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The Informer – September 2019

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1. United States Supreme Court Update (1-hour)

Presented by Henry McGowen, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

As we come to the close of the U.S. Supreme Court's 2018-2019 session, it is a good time to see how the Court ruled on key criminal justice issues. This 1-hour webinar will review the Court's opinions on cases which address key constitutional issues related to the work of law enforcement officers and prosecutors.

Wednesday October 9, 2019: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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2. Use of Force in Medical Emergencies (1-hour)

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

This webinar presents legal aspects of use of force during medical emergencies following a recent decision by the Sixth Circuit Court of Appeals (*Estate of Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017)). Police officers frequently encounter medical conditions which cause otherwise law-abiding citizens subjects to act in an erratic, aggressive, and sometimes combative manner; e.g. diabetes, epilepsy, mental illness, and excited delirium. When confronted with such a scenario, an officer must quickly assess the situation and when appropriate, employ force to protect themselves, the patient, or other emergency responders providing necessary medical care.

Wednesday October 16, 2019: 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific

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CASE SUMMARIES

Circuit Courts of Appeal

Sixth Circuit

Studdard v. Shelby Cty., 934 F.3d 478 (6th Cir. TN August 12, 2019)

Angela Studdard, wife of deceased Edmond Studdard, filed an action under 42 U.S.C. § 1983 alleging that officers Terry Reed and Erin Shepherd used excessive force when the officers shot her husband as he held a knife to his own throat.

The case was on appeal from the U.S. District Court for the Western District of Tennessee Memphis, which denied the officers' motion for summary judgment based on qualified immunity. The Sixth Circuit Court of Appeals affirmed. The issue before the court was whether an officer can use deadly force on an individual who only presents an immediate threat of serious physical harm to himself, but not the officer or others.

The Circuit Court discussed the facts of the case in three scenes. First, on a hot day in July 2016, Officer Kyle Lane, a Shelby County deputy, responded to a hit-and-run call where several witnesses told Lane he should follow Edmond Studdard. Studdard departed the scene of the accident on foot. Lane was forewarned by the witnesses that Studdard had slit his wrists. Lane went after Studdard on his patrol motorcycle.

Second, Lane pulled up next to Studdard and asked Studdard to stop. Studdard ignored Lane but turned toward him displaying what appeared to be a knife. While continuing to follow Studdard, Lane called for backup, and three other officers arrived. The officers included Deputies Samuel Page, Erin Shepherd, and Terry Reed. They all parked their vehicles in a way to block traffic and Studdard's exit path.

Third, the court described how the three newly arrived officers exited their vehicles and pulled out their firearms. In response, Studdard stopped his journey; meanwhile, Lane stood to the south, and the other three officers, including Reed and Shepherd, stood to the west approximately 34 feet away. After being ordered to drop the knife, Studdard raised the knife up to his own throat and moved in a swaying motion. Almost immediately, Reed and Shepherd opened fire. Studdard died several weeks later due to the gunshot wounds.

The facts were construed in light of the moving party (non-movant on appeal). The Court cited [Sova v. City of Mt. Pleasant](#), another case of a knife wielding man who threatened only himself and ignored commands to drop the knife. In [Sova](#), the officers stood even closer than 34 feet and were more at risk, and in that case, the officers were denied qualified immunity.

A deputy who witnessed the incident said he did not see Studdard advance toward the officers. Evidence supported Studdard merely swayed. In addition, Studdard stood in the middle of a 19' wide grassy area, and after he was shot, paramedics found him about 10' from the curb, still in the middle.

The officers cited [Stevens-Rucker v. City of Columbus](#), in which a suspect was tased twice, recovered, and then ran at officers with a knife in hand. The court noted a distinction in this case as the officers were at a perilous distance without as much control of the surroundings.

Ultimately, the court affirmed the denial of the officers' request for qualified immunity because the facts in this case were sufficiently distinct from the [Stevens-Rucker](#) case in that the suspect did not pose a serious risk to anyone in the area, the suspect made no verbal threats to the officers or anyone else while wielding the knife, and the suspect made no advances towards the officers while holding the weapon.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/19-5084/19-5084-2019-08-12.pdf?ts=1565625613>

Vanderhoef v. Dixon, 2019 U.S. App. LEXIS 24897 (6th Cir. TN Aug. 21, 2019)

The case deals with a May 2016 car accident and subsequent confrontation between Logan Vanderhoef and Maurice Dixon. Vanderhoef, a teenager, was driving a car, with two other teenage passengers, at a high rate of speed when he lost control and ultimately hit Dixon's front fender. Dixon was a part-time reserve officer with the City of Maryville, Tennessee who was off duty and in his personal vehicle.

After the accident, the three teens climbed out of Vanderhoef's car as Dixon, with his gun drawn, yelled, "Let me see your hands, get on the ground." All three teenagers complied, but Dixon held the gun pointed at Vanderhoef's head for two minutes.

A witness saw everything and urged Dixon to put his gun down. The witness called police as Dixon retrieved his badge from his car.

Vanderhoef filed an action under 42 U.S.C. § 1983 as well as for assault and false imprisonment under Tennessee law.

This case was on appeal from the U.S. District Court for the Eastern District of Tennessee at Knoxville, which held the officer violated the driver's Fourth Amendment rights when he held the three unarmed, nonthreatening, and compliant teens at gunpoint for two minutes after the vehicle accident, but also held the officer was entitled to qualified immunity. The Sixth Circuit Court of Appeals reversed the judgment stating that the trial court erred when granting qualified immunity to the officer, as the officer should have known he was violating the driver's Fourth Amendment rights.

The Circuit Court first determined whether there was a violation of Vanderhoef's constitutional rights under the Fourth Amendment. The court noted that in order to analyze whether force was excessive, it must balance the nature of the intrusion on an individual's Fourth Amendment interests against countervailing governmental interests. In determining this, the court drew from the facts outlined by the jury verdict to make its legal conclusions.

The facts were that Dixon was off duty, out of uniform, and never identified himself as law enforcement while keeping his gun pointed at Vanderhoef while issuing orders.

The court then discussed the [Graham](#) factors in detail. First, the severity of the crime that Dixon knew of was simply reckless driving. Second, Vanderhoef did not pose an immediate threat to

the safety of Dixon or others, as it was clear from the jury trial that neither Vanderhoef nor his passengers posed any viable threat. Third, there was no evidence that Vanderhoef or his passengers did anything but comply completely with Dixon's commands. There was no issue of resisting arrest or evading by flight.

Based on those factors, the court deemed Dixon's conduct objectively unreasonable, and it violated Vanderhoef's constitutional rights.

Next, the Circuit Court analyzed the doctrine of qualified immunity noting that even if Dixon violated Vanderhoef's constitutional rights, the second prong of the qualified immunity analysis questioned whether the rights violated were clearly established at the time. For this analysis, the court discussed multiple Sixth Circuit and sister circuit cases that provided precedent to show that without additional provocation, a plain-clothed officer may not hold at gunpoint an unarmed citizen suspected of mere traffic violations. The court determined that Dixon should have known that by pointing his gun at Vanderhoef, a non-fleeing teenager, not suspected of any crime besides speeding and reckless driving, for two minutes violated Vanderhoef's Fourth Amendment rights.

As such, the court held that the officer was not entitled to qualified immunity because his actions violated clearly established constitutional law.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-5993/18-5993-2019-08-21.pdf?ts=1566406931>

Shanberg v. Licking Cty., 2019 U.S. App. LEXIS 25305 (6th Cir. OH Aug. 23, 2019)

In 2015 on an early winter Ohio morning, a person called the police to report a drunk driver on the road. The caller provided the license-plate number. The police dispatch ran the license-plate number and the car came back as "stolen." The report identified the suspect of the theft to be Brandon Scott Powell and described him as "armed and dangerous."

The Licking Sheriff Office sent three deputies after the drunk driver. The deputies found the car and driver within minutes using the frequent updates provided by the caller of the car's location. The car had stopped on the side of a dirt road and the driver was standing outside the car when the deputies arrived.

The deputies ordered the driver to get on the ground and the driver promptly got down on his knees and put his hands in the air. After exiting their vehicles, while the deputies approached the driver, Deputy Stetson told the driver to lie down on the ground. The driver yelled he would not lie down and asked what was wrong. Deputy Stetson and the driver repeated this conversation at least nine times. Each time the conversation repeated the driver got more belligerent. On one occasion, the driver reached toward his open truck but returned his hands in the air after an ordered to do so by Deputy Stetson.

Deputy Stetson ended the confrontation when he tased the driver. Prior to tasing the driver, Stetson had warned the driver three times to get on the ground or he would be tased. After the driver was handcuffed it was determined he was not Powell. The driver was the owner of the car, Ty Shanberg. Sometime earlier, the police had recovered the stolen car but the accidentally put the car back into the "stolen car" database.

The owner-driver, Shanaberg, sued Deputy Stetson, the other two deputies at the scene, and the County of Licking under 42 U.S.C. § 1983. The allegations were that Deputy Stetson used excessive force, the other two deputies failed to intervene and stop Stetson from using excessive force, and use of Licking County's Use of Force Policy caused or contributed to Deputy Stetson's use of excessive force causing damage to the plaintiff.

Both Plaintiff Shanaberg and the defendants moved for summary judgment motion. The District court denied Plaintiff Shanaberg's motion for summary judgment and granted the defendants' motion for summary judgment based upon qualified immunity. Plaintiff Shanaberg appealed to the United States Court of Appeals for the Sixth Circuit. The rulings of the United States District Court for the Southern District of Ohio at Columbus were affirmed.

The Court of Appeals stated that the use of force by Deputy Stetson was objectively reasonable given the circumstances he confronted. Citing [Graham v. Connor](#), the court noted that the officer's intent is immaterial and that the facts are not viewed from hindsight, but from the totality of the circumstance confronted by the officer (known to the officer at the time force is used). Then the Court applied the main Graham factors: (1) the severity of the crime; (2) is the suspect an immediate threat to the officers or others; whether the suspect is: (3) actively resisting arrest or (4) attempting to evade arrest. The Court stated the second factor was dispositive in this case and distinguishes this case from previous taser cases on its facts.

The Six Circuit Court found that:

- (1) It was reasonable under the facts of this case that Deputy Stetson would believe that Shanaberg was armed and intoxicated.
- (2) That the severity of the crime was high – theft of auto.
- (3) That a reasonable officer would fear that Shanaberg might draw a weapon or attempt to reach for a weapon when an officer detains him; and
- (4) That the force was reasonable (Shanaberg was tased) when he was verbally belligerent and refused the reasonable request to lie down on the ground to be approached and handcuffed more safely by the officers (while intoxicated and armed).
- (5) The Court also found that because the force used was not unconstitutional there could be no claim for failure to intervene by the other two deputies.
- (6) Also, if there was no unconstitutional harm done, the Licking County Use of Force Policy could not be the cause of unconstitutional harm to the plaintiff.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-3916/18-3916-2019-08-23.pdf?ts=1566579664>

Baker v. City of Trenton, 2019 U.S. App. LEXIS 26207 (6th Cir. MI Aug. 29, 2019)

In May 2015, 18-year-old Kyle Baker was set to graduate from high school. Baker's parents were divorced, and he usually stayed with his father and stepmother on weeknights and his mother on weekends. Sometime in mid-to-late May, while participating in "Senior Skip Day," a traditional day for senior students to skip class, Baker apparently tried LSD, a controlled substance. About

one week later, his friends observed that Baker was acting oddly at school (staring, covering his eyes, making unintelligible conversation). The principal, suspicious that Baker was under the influence of drugs, called the police. A Trenton Police Department officer came to the school, and agreed that Baker appeared to be under the influence of drugs. While the officer and principal were conferring in private, Baker left the school.

Collin Mathieu, one of Baker's friends, texted Baker's mother to let her know what had happened. The principal notified both of Baker's parents. Baker's mother reached him after several attempts, but Baker did not tell her where he was. Baker's mother texted Mathieu that she was worried about Baker. After school, Mathieu went looking for Baker, and ultimately found him in the basement of Baker's father's home. Mathieu called Baker's mother on his cell phone and gave the phone to Baker. Baker talked briefly with his mother, but refused to return the cell phone to Mathieu. Baker also showed Mathieu a pocketknife, but did not open the blade.

Mathieu went to the police station, where he stated he told the dispatcher about the phone call between Baker and his mother, but claimed he did not say that Ms. Baker was present in the home with Kyle, or that Kyle had threatened Ms. Baker. The dispatcher recalled Mathieu's statement differently. She issued a dispatch stating that Mathieu said Baker was in the home with a knife and had threatened his mother. The dispatcher also relayed that as far as Mathieu knew, Baker was still in the home. The dispatch officer further stated that Baker might have purchased a shotgun the previous week. She stated that she had tried to make contact on the house phone, but the phone was busy.

Four officers responded to the call. After they reached the house, but before they entered, the dispatch officer called and provided additional information. She again stated that Mathieu said that Baker threatened and yelled at his mother and pulled a knife. She also said that attempts to contact the house by phone were not successful. Based on this information, the officers testified they believed Baker, armed with a shotgun or knife or both, was holding his mother hostage.

The officers knocked on the front door of the house, but no one responded. One officer remained at the front door, and the other three entered an unlocked back door. They loudly announced their presence as police and asked if anyone was at home. Baker responded from the basement by shouting obscenities and demanding that the officers leave. The fourth officer then entered the house through the back door. Two officers swept the house, except for the basement, and did not find Ms. Baker or any weapon. The officers then went to the top of the basement stairs. They asked Baker where his mother was, and Baker responded he did not know. The officers noticed Baker was holding a lawnmower blade. Baker took a couple of steps up the stairs, and two of the officers tasered him. Baker appeared stunned, and a third officer, Driscoll, went down the stairs to subdue him. As Driscoll descended, Baker stood up and resumed climbing the stairs. The other three officers retreated, but Driscoll lost his footing and fell in a seated or semi-seated position near the top of the stairs. He saw Baker continuing up the stairs and swinging the lawnmower blade. Baker struck Driscoll once with the blade, producing a cut that required stitches. Driscoll fired his gun at Baker, inflicting wounds that later proved fatal. After the shooting, the officers determined Ms. Baker was not in the basement, and found a shotgun under the bed in Baker's room. The city investigated and determined Driscoll shot Baker in self-defense.

Ms. Baker sued the officers and the city of Trenton under 42 U.S.C. §1983. She alleged three Fourth Amendment claims based on: 1) the officers' warrantless entry of the home; 2) Driscoll's shooting of Baker; and 3) the city's failure to properly train and discipline the officers.

With regard to the warrantless entry, the court cited [Payton v. New York](#), noting that warrantless searches inside a home are presumptively unreasonable unless an exception to the warrant requirement exists. In this case, the court found that the officers' warrantless entry was justified under the exigent circumstances exception, specifically, that immediate entry was necessary to prevent physical harm. As applied to this exception, the court noted that a lawful warrantless entry requires "an objectively reasonable basis for believing . . . that a person within the house is in need of immediate aid." The court held that based on the information provided to the police officers by the dispatcher, the officers reasonably believed that Ms. Baker was inside with Baker, that he was armed with a knife or a shotgun, and that he was threatening her. Once at the home, the court noted the officers could not communicate with anyone inside, and received an update from the dispatcher that the phone was busy. The court further noted that once the officers entered the home, Baker's erratic behavior and possession of the lawnmower blade justified them in remaining inside.

The court examined the excessive use of force claim using the [Graham v. Connor](#) objective reasonableness standard. Citing [Tennessee v. Garner](#), the court posed the question of whether Officer Driscoll, when he used deadly force, had probable cause to believe that Baker posed a significant threat of death or serious injury. Given the undisputed facts that, at the moment of the shooting, Baker was holding a lawnmower blade; advancing on the stairs toward Driscoll, who had fallen backward onto the stairs in a seated or semi-seated position; and Baker actually struck Driscoll with the blade, the court found use of deadly force was objectively reasonable.

While municipalities may be held liable under 42 U.S.C. § 1983 for constitutional violations committed by their employees if the violations result from municipal practices or policies under [Monell v. Department of Social Services](#), the court found that since the officers in this case committed no constitutional violations, the claims against the city of Trenton must fail.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-2181/18-2181-2019-08-29.pdf?ts=1567096238>

Eighth Circuit

Kelsay v. Ernst, 933 F.3d 975 (8th Cir. NE August 13, 2019)

On May 29, 2014, Plaintiff Kelsay, her three children, and her friend Patrick Caslin went swimming at a public pool in Wymore, Nebraska. At one point, Caslin came up behind Kelsay as if to throw her into the pool, and she objected. Although Kelsay later explained that she and Caslin were "just playing around," some onlookers thought Caslin was assaulting her, and a pool employee contacted the police.

As Kelsay and her party left the pool complex, they encountered Wymore Police Chief Kirkpatrick and several other responding officers. Kirkpatrick informed Caslin that he was under arrest for domestic assault and escorted him to a patrol car. Plaintiff Kelsay became angry that Caslin was arrested and tried to explain to the officers that Caslin had not assaulted her.

According to the officer's testimony, Caslin, in handcuffs, began to resist as he was walked to the patrol car. Plaintiff Kelsay then approached the patrol car and stood in front of the door blocking the way. Chief Kirkpatrick claims that he told her to move several times before another officer escorted her out of the way. He informed Officer Ernst that she had interfered in Caslin's

arrest and that he was going to arrest her also.

Plaintiff then moved to a spot between the cruiser and the exit gate from the pool complex, approximately 20' from either point. One of Kelsay's children was near the gate and seemed to be in a verbal altercation with another pool patron. Kelsay began to walk towards her child. Observing this, Officer Ernst told her to "get back here" multiple times.

After Kelsay walked a few feet away from Ernst on the grass, the deputy placed Kelsay in a bear-hug, threw her to the ground, and placed her in handcuffs. Kelsay momentarily lost consciousness after she hit the ground. When she regained her senses, she was already handcuffed, and began complaining of pain in her shoulder. It was later determined that Kelsay suffered a broken collarbone.

Ultimately, Kelsay pled No Contest to misdemeanor charges of Attempted Obstruction of Government Operations and Disturbing the Peace.

Kelsay sued the City of Wymore and officers Kirkpatrick, Bornmeier, Ernst, and Welch in their individual and official capacities, alleging wrongful arrest, excessive force, and deliberate indifference to medical needs. The district court granted summary judgment in favor of all defendants on all claims but one. The court ruled that Officer Ernst was not entitled to qualified immunity on a claim that he used excessive force to arrest Kelsay when he took her to the ground and caused the broken collarbone. The District Court reasoned that the evidence, viewed in the light most favorable to Kelsay, could lead a factfinder to conclude that Ernst's use of force was unreasonable and violated Kelsay's clearly established rights under the Fourth Amendment.

Qualified immunity shields a government official from suit under § 1983 if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

In this case, Kelsay alleged that Ernst's takedown maneuver violated her right under the Fourth Amendment to be free from the use of unreasonable force. The district court rejected Ernst's defense of qualified immunity. The court reasoned that where a nonviolent misdemeanor poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully. The court ruled that the excessiveness of Ernst's use of force would have been apparent to a reasonable officer, because while Kelsay "was not precisely 'compliant'—that is, she had been told to stop but kept walking instead—she was not using force or actively resisting arrest, and posed no danger to anyone."

The Appeals Court rejected the District Court's analysis. They found that it was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to "get back here" and continued to walk away from the officer. None of the decisions cited by the district court involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances.

In this case, Ernst knew when he spoke to Kelsay that she was going to be arrested for attempting to interfere with Caslin's arrest. Kelsay then walked toward another patron after stating that "some bitch is talking shit to my kid and I want to know what she's saying." Even if a jury could find that Kelsay posed no danger to anyone at the time of the seizure, a reasonable officer in Ernst's position could have believed that it was important to control the situation and to prevent a confrontation

between patrons that could escalate. This is another factor that was not present in previous cases, and reasonableness depends on the totality of the circumstances.

The Appeals Court found that the closest decision on point supports qualified immunity for Ernst. In [Ehlers v. City of Rapid City](#), the court held that an officer did not violate the Fourth Amendment by executing a takedown of a nonviolent misdemeanor when the officer twice ordered the suspect to place his hands behind his back, but the suspect continued walking away. The court concluded that a reasonable officer would interpret the subject's behavior as "noncompliant," and reasoned that he "at least appeared to be resisting" when he continued to walk away, so the officer was "entitled to use the force necessary to effect the arrest."

The constitutionality of Ernst's takedown was not beyond debate, i.e. he did not violate a clearly established constitutional right, and he was thus entitled to qualified immunity. The Court of Appeals reversed the District Court's order denying Ernst Qualified Immunity.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-2181/17-2181-2019-08-13.pdf?ts=1565710223>

Murphy v. Engelhart, 933 F.3d 1027 (8th Cir. MO August 14, 2019)

Murphy filed a 42 U.S.C. § 1983 action against Missouri State Highway Patrol Trooper Engelhart, alleging Fourth Amendment excessive use of force and unlawful seizure claims. On the night in question, Murphy had had several drinks before she got into her car shortly before 10:00 p.m. to drive to work. Some of the encounter between Murphy and Engelhart was captured on the dash cam of Engelhart's patrol car. Engelhart stopped Murphy for driving on the right outside lane line on the highway. Engelhart told Murphy he stopped her because she went off the right side of the road a couple of times, and instructed her to sit in his patrol car while he checked her license. Murphy got out of the patrol car after a few minutes and walked back to her car. Engelhart followed Murphy, grabbed her arm, and instructed her at least seven times to go back and sit in his patrol car. Murphy refused and repeatedly tried to pull her arm out of Engelhart's grasp. Engelhart instructed Murphy at least twice to turn around, and she did not do so. Using an arm bar, Engelhart moved Murphy to the front of the patrol car.

As they moved to the passenger side of the patrol car, Murphy and Engelhart were no longer in the dash cam's view, and their accounts of what took place differed. For purposes of the appeal, the court credited Murphy, who claimed that Engelhart threw or shoved her to the ground and landed on top of her. Murphy broke her knee in the fall.

The court stated that qualified immunity shields an officer whose "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," quoting [Harlow v. Fitzgerald](#). To establish her right was clearly established, Murphy must identify "controlling authority" or "a robust 'consensus of cases of persuasive authority'" that "placed the statutory or constitutional question beyond debate" at the time of Engelhart's alleged violation (quoting [Ashcroft v. al-Kidd](#)).

The court noted it was undisputed that Murphy disregarded Engelhart's repeated instructions to return to his car; was uncooperative when he grabbed her arm and told her to turn around; and repeatedly tried to pull her arm from his grasp. It was also undisputed that Murphy had been

drinking and driving erratically and that her struggle with Engelhart took place on the shoulder of a dark highway while several cars drove by.

The court, citing its own prior precedent, stated it was clearly established that an officer could use force against an uncooperative suspect who refused to follow the officer's orders. See [Carpenter v. Gage](#) - suspect tased for refusing to offer his hands when ordered to do so; [Blazek v. City of Iowa](#), - suspect thrown to the ground and handcuffed for refusing to stay seated as directed. The court also noted a recent Supreme Court decision, [City of Escondido v. Emmons](#), vacating denial of qualified immunity to an officer who executed a takedown of a suspect who disobeyed the officer's order not to close an apartment door and then tried to brush by the officer.

In light of the undisputed facts and controlling authorities, the court found that Murphy had not met her burden of establishing that Engelhart's takedown violated a clearly established constitutional right. The court reversed the denial of Engelhart's summary judgment motion on Murphy's excessive force claim.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-3054/18-3054-2019-08-14.pdf?ts=1565796648>

Ninth Circuit

Nicholson v. City of L.A., 2019 U.S. App. LEXIS 24902 (9th Cir. Aug. 21, 2019)

At around 7:15 AM on February 10, 2015, Plaintiffs Jamar Nicholson, a minor, and Jason Huerta, also a minor, were standing among a group of boys in an alley prior to school. They would often assemble at this location to sing, dance, and socialize. They would then don their school uniforms and walk the short distance to their school. That day, one of the other boys, Sanders, was holding an Airsoft replica pistol. It was realistic in appearance, except for an orange tip at the end of the barrel.

Two LAPD officers were on patrol in an unmarked vehicle with Officer Amaral driving and Officer Gutierrez as the passenger. Both officers were in plain clothes. As the vehicle passed the alley, Gutierrez observed the group of boys in a tight circle and saw one of them with the pistol. Believing one of the youths was "being robbed at gun point or was about to be murdered" Gutierrez called out "gun, gun, gun." Amaral immediately stopped the vehicle and Gutierrez jumped out and ran down the alley without waiting for his partner. Amaral parked the vehicle and then followed Gutierrez.

Gutierrez discharged his firearm several times. Nicholson was hit in the back. He was neither the youth holding the toy gun (Sanders) nor the youth apparently being robbed in close proximity. There was contradictory testimony as to whether Gutierrez identified himself as a law enforcement officer. There was also contradictory testimony as to whether Gutierrez fired his weapon one-handed while still running or if he approached, stopped a short distance from the boys, and then fired.

Other units responded and Gutierrez directed the arriving officers to handcuff each of the boys and separate them from one another. Per LAPD policy, Gutierrez and Amaral were then themselves separated and monitored by other officers.

While the responding officers investigated, the youths were detained in handcuffs. After five hours, the boys were released without charges.

In addition to several state law claims, the Plaintiffs assert violations of their Fourth Amendment right to free from excessive force (handcuffs) and unreasonable seizure (duration). The US District Court denied Gutierrez's motion for Qualified Immunity. The Plaintiffs also alleged that the shooting itself also violated their Fourth Amendment rights. The district court granted summary judgment in favor of the officers on this claim, finding that the teenagers were not "seized" by Gutierrez's gunfire under the Fourth Amendment because Gutierrez intended to use deadly force against the boy with the replica gun, not the current plaintiffs. Nicholson and Huerta did not challenge this ruling and thus the question of whether the shooting violated their Fourth Amendment rights was not reviewed.

Qualified immunity attaches when an officer's conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have known.

Once a defendant has raised qualified immunity as a defense to a claim, a plaintiff must show (1) the right was violated; and (2) that the right was clearly established at the time of the alleged misconduct.

This court found that it is well established that a "person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated."

The plaintiff's continued detention for five hours – well after any probable cause would have dissipated – and the use of handcuffs throughout the duration of the detention violated Plaintiff's clearly established Fourth Amendment right to be free from unlawful arrest and excessive force. However, Gutierrez argues that though he instructed the responding officers to handcuff the youths, he was subsequently separated and monitored. He admits he was an integral participant in the initial handcuffing and detention, but he was not responsible for any subsequent constitutional violation because he played no role in that conduct.

However, the court found that an officer need not have been the sole party responsible for a constitutional violation before liability may attach. "An officer's liability under section 1983 is predicated on his 'integral participation' in the alleged violation. Officers, like other civil defendants, are generally responsible for the 'natural' or 'reasonably foreseeable' consequences. Thus, an officer can be held liable where he is just one participant in a sequence of events that gives rise to a constitutional violation.

Because a reasonable jury could conclude that Gutierrez played an integral role in the unlawfully prolonged detention and sustained handcuffing of the plaintiff, the Court of Appeals affirmed the District Court's denial of qualified immunity with regard to the Fourth Amendment violation.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/17-56648/17-56648-2019-08-21.pdf?ts=1566407002>

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United States Supreme Court Preview

October 2019 Term

Kansas v. Glover

Decision below: [422 P.3d 64 \(Kan. 2018\)](#)

While on routine patrol, a police officer saw a pickup truck and ran the truck's license plate number through the Kansas Department of Revenue's database. The officer learned that Charles Glover, Jr. had registered the vehicle and Glover's Kansas driver's license had been revoked. The officer did not observe any traffic violations; however, he initiated a traffic stop based on his assumption that Glover was driving the vehicle. The officer did not confirm the identity of the driver before initiating the traffic stop. The officer ultimately identified Glover as the driver and the state subsequently charged him with driving as a habitual violator.

Glover filed a motion to suppress the evidence arguing that the officer lacked reasonable suspicion to initiate the traffic stop. After the district court granted Glover's motion, the state appealed. The court of appeals reversed the district court, holding that:

“[A] law enforcement officer has reasonable suspicion to initiate a stop of a vehicle to investigate whether the driver has a valid license if, when viewed in conjunction with all of the other information available to the officer at the time of the stop, the officer knows the registered owner of the vehicle has a suspended license and the officer is unaware of any other evidence or circumstances from which an inference could be drawn that the registered owner is not the driver of the vehicle.”

Glover appealed. The Kansas Supreme Court reversed the court of appeals and held that the stop violated the Fourth Amendment. The court's holding was contrary to the holding of 12 state supreme courts and 4 federal circuit courts of appeal that had ruled on the same or similar issues. The Kansas Supreme Court explicitly rejected that “the owner-is-the-driver presumption because it assumes the registered owner is likely disregarding his or her suspension or revocation order based on only the *general* fact his or her vehicle is being driven.” The court added that “the determinative question is not the status of the registered owner's license; it is the status of the *actual* driver's license.” The court found that “the officer must have *specific and articulable* facts suggesting the owner is driving the vehicle or is otherwise likely to violate the suspension order based on other corroborating information, such as the officer's prior encounters.”

The state appealed and the United States Supreme Court granted certiorari on April 1, 2019. The issue before the Court is:

Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle, absent any information to the contrary.

The Court has scheduled oral argument for this case on November 4, 2019.

Hernandez v. Mesa

Decision Below: [885 F.3d 811 \(5th Cir. 2018\)](#)

A United States Border Patrol Agent, Jesus Mesa, Jr., standing in the United States, shot and killed Sergio Hernandez Guereca, a fifteen-year old Mexican citizen, standing in Mexico. Hernandez's parents (plaintiffs) filed a lawsuit against Agent Mesa under [Bivens](#), alleging that Agent Mesa violated their son's rights under the Fourth and Fifth Amendments. Specifically, the plaintiffs alleged that Agent Mesa violated the Fourth Amendment by using excessive force against Hernandez and the Fifth Amendment by depriving Hernandez of due process.

The Fifth Circuit Court of Appeals, sitting en banc, without deciding the issue, assumed that the plaintiffs could sue Agent Mesa under [Bivens](#). However, the court then held that the plaintiffs failed to state a claim for a violation of the Fourth Amendment because Hernandez was a Mexican citizen who had no "significant voluntary connection to the United States" and "was on Mexican soil at the time he was shot." Consequently, the court dismissed the plaintiff's Fourth Amendment excessive force claim.

The court further held that Agent Mesa was entitled to qualified immunity on the plaintiffs' Fifth Amendment due process claim. Again, the court did not decide whether the plaintiffs could sue Agent Mesa under [Bivens](#). Instead, the court granted Agent Mesa qualified immunity, finding that at the time of the shooting it was not clearly established that shooting across the United States border into Mexico and injuring someone with no significant connection to the United States was unlawful.

Significantly, the Fifth Circuit Court of Appeals dismissed the lawsuit without deciding whether the plaintiffs had stated a valid constitutional claim under the Fourth or Fifth Amendments and whether they could sue Agent Mesa under [Bivens](#). Hernandez appealed to the Supreme Court.

The Supreme Court vacated the Fifth Circuit Court of Appeal's judgment and remanded the case on June 26, 2017. In part, the Court found that the Fifth Circuit should determine whether the plaintiffs have the right to sue Agent Mesa for the alleged Fourth and Fifth Amendment violations under [Bivens](#), as no federal statute authorizes an action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. To determine this issue, the Court directed the Fifth Circuit Court of Appeals to apply the facts of the case to the two-prong test the Court outlined in [Ziglar v. Abbasi](#), decided on June 19, 2017. In [Abbasi](#), the Court noted that it does not favor judicially implied causes of action, such as [Bivens](#), because under the separation of powers principle, Congress is in a better position to create express causes of action. Going forward, the Court commented that lower courts should determine if a case "is different in a meaningful way" from prior [Bivens](#) cases and if any "special factors" are present that would preclude extending [Bivens](#).

On remand, the Fifth Circuit Court of Appeals dismissed the lawsuit against Mesa. First, the court held that this was not a typical excessive force case against a federal law enforcement officer. The court found that the transnational aspect of the facts presented a meaningful difference that would present a "new context" for a [Bivens](#) claim. Because Hernandez was a Mexican citizen with no ties to the United States, and his death occurred on Mexican soil, the existence of any

Constitutional rights he might have had raises novel and disputed issues. In addition, the court recognized that there has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil.

The court held that the “newness” of this “new context,” by itself, warranted the dismissal of Hernandez’s claim. The court further added that several “special factors” existed which precluded the court from extending Bivens in this area. The court found that judicially creating a cause of action in this transnational context would increase the likelihood that Border Patrol agents would “hesitate in making split second decisions.” The court also noted that extending Bivens in this context risked interference with foreign affairs and diplomacy in general. Finally, the court noted that Congress’ failure to provide causes of action in other related legislation was intentional and represented Congress’ refusal to create private rights of action against federal officials for injuries to foreign citizens on foreign soil. The court concluded by stating that it “is not credible that Congress would favor judicial invention of those rights.”

Hernandez appealed and the Supreme Court granted certiorari on May 28, 2019. The issue before the Court is:

Whether the federal courts can and should recognize a claim for damages under Bivens when a plaintiff plausibly alleges that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy.

The court has scheduled oral argument in this case on November 12, 2019.

N.Y. State Rifle & Pistol Association, Inc. v. City of New York

Decision Below: [883 F.3d 45 \(2d Cir. 2018\)](#)

New York City prohibits its residents from possessing a handgun without a valid license issued by the city. One type of license issued by the city is defined as a “premises” license. Prior to July 21, 2019, individuals with premises licenses were authorized to possess handguns only in their homes or en route to one of seven shooting ranges within New York City. Consequently, the city effectively banned premises license holders from transporting a handgun to any place outside its limits, even if the handgun was unloaded and locked in a container separate from its ammunition.

The New York State Rifle & Pistol Association, Inc. and three individuals (plaintiffs) sued the city in the United States District Court. The plaintiffs sought to decrease restrictions upon licensed handgun owners to permit extended transport, e.g. to include transporting licensed handguns to shooting ranges outside New York City and transporting a licensed handgun to a second home in upstate New York. The district court dismissed the plaintiffs’ suit, holding that the city’s restrictions on premises licenses did not violate the Second Amendment, the Commerce Clause, the fundamental right to travel, or the First Amendment.

The plaintiffs appealed. The Second Circuit Court of Appeals affirmed the district court. The plaintiffs then appealed to the United States Supreme Court, which granted certiorari, i.e. agreed to hear the case on January 22, 2019.

After the Supreme Court granted certiorari, the city amended its regulations to allow licensed handgun owners to transport their guns to, among other places, second homes and shooting ranges outside New York City effective July 21, 2019. Similarly, the State of New York enacted legislation, which allows licensed gun owners to transport handguns from their home to other places such as second homes, shooting ranges, and shooting competitions effective July 16, 2019.

Subsequently, the city informed the Supreme Court that the plaintiffs' challenges to the city's ban on transporting guns outside the city limits was moot because of the changes to city and state law. Typically, the Supreme Court will not decide a case when there is no longer a "live controversy" between the parties that needs to be resolved. However, the plaintiffs urged the Court not to dismiss their appeal, arguing that the case was not moot for several reasons:

- 1) Despite the changes to the law, the city's position is that it can regulate the transport of licensed guns without regard for the Second Amendment, which the plaintiffs oppose.
- 2) The city could change the law in the future and re-impose restrictions on the transportation of handguns.
- 3) The city's changes to the law still prohibit those transporting handguns outside the city from making interim stops, such as at gas stations or coffee shops.

The Supreme Court rejected the city's request to dismiss the case as moot.

The issue before the Court is:

Whether the city's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

The court has scheduled oral argument in this case on December 2, 2019.
