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# THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW  
ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at [FLETC-LegalTrainingDivision@dhs.gov](mailto:FLETC-LegalTrainingDivision@dhs.gov). You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions dating back to December 2020 by visiting <https://leolaw.podbean.com>.

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## FLETC Informer Webinar Schedule – May 2021

### **1. Supreme Court Fourth Amendment Updates (1-hour)**

Presented by Arie J. Schaap, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

This webinar will focus on three recent Supreme Court cases that addressed, or will address, Fourth Amendment issues that may impact the law enforcement community. First, we will examine the recently decided case of Torres v. Madrid, where the Court

ruled victims of a police shooting may pursue a claim for excessive force under the Fourth Amendment even if the victim is not actually detained at the time of the shooting. Next, we discuss two cases where the Court recently held oral arguments. The first case is Lange v. California, which addresses whether the exigent circumstances exception to the Fourth Amendment’s warrant requirement applies when police are pursuing a suspect whom they believe committed a misdemeanor. The second case is Caniglia v. Strom, which addresses whether the community caretaking exception to the Fourth Amendment’s warrant requirement extends to the home.

**Thursday, May 20, 2021: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific**

To participate in this webinar: <https://share.dhs.gov/informer>



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- 1. Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:**

- A Flash History of the Fourth Amendment
- What is a Fourth Amendment Search?
- What is a Fourth Amendment Seizure?
- Fourth Amendment Levels of Suspicion
- Stops and Arrests
- Plain View Seizures
- Mobile Conveyance (Part 1 and Part 2)

- Exigent Circumstances
- Frisks
- Searches Incident to Arrest (SIA)
- Consent (Part 1 and Part 2)
- Inventories
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- 2. Fifth and Sixth Amendment Series – A 10-Part podcast series that covers the following Fifth and Sixth Amendment topics:**

- What’s In the Fifth Amendment?
- Right Against Self-Incrimination
- Kalkines / Garrity
- Miranda – The case
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- Miranda – Waiver
- Miranda – Invocation of Rights
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# CASE SUMMARIES

## Circuit Courts of Appeals

### Third Circuit

#### **Peroza-Benitez v. Smith, 2021 U.S. App. LEXIS 10126 (3d Cir. PA Apr. 8, 2021)**

Officers with the City of Reading Police Department went to Jose Peroza-Benitez's apartment in the pre-dawn hours to execute a search warrant related to suspected drug offenses. When officers broke down the door to the third-floor apartment, Peroza-Benitez climbed out of his bedroom window onto the roof of the building wearing only an undershirt, boxer shorts, and flip flops. Shortly thereafter, Peroza-Benitez realized the police were in pursuit and, instead of surrendering, led the officers on a rooftop chase. One of the officers pursuing Peroza-Benitez on the roof radioed that the suspect had a gun. During the pursuit, Peroza-Benitez dropped the gun, which fell off the roof and landed on the ground in an alley below.

At the end of the block, Peroza-Benitez entered an abandoned building. Several officers, including Criminal Investigator Kevin Haser and Officer Darren Smith, who had been following the chase on street level, followed him into the abandoned building. When CI Haser and Officer Smith cornered Peroza-Benitez on the second floor, he climbed out of a street-facing window. By the time Peroza-Benitez climbed out of the window, C.I. Haser was aware that he was unarmed and shifted his attention to Peroza-Benitez's safety, recognizing that the over ten-foot fall from the window could result in injury.

With their firearms holstered, Officer Smith and C.I. Haser grabbed ahold of Peroza-Benitez and attempted to hoist him back through the window. Both Officer Smith and C.I. Haser testified that Peroza-Benitez, who was injured and "slippery" as he was covered in his own blood, resisted their efforts.

According to Peroza-Benitez, as he was hanging from the windowsill with his hands, his feet "dangling," C.I. Haser "repeatedly" punched him in the temple region of his head with a closed fist. C.I. Haser testified that he punched Peroza-Benitez "[o]ne or two times . . . [p]robably two," with the purpose being to "stun" and "disorient" Peroza-Benitez into compliance "to help him out." C.I. Haser testified that his punches had no effect on Peroza-Benitez, who continued to resist against the officers' efforts to pull him back inside, although C.I. Haser noted that Peroza-Benitez did not use any force against them. At some point, the officers let go of Peroza-Benitez. According to CI Haser, he thought, "we're like, screw it, you want to fall, you're gonna fall. So, we let go of him." According to Peroza-Benitez, CI Haser's punches caused him to fall.

Officer Daniel White was among the officers assembled outside the building who witnessed Peroza-Benitez's fall from the window. Officer White had heard the earlier radio transmission that Peroza-Benitez was armed and assumed that was still the case given that he "did not see a lack of a weapon" on Peroza-Benitez when he was hanging from the window.

Falling feet first, Peroza-Benitez's leg collided with the railing of an elevated porch before landing backwards with a "thud" into a below-ground, concrete stairwell. At this point, officers' testimony differed as to whether Peroza-Benitez voluntarily moved upon landing. Officer White

testified that Peroza-Benitez “started to sit forward” upon landing, another officer testified that “[a]s soon as [Peroza-Benitez] hit the ground, he made a [lunging] motion like he was going to start running again.” In contrast, Peroza-Benitez testified that he hit his head on the concrete steps as a result of the fall and was knocked temporarily unconscious.

Officer White tased Peroza-Benitez after he struck the concrete steps. Accounts differed as to the exact duration of time that elapsed between Peroza-Benitez landing in the stairwell and getting tased, ranging from “as soon as he hit the concrete” to “less than five seconds.” However, it was undisputed that Peroza-Benitez was tased either immediately or almost immediately upon landing. Soon thereafter, officers took Peroza-Benitez into custody. Peroza-Benitez was transferred from the scene to the hospital, where he was treated for a variety of injuries.

Peroza-Benitez filed suit under 42 U.S.C. § 1983 alleging that several officers used excessive force in violation of his constitutional rights during his arrest, as well as for assault and battery claims under Pennsylvania common law. After the district court granted the officers qualified immunity, Peroza-Benitez appealed as to CI Haser and Officer White.

A police officer is entitled to qualified immunity as long as the officer’s actions do not violate a suspect’s clearly established constitutional rights. In addition, a court is bound to accept the facts as alleged by the plaintiff – in this case, Peroza-Benitez – when determining whether a police officer is entitled to qualified immunity.

In the case at hand, the Third Circuit Court of Appeals held that at the time of the incident, it was clearly established by case law that an injured, visibly unarmed suspect had the right under the Fourth Amendment to be free from temporarily paralyzing force while positioned as Peroza-Benitez was.

Next, the court found that a reasonable jury could credit Peroza-Benitez’s version and conclude that C.I. Haser “repeatedly” punched Peroza-Benitez in the head and caused him to fall from a second-story window, in violation of that right. On the other hand, the court found that a jury could conclude that the facts do not support Peroza-Benitez’s account of the incident. Consequently, the court held that there was a genuine dispute of material fact regarding C.I. Haser’s conduct, which had to be resolved by a jury; therefore, C.I. Haser was not entitled to qualified immunity.

Concerning Officer White, the court found that at the time of the incident, it was clearly established that a suspect had the right under the Fourth Amendment to be free from excessive force in the form of being tased while visibly unconscious. Although the court recognized that police officers are often forced to make split-second judgments in situations that are tense, uncertain, and rapidly evolving, the court held that a reasonable jury could credit Peroza-Benitez’s version of the incident and find that Officer White violated this right. However, the court noted that a jury could find that the facts do not support Peroza-Benitez’s account. For example, a jury could find: 1) that Peroza-Benitez was not unconscious and was still trying to flee; 2) that Officer White reasonably believed Peroza-Benitez was armed; or, 3) that there was not enough time for Officer White to recognize that Peroza-Benitez was unconscious. Consequently, the court held there was a genuine dispute of material fact that had to be resolved by a jury; therefore, Officer White was not entitled to qualified immunity.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca3/20-1390/20-1390-2021-04-08.pdf?ts=1617901211>

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## **Fifth Circuit**

### **United States v. Nelson, 990 F.3d 947 (5th Cir. 2021)**

Vernon Nelson entered the U.S. Border Patrol Laredo North checkpoint, which is located near the 29-mile marker on Interstate Highway 35. At the checkpoint, Nelson consented to a scan of his tractor-trailer and was directed to another area. Nelson went to the second area where he was met by Border Patrol Agent (BPA) Marcus Stauffiger. BPA Stauffiger had worked as a Border Patrol Agent for over nine years and for two of those years he was detailed to the Drug Enforcement Administration (DEA) where he received specialized training and investigated narcotics crimes.

BPA Stauffiger scanned Nelson's tractor-trailer using the "Vehicle and Cargo Inspection System" (VACIS), which he described in laymen's terms as "an x-ray machine" used on commercial vehicles. From his scan of Nelson's trailer, he observed only several bundle-shaped objects and the outline of a dolly. BPA Stauffiger initially suspected that these objects were equipment being stored by Nelson; however, his assessment changed when he saw a seal on the back door of the trailer. From his experience, BPA Stauffiger knew that these seals are typically used to ensure that nothing goes missing from a cargo load during transport. If the trailer contained only equipment, there would be no need for a seal. Given these anomalies, BPA Stauffiger typically would have directed the truck to the secondary inspection area. However, due to ongoing construction at the checkpoint, jersey barriers forced drivers to turn toward the exit before the scan was completed. Due to this setup, it was not feasible for agents to direct drivers to the secondary inspection area, so Nelson was allowed to leave the checkpoint.

Suspecting the VACIS scan revealed bundles of narcotics in Nelson's trailer, BPA Stauffiger showed the scan to another agent. The two agents decided to pursue the tractor-trailer to perform a roving-patrol stop. The agents left in separate marked vehicles and pulled Nelson over six miles north of the checkpoint. Once stopped, Nelson presented the agents with a bill of lading, indicating that he was carrying a load of five pallets of Kellogg's cereal. BPA Stauffiger doubted this account, believing that his scan revealed only two pallets at most. BPA Stauffer also noticed inconsistencies in the bill of lading, including a misspelling of Kellogg, two seal numbers instead of one, and a misspelling of seal as "SeAl."

After reviewing the bill of lading, BPA Stauffiger asked Nelson if he would step out of the truck. He was neither handcuffed nor formally placed under arrest. BPA Stauffiger told Nelson: "It looks like there's bundles inside the trailer." He asked Nelson for consent to search the trailer and told him that, if he refused, a service canine would be requested. Nelson refused, and BPA Stauffiger called for a service dog, which had to be brought from the checkpoint. BPA Stauffiger informed Nelson that if the service canine did not alert, Nelson would be free to go. While waiting for the service canine to arrive, BPA Stauffiger questioned Nelson for approximately two minutes, asking Nelson about his employment as a truck driver and his ownership of the tractor-trailer.

When an agent arrived with the service canine, it alerted on the trailer. The agents searched the trailer and found approximately 72 kilograms of marijuana, packed in tightly wrapped bundles, consistent with BPA Stauffiger's assessment of the VACIS images.

The government charged Nelson with drug-related offenses. Nelson filed a motion to suppress the evidence seized from his tractor-trailer and the statements he made to BPA Stauffiger while

waiting for the canine unit to arrive. After the district court denied Nelson's motion to suppress, he pleaded guilty, reserving the right to appeal the denial of his motion to suppress.

On appeal, Nelson argued the agents violated the Fourth Amendment when they pulled him over after leaving the checkpoint because they lacked reasonable suspicion to believe that he was involved in criminal activity.

The Fifth Circuit Court of Appeals disagreed. A Border Patrol agent on roving patrol "is justified in stopping a vehicle if he reasonably suspects, based on specific articulable facts together with rational inferences from the facts, that the vehicle might be engaged in criminal activity." In determining whether reasonable suspicion exists in those circumstances, the court will often consider the factors outlined by the Supreme Court in [United States v. Brignoni-Ponce](#), to include proximity to the border and the agent's experience in detecting illegal activity.

Here, the court found that "proximity" to the border is a "paramount factor in determining reasonable suspicion." While there is no bright-line test with regard to this factor, the Fifth Circuit has held that "the proximity element is satisfied . . . if the defendant's car was first observed within 50 miles of the United States/Mexico border." In this case, it was undisputed that Nelson's vehicle was first spotted at the Laredo-North checkpoint, approximately 29 miles from the border, a factor weighing in favor of the reasonableness of BPA Stauffiger's suspicions.

Next, the court recognized that after proximity to the border, an officer's experience is the most important factor to determine if reasonable suspicion exists. BPA Stauffiger received five months of training at the Border Patrol Academy, and received nine months of post-academy afterward. As a Border Patrol agent, he worked various operations at Laredo-North for nine years and worked at the DEA for two years investigating narcotics crimes. From this extensive experience, BPA Stauffiger noticed irregularities with Nelson's vehicle. Specifically, BPA Stauffiger knew the seal on Nelson's trailer was likely incompatible with a scan that seemingly showed a small amount of personal equipment inside and that the VACIS images of Nelson's trailer were consistent with images of bundles of narcotics. Based on these facts, the court concluded that BPA Stauffiger had reasonable suspicion to justify stopping Nelson's vehicle.

Next, Nelson argued that he was in custody while waiting for the canine unit to arrive; therefore, he was entitled to Miranda warnings prior to being questioned.

Generally, a suspect's incriminating statements during a custodial interrogation are inadmissible if he has not first received Miranda warnings. A suspect is "in custody" for Miranda purposes "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement to the degree which the law associates with formal arrest." To determine whether a suspect is in custody for Miranda purposes a court will consider the following factors: 1) the length of the questioning; 2) the location of the questioning; 3) the accusatory, or non-accusatory, nature of the questioning; 4) the amount of restraint on the individual's physical movement; and, 5) statements made by officers regarding the individual's freedom to move or leave.

The court held that, based on these factors, Nelson was not in custody when BPA Stauffiger questioned him. First, Nelson was only questioned for two minutes, on the side of the highway, visible to those driving past. Second, BPA Stauffiger's questioning was never hostile or accusatory: his tone was cooperative and he never accused Nelson of lying or committing a crime. Finally, Nelson was not handcuffed or otherwise physically restrained — he answered Stauffiger's questions while leaning against the hood of the BPA's vehicle.



The court added that while Nelson made much of the fact that he was not free to leave while waiting for the canine unit, temporary detention, by itself, does not automatically rise to the level of custodial interrogation. Here, BPA Stauffiger told Nelson that “so long as . . . everything checked out,” he would be able to leave shortly. The court found that such limited restraint is not the type associated with formal arrest. As a result, the court concluded that Nelson was not subject to custodial interrogation and therefore was not entitled to Miranda warnings.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca5/19-41008/19-41008-2021-03-12.pdf?ts=1615813280>

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### **Cloud v. Stone, 993 F.3d 379 (5th Cir. 2021)**

Around midday on August 29, 2017, Deputy Kyle Luker observed Joshua Cloud speeding and conducted a traffic stop. Deputy Luker issued Cloud a ticket for driving 13 miles-per-hour over the speed limit. Cloud refused to sign his ticket, which is grounds for arrest under Louisiana law.

Planning to arrest Cloud, Deputy Luker had Cloud exit his pickup truck and face its side with his hands behind his back. While standing behind Cloud, Deputy Luker handcuffed his left wrist, at which point Cloud turned partially around to his left. Deputy Luker ordered Cloud to turn back around and reached for his right hand to finish handcuffing him. Cloud did not comply but instead he spun all the way around, turning away from Deputy Luker’s reach, facing him head-on, with the handcuffs hanging from his left wrist.

Deputy Luker stepped back a few feet and deployed his taser, striking Cloud in the chest. Although both taser prongs hit Cloud and began cycling, they did not incapacitate him. Cloud yelled and pulled the prongs from his chest. Deputy Luker then released his police dog from his car with a remote button and tried to regain control of Cloud. Deputy Luker grabbed Cloud around the waist and tased him again, now with the taser in “drive-stun” mode.

The two men, grappling with each other, moved toward the truck’s open door. Cloud produced a revolver from somewhere near the driver’s seat. As the two struggled for control of the gun, it discharged twice, the second shot hitting Deputy Luker in the chest. Deputy Luker was in pain but unable to tell how badly he was injured, as his protective vest spared him all but a minor injury. As the struggle continued, Deputy Luker managed with one hand to radio police dispatch that shots had been fired. Deputy Luker was then able to get the revolver out of Cloud’s hands and throw it to the ground on the street behind him. With Cloud disarmed and the police dog now engaging, Deputy Luker drew back a short distance, withdrew his duty weapon, and ordered Cloud to get on the ground.

At this point, Cloud was crouching in his truck’s doorway, keeping the dog at arm’s length with his hand on the dog’s head. Cloud’s revolver was on the ground, behind Deputy Luker and to his left. Cloud then rushed toward Deputy Luker and started to move past him. As Cloud lunged toward the revolver lying on the ground, Deputy Luker fired two shots into Cloud’s back. Cloud died at the scene.

Cloud’s parents (Plaintiffs) sued Deputy Luker and others alleging a variety of constitutional and state tort law violations. After the district court dismissed all the plaintiffs’ claims, they appealed. The sole issue on appeal was whether Deputy Cloud used excessive force against Cloud during the encounter.



First, the plaintiffs claimed that Deputy Luker's non-lethal force, first tasing Cloud from a few feet away, then using his taser in drive-stun mode while wrestling with Cloud, violated Cloud's Fourth Amendment right to be free from excessive force during his arrest.

In [Graham v. Connor](#), the Supreme Court outlined several factors that courts should analyze to determine the reasonableness of an officer's use of force: 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. The court found that the extent of Cloud's resistance was the most important factor in determining the reasonableness of Deputy Luker's use of his taser.

The court noted that Fifth Circuit Court of Appeals cases on police use of tasers have paid particular attention to whether officers faced active resistance when they resorted to deploying their tasers. Specifically, the court found that when a suspect resists arrest or fails to follow police orders, officers do not violate the suspect's right against excessive force by deploying their tasers to subdue him. The court added that other circuits (4th, 6th, 8th and 11th), which have addressed police tasing, have held that if a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him. In contrast, the court found that the 5th Circuit and other circuits (8th and 9th) have found force to be excessive when officers tased someone offering only passive resistance or no resistance at all.

In this case, Cloud was suspected of committing a minor offense. However, Cloud interrupted the handcuffing process by turning partially around. When Deputy Luker ordered Cloud to turn back around and reached for Cloud's right hand, Cloud turned to face him, with the handcuffs dangling from his left wrist. Until this point, Deputy Luker had addressed Cloud's general uncooperativeness and modest resistance with verbal commands and milder force. The court concluded that when Cloud took this "confrontational" stance, depriving Deputy Luker of the use of his handcuffs and thwarting his efforts to complete the arrest, he created a threat to Deputy Luker's safety; therefore, it was reasonable for Deputy Luker to tase Cloud.

Next, the court held that Deputy Luker's use of the taser in drive-stun mode against Cloud was reasonable. The court recognized that the same incident can include both lawful and unlawful uses of force. However, in this case, the court concluded that the circumstances that justified Deputy Luker's initial tasing of Cloud were still present during the drive-stun tasing. The court found that there was no evidence indicating that Cloud complied with any commands or ceased to resist after the first tase. In addition, the court noted that the situation remained "tense, uncertain, and rapidly evolving." Under these circumstances, the court held that Deputy Luker's continued force to complete the arrest, like his initial tase, was reasonable.

Finally, the court held that Deputy Luker's use of lethal force against Cloud was reasonable. In [Tennessee v. Garner](#), the Supreme Court held that, "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." In addition, the Fifth Circuit has held that officers are justified in using lethal force if they reasonably believe that a person is reaching for a gun, even in cases where officers had not yet seen a gun when they fired, or when no gun was ever found at the scene.

In this case, the court held that Deputy Luker could have reasonably believed that Cloud threatened him with serious physical harm. First, Deputy Luker knew that a loaded revolver lay on the ground behind and to the left of him. Second, Deputy Luker knew that the gun had just

discharged twice, once into his chest, and that he had just had to wrest it from Cloud's hands and toss it away. Finally, Deputy Luker shot Cloud as Cloud was moving toward the revolver, potentially seconds from reclaiming it. Based on these facts, the court held that it was reasonable for Deputy Luker to shoot Cloud.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/20-30052/20-30052-2021-04-06.pdf?ts=1617751821>

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## **Eighth Circuit**

### **United States v. Cox, 992 F.3d 706 (8th Cir. 2021)**

On April 17, 2019, Arkansas State Trooper Christopher Short observed a white SUV steadily accelerating to closely approach a black pickup. When the pickup braked to take an exit, the SUV had to quickly apply its own brakes. Based on this observation, Trooper Short initiated a traffic stop of the SUV. Scott Green was driving the SUV and Stephen Cox was in the passenger seat. After informing Green that he was following "a little bit close," Trooper Short stated that he did not intend to issue a ticket but nevertheless asked for identification. Upon learning the vehicle was rented, he asked to see a copy of the rental agreement and asked the men about their line of work. Green responded that they were engaged in fugitive recovery.

Green accompanied Trooper Short back to the patrol car, where Trooper Short asked Green about the men's travel plans and purpose and then radioed dispatch to obtain Cox's and Green's criminal histories. Green replied by saying that they were traveling to Virginia in pursuit of a fugitive and planned to stay there for three days. Trooper Short then returned to the SUV and asked Cox similar questions. Cox could not remember the name of the fugitive they were pursuing but told Trooper Short that they planned to spend only one day in Virginia. When asked about his criminal history, Cox admitted to a prior DUI conviction.

Trooper Short then returned to the patrol car and asked Green whether there were any weapons or drugs in the vehicle. Trooper Short noted that both men seemed to be nervous. Green responded that there were not any weapons or drugs in the car. When Trooper Short asked if he could search the vehicle, Green replied, "I don't care." Dispatch then responded and reported that Cox had a prior drug charge in addition to the DUI conviction. Trooper Short again asked Green if he could search the SUV, and Green again said, "I don't care." Green indicated to Trooper Short that both he and Cox had signed the rental paperwork. This exchange occurred about eight minutes after the traffic stop had begun.

Trooper Short then returned to the SUV, informed Cox that Green had consented to a vehicle search, and asked Cox to step out of the vehicle. Cox voiced no objection to the search and exited the vehicle, within which Trooper Short discovered seventeen kilograms of cocaine during his ensuing search.

Cox pleaded guilty to possession with intent to distribute more than five kilograms of cocaine while reserving the right to appeal the district court's denial of his motion to suppress the evidence seized from the vehicle.

On appeal, Cox argued that the trooper lacked probable cause to initiate the stop. The Eighth Circuit Court of Appeals disagreed. The court agreed with the district court, which held that,

based on dash camera footage, Trooper Short's conclusion that the SUV was following too closely in violation of the relevant statute was objectively reasonable.

Alternatively, Cox argued that Trooper Short lacked probable cause because Green was not at fault for the violation, as he was unable to slow down or change lanes. Again, the court disagreed. The court agreed with the district court, which found that the pickup truck's braking should not have been a surprise to Green in light of the road sign indicating an upcoming exit. In addition, Trooper Short's ability to immediately move into the lane behind Green indicated that Green too could have safely slowed down in his own lane. Consequently, the court found that nothing prevented Green from slowing down sooner and maintaining a reasonable distance behind the pickup truck.

Next, Cox argued that even if the stop was lawful, it was unlawfully prolonged once Trooper Short indicated that he did not intend to issue a ticket. The court recognized that while "[a] seizure justified only by a police-observed traffic violation, . . . becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation," the officer may still conduct certain routine tasks related to the traffic violation." Some of these routine tasks include: "running a computerized check of the vehicle's registration and insurance; running a similar check of the occupants' identification documents and criminal histories; preparing the traffic citation or warning; and, asking the occupants about their destination, route, and purpose."

In this case, the court held that Trooper Short was clearly conducting routine traffic violation-related tasks. The court noted that Trooper Short's initial questions to Green and Cox related to their destination, route, and purpose and were posed while awaiting dispatch's response to his criminal histories check. In addition, Trooper Short's questions about drugs or weapons came only after his suspicions were raised by the men's demeanors, their nervousness, and their inconsistent answers to his questions. As a result, the court held that these circumstances justified Trooper Short's decision to expand the scope of the stop beyond the traffic violation.

Finally, Cox argued that the search of the vehicle was non-consensual. Although Cox did not argue that Green's consent was involuntary, he claimed that as a co-renter of the vehicle, he also had a Fourth Amendment-protected privacy interest in the vehicle that was not waived by Green's consent.

The court stated that the driver may consent to a search of a vehicle "even when some other person who also has control over the car is present, if the other person remains silent when the driver consents and does not object to the search." In this case, it was undisputed that Green, the driver, consented to the search and that Cox, the passenger, did not object when informed of the impending search but instead stood by quietly while Trooper Short conducted the search. The court concluded that Green's consent validated Trooper Short's search also as to Cox.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/20-2039/20-2039-2021-03-30.pdf?ts=1617118245>

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**United States v. Parker, 993 F.3d 595 (8th Cir. 2021)**

Shortly after midnight on April 17, 2017, Richard Parker called 911 from a friend's apartment on to report that his girlfriend, E.M., was not breathing. Officers from the Dubuque Police Department arrived at the apartment, which was shared by Donte Richards and Ashley Ostrander, both known narcotics users. As Officer Richard Walker interviewed Parker, Parker would pause briefly to answer question, and then continue to walk around the apartment, where other officers, Ostrander, Richards, and paramedics were either speaking, moving about, or caring for E.M.

Eventually, Officer Walker told Parker to "just kinda stay here." Parker stopped for a moment and then continued to roam throughout the apartment. Officer Walker asked him whether E.M. had drunk alcohol or used drugs. Parker replied that E.M. had been drinking and used cocaine. At this point, another officer asked Officer Walker and Parker to continue their conversation outside.

Outside, Officer Walker continued asking Parker about the events that led up to E.M.'s medical emergency and the 911 call. Officer Walker also asked whether Parker had used drugs that day, which Parker denied. As they spoke, Parker tried to reenter the apartment a few times, but each time Officer Walker told him to "just wait here" and remain outside, including when paramedics brought a stretcher through the apartment's back door. Eventually, Officer Walker was able to get Parker to stand inside a vestibule just outside the apartment door. Here, Officer Walker asked Parker about his own drug use and this time, Parker admitted to using drugs earlier that evening. He also told Officer Walker that he last saw E.M. alert roughly 30 minutes before he called 911. Following this conversation, Parker reentered the apartment and sat in the dining room. While Parker sat, officers learned that E.M. had died at the hospital.

Investigator David Randall arrived at the apartment around 2:45 a.m. and asked whether Parker, Ostrander, and Richards would voluntarily accompany him to the police station. He told them that they were not under arrest. Parker was the only one who agreed. Before asking any questions at the station, Investigator Randall again informed Parker that he was not under arrest and also advised him of his Miranda rights. Parker waived those rights and admitted that he and E.M. snorted something he believed was heroin. Later that morning, Parker was arrested for a parole violation and police executed a search warrant at apartment. Officers recovered baggies containing four grams of heroin from a living room chair.

The government charged Parker with several drug-related charges. The district court denied Parker's motion to suppress statements he made at the apartment and later at the police station. After being convicted at trial, Parker appealed.

First, Parker argued the statements he made at the apartment should have been suppressed because he was in custody when Officer Walker told him "just kinda stay here" without providing him Miranda warnings.

Police officers are required to provide Miranda warnings when conducting a custodial interrogation. A person is in "custody" for Miranda, purposes, when there is a formal arrest, or the officers restrain the person's freedom of movement to the degree associated with a formal arrest. To determine whether a person was in custody, the court asks, "whether given the totality of the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave or cause the [officers] to leave." Finally, a "seizure is a necessary prerequisite to Miranda." A Fourth Amendment seizure occurs when a "reasonable person in the same circumstances would not feel free to leave."

The court held that Parker's initial interaction with the officers was a consensual encounter. After waking up, Parker called 911 to report that E.M. needed medical assistance. Once the paramedics and officers arrived, it was reasonable to expect that officers would talk to individuals at the apartment. Afterward, the court noted that Officer Walker and Parker's conversation occurred as Parker paced throughout the apartment while paramedics attended to E.M. and other officers spoke with Ostrander and Richards. The court concluded that Officer Walker's request that Parker "just kinda stay here" did not by itself constitute a seizure or a significant restraint on his movement requiring Miranda warnings because it was "spoken as a colloquialism to be understood by the reasonable person to mean something more on the order of 'be patient while we finish up here,' not 'you are being detained.'"

Second, Parker argued that even if he was not seized inside the apartment, a seizure occurred outside when Officer Walker told him to "just wait here." Again, the court disagreed. Officer Walker and Parker continued their conversation outside at another officer's request. While outside, paramedics continued to assist E.M. and also brought a stretcher inside through the back door. During this conversation, Parker moved toward the back door and each time, Officer Walker told him to remain outside. Viewed in context, Officer Walker telling Parker to wait outside was not a command indicating compliance was necessary; instead, he was ensuring that neither he nor Parker got in the way of paramedics or other conversations inside. The court added that Officer Walker's statement to Parker outside would be understood by the reasonable person to mean, "let's just stay here and out of the way," rather than an order indicating something akin to, "you are being detained."

In addition, the court found that while Parker was never explicitly told the questioning was voluntary, his continued walking around the apartment shows he possessed virtually unrestrained freedom of movement during the questioning. By merely following Parker inside and saying they should wait outside, the court held that Officer Walker did not restrain Parker's "freedom of movement to the degree associated with formal arrest."

Finally, the court held that Parker voluntarily waived his Miranda rights before being interrogated by Investigator Randall at the police station. A Miranda waiver must be made voluntarily, knowingly, and intelligently. The waiver must be voluntary in the sense that "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."

In this case, Parker and Officer Walker's conversation ended around 12:48 a.m. Afterward, Parker sat in the dining room until 2:45 a.m. and, during this time, fell asleep. There was no suggestion that officers intimidated, coerced, or deceived Parker following his conversation with Officer Walker. To the contrary, once Investigator Randall arrived, he informed Parker that he was not under arrest. Investigator Randall then asked Parker if he would accompany him to the station and reiterated that Parker was not under arrest. Even if Parker's contention that Officer Walker demanded that he provide a statement to Investigator Randall were accurate, Investigator Randall made it clear that Parker was not under arrest and was not required to accompany him to the station. Based on these facts, the court concluded that Parker went to the police station voluntarily and was not in custody; consequently, a Miranda warning was unnecessary. However, the court added that even assuming that Parker was seized and in custody at the police station, it was clear from the totality of the circumstances that Parker voluntarily waived his Miranda rights.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-3277/18-3277-2021-04-07.pdf?ts=1617809424>

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## **Ninth Circuit**

### **O’Doan v. Sanford, 991 F.3d 1027 (9th Cir. 2021)**

At 6:47 p.m., on July 15, 2016, April O’Fria called 911 and claimed that her boyfriend, James O’Doan, had experienced an epileptic seizure in the shower, was trying to break windows, and had fled their home naked. Firefighters arrived first and found O’Fria and O’Doan on a busy Reno street “struggling” and “grappling” with each other. O’Doan ran past the firefighters and ignored their requests for him to stop. O’Fria told one of the firefighters that she believed O’Doan was experiencing a seizure. At this point, the firefighters initiated a “Code 3,” which meant something violent was occurring and that police were needed immediately.

In the meantime, police dispatch notified Reno Police Officers Joshua Sanford and Cade Leavitt of the Code 3 request. While en route to the scene, Officer Sanford saw an EMS advisory on the computer in his police car showing that the 911 caller had reported that the subject was suffering a seizure. Officer Leavitt was not aware that O’Doan had allegedly suffered a seizure.

When the officers arrived, they tried to catch up with O’Doan while identifying themselves as police officers and ordering O’Doan to stop. O’Doan did not comply. Instead, O’Doan turned, faced the officers, clenched his fists, and exhibited “body language” as if he was going to attack the officers. Officer Leavitt tried to deploy his taser on O’Doan but the taser malfunctioned. O’Doan then turned away and moved off quickly. At that point, Sanford approached O’Doan and used a “reverse reap throw” to bring him to the ground. This maneuver essentially involves tripping the subject from behind to throw him off balance and then “guiding” him to the ground with both hands.

After Sanford brought O’Doan down, officers engaged in a “major struggle” with O’Doan, who was “combative.” O’Doan thrashed around, “scuffling” with the officers, “kicking and attempting to get up off the ground,” and continued to resist attempts to restrain him. The officers repeatedly told O’Doan to stop resisting, but O’Doan did not obey. Firefighters and a third officer who had since arrived on the scene had to help Officers Sanford and Leavitt restrain O’Doan. After his arms were handcuffed behind his back, O’Doan continued to try to kick people, so officers put leg restraints on him. O’Doan received some abrasions and lacerations to various parts of his body during the episode.

Once he was restrained, EMS personnel administered a sedative to O’Doan, who began to relax. O’Doan was then loaded onto a gurney, put into an ambulance, and transported to the hospital. The EMS personnel at the scene, who had training in responding to persons having seizures, did not believe O’Doan had suffered a seizure. Instead, they believed that O’Doan’s behavior was consistent with someone that was on a drug binge.

Officers Sanford and Leavitt went to the hospital and agreed to arrest O’Doan for resisting a public officer and indecent exposure. O’Doan was released into police custody around 9:40 p.m., charged with both offenses and booked into county jail. In the arrest report drafted by Officer Leavitt, and in the police report narratives prepared by both officers, there was no mention of an alleged seizure. However, a supplement to the arrest report noted that O’Doan was brought to the hospital to be “evaluated for his injuries and other possible health issues.” The next morning, O’Doan was released on bail. The charges against O’Doan were dismissed several months later.

O'Doan later filed suit against Officers Sanford and Leavitt pursuant to 42 U.S.C. § 1983 alleging that the officers: 1) used excessive force against him; 2) lacked probable cause to arrest him; and, 3) prepared deliberately fabricated police reports by omitting any reference to his seizure. In addition, O'Doan sued the City of Reno under the Americans with Disabilities Act (ADA), claiming that the officers failed to make a reasonable accommodation for his epilepsy when they detained him.

After the district court granted the officers qualified immunity and dismissed O'Doan's claim against the city, he appealed.

First, the Ninth Circuit Court of Appeals held that Officer Sanford's use of a "reverse reap throw" did not constitute excessive force, in violation of the Fourth Amendment's prohibition against unreasonable seizures. The court found that the officers responded to call for immediate police assistance for a "violent" individual. When the officers arrived, O'Doan was naked and moving quickly on a busy street. O'Doan repeatedly resisted the officers' command to stop and then turned toward the officers in a threatening manner with his fists clenched. The court concluded that the officers acted reasonably in deciding to bring O'Doan under control and that the use of the reverse reap throw maneuver was a reasonable way in which to achieve this. The court recognized that the officers' efforts may have prevented O'Doan from harming himself or those around him.

Second, the court held that the district court properly dismissed O'Doan's ADA claim that the officers should have detained him in a less forceful manner that was more appreciative of his epilepsy. The court held that O'Doan did not establish that a lesser amount of force would have been reasonable under the circumstances, especially when O'Doan had refused to comply with several warnings to stop.

Third, the court agreed with the district court, holding that the officers had probable cause to arrest O'Doan after they witnessed him engage in conduct that violated Nevada law. While O'Doan conceded that he violated Nevada law, he argued that the officers should have known that he did not have the requisite mental intent to commit these crimes, as he was in an altered state of consciousness due to an epileptic seizure.

The court disagreed. Once on the scene of a "Code 3" emergency, the officers encountered a mobile individual who appeared to recognize verbal commands and turned to flee at a quicker pace. The court held that the officers could conclude that O'Doan was not in the midst of a seizure at this time, and there is no suggestion that he was. Instead, officers witnessed O'Doan engage in unlawful conduct that included O'Doan refusing to comply with officers' orders, raising his fists toward them in a threatening manner, and combatively engaging them in a "major struggle." Under these circumstances, the court found that the officers could reasonably believe they had probable cause to arrest O'Doan based on their observations of his conduct.

Finally, the court rejected O'Doan's claim that the officers violated due process because they did not discuss his reported seizure in their police report and affidavit supporting probable cause. The court commented that it could not locate any clearly established law that would suggest police officers commit a due process violation when they omit from their write-ups initial accounts from an arrestee or others that the arrestee had undergone a seizure at some point before the unlawful conduct.

In this case, the court noted that Officer Leavitt's report stated that O'Doan was transported to a hospital to be "evaluated for his injuries *and other possible health issues.*" The court stated that



nothing in clearly established law suggests that the officers were required to provide more detail to avoid violating the Constitution and that the police reports likewise did not mention Officer Leavitt's skepticism as to whether O'Doan's claimed seizure had caused his conduct. The court concluded by commenting that more information is usually better than less and that including more specific information about reports of O'Doan's possible seizure would have been preferable. However, the court held that the officers did not violate clearly established law.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/19-15623/19-15623-2021-03-19.pdf?ts=1616173431>

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