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

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The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. 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 – October 2024

Circuit Courts of Appeals

Second Circuit

United States v. Thompkins: Whether the district court should have suppressed images of child pornography found on a SanDisk flash memory card ("SD card") inserted into the back of Thompkins' Samsung cellular phone because the search warrant that authorized the search of his phone did not separately identify the SD card as a place to be searched. Was it within the scope of the *initial* warrant? **Interesting Quote**: *Durably Attached*

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Fourth Circuit

United States v. Elboghdady: Whether a defendant may avail himself of the defense of government entrapment when a state Law Enforcement Officer posted an ad on Craigslist to attract child predators. Specifically, did the undercover operation overreach or induce Elboghdady? **Interesting Quote**: *The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.*

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Eighth Circuit

United States v. Collier: What specific factors will a court review when considering a defendant's assertion that a trained dog's alert was insufficient to establish probable cause? **Interesting Quote**: *The reliability of a dog's alert, not its manner, is what matters.*

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Tenth Circuit

United States v. Pena: What specific factors will a court consider when determining the voluntariness of the Appellant's confession to having sex with his underage daughter and posting the footage. The court gives an in-depth analysis of Pena's appeal. **Interesting Quote**: *But, deceit does not inherently render a confession involuntary.*

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FLETC Informer Webinar Schedule:

October 31, 2024, 2:30 EST – FLETC OCC Informer Webcast Series "Michigan v. Summers and the Detention of Individuals during the Execution of Search Warrants" presented by James Stack, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Center, Charleston, South Carolina. The class will examine the Constitutional basis for law enforcement officers to detain the occupants of a house during the execution of a search warrant.

Link: Click Here

November 1, 2024, 2:30 EST – FLETC OCC Informer Webcast Series, "Graham v. Connors, a Reasonable Defense Denied?" presented by Sam Lochridge and Mary Mara, Attorney Advisors/Senior Instructors, Federal Law Enforcement Training Center, Glynco, Georgia. The class will examine the, perhaps, inconsistent application of the reasonable officer standard when an officer is charged criminally.

Link: Click Here

CASE SUMMARIES

Circuit Courts of Appeals

Second Circuit

United States v. Thompkins, No. 22-599 (2d. Cir. 2024)

Eric Tompkins was convicted of possession of child pornography and failing to register as a sex offender. During his arrest, a Samsung cellular phone with an SD card was seized. A search warrant was obtained to examine the phone for *evidence related to his failure to register*. During that search, child pornography was found on the SD card. A second warrant was then obtained to search the phone and SD card specifically for child pornography, leading to the discovery of additional images.

The lower court denied Thompkins motion to suppress based on the recognized concept of Good Faith established in US v. Leon. However, this court affirmed the denial on a different basis. The 2d Circuit found that the initial warrant did in fact "sufficiently describe" the items to be seized, including the SD card.

Court's Analysis:

The court looked at the verbiage of the initial (April 2019) warrant and reviewed precedent. The first search warrant expressly authorized a search of the cellular phone for the purpose of locating information evidencing Tompkins's failure to register, "in whatever form and by whatever means . . . created or stored, including any form of computer or electronic storage (such as flash memory or other media that can store data)." During the suppression hearing an expert witness (Investigator Kozel) testified that an SD card is "a type of flash media" and flash media is a "type of storage" on an electronic device. The purpose of an SD card, he continued, is typically to provide additional storage space to the cellular phone. The cellular phone, in turn, will "install . . . its own file system so that it can utilize the SD card" as soon as the SD card is inserted. The phone's utilization of a given SD card is thereafter affected by user preferences. The operating system may ask if a user

wants to store their pictures there, . . . as opposed to in the internal memory of the phone. In that way, a cellular phone communicates with the SD card, "such that the SD card becomes an extension of the cellular device" once inserted. As such, the warrant clearly authorized the search of a SD card—which is itself a form of electronic storage—inserted into the cellular phone and *durably attached* to it.

If you have a constitutional basis to search the phone, then you have a constitutional basis to search the inserted SD card by definition.

For the Court's Opinion: United States v. Tompkins, No. 22-599 (2d Cir. 2024) :: Justia

Fourth Circuit

United States v. Elboghdady, No. 22-4194 (4th Cir 2024)

The case involves Makel Elboghdady, who was convicted of traveling in interstate commerce with the intent to engage in illicit sexual conduct, violating 18 U.S.C. § 2423. The conviction stemmed from an undercover operation where a West Virginia State Police officer posted an ad on Craigslist to attract child predators. Elboghdady responded to the ad and engaged in a series of communications with the undercover officer, which led to his travel from Ohio to West Virginia for a face-to-face meeting. Upon arrival, he was arrested and charged.

At trial, Elboghdady's proposed jury instructions included an entrapment instruction. The government objected and argued that no evidence of government inducement existed, and an entrapment instruction was thus unwarranted. The district court agreed.

Court's Analysis:

Although entrapment is generally a jury question, a court may find as a matter of law that no entrapment existed when there is no evidence in the record that would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it. (United States v. Osborne) More than a scintilla of evidence of (1) government inducement to commit a crime and (2)

the lack of predisposition on the part of the defendant to engage in criminal conduct *must exist* for a court to instruct the jury on entrapment. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play. (Hampton v. United States)

Government overreach, or inducement is defined as "solicitation plus some overreaching or improper conduct on the part of the government." To be entitled to the defense, Elboghdady must point to evidence of "government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." He claims that the Under Cover's (UC's) decision to continue the conversation despite his repeated interest in the fictitious mother and the language barrier that permeated their conversations provide proof of overreach.

The court disagreed. Elboghdady points to the UC repeatedly offering him the fictious young girls as the qualifying conduct. But repeated suggestions from law enforcement do not give rise to government overreach. (United States v. Velasquez) His sustained interest in the fictitious mother also failed to rise to the level of overreach because it does not concern government action. Each time Elboghdady expressed interest in the mother, the UC declined the advance and refocused the conversation on the two young girls. She did so without persuading or otherwise swaying Elboghdady to act, so the defense was unwarranted.

However, the entrapment standard does not act as a free pass for the government to ignore the context of the interactions they engage in during undercover operations. As the lower court deduced, "there is not evidence here that Mr. Elboghdady was a predator, was on the prowl when he saw this ad and decided here was his chance to go have sex with a couple of minors." The court cautioned law enforcement to remember the purpose of its conduct when operating undercover operations: "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." (Sherman v. United States)

Elboghdady also argued that the lower court erred because it only considered the inducement prong in its denial of the entrapment instruction. He contends that because predisposition is "the principal element in the defense of

entrapment," the court was required to decide that issue. However, both elements are required to unlock the instruction. A deficient showing on either prong ends the analysis. "The court properly concluded that no evidence of inducement existed, therefore, it found no error in the district court's decision to deny the instruction on that basis."

For the Court's Opinion: United States v. Elboghdady, No. 22-4194 (4th Cir. 2024) :: Justia

Eighth Circuit

United States v. Collier, No. 23-3255 (8th Cir. 2024)

While patrolling Interstate 40 in Lonoke County, Arkansas, State Police Corporal Travis May stopped Tommy Collier for drifting onto the shoulder. May noticed Collier's shaking hands, a disorderly car interior, and an unusual travel itinerary, which aroused his suspicion. Collier, a resident of Mississippi, was driving a car rented in Las Vegas with a Utah license plate. After Collier declined a search request, May called a K-9 unit. The drug-detection dog, Raptor, alerted to the presence of drugs, leading to a search that uncovered ten bundles of cocaine. Collier was arrested and later indicted for unlawful possession of cocaine with intent to distribute.

Collier was convicted and sentenced to ten years imprisonment. This appeal challenged, in part, the reliability of the drug-detection dog to establish probable cause to search the Appellant's vehicle.

Court's Analysis:

Collier challenged the reliability of the canine, Raptor, to satisfactorily detect illicit drugs. He also contends that Raptor's alert was insufficient to establish probable cause to search his car. But, a dog is *presumptively reliable* at detecting illicit drugs—and its alert establishes probable cause for a search—*if* the dog has satisfactorily completed a bona fide certification or training program. (Florida v. Harris) This presumption may be overcome if a defendant can show by cross-examination or opposing evidence the inadequacy of the certification or training program or that the circumstances surrounding a canine alert undermined the case for probable cause.

Before encountering Collier's car, Raptor completed a 320-hour basic training course under the Arkansas State Police. Further, Raptor maintained its drug-detection skills through "monthly sessions." The record contains no opposing evidence undermining Raptor's reliability. The record shows that authorities had previously deployed Raptor 158 times, it had alerted 73 times, and authorities had discovered illicit drugs 71 times. In the field, Raptor's accuracy rate was 97 percent. Previous cases held that, absent contradictory circumstances, a trained dog's alert will establish probable cause when the dog's previous in -field accuracy rate exceeds 50 percent. (United States v. Holleman) Raptor far surpassed the 50-percent standard. But, Collier also questioned how Raptor alerted, suggesting that its alert was insufficiently "profound." Every dog is unique, and a dog that smells illicit drugs is not required to communicate with its handler in any specific way. Dogs alert in many different manners. One dog may alert in one fashion while another dog may alert differently. (United States v. Howard) It's the *reliability* of a dog's alert, not its *manner*, that brings confidence to the question. Based on the record, the court concluded that Raptor's own unique manner of alert reliably signaled the probable presence of illicit drugs. Because Raptor was reliable and its alert was sufficient, the officers had probable cause to search Collier's car.

The lower court correctly admitted the narcotics evidence derived from the search.

For the Court's Opinion United States v. Collier, No. 23-3255 (8th Cir. 2024) :: Justia

Tenth Circuit

United States v. Pena, No. 23-2047 (10th Cir. 2024)

The defendant, Jose Pena, was accused of inducing his minor daughter to engage in sexual activity and recording it. Using a Facebook alias, "Jaime Peres," Pena initiated an online relationship with his daughter, Jane Doe, and later coerced her into recording sexual acts with him by threatening her with fabricated cartel violence. Jane reported the incidents to her school, leading to Pena's arrest and confession during a police interview.

The United States District Court for the District of New Mexico denied Pena's motion to suppress his confession, finding it voluntary under the totality of the circumstances. The court noted that law enforcement did not overbear Pena's will despite using various interrogation tactics. A jury subsequently convicted Pena of inducing a minor to engage in sexual activity and producing child pornography.

The United States Court of Appeals for the Tenth Circuit reviewed the district court's denial of the motion to suppress. The appellate court upheld the lower court's decision, agreeing that the confession was voluntary. The court found that law enforcement's conduct, *while at times troubling*, did not critically impair Pena's capacity for self-determination.

Court's Analysis*:*

The government's use of an involuntary confession as evidence in a criminal trial violates a defendant's Fifth Amendment right against self-incrimination. The court considered the totality of the circumstances, and no single component was, by itself, determinative. The Government always bears the burden of demonstrating a confession is voluntary by a preponderance of the evidence. Although the court evaluates voluntariness by the totality of the circumstances, precedent recognizes that the following often inform a court's judgment: (1) the Defendant's age, intelligence, and education; (2) the detention's length; (3) the questioning's length and nature; (4) whether law enforcement advised Defendant of his constitutional rights; and (5) whether law enforcement subjected Defendant to physical punishment. The lower court found that none of these factors suggested defendant involuntarily confessed. Pena challenged only the district court's conclusions about the length and nature of his questioning. He also argued that law enforcement compelled his confession by coercive conduct, including speaking in loud voices, questioning Defendant for almost four hours, implying that Defendant's children might commit suicide because of Defendant's actions, informing Defendant that his children had talked about committing suicide, invading Defendant's personal space, utilizing three officers in questioning the Defendant, exhorting Defendant to confess almost 100 times with phrases like "be honest" and "tell the truth," deceiving Defendant by telling him (initially) he was not a suspect and that law enforcement had "overwhelming evidence" against him, threatening jail time, implying Defendant could earn leniency by

confessing, telling Defendant his daughter couldn't forgive him unless he confessed, and implying they would continue questioning Defendant until he confessed.

In considering the totality of the circumstances, The Appeals Court agreed with the lower court's finding that law enforcement's conduct was, at times, "uncivil" and "troubling." But the constitutional inquiry is not whether law enforcement's conduct deserves criticism. The Fifth Amendment does not forbid law enforcement from persuading a defendant to confess, nor does it prohibit law enforcement from crafting an environment where the defendant "is more likely to tell the truth."

Rather, the court found a confession is involuntary only if law enforcement overbore the defendant's free will and critically impaired the defendant's "capacity for self-determination." (United States v. Perdue) Considering the totality of the circumstances, the court held the Government had demonstrated by a preponderance of the evidence that Defendant's confession was the result of an "essentially free and unconstrained choice."

Several considerations lead to their decision. First, as the lower court found, Defendant was "not particularly susceptible to coercion." Defendant had not challenged this finding, and the record provided no reason to doubt that Pena appeared to understand law enforcement at all times, and had no communication issues.

Second, law enforcement advised Pena of his right to remain silent. Although the administration of Miranda warnings is not necessarily sufficient to determine voluntariness, cases in which a defendant can make a creditable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare. Here, law enforcement on three occasions informed Defendant that he could refuse to answer questions, (1) mirandizing Defendant, (2) reminding Defendant he could decline to answer any of law enforcement's questions during the interrogation, and (3) telling Defendant that if he decided he didn't want to talk anymore, he could stop talking and tell law enforcement. These warnings demonstrated that although the officers tactics encouraged the confession, law enforcement enabled—rather than overbore—Defendant's free will.

Third, the duration of Defendant's interrogation (three hours, forty-eight minutes, and eight seconds) suggested the Defendant confessed voluntarily. This duration is not inherently troubling for Fifth Amendment purposes. For example, in Germany v. Hudspeth, the court held that an interrogation lasting three and one-half hours was not the "long and uninterrupted questioning" that would overbear a defendant's volition. But in contrast, an officer should review, Ashcraft v. Tennessee, where the court found a confession involuntary where the defendant was interrogated for thirty-six hours without sleep. Also in contrast, Davis v. North Carolina, held a confession involuntary where the defendant was interrogated repeatedly over a period of sixteen days.

Fourth, the nature of Defendant's interrogation did not offend the Fifth Amendment's guarantees. Pena offered no basis suggesting he suffered any sort of sleep deprivation. During the interrogation, law enforcement provided him breaks in questioning, offering soda, water, and the opportunity to use the bathroom. And, although law enforcement—at times—spoke loudly and gestured into Defendant's personal space, the record did not suggest that these physical threats or intrusions critically impaired his capacity for self-determination. Again, in contrast, an officer should review Beecher v. Alabama where the defendant confessed after the police chief "pressed a loaded gun to the defendant's face" and told the defendant he would kill him if he didn't tell the truth, and also Payne v. Arkansas, where the defendant confessed after the Chief of Police told the defendant he would admit a mob into the jail if he didn't tell him the truth. Obviously, these confessions were suppressed.

Fifth, the court was not persuaded that law enforcement's repeated exhortation for honesty reasonably contributed to overbearing Defendant's free will. The practice of encouraging a suspect to be honest is well-established in the circuits as noncoercive conduct. (United States v. Chalan)

In the context of these precedents, Pena did not sufficiently explained how repeated requests for honesty impaired his free will. And without such an explanation, the court rejected his contention that the Fifth Amendment forbids law enforcement to implore a person to tell the truth.

Sixth, the Government demonstrated that law enforcement's deceptions did not compel Defendant's confession. The lower court found law enforcement deceived Defendant by overstating the strength of its evidence and denying

(initially) that Defendant was a suspect. *But deceit does not inherently render a confession involuntary*. (United States v. Woody) Instead, the court considered whether the purportedly coercive activity caused the confession. Under both Supreme Court and Tenth Circuit precedent, deceit about the strength of evidence against a defendant does not alone render an otherwise voluntary confession involuntary. (Lucero v. Kerby)

Finally, law enforcement's deceit about the Defendant's being a suspect did not contribute the Defendant's confession. Law enforcement actually told Pena he was being questioned as a suspect long before Defendant confessed, and Defendant himself acknowledged, early in the session, that he was being questioned because his daughter had accused him of having sexual intercourse with her. In short, law enforcement's deceptive statement about Defendant's "suspect-hood" could not have caused Defendant's confession because Defendant understood—and admitted—he was a suspect *prior* to confessing.

In sum, the Court of Appeals concluded that law enforcement's deceptions and tactics, "though troubling" in some respects, did not override Defendant's free will. The District Court properly admitted Pena's confession.

For the Court's Opinion United States v. Pena, No. 23-2047 (10th Cir. 2024) :: Justia