# 1st Circuit: Cell Phone Video Exam – United States v Rivera-Morales

## Description

Last week, we looked at a case out of the 8th Circuit talking about a case similar to the case we will discuss today. In *United States v Suellentrop,* the 8th Circuit allowed evidence to be submitted of pictures found on a cell phone after the pictures were found and provided to the police by a citizen. In *Sullentrop*, the 8th Circuit determined that the limitations on searching cell phones demanded by the Supreme Court in *Riley v California* did not apply to a citizen who was not acting at the behest of the police.

In today's case, the First Circuit deals with similar circumstances and invoked the "private search doctrine". Under the doctrine officers are allowed to look at evidence unearthed by a private party and provided to the officer as long as the officer's review is limited to the scope of the initial search by the private citizen. So, let's see if the officers fared as well in the 1st Circuit as they did in the 8th.

### FACTS

The defendant and his wife were sitting at home when the wife used the defendant's phone to unlock a video game. While doing so she scrolled through the defendant's picture files and found a photo of the defendant exposing himself. When questioned about the picture the defendant claimed it was an old photo and took his phone back.

Later that night after the defendant went to bed, Mrs. Sanchez found the phone and continued scrolling through the pictures. She found a video of their 6-year-old daughter masturbating the defendant. She then demanded that the defendant leave the house but kept his cell phone. Sanchez called her uncle, a local police official, and told him what had occurred. She then brought the phone to her uncle and played the fourteen second video. The uncle suggested she go to the police station, where she played the video for the desk officer. The next day Sanchez met an investigator and again played the short video. The investigator then brought Sanchez to meet with the prosecutor and federal agents, and again she played the video. At no time did the police take possession of the phone or view any pictures or videos other than the one short video shown by Sanchez.

Later that day officers met with the defendant, read him his *Miranda* warnings and questioned him concerning the video. The defendant admitted that he had made the video and consented to a search of the phone. The defendant was later indicted and sought to have the video suppressed. The district court refused and a jury found the defendant guilty of child pornography. This appeal followed.

### 1st Circuit Findings

On appeal the defendant claimed that the trial court had misapplied the "private search doctrine". According to the defendant, the initial review by Sanchez's uncle and subsequent reviews of the video by other government agents resulted in a risk that the officers would come across private information outside the scope of the video initially viewed by his wife.


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The appellate court disagreed, reviewing the three factors that determine whether a private party is acting as a government agent:

- The extent of the government's role in instigating or participating in the search;
- The government's intent or degree of control over the search and the private citizen; and
- The extent to which the private citizen looks to help the government or to serve his or her own purposes.

Under these circumstances, it was clear that Sanchez acted under her own volition to search the phone. She did not contact government authorities until after she found the video and her reasons for conducting the search were purely personal.

The court then discussed the multiple viewings of the video by police and government agents. First, the court determined that Sanchez's uncle was acting as a private citizen when he suggested to her that she go to the police station and he did not escort her there. Once at the station, Sanchez retained custody of the phone and she only allowed officers to view the video; no other pictures or files were accessed by the police during any of the subsequent showings. Finally, there was no evidence that Sanchez's actions were initiated at the behest of the police or that she went to the station to assist the police. To the contrary, the court determined that Sanchez was compelled by a need to protect her daughter from further harm.

Turning to the last showing of the video the court determined that, arguably, Sanchez was acting as an agent of the state since she was directed to attend the meeting with federal agents and the prosecutor. Notwithstanding this finding, the court determined that the viewing was allowed since the subsequent viewings "[was] coextensive with the scope of the initial search by the private citizen".

Summarizing their findings, the court stated:

*Given the targeted manner in which the officers acted, it is neither clear nor obvious that the possible appearance of a pop-up notification on the defendant's cellphone was sufficient to dispel the officers' virtual certainty that they would see no other information of significance when they accessed and viewed the video. The defendant has, therefore, failed to show that the district court plainly erred in concluding that the "virtual certainty" requirement of the private search doctrine was satisfied with respect to the reexaminations of the video.*

**TAKEAWAYS**

While we can be happy with the 1st Circuit's finding in this case, there are a few procedural issues that need to be reviewed. Whether you follow the Daigle Law Group policy on evidence collection or have your own policy concerning the seizure of electronic evidence, it is important to secure the electronics at the first possible instance. In this case officers should have seized the phone and applied for a warrant once it was clear that the phone held evidence of a crime.

During the course of the multiple viewings, officers run the risk of deleting critical evidence or viewing additional videos that might later be suppressed. Finally, it is important that the initial meeting and viewing is thoroughly documented to assure the court is certain that the private search doctrine applies.

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