FOURTH AMENDMENT — EXCLUSIONARY RULE — NINTH CIRCUIT SUPPRESSES EVIDENCE BASED ON VIOLATION OF REGULATIONS AND POLICIES IMPLEMENTING POSSE COMITATUS ACT–LIKE RESTRICTIONS. — *United States v. Dreyer*, 767 F.3d 826 (9th Cir. 2014).

In recent years, the Supreme Court has cut back on application of the exclusionary rule,[1] a "judicially created remedy designed to safeguard" certain constitutional rights by rendering inadmissible illegally obtained evidence.[2] Circuit courts of appeal, bound by Supreme Court precedent, have similarly constrained application of the rule, and there has been a discernible trend toward letting more evidence in at trial.[3] Recently, in *United States v. Dreyer*,[4] the Ninth Circuit held that a Naval Criminal Investigative Service (NCIS) special agent who launched a broad investigation into the sharing of child pornography on a peer-to-peer network by anyone in the State of Washington, and discovered and investigated such activity by a Washingtonian with no current military affiliation, violated policies and regulations restricting naval participation in civilian law enforcement activities.[5] Upon finding the violation, the court held that the district court erred in denying the defendant's motion to suppress evidence gathered as a result of the agent's investigation.[6] The Ninth Circuit's application of the exclusionary rule diverged from recent trends in both its own and Supreme Court precedent. Both courts have suggested that application of the exclusionary rule is not required and indeed may be inappropriate where a regulatory violation does not also constitute a constitutional violation. Because Fourth Amendment protections do not extend to file-sharing networks, the court should have found that the exclusionary rule did not apply in this case, and affirmed the district court's decision to deny the motion to suppress.

In late 2010, Georgia-based NCIS Special Agent Steve Logan, a civilian naval employee, began using the software program RoundUp to search for any computers located in Washington State that were shar-

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[1] *See* Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 2–3 (2012); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1887–89 (2014).

[2] United States v. Calandra, 414 U.S. 338, 348 (1974).

[3] *See, e.g.*, United States v. Hamilton, 591 F.3d 1017, 1028 (8th Cir. 2010) ("[Supreme Court] precedents establish important principles that constrain application of the exclusionary rule." (alteration in original) (quoting Herring v. United States, 555 U.S. 135, 140 (2009)) (internal quotation mark omitted)).

[4] 767 F.3d 826 (9th Cir. 2014).

[5] *See id.* at 832.

[6] *Id.* at 837.

ing child pornography on the Gnutella file-sharing network.[7] Some months later, Agent Logan found a computer sharing files identified by RoundUp as child pornography, downloaded the images from that computer, viewed the images, and concluded that they were child pornography.[8] Agent Logan then requested an administrative subpoena for information about the user associated with the computer and received Michael Dreyer's name and address.[9] Agent Logan checked a Department of Defense (DOD) database, determined that Dreyer had no current military affiliation,[10] summarized his investigation, and forwarded his report and supporting material to the Washington State NCIS office, thereby concluding his role in the investigation of Dreyer.[11] The local NCIS office passed the information to local police, who secured a search warrant and executed a search of Dreyer's residence.[12] During the search, a detective identified images of possible child pornography on a desktop computer and directed officers to seize the computer.[13] A Department of Homeland Security special agent conducted a forensic examination of Dreyer's computer that discovered many videos and images of child pornography.[14]

Dreyer was charged with one count of possessing and one count of distributing child pornography.[15] Arguing that the NCIS agent did not have lawful authority to investigate civilian crime, Dreyer moved to suppress both the evidence seized in the search of his residence and the evidence discovered during the examination of his computer.[16] Following an evidentiary hearing, Chief Judge Pechman of the United States District Court for the Western District of Washington orally denied Dreyer's motion.[17] Dreyer was subsequently convicted and sentenced to 216 months of incarceration and a lifetime of supervised release.[18] He timely appealed to the Ninth Circuit Court of Appeals.[19]

The Ninth Circuit reversed and remanded.[20] Writing for the panel, Judge Berzon[21] held that the NCIS agent's investigation flouted the

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[7] *Id.* at 827–28.
[8] *Id.* at 828.
[9] *Id.*
[10] Coincidentally, Dreyer is a retired U.S. Air Force Technical Sergeant. *See id.* at 828 n.3; Defendant-Appellant's Opening Brief at 7 n.4, *Dreyer*, 767 F.3d 826 (No. 13-30077).
[11] *Dreyer*, 767 F.3d at 828.
[12] *Id.*
[13] *Id.* at 828–29.
[14] *Id.* at 829.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 837.
[21] Judge Berzon was joined by Judge Kleinfeld.

spirit of the Posse Comitatus Act[22] (PCA) — an act limiting the involvement of the Army and Air Force in civilian law enforcement efforts[23] — and directly violated DOD policies and regulations imposing PCA-like restrictions on naval personnel.[24] The court held that evidence collected as a result of the agent's investigation should have been suppressed.[25]

First, Judge Berzon rejected the government's contention that PCA-like restrictions do not apply to civilian NCIS agents.[26] Judge Berzon noted that, as a matter of policy, the DOD made PCA-like restrictions applicable to the Navy despite the fact that the PCA itself applies only to the Army and the Air Force.[27] In addition, the Ninth Circuit had previously found in *United States v. Chon*[28] that "PCA-like restrictions adopted by DOD with respect to the Navy apply to the NCIS" largely due to the imperceptible distinction between military and civilian NCIS agents.[29] Judge Berzon maintained that *Chon* resolved this matter and declined to revisit the court's prior interpretation.[30]

Next, Judge Berzon determined that Agent Logan's surveillance of all computers in Washington that were sharing files on the Gnutella network amounted to direct involvement in civilian law enforcement activities and was impermissible under the DOD's PCA-like re-

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[22] 18 U.S.C. § 1385 (2012).

[23] The PCA states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." *Id.*

[24] *Dreyer*, 767 F.3d at 834–35.

[25] *Id.* at 837.

[26] *Id.* at 830–32.

[27] *See id.* at 830. Congress has directed the Secretary of Defense to "prescribe such regulations as may be necessary" to ensure members of the Army, Navy, Air Force, and Marine Corps do not directly participate in civilian law enforcement activities. *See* 10 U.S.C. § 375 (2012). The DOD has issued regulations, directives, and instructions consistent with this direction as a matter of policy despite proclaiming that the Department is not actually restricted by the statutory command. *See infra* note 48. DOD Directive No. 5525.5 (Directive) was in force at the time of the search at issue in *Dreyer*. *See Dreyer*, 767 F.3d at 830 n.8. The Directive provided that "DOD guidance on the Posse Comitatus Act . . . is applicable to the Department of the Navy . . . as a matter of DOD policy." Dep't of Def., Directive 5525.5, Enclosure 4.3 (1989) [hereinafter DODD]. The Directive has since been cancelled and replaced with DOD Instruction No. 3025.21, which provides similar guidance. *See Dreyer*, 767 F.3d at 830 n.8; Dep't of Def., Instruction No. 3025.21, Enclosure 3.3 (2013) ("By policy, Posse Comitatus Act restrictions . . . are applicable to the Department of the Navy . . . .").

[28] 210 F.3d 990 (9th Cir. 2000).

[29] *Id.* at 993. The *Chon* court expressly rejected the government's contentions that "[10 U.S.C.] § 375 does not apply to the NCIS because [(1)] most of its agents are civilians," *Dreyer*, 767 F.3d at 830 (quoting *Chon*, 210 F.3d at 993) (internal quotation marks omitted), and (2) the NCIS "is headed by a civilian director with a civilian chain of command," *id.* (quoting *Chon*, 210 F.3d at 994) (internal quotation mark omitted).

[30] *See Dreyer*, 767 F.3d at 830–32.

strictions.[31] Judge Berzon found that Agent Logan "acted as an investigator, an activity specifically prohibited as direct assistance" under a DOD directive in force during the investigation.[32] Further, his investigation did not merely supplement the work of civilian law enforcement.[33] Instead, "[w]ithout Agent Logan's identification of Dreyer, his computer, and the child pornography on his computer, there would have been no [subsequent] search[es] and no prosecution."[34] Agent Logan was only authorized to search areas where there was a Department of Navy interest, and his sweeping search did not honor those limitations.[35]

Finally, Judge Berzon considered whether to suppress evidence procured based on Agent Logan's investigation.[36] In *United States v. Roberts*,[37] the court had held that "an exclusionary rule should not be applied to violations of [PCA-like restrictions] until a need to deter future violations is demonstrated," and, in particular, until violations are "widespread and repeated."[38] According to Judge Berzon, the record in *Dreyer* demonstrated such a need since "Agent Logan and other NCIS agents routinely carry out broad surveillance activities that violate the restrictions on military enforcement of civilian law."[39] Judge Berzon contended that the government's position that military personnel may permissibly "monitor for criminal activity all the computers anywhere in any state with a military base or installation, regardless of how likely or unlikely the computers are to be associated with a member of the military" displayed "a profound lack of regard for the important limitations on the role of the military in our civilian society."[40] Judge Berzon held that the district court erred in denying Dreyer's motion to suppress.[41]

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[31] *Id.* at 832.

[32] *Id.* Directive No. 5525.5 expressly prohibited as a form of direct assistance "[u]se of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators." DODD, *supra* note 27, at Enclosure 4.1.3.4.

[33] *Dreyer*, 767 F.3d at 833.

[34] *Id.*

[35] *Id.* The court rejected the government's claim that because the Uniform Code of Military Justice prohibits distribution of child pornography by members of the armed forces, Agent Logan's investigation could have been primarily undertaken to further a military function with benefits to civilian authorities only accruing incidentally. *Id.* at 833–35. The court found that Agent Logan had not meaningfully attempted to limit his search to members of the military and thus his investigation did not serve an independent military function. *Id.* at 835.

[36] *See id.* at 835–37.

[37] 779 F.2d 565 (9th Cir. 1986).

[38] *Id.* at 568.

[39] *Dreyer*, 767 F.3d at 836.

[40] *Id.*

[41] *Id.* at 837. Judge Kleinfeld joined the majority opinion in full but wrote a separate concurring opinion to address the applicability of the exclusionary rule to this case. *Id.* (Kleinfeld, J., concurring). He emphasized the degree to which the circumstances in this case demonstrated a

Judge O'Scannlain concurred in part and dissented in part.[42] Though he agreed with the court's conclusion that Agent Logan violated the PCA-like restrictions, he disclaimed the court's invocation of the exclusionary rule, a remedy of "last resort."[43] Judge O'Scannlain contended that the court failed to conduct a "rigorous weighing of [the exclusionary rule's] costs and deterrence benefits" as performed in recent Supreme Court and Ninth Circuit cases.[44] Had the *Dreyer* court done so, it would have seen that "the costs of exclusion substantially outweigh the evanescent benefits"[45]: application of the exclusionary rule would likely result in a convicted child pornographer walking free, a significant cost in light of the "paucity of evidence" of widespread violations of PCA-like restrictions.[46]

The *Dreyer* court deviated from the recent Supreme Court and Ninth Circuit trend limiting the application of the exclusionary rule. Both courts have suggested that the exclusionary rule is not triggered by the gathering of evidence in violation of a regulation. Instead, a court should determine whether a defendant's constitutional rights have also been violated by the government agent's conduct. Absent such a showing, recent precedent indicates that application of the exclusionary rule is inappropriate. Because the Ninth Circuit has held that Fourth Amendment protections do not extend to file-sharing networks, the court should have found that the exclusionary rule did not apply.

As the court in *Dreyer* made clear, the Navy is not subject to the PCA.[47] Instead, "as a matter of policy" the DOD has, through

need to deter future violations of the PCA. *See id.* at 838. Judge Kleinfeld noted that because the criminal penalty for violation of the PCA does not apply to Navy personnel, "the exclusionary rule is about all that the judiciary has to deter" these violations. *Id.*

[42] *See id.* at 838–42 (O'Scannlain, J., concurring in part and dissenting in part).

[43] *Id.* at 839 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). Judge O'Scannlain noted that "there is a strong argument to be made that exclusion is *never* justified for violations of the PCA," and put forward several considerations that might support such an argument, including that Congress could have provided a suppression remedy for violation of the Act but chose not to do so. *Id.* at 841 n.3. However, he declined to draw that conclusion. *Id.*

[44] *Id.* at 839 (alteration in original) (quoting Davis v. United States, 131 S. Ct. 2419, 2427 (2011)) (internal quotation mark omitted).

[45] *Id.* at 840.

[46] *Id.* at 842.

[47] *See id.* at 830 (majority opinion) ("We have previously recognized that . . . 'the PCA does not directly reference the Navy.'" (quoting United States v. Chon, 210 F.3d 990, 993 (9th Cir. 2000))); *see also* United States v. Roberts, 779 F.2d 565, 567 (9th Cir. 1986) ("By its express terms, this act prohibits only the use of the Army and the Air Force in civilian law enforcement. We decline to defy its plain language by extending it to prohibit use of the Navy."); Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 158–59 (2003) (discussing courts' erroneous conflation of DOD regulations extending PCA-like restrictions to the Navy as a matter of policy with the Act itself). Applying differential treatment to seemingly similar branches of the armed forces should not give courts pause. In the past, Congress has not

regulation, voluntarily made PCA-like restrictions applicable to the Navy.[48] Both the Supreme Court and the Ninth Circuit have suggested that a regulatory violation is insufficient to trigger the exclusionary rule.[49] In *United States v. Caceres*,[50] the Supreme Court held that the failure of an Internal Revenue Service agent to follow agency electronic surveillance regulations before recording conversations between a taxpayer and the agent did not require suppression of the tape recordings in the taxpayer's bribery trial.[51] The Court reasoned that "rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional

treated all branches of the military equally. *Cf.* Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 125–33 (2014) (distinguishing the Framers' concerns and approach to crafting restrictions on the Army, a force they believed "could undermine the fabric of the new republic," from their concern and approach with respect to the Navy, which they believed "presented a more limited threat," *id.* at 133).

48 *See* Defense Support of Civilian Law Enforcement Agencies, 32 C.F.R. § 182.6(a)(3) (2014) ("By policy, Posse Comitatus Act restrictions . . . are applicable to the Department of Navy . . . ."); *see also Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 21 (1981) (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Section, Criminal Division, Department of Justice) ("[T]he Department's position is that posse comitatus does not affect or restrict the Navy from lending assistance to civilian law enforcement, and we would not want this statute to at all be read or interpreted as some restriction on the naval forces . . . ."). The DOD's characterization of its restrictions on the Navy as voluntary appears to be correct. Whereas the PCA criminally restricts Army and Air Force personnel from enforcing civilian law "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress," 18 U.S.C. § 1385 (2012), the Secretary of Defense has full authority to provide exceptions to PCA-like restrictions on the Navy. *See* 32 C.F.R. § 182.6(a)(3), (5); *see also* 10 U.S.C. § 375 (2012) (providing that the Secretary of Defense "shall prescribe such regulation as may be necessary" to prohibit certain branches of the armed forces from directly participating in civilian law enforcement activities "unless participation in such activity by such member is otherwise authorized by law").

49 The Supreme Court has also seemingly shifted from its mid-twentieth-century "free-form approach" to the exclusionary rule under which it imposed suppression of evidence upon finding a statutory violation even absent a statutory suppression remedy. *See* Orin Kerr, *The Posse Comitatus Case and Changing Views of the Exclusionary Rule*, WASH. POST: VOLOKH CONSPIRACY (Sept. 15, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/15/the-posse-comitatus-case-and-changing-views-of-the-exclusionary-rule [http://perma.cc/BPD3-BYMD]. Instead, in recent years the Court has been reluctant to demand suppression for violations of nonconstitutional rules. *See* Re, *supra* note 1, at 1939–40. Recently, in *Davis v. United States*, 131 S. Ct. 2419, the Court suggested that the exclusionary rule may only be available for constitutional violations. *See id.* at 2426 ("[T]he rule's *sole* purpose . . . is to deter future Fourth Amendment violations." (emphasis added)); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1190 (2012) ("The rationale of *Davis* confirms that the Court intends to limit application of the [exclusionary] rule to deliberate, bad-faith, or recurring Fourth Amendment violations.").

50 440 U.S. 741 (1979).

51 *Id.* at 756–57. Notably, the Court of Appeals for the Armed Forces has already expressly compared the failure of an NCIS agent to follow a DOD directive with the civilian dereliction at issue in *Caceres*. *See* United States v. Guzman, 52 M.J. 318, 321 (C.A.A.F. 2000).

standards to govern prosecutorial and police procedures."[52] The Ninth Circuit went even further in *United States v. Hinton*,[53] stating that "suppression is *not* the appropriate remedy for a failure to follow agency regulations."[54] Instead, "the relevant query is whether a constitutional right, not an agency regulation, has been violated," and "[c]onsequently, rather than automatically suppress the evidence due to a violation of agency regulations, [the court] *must* determine whether [the defendant] has a constitutional right of privacy to the information" allegedly subject to search.[55] The *Dreyer* court relied upon *Roberts* to reach its decision; *Caceres* and *Hinton*, which reflect the jurisprudential trend toward limiting the application of the exclusionary rule that has emerged since *Roberts* was decided, provide a more up-to-date framework for assessing the applicability of the exclusionary rule to the regulatory violation at issue in *Dreyer*.[56]

Had the court proceeded under *Hinton*, it would likely have found that its own precedent establishes that Agent Logan's conduct did not constitute a Fourth Amendment violation. The Fourth Amendment protects against "unreasonable searches and seizures."[57] A governmental intrusion will constitute a search if it violates an individual's "legitimate expectation of privacy."[58] The inquiry to determine whether such a violation has occurred asks whether (1) "the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy'" *and* whether (2) "the individual's subjective expectation of privacy is

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[52] *Caceres*, 440 U.S. at 755–56.

[53] 222 F.3d 664 (9th Cir. 2000).

[54] *Id.* at 674 (emphasis added).

[55] *Id.* at 675 (emphasis added); *see also* United States v. Ani, 138 F.3d 390, 392 (9th Cir. 1998) (holding that the exclusionary rule was not triggered when a customs inspector searched without reasonable cause a package sent through international mail in violation of department regulations). Other circuit courts of appeal have disagreed with the Ninth Circuit's refusal to apply the exclusionary rule absent some constitutional violation. *See, e.g.*, United States v. Hammad, 846 F.2d 854, 860–61 (2d Cir. 1988).

[56] To be sure, the court did not err in engaging with *Roberts*, but the court should have also engaged with other relevant precedent, including *Hinton*. In relying narrowly on *Roberts*, the court neglected later precedential developments that were informed by the Supreme Court's more recent limiting of the application of the exclusionary rule. *See supra* note 49.

Furthermore, the *Hinton* test is not necessarily irreconcilable with *Roberts*. In *Roberts*, the court held (quite narrowly) that "an exclusionary rule should not be applied to violations of 10 U.S.C. §§ 371–378 until a need to deter future violations is demonstrated." *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986). The *Roberts* and *Hinton* lines of precedent can be reconciled if *Roberts* is read to impose an additional necessary condition on the application of the exclusionary rule for violations of PCA-like restrictions: *Roberts* can be read to suggest that a court should not even entertain application of the exclusionary rule in PCA cases without first finding widespread and repeated violations of the restrictions.

[57] U.S. CONST. amend. IV.

[58] Smith v. Maryland, 442 U.S. 735, 740 (1979) (internal quotation marks omitted). *But see* Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013) (suggesting that a Fourth Amendment search can occur when there is a physical invasion regardless of privacy expectations).

'one that society is prepared to recognize as "reasonable."'"[59] The Ninth Circuit has held that Fourth Amendment protections do not extend to file-sharing networks. In *United States v. Ganoe*,[60] the court plainly indicated that a defendant has no reasonable expectation of privacy and therefore "cannot invoke the protections of the Fourth Amendment" when he "install[s] and use[s] file-sharing software, thereby opening his computer to anyone else."[61] In *United States v. Borowy*,[62] the court extended the *Ganoe* principle: even when a defendant made an "ineffectual effort to prevent [a peer-to-peer network] from sharing his files," his "subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access."[63] In recent years, other circuit courts of appeal have agreed.[64]

In this case, Dreyer used peer-to-peer software, opening his computer up to anyone. According to Ninth Circuit precedent, his constitutional rights were not violated. With no constitutional violation, and in accordance with *Caceres* and *Hinton*, the court should have found that the exclusionary rule should not apply, and affirmed the district court's denial of Dreyer's motion to suppress. But instead, when faced with two potentially, but not necessarily, conflicting lines of precedent, the *Dreyer* court opted to maintain the outdated line rather than adopt the one more in keeping with recent jurisprudential trends. The Supreme Court's recently imposed limitations on the application of the exclusionary rule seem to suggest that the rule itself may be on its last legs.[65] *Dreyer* further muddies the doctrinal waters and may generate confusion going forward until the Supreme Court determines outright the contours of its contemporary exclusionary rule doctrine.

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[59] *Smith*, 442 U.S. at 740 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[60] 538 F.3d 1117 (9th Cir. 2008).

[61] *Id.* at 1127.

[62] 595 F.3d 1045 (9th Cir. 2010) (per curiam).

[63] *Id.* at 1048. The fact that the software program used by law enforcement to confirm that files contained child pornography was not available to the public did not alter the analysis. *Id.*

[64] *See, e.g.*, United States v. Hill, 750 F.3d 982, 986 (8th Cir. 2014) (holding that defendant had no expectation of privacy in files in a peer-to-peer file-sharing folder on his computer); United States v. Conner, 521 F. App'x 493, 498 (6th Cir. 2013) (same); United States v. Norman, 448 F. App'x 895, 897 (11th Cir. 2011) (per curiam) (same). Moreover, in *Smith v. Maryland*, the Supreme Court held that society does not recognize privacy expectations as reasonable when an individual "voluntarily turns over [information] to third parties." *Smith*, 442 U.S. at 744.

[65] *See generally* David A. Moran, *Hanging on by a Thread: The Exclusionary Rule (Or What's Left of It) Lives for Another Day*, 9 OHIO ST. J. CRIM. L. 363 (2011).