined the identification's reliability. A judge then relied on this altered story to issue a warrant to arrest Kobe Pinkney. But, because there was no probable cause to arrest him, Officer Frum violated his clearly established rights. According to the pleadings, Officer Frum made three reckless errors in his affidavit: (1) overstating the witnesses' certainty, (2) overlooking an inconsistency in the witnesses' statement, and (3) leaving out key facts. To be constitutionally suspect, the misstatements and omissions must have been "***material, or necessary, to the finding of probable cause.***" To tell if the errors were material, the court reconstructed the affidavit by excising the offending inaccuracies and inserting the facts recklessly omitted. Then the court considered whether the revised facts and circumstances would have been sufficient in themselves to warrant a reasonable person to believe that Pinkney had committed the assault.

Using the two-prong Qualified Immunity analysis the court found that no reasonable officer would have covered up a lack of probable cause by recklessly disregarding the truth in an affidavit. A reasonable officer thus would have known that Officer Frum's alleged conduct was unlawful. "Probable cause requires enough evidence—one obviously unreliable, uncorroborated witness is not enough." According to the pleadings, Officer Frum exaggerated and hid facts to manufacture probable cause. As such, the court denied Frum's motion for Qualified Immunity and allowed the civil lawsuit to proceed.

For the Court's Opinion: [Pinkney v. Meadville Pennsylvania, No. 23-1095 \(3d Cir. 2024\) :: Justia](#)

Sixth Circuit

United States v. O'Neill: No. 22-3793 (6th Cir. 2024)

In this case, the defendant, Charles O'Neill, appealed the judgment of the district court. O'Neill was charged with sexually exploiting a minor and receiving or distributing child pornography. Initially, the evidence included large numbers of photographs of nude and partially nude minor boys on O'Neill's phone in his house. Subsequently, similar photographs were found on an iPad, computer, camcorder, camera, and digital storage devices.

The district court found that although the affidavits from the police officers used to obtain search warrants contained inaccurate statements and lacked probable cause, (A key distinction was the court's finding that photos of nude children were not, in themselves, necessarily child pornography.) the officers had not knowingly or recklessly misled the issuing magistrate, and their reliance on the warrants was objectively reasonable under the good-faith exception in United States v. Leon.

On appeal, the Sixth Circuit affirmed the district court's decision, agreeing that none of the exceptions to the Leon good-faith standard applied. The court found that the officers' errors in the affidavits were **negligent** rather than **reckless**, the affidavits weren't "bare bones" as they contained more than conclusory claims and were far from devoid of factual support, and the **warrants weren't facially deficient**. The court noted that the officers' reliance on the search warrants was objectively reasonable, and therefore the fruits of their searches shouldn't be suppressed.

Court's Analysis:

The Fourth Amendment requires warrants to be supported by probable cause. To enforce this requirement, the Supreme Court created the exclusionary rule. Because exclusion "exact[s] a heavy toll on both the judicial system and society at large," it is only appropriate where the deterrence benefits of suppression...outweigh its heavy cost. Even when a warrant is later found to be invalid for want of probable cause, the fruits of the search will not be suppressed **unless** the executing officers' reliance on the warrant was not objectively reasonable. The Supreme Court recognized this "good faith" exception to the exclusionary rule in United States v. Leon.

There are four exceptions, however. Exclusion will remain appropriate where:

- (1) the issuing magistrate was deliberately or recklessly misled by an affiant;
- (2) the issuing magistrate "wholly abandoned" the judicial role;
- (3) the affidavit was "bare bones," or "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable";
- (4) the warrant was "so facially deficient" that the officers could not "reasonably presume it to be valid."

Reliance on a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has ‘acted in good faith in conducting the search. That is because any error in deciding whether probable cause exists for the search warrant belongs primarily to the magistrate issuing the warrant, not the officer seeking it. The ‘officer cannot be expected to question the magistrate’s probable cause determination or his judgment that the form of the warrant is technically sufficient. So evidence obtained in reliance on a warrant ordinarily will not be suppressed.

The court determined that the officers had not knowingly or recklessly misled the issuing magistrate. As to the existence of probable cause to support the warrants, the district court concluded that **probable cause was lacking**. The court reasoned that, under the Supreme Court’s decision in New York v. Ferber, nude, or partially nude photos, even of children, are not, **without more**, “pornography.” The court stated that “nothing in the affidavits indicated that any of O’Neill’s...images depicted lewd or lascivious exhibitions or a graphic focus on the boys’ genitals,” which would meet the Court’s definition of child pornography. The **conclusory assertion** at the beginning of Officer Brian’s affidavit that police had received a report “about a citizen possessing pornographic material involving a minor” did not create probable cause to believe “that what O’Neill possessed was (in fact) child pornography.” Although the district court determined that the warrants were not supported by probable cause, the court concluded that the good-faith exception articulated in United States v. Leon, justified the officers’ objectively reasonable reliance on the warrants’ “apparent validity.” Accordingly, the court declined to suppress the evidence found in the house and the barn.

For the Court’s Opinion: [United States v. O’Neill, No. 22-3793 \(6th Cir. 2024\) :: Justia](#)

Seventh Circuit

United States v. Hudson: (7th Cir. 23-1108)

In this case, defendant Hudson was in an emergency room suffering from a gunshot wound to the buttocks. Officers had responded to a shooting outside a local bar and found Hudson as he was being transported to the emergency room by a bar patron. Officers Smith and Finke were in, or immediately

outside, the room during Hudson's treatment. The ER personnel soon realized Hudson was concealing something in his mouth and urged him to spit it out, fearing that either his airway could become obstructed, or drugs might be ingested.

After 20 minutes of the medical personnel's urging, Hudson finally spit out the foreign object. It was determined to be a Glock component capable of converting a firearm into a fully automatic weapon (machine gun). Hudson was charged with violation of 18 USC 922 (o) and 924 (a)(2). He moved to suppress the evidence arguing that the ER personnel were de facto government actors and that they conducted a warrantless search.

Court's Analysis:

The issue is whether the medical personnel were acting as government agents when they urged Hudson to spit out the foreign object. The court found that the ***defendant bears the burden*** of proving that a private individual acted as an instrument or agent of the government in conducting a search. To meet this burden, 'a defendant must prove some exercise of governmental power over the private entity, such that the private entity may be said to have acted on behalf of the government rather than for its own, private purposes.' There are two critical factors to assist courts in the analysis:

1) "whether the government knew of and **acquiesced** in the intrusive conduct," and

2) "whether the private party's conduct was done with the purpose of assisting law enforcement or to further its own ends."

Further, other useful criteria are whether the private actor acted at the request of the government and whether the government offered the private actor a reward. The lower court found that each of these factors pointed to the nonexistence of any agency relationship.

Hudson's argument focuses on the "**acquiesced**" language of the first factor, arguing that Smith clearly knew of and acquiesced in medical staff's search because Smith maintained a constant presence both inside and outside the emergency room and stood idly by while staff directed Hudson to spit out the item. However, knowledge and inaction alone, are ***insufficient to establish an agency relationship***. The mere fact that the police witness a private party's

search does not transform the private party into a governmental agent. Mere knowledge of another's independent action, does not produce vicarious responsibility absent some manifestation of consent and the ability to control. Passive acceptance by the Government is not enough.

While the court agreed that Smith had some degree of interaction with medical staff, the lower court did not err in discounting this interaction and that Smith did not attempt to induce medical staff to act or otherwise manifest any ability to control medical staff's actions.

For the Court's Opinion: [United States v. Hudson, No. 23-1108 \(7th Cir. 2023\)](#) :: [Justia](#)

Tenth Circuit

United States v. Renquillo: (10th Cir. 22-1247)

In this case the Court of Appeals examined a case involving a defendant who was found sleeping in a detached garage during the execution of a search warrant of the house. The defendant was found with methamphetamine, cocaine, and heroin on his person and was subsequently charged with possession with intent to distribute. In his defense, Renquillo argued that the officers should not have entered the garage as it was not specifically included in the search warrant. The court disagreed, upholding the lower court's decision that the warrant covered the garage since it was within the curtilage of the property being searched.

Dunn Factors:

The court applied the four-factor test from [United States v. Dunn](#), considering

- the proximity of the garage to the home,
- whether the area was enclosed,
- the nature of the uses of the area, and
- the steps taken by the resident to protect the area from observation by people passing by.

Courts Analysis:

Defendant argued that the warrant did not authorize the search of the detached garage because the warrant and supporting affidavit contained no reference to the detached structure. But police may search a detached structure not directly referenced in a warrant if the curtilage contains the detached structure. Courts have consistently held that a search warrant authorizing a search of a certain place includes any detached structures and vehicles located within its curtilage. The curtilage and the home receive the same Fourth Amendment protections because “the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” Oliver v. United States.

Proximity. The close proximity of the detached garage to the residence suggested that it fell within the curtilage of the residence. The detached garage was about twenty-five feet from the main residence, and a walkway through the backyard connected the detached garage to the main residence.

Enclosure. A chain link fence surrounded the backyard and connected to the detached garage. The fence did not enclose the entire building of the detached garage, but the fence started and ended at the detached garage and the garage door was inoperable—creating a full enclosure and requiring anyone wishing to enter the detached garage to do so from inside the fence. Thus, the fence and the detached garage “serve[d] to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house.”

Intimate activities of the home. Defendant used the detached garage as a living quarter. The detached garage had clothes, mouthwash multiple chairs, a mirror, lamps, and drinks. Officers also found Defendant sleeping in a bed. Defendant used the detached garage as a bedroom, and the activities that occur in a bedroom are the type of private intimate activities that occur in the home.

Shielding from public view. The public could not observe the interior of the detached garage, which weighed in favor of the notion that the detached garage existed within the curtilage. The detached garage had two windows and one door, all of which faced the main residence and not the public. Two other boarded up windows protected the interior from public observation.

The court found that the garage was close to the main residence, enclosed by a chain link fence, used for intimate activities associated with home life, and shielded from public view. Therefore, it was part of the curtilage of the property, and the search was lawful based on the search warrant of the home.

For the Court's Opinion: [United States v. Ronquillo, No. 22-1247 \(10th Cir. 2024\) :: Justia](#)

United States v. Hay (10th Cir. 22-3276)

The Department of Veterans Affairs (VA) offers lifetime benefits to permanently disabled veterans. A Kansas jury convicted Bruce Hay of ten counts of stealing government property and six counts of wire fraud as part of a scheme to defraud the VA by exaggerating his disability.

Based on an anonymous tip the VA Inspector General's office installed a pole camera on a school rooftop across the street from Mr. Hay's house. The camera was remote-controlled and also activated by motion. It recorded near constant footage of Hay's house as visible from across the street. All told, the camera captured 15 hours of footage per day for 68 days. Hay contended that constant video surveillance of his home over several months constituted an unreasonable search under emerging Supreme Court case law.

The camera could only view Mr. Hay's property as visible from the street. For decades, the Supreme Court has held that individuals do not have a reasonable expectation of privacy in activity that occurs in public view. "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." California v. Ciraolo.

The Supreme Court's guideposts are clear: viewing of private settings, visible only with technology that is not in general public use, is considered a search; viewing settings that are in public view, or visible via generally available technology, does not constitute a search. In US v. Jackson, the US Supreme Court concluded that the use of a pole camera does not constitute a search if the camera can only capture activity in public view.

However, Hay contended that Jackson is limited by the more recent Carpenter decision. In *Carpenter*, the Supreme Court considered whether the government conducts a search when it accesses historical cell-site location information. There, the government subpoenaed cell phone data from the suspect's wireless provider to track the suspect's movement before, during, and after a crime. The Court found this to be a search covered by the Fourth Amendment.

According to Mr. Hay, the recording of his house for an extended period of time (68 days in this case) catalogs his habits, patterns, and visitors in a way that ordinary physical surveillance could not duplicate. As he put it, "the footage obtained painted an intimate portrait of Mr. Hay's personal life," including "when he entered and exited his home; who visited him and his family," and "what Mr. Hay did on his own front porch." He acknowledged that this activity took place in public but argued that "while people subjectively lack an expectation of privacy in some discrete actions they undertake in unshielded areas around their homes, they do not expect that every such action will be observed and perfectly preserved for the future."

The court rejected this argument finding that the pole camera across the street from Mr. Hay came nowhere close to capturing "the whole of his physical movements." It could only capture his movements at a single location, outside his house. As soon as he left his house, the government could no longer track him by this means. Further, the camera could not record any activity that occurred within the protected confines of his home.

The court concluded Mr. Hay had no reasonable expectation of privacy in a view of the front of his house, even for an extended 68-day period.

For the Court's Opinion: [United States v. Hay, No. 22-3276 \(10th Cir. 2024\) :: Justia](#)

California Court of Appeals

People v. Felix: (CA Ct.App. B317938)

Jason Felix was arrested for a traffic violation in Utah where a consensual search of his car led to the discovery of a handgun, ammunition, and over five kilograms of methamphetamine. Subsequently, Felix became a suspect in two

murders in southern California while in custody in Utah on the drug charges. Upon his extradition to California, Felix invoked his right to counsel during an interview about one of the murders. He was then placed in a cell with an ***undercover detective***, to whom he made ***incriminating statements*** about both murders. The lower court denied Felix's motion to suppress and admitted his incriminating statements made to the undercover agent. He was found guilty of two counts of first-degree murder.

After defendant was extradited to California, he was taken to the San Fernando Police Department. On September 21, 2017, defendant was interviewed by Sergeant Gray and Detective Ruiz regarding the shooting of Mr. Mota. Defendant was read his Miranda rights. He did not immediately invoke his right to counsel. Defendant answered some questions, mostly concerning general background information. He also confirmed his cell phone number and said he had borrowed the car he was driving from a friend. When shown photographs of the murder victim, Mota, and of a 15-year-old suspected accomplice in the murder, defendant denied knowing either one. Defendant eventually invoked his right to counsel and the interview was concluded.

Following the September 2017 interview, an undercover detective was placed in the same holding cell as defendant. The undercover detective was wearing civilian clothes and acted like he was a fellow detainee. He was wired to record audio of any conversation. Felix initiated a conversation with the undercover detective, asking him if he spoke Spanish. The undercover detective said yes and they began to talk about what led defendant to being in custody. Defendant told the undercover detective he had been in custody in Utah on drug charges but the case had been "dropped." He said he had been transporting drugs ("ten pounds of crystal") and was on his way from Los Angeles to New York when he was stopped for a traffic violation. Sergeant Gray and Detective Ruiz then stopped by the cell and removed the defendant. They told him they had received more evidence pointing to his involvement in the murder of Mr. Mota. They returned defendant to the holding cell and told defendant to think about what they had told him. After the detectives left, defendant resumed his conversation with the undercover detective. He said the detectives wanted him to "snitch" on some kid who had killed a man. Felix eventually made incriminating statements about his involvement in the murder of Mr. Mota. He said the kid who did the shooting was 15 years old and had already killed six people. He had given the kid a nine-millimeter

Beretta handgun and drove him to “do it” outside of a church. Defendant said he never touched Mr. Mota and his fingerprints were not on the gun because he cleaned it well before giving it to the kid.

In Illinois v. Perkins(1990), the Supreme Court held that an “undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response.” Perkins came to this conclusion because conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. Perkins made clear that “Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect’s misplaced trust in one he supposes to be a fellow prisoner.”

The court held that Felix's incriminating statements to the undercover detective were properly admitted, as they were made freely to someone he believed to be a fellow inmate

For the Court’s Opinion: [People v. Felix :: 2024 :: California Courts of Appeal Decisions :: California Case Law :: California Law :: US Law :: Justia](#)