

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

Case No. 17-cr-11-wmc

BRIAN SAVAGE,

Defendant.

UNITED STATES SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION TO
EXCLUDE EVIDENCE AND DISMISS THE INDICTMENT

Since the United States filed its initial brief in this case, two Circuit Courts have issued opinions related to the Pacifier investigation. Both Circuits found the evidence seized pursuant to the NIT warrant admissible, although they got their in slightly different ways.

On July 21, 2017, the Tenth Circuit issued an opinion in *United States v Workman*, ___ F. 3d. ___, 2017 WL 3092174 (10th Cir. Jul. 21, 2017). In reaching its holding, the Tenth Circuit assumed for the sake of argument that (1) the magistrate who issued the NIT warrant lacked authority to do so and (2) that the resulting search was both unconstitutional and prejudicial, but ultimately found that the Leon "good-faith" exception applied and that agents acted with an objectively reasonable belief in the validity of the warrant. *Workman*, 2017 WL 3092174 at ** 2-6.

The Tenth Circuit first rejected Workman's argument that the Leon "good faith" exception cannot apply to a warrant that is purportedly "void ab initio," finding that argument "foreclosed by the Supreme Court's opinions in *Herring v. United States*, 555

U.S. 135 (2009), and *Arizona v. Evans*, 514 U.S. 1 (1995).” *Id.* at *3. Rather, the Court found that exception to apply “even if the magistrate judge had exceeded geographic constraints in issuing the warrant,” as there was no law enforcement misconduct to deter where agents “mistakenly relied on the magistrate judge’s authority to issue the warrant.” *Id.* at **3-4.

Turning to the issue of whether agents reasonably relied on the issuance of the Operation Pacifier NIT warrant, the Tenth Circuit found persuasive the fact that the government server on which the NIT was installed, the issuing magistrate, and the retrieval of the collected information all occurred in the issuing District (E.D.Va.). *Id.* at *5. Those facts – in addition to the “nuanced legal issues” presented by the investigation and rulings of numerous federal judges that the NIT warrant was properly issued as a tracking device – rendered agents’ reliance on the warrant authorization reasonable. *Id.*

In a footnote, the Tenth Circuit also opined that the warrant here was not “void ab initio” because it could have been validly executed on computers within the issuing magistrate’s district. *Id.* at *6, n. 1.

On July 24, 2017, the Eighth Circuit issued its opinion in *United States v. Horton*, ___ F. 3d. ___, 2017 WL 3122073 (8th Cir. Jul. 24, 2017). Unlike in *Workman*, which assumed for purposes of argument that the issuing magistrate lacked authority to issue the NIT warrant and that the resulting search was unconstitutional, the panel majority found that: (1) a warrant was required to use the NIT; (2) the issuing magistrate lacked jurisdiction to issue the NIT warrant; and (3) the resulting Rule 41 violation was of

