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Free FLETC Informer Webinar Series Schedule

The FLETC Informer Webinar Series continues in July with the following webinars:

1. Search Incident to Arrest – Digital Devices in a Post-Gant World

50-minute webinar presented by Mikell Henderson, FLETC Legal Division

Dates and Times: Tuesday July 9, 2013: 11:00 am EDST Click [HERE](#) to Login

or

Tuesday July 30, 2013: 3:00 pm EDST Click [HERE](#) to Login

2. Government Workplace Searches: A review of the law that controls the government's ability to intrude into its employees' workspaces.

50-minute webinar presented by John Besselman and Bob Cauthen, FLETC Legal Division.

Date and Time: Thursday July 11, 2013: 10:30 am EDST Click [HERE](#) to Login.

3. The Circuit Split in Using Deadly Force to Control Suicidal People

50-minute webinar presented by Tim Miller, FLETC Legal Division

Date and Time: Tuesday July 30, 2013: 12:30pm EDST Click [HERE](#) to Login.

4. United States Supreme Court Wrap-Up: A review of cases decided by the USSC in the October 2012 Term that affect law enforcement officers.

50-minute webinar presented by Ken Anderson and John Besselman, FLETC Legal Division

Dates and Times: Thursday July 18, 2013: 2:30 pm EDST Click [HERE](#) to Login

or

Tuesday July 23, 2013: 10:30 am EDST Click [HERE](#) to Login.

5. *Kalkines* and *Garrity* – Getting the Basics: An Introduction to some of the parameters of the important case holdings of *Kalkines* and *Garrity*.

50-minute webinar presented by John Besselman, FLETC Legal Division

Date and Time: Thursday July 25, 2013: 10:00 am EDST Click [HERE](#) to Login.

If there are any specific legal topics that you would like to see offered in future FLETC Informer webinars, please let us know!

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The Circuit Split in Using Deadly Force to Control Suicidal People
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Ruddy Elizondo was 17 years old and lived with his sister and mother in Garland, Texas. Ruddy had gone out drinking and upon returning home around midnight, began playing loud music. Ms. Elizondo got up and told her son to go to bed. Ruddy went to his room, but started crying. When Ms. Elizondo went to check on Ruddy, she found her son holding a knife to his stomach. Ruddy had attempted suicide before, so Ms. Elizondo, who was understandably concerned, began crying and pleading with Ruddy to put down the knife. Upon hearing this commotion, Ruddy's sister called 911. Officer Green was dispatched to the home. He entered the house, went to Ruddy's room, and found Ruddy still holding the knife. Officer Green drew his pistol, backed out of the room, and repeatedly told Ruddy to drop the knife. Instead, Ruddy tried to close the bedroom door. Officer Green would not let him. Ruddy cursed, "F---ing shoot me." Officer Green told Ruddy he did not want to shoot, but he would if Ruddy came closer. After Ruddy moved closer, still holding the knife in a threatening manner, Officer Green fired three times, hitting Ruddy in the chest, shoulder and abdomen. Ruddy was dead approximately five minutes after his sister called for help.¹

The Elizondos belong to a group of families that called for emergency assistance and watched the responding officers shoot the person the family intended to help. Incredibly, *Elizondo* was the Fifth Circuit Court of Appeals' second case in two months that involved police officers shooting a mentally unstable person in the City of Garland, Texas.² The facts in many of these cases are as consistent as how they end. They begin with someone who is suicidal or exhibiting signs of mental illness. A concerned family member calls 911. Police arrive, but escalate the encounter by aggressively confronting the person, which prompts the person confronted to be aggressive. The person threatens the officers with a knife, or some other weapon at hand, and the officers are forced to shoot.

While the facts may be consistent, the court decisions about whether the officers committed a Fourth Amendment violation are not. The Second, Fourth, Fifth, Sixth, and Eighth Circuit Courts of Appeal confine the excessive force inquiry to whether the police officer, or another, was in danger at the moment the officer used deadly force.³ These circuits have concluded the events preceding the officer's use of force are generally irrelevant. Even though an expert witness testified Officer Green's behavior before he shot Ruddy was an abomination, and that Ruddy's death was completely avoidable, his opinion had no effect on the Fourth Amendment

¹ *Elizondo v. Green*, 671 F.3d 506 (5th Cir. 2012) cert. denied, 2012 U.S. LEXIS 7560 (2012); see also *Elizondo v. City of Garland*, 2012 U.S. Briefs 1375 (2012).

² See *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011).

³ See *Nimely v. City of New York*, 414 F.3d 381, 390 (2nd Cir. 2005)(an officer's decision to use deadly force depends on the officer's knowledge of the circumstances immediately prior to and at the moment); *Cowen v. Breen*, 352 F.3d 756, 762 (2nd Cir. 2003); *Waller v. City of Danville*, 212 Fed. Appx. 162, 171 (4th Cir. 2006)(although circuits differ, the Fourth Circuit has repeatedly held that pre-shooting conduct is generally not relevant); *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005); *Elliott v. Leavitt*, 99 F.3d 640, 643-44 (4th Cir. 1996); *Rockwell*, 664 F.3d at 991 (the excessive force inquiry is confined to whether [the officer or other person] was in danger at the moment of the threat); *Bazan v. Hidalgo City*, 246 F.3d 481, 493 (5th Cir. 2001); and *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992); *Schultz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995).

question before the court.⁴ Consequently, the Fifth Circuit held shooting Ruddy was not unconstitutional because the teenager posed an immediate threat of serious bodily harm when Officer Green shot him.⁵

The First, Ninth, and Tenth Circuit Courts of Appeal conduct a more extensive “totality of the circumstances” inquiry rather than focusing on the moment the officer fired.⁶ For example, the Tenth Circuit would likely find the expert’s opinion relevant as to whether the officer escalated the need to use deadly force.⁷

The circuit split is illustrated in the Tenth Circuit’s decision, *Sevier v. City of Lawrence*.⁸ The facts are eerily similar to *Elizondo*. The Seviers’ called 911 to report their son, Gregory, was in his bedroom with a butcher knife. Gregory had previously attempted suicide. Gregory had been out drinking that night, returned home, and began playing loud music. The police arrived. According to the court, there was a dispute about whether the officers talked to Gregory’s parents, or ignored the Seviers’ attempts to discuss the situation. The officers drew their weapons, opened Gregory’s door, and ordered him to show his hands. Gregory’s response was to approach the door with the knife. The officers predictably shouted, “Drop it.” Gregory cried, “I love you, Mom” and either lunged at the officers, according to the police, or continued to stand with the knife at his side, according to his parents. The officers shot and killed Gregory. The Tenth Circuit refused to dismiss the case in part because there was a question for the jury “as to whether the officers precipitated the use of deadly force by their own actions during the course of the encounter immediately prior to the shooting.”⁹ Unlike the Fifth Circuit in *Elizondo*, here, the jury would be able to hear the expert witness’ opinion and decide if it was relevant in determining whether the officers escalated the need to use deadly force. Reasonableness, according to the Tenth Circuit, depends not only on whether the officer was in danger at the moment he used force, but also on whether the officer’s own conduct unreasonably created the need to use force.¹⁰

So what does the Fourth Amendment demand of an officer confronting a mentally unstable person? Is it just to be reasonable at the moment they shoot, or should the court conduct a more extensive inquiry into whether the officers unreasonably created the need to use force? The answer may lie in the Supreme Court’s 2011 decision, *Kentucky v. King*.¹¹

King concerned the so-called police-created exigency doctrine; a rule that prevented police from benefiting from a warrantless entry into a home based on exigent circumstances, if the police created the exigency. The facts were that after smelling burning marijuana coming from King’s

⁴ *Elizondo v. City of Garland*, 2012 U.S. Briefs 1375 (2012)(“Rather than call for back-up, consult with a critical incident team, contact suicide prevention personnel, consult with family, move away from the doorway, formulate a plan to calmly and safely remove the knife, or deploy non-lethal force, Green did exactly what no reasonable officer should do with a mentally unstable, suicidal person. He pulled out his gun, pointed it at Ruddy and began yelling at the distraught kid to drop the knife. How he could possibly assume that it was reasonable . . . to yell and make threats with a semi-automatic handgun against a teenager in his own bedroom, who posed only a minimal to moderate threat to himself with a kitchen knife, is beyond reasonable comprehension.”)

⁵ *Elizondo v. Green*, 671 F.3d 506 (5th Cir. 2012)

⁶ *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005)(“Once a seizure has occurred the court should examine the actions of the [officer] leading up to the seizure. This rule is most consistent with the Supreme Court’s mandate that we consider these cases in the ‘totality of the circumstances’”); *Deorle v. Rutherford*, 272 F.3d 1282 (9th Cir. 2002) cert. denied, 536 U.S. 958 (2002); *Sevier v. City of Lawrence*, 60 F.3d 695, 696 (10th Cir. 1995).

⁷ See *Sevier*, 60 F.3d at 696 citing *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

⁸ *Sevier*, 60 F.3d at 699.

⁹ *Id.* at 701.

¹⁰ See *Sevier*, 60 F.3d at 696 (citing *Garner*, 471 U.S. at 9).

¹¹ *Kentucky v. King*, 131 S.Ct. 1849 (2011).

door, the police knocked “as loud as [they] could” and announced “This is the police” or “Police, police, police.” Next the officers heard the predictable sounds of people moving inside, and other sounds suggesting that drug related evidence was about to be destroyed. The officers yelled “we’re going to make entry inside the apartment,” kicked the door open, and seized controlled narcotics in plain view.¹² The Kentucky Supreme Court held the conduct of the police created the need to enter the home without a warrant. The warrantless entry was unconstitutional because the pounding and shouting by the police made it “reasonably foreseeable” that the occupants would attempt to destroy the evidence.¹³

The United States Supreme Court disagreed. Whether the officers’ conduct made it foreseeable the occupants would destroy the evidence, or pick some other course of action was not relevant. The Supreme Court restricted the inquiry to whether the police engaged in, or threatened to engage in conduct that violated the Fourth Amendment before they entered the apartment.¹⁴ The Court found the knocking and shouting in this case was not constitutionally objectionable. The court refused to approve a test that would second-guess police officers about how loud they should announce their presence. Quoting *Graham v. Connor*, the Court stated the “reasonable foreseeability” test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field.¹⁵

Applying the Supreme Court’s rationale from *King* to the Fifth Circuit’s decision in *Elizondo*, was Officer Green’s conduct toward Ruddy Elizondo reasonable? If the inquiry is restricted to whether Green violated, or threatened to violate the Fourth Amendment, it was reasonable, at least in a constitutional sense. Green lawfully entered the Elizondo’s home based on facts that one of the occupants needed emergency assistance¹⁶ and he did not use deadly force until that person put him in fear of serious bodily harm.¹⁷

The circuit split appears to be over a disagreement about what is a Fourth Amendment violation and unprofessional law enforcement conduct. In a concurring opinion from *Elizondo*, Judge DeMoss made the distinction between the law and the profession of law enforcement in the two cases that arose out of Garland City.¹⁸ “While [the officers’] conduct is not legally objectionable” he stated, “neither is it admirable.”¹⁹ He urged law enforcement agencies to better prepare officers for foreseeable, volatile situations involving mentally ill citizens.²⁰

Police Chief Magazine echoed Judge DeMoss’ comments in a recent article that recommended realistic, scenario based training that teaches police officers how to maintain emotional control, and not meet hostility with hostility when dealing with mentally ill and/or suicidal suspects.²¹ The article states law enforcement alone will not work and partnerships with mental health professionals in responding to persons with serious mental illness are crucial. Following the advice of mental health professionals will allow officers to not only support and defend the constitution, but also better serve the public, regardless of the circuit in which they serve.

¹² *Id.* at 1854.

¹³ *Id.* at 1855.

¹⁴ *Id.* at 1863 (There was no evidence of a “demand” of any sort to open the door until after the exigency arose).

¹⁵ *Id.* at 1860, quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

¹⁶ *Id.* at 1856 (officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury); see also, *Rockwell*, 664 F.3d at 995.

¹⁷ *Rockwell*, 664 F.3d at 991; see also *Garner*, 471 U.S. at 11.

¹⁸ *Elizondo*, 671 F.3d at 511- 12 (DeMoss, H.R., concurring); *Rockwell*, 664 F.3d 985, 996 – 97 (DeMoss, H.R., concurring).

¹⁹ *Rockwell*, 664 F.3d at 997 (DeMoss, H.R. concurring).

²⁰ *Rockwell* at 997.

²¹ Jeni McCutcheon, et al., *Responding to Calls with Suicidal Suspects: Practical Command and Psychological Considerations*, *The Police Chief* 32-35 (May 2013).

CASE SUMMARIES

United States Supreme Court

Maryland v. King, 2013 U.S. LEXIS 4165 (U.S. June 3, 2013)

In 2009, police arrested King and charged him with first and second-degree assault. Under the Maryland DNA Collection Act, because King had been charged with a “serious offense” a sample of King’s DNA was taken by applying a cotton swab to the inside of his cheeks. King’s DNA profile generated a match to a DNA profile developed from a sample collected from a victim in an unsolved sexual assault case from 2003. A grand jury indicted King for the 2003 sexual assault, and he was convicted and sentenced to life in prison.

The Maryland Court of Appeals reversed King’s conviction, holding the portions of the DNA Act authorizing the collection of a DNA sample from a mere arrestee were unconstitutional as applied to King.

The United States Supreme Court in a 5-4 decision reversed the Maryland Court of Appeals and held that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. The court stated,

“When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the *Fourth Amendment*.”

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

Salinas v. Texas, 2013 U.S. LEXIS 4697 (U.S. June 17, 2013)

During the course of a murder investigation, Salinas gave his shotgun to the police for ballistics testing and then voluntarily went to the police station for questioning. The police did not advise Salinas of his *Miranda* rights and all parties agreed Salinas was not in-custody for *Miranda* purposes. For most of the one-hour interview, Salinas answered the police officer’s questions. However, when the officer asked Salinas whether his shotgun “would match the shells recovered at the scene of the murder,” Salinas declined to answer. After a few moments of silence, the officer asked other questions, which Salinas answered.

Salinas was charged with murder. At trial, the prosecution argued to the jury Salinas’ failure to answer the officer’s question concerning the shotgun was evidence of his guilt. The jury convicted Salinas.

Salinas argued the prosecution violated the *Fifth Amendment* by commenting on Salinas’ silence when the officer asked him about the shotgun.

Without deciding the issue raised by Salinas, the court reiterated the privilege against self-incrimination generally was not self-executing and a witness who wanted its protection needed to

invoke it explicitly. The court stated, “a suspect who stands mute had not done enough to put police on notice that he is relying on his *Fifth Amendment* privilege.” Consequently, before Salinas could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the Texas Court of Criminal Appeals properly rejected his claim that the prosecution’s use of his silence in its case-in-chief violated the *Fifth Amendment*.

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

Circuit Courts of Appeals

1st Circuit

United States v. Wurie, 2013 U.S. App. LEXIS 9937 (1st Cir. Mass. May 17, 2013)

Police officers arrested Wurie for distributing crack cocaine and took him to the police station. When Wurie arrived at the station, two cell phones were taken from him. A few minutes later, one of the officers noticed one of Wurie’s cell phones was repeatedly receiving calls from a number identified as “my house” on the external caller ID screen on the front of the phone. The officers were able to see the caller ID screen and the “my house” label in plain view. A few minutes later, an officer opened the phone and pressed a button to look at Wurie’s call log to determine the phone number associated with the “my house” caller ID reference. An officer typed the phone number into an online phone directory and discovered the address associated with the phone number was a nearby apartment. Officers connected Wurie to the apartment, obtained a warrant, and searched the apartment finding drugs and firearms.

Wurie filed a motion to suppress the evidence from his apartment, arguing the officers violated the *Fourth Amendment* by opening his cell phone and accessing his call log to determine the phone number associated with the “my house” caller ID reference.

The court held the search incident to arrest exception does not authorize the warrantless search of data on cell phones seized from individuals arrested by the police. The court recognized a modern cell phone is not like a purse, wallet or other type of container an officer might typically find on an arrestee. A cell phone has the ability to store a large amount of highly personal information such as photographs, videos, text messages and emails. Allowing the police to search the data on a cell phone without a warrant any time they conducted a lawful arrest would create a serious and recurring threat to the privacy of countless individuals.

Even though the evidence should have been suppressed in this case, the court recognized other exceptions to the warrant requirement might justify a warrantless search of cell phone data in certain situations. For example, the exigent circumstances exception would allow the police to conduct an immediate, warrantless search of a cell phone’s data where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident.

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

4th Circuit

United States v. Castellanos, 2013 U.S. App. LEXIS 10797 (4th Cir. N.C. May 29, 2013)

A police officer patrolling a truck stop saw a commercial car carrier and became suspicious when he saw one of the vehicles on the car carrier, a Ford Explorer, bore a dealership placard instead of a regular license plate. The driver of the car carrier gave the officer shipping information indicating the owner of the vehicle was Wilmer Castenada. The officer was unsuccessful in reaching Castenada by telephone. When the officer attempted to verify the origin and destination addresses provided by the car carrier, he could not find anyone who knew Castenada or was expecting delivery of a vehicle. The officer obtained consent to search the Explorer from the driver of the car carrier and found bricks of cocaine hidden in the gas tank.

Afterward, an individual claiming to be Castenada called the car carrier and asked about the status of the Explorer. The individual was told the vehicle had been impounded and provided information on how to recover it. Castellanos then arrived to claim the Explorer. Castellanos had the title to the Explorer, tracking information for the vehicle from the car carrier and a piece of paper with the officer's phone number from earlier calls. Castellanos claimed he was in the process of purchasing the Explorer from Castenada. The government indicted Castellanos for conspiracy to distribute cocaine.

Castellanos argued the cocaine found in the Explorer's gas tank should have been suppressed.

The court disagreed. Castellanos did not enter the title to the Explorer into evidence or otherwise establish he was the owner of the vehicle before the police searched it. As a result, Castellanos failed to establish he had a reasonable expectation of privacy in the Explorer; therefore, he could not challenge the search.

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

5th Circuit

Ramirez v. Martinez, 2013 U.S. App. LEXIS 9757 (5th Cir. Tex. May 15, 2013)

Deputy Martinez and other police officers went to Ramirez's landscaping business to execute a warrant for the arrest of Ramirez's sister-in-law. Ramirez confronted Deputy Martinez and the two exchanged profanities. Deputy Martinez ordered Ramirez to turn around and place his hands behind his back. After Ramirez failed to comply, Deputy Martinez grabbed Ramirez's hand and told him to turn around, but Ramirez pulled his arm away. Deputy Martinez then deployed his Taser, striking Ramirez in the chest. Deputy Martinez and several other officers forced Ramirez to the ground and restrained him with handcuffs. Deputy Martinez deployed his Taser a second time, while Ramirez was lying face down on the ground in handcuffs. Deputy Martinez arrested Ramirez for disorderly conduct; however, the charge was later dismissed.

Ramirez sued Deputy Martinez and several other officers for false arrest and excessive use of force.

The court held Deputy Martinez was entitled to qualified immunity on Ramirez's false arrest claim. Under Ramirez's version of the incident, a reasonable officer on the scene would have

thought he had probable cause to arrest Ramirez for resisting arrest after Ramirez pulled his arm out of Deputy Martinez's grasp.

However, the court held Deputy Martinez was not entitled to qualified immunity on Ramirez's excessive force claim. The court concluded Ramirez's version of the facts was sufficient to establish under the *Graham* factors that Deputy Martinez used excessive force. First, analyzing the severity of the crime, the court noted while Ramirez pulled his arm out of Deputy Martinez's grasp, there was a dispute regarding any subsequent resistance up until Deputy Martinez deployed his Taser.

Second, the court held a reasonable officer could not have concluded Ramirez posed an immediate threat to the safety of the officers by questioning their presence at his place of business or while lying on the ground in handcuffs. Pulling his arm out of Deputy Martinez's grasp, without more, was insufficient to find Ramirez posed an immediate threat to the safety of the officers.

Finally, the court held it was objectively unreasonable for Deputy Martinez to deploy his Taser twice against Ramirez when the only resistance Ramirez offered was pulling his arm out of Deputy Martinez's grasp.

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

6th Circuit

Smith v. Stoneburner, 2013 U.S. App. LEXIS 9472 (6th Cir. Mich. May 10, 2013)

Officers Stoneburner and Knapp went to Charles Smith's house after an employee at a local store reported that Charles had stolen a cell phone charger. Once at the house, the officers found Charles' brother, Logan, outside. After the officers confirmed Charles was in the house, they asked Logan if they could enter the house. According to Logan, he told the officers to wait outside on the back deck while he went inside to check with his mother. As Logan went into the house, Officer Stoneburner followed him inside and Officer Knapp remained outside. Logan found Charles and his mother and they went with Officer Stoneburner back outside. Once outside, the officers asked Charles about the shoplifting incident, which Charles denied. Charles began to walk back inside the house, but Officer Stoneburner grabbed him by the wrist, pulled him back outside and arrested him for stealing the cell phone charger. During the arrest, Charles and his mother both struggled with the officers.

The Smiths sued Officer Stoneburner claiming he violated the *Fourth Amendment* by unlawfully entering their house twice and then using excessive force against Charles and his mother.

The court held Officer Stoneburner was not entitled to qualified immunity.

First, whether Officer Stoneburner violated the Smiths' *Fourth Amendment* rights when he followed Logan into the house to look for Charles was a question for the jury to decide, as each party gave a different version as to what happened. If a jury chose to believe Logan, that would mean Officer Stoneburner ignored Logan's request to stay outside the house. If Officer Stoneburner ignored this request, he would have violated the *Fourth Amendment* because he would have entered the house without a warrant, and no exception to the warrant requirement applied.

Second, Officer Stoneburner admitted that by reaching across the doorway to grab Charles by the wrist to arrest him, he entered the house a second time. The court held Officer Stoneburner's warrantless entry could not be justified under the hot pursuit or destruction of evidence exceptions to the *Fourth Amendment's* warrant requirement.

The court concluded Officer Stoneburner's entry into the house was neither a "pursuit" nor "hot." Charles voluntarily agreed to talk with Officer Stoneburner and Stoneburner did not attempt to arrest Charles when they spoke. In a consensual encounter, a person has the right to walk away from the police officer and go about his business. The result may have been different if Officer Stoneburner had told Charles he was under arrest and then Charles decided to walk away. In addition, no emergency required immediate police action and the risk of the destruction of evidence was remote. If Officer Stoneburner wished to pursue the investigation, he could have contacted a magistrate and obtained a warrant instead of choosing to act as his own magistrate and enter the house.

Finally, the Smiths and the officers gave differing accounts as to the amount of force that was used to arrest Charles. These differing accounts create a question of fact for a jury to decide. If a jury decides Charles resisted, the officers' use of force may have been reasonable; if not, their use of force may have been excessive.

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

United States v. Washington, 714 F.3d 962 (6th Cir. Mich. May 10, 2013)

Washington and another man confronted John Nesbitt in a parking lot, pointed a gun at Nesbitt's head and demanded that Nesbitt hand over his car keys. Nesbitt saw Washington clearly, as Washington did not use anything to cover his face. Nesbitt described his attacker as a black male, nineteen years-old, with a medium brown complexion, 5'9", 150 pounds, with a small beard.

Five months later, police officers asked Nesbitt to view a photo array to determine if he could recognize the men who carjacked him. The officers told Nesbitt the photographs in the array could be affected by the lighting of the cameras, and that some features in the photographs, such as hair and facial hair, could be easily changed. After receiving these instructions, Nesbitt viewed the photo array and immediately picked out Washington as the man who carjacked him.

Washington filed a motion to suppress Nesbitt's identification, arguing it was unduly suggestive. Specifically, Washington claimed after Nesbitt described his attacker as having light brown skin, the police officers chose darker skinned individuals than Washington to appear in the photo array alongside him.

The court disagreed, holding the identification procedure was not impermissibly suggestive to the extent there was a likelihood of misidentification. First, the photo array contained five African-American men in addition to Washington. Second, at least four of the men appeared to have some sort of facial hair and all five men appeared to be around the same age as Washington. Third, even though Washington has lighter skin tone than some of the other men in the photo array, the difference was not drastic. Finally, although Washington's photo had a glare on his face from the camera flash, the officer told Nesbitt the lighting and appearance of the individuals in the photos could be easily altered.

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

7th Circuit

Ramos v. City of Chicago, 2013 U.S. App. LEXIS 10487 (7th Cir. Ill. May 24, 2013)

Police officers learned a burglary suspect, known only as “Jose” lived at 7249 South Lawndale Avenue. The police also knew Jose was male, Hispanic, in his twenties, approximately 5’2” tall, bald, and might be wearing a red shirt. As officers approached the South Lawndale address, they saw an Hispanic male, who appeared to be in his mid-twenties, wearing a red shirt, pull away from the curb in a vehicle. An officer performed a traffic stop and asked the man for his driver’s license. The man told the officer he did not possess a valid driver’s license; however, he gave the officer a state identification card, which identified the man as Pedro Ramos. In addition, Ramos was 6’1” tall. The officer had Ramos get out of the vehicle, handcuffed him and placed him in the back of a police car. The officer told Ramos he was being detained in connection with a burglary investigation. Shortly afterward, another officer brought a witness from the burglary to the scene, and the witness positively identified Ramos as one of the perpetrators. The officers then arrested Ramos for burglary. Ramos remained incarcerated for 253 days until he was acquitted of the burglary offense.

Ramos filed a lawsuit, claiming the police officers violated the *Fourth Amendment* by stopping his vehicle, handcuffing him and then placing him in the back of a police car until the burglary victim arrived and identified him.

The court held the initial stop of the vehicle as it was pulling away from curb at 7249 South Lawndale Avenue was supported by reasonable suspicion; therefore, the officers were entitled to qualified immunity. At the time of the stop, the officers had information that a burglary suspect lived at the South Lawndale address, that he was an Hispanic male and that he may be wearing a red shirt. The similarity between Ramos’ appearance and the description of the suspect, particularly given that the suspect was pulling away from the curb at the address identified as that of the suspect, gave the officers reasonable suspicion to conduct a *Terry* stop.

Even though the officers were granted qualified immunity, the court voiced concern over the officers’ decision to handcuff and detain Ramos after the initial stop. The court noted that once the officers pulled Ramos over, their basis for reasonable suspicion diminished. Ramos provided the officers with identification, which indicated his name was Pedro not Jose and he was significantly taller than the height reported for the burglary suspect. Further, while the court has upheld the use of handcuffs to ensure officer safety in a *Terry* stop without automatically escalating the encounter into an arrest, that does not mean law enforcement can routinely handcuff suspects in every situation. The court stated:

“The proliferation of cases in this court in which ‘*Terry*’ stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing, and we would caution law enforcement officers that the acceptability of handcuffs in some cases does not signal that the restraint is not a significant consideration in determining the nature of the stop.”

The court further noted it did not need to decide if the officers' use of handcuffs turned the initial *Terry* stop into an arrest because the officers had probable cause to arrest Ramos after he failed to produce a valid driver's license after the initial lawful stop.

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

8th Circuit

United States v. Quintero-Felix, 714 F.3d 563 (8th Cir. Iowa May 1, 2013)

A police officer stopped Felix's vehicle for a license plate violation. During the stop, Felix appeared nervous, his hands were shaking, his legs were bouncing and he was picking imaginary balls of lint from his shirt. In addition, Felix and his passenger gave the officer conflicting stories concerning their travel plans. After the officer issued Felix a warning ticket, and returned his documentation, the officer asked Felix if he could ask him a few more questions. Felix agreed and answered some of the officer's questions. The passenger consented to a drug dog sniff of the vehicle. After the drug dog alerted to the presence of drugs, the officer searched the vehicle and found a hidden compartment containing \$16,000 in cash and a handgun. Police later identified \$6,000 of the seized cash as pre-marked currency from a controlled drug buy.

Felix argued his statements and evidence from the traffic stop should have been suppressed because the officer unreasonably extended the traffic stop once he issued the warning ticket and returned Felix's documentation.

The court did not agree. By the time the officer issued Felix the warning ticket and returned his documentation, the officer had developed reasonable suspicion to extend the traffic stop. Felix exhibited nervous behavior throughout the stop and he and the passenger gave the officer conflicting accounts of their travel history. Consequently, extending the traffic stop approximately seven minutes until the drug dog arrived was not unreasonable.

The court added, even if the officer lacked reasonable suspicion, Felix consented to the extension of the stop. Felix remained in the officer's car and answered additional questions after the officer issued a warning ticket, returned Felix's documentation and told him he was free to leave.

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

LaCross v. City of Duluth, 713 F.3d 1155 (8th Cir. Minn. May 8, 2013)

LaCross claimed a police officer deployed his Taser against him while he was handcuffed and seated in the back of a police car on September 17, 2006. The next day, LaCross sought medical care for bruising on his wrists from the handcuffs, but he did not complain of any injuries related to the Taser application. LaCross filed suit in 2010 claiming the officer's use of the Taser constituted excessive use of force.

The court held the officer was entitled to qualified immunity because he did not violate LaCross' then clearly established constitutional rights. In September 2006, a reasonable officer could have believed that as long as he did not cause more than *de minimis* injury to an arrestee, his actions would not violate the *Fourth Amendment*. It was not until 2011 that the Eighth Circuit

determined the appropriate inquiry in excessive force cases was whether the force used to effect a particular seizure was “reasonable,” not the degree of injury suffered by an arrestee.

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

United States v. Arrocha, 713 F.3d 1159 (8th Cir. Mo. May 8, 2013)

Police officers arrested Arrocha on an outstanding arrest warrant after they encountered him at a convenience store. The officers decided to tow and impound Arrocha’s vehicle, which was properly parked in the store’s parking lot. During their inventory search, the officers found a handgun inside the car. Arrocha was indicted for unlawful possession of the handgun by a convicted felon.

Arrocha claimed the officers’ decision to tow his vehicle violated the *Fourth Amendment*.

First, although the officers exercised some discretion in deciding whether to tow Arrocha’s vehicle, the court held the officers followed their department’s operations manual, which outlined the procedures for the towing of vehicles. Second, there was no evidence the officers’ use of this discretion was a ruse for a general search of Arrocha’s vehicle to discover incriminating evidence.

Finally, even though Arrocha’s vehicle was parked on private property, the court noted police may take protective custody of a vehicle when they have arrested its occupants, even if it is lawfully parked and poses no public safety hazard. Here, while the officers did not consult with the convenience store employees before towing Arrocha’s vehicle, the officers testified the police had an informal agreement with the convenience store that vehicles abandoned in its busy parking lot because of an arrest would be towed.

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

United States v. Winarske, 2013 U.S. App. LEXIS 10156 (8th Cir. N.D. May 21, 2013)

A confidential informant (CI), who had provided police with accurate information about local criminal activity in the past, told officers Winarske had a stolen handgun he wished to sell. The CI told officers that Winarske was a registered sex offender who was currently on probation. Officers confirmed a handgun had recently been stolen from a vehicle two blocks from Winarske’s house and that Winarske was a convicted felon and registered sex offender currently on probation.

Winarske agreed to meet the CI in the parking lot of a shopping mall and sell him a stolen handgun. Prior to the meeting, the CI told the officers the time and place of the meeting in addition to the color, make and model of Winarske’s vehicle and the fact that Winarske’s girlfriend would be present. Police officers conducted surveillance at the mall and just before the arranged meeting time, they saw Winarske and a female, later identified as Winarske’s girlfriend, enter a vehicle that matched the description of the vehicle provided by the CI. The officers approached the vehicle, removed Winarske and his girlfriend, patted them down and then handcuffed them. Winarske admitted there was a handgun in the vehicle. Officers searched the

car and seized a handgun and ammunition. The government charged Winarske with being a felon in possession of a firearm.

Winarske argued the information provided by the informant did not establish probable cause to arrest him; therefore, the warrantless search of the vehicle violated the *Fourth Amendment*.

The court disagreed. First, the officers had reason to believe the CI was reliable based on his established track record of providing accurate information on local criminal activity. Second, the CI provided identifying information about Winarske that was independently corroborated by police, to include, Winarske's first and last names, criminal history and supervision status. Third, the CI provided accurate information about the time and place of a planned meeting with Winarske to purchase a stolen handgun. Consequently, the court held the officers had probable cause to support a warrantless arrest of Winarske when they encountered him in the mall parking lot.

The court further held the officers lawfully searched the vehicle incident to Winarske's arrest. Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense for which the suspect is being arrested.

Here, it was reasonable for the officers to believe the vehicle contained evidence of the offense of arrest in the form of the handgun. Even if Winarske was not under arrest at the time of the search, the court concluded the officers could have lawfully searched the vehicle without a warrant under the automobile exception, as the court already concluded the police had probable cause to believe Winarske arrived at the mall to conduct an illegal firearms sale.

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

United States v. Brooks, 2013 U.S. App. LEXIS 10633 (8th Cir. Iowa May 28, 2013)

Brooks robbed a bank and then stole a van before the police arrested him. The police found a cell phone in the van, searched it without a warrant, and discovered photographs and a video of a man who resembled Brooks posing with a firearm that matched the one used in the bank robbery. Eight months later, police officers obtained a warrant to conduct a more thorough search of the cell phone.

Brooks moved to suppress the photographs and video discovered during the warrantless search of the cell phone. Brooks argued the eight-month delay in obtaining the warrant was to cure the illegality of the initial search.

Without deciding the issue, the court held even if the warrantless search of the cell phone was illegal, the independent source rule applied. The police suspected Brooks had an accomplice in the bank robbery. Prior to seeking the search warrant, officers obtained additional information concerning the accomplice. An officer testified the investigators sought the warrant to obtain cell phone call and text records to help identify the accomplice. The officer also testified that investigators sought warrants for other phones in an effort to identify Brooks' accomplice and the initial search of the cell phone did not recover any call logs or text messages. The court noted the police did not include any details from the photographs or video in their search warrant application and concluded the investigators would have applied for the warrant even without the information obtained from the initial warrantless search.

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

9th Circuit

Gonzalez v. City of Anaheim, 2013 U.S. App. LEXIS 9607 (9th Cir. Cal. May 13, 2013)

Officers Wyatt and Ellis conducted a traffic stop on a van driven by Gonzalez. Gonzalez pulled over and the officers approached the van on foot from each side. After Officer Wyatt saw Gonzalez reach back between the seats, he drew his gun and told Gonzalez not to reach back there. Officer Ellis twice told Gonzalez to turn off the van but he did not respond. Gonzalez also refused to open his right hand, which appeared to be concealing a plastic baggie. The officers opened the driver and passenger side doors, and Officer Wyatt reached in and struck Gonzalez on the arm with his flashlight three times. Gonzalez responded by moving his right hand toward his mouth, attempting to swallow whatever was in his hand. Officer Ellis then attempted to apply a carotid restraint or sleeper-hold on Gonzalez, who struggled with him, while Officer Wyatt entered the van on the passenger side and began punching Gonzalez in the head and face. After Gonzalez tried to shift the van into gear, Officer Ellis struck him on the back of the head three times with his flashlight. Nonetheless, Gonzalez shifted the van into gear and it began to pull away with Officer Wyatt still in the passenger seat. After Gonzalez accelerated, Officer Wyatt yelled at him to stop and tried to knock the van out of gear, but Gonzalez slapped his hand away. Officer Wyatt pulled out his gun and shot Gonzalez in the head. The van hit a parked vehicle and stopped. Gonzalez died.

Gonzalez's family sued the officers, claiming the officers used excessive force several times against Gonzalez in violation of his *Fourth Amendment* rights.

Applying the factors from *Graham v. Connor*, the court held the officers were entitled to qualified immunity.

First, the court held Officer Wyatt's striking Gonzalez in the arm with the flashlight three times was not excessive force given Gonzalez's refusal to follow the officers' commands.

Second, the court held Officer Ellis' attempted use of a carotid restraint, Officer Wyatt's punches to Gonzalez's face and Officer Ellis' flashlight strikes to Gonzalez's head were objectively reasonable because the officers had reason to believe Gonzalez possessed illegal drugs and was trying to destroy evidence. In addition, Gonzalez posed an immediate threat to the officers as he repeatedly refused to obey the officers' commands and Gonzalez shifted the van into gear with an officer inside the van. It was reasonable for the officers to believe Gonzalez had a hidden weapon and that remaining inside the van posed a threat to Officer Wyatt. Finally, Gonzalez was actively resisting arrest and attempted to evade arrest by fleeing in the van.

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

10th Circuit

Roosevelt-Hennix v. Prickett, 2013 U.S. App. LEXIS 9808 (10th Cir. Colo. May 16, 2013)

A police officer arrested Hennix for driving under the influence (DUI), handcuffed her arms behind her back, placed her in the back seat of his patrol car and closed the door. Hennix banged her head against the window of the patrol car to get the officer's attention. Officer Prickett, who had arrived on the scene, opened the door and told Hennix to calm down and stop banging her head against the window. At some point, Officer Prickett decided Hennix should have her legs restrained for the ride to the police station. Officer Prickett opened the door to the patrol car and ordered Hennix to place her feet outside the vehicle. Hennix claimed she told Officer Prickett that she could not lift herself and turn her body to place her feet outside the police car because of a pre-existing back injury. Officer Prickett deployed his Taser against Hennix in drive-stun mode one time. After Officer Prickett deployed his Taser, another officer removed Hennix's legs from the patrol car and placed them in restraints. Hennix immediately told the officers she could not feel her legs and the next day underwent back surgery for paralysis in her lower extremities.

The court held Officer Prickett was not entitled to qualified immunity. The court found there was sufficient evidence for a jury to conclude Hennix told the officers she was physically unable to comply with their requests to move her feet outside the patrol car. The court further found there was sufficient evidence for a jury to conclude the officers never attempted to help Hennix in moving her feet outside the patrol car before Officer Prickett deployed his Taser.

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