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# THE FEDERAL LAW ENFORCEMENT - INFORMER -

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

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**Intermediate Weapons (Batons, Dart Tasers, Stun Tasers, OC)**

**Myths vs. Reality**

**Qualified Immunity**

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# CASE SUMMARIES

## Circuit Courts of Appeals

### 2<sup>nd</sup> Circuit

***Jones v. Town of East Haven***, 2012 U.S. App. LEXIS 15928, August 1, 2012

Jones sued the Town of New Haven under *42 U.S.C. § 1983* after an East Haven police officer shot and killed her son. She claimed, among other things, that the Town's custom, policy, or usage of deliberate indifference to the rights of black people caused the killing of her son.

The court concluded the evidence that Jones presented at trial was not sufficient to support a reasonable finding that her son's death was caused by a custom, policy or usage of deliberate indifference by the Town of East Haven. Even though Jones showed instances of illegal and unconstitutional conduct by individual East Haven police officers, to hold the town liable, she needed to show that her loss was attributable to a custom, policy or usage by the Town's supervisory officials. At trial, Jones showed three instances, over a period of several years, in which a small number of officers abused the rights of black people. This evidence fell short of showing a policy, custom or usage of the officers to abuse the rights of black people, and far short of showing abusive conduct among officers so persistent that it must have been known to the Town's supervisory personnel.

Click [HERE](#) for the court's opinion.

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***Marcavage v. The City of New York***, 2012 U.S. App. LEXIS 16081, August 2, 2012

Police arrested Marcavage and another protester during the 2004 Republican National Convention after they failed to comply with police instructions to move from a no-protest-zone to a designated protest-zone. The protesters sued under *42 U.S.C. § 1983*, claiming that the New York City Police Department's (NYPD) protest-zone policy violated the *First Amendment* and their arrests violated the *Fourth Amendment*.

The court held that the NYPD's protest-zone policy was a permissible time, place and manner restriction on *First Amendment* expression and that the protesters' arrests were supported by probable cause.

First, the NYPD policy on expressive activity around the convention was content-neutral. The restriction was not aimed at the content of the protesters' message; no demonstrating of any kind was allowed in the no-protest-zones. Second, the no-protest-zones were confined to a two-block stretch of Seventh Avenue and were in place only during the four days of the convention. The policy that created the no-protest-zones was tailored to meet the congestion and security challenges presented by the convention. Finally, the designated protest-zone, located one block from the primary entrance to the Convention site, was an ample alternative site for the protesters.

The court further held that the officers had probable cause to arrest the protesters under New York law for obstruction of governmental administration after the protesters ignored seventeen requests by three officers to leave the no-protest-zone.

Click [HERE](#) for the court's opinion.

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### 3<sup>rd</sup> Circuit

*U.S. v. Harrison*, 2012 U.S. App. LEXIS 16371, August 7, 2012

Three police officers entered a house without a warrant because they believed that it was abandoned. Once inside, the officers found Harrison sitting in a chair with a gun, scales, pills and cocaine on a table next to him.

The court concluded that Harrison had a reasonable expectation of privacy in the house; however, based on the totality of the circumstances it was reasonable for the officers to mistakenly believe that the house was abandoned. As a result, the warrantless entry into the house did not violate the *Fourth Amendment*.

The officers testified consistently that the exterior of the house was in a severe state of disrepair and that there was trash all over the lawn, which was overgrown with weeds. In addition, the windows on both levels were either boarded up or exposed and the front door was left open. While this information alone would not have been enough to make their mistake reasonable, the officers knew more. First, they knew that the house was a drug-den. Second, the interior matched the rundown condition of the exterior. Third, there were no furnishings other than a single mattress on the top floor. Fourth, that human waste filled the bathtub and toilets. Finally, there was no running water or electricity in the house.

Click [HERE](#) for the court's opinion.

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### 4<sup>th</sup> Circuit

*Durham v. Horner*, 2012 U.S. App. LEXIS 16483, August 8, 2012

Officer Horner arrested Michael Durham, who was incarcerated for more than three months, before the prosecutor realized that the wrong Michael Durham had been arrested and indicted. The court held that Horner was entitled to qualified immunity. The court concluded that there was enough evidence for a reasonable law enforcement officer to believe that Durham was involved in the three drug transactions for which he was charged, even though it turned out that the officer was mistaken.

Click [HERE](#) for the court's opinion.

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## 5<sup>th</sup> Circuit

*U.S. v. Rico-Soto*, 2012 U.S. App. LEXIS 16002, August 2, 2012

A Border Patrol Agent conducted a traffic stop on Rico-Soto's van and eventually arrested him for harboring illegal aliens. The court held the agent did not violate the *Fourth Amendment* because the stop was supported by reasonable suspicion.

First, the van was traveling on Interstate 10, a major corridor for alien smuggling, and the agent had pulled over vans transporting illegal aliens on this route multiple times. Second, various characteristics of the van and its passengers added to the agent's suspicions. The van was a fifteen-passenger model of the kind often used in transporting illegal aliens. There was a company name stenciled on the side of the van, but it was registered to a woman and not the transportation company. The agent knew that vans used to transport illegal aliens were often registered to individual women rather than to a transportation company. Third, the agent noticed that the passengers were seated in separate rows rather than clustered together as people normally would sit. Finally, the agent had specific information from his agency that this particular transportation company had become active in transporting illegal aliens. The agent's 19 ½ years of experience allowed him to recognize suspicious circumstances that might not be recognized by others and by themselves might not arouse suspicion, but when examined together, established reasonable suspicion to support the traffic stop.

Click [HERE](#) for the court's opinion.

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*U.S. v. Mubdi*, 2012 U.S. App. LEXIS 16708, August 10, 2012

Two police officers stopped Mubdi after they both visually estimated that he was speeding and that he was following one of the officer's patrol cars too closely. One of the officers issued Mubdi a warning ticket and then had him step out of his car while the other officer walked his drug-detection dog around it. After the dog alerted to the presence of drugs, the officers searched Mubdi's car and found cocaine and two loaded firearms.

The court agreed with the district court, which held that the officers had probable cause to stop Mubdi for speeding because they were trained in estimating vehicle speed and that their testimony regarding Mubdi's rate of speed was credible. The court further held that even if the officers were mistaken in believing that Mubdi was violating the law by following the officer's patrol vehicle too closely, it was a reasonable mistake, which did not affect the officers' probable cause to stop Mubdi for speeding.

The court held that after the officers issued Mubdi the warning ticket, they had reasonable suspicion to detain him for further investigation. First, Mubdi took an excessive amount of time to pull over and he was extremely nervous when talking to the officers. Second, during the stop, he kept his foot on the car's brake pedal instead of shifting the transmission into park. Third, he could not provide details as to his destination or the family member he was going to visit. Fourth, he lied to the officer about who had rented the car; he was not an authorized driver of the car and the rental car was being driven out-of-state, which was prohibited by the rental contract. All of these circumstances supported the officers' decision to extend the duration of the initial

traffic stop to conduct the open-air canine sniff, which eventually alerted the officers to the presence of contraband in Mubdi's car.

Click [HERE](#) for the court's opinion.

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## 6<sup>th</sup> Circuit

***Austin v. Redford Township Police Department***, 2012 U.S. App. LEXIS 16432, August 8, 2012

Austin sued three police officers, claiming that they had used excessive force when they arrested him.

The district court held that the officer who first deployed his taser against Austin was entitled to qualified immunity for its initial use. However, the district court held that the same officer was not entitled to qualified immunity for the subsequent deployment of his taser against Austin, nor was the second officer who deployed his taser against Austin, nor was the third officer who deployed his police dog against Austin.

After the initial deployment of the taser against him, Austin claimed that he was subdued on the ground to the point that he posed no significant threat to the officers and that the subsequent use of the tasers and the police dog against him were excessive. The officers argued that the videotapes taken from the in-car-cameras in their patrol cars blatantly contradicted Austin's version of the incident. Consequently, the officers argued that the district court should have determined the issue of qualified immunity based on the facts depicted in the videotapes.

The court held that even after considering the videotape evidence, it was not blatantly or demonstrably false for the district court to conclude that there remained a genuine dispute regarding whether Austin was subdued once he was on the ground and if the subsequent use of the tasers and the police dog against him were excessive.

Click [HERE](#) for the court's opinion.

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***U.S. v. Skinner***, 2012 U.S. App. LEXIS 16920, August 14, 2012

Drug Enforcement Administration (DEA) agents suspected that Skinner was driving cross-country in a motorhome with a load of marijuana. The agents obtained a court order that authorized the phone company to release subscriber information, cell site information, GPS real-time location and "ping" data for a pay-as-you-go cell phone owned by Skinner. By continuously "pinging" his phone, the agents learned that Skinner had stopped somewhere near Abilene, Texas where they eventually found his motorhome parked at a truck stop. After Skinner denied the agents request to search the vehicle, an officer walked his drug-dog around the perimeter of the motorhome. The dog alerted to the presence of narcotics and the agents searched the motorhome where they discovered over 1,100 pounds of marijuana.

Skinner argued that the use of the GPS location information emitted from his cell phone was a warrantless search that violated the *Fourth Amendment*.

The court held that there was no *Fourth Amendment* violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone as he traveled on public roadways. If a tool used to transport contraband gives off a signal that can be tracked for location, the police may track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. In addition, although not necessary to a finding that there was no *Fourth Amendment* violation, the government's case was strengthened by the fact that the agents sought court orders to obtain information on Skinner's location because of the GPS capabilities of his cell phone.

Click [HERE](#) for the court's opinion.

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***Hagens v. Franklin County Sheriff's Office***, 2012 U.S. App. LEXIS 17851, August 23, 2012

Police officers were dispatched to Hagens' house after a neighbor called 911 to report a disturbance there. The first officer on the scene saw Hagens running toward him and ordered Hagens to stop. Hagens ignored the officer and ran around the house where he tried to open the locked driver's side door of a police cruiser that belonged to another officer that had just arrived. Hagens did not comply with officer's command to stop. The two officers scuffled with Hagens who refused to be handcuffed. A third officer arrived and deployed his taser in drive-stun mode to Hagens' back as he continued to fight with the other two officers on the ground. The officer tased Hagens a second time after the initial shock did not subdue him. After the second shock, Hagens continued to fight with the officers and grabbed for the taser. The officer tased Hagens two to four more times in drive-stun mode. Realizing that the shocks were not working, the officer joined the other two officers in trying to subdue Hagens by hand. After the officers secured Hagens with handcuffs and leg shackles, he lost consciousness and stopped breathing. Hagens died three days later. The coroner found cocaine in Hagens' system and concluded that Hagens' death was caused by respiratory complications due to cocaine intoxication.

Hagens' estate claimed that the officer used excessive force, in violation of the *Fourth Amendment*, by repeatedly deploying his taser against Hagens.

The court disagreed and held that the officer was entitled to qualified immunity. First, it was not clearly established in May 2007, when this incident occurred, that using a taser repeatedly on a suspect who was actively resisting arrest and refusing to be handcuffed amounted to excessive force. Second, cases from this circuit and others, before and after May 2007 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.

Click [HERE](#) for the court's opinion.

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***Patrizi v. Connole***, 2012 U.S. App. LEXIS 18082, August 24, 2012

Police officers arrested Patrizi, an attorney, for "obstructing official police business" in violation of a local ordinance, after they claimed she interfered with their investigation of an assault at a nightclub. After the criminal charge was dismissed, Patrizi sued the officers claiming that she was arrested without probable cause.

The obstruction ordinance under which Patrizi was arrested requires an affirmative act that interrupts police business. Convictions under this statute that are based on speech towards the officer have been upheld when that speech involved yelling, cursing, aggressive conduct and/or persistent disruptions, after warnings from the police, against disrupting the investigation.

Here, the court concluded that Patrizi's actions did not constitute an affirmative act under the obstruction ordinance. Patrizi asked the officers questions in a calm and measured manner; she did not continuously interrupt the officers and she did not in any way exhibit aggressive, boisterous or unruly disruptive conduct. Because it was clearly established at the time of her arrest that Patrizi's conduct did not constitute an affirmative act under the obstruction ordinance, the court refused to grant the officers qualified immunity.

Click [HERE](#) for the court's opinion.

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***Embodly v. Ward***, 2012 U.S. App. LEXIS 18399, August 30, 2012

Embodly went to a state park in Tennessee, dressed in camouflage and armed with a Draco AK-47 pistol that had an eleven-and-one-half inch barrel and a fully loaded thirty-round clip attached to it. Tennessee law allows individuals with gun permits to carry handguns in public places owned or operated by the state (*Tenn. Code 39-17-1311(b)(1)(H)*) and defines a "handgun" as "any firearm with a barrel length of less than twelve inches" designed or adapted to be fired with one hand.

A park ranger disarmed Embodly at gunpoint and detained him to determine whether the AK-47 was a legitimate pistol under Tennessee law. Once the ranger determined that Embodly had a valid gun permit and that the AK-47 fit the definition of a handgun under state law, he returned the gun to Embodly and released him. Embodly sued the officer, claiming violations of his constitutional rights.

The court held that the park ranger was entitled to qualified immunity. First, Embodly's AK-47, carried openly and fully loaded through a state park gave the ranger ample reason to suspect that Embodly possessed an illegal firearm. The barrel was a half-inch shy of the legal limit and when coupled with the thirty-round ammunition clip, looked more like a rifle than a handgun. In addition, Embodly had painted the tip of the barrel of the gun orange, typically an indication that the gun is a toy. An officer could fairly suspect that Embodly had used the paint to disguise an illegal weapon. Second, the scope of the ranger's investigation was reasonable. Ordering Embodly to the ground at gunpoint was reasonable under the circumstances as was the two and one half hours detention the ranger spent trying to confirm or dispel his suspicions, especially when Embodly insisted that a supervisor be called to the scene, which he was told, would delay his release.

Click [HERE](#) for the court's opinion.

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## 7<sup>th</sup> Circuit

*Rann v. Atchison*, 2012 U.S. App. LEXIS 16091, August 3, 2012

Rann's fifteen-year-old biological daughter reported to the police that Rann had sexually assaulted her and that he had taken pornographic pictures of her. After her interview, Rann's daughter returned home, retrieved a memory card from Rann's digital camera and gave it to the police. The police officers did not direct Rann's daughter to attempt to recover evidence for them. Images downloaded from the memory card depicted Rann sexually assaulting his daughter. Sometime later, Rann's wife gave police officers a computer zipp-drive that contained additional pornographic images of her daughter and Rann.

Rann argued that he received ineffective assistance from his trial attorney because the attorney did not attempt to suppress the incriminating images discovered on the memory card and zipp-drive. Rann claimed that when the police conducted their warrantless searches of these storage devices, they exceeded the scope of the initial private searches conducted by his daughter and his wife.

The court disagreed, and agreeing with the Fifth Circuit, held that the warrantless search of any material on digital media is valid if the private party, who conducted the initial search, has viewed at least one file on that media. The court held that the trial court reasonably found that Rann's daughter and wife knew the contents of the memory card and zipp-drive. Because Rann's daughter and wife knew the contents of both the digital media devices, the subsequent warrantless searches of these devices by the police were valid. The court added, even if the police had searched the digital media devices and viewed images that Rann's daughter or wife had not viewed, their search still would not have exceeded or expanded the scope of the initial private searches.

Click [HERE](#) for the court's opinion.

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*U.S. v. Saucedo*, 2012 U.S. App. LEXIS 16264, August 6, 2012

During a traffic stop, Saucedo gave a state trooper consent to search his truck and trailer after the trooper asked him if he was carrying any weapons or drugs. At no time did Saucedo limit the scope of the search. Inside the cab of the truck, the trooper found what he thought was an alteration to a small alcove that housed a compartment in the sleeper/bunk area behind the driver's seat. The trooper used a screwdriver to disassemble one screw, pulled back the plastic molding around the alcove, looked in, and found a hidden compartment. The trooper eventually removed the hidden compartment from its location, opened it and found ten kilograms of cocaine inside.

Saucedo argued that the trooper exceeded the scope of his general consent to search the tractor-trailer by using a flashlight and screwdriver to remove the screws holding the molding in place that covered the hidden compartment. The court noted that the scope of a consent search is determined by the expressed object of the search. Here, the trooper received Saucedo's consent to search for drugs and weapons. A reasonable person may be expected to know that drugs are generally carried in some kind of a container. As a result, Saucedo's consent allowed the trooper to search all compartments inside the tractor-trailer, including the sleeper area, where drugs

could be concealed. If Saucedo did not want the hidden compartment to be searched, he could have limited the scope of his consent.

Saucedo also argued that the trooper exceeded the scope of his consent because he used a flashlight and screwdriver to look behind a television, unscrew the molding, and remove the hidden compartment from the cab. The court disagreed, stating that it was objectively reasonable for the trooper to believe that the scope of consent allowed him to open the compartment by removing the screws that held it in place. The removal of the hidden compartment did not dismantle any functional part of the vehicle; the compartment had no function other than to conceal drugs.

Click [HERE](#) for the court's opinion.

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***U.S. v. McDowell***, 2012 U.S. App. LEXIS 16342, August 7, 2012

After federal agents arrested McDowell on drug charges, McDowell claimed that he was working undercover for the Chicago Police Department (CPD). Because it was after hours, the agents asked McDowell if he would be willing to waive his right to prompt presentment before a magistrate judge while they tried to verify his claim. McDowell agreed and signed a written *Federal Rule of Criminal Procedure 5(a)* waiver and spent the night in jail. The federal agents eventually discovered that McDowell worked for the CPD as an informant, but that he was not working under their direction at the time of the transaction that led to his arrest. The next morning, approximately sixteen hours after his arrest, McDowell waived his *Miranda* rights and made several incriminating statements. After that, McDowell was brought before a magistrate judge for his initial appearance. McDowell argued that his incriminating statements should have been suppressed because the delay in bringing him in front of the magistrate was unreasonable.

The court disagreed. By signing the *Rule 5(a)* waiver, McDowell gave up his right to prompt presentment to the magistrate for the length of time specified in the waiver, which in this case was 72 hours. As a result, McDowell also gave up the right to challenge the admissibility of his incriminating statements on the grounds of his delay in presentment to the magistrate. There was no dispute that McDowell signed the *Rule 5(a)* waiver voluntarily. In addition, McDowell did not argue that his confession was otherwise inadmissible. All parties agreed that the agents complied with *Miranda* and that McDowell confessed voluntarily.

Click [HERE](#) for the court's opinion.

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***U.S. v. Freeman***, 2012 U.S. App. LEXIS 17526, August 21, 2012

Freeman and another man showed up at the appointed time and place for a drug transaction with a police informant. They were in a mini-van that matched the description provided by the informant. After remaining at the scene for only a few minutes, they drove away. An officer conducted a traffic stop on the van and a drug dog alerted to presence of drugs, however the officers did not find any drugs inside the van. The officers arrested the men for attempted cocaine distribution. At the station, one of the officers noticed that Freeman was visibly uncomfortable while seated and that he kept fidgeting and changing positions in his seat. During

the booking process at the jail, Freeman was strip-searched and found to be concealing a bag containing crack cocaine between his buttocks.

Freeman argued that the officers did not have probable cause to arrest him and that they did not have reasonable suspicion to conduct the strip-search.

The court disagreed. At the time of his arrest, the officers had probable cause to believe Freeman had committed the crime of attempted distribution of cocaine. Freeman pulled into the parking lot at precisely the time the drug transaction was to occur, in a van that matched the description provided by the informant. Once the traffic stop occurred, an officer heard Freeman speak in a raspy voice, similar to the voice on the phone that had set up the sale. In addition, Freeman had a cast on his leg, which matched information from the informant that Freeman had recently been in the hospital because of a problem with his leg.

The court also held that the jail officials had reasonable suspicion to conduct the strip search. Freeman was arrested for attempted drug distribution, which is exactly the type of crime that raises reasonable suspicion of concealed contraband. The officers knew of Freeman's habit of hiding drugs between his buttocks from the confidential informant. When the officers failed to find any drugs at the scene of the traffic stop, it was completely reasonable to think that he might be concealing drugs this way. Finally, Freeman's uncomfortable fidgeting while seated at the police station indicated that he may be concealing drugs on his person.

Click [HERE](#) for the court's opinion.

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*U.S. v. Garcia*, 2012 U.S. App. LEXIS 18120, August 27, 2012

After police officers arrested Garcia for attempting to possess and distribute cocaine, they found a piece of paper in his pocket with an address on it. The officers went to the address and discovered that Garcia's sister and eighteen-year-old niece lived there. Garcia's eight-year-old son was also present. The niece told the officers that she took care of the child often and that she had a key to Garcia's apartment so she could get the child dressed for school when Garcia was not home. The niece signed a consent-to-search form for Garcia's apartment. Inside a closet, officers found thirteen kilograms of cocaine.

The court held that the officers had a reasonable belief that the niece was authorized to consent to the search of Garcia's apartment. Garcia gave his niece unlimited access to his apartment so she could take care of his child. She spent time there getting the child dressed for school in the mornings and often stayed with the child in the apartment after school when Garcia was not there. The defendant kept a large quantity of cocaine in a closet that also contained his child's clothing, which is an indication of the trust he had in his niece because part of her responsibility was getting the child dressed for school.

Click [HERE](#) for the court's opinion.

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*U.S. v. Seiver*, 2012 U.S. App. LEXIS 18185, August 28, 2012

Seiver argued that federal agents relied on stale information to obtain the warrant to search his computer that led to the discovery of child pornography. He claimed that there was no reason to

believe that seven months after he had uploaded child pornography there would still be evidence of the crime on his computer.

The court disagreed. Even if even if defendant had deleted the child pornography, a successful recovery of the images from his hard drive by an FBI computer forensic expert would establish that he had possessed them at one time, well within the five-year statute of limitations. The court noted that the issue of staleness is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file. The court explained that a deleted file would seem to have vanished only because the computer had removed it from the user interface and the user could not "see" it any more. However, such a file would remain on the computer and normally would be recoverable by computer experts until it was overwritten because there was no longer unused space in the computer's hard drive.

The court concluded that even after seven months, it was still probable the images of child pornography would be present on Seiver's computer.

Click [HERE](#) for the court's opinion.

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***Tebbens v. Mushol***, 2012 U.S. App. LEXIS 18383, August 30, 2012

Officer Mushol saw Tebbens, a former firefighter, soliciting funds for a charity using a firefighter's boot. During this encounter, Mushol found a firefighter's identification card in Tebbens' wallet. Tebbens claimed the identification card was a souvenir from the fire department.

A few months later, Mushol saw Tebbens again soliciting funds for a charity using a firefighter's boot. Mushol arrested Tebbens for theft related to the firefighter identification card because he had discovered, after their first encounter, that Tebbens was not permitted to possess an active firefighter identification card. Tebbens agreed to an order of supervision on the theft charge, which prohibited him from holding himself out as a member of the fire department or collecting money using a boot similar to a firefighter's boot.

Mushol saw Tebbens for a third time soliciting funds for a charity, using a large boot and arrested him for violating the order of supervision. Tebbens sued Mushol, claiming that Mushol had arrested him without probable cause.

The court held that Mushol was entitled to qualified immunity. First, the court concluded that Mushol had the authority to arrest Tebbens for violating the terms of his supervision. Second, the court held that a Mushol could reasonably conclude that, in soliciting funds on an intersection using a large rubber boot, Tebbens was holding himself out as a firefighter and soliciting funds on behalf of the fire department, in violation of the terms of his supervision.

Click [HERE](#) for the court's opinion.

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## 8<sup>th</sup> Circuit

*U.S. v. Anderson*, 2012 U.S. App. LEXIS 15849, August 1, 2012

Anderson sold cocaine base to an undercover police officer. Other officers moved in to arrest him, but Anderson fled into an apartment building. The officers stepped onto the balcony of the apartment unit where Anderson had gone and saw him and another individual inside. The court held the officers' warrantless entry onto the balcony was lawful under the hot pursuit exception to the *Fourth Amendment's* warrant requirement. Where the police attempt to make an arrest for a "serious offense" in a public place, they may pursue the suspect into a private home or business without obtaining a warrant, as long as their pursuit is "immediate and continuous."

In this case, because Anderson committed a "serious offense" by selling cocaine base to an undercover police officer and because the other officers "immediately and continuously" pursued Anderson after the transaction, they entered the balcony of the apartment lawfully. As a result, the observations by the officers while on the balcony did not taint the affidavit that the officers drafted in support of the warrant they later obtained to search the apartment.

The court also held that Anderson's girlfriend, the lessee of the apartment where he had fled, first gave the officers consent to enter the apartment to detain Anderson and then later gave them consent to conduct a protective sweep.

Click [HERE](#) for the court's opinion.

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*U.S. v. Lumpkins*, 2012 U.S. App. LEXIS 16284, August 6, 2012

Police officers conducted a traffic stop on a car they believed had illegally tinted windows. The car pulled into a driveway, and when the driver refused to a command to "come here" the officers placed him in handcuffs. One of the officers looked through the windshield and saw marijuana in the center console. The officer tried to open the door to seize the marijuana, but it was locked and the keys were lying on the driver's seat. The officers discovered the car was a rental and that it was several days overdue for return. Both Lumpkins and the authorized renter refused to give consent to search the car. A manager from the rental car company arrived, unlocked the car and gave the officers consent to search. The officers found marijuana, crack cocaine and a loaded firearm in the car.

The court held that the manager from the rental car company had the right to take immediate control of the car and give the officers valid consent to search it because, at the time of the search, the car was overdue for return.

The court also held that the manager's consent to search the rental car was valid even though the person named in the rental agreement and Lumpkins both refused consent to the search. The court commented that a driver of an overdue rental car who is on notice that the rental car company is entitled to repossess it at any time, may not exercise authority over the car, contrary to the rental car company.

Finally, the court did not rule on whether Lumpkins' initial detention violated the *Fourth Amendment*. However, even if it did, the court held that evidence against Lumpkins was discovered as the result of a valid consent search and not as the result of his detention.

Click [HERE](#) for the court's opinion.

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*U.S. v. Roberts*, 2012 U.S. App. LEXIS 16601, August 9, 2012

A police officer conducted a traffic stop on a vehicle because its rear license plate was not illuminated. The officer requested and received identification from the driver, Roberts and two other passengers. The officer learned that Roberts had an outstanding warrant, arrested him and found an unlawful firearm on his person.

Roberts argued that the officer unlawfully extended the traffic stop beyond the time reasonably necessary to complete the initial purpose of the stop when he turned his focus away from the initial reason for the stop and toward the identity and warrant status of the vehicle's passengers.

Because the officer's investigation into Roberts' warrant status was concurrent with his investigation into the initial purpose of the traffic stop, the traffic stop was not prolonged by the inquiry into Roberts' warrant status.

Click [HERE](#) for the court's opinion.

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*U.S. v. Swift*, 2012 U.S. App. LEXIS 17860, August 23, 2012

Police officers obtained a warrant to search Swift's house, after they encountered him at the home of another drug suspect on the same day they seized a large amount of methamphetamine from that home. The officers seized \$16,000 in cash hidden in a heater vent pipe in Swift's house. Swift moved to suppress this evidence, arguing that the warrant to search his house lacked information necessary to establish probable cause to believe that evidence of drug trafficking would be found there.

The court refused to suppress the evidence, holding that the good-faith exception applied. Under the good-faith exception, disputed evidence will be admitted if it was objectively reasonable for the officer executing the search warrant to have relied on good faith on the judge's determination that there was probable cause to issue the warrant.

Here, it was reasonable for the state judge who issued the search warrant to infer that evidence connected to drug trafficking would be at Swift's house. As a result, the officer reasonably believed that the information in the affidavit that placed Swift at a house where a large quantity of methamphetamine had been seized earlier in the day, established probable cause to search his house. Reliance on the search warrant was reasonable and there was no evidence the officer acted in bad faith.

Click [HERE](#) for the court's opinion.

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## 9<sup>th</sup> Circuit

*Nelson v. City of Davis*, 2012 U.S. App. LEXIS 14140, July 11, 2012

Nelson suffered permanent injury when he was shot in the eye by a pepperball projectile fired from the weapon of a police officer when the police attempted to clear an apartment complex of partying college students. Nelson sued, claiming among other things, that the officers violated his *Fourth Amendment* right to be free from unreasonable seizures.

The officers argued that they did not intentionally seize Nelson, so there could be no *Fourth Amendment* violation. The court disagreed. A person is seized when a police officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied.

Here, the police officers took aim and intentionally fired in the direction of a group of people which included Nelson. Nelson was hit in the eye by a projectile filled with pepper spray and, after being struck, was rendered immobile until he was removed by an unknown person. Although the officers did not specifically target Nelson, the intentionality requirement is satisfied when the termination of freedom of movement occurs through means intentionally applied. Regardless of whether Nelson was the specific object of governmental force, he and his fellow students were the undifferentiated objects of shots intentionally fired by the officers in the direction of that group. Although the officers may have intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement. Nelson was therefore intentionally seized under the *Fourth Amendment*.

After determining that Nelson was seized, the court considered the factors outlined in *Graham v. Connor* to determine if that seizure was reasonable. First, the severity of the crime at issue weighted heavily in favor of Nelson and against the use of force employed by the officers. The officers did not claim that Nelson or any of his companions were committing a crime at the time he was shot. After he was incapacitated, the officers did not place him under arrest, but rather walked past him as he lay on the ground. Second, the undisputed facts supported the conclusion that the officers did not reasonably believe Nelson or his companions posed a threat. In their depositions, several officers testified that they did not see anyone in Nelson's group throw anything at them or engage in any threatening or dangerous behavior. Finally, no one in Nelson's group was actively resisting or attempting to evade arrest.

As a result, the court denied the officers' qualified immunity, holding that their use of force against Nelson was unreasonable and that the law at the time of the incident should have placed the officers on notice that the shooting of the pepperballs under the circumstances was an act of excessive force.

Click [HERE](#) for the court's opinion.

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*U.S. v. Tschacher*, 2012 U.S. App. LEXIS 15976, August 2, 2012

A police officer arrested Tschacher for driving with a suspended license. While Tschacher was handcuffed in his patrol car, the officer searched Tschacher's vehicle incident to arrest and found two illegal firearms. Tschacher argued that the firearms should have been suppressed because the search of his vehicle did not comply with *Arizona v. Gant*. Under *Gant*, police officers may search the passenger compartment of a vehicle incident to arrest only if the arrestee might have access to the vehicle at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of the arrest.

While neither of these factors was present when the officer searched Tschacher's vehicle, this incident occurred before the Supreme Court's ruling in *Gant*. The Supreme Court has held that it is unnecessary to suppress evidence under *Gant* where the search occurred prior to the *Gant* decision. As a result, the court held that the illegal firearms should not be suppressed because the search of Tschacher's vehicle occurred before the *Gant* was decided and that it was lawful based on the case law at the time.

Click [HERE](#) for the court's opinion.

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*U.S. v. Duenas*, 2012 U.S. App. LEXIS 17211, August 16, 2012

Local and federal police officers executed a search warrant on Duenas' property for evidence of narcotics trafficking. Members of the media and other civilians were allowed on the property during the search to film and photograph the scene. While the management of the scene was characterized as "woefully inadequate," the court refused to suppress the evidence seized by the officers.

The court held that Duenas' front yard was not part of the curtilage; therefore, the presence of the media there did not violate the *Fourth Amendment*. However, some journalists were escorted beyond the front yard to photograph a marijuana patch in the back yard. In agreeing with the Eleventh Circuit, the court held that as long as the media did not discover or develop any of the evidence later used at trial, the evidence did not have to be suppressed. In this case, the media did not expand the scope of the search warrant and they did not assist the police or touch, handle or taint the admitted evidence in any way. The more appropriate remedy here would be a *Bivens* or 42 U.S.C. § 1983 action.

Click [HERE](#) for the court's opinion.

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*U.S. v. McTiernan*, 2012 U.S. App. LEXIS 17473, August 20, 2012

McTiernan hired a private investigator to illegally wiretap telephone conversations of two individuals. When FBI agents questioned McTiernan about the private investigator's activities, McTiernan claimed that he knew nothing about any wiretapping. However, the FBI had obtained a digital recording that the private investigator had made in which he and McTiernan discussed the illegal wiretapping. McTiernan did not know that the private investigator had recorded this conversation. After being convicted of making a material false statement to the FBI agents, McTiernan argued that this recording should have been suppressed.

The court disagreed. Because the recording was not made for the purpose of committing a criminal or tortious act, the court concluded that the district court did not err in denying the motion to suppress.

Click [HERE](#) for the court's opinion.

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## 10<sup>th</sup> Circuit

*Armijo v. Perales*, 2012 U.S. App. LEXIS 15909, August 1, 2012

Criminal investigators from the district attorney's office obtained a warrant to search a police chief's house for two firearms. The investigators claimed that the chief had purchased the two firearms for personal use as part of a transaction where other firearms were purchased for his department.

After locating the two firearms in the chief's house, the investigators obtained a warrant to arrest him for larceny of the firearms. All charges were later dismissed and the chief sued the investigators under *42 U.S.C. § 1983* claiming false arrest, false imprisonment, and illegal search and seizure in violation of the *Fourth Amendment*. The chief also claimed the search of his house and his arrest violated the *First Amendment* because they were in retaliation for reporting an alleged battery committed by the mayor to the state police.

The court agreed with the district court, which had held that the investigators were not entitled to qualified immunity for searching the chief's house or arresting him.

First, the search warrant authorized the investigators to search for a number of items not related to the two firearms including, controlled substances, records and documents relating to controlled substances, photographs or videotapes and financial records. However, the affidavit submitted in support of the search warrant only provided evidence of the chief's alleged larceny of the two firearms. The affidavit offered no evidence linking the chief to any missing funds, narcotics or other police department property. If the investigators wanted to search for other items that may have been stolen from the police department's inventory, they needed to include information in the affidavit to establish probable cause. Even if the allegations regarding the two firearms were sufficient to believe the two firearms were improperly obtained, the warrant violated the *Fourth Amendment* because its scope far exceeded the probable cause to support it.

In addition, the court concluded that a reasonably well-trained officer would have known a search pursuant to such an obviously overbroad warrant was illegal under clearly established law.

Second, the arrest warrant lacked probable cause. The affidavit clearly stated that while the town originally received a bid sheet for six firearms, the town only paid for four firearms and the chief purchased the remaining two firearms for personal use. However, the affidavit did not allege that the chief used police department funds to pay for the two firearms, nor did it claim that he was somehow restricted from purchasing these firearms for personal use because of some department policy. The only evidence in the affidavit regarding the purchase of the two firearms indicated that the chief, not the town paid for the firearms. This was insufficient to establish probable cause to arrest the chief for larceny. The investigators failed to provide any reason why the chief's possession of the two firearms was illegal. A reasonable officer would

have known that an arrest warrant stating that the chief had purchased two firearms, without any allegation of criminal activity, did not establish probable cause to arrest him.

The court held that it did not have jurisdiction to decide the *First Amendment* issue, therefore the district court's denial of qualified immunity to the investigators remained unchanged.

Click [HERE](#) for the court's opinion.

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