

## **APPENDIX B**

District Court's Suppression Ruling,  
(September 6, 2018)

1                   As far as the evidence on the phone, we have been  
2 talking about this exhaustively; but there is no binding  
3 precedent concerning whether the border exception to the  
4 warrant requirement extends to searches of cell phones.

5                   But all the persuasive authority that I have reviewed  
6 answers affirmatively. And binding precedent, which for me is  
7 the Fifth Circuit, says that the search falls into the good-  
8 faith exception to the exclusionary rule.

9                   And so that's what I'm going to base my decision on  
10 here today. I'll leave it up to the Circuit to elaborate if  
11 they want to take it further and decide that, you know, it does  
12 apply or it doesn't apply.

13                   But I don't think that I've got to make that decision  
14 here today.

15                   And there's all sorts of cases -- and I'll go through  
16 some of these. We were talking about them. And you asked me  
17 for the cites, Mr. Charles.

18                   **MR. CHARLES:** Yes, Your Honor.

19                   **THE COURT:** All right, so let's begin with then --  
20 well, the binding precedent that I was referring to is  
21 Molina-Isidoro, 884 F.3d 287, at 292 to 293; that's the 2018  
22 Fifth Circuit case.

23                   That says that these kinds of searches -- and again,  
24 we're talking about warrantless searches of cell phones at the  
25 border fall into the good-faith exception to the exclusionary

1 rule.

2 There's also a case law that says that simply  
3 transporting the cell phone to another area, where HSI agents  
4 can forensically examine the phone, does not take the phone  
5 outside the border exception to the warrant requirement.

6 And I'm referring to *U.S. versus Gandy*, G-A-N-D-Y,  
7 2018 Westlaw 348, 3072, at paragraph 2. That's a Southern  
8 District of Texas case, July 19th, 2018, that is citing *U.S. v*  
9 *Stewart*, which is a case out of the Sixth Circuit from 2013,  
10 and that's 729 F.3d 517 at 526.

11 And also citing *U.S. v Cotterman* that you referenced,  
12 Mr. Charles, 709 F.3d 952 at 961; that's Ninth Circuit 2013.

13 The 10 days that we had here in searching the  
14 Defendant's cell phone, it's my finding does not itself remove  
15 the search from the border exception to the warrant requirement  
16 or even transform it into an extended border search requiring  
17 reasonable suspicion.

18 And I would refer the Court to *Cotterman*, 533 F.3d at  
19 526, holding that a forensic search of a laptop seized at the  
20 border was not transformed from a border search into an  
21 extended border search by a five-day delay or a 170-mile  
22 distance from the border.

23 Several Courts have also held that off-site forensic  
24 searches of electronic devices that take place over an extended  
25 period of time are still considered border searches, as long as

1 the device was seized and the border -- at the border and never  
2 clear to pass through the border because the Defendant never  
3 regained any expectation of privacy.

4 In other words, these are items that are seized at  
5 the border and maintained as evidence. And the *Holsuz* case  
6 that I referenced earlier, 185 Fed.Supp.3d, 843 at 849-850,  
7 Eastern District of Virginia, 2016 case, holds that a month-  
8 long off-site forensic search of Defendant's iPhone not  
9 governed by *Riley* but governed by border search doctrine.

10 And *U.S. versus Feiten* or *Feiten*, F-E-I-T-E-N, that I  
11 also referenced earlier, 2016 Westlaw 894452 at paragraph 2,  
12 Eastern District of Michigan, March 9th, 2013 case, holding  
13 that an off-site month-long forensic search of a laptop was  
14 still within the border search exception.

15 In the end though, I want to be clear, I don't think  
16 there's any controlling precedent that answers this squarely on  
17 point as to whether the cell phone post-arrest transforms the  
18 incident from a border encounter into a law enforcement  
19 investigation.

20 Because I know that individuals have argued, well,  
21 this is a search incident to arrest. And I think the Courts  
22 are saying, let's be real careful with not going there, if we  
23 don't have to.

24 Because again, the primary reasons and the rationale  
25 for doing a search incident to arrest don't really -- it's hard

1 to justify the reasons when we're talking about a phone.

2 Let's see. There's a couple of other cases that I  
3 also reviewed, *U.S. v Ickes*, 393 F.3d 501 at 507, Fourth  
4 Circuit 2005, holding that the search of a laptop immediately  
5 post-arrest is still a border search.

6 *U.S. versus Caballero*, 178 F.Supp.3d, 1008 at 1016  
7 and 1017, Southern District of California, 2016 case, arguing  
8 that a post-arrest search of an electronics seized at the  
9 border do not fall under the border exception because another  
10 border exception justifications apply, but nonetheless, finding  
11 it to be valid and justifiable under a Ninth Circuit precedent.

12 And anyway, it goes on and on. But I think the point  
13 here is that Isidoro is still binding on the Court.

14 And the Court, i.e. being me, today, I find that the  
15 good-faith exception applies in this case and that the agents  
16 acted reasonably, pursuant to a good-faith belief that they  
17 could search this phone and its contents.

18 And I don't find the time period to be unreasonable.  
19 But I can certainly understand why you raised these issues,  
20 Mr. Charles. And I think you've adequately preserved them for  
21 further review.

22 At the end of the day, I -- this is a side note that  
23 has nothing with what I just found here -- but even if I had, I  
24 think suppressed the original set of statements. I don't think  
25 that that would be dispositive of this case anyway.