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

May 2015

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.

This edition of *The Informer* may be cited as 5 INFORMER 15.

Join The Informer E-mail Subscription List

It's easy! Click HERE to subscribe, change your e-mail address, or unsubscribe.

THIS IS A SECURE SERVICE. No one but the FLETC Legal Division will have access to your address, and you will receive mailings from no one except the FLETC Legal Division.

The Informer – May 2015

Case Summaries

United States Supreme Court

♦

Circuit Courts of Appeals

First Circuit

Fifth Circuit

Seventh Circuit

Eighth Circuit

Tenth Circuit

♦

FLETC Informer Webinar Series

1. Law Enforcement Legal Refresher Training

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

This two-hour block of instruction 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 two-hour legal refresher training requirements.

Date and Time: Thursday June 4, 2015: 2:30 p.m. EDT

To join this webinar: https://share.dhs.gov/lgd0312

♦

To participate in a FLETC Informer Webinar:

1. Click on the appropriate link above to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the webinar.
6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Meeting rooms will be open and fully accessible at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

****

CASE SUMMARIES

United States Supreme Court

Rodriguez v. United States, 2015 U.S. LEXIS 2807 (U.S. Apr. 21, 2015)

A police officer stopped Rodriguez for a traffic violation. After completing all of the tasks related to the stop, to include checking Rodriguez's driver's license and issuing a warning ticket, the officer asked Rodriguez for permission to walk his drug-sniffing dog around Rodriguez's car. After Rodriguez refused, the officer directed Rodriguez to get out of the car until a back-up officer arrived. After the back-up officer arrived, the officer walked his dog around Rodriguez's car and the dog alerted to the presence of drugs. The officer searched the car, found a large bag of methamphetamine and arrested Rodriguez. Approximately seven or eight minutes elapsed from the time the officer issued the warning ticket until the dog alerted on Rodriguez's car.

Rodriguez moved to suppress the evidence seized from his car. Rodriguez argued that after issuing the ticket, the officer violated the *Fourth Amendment* by extending the duration of the traffic stop without reasonable suspicion in order to conduct the dog sniff.

The district court denied Rodriguez's motion. The court held that dog sniffs that occur shortly after the completion of a traffic stop are lawful if they constitute only a *de minimis* intrusion on a person's liberty. Here, the court found the seven to eight minutes added to the duration of the stop constituted a *de minimis* intrusion on Rodriguez's personal liberty; therefore, it was reasonable for the officer to extend the duration of the stop after issuing Rodriguez a ticket.

The Eighth Circuit Court of Appeals affirmed the district court. Because the court held the delay in this case constituted an acceptable *de minimis* intrusion on Rodriguez's personal liberty, the court declined to address whether the officer established independent reasonable suspicion to extend the duration of the stop after issuing Rodriguez the ticket.

The issue before the Supreme Court was whether an officer may extend an already completed traffic stop for a dog sniff without reasonable suspicion or other lawful justification. In a 6-3 decision, the court held that "a police stop exceeding the time needed to handle the matter for which the stop was made" constitutes an unreasonable seizure under the *Fourth Amendment*. When conducting a traffic stop, officers may check the driver's license, determine whether there are outstanding warrants against the driver and inspect the automobile's registration and proof of insurance. The court noted that all of these tasks are related to the objective of the stop, which is enforcement of the traffic code and ensuring that vehicles on the road are operated safely and responsibly. On the other hand, a dog sniff aimed at detecting evidence of a crime is not a routine measure ordinarily incident to a traffic stop. Consequently, the court noted the critical question is not whether the dog sniff occurs before or after the officer issues the ticket, but whether conducting the dog sniff extends the duration of the stop. If the dog sniff extends the duration of the stop, it is a violation of the *Fourth Amendment* unless the officer has reasonable suspicion of criminal activity. As the Eighth Circuit Court of Appeals never determined whether the officer had reasonable suspicion of criminal activity to justify

the seizure of Rodriguez beyond the time needed to issue the ticket, the Supreme Court remanded the case to the Eighth Circuit to decide this issue.

Click **HERE** for the court's opinion.

*****

Henderson v. United States, 2015 U.S. LEXIS 3199 (U.S. May 18, 2015)

Henderson, a former United States Border Patrol Agent, was charged with distribution of marijuana, a federal felony. As a condition of his bond, Henderson voluntarily surrendered nineteen firearms to the Federal Bureau of Investigation (FBI). Henderson pled guilty to the drug charge and became a convicted felon in 2007. In 2008, the FBI refused to return the firearms after Henderson proposed to transfer them to a potential buyer. Henderson then filed a motion under *Rule 41(g)* of the *Federal Rules of Criminal Procedure* requesting that he be allowed to transfer ownership of the firearms to the potential buyer, or alternatively, to his wife.

The Eleventh Circuit Court of Appeals, in an unpublished opinion, denied Henderson's motion. The court held it would be in violation of *18 U.S.C. § 922(g)* if the court delivered actual or constructive possession of firearms to a convicted felon. The court noted Henderson acknowledged in his plea agreement that as a felon he would not be allowed to possess firearms. In addition, the court stated a defendant who has been convicted of a felony drug offense has "unclean hands" to demand the equitable return of his firearms.

The issue before the Supreme Court was whether *18 U.S.C. § 922(g)* prohibits a court from approving a convicted felon's request to transfer his firearms to another person.

The court reversed the Eleventh Circuit and held that a court ordered transfer of a felon's lawfully owned firearms from government custody to a third party is not prohibited by *18 U.S.C. § 922(g)* if the court is satisfied that the recipient will not give the felon control over the firearms. For example, the court noted that a court could order the guns be turned over to a firearms dealer for subsequent sale on the open market. Another option would be for the court to grant a felon's request to transfer his firearms to a third party who would maintain custody of them. Under either option, a court must first be satisfied that the recipient of the firearms will not allow the felon to either use the firearms or direct their use.

Click **HERE** for the court's opinion.

*****

San Francisco v. Sheehan, 2015 U.S. LEXIS 3200 (U.S. May 18, 2015)

Sheehan, a woman who suffered from mental illness, lived in a group home that accommodated such persons. Sheehan's social worker became concerned about her deteriorating condition because Sheehan was not taking her medications. When the social worker entered Sheehan's room, Sheehan told the social worker to get out. In addition, Sheehan told the social worker she had a knife and threatened to kill him. The social worker left Sheehan's room, cleared the building of other residents and called the police to help him transport Sheehan to a mental health facility for an involuntary commitment for evaluation and treatment.

When Officers Reynolds and Holder arrived, the social worker told them he had cleared the building of other residents. The social worker also told the officers the only way for Sheehan to leave her room was by using the main door, as the window in Sheehan's room could not be used as a means of escape without a ladder. The officers then entered Sheehan's room without a warrant to confirm the social worker's assessment, and to take Sheehan into custody. When Sheehan saw the officers, she grabbed a knife and threatened to kill them, stating she did not wish to be taken to a mental health facility. The officers went back into the hallway and closed the door to Sheehan's room. The officers called for back-up, but before other officers arrived, Reynolds and Holder drew their firearms and forced their way back into Sheehan's room. After Sheehan threatened the officers with a knife, the officers shot Sheehan five or six times. Sheehan survived and sued the city and the officers, claiming the officers violated her *Fourth Amendment* rights by entering her room without a warrant and using excessive force.

The Ninth Circuit Court of Appeals held the officers first warrantless entry into Sheehan's room was justified under the emergency aid exception to the *Fourth Amendment's* warrant requirement. The court concluded that when the officers first entered Sheehan's room, they had an objectively reasonable basis to believe Sheehan was in need of emergency medical assistance based on the information provided by the social worker.

However, the court found that even though the officers might have been justified in entering Sheehan's room the second time, there were unresolved factual issues that had to be determined by a jury and not the court. For example, Sheehan produced evidence suggesting the officers deviated from training they received from their department on how to deal with mentally ill subjects. Consequently, because a reasonable jury could find that the officers acted unreasonably by forcing their way into Sheehan's room and provoking a near fatal confrontation, the court concluded the officers were not entitled to qualified immunity.

Concerning the officers' use of deadly force, the court held at the moment of the shooting, the officers' use of deadly force was reasonable because Sheehan posed an immediate threat of danger to the officers' safety. However, the court determined that under Ninth Circuit case law, police officers may be liable for an otherwise lawful use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of a separate *Fourth Amendment* violation. In this case, the court found that Sheehan presented evidence from which a reasonable jury could find the officers acted recklessly by failing to take her mental illness into account and in forcing a deadly confrontation rather than attempting to de-escalate the situation.

The City of San Francisco and the officers appealed, and the United States Supreme Court agreed to hear arguments on the two questions presented below.

1. Whether Title II of the Americans with Disabilities Act (ADA) requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.

2. Whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the *Fourth Amendment* by reason of the anticipated resistance of an armed and violent suspect within.

First, the Supreme Court dismissed the first question presented by the city because at oral argument, the city did not argue the issue presented in the question. Instead of arguing that the ADA did not apply to enforcement actions by law enforcement officers, the city conceded that the ADA might apply to arrests. The city then argued that in this case, the officers were not required to provide Sheehan an accommodation under the ADA because of the threat she posed to the officers. Because the United States Supreme Court does not usually decide questions of law that were not presented to and ruled upon by a lower court, it decided to dismiss the first question presented by the city.

Concerning the second question presented by the officers, the court reversed the Ninth Circuit, holding the officers were entitled to qualified immunity. First, the court held the case law relied upon by the Ninth Circuit in denying the officers qualified immunity did not clearly establish that it was unreasonable for the officers to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and threatening others when there was no objective need for immediate entry. Second, even if the officers acted contrary to the training they received on how to deal with mentally ill subjects, the court held at the time of the incident is was not clearly established that the *Fourth Amendment* required the officers to accommodate Sheehan's mental illness before attempting to arrest her.

Click **HERE** for the court's opinion.

*****

Circuit Courts of Appeal

First Circuit

United States v. Aviles-Vega, 2015 U.S. App. LEXIS 5971 (1st Cir. P.R. Apr. 13, 2015)

An anonymous caller reported that he had witnessed the front-seat passenger in the car travelling in front of him, pass a firearm to a rear-seat passenger. The caller described the car, provided a partial license plate number as well as the location of the incident and the car's direction of travel. Within thirty minutes, officers located a car matching the description of the car provided by the caller. The officers ordered the four occupants, including Vega, out of the car. An officer frisked Vega and seized a loaded handgun from him. The government charged Vega with being a felon in possession of a firearm.

Vega argued the firearm should have been suppressed because the information provided by the anonymous caller was not sufficiently reliable to provide the officers with reasonable suspicion to stop and then frisk him.

The court disagreed. First, the court recognized that Puerto Rico is a concealed-carry jurisdiction; therefore, a person must carry a firearm in a concealed manner even if he possesses a license to carry the firearm. Consequently, the court concluded if the information provided by the caller was correct, the officers had reasonable suspicion to believe the occupants in Vega's car had violated the conceal-carry law. Second, the court held the information provided by the anonymous caller was sufficiently reliable to establish reasonable suspicion for the officers to stop Vega and frisk him. Here, the caller reported that he had just witnessed the passing of a firearm in Vega's car and provided a detailed description and

location of the car. The court found that the caller's tip suggested he was a concerned citizen reporting his direct observation of a crime and not a person making a false report.

Click **HERE** for the court's opinion.

*****

Fifth Circuit

United States v. Alvarado-Zarza, 2015 U.S. App. LEXIS 5499 (5th Cir. Tex. Apr. 6, 2015)

An officer stopped Zarza for violating *Tex. Transp. Code Ann. § 545.104(b)* which requires drivers to signal 100 feet in advance of a turn. During the stop, the officer obtained consent to search and found cocaine in Zarza's car. The government charged Zarza with possession with intent to distribute cocaine.

Zarza moved to suppress the evidence of the cocaine. At the suppression hearing, the officer testified that he believed Zarza violated *§ 545.104(b)* by failing to signal 100 feet before making a lane change, and not when Zarza actually turned. Zarza claimed the stop was unlawful because *§ 545.104(b)* only applies to turns, not lane changes.

The court agreed with Zarza. First, the court found *§ 545.104(b)* is unambiguous, as its 100-foot requirement only applies to turns, not lane changes. Second, in other sections of the statute, there is a distinction made between turns and lane changes. Third, the Texas Driver's Handbook defines the distinction between turns and lane changes. Consequently, the court concluded that *§ 545.104(b)* by its plain terms, does not apply to lane changes.

Next, the court noted that seven months before Zarza's stop, the Texas Court of Criminal Appeals, in *Mahaffey v. State*, drew a clear distinction between turns and other movements, including lane changes. Because applicable case law pre-dated Zarza's stop and because *§ 545.104(b)* gave no support to the officer's interpretation of the 100-foot requirement, the court concluded the officer's mistake of the law was objectively unreasonable.

The court further held is was not objectively reasonable for the officer to believe Zarza failed to signal 100 feet before actually turning when credible expert witness testimony concluded Zarza signaled 300 feet before turning. The officer conceded that he acted quickly and could not "really be measuring" the exact signaling distance. In addition, the officer's estimations of distance related to the point where Zarza changed lanes and not the point where he turned. As a result, the court held the officer did not have reasonable suspicion to believe Zarza violated *§ 545.104(b)*; therefore, the evidence seized during the stop should have been suppressed.

Click **HERE** for the court's opinion.

*****

Seventh Circuit

United States v. Procknow, 2015 U.S. App. LEXIS 6942 (7th Cir. Wis. Apr. 27, 2015)

Officers arrested Procknow and his girlfriend, Van Krevelen, in the lobby of a hotel where the couple had been staying. After their arrests, the hotel manager told officers the couple's hotel stay was being terminated and asked the officers to collect the dog believed to be in their room. The officers entered Procknow's room and secured the couple's dog. While in the room, officers saw documents, financial forms and other evidence that caused them to believe Procknow was involved in identity theft. The officers secured the room, obtained a search warrant and seized evidence related to identity theft. At trial, Procknow moved to suppress all the evidence, arguing the officers' initial warrantless entry into his hotel room violated the *Fourth Amendment*.

The court disagreed. The court ruled the hotel's termination of Procknow's occupancy was justified under Minnesota law. Once the hotel terminated Procknow's occupancy, the court held Procknow lost any reasonable expectation of privacy he might have had in the hotel room. After this occurred, the authority to consent to the officers' entry into the room reverted to the hotel. As a result, the court held the officers' entry into the hotel room did not violate the *Fourth Amendment* and the evidence seized was admissible against Procknow.

Click **HERE** for the court's opinion.

*****

Eighth Circuit

United States v. Cotton, 2015 U.S. App. LEXIS 5459 (8th Cir. Minn. Apr. 6, 2015)

Officers were on patrol at an apartment complex when they saw a person throw a set of keys off a third floor balcony to two men who were standing on the ground below. The officers knew the property manager had instructed residents of the complex not to throw their keys off their balconies to people waiting below, as this behavior compromised the security of the building. In addition, one of the officers had patrolled the area for over eight years and described the location around the complex as a violent area plagued with narcotics activity, robberies and shootings. Immediately after the keys hit the ground, the officers told the men they were not allowed to take the keys. One of the men ignored the officers, grabbed the keys and entered an apartment. As the man was entering the apartment, the officers ordered him to stop; however, the man did not comply. During this time, the other man, who had a nervous look on his face, did not move. When the officers approached the man, later identified as Cotton, he reached for his waistband. Believing that Cotton was reaching for a weapon, the officers grabbed Cotton's arms and handcuffed him. The officers frisked Cotton and seized a pistol from his waistband. The government indicted Cotton for being a felon in possession of a firearm.

Cotton moved to suppress the pistol, arguing the officers did not have reasonable suspicion to initially stop him and then to frisk him.

The court disagreed. First, the officers encountered Cotton and another man in an area known for violence. Second, the unidentified man failed to comply with the officers' commands not to pick up the keys, and when the man picked up the keys, he fled. As a result, the court

concluded Cotton's location in relation to the other man and the keys, combined with the violation of the apartment complex's rules, gave the officers reasonable suspicion to conduct a *Terry* stop of Cotton.

The court further held the officers established reasonable suspicion to believe Cotton was armed and dangerous. The encounter occurred in a known violent area, and as the officers approached Cotton, he reached for his waistband with a nervous look on his face. Consequently, the court held it was reasonable for the officers to detain Cotton to conduct a *Terry* frisk.

Click **HERE** for the court's opinion.

*****

United States v. Thurmond, 2015 U.S. App. LEXIS 5932 (8th Cir. Iowa Apr. 13, 2015)

An informant told officers that a man and a woman were selling crack cocaine from a specific residence. Officers went to the address and conducted a trash-pull. Inside one of the trash bags, officers found two marijuana "roaches" with green plant material inside that looked and smelled like marijuana, as well as "blunt" material and a piece of mail addressed to Thurmond at that address. A field test of the suspected marijuana tested positive for THC. The next day, officers conducted surveillance on the residence, but did not observe activity consistent with the sale of illegal drugs. The officers also discovered that Thurmond had been arrested one month prior for possession of a controlled substance and that he had a juvenile record, which included possession of a controlled substance. The following day, officers executed a search warrant on the residence and seized a sawed-off shotgun, marijuana and drug paraphernalia. The government indicted Thurmond for possession of an unregistered sawed-off shotgun.

Thurmond argued the weapon should have been suppressed because the officers' discovery of a *de minimis* amount of discarded marijuana in his trash did not establish probable cause to obtain the warrant to search his house.

The court disagreed. Based on the totality of the circumstances, to include Thurmond's history with controlled substances and the contraband obtained from the trash pull, the court held the officers established probable cause to believe contraband would be found in Thurmond's residence. In addition, the court held the two-day delay in seeking the warrant following the trash-pull did not diminish the probable cause. The officers conducted the trash-pull and then reasonably conducted surveillance on the residence the next day, which did not yield any results. The court concluded that obtaining the warrant the following day did nothing to lessen the probable cause determination.

Click **HERE** for the court's opinion.

*****

Tenth Circuit

United States v. Paetsch, 2015 U.S. App. LEXIS 5624 (10th Cir. Colo. Apr. 8, 2015)

After an armed bank robbery, officers learned that one of the stacks of stolen money contained a Global Positioning System (GPS) tracking device. Approximately fourteen minutes after the robbery, officers isolated the GPS signal to a general area and barricaded an

intersection, which prevented a group of 20 cars containing 29 people from leaving. Approximately thirty-minutes later, officers ordered Paetsch out of his car and handcuffed him after he kept shifting in his seat and failed to keep his hands outside his car as ordered. After the officers cleared all 20 cars, they began a secondary search by looking through the cars' windows to ensure no one was hiding inside them. Inside Paetsch's car, officers saw a money band and a slip of colored paper that banks use to wrap stacks of money. Approximately one-hour later, the officers isolated the GPS signal to Paetsch's car. The officers arrested Paetsch, searched his car and recovered stolen cash, the GPS tracking device, two handguns and other evidence related to the bank robbery.

Paetsch moved to suppress statements he made to the officers as well as the physical evidence seized from his car. Paetsch argued the police barricade violated the *Fourth Amendment* because the officers lacked individualized suspicion that any particular person stopped at the intersection had committed the bank robbery.

The court disagreed. The court held Paetsch's initial thirty-minute seizure at the barricade did not violate the *Fourth Amendment* because the public interest in apprehending an armed bank robber outweighed the minimal intrusion on Paetsch's liberty. The court further held that when the officers directed Paetsch out of his car and handcuffed him, they had established reasonable suspicion to believe Paetsch was involved in the robbery. As a result, the court concluded Paetsch's additional one-hour detention was reasonable until the officers confirmed the GPS tracking device was located inside Paetsch's car and arrested him.

Click **HERE** for the court's opinion.

*****

Eleventh Circuit

Mobley v. Palm Beach Cnty. Sheriff Dep't., 2015 U.S. App. LEXIS 6094 (11th Cir. Fla. Apr. 15, 2015)

Mobley was seated in his parked truck preparing to smoke crack cocaine when a police officer approached and asked Mobley, "What are you doing?" When Mobley started his truck, the officer reached through the open driver's side window and tried to open the door. Mobley backed his truck out of the parking space and dragged the officer approximately twenty-feet across the parking lot before the officer fell clear of the truck. After Mobley fled, the officer radioed a bulletin that included a description of Mobley and his truck, and the fact that Mobley struck him with the truck and had tried to run him over. A short time later, other officers located Mobley and began a vehicle pursuit. During the pursuit, Mobley drove recklessly at high speeds in an attempt to evade the officers. After Mobley struck a tree, he exited his damaged truck and waded into the middle of an adjacent retention pond. Mobley eventually walked out of the pond and the officers shoved him to the ground. While on the ground, officers struck, kicked and tased Mobley repeatedly after Mobley refused the officers' commands to place his hands behind his back to be handcuffed. As a result, Mobley suffered a broken nose, teeth and a broken dental plate.

Mobley sued nine police officers under *42 U.S.C. § 1983* claiming the officers had used excessive force when they arrested him.

The court held the officers were entitled to qualified immunity. First, the officers who participated in Mobley's arrest knew that Mobley was a fleeing suspect who had had struck an officer with his truck and then led officers on a reckless, high-speed chase. Second, the officers saw Mobley wade into the middle of a pond in what they reasonably assumed was a continuing attempt to avoid arrest. Finally, Mobley refused to allow the officers to handcuff him despite the application of escalating force and repeated use of a taser. The court concluded, under those circumstances, striking, kicking and tasing the resisting and presumably dangerous suspect in order to arrest him were reasonable uses of force and did not violate Mobley's constitutional rights.

Click **HERE** for the court's opinion.

*****

United States v. Davis, 2015 U.S. App. LEXIS 7385 (11th Cir. Fla. May 5, 2015)

A jury convicted Davis on seven counts of robbery. At trial, the government introduced cell site location information obtained from Davis' cell phone service provider. The cell site location information included a record of Davis' calls and revealed which cell towers carried the calls. The government argued the cell site location information established that Davis placed and received cell phone calls near the locations of the robberies around the same time the robberies were committed. The government obtained Davis' cell site location information after obtaining a court order pursuant to *18 U.S.C. § 2703(d)*. To obtain a court order under *§2703(d)*, the government was not required to establish probable cause.

On appeal, Davis claimed the government violated the *Fourth Amendment*, arguing the government was required to obtain a warrant based on probable cause to obtain his cell site location information. The government argued the cell site location information was not covered by the *Fourth Amendment* and was properly obtained under the *§ 2703(d)* court order.

A three-judge panel with the Eleventh Circuit Court of Appeals held that Davis had a reasonable expectation of privacy in the cell site location information and the government violated the *Fourth Amendment* when it obtained that information without a warrant. However, the court further held the cell site location information did not need to be suppressed because the officers acted in good faith reliance on *§2703(d)* order. Specifically, the court concluded the police officers, prosecutors and judge who issued the order followed the requirements of *18 U.S.C. § 2703* and had no reason to believe it was unconstitutional as written. The government appealed the panel's ruling on the *Fourth Amendment* issue and the Eleventh Circuit Court of Appeals agreed to a rehearing *en banc*, or in front of eleven judges.

The full Eleventh Circuit Court of Appeals reversed the three judge panel, and held that the government did not violate the *Fourth Amendment* by obtaining Davis' cell site location information through the use of a *§2703(d)* court order. The court concluded Davis had no reasonable expectation of privacy in these business records, which were maintained by the cell phone service provider. As a result, the government's obtaining a *§2703 (d)* court order for the production of the cell phone provider's business records at issue did not constitute a search under the *Fourth Amendment*.

Click **HERE** for the court's opinion.

*****

District of Columbia Circuit

United States v. Gross, 2015 U.S. App. LEXIS 6526 (D.C. Cir. Apr. 21, 2015)

Four officers with the D.C. Metropolitan Police Department's Gun Recovery Unit were riding together in a police car in an attempt to recover guns. The officers' car was unmarked, but each officer wore a tactical vest that said "police" in large letters on the front and back. When the officers first saw Gross, he was walking on the sidewalk to the left side of their car. When the officers reached an intersection, they turned left and watched as Gross also turned left and continued to travel in the same direction as the officers. Officer Bagshaw slowed the car as it moved next to Gross and shined a flashlight on Gross to get his attention. Officer Bagshaw then called out to Gross from the car, "Hey, it is the police, how are you doing? Do you have a gun?" Gross stopped, but did not reply. Officer Bagshaw stopped the car parallel to Gross and asked him, "Can I see your waistband?" Gross did not reply; however, he lifted his jacket to show his left side. Suspicious of Gross, Officer Katz exited the car and asked Gross, "Can I check you out for a gun?" Gross turned around and fled, with Officer Katz in pursuit. During the chase, Officer Katz saw Gross patting his right side with his hand, which caused Officer Katz to believe that Gross might be trying to hold a gun in his waistband. After Officer Katz apprehended Gross, he performed a *Terry* frisk and recovered a handgun from Gross' waistband. The government indicted Gross for unlawful possession of a firearm by a convicted felon.

Gross moved to suppress the handgun, arguing that he was unlawfully seized when Officer Bagshaw, speaking to him from the police car, asked Gross if he was carrying a gun and would expose his waistband.

The court disagreed. A *Fourth Amendment* seizure occurs only when an officer, "by means of physical force or show of authority, has in some way restrained the liberty" of a person. The court noted that the presence of multiple officers wearing police gear does not automatically mean that a person has been seized. In this case, all four officers remained in a car separated from Gross by one lane of traffic during Officer Bagshaw's questioning. In addition, while the officers carried weapons, there was no indication that the weapons were visible to Gross from the sidewalk. The court further found that Officer Bagshaw's questions, "Do you have a gun?" and "Can I see your waistband?" did not accuse Gross of possessing a gun or committing a crime. Instead, Officer Bagshaw simply asked Gross two questions. Consequently, the court concluded that Officer Bagshaw's questioning of Gross did not constitute a *Fourth Amendment* seizure. Gross did not appeal the denial of his suppression motion regarding Officer Katz's question or the subsequent foot-chase and *Terry* frisk.

Click **HERE** for the court's opinion.

*****