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A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW
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FLETC Informer Webinar Schedule

1. Law Enforcement Report Writing (1-hour)

Presented by Mary M. Mara, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

The importance of a well-written police report cannot be overstated; it represents an officer's first, best, and sometimes only opportunity to clearly and plainly set forth all of the relevant facts of a case as well as the factors that went into the officer's decision-making process. While a well-written police report provides a solid foundation for subsequent criminal and civil litigation, a poorly written report can undermine an officer's credibility, sabotage criminal prosecution, and expose the officer and his or her department to scrutiny, criticism, and protracted civil litigation. This webinar will review the significance of effective report writing and offer tips to improve this critical skillset.

Wednesday, February 26, 2020: 3 p.m. EST / 2 p.m. CST / 1 p.m. MST / 12 p.m. PST

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Can a Federal Officer be Prosecuted Under the New California Use of Force Law?¹

The Legal Division for the Federal Law Enforcement Training Centers (FLETC), Glynco, GA, received some questions from the field about the new California use of force law (Assembly Bill 392)² – particularly, whether a federal officer operating in that state may be prosecuted under the new statute. The answer involves a seldom-litigated corner of constitutional law known as Supremacy Clause immunity.³ The legal concept regarding Supremacy Clause immunity governs the extent to which a state, like California, may impose civil or criminal liability on federal law enforcement officials. Ultimately, under certain circumstances, the state case may be removed to federal court and even dismissed.

The removal statute is 28 U.S.C. § 1442, et seq. Removing the case to federal court requires the officer to show: (1) that he or she is a federal official; (2) that the prosecution arises out of acts committed by him or her under color of federal law; and, (3) that he or she has a “colorable” federal defense. “Colorable” only means that the defense is “plausible,” not necessarily “clearly sustainable.” If the defense is plausible, the district court judge should remove the case. Removal provides the officer with a federal forum for the state trial, meaning the federal court shall decide the question of guilt or innocence and the availability of any defense, like immunity.⁴

The defense under Supremacy Clause immunity means that the state has no jurisdiction to prosecute the case. The state charge may be dismissed if (1) the federal agent was performing an act which he was authorized to do by the laws of the United States and (2) in performing it, the federal official did no more than was necessary and proper.⁵ In contrast, *stripping* the officer of immunity, means that he or she could not honestly consider the act [for which he or she is now being prosecuted] reasonable – or, that he or she acted out of malice or with criminal intent. But

¹ Tim Miller is an attorney and instructor at the Legal Division for the FLETC, Glynco, GA. The opinions in this article are his own. They should not be attributed to the Centers or be taken as legal advice. Any information derived from this article should be shared with your agency or legal counsel.

² See California Assembly Bill Number 392. The California law changes the legal standard for using deadly force to “only when necessary in defense of human life.” This standard is a departure from the federal constitutional standard, of which Federal officers are familiar, objective reasonableness. *Graham v. Connor*, 490 U.S. 386, 396-397 (1989).

³ Immunity for federal officers is rooted in the Supremacy Clause of the United States Constitution, which provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

⁴ The removal statute has three elements. First, the defendant officer is a “federal officer.” Second, the state’s prosecution must be either (a) “for or relating to any act under color of such officer” or (b) “on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals.” Third, the defendant must “raise a colorable federal defense” to prosecution by the state. See 28 U.S.C. § 1442(a)(1) and *Texas v. Kleinert*, 855 U.S. 305, 311-313 (5th Cir. 2017).

⁵ See *Texas v. Kleinert*, 855 F.3d at 314 (immunity was properly granted after a federal task force member used his gun like a club to subdue a resisting armed robber and he unintentionally discharged the weapon, killing the alleged robber); *Wyoming v. Livingston*, 443 F.3d 1211 (10th Cir. 2006)(a state charge of trespassing was properly dismissed after federal officers entered private property in the course of tranquilizing and collaring grey wolves); *Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988)(state criminal charges were dismissed against a federal agent under the Supremacy Clause).

if the officer reasonably believed that the act was necessary to perform his federal duties, the case should be dismissed.⁶

The Supreme Court's leading case on Supremacy Clause immunity is its 1890 decision *In re Neagle*.⁷ *Neagle* came at a time when the Supreme Court justices rode the federal circuit. Justice Stephen Field was hearing a case in California when two angry litigants, David Terry and his wife, erupted in violent outbursts inside the courtroom. Mr. Terry punched a deputy marshal, knocking out a tooth, and pulled a knife from inside his vest. His wife attempted to draw a handgun from her handbag. The Terrys were finally removed from the courtroom and sentenced to prison for contempt of court. Undeterred by their contempt sentence, the Terrys issued threats against Justice Field. The threats were described as "open, frequent, and of the most vindictive and malevolent character." The Attorney General's response was to assign Deputy United States Marshal David Neagle to accompany Justice Field when he returned to California the next year.

Now under the protection of Deputy Neagle, Justice Field was traveling by railway from Los Angeles to San Francisco when the Terrys boarded the train. Justice Field was in the dining car when he encountered the combative couple. Mrs. Terry left the dining car to obtain a revolver while Mr. Terry assaulted Justice Field with his fists. Deputy Neagle pointed his gun at Mr. Terry and cried out, "Stop! Stop! I am an officer!," whereupon Mr. Terry reached into his clothing, as if to pull out a weapon. Neagle shot Mr. Terry, killing him. It turned out that Mr. Terry had no weapons on his person and California charged Neagle with murder.

The Supreme Court held that Neagle was immune from state prosecution. Deputy Neagle was performing "an act which he was authorized to do by the law of the United States, which it was his duty to do as a marshal of the United States, and [] in doing that act he did no more than what was necessary and proper for him to do." Under such circumstances, "he cannot be guilty of a crime under the law of the State of California."⁸

"Necessary and proper" means that the officer reasonably believed that what he did was necessary to carry out his federal duties. *Clifton v. California*⁹ provides another example. Clifton was a federal officer operating in California and a member of a task force. The task force had a search warrant for illegal drug manufacturing as well as an arrest warrant for Dirk Dickenson, one of the owners of the property. A helicopter transported the task force to the raid site and landed. In the dust and confusion after landing, the task force jumped out and one of the agents fell. Clifton thought that the agent was shot. He rushed the cabin and kicked in the door. As Clifton ran in, Dickenson ran out into the backyard and headed towards some woods. Clifton pursued and leveled his pistol. "Halt!" he yelled. He waited a few seconds and yelled "Halt" again. He waited a second or two more and fired, hitting Dickenson in the back. Dickenson died on the way to the hospital.

Like Terry, shot dead by Deputy Neagle, Dickenson turned out to be unarmed and the State of California charged Agent Clifton with murder. Making the state case seem more likely than Neagle's was the fact that Dickenson had offered no physical resistance other than flight. Still, the federal court dismissed the state charge. The court found that Clifton reasonably believed that:

⁶ See *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) and *California v. Dotson*, 2012 U.S. Dist. LEXIS 73250 (S.D. Cal. May 2012).

⁷ *In re Neagle*, 135 U.S. 1 (1890).

⁸ *Id.* at 75.

⁹ *Clifton*, 549 F.2d 722.

(1) the fleeing suspect was Dirk Dickenson, the individual named in the arrest warrant for felony violations of federal drug laws; (2) the fleeing suspect had just shot a fellow officer; (3) the fleeing suspect was potentially armed and dangerous, and (4) his successful entry into the woods would pose a danger to the lives of the pursuing officers.¹⁰

Clifton did not have to convince the court that shooting Dickenson was necessary *in fact* or in retrospect, justifiable, but only that he reasonably believed it to be. In this way the federal immunity defense gives federal officers ample leeway to enforce federal law without the risk of state interference – particularly, prosecution.

Federal officers should be mindful that Supremacy Clause immunity is not the green light to ride roughshod over state law. Immunity was denied in the infamous *Ruby Ridge* incident in Idaho where an FBI sniper shot and killed an unarmed woman (and her dog) as she held the door open for her fleeing husband. The Court strongly suggested that the FBI sniper was not being truthful about the facts of the shooting and that he had already decided to shoot the suspects whether or not they were a threat.¹¹

Another word of a caution: the Supremacy Clause offers no immunity from *federal* law. Of particular note is the proposed federal legislation known as the PEACE Act. If enacted, it would require federal officers to use force only when necessary – similar to the California law.¹² Supremacy Clause immunity merely confirms that federal law is “supreme” and cannot be obstructed by the states. It does nothing for a federal officer in district court, facing federal charges. How, exactly, the PEACE Act will affect federal officers *if enacted* is uncertain, and will certainly generate more questions from the field.

¹⁰ *Id.* at 729.

¹¹ *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir.) (en banc) (Hawkins, dissenting), vacated as moot, 266 F.3d (9th Cir. 2001).

¹² <https://lacyclay.house.gov/media-center/press-releases/clay-khanna-s-peace-act-would-mandate-federal-law-enforcement-use-deadly>

CASE SUMMARIES

Circuit Courts of Appeal

Third Circuit

United States v. Ludwowski, 944 F.3d 123 (3d Cir. 2019)

Michael Ludwowski was a pharmacist who owned two independent pharmacies. Ludwowski contacted police after having received a series of threatening text messages and a letter demanding thousands of oxycodone and adderall pills as well as \$20,000 in cash. After speaking with an officer over the telephone, Ludwowski arranged to meet with officers three days later to discuss the matter. Prior to the meeting, officers learned that another law enforcement agency had an open investigation into possible criminal activity at Ludwowski's pharmacies.

As scheduled, Ludwowski went to the police station and met with two officers. Initially, the officers questioned Ludwowski extensively about the threats he had received and why he might be vulnerable extortion. After taking a 20-minute break, the officers asked Ludwowski more pointed questions and suggested that he knew more than he was telling the officers. During the course of the interrogation, Ludwowski made incriminating statements, indicating that he had been filling fraudulent oxycodone prescriptions. The officers did not arrest Ludwowski at that time and he was permitted to leave at the end of the interrogation.

The government subsequently charged Ludwowski with several drug-related offenses. Ludwowski filed a motion to suppress the statements made during the interrogation. Ludwowski claimed his statements were inadmissible because the officers questioned him while he was in custody without having first advised him of his rights under Miranda.

In Miranda v. Arizona, the Supreme Court found that a person's Fifth Amendment right against self-incrimination is jeopardized "when a person is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and subjected to questioning." To determine whether a person is in custody for Miranda purposes, the court must first examine the circumstances surrounding the interrogation. Next, the court must determine whether "a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave." To make this determination, the court will decide if there was "a restraint on [the person's] freedom of movement associated with a formal arrest."

In this case, the court found the following circumstances surrounding Ludwowski's interrogation relevant: 1) Ludwowski voluntarily met with the officers and requested their help in an extortion plot against him; 2) Ludwowski knew that he would likely be asked for his interpretation of the threats he received and whether he had any information as to the identity of the person who had issued the threats; 3) during the interrogation the officers were not "laying" a trap to induce Ludwowski to incriminate himself but rather they were trying to solve the extortion case; 4) there were never more than two officers in the room at a time questioning Ludwowski and the officers did not block the exit; 5) the interrogation was "businesslike" in tone, with no shouting, pounding of fists on the table, or any display of emphatic behavior; 6) during the interrogation there were two breaks and Ludwowski maintained his cell phone throughout the interview; and finally, 7) Ludwowski never indicated that he did not want to

answer questions, although he provided hesitant or inconsistent answers, exhibiting the demeanor of a person intended to deflect questions posed by the officers or pretend not to know the answers.

The court also held that a reasonable person in Ludwikowski's circumstances would have felt free to terminate the interrogation and leave. The court noted that Ludwikowski voluntarily went to the police station to discuss the extortion threat with the officers, where he knew or reasonably should have known that he would be questioned about the reasons behind the threats against him, including his own potential criminal activities at the pharmacy. Further, during the interrogation, he was not physically restrained. And although Ludwikowski spent seven hours at the police station, only four of those hours included active questioning. In addition, the court found that the majority of the interview centered on the identification and purpose of the extortion scheme suffered by Ludwikowski. The court recognized that the interview would have been shorter if Ludwikowski had been more forthcoming in response to the officers' questions. During the interrogation, the officers afforded Ludwikowski two breaks, the use of his cellphone, and the opportunity to use the restroom. Based on the, the court held that the interview with Ludwikowski was not in custody for Miranda purposes.

Ludwikowski further argued that even if the officers were not required to advise him of his Miranda warnings, his incriminating statements should have been suppressed because he did not make them voluntarily.

Again, the court disagreed. The court concluded that Ludwikowski is a mature, educated, and sophisticated business owner who was in sound mental and physical health at the time of the questioning. The court added there was no evidence to show that the circumstances surrounding the interrogation or the officers' conduct caused Ludwikowski to make any involuntary statements.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/18-1881/18-1881-2019-12-05.pdf?ts=1575568806>

Fourth Circuit

United States v. Small, 944 F.3d 490 (4th Cir. 2019)

On October 4, 2015, three masked men confronted Brandon Rowe and robbed him at gunpoint. The men took Rowe's car keys and stole his car, an Acura. Three days later, a man later identified as Dontae Small drove a silver Acura into the Arundel Mills Mall parking lot shortly after 8:00 p.m.. Security cameras on the premises scanned the car's license plate, which revealed that it was Rowe's stolen Acura. Police officers responded to the parking lot, set up a perimeter around the Acura, and waited for its driver to return. Small returned to the parking lot at 8:50 p.m., got into the Acura, and drove away. At this point, one of the officers pulled his marked police car behind the Acura and activated his emergency equipment.

Instead of stopping, Small drove the Acura over a curb and fled. Numerous officers followed in pursuit, and a high-speed chase ensued. After driving for nearly five miles, Small sped through the outbound gate at Fort Meade. Once inside Fort Meade, and with officers still in pursuit, Small drove through a fence surrounding the National Security Agency ("NSA") facility and crashed down an embankment. Though officers arrived at the scene of the crash within one minute, they could not locate Small.

Officers did not immediately locate Small; however, while searching the NSA grounds, officers found a black hat and a bloodied, white t-shirt near the crash site. Afterward, officers found a cell phone on the ground approximately 50 yards from the bloody shirt and hat. NSA Special Agent Kristel Massengale noticed that the cell phone was receiving calls from a person identified on the screen as “Sincere my Wife.” Without obtaining a warrant, SA Massengale used the phone to call “Sincere” back. “Sincere”, whose real name is Kimberly Duckfield, told SA Massengale that the phone belonged to her husband, Dontae Small. The officers obtained a photo of Small and found it matched security footage of the driver from the Arundel Mills Mall. Based on this evidence, officers concluded that Small was likely the driver of the stolen Acura.

Throughout the morning, officers used the cell phone three more times without obtaining a warrant. On two occasions, the officers used the phone to communicate with Duckfield and the final time an officer removed the phone’s back casing to locate its serial number and other identifying information. At approximately 10:00 a.m., Small emerged from the sewer system through a manhole a short distance from the location of the crash and scattered items. An NSA police officer saw Small and arrested him after a brief chase.

The government subsequently obtained three search warrants for Small’s cell phone. The search warrant applications contained Small’s name and the phone’s serial number, information that the government had learned from its use of the phone during the manhunt. The warrants authorized the government to collect among other information, call history, text messages, and historical cell site location information.

The government charged Small with carjacking, conspiracy to commit carjacking, and destruction of government property for crashing through the NSA fence. At trial, the government relied on evidence obtained pursuant to warrants to search Small’s phone.

Small filed a motion to suppress the cell phone evidence. Small claimed that the four warrantless searches of his cell phone on the morning of the incident violated the Fourth Amendment. As a result, Small argued that all subsequent evidence, which stemmed from these searches, including his cell phone location information and text messages, should have been suppressed.

The district court denied Small’s motion, holding that no warrant was required for the searches because Small had abandoned his phone. Small appealed.

The Fourth Circuit Court of Appeals affirmed the district court. Although warrantless searches are generally considered per se unreasonable under the Fourth Amendment, one exception to the warrant requirement is abandonment. The court noted it is well established that a person who voluntarily abandons property loses any reasonable expectation of privacy in that property. However, the court added that abandonment should not be “casually inferred,” as people lose or misplace their cell phones all the time and the simple loss of a cell phone does not automatically mean that a person loses a reasonable expectation of privacy in it. Instead, the court recognized that there had to be some voluntary aspect to the circumstances that lead to the phone being what could be called “abandoned”.

In this case, the court found evidence which depicted a fleeing suspect tossing aside personal items while attempting to evade capture. Small fled on foot after crashing through the NSA gates, leaving his vehicle and contents behind. During the manhunt, officers found a bloodied shirt and hat near the crashed car. The obvious conclusion reached by the officers was that these items, particularly the shirt, were purposefully removed and discarded. Finally, a short time later,

officers found a cell phone in a grassy area approximately 50 yards from the hat and shirt. Based on these circumstances, the court held that it was reasonable for the officers to believe that Smith intentionally abandoned his phone to prevent officers from discovering his location by tracking the phone through its GPS data. When Small discarded the phone, he ran the risk that complete and total strangers would find it. Consequently, the court held that Small lost any reasonable expectation of privacy in the cell phone.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/18-4327/18-4327-2019-12-06.pdf?ts=1575660631>

Fifth Circuit

United States v. Darrell, 945 F.3d 929 (5th Cir. 2019)

Two uniformed police officers went to Brandy Smith's house in marked police vehicles to arrest her on an outstanding warrant for failing to appear in court. Smith's house was a known "drug house" where multiple arrests and disturbances, including shootings, had occurred in the past. One of the officers himself had made several arrests there.

As the officers pulled up to Smith's house, they saw a car parked in the driveway. Almost immediately, Justin Darrell exited the car and began walking toward the back of Smith's house. One of the officers ordered Darrell to stop; however, Darrell increased his pace and continued to walk away from the officers. If Darrell had walked another 15-20 feet he would have been behind the house and outside the officers' field of vision. The officers feared that Darrell might pull a concealed weapon or warn Smith of their presence if he was permitted to reach beyond their sight. Alerting Smith of the officers' presence would constitute a crime under Mississippi law. The officers again ordered Darrell to stop and he did. At this point, Darrell walked back to the officers.

While one officer went to the house, the other officer remained outside with Darrell. The officer frisked Darrell after he saw two knives hooked onto Darrell's belt. The officer seized the knives and then frisked Darrell for additional weapons. After the officer felt an object in Darrell's front pocket, he removed a loaded pistol with an obliterated serial number. The officer also seized methamphetamine from Darrell's pocket.

After the government charged Darrell with being a felon in possession of a firearm, he filed a motion to suppress the pistol. Darrell argued that the officers did not establish reasonable suspicion to stop him; therefore, he had been unreasonably seized by the officers in violation of the Fourth Amendment. The district court disagreed and Darrell appealed.

In [Terry v. Ohio](#), the Supreme Court held that if a law enforcement officer can establish specific, articulable facts that lead him or her to reasonably suspect "that criminal activity may be afoot," the officer may briefly detain the individual to investigate.

In this case, the Fifth Circuit Court of Appeals noted that both parties agreed that the officers indeed seized Darrell under Fourth Amendment principles when the officers ordered Darrell to stop and after which Darrell complied with the second command to stop.

The court held that when the officers detained Darrell, they had established reasonable suspicion to believe that he might be involved in criminal activity. When the uniformed officers arrived in marked police vehicles to a residence known for criminal activity, Darrell exited his vehicle and

immediately tried to get out of the officers' sight. Although walking away from police officers by itself does not establish reasonable suspicion, when Darrell responded to the arrival of officers by making a sudden attempt to avoid them in an area of known criminal activity, the court concluded that it was reasonable for the officers to conduct an investigatory stop. The court found that the totality of the circumstances made it reasonable for the officers to fear that Darrell might draw a weapon or warn Smith of the officers' presence if he were allowed to withdraw from their view. The court added the fact that the officers did not observe Darrell committing any criminal activity did not affect the reasonableness of their suspicion as Terry only requires reasonable suspicion supported by articulable facts that criminal activity "may be afoot," not absolute certainty that a crime is being committed.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/19-60087/19-60087-2019-12-23.pdf?ts=1577125835>

Eighth Circuit

United States v. Lopez-Tubac, 943 F.3d 1156 (8th Cir. 2019)

In January 2017, local police officers contacted a United States Immigration and Customs Enforcement (ICE) deportation officer after they arrested a subject for driving while under the influence of intoxicants. The officers released the subject following the arrest but suspected that he might be illegally present in the United States. As part of his investigation, the ICE officer learned that the subject had previously been removed from the United States to Mexico in September 2011. The officer also learned that after a 2017 arrest the subject claimed that he resided at 537 Montero Drive, an address that corresponded to a mobile home park. Finally, the officer learned that the car the suspect had been driving was registered to a woman who lived at 537 Montero Drive.

Over the next 16 months, the ICE officer attempted to locate the suspect. In his arrest record, the suspect was described as standing approximately 5'3" tall, weighing approximately 187 pounds, and having brown eyes and dark brown hair. The officer also obtained a photograph of the suspect taken after his 2011 arrest. The officer contacted the manager of the mobile home park, who, after viewing the photograph of the suspect, verified that he lived at 537 Montero Drive. Between February 2017 and May 2018, the officer conducted periodic surveillance, observing the residence at 537 Montero Drive between six to eight times. In March 2018, the officer saw the vehicle associated with the suspect at the residence but he did not observe any men who resembled the suspect.

While conducting surveillance on the residence on May 8, 2018, the ICE officer saw a man emerge from between 537 Montero Drive and 541 Montero Drive at 6:20 a.m. and enter the passenger side of a nearby stopped vehicle. The man passed within thirty feet of the officer who observed him for ten to 15 seconds. From his viewpoint, the officer believed that the man matched the picture of his suspect.

The ICE officer followed the vehicle and initiated a traffic stop. During the stop, the passenger identified himself as Misael Saqueo Lopez-Tubac and told the officer that he did not have permission to be in the United States. The officer detained and fingerprinted Lopez-Tubac. The fingerprints revealed that Lopez-Tubac was not the suspect the officer had searched for in connection with the 2017 arrest. However, the officer discovered that Lopez-Tubac had

previously been charged with and immigration offense and arrested him for being illegally present in the United States. During an inventory search of Lopez-Tubac's belongings, the officer found an employee identification card. The officer contacted the employer listed on the card and obtained documents falsified by Lopez-Tubac, including a W-4 tax form, a Form I-9, and photocopies of a permanent resident card and a social security card.

The government charged Lopez-Tubac with the unlawful use of identification documents. Lopez-Tubac filed a motion to suppress all evidence discovered as a result of the traffic stop, including his statements and all documents found during the inventory search and subsequent investigation.

First, Lopez-Tubac argued that the ICE officer violated the Fourth Amendment because the officer did not have reasonable suspicion to stop his actual suspect. As a result, Lopez-Tubac claimed that the ICE officer lacked reasonable suspicion to justify his mistaken stop of him.

The court disagreed. The ICE officer received a report from the local police that they had arrested a person they suspected was in the country illegally. Afterward, the officer confirmed the suspect had been deported from the United States in September 2011 and his arrest indicated that he had reentered the United States. Finally, the car in which the suspect had been arrested was registered in another person's name. According to the officer, facilitating a detached car registration is a common tactic of individuals who illegally reenter the country because it allows them to avoid detection. Based on the totality of the circumstances, the court held that the ICE officer had a reasonable suspicion that Lopez-Tubac was the original suspect the ICE officer had been tasked with investigating post the 2017 arrest of subject referred to ICE by local authorities.

Lopez-Tubac also claimed that it was unreasonable for the officer to mistake him for the suspect because the officer had not observed the suspect at the related residence and because Lopez-Tubac and the suspect did not resemble one another.

Again, the court disagreed. Although the ICE officer mistook Lopez-Tubac for his suspect, the court held the officer's mistake was objectively reasonable under the circumstances. First, the officer had recently observed Lopez-Tubac's vehicle in which the suspect had been arrested at the related residence. Second, the officer saw Lopez-Tubac emerge from near that residence at 6:20 a.m., a fact that suggested that Lopez-Tubac lived there. Third, Lopez-Tubac closely resembled the suspect based on the suspect's description and photograph. Although Lopez-Tubac weighed roughly 30 pounds less than the suspect, the court found that weight is subject to change over time and given that the officer saw Lopez-Tubac from a distance of 30-feet, some variance in height or weight was not unreasonable. Because the ICE officer's mistake was objectively reasonable, the court held that the officer had reasonable suspicion to stop Lopez-Tubac.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-3123/18-3123-2019-12-06.pdf?ts=1575649823>

United States v. McGhee, 944 F.3d 740 (8th Cir. 2019)

A police officer responded to a traffic accident involving Delandus McGhee. McGhee told the officer that he was in a hurry to pick up his daughter and take her to the hospital. Based on this explanation, the officer expedited the processing of the accident and released McGhee with a traffic summons. 25 minutes later, the officer saw McGhee driving in the same vicinity.

Suspicious, the officer ran a background check on McGhee and discovered that he had an outstanding arrest warrant and a suspended driver's license.

A few hours later, the officer located McGhee asleep in his parked car. The officer awoke McGhee and ordered him out of his vehicle. As he exited, with the officer securing his left arm, McGhee reached down toward the car's floor mat. The officer told McGhee not to reach for anything, grabbed McGhee's right arm, and handcuffed him. McGhee told the officer that he was attempting to retrieve his shoe. After securing McGhee, the officer went to retrieve the shoe and saw that the floor mat had an extremely raised center. The officer lifted the floor mat and found a handgun.

The government charged McGhee with being a felon in possession of a firearm. McGhee filed a motion to suppress the firearm, arguing that the warrantless search of his car violated the Fourth Amendment.

An exception to the Fourth Amendment's warrant requirement is the automobile exception. A warrantless search of an automobile is reasonable under the Fourth Amendment if an officer establishes probable cause to believe that contraband or evidence of crime will be located in the automobile.

In this case, the court held that the officer established probable cause that McGhee's car contained contraband or evidence of criminal activity. First, when the officer first encountered McGhee, he told the officer he was in a hurry to pick up his daughter and take her to the hospital. However, less than 30 minutes later, the officer saw McGhee driving in the same area. The court noted that apparently false statements and inconsistent stories can support a finding of probable cause that a person is involved in criminal activity. Second, McGhee's sudden reach toward the floor mat as the officer was escorting him from the vehicle also supported a finding of probable cause that contraband or evidence of a crime would be located in the vehicle. Finally, the conspicuously raised floor mat added to the officer's belief that McGhee was involved in criminal activity. The court noted that numerous cases have been reported where officers found contraband underneath a vehicle's floor mat.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-3594/18-3594-2019-12-10.pdf?ts=1575995427>

United States v. Green, 2019 U.S. App. LEXIS 38823 (8th Cir. IA Dec. 27, 2019)

In January 2019, at approximately 1:00 a.m., Officer Jordan Ehlers saw a Nissan Rogue SUV that, based on his visual estimation, was speeding. The officer ran a search of the license plate number on the SUV, which returned a record that the license plate belonged on a 2004 Mercedes-Benz ML 500. Officer Ehlers noticed that the license plate frame covered a portion of the license plate and registration sticker, a violation of Iowa law. Based on these facts, Officer Ehlers conducted a traffic stop.

Once the SUV stopped, Officer Ehlers shined his spotlight on the back of the vehicle and saw the passengers making what he perceived to be "suspicious" movements. When Officer Ehlers made contact with the occupants, he immediately smelled alcohol and saw open liquor bottles on the floor. Officer Ehlers obtained an identification from the driver and then spoke with front seat passenger, who did not have identification, but identified himself as Tereall Green. Officer Ehlers

recognized Green's name from a prior intelligence report indicating that Green had been seen in a Facebook video possessing a weapon.

When Officer Ehlers asked the back-seat passengers for identification, Deshawn Marks rolled down his window and identified himself, at which point Officer Ehlers smelled marijuana coming from the vehicle. The other back seat passenger identified himself as "Spencer Green" although Officer Ehlers recognized "Green" as Javonta Herbert from prior contact with him.

After Officer Randy Girsch arrived as back up, Officer Ehlers directed Tereall Green to exit the vehicle. Officer Ehlers conducted a brief frisk of Green. Officer Ehlers conducted the frisk more quickly than usual because of the cold temperature and did not find anything on Green. Officer Ehlers then frisked Marks and seized from him several clear bags containing marijuana. Because Green and Marks were shivering, Officer Girsch offered to let them sit in his patrol car and both men accepted.

In the meantime, Officer Ehlers had directed "Spencer Green" to step out of the vehicle, where he admitted that his real name was Javonta Herbert. As Officer Ehlers frisked Herbert, another officer saw a handgun on the backseat floorboard of the SUV where Herbert had been sitting. The officer alerted Officers Ehlers and Girsch of his discovery.

At this point, although Officer Girsch had observed Officer Ehlers frisk Tereall Green earlier in the stop, Officer Girsch frisked him again, this time conducting a more thorough pat down. Officer Girsch discovered a loaded firearm hidden in Green's pants.

Herbert and Green were each charged with being a felon in possession of a firearm. Green filed a motion to suppress the firearm seized during the stop. The district court denied Green's motion, finding that Officer Ehlers had probable cause to stop the SUV and that neither frisk of Green constituted an unreasonable search under the Fourth Amendment. Green appealed.

First, the Eighth Circuit Court of Appeals held that Officer Ehlers had probable cause to believe the SUV was in violation of three different Iowa traffic laws: 1) speeding, 2) having a license plate frame that obscured the license plate and registration sticker, and 3) displaying a license plate on a 2011 Nissan Rogue that was registered to a 2004 Mercedes-Benz. As result, the court held that initiating the traffic stop did not violate the Fourth Amendment.

Next, the court held that both frisks of Green were reasonable. The court stated: "[o]fficers may conduct a protective pat-down search for weapons during a valid stop . . . when they have objectively reasonable suspicion that a person with whom they are dealing might be armed and presently dangerous . . ."

The court found that the first pat down was justified by reasonable, articulable suspicion. First, Officer Ehlers recognized Green's name from a prior intelligence report indicating that Green possessed a weapon in a Facebook video. Second, Officer Ehlers smelled marijuana in the vehicle, and he had observed movement by the passengers prior to the stop, which he considered suspicious. The court concluded these facts made it reasonable for Officer Ehlers to believe that drugs were being transported in the vehicle.

The Eighth Circuit has recognized that "a suspicion on the part of police that a person is involved in a drug transaction supports a reasonable belief that the person may be armed and dangerous because weapons and violence are frequently associated with drug transactions." Consequently, viewing the totality of the circumstances, the court held that Officer Ehlers had reasonable

suspicion that Green was armed and dangerous; therefore, the first frisk did not violate the Fourth Amendment.

The court further held that Officer Girsch's second frisk of Green was reasonable. Although Officer Girsch had observed Officer Ehlers's frisk of Green, it was not unreasonable for him to conduct a second, more thorough pat down after a firearm was discovered in the vehicle. The court found that the discovery of a firearm in the vehicle heightened the risk that other passengers in the vehicle might be armed. The court recognized that although the presence of a gun in possession of one individual does not automatically justify a pat down of a companion of that individual, it is a fact to be considered in determining the overall reasonableness of the officer's actions. In addition, given that the first pat down was quick and cursory due to the frigid temperatures, it was reasonable in light of the discovery of one weapon for Officer Girsch to conduct a more thorough pat down of Green. The court noted that the thoroughness of an initial frisk is one of the factors to be considered in evaluating the reasonableness of a second frisk. As a result, the court held that Officer Girsch had reasonable suspicion that Green was armed and dangerous; therefore, the second frisk did not violate the Fourth Amendment.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-3589/18-3589-2019-12-27.pdf?ts=1577464252>

Tenth Circuit

McCowan v. Morales, 2019 U.S. App. LEXIS 38816 (10th Cir. NM Dec. 27, 2019)

On August 21, 2015, Officer Moralez (incorrectly spelled Morales in the plaintiff's pleadings) stopped Warren McCowan for driving without his headlights. During the stop, Officer Moralez suspected McCowan was intoxicated and McCowan agreed to take a sobriety test. However, before taking the test, McCowan told Officer Moralez that he had pre-existing neck and shoulder injuries, which disrupted his equilibrium; therefore, his ability to pass the test would be impaired. Officer Moralez arrested McCowan after he performed "poorly" on the sobriety test.

According to McCowan, Officer Moralez handcuffed him, placed him in the back of his patrol car without securing him with the seatbelt, and transported him to the police station. McCowan claimed that Officer Moralez's "fast, jerky driving" caused him to be "slammed throughout the backseat like a ping pong ball." McCowan claimed that he begged Officer Moralez to slow down but instead, Officer Moralez laughed at him and continued to speed.

Once at the police station, McCowan claimed that Officer Moralez ignored his complaints that his handcuffs were too tight, although he continued to cry and scream in pain. After Officer Moralez completed booking paperwork, he transported McCowan to the county detention center where he had access to medical treatment.

McCowan sued Officer Moralez under 42 U.S.C. § 1983 alleging: 1) Officer Moralez used excessive force against McCowan by placing him in the back seat of the patrol car, handcuffed but unrestrained by a seatbelt, and then driving recklessly to the police station, knowing McCowan was being tossed about the backseat; and 2) Officer Moralez was deliberately indifferent to McCowan's serious medical needs, i.e. his injured shoulders, when he delayed access to medical care, which was made available only after arriving at the detention center.

Officer Moralez filed a motion for summary judgment based qualified immunity. After the district court denied qualified immunity, Moralez appealed to the Tenth Circuit Court of Appeals.

A police officer violates an arrestee's Fourth Amendment right to be free from excessive force during an arrest if the officer's actions were not objectively reasonable in light of the facts and circumstances confronting him. To determine the objective reasonableness of an officer's use of force, courts consider the following factors as outlined by the Supreme Court in [Graham v. Connor](#): 1) the severity of the crime at issue, 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Applying the [Graham](#) factors to the facts as alleged by McCowan, the court held that Officer Moralez's gratuitous use of force against McCowan, a fully compliant arrestee who posed no threat to the officer or others, was unreasonable and clearly in violation of the Fourth Amendment. While the court noted that McCowan's claims were sufficient to allege that Officer Moralez used excessive force against him in violation of the Fourth Amendment, the court added that to succeed on this claim, McCowan would ultimately have to prove that the events at issue unfolded as he alleged they did.

Even if his actions were considered unreasonable, Officer Moralez claimed he was still entitled to qualified immunity. Moralez argued that, nevertheless, under Fourth Amendment principles he should be entitled to qualified immunity because his actions did not violate a clearly established law at the time of the conduct.

Established Fourth Amendment law holds that in order to overcome the defense of qualified immunity, a plaintiff must: (1) establish that the defendant committed a violation of constitutional right; and (2) must also demonstrate that the right at issue was clearly established at the time of the defendant's unlawful conduct.

In this case, Officer Moralez argued that there was no prior Supreme Court or Tenth Circuit case which ruled upon excessive force case in a fact scenario similar to the one alleged in this case, i.e. an officer driving recklessly, and knowingly tossing about a suspect in the backseat of a patrol car who was handcuffed but otherwise unrestrained arrestee. As a result, Officer Moralez argued that he was not on notice that what he did as alleged by McCowan violated the Fourth Amendment.

The court disagreed. The court held that in August 2015 it was clearly established law that there were relevant Tenth Circuit cases which provided Officer Moralez sufficient notice that the gratuitous use of force against a fully compliant, restrained, non-threatening misdemeanor arrestee violated the Fourth Amendment.

The court held that McCowan adequately alleged that Officer Moralez was deliberately indifferent to his serious medical needs, i.e. his injured shoulders, while Officer Moralez held McCowan at the police station before transporting him to the detention center. The court further held that in August 2015 it was clearly established that depriving an arrestee of medical care violated the Fourteenth Amendment, which entitles pre-trial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment. Consequently, the court held that Officer Moralez was not entitled to qualified immunity.

As with McCowan's excessive use of force claim, the court stated that it remained McCowan's obligation to prove the underlying facts of the allegation at trial.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca10/18-2169/18-2169-2019-12-27.pdf?ts=1577469871>
