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IACP Legal Officers Section
Handling Emotionally Disturbed Persons & 42 U.S.C. §1983 Civil Liability Update
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HANDLING EMOTIONALLY DISTURBED PERSONS

INVESTIGATORY STOP AND CUSTODY

Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005)

The plaintiff, a seventy-seven year old retired farmer, went out to shoot groundhogs. He positioned himself sitting in a folding chair on an elevated railroad grade. A passerby, thinking he was possibly suicidal, called the Sheriff's Department. The officers used a microphone and instructed the plaintiff to come toward them. He complied and also complied when the officers told him to put down his gun and, later, when he neared the officers, to lie down on the ground. When the officers handcuffed him, he went into cardiac arrest, which resulted in a permanent disability.

It was argued that the officers violated his Fourth Amendment rights when they arrested him without probable cause required to justify a mental health seizure. The officers argued and the District Court agreed that the officers merely conducted a *Terry* stop and that they had reasonable suspicion to believe that this individual may have presented a danger to himself or others.

The Appellate Court did not agree, stating that in the Circuit, absent criminal activity, an officer may not physically restrain an individual merely to assess his mental health. The Court cited cases from the Second, Fourth, Fifth, Seventh, Eighth and D.C. Circuits, all agreeing that the standard for a seizure of someone with mental health problems is probable cause to believe that the person is dangerous to himself or others. The facts of this case did not demonstrate the requisite probable cause standard. Fisher did not do anything that the officers considered suspicious or threatening and complied with the officers' requests. There was no danger after complying with the officers' requests to lay down his gun and the officers never even questioned him with regard to potential depression or suicide. Even if reasonable suspicion were the standard for detaining someone with mental health problems, the rule would not apply in this case because the force used by the officers elevated a seizure from a mere investigative stop to an arrest.

Meyer v. Board of County Commissioners of Hartford County, Oklahoma, 482 F.3d 1232 (10th Cir. 2007)

Plaintiff had been in a romantic relationship with an individual who was allegedly friends with officers who responded to this incident. She alleges that she went outside her home to investigate a noise and was assaulted. She did not report the attack, but the following night when she reported trespassers she told the arriving officer about the assault that she believed had been committed by her former boyfriend. She was told she would have to go to town to report the crime. When she arrived at the County Sheriff's Office later that day, she was told by the dispatcher that they "didn't do that" there. She finally went to the police chief's home and was told to go to the police station where an officer met her, took pictures of her bruises and said he would consult with the Sheriff's Office. After leaving the station, she went to confront her boyfriend who was at a family graduation party. She told her boyfriend's sister that he was an enforcer with the KKK, and was planning to murder her. The sister told her she was crazy

and ordered her to leave the party. Police arrived and told her to get in the vehicle where she stayed calmly for about an hour until taken for a psychiatric evaluation. Although there was absolutely no evidence of any threat, violence or harm to any person or property, the admitting physician noted in her report that the plaintiff had apparently threatened violence and that it required four officers to restrain her.

The Appellate Court agreed with the District Court's analysis on three points.

First, the seizure of a person for an emergency mental health evaluation is a restriction on the fundamental right to personal liberty, and therefore is governed by the Fourth Amendment. Second, probable cause is required to support an emergency detention for a psychiatric evaluation. Third, probable cause in this context means cause to believe that the individual poses a danger to himself or others. The Court concluded that there was an absence of evidence supporting this standard. Further, given the above alleged facts and the marked discrepancy between the doctor's notes and the total lack of evidence of any such behavior, a jury could conclude that this false information was provided by the police for the purpose of supporting an emergency examination order. In summary, the Court determined that the officers were not entitled to qualified immunity as they did not have probable cause supporting the examination and a reasonable officer would know that he cannot rely on deliberate falsehoods to establish probable cause to deprive a person of her liberty.

The Court also denied qualified immunity on her First Amendment claim that she was detained and committed in retaliation for exercising her First Amendment rights for trying to register a complaint with the law enforcement officers. "Filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right to petition the government for a redress of grievances."

COMMUNICATIONS

DePalma v. Metropolitan Government of Nashville, 40 Fed.Appx. 187 (6th Cir. 2002)

Although the operator claimed she did not hear gunshots, there were screams and two gunshots transmitted over an open 911 line. Officers responded to a non-emergency domestic disturbance in progress call. The operator called back the house saying the police were on the way and received unresponsive comments. Upon getting no response at the door, the officer opened the front door and stepped inside the foyer. At the top of the stairs, he saw Antonio Neal and asked if everything was okay. Neal was standing with his hands behind his back and stated that everything was fine. He refused to show the officer his hands. Connie Neal appeared, holding a baby and also said everything was okay, but the officer glanced into the living room saw what appeared to be the torso of a body with a bloodlike substance coming from its mouth. The officer backed outside after unsuccessfully trying to get Neal to come with him. After two backup officers were briefed, the dispatcher called the Neal home confirming that everything was NOT all right and informed the officers of this conversation. When the officers were about to enter the home six to twelve gunshots rang out from inside the house. The SWAT team entered to find the four dead adults and an unconscious Antonio Neal. The jury returned a verdict in favor of the police, while the district court rendered a decision on the state law claims finding the 911 operator to be negligent. The district court stated that the plaintiffs proved that the situation would have ended differently had the police officers been given the information necessary to respond to the situation quickly and with a backup force.

Had the officers known that shots had been fired the first officer would have waited to enter the residence with backup officers with their weapons drawn. The court further found that it was entirely likely that the SWAT team and a negotiator would have been called to the scene quickly and that the use of such tactics would have had a good chance of defending the tragedy that took place.

ENTRY

Koch v. Town of Brattleboro, 287 F.3d 162 (2nd Cir. 2002)

Acting on the State's Attorney's advice, officers went to Koch's residence to either issue him a citation or bring him to the police station. They knew the 70 year old suffered from bi-polar disorder and was friendly with Doris Reed who answered the door, but did not live there. Koch, who was standing at the top of the stairs, told them to leave but they followed him to his bedroom. When they knocked on the door, Koch opened the door, allowing one officer to enter and then locked the door. The second officer picked the lock and Koch was handcuffed and transferred to the police department.

The court first found that the officer's "initial entry" was reasonable. Although Reed did not have actual common authority over the residence, an objectively reasonable officer could have believed that she had authority to consent to the entry into the home. The court found that the officers were entitled to qualified immunity on the issue of their "continued presence" over Koch's objection. It was unsettled at the time whether police may remain in a home over the objections of the primary occupant when they enter pursuant to the reasonable belief that the third party, whom the police know has lesser authority, consented to their entry.

Finally, the court found that the officer's "forced entry" into the second floor room was reasonable pursuant to exigent circumstances. "Police may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." Given Koch's known propensity for erratic behavior and the abrupt manner in which the first officer vanished inside the room, it was reasonable for her partner to believe that she was in danger.

Kerman v. City of New York, 261 F.3d 229 (2nd Cir. 2001)

Police received an anonymous phone call (plaintiff's girlfriend placed the call) stating that a man at a certain address and telephone number was mentally ill, acting crazy, off his medication, and possibly had a gun. Arriving officers rang the doorbell, pounded on the door and waited several minutes until Kerman, who had been in the shower, opened the door. According to the plaintiff, the officers slammed the partially opened door into his forehead, knocking him to the floor. They then rushed in, jumped on his back, pulled his arms behind him and handcuffed him. One officer allegedly put a gun to his head and said, "Listen you fucking nut job, just hold still or I'll blow your brains out." They then dragged him on his stomach up a short flight of stairs and pushed him against the wall where he stood naked. The Lieutenant in charge held the door open with people looking in from the outside. When plaintiff asked for it to be closed the lieutenant replied, "You shut your fucking mouth, I'll shut the door when I want

to." While officers searched his apartment plaintiff made hostile remarks including, "It must be a slow day at Dunkin Donuts" and the officers gave, "Mark Furhman a good name." Plaintiff's girlfriend and doctor called but police allegedly did not give them an opportunity to explain the circumstances. Plaintiff said he would walk to the ambulance and asked to go to Presbyterian Hospital. Instead, the lieutenant stated to him, "I'm going to teach you a lesson….I'll give you something to sue for." They had him put in a restraint bag, carried out on a stretcher and taken to Bellevue Hospital. An appeal followed a jury verdict in favor of plaintiff in the amount of $75,000.

Warrantless Entry

Police officers may enter a dwelling without a warrant to render assistance to a person whom they reasonably believe to be in distress. However, the question in this case was whether an uncorroborated and anonymous 911 call was sufficient to establish probable cause that plaintiff was in danger. The courts found that based on the absence of evidence in the record to corroborate the 911 call and the protection afforded to private dwellings under the Fourth Amendment, the officers' warrantless entry into plaintiff's apartment violated the Fourth Amendment. Although the Supreme Court in *Alabama v. White (1990)* and *Florida v. JL (2001)* cast doubt on the reliability and constitutional sufficiency of anonymous tips, in 1995 there was no clearly established law prohibiting a warrantless entry into an apartment on the grounds of exigent circumstances based solely on an anonymous 911 call, therefore providing the officers with qualified immunity.

Seizure

Plaintiff claims the officer's decision to handcuff and detain him during the search violated his Fourth Amendment rights. An officer's decision to handcuff and detain a person will not violate the Constitution so long as the officer had probable cause to believe the person presented a risk of harm to himself or others. Police are entitled to qualified immunity since once inside the apartment reasonable police officers could, at very least, disagree over whether, in light of the mention of a gun, they could protect themselves from a dangerous situation by handcuffing and immobilizing the plaintiff.

Excessive Force

Given plaintiff's version of the facts that he was handcuffed tightly, verbally abused, humiliated and unnecessarily confined in a restraint bag, there remained a disputed issue of fact as to whether or not the use of force was objectively reasonable.

Hospitalization at Bellevue

Given the lieutenant's failure to corroborate the 911 call and ignoring two opportunities to confirm the seriousness of the plaintiff's condition with his girlfriend and doctor, a jury could find that the officers acted unreasonably in placing plaintiff in restraints and transporting him to the hospital after failing to reasonably investigate his mental state and grossly misjudging the situation.

Retaliation for Protected Speech

The court found that plaintiff had a right to criticize the police without reprisal supporting his interests protected by the First Amendment. Proof that the defendant's actions were motivated by or substantially caused by the plaintiff's exercise of his First Amendment rights were supported by the lieutenant's comments that he would give him something to sue for. And finally, the involuntary overnight trip to Bellevue would support plaintiff's claims that the defendant's actions violated the exercise of his First Amendment rights.

Buchanan v. Maine, 469 F.3d 158 (1st Cir. 2006)

Officers responded to the home of Buchanan at the request of his mental health manager who told them that Buchanan might light his barn on fire. Buchanan was 62 years old and had suffered from mental illness for approximately 30 years. The Court describes his long mental illness, his deteriorating conditions, and the officers' valiant attempts to try and calm him and the numerous irrational comments and behavior on the part of Buchanan including repeatedly spitting on the officers. At the end of the encounter, Officer Emerson attempted to grab Buchanan who had a knife in his hand. Buchanan pushed the officer and began stabbing him in the shoulder, back and head. Officer Hatch shot Buchanan four times, killing him.

There was no issue with regard to the reasonableness of the use of deadly force. Plaintiffs claimed that Buchanan's constitutional rights were violated by the warrantless entry which resulted in the shooting. The Court ruled that the officers had reasonable grounds to believe that Buchanan presented a threat of imminent and substantial physical harm to himself or others, including the deputies. At one point during the incident, they observed a cut on Buchanan's hand which they believe was caused when he punched a window out. Also, he had threatened to kill the officers, had thrown liquid at one of them, spit numerous times and earlier, someone matching his description had been spotted attempting to light a fire in a neighbor's wood pile. Even if plaintiffs could provide evidence that the officers did not have exigent circumstances to enter the home, the law at the time tended to support the officers' actions, therefore entitling them to qualified immunity.

Bates v. Harvey, 518 F.3d 1233 (11th Cir. 2008)

Officers executing a civil commitment order for seventeen-year-old "J. T. arrived at the Bates home at 9:00a.m. A fourteen-year-old girl answered the door informing the officers that J.T. was not there. When officers asked if they could come in she responded "I don't know". The officers entered the home, opened the bedroom door where they found an eighteen year old girl lying in bed. She said she didn't know if J.T. was there when asked if they could look around she replied "something to the effect of I guess so" the officers proceeded to another bedroom where they found the Bates nineteen year old son and J.T. asleep.

Mrs. Bates, hearing voices came out of her bedroom and demanded to see a search warrant. The deputy explained the commitment order but Bates told them to leave the house if they could not show her a search warrant. The deputy told Bates that the commitment order was in the patrol car and that she would be arrested for obstruction of justice if she continued to impede the officer's actions. After about a minute of argument the deputy grabbed Bates' hand twisting her arm until she fell to the floor while he tried to handcuff her. She was able to escape, run into the bathroom where the deputy grabbed her, allegedly struck her in the face then dragged her by her feet across the bathroom floor out into the hallway. During the commotion J. T. fled from the house and Mrs. Bates was not at that point arrested. After chasing J.T. Deputy Harvey returned to the Bates residence to arrest Mrs. Bates for obstruction of justice. He entered the home, arrested and handcuffed Mrs. Bates. Bates filed suit after her acquittal.

In order for Deputy Harvey to be entitled to qualified immunity for the alleged wrongful arrest he must demonstrate that his presence in the home without a warrant was lawful and did not violate clearly established law. Deputy Bates attempted to justify his entry under the consent and exigent circumstance exceptions to the warrant requirement. He attempted to rely upon the eighteen year old daughter's consent, however, the Court found that her comment "something to the effect of I guess so" was at best an equivocal answer, which did not amount to a valid consent.

For exigent circumstances the officer relied on the wording in the civil commitment order indicating that J.T. presented a substantial risk of harm to himself or others. Neither Payton nor Steageld address whether a civil commitment order may authorize entry into a home. The Court found that Harvey failed to demonstrate circumstances sufficiently exigent to justify his warrantless entry. Although J.T.'s mother said her son might be spending the night at a friend's house the deputy at the time he entered the home did not have an objectively reasonable basis for believing there was an occupant in the Bates' home who was a danger to himself or others, especially after being informed that J.T. was not in the home. He also did not have exigent circumstances once he located J.T. as the boy was fully cooperative and presented no threat of immediate danger. The court did find that Deputy Harvey could have interpreted the language in the commitment order as compelling the execution of the order with speed and immediate attention to an emergency situation, therefore, supporting his argument that a reasonable officer could have thought there was an emergency situation entitling Harvey to qualified immunity.

APPROACH

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995)

Police responded to a call of an emotionally disturbed person sleeping behind Wendy's for several days. The court describes in great detail the contact between the officers and plaintiff, who was at first cooperative, but became increasingly resistant. When he refused to take his hand out from under his poncho he was sprayed in the chest with mace, which had no effect. At some point the officers drew their weapons and as other officers arrived, he began to run. The responding sergeant decided to hit the plaintiff with his car because the plaintiff was displaying an intent to use deadly force and other efforts of containment had failed. The court ruled that the Sergeant's attempt to hit an individual with a moving squad car is an attempt to apprehend by use of deadly force. Material issues of fact, precluding a

summary judgment, were whether the car was almost stopped, which would not be **per se** unreasonable use of force, or whether it was moving 15 mph which would arguably be unreasonable.

The sergeant ordered an officer to mace the plaintiff, which was again ineffective. As plaintiff continued to run, Anderson shot twice at the plaintiff causing him to flinch. Within a couple of seconds an officer yelled that he had a shotgun and the sergeant said "go ahead" resulting in the discharge of the shotgun.

The court found material questions of fact as to whether the plaintiff's actions at the time of the shooting, even if dangerous, threatening or aggressive, posed a threat of serious physical harm as required by Garner. At the time of the shooting, eight officers were at the scene and the nearest bystander was approximately 150 feet away. If the plaintiff continued running, he would have increased that distance. At the time of the shooting, the officers had seen plaintiff with a knife, but he'd only taken defensive positions and never moved towards any officer. In addition, neither officer gave plaintiff any warnings as recommended in Garner. It was certainly arguable that the actions of this plaintiff, who was initially suspected of being homeless and emotionally disturbed and later of misdemeanor criminal activity, engaged in conduct which placed no one in immediate harm.

The court also looked at the department's policy on handling of emotionally disturbed persons and found that although these police department guidelines do not create a constitutional right, they are relevant to the analysis of the excessive force claim.

SWAT

Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)

A police supervisor received information that Mr. Lekan who was a paranoid schizophrenic and suffered from post-traumatic stress had threatened his bed-ridden wife by placing a rifle near her bed over the course of several days in front of a visiting nurse. Concerned for the Lekans and their sons, the sergeant had two plainclothes officers dispatched to the Lekan residence to determine whether Mrs. Lekan or her son was in danger. Other officers waited at a nearby shopping center. Mr. Lekan opened the inner door and the officers without identifying themselves, asked to speak to Mrs. Lekan. Mr. Lekan spoke to them through an open window and at one point started to sing the Star Spangled Banner. The officers then identified themselves and again said they needed to speak with Mrs. Lekan. Mr. Lekan slammed the front door after which one of the officers opened the screen door, kicked in the inner door entered the house and was shot by Mr. Lekan. Both officers retreated and the ERT team was called.

Mrs. Lekan called the police to report that someone had been shot and Sergeant Suller asked to call her back on another line. When he did, Mr. Lekan answered stating the first officer was lucky, and he had his .270 rifle loaded and ready to go. Police began negotiations but refused to allow family members to speak with Mr. Lekan. One of two mental health professionals at the scene told the chief that the threat level was high and asked if the officers had a reason not to execute a forced entry as a solution to the stand off. The chief ordered an armed entry using a battering ram, incendiary devices and tear gas. When one of the incendiary devices started a hall fire, the officers stopped to put it out, and exchanged gunfire

with Mr. Lekan during which two more officers were injured, resulting in a retreat and continued stand off.

Approximately seven hours after the first assault J.T., the son, spoke to the police saying he was fine but scared. Mr. Lekan took the telephone and asked to speak with his cousin who was a priest. Concluding that the request was a sign of danger and that he might be contemplating a murder/suicide an armored vehicle was driven onto the front lawn illuminating the house. A short time later, the vehicle rammed through the living room wall and injected tear gas into the house. Between 4:00 a.m. and 5:00 a.m. the police heard gunshots and at 11:00 a.m. the chief ordered the vehicle to push through the garage door. The bodies of Mr. Lekan and his son were found.

The city hired an independent consultant to review the incident. In the almost 400 page report the consultant indicated that he didn't believe the incident could be resolved through traditional forms of hostage negotiation and that Lekan set out on a path of self-destruction when he shot the first officer. Among other things he concluded that the tactical entry was conducted too soon, it was a mistake to use the armored vehicle and it was a mistake to interrupt the tactical entry to deal with the fire.

Warrantless Entry: The court found that the "knock and talk strategy" was a reasonable investigative tool to gain the occupant's consent to search. They did not create an exigency by failing to identify themselves. The "created – exigency" cases typically require some showing of deliberate conduct on the part of police evincing an effort to intentionally evade a warrant requirement. Here the forced entry was reasonable since the officers had an armed and emotionally disturbed person inside the home while others inside the home were exposed to danger.

Excessive Force: The fourth amendment test did not apply since Mr. Lekan, his wife and his son, were not seized by the officers. The distinguishing feature of a seizure is the restraint of the subject's liberty. The police did not seize Mr. Lekan merely by surrounding his house. He chose to barricade himself and not submit to official authorities. The court found that the use of a battering ram and incendiary devices against the Lekan home was objectively reasonable. It also found that the use of nondeadly force such as tear gas and psychological tactics, while perhaps ill considered, were not excessive. Summary judgment was affirmed as the use of deadly force was employed only when Mr. Lekan was firing at the officers.

Substantive Due Process Claims: The due process clause does not impose liability on the state for injuries inflicted by private acts of violence. The two exceptions to this rule are (1) when the state fails to provide protection of individuals in state custody and (2) where affirmative actions directly increase the vulnerability of citizens to danger. The test for liability under the fourteenth amendment is the "shock the conscience" standard. The nature of this standard extends from the "deliberate indifference" to an "intent to harm unrelated to a legitimate governmental interest" depending on whether the circumstances allow the state actors time to fully consider the potential consequences of their conduct.

Here, where the police waited five hours to initiate the first tactical solution and the chief consulted with two mental health professionals and others at the scene, the more appropriate test would be deliberate indifference. "In cases such as this one in which officers must choose among the risks, a plaintiff must

show that the police 'knowingly and unreasonably' opted for a course of conduct that entailed a substantially greater total risk than the available alternatives." Although decisions may have been ill advised or negligent and they may have employed better equipment, such as thermal imaging, such conduct does not amount to deliberate indifference.

Holland Ex Rel. Overdorff v. Harrington, 268 F.3d 1179 (10th Cir. 2001)

Two days after an altercation in which a number of patrons at a steak house were beaten, a misdemeanor warrant was obtained for one of the assailants as well as a warrant to search his residence for evidence of the assault. The SWAT team was deployed at 8:30 p.m., dressed in green camouflage clothing with hoods showing only their eyes. As the team approached, it encountered three young men (24, 18 and 8) playing basketball in the driveway. They were ordered at gunpoint to lie face down on the ground. A 14-year-old boy near the bunkhouse was also ordered to the ground at gunpoint where he was kept in a prone position for nearly 10 minutes. A 4-year-old girl seeing the armed deputies ran screaming into the house, pursued by an officer who aimed his laser lighted weapon on the child's back. The deputies found the suspect and the four women in the home, three of whom were ordered to lie face down on the living room floor.

Decision to Use the SWAT Team: "The decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force - - a force far greater than that normally applied in police encounters with citizens… the decision to use a SWAT team to make a 'dynamic entry' into a residence constitutes conduct 'immediately connected with the seizure' because it determines the degree of force initially to be applied in effecting the seizure itself.

The decision makers claimed that Franklin had a history of violence and there were others on the sixty-acre compound with histories of criminal violence. They also suspected that there were firearms in the residence and did not know how many adults they would encounter. The court found that the plaintiffs failed to show that the display of force inherent in the deployment of the SWAT team was excessive under the fourth amendment.

Specific Conduct of SWAT Deputies: "The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at the time… where a person has submitted to the officer's show of force without resistance and where an officer had no reasonable cause to believe that the person poses a danger to the officers or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person in contrast to simply holding the weapon in a fashion ready for immediate use." The pointing of firearms at the child bystanders found at the residence violated their constitutional rights. The court also commented on the harsh language used by the SWAT team members. While recognizing the necessity of exercising unquestioned command, they suggested that simple instructions spoken in a firm and commanding tone communicating what the officers want to the subjects is far better than expletives which communicated little more than the officers' own personal animosity, hostility or belligerence. While harsh language

alone could not render a search or seizure unreasonable, it may be sufficient to tip the scales in a close case.

The court also commented on the attitude of the SWAT team members. Being on a SWAT team does not exempt officers from fourth amendment standards, and in fact, given the special training, requires greater discipline, control and restraint.

Finally, the court denied the supervisors' qualified immunity. "We can find no substantial grounds for a reasonable officer to conclude that there was legitimate justification by continuing to hold the young people outside the residence directly at gunpoint after they completely submitted to the SWAT deputies initial show of force or for training a firearm directly upon a four-year-old child at any time during the operation. Davis' supervision of the SWAT deputies during the raid, furnishes the affirmative link between this violation and Davis' conduct; it appears uncontroverted that the SWAT deputies continued to point their weapons at the persons found on the Heflin property until Davis directed them to stop doing so at the conclusion of the search.

LESS LETHAL

Deorle v. Rutherford, 242 F.3d 1119 (9th Cir. 2001)

Mrs. Deorle dialed 911 when her husband lost control of himself and began banging on the walls and screaming. She removed herself and her children from the home. Approximately thirteen officers responded securing the area while awaiting the arrival of the Special Incident Response Team. Officer Rutherford. who had been at the scene for thirty to forty minutes, set up a position where he observed Deorle for about five to ten minutes. He observed Deorle carrying an unloaded, plastic crossbow in one hand and a bottle of charcoal lighter fluid in the other. Rutherford, who was armed with a 12 gauge shotgun, loaded with less lethal beanbag rounds, decided to shoot Deorle when he passed a small tree approximately thirty feet away. Prior to the time of the shooting, Deorle had followed the officers' instructions and dropped a number of objects when being ordered to do so.

When Rutherford shouted at him to drop the crossbow, he discarded it. Without warning Deorle to stop or warning him that he was going to be shot, Rutherford aimed at his torso, striking him in the face resulting in multiple fractures to his cranium, loss of his left eye, and embedded lead shot in his skull.

The court determined that although Rutherford admitted that the rounds could have lethal capabilities at thirty feet and are potentially lethal up to fifty feet, the cloth-case shot appeared to fall short of deadly force as defined by statute to be "that force which is reasonably likely to cause death."

The court ultimately determined that Rutherford's use of force was unreasonable and that he would not be entitled to qualified immunity. This is not a situation that will provide for the type of latitude allowed by Graham as Rutherford was not a lone officer suddenly confronted by a dangerous armed felon threatening immediate violence. He also did not attempt to evade arrest, stayed on his own property and did not pose an immediate safety threat, as he had responded to the officer's instructions and did not attack anyone.

Also, Deorle might never have passed the predetermined spot had Rutherford given him warning or commanded him to halt. At the time of the shooting, Rutherford was confronted by an emotionally disturbed individual who was possibly intent on committing suicide. He was unarmed and walking towards Rutherford at a normal gait. No officer could reasonably have believed that under these facts, this shooting, which was reasonably likely to cause serious physical injury, could constitute reasonable force.

Clem v. Corbeau, 284 F.3d 543 (4th Cir. 2002)

The court affirmed the denial of summary judgment on behalf of an officer who shot a fifty eight year old, mentally disturbed man, who had not taken his medication or eaten in three days, and within moments before the shooting had been pepper sprayed twice. Officer Corbeau contended that a reasonable officer would have had reason to believe that Clem was armed or otherwise sufficiently dangerous to justify the use of deadly force, however, his fellow officer never believed that Clem was armed and while both officers spent several minutes close to Clem, neither saw bulges in his pockets or waistline. When he was coming toward the officer, his hands were obviously empty. The officer also claimed that Clem posed an immediate threat of bodily harm because the pepper spray had no effect on him, Clem was larger (2 inches and 45 lbs.) and was rapidly charging toward him. All of the witnesses testified that Clem who was 58 years old was blinded and gagging from the pepper spray, and was fumbling toward the bathroom, therefore posing no serious risk of harm to the 28 year old, discharged marine who was standing holding a 26 inch metal baton.

The court also discussed the discrepancies between the officer's initial interviews with the investigators and his report with his later contentions in support of his summary judgment motion. It also mentioned that the fellow officer was behind Clem in the line of fire.

Caricofe v. Mayor & City Council of Ocean City Maryland, 32 Fed.Appx. 62 (4th Cir. 2002)

Responding to a call from a desk clerk at a hotel, officers found the plaintiff, a large naked man, approximately 290 pounds and over six feet tall, jumping around and banging himself against the walls. Officers attempted to calm him by talking to him, but he continued to act in an aggressive manner, banging on the walls, growling and flexing his muscles. The fourth officer that arrived brought a violent prisoner-restraining device, which was a rope that was used to bind the feet of violent prisoners.

When the plaintiff stumbled onto the floor, the officers used this opportunity to try to restrain him with handcuffs. After the officers placed two sets of handcuffs on either hand, plaintiff threw the officers off, stood up swinging his arms violently with the two sets of handcuffs still attached. The officers then all pepper-sprayed him, which seemed to have no effect. After he pinned one of the officers against the wall, they began striking him in the buttocks and legs with their batons.

The plaintiff then ran down the stairs into the parking lot where the officers attempted to tackle him. Other officers arrived and one ran over and used pepper foam to no apparent effect. They then continued to use their batons, but plaintiff ran away again. The officers converged on the plaintiff and

used the restraining device. Eventually he stopped moving and prior to the arrival of paramedics stopped breathing. The cause of his death was "multiple drug use and arterial sclerotic cardiovascular disease."

The court concluded that the sequence of events demonstrated a reasoned and restrained approach. The fact that plaintiff died after a struggle was most tragic, but it could not be said that it was from any unreasonable conduct on the part of the police.

Gaddis v. Redford Township, 364 F.3d 763 (6th Cir. 2004)

Plaintiff, an emotionally disturbed man, was seen swerving within his lane and apparently leaning to one side. After several failed attempts, the defendant officer finally stopped the plaintiff who stated that his license was suspended and handed the officer an expired license. When ordered to get out of the car, the officer told him to remove his hands from his pockets. The video shows the officer jumping back, visibly alarmed. The officer claims he had a knife in his hand, which cannot be seen in the video. Three officers were present during the succeeding two or three minute standoff. Plaintiff said to the stopping officers, "Why are you doing this to me, Chris, like you did to me in California?" None of the officers were named Chris or had ever encountered Gaddis in California. Plaintiff then said he wanted to leave, at which point the stopping officer sprayed him with pepper spray. The second officer clambered over the trunk trying to grab the plaintiff. In the videotape, plaintiff appears to be swinging his arms in what the Court interprets to be a stabbing motion toward the officer. Two officers then fired a total of 16 shots at the plaintiff.

The first issue was whether the initial stop of the plaintiff was reasonable. Based on the above-stated facts, the majority determined that the officer had reasonable suspicion that plaintiff was intoxicated.

The next question was whether Bain's grabbing of Gaddis as he got out of the car was unconstitutionally excessive force. Even minor use of force is constitutionally excessive if totally gratuitous. This force was not gratuitous as the officer intended on preventing the plaintiff from fleeing and was going to conduct a pat down. Such action was reasonable when dealing with a suspect who had previously refused to stop and appeared to be disoriented. The next three use of force issues depend on whether or not there was an issue of fact as to whether or not the plaintiff had a knife. Three of the officers saw plaintiff with a knife, one did not and the videotape did not show a knife. The Court explained, given the position of the non-viewing officer and the poor quality of the videotape, there was no disputed issue of fact regarding the presence of the knife.

The next issue was whether or not the use of pepper spray was reasonable. The Court noted that the main purpose of non-lethal, temporarily incapacitating devices is to give police options short of lethal force to take a person into custody. Since plaintiff was armed with a knife and refusing to submit to the arrest, the use of pepper spray was objectively reasonable. An expert testified that the use of pepper spray as well as the officers' attempt to grab the plaintiff after the spray amounted to inappropriate tactics in dealing with an emotionally disturbed person. He claimed that the officers should have acted in a non-confrontational manner that would ensure the plaintiff would not be provoked to violence. The Court

agreed that the apparent mental state is one of the facts that officers should take into consideration in using force and cited a prior holding in which inadequate training of the Cincinnati Police Department may have contributed to the shooting death of a mentally ill decedent. In this case, the Court found that the expert's affidavit was not sufficient to create a material issue of fact as to the reasonableness of these uses of force.

Finally, the officers' use of deadly force was objectively reasonable in that they saw the plaintiff strike a fellow officer with a knife. The use of a single volley of 16 shots from two officers did not make this use of force unreasonable.

The dissenting opinion noted that the stopping officer's credibility should have been taken into consideration as he was subsequently convicted of criminal sexual conduct. They also indicated that there were problems with the collection of evidence, which bore on whether or not there were issues of fact in the case including the failure to secure a second knife found on the plaintiff's front seat, failure to fingerprint the knife found outside of the scene, and the failure to preserve the officer's allegedly bloody T-shirt. The Court also noted that prior to the use of deadly force, the officer who had allegedly been stabbed was far enough away so that he was no longer in danger.

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005)

Upon arrival at the Mercado home in response to a domestic, officers found Mr. Mercado sitting on the kitchen floor, crying, with a knife in both hands pointed toward his heart and a telephone cord wrapped around his neck. After ordering him in English and Spanish to drop the knife, Officer Padilla followed Rouse's order to hit Mercado with a Sage and then with an SL6 Launcher (less lethal munition, fires polyurethane baton 1.5 inches wide designed to leave bruises), hitting Mercado once in the head resulting in brain injuries.

Applying Graham, the Appellate Court overturned the District Court's grant of qualified immunity to the officers. The Court determined that he was not committing a crime, resisting arrest or posing an immediate threat to the officers. By aiming at Mercado's head, Padilla used excessive force because he was trained on how to use the Sage Launcher - the weapon accurately hits targets at distances up to five yards - and Padilla was aware that the launcher was a lethal force if shot at a suspect from close range. Furthermore, the officers were aware that alternative actions such as using a crisis negotiation team were available, and recommended under policy; especially when Mercado was not making any threatening moves toward himself or the officers.

Even though there was no specific case law that would put Padilla on notice that his actions violated clearly established law, the court found that he was not entitled to qualified immunity because he was aware that police policy forbid him from using deadly force under the circumstances. Simply put, he used deadly force in violation of the clearly established principal, that deadly force cannot be used in non-deadly situations. "…this is one of the cases that lie so obviously at the very core of what the fourth amendment prohibits, that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law. The facts in this case are also so far beyond the hazy border

between excessive and acceptable force that the official had to know he was violating the constitution even without case law on point." (citations omitted.)

NOTE: Under Florida law, deadly force does not include the discharge of a firearm by an officer loaded with less lethal munition. Less lethal munition is defined as, "a projectile that is designed to stun, temporarily incapacitate, or cause temporary discomfort to a person without penetrating the person's body."

Mann v. Yarnell, 497 F.3d 822 (8th Cir. 2007)

In the early evening Mann fired a shot at pursuing police officers, fled to his home where he took a shower and went to sleep. His wife went to the police department to report domestic abuse and that Mann was irrational, in a paranoid state and had been using methamphetamine for five continuous days. She reported that he kept firearms in the home, had threatened suicide and stated he would shoot it out with the police and would go out in a blaze of glory with a gun fight with police if they tried to arrest him. Officers using a loudspeaker repeatedly urged Mann to exit his home. When he did not respond, they fired tear gas into the house resulting in Mann coming out clad in a towel wrapped around his waste. They ordered Mann to get down on his stomach and to come under a fence and to put his hands behind his back. He neither dropped down nor placed his hands behind his back. After Mann disregarded repeated instructions, a canine held onto his leg for about fifteen seconds while two officers attempted to apply handcuffs. Mann struggled, slipped away and grabbed at the barrel of one of the officer's guns. Yarnell struck Mann five times with what he described as a brachial stun technique. This technique involves the application of an officer's forearm to an area of major muscle mass such as the side of Mann's neck to induce temporary paralysis. Following the administration of each blow, an officer must ascertain if the stun had the intended effect before it is reapplied. The Court determined that the use of this technique, as well as, the canine were reasonable under the circumstances. It was helpful that a video depicted Mann's refusal to comply with the officer's order as well as the delivery of the stun technique, during which the officer can be seen pausing between each blow.

DEADLY FORCE

Woodward v. Town of Brattleboro, 148 Fed.Appx. 13 (2005) and 2006 WL 36906 (2006)

Officers responded to a dispatch that Woodward was at a church with a knife threatening the congregation. When Woodward did not drop the knife upon being ordered to do so and began to approach the officers, he was shot and killed.

The Appellate Court stated that to determine whether the officer was entitled to qualified immunity the Court must first ask whether the use of force was objectively reasonable. "Deadly force is reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Cowan v. Breen, 352 F.3d 756 (2d Cir. 2003). Noting that four witnesses gave sworn statements that Woodward made no advances or threatening moves toward the officers or any bystanders before he was shot, the court determined that there was an issue as to whether or not the threat was immediate and remanded the case to the district court. The district court

explained that at the time the officers entered the church there were a number of congregants in close proximity to a potentially dangerous man. Evaluating the situation under the 21-foot rule, a reasonable officer could conclude that someone might be hurt considering Woodward's agitated demeanor, unpredictable behavior, his close proximity to a number of individuals and his refusal to put down the weapon. The fact that several congregants judged Woodward's actions as only indicating that he intended to harm himself and that they did not perceive him as making any aggressive movement toward any of the officers or a risk to themselves, did not raise a material issue of disputed fact precluding summary judgment.

The expert testimony that the officers acted unprofessionally in walking within eight to fifteen feet of Woodward putting themselves in harm's way also did not raise a material issue of fact as the Second Circuit has explicitly ruled that an officer's action leading up to a shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. "The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and the moment he made the split-second decision to employ deadly force. Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996).

In rendering its decision, the court relied heavily on the training and policy of the department. The 21 foot rule informs officers of circumstances in which they must assume that a person is able to unexpectedly and quickly do serious harm. The fact that Woodward had a knife and was within 21 feet of people and refused to drop the knife presented a situation which pursuant to training could potentially and unexpectedly turn fatal for the officers or others. The court noted that under this rule if Woodward unexpectedly had lunged at someone there may have been another set of plaintiffs who would claim that police failed to control him in a timely manner.

The court compared this case with Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995). In that case, witnesses and expert testimony indicated that the deceased was holding his gun in the surrender position, and therefore the police shooting of him was not reasonable. The court rejected this argument pointing out that "it is hard to imagine that pointing a .357 magnum in any direction would not cause a reasonable officer to fear for someone's life – if not his own, then the life of a bystander or the gunman himself." It was of little importance that Wilson may have been backing up, quivering and not holding the gun in the officer's direction. "Qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat."

Summerland v. Livingston, 2007 WL 2426463 (C.A. 6 Mich.)

At approximately 6:30 p.m., officers arrived at the home of an emotionally disturbed individual who had placed a large sign in his front yard that read "no police, you'll be shot." Ryan Smith was ordered out of his home but refused yelling at the officers to stay out of his yard. During phone contact he indicated that he was a Vietnam Vet, that nobody appreciated him and that two weeks prior deputies had beaten him up while taking him to the hospital for psychiatric treatment because he wanted to die. Officers convinced him to throw his psychiatrist's business card out the window. A short time later he threw his cell phone out the window and after that appeared in the window with what looked to be a gun.

At about 7:30, he emerged from the mobile home with what appeared to be a hand gun. Following some attempts at having him drop what he was holding, he began running with what one witness thought was a gun, but the officers testified was an axe in his right hand, he was then shot by two officers who approached finding a shovel, a metal L shaped bracket and a plastic framing square near his body. He died at the scene.

Plaintiff's central claims were as follows:

1) Ryan Smith was simply running away from another deputy when he turned the corner near the shed and was shot by the officers. The Court found that assuming this was true, there was nevertheless probable cause to believe that Ryan Smith posed a serious physical threat to the officers justifying deadly force.

2) The deputies were respectively 23.8 feet and 35 feet away from Ryan Smith at the time of the shooting. The Court determined that the deputies had knowledge of the sign, believed he had brandished an object which appeared to be a shotgun and began charging at them in the dark. Ryan Smith, therefore, forced the deputies to make a split-second judgment which was reasonable under the circumstances.

3) Ryan Smith had committed no crime. Even if the officers had no justifiable reason to arrest Ryan Smith, that would not give him a free pass to threaten the deputies with serious physical harm.

4) Ryan Smith's diminished capacity should have been taken into account when assessing the amount of force exerted. Although some cases have held that where it is or should be apparent that the individual involved is emotionally disturbed, that is a factor that must be considered in determining the reasonableness of use of force, those cases involved mentally disturbed individuals who were unarmed. Ryan Smith's diminished capacity did not make him any less of a serious threat to the deputies.

5) Ryan Smith was shot without warning that deadly force would be used and he was given no time to comply with the "stop" order. The Court responded that Ryan Smith was charging directly at the officers who yelled, "Stop, drop the weapon" with their guns pointed in his direction thereby giving Ryan Smith a definite warning of the probable result.

Estate of Meadours v. Ermel, 483 F.3d 417 (5th Cir. 2007)

Four officers confronted an emotionally disturbed plaintiff who was 6'2" tall and weighed 203 lbs., holding a 10 ¾" screwdriver. They decided that they should try to control him before allowing EMS personnel to approach. The officers radioed Sergeant Ermel, who was in the front yard, to bring a bean bag shot gun. He fired one shot into plaintiff's upper thigh causing him to run and jump over a fence into a dog pen and climb on top of the dog house. He fired a second shot with no result and then a third which knocked Meadours from the dog house. While Meadours was running toward an officer with the screwdriver, he was shot at 23 times, being struck 14 times within a few seconds.

The Appellate Court found that the District Court erred in analyzing the officer's actions collectively. The Court ruled that merely because they were acting in unison does not mean that their actions should not be considered separately.

The Court denied the officers qualified immunity finding there was an issue of fact and therefore, they did not have jurisdiction to consider the interlocutory appeal. The issue was, the plaintiffs claim, that it was not a third bean bag that hit the plaintiff, but a gun shot, based on an expert's testimony given the trajectory of one of the bullet wounds.

In a footnote the court mentioned that Meadours was not a criminal suspect. Although they had not considered qualified immunity in the context of killing a mentally ill individual, they recognized that the 9th Circuit held, "the governmental interest in using deadly force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, or the mentally ill individual." Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001). They also noted the City's policy for using force against mentally ill individuals states that, "if an officer must control and restrain a mentally ill person, he shall use the least amount of force."

Sanders v. City of Minneapolis, 474 F.3d 523 (8th Cir. 2007)

Sanders, who was bipolar, attempted to drive over officers who shot and killed him. The court first found that the use of deadly force was objectively reasonable where the officers were forced to make split second decisions in a situation where they reasonably believed that they or others were being subjected to the risk of serious physical injury or death.

Because the law requires admissible evidence to rebut summary judgment, the court properly disregarded an unsworn statement by a witness who was 150 feet from the action and his view was blocked by squad cars. These statements constituted double hearsay.

The fact that Alfred might have been experiencing a bi-polar episode did not change the fact that he posed a risk of deadly threat to the officers. Plaintiff argued that had the City properly trained its officers on how to approach individuals with mental illness, the situation would not have escalated to the point requiring deadly force. The court ruled that it was not the City's failure to train the officer, but Alfred's attempt to run them over which precipitated the shooting.

The Court affirmed the decision to award $4,500.00 in sanctions as the plaintiff failed to withdraw their expert whose curriculum vitae was based on misrepresentations and falsehoods, and they were forced to incur $40,000.00 in costs to challenge the expert.

Ramirez v. Knoulton, 542 F.3d 124 (5th Cir. 2008)

Officers were dispatched to stop Ramirez, who they were told was suicidal and armed. Officers activated their overhead lights and their video camera, stopping Ramirez after a short distance. Ramirez, upon instruction, got out of his car after approximately one minute. At first the officers did not recognize what he had in his hand, and continually ordered him to raise his hands. Eventually they saw that he had

a gun in his right hand. He refused to drop the gun, briefly put his hands on his hips and brought the hands together in front of his waist at which point Knoulton fired a single round from his AR15 rifle hitting Ramirez in the face, seriously wounding him.

The trial judge denied qualified immunity determining that although the facts were not disputed, the officer's use of force may have been objectively unreasonable because Ramirez did not raise his weapon, discharge the weapon or even point it at the officers. The Court noted that Ramirez was stopped in an area where no others were around and that the officer had summoned a crisis negotiator, but shot Ramirez before the negotiator could speak to him to convince him to surrender. He also noted that there was no indication that the officers first considered using non-lethal force and the officers shot Ramirez less than two minutes after the stop and about ten seconds after he stepped out of the vehicle.

The Appellate Court determined that the officers were in fact entitled to qualified immunity. The finding of the judge that Ramirez made no threatening gestures toward the officers failed to consider the reasonable belief of an officer at the scene. As to the failure to consider the use of non-lethal force or employ a crisis negotiator, they noted, "a creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." Quoting United States v. Sharpe, 470 U.S. 675 (1985). Finally, the Judge's focus on the timing ignored that police officers must make decisions in situations that are "intense, uncertain, and rapidly evolving." Ramirez brought his hands together in what could reasonably be interpreted as a threatening gesture as if preparing to aim his weapon. In addition, the officers knew that Ramirez was armed, emotionally unstable and potentially suicidal supporting the officer's reasonable fear for their lives and that of their fellow officers.

Graves v. Zachary, 277 Fed.Appx. 344 (5th Cir. 2008)

After 3 o'clock in the morning Beseck called 911 complaining that her boyfriend was outside her door threatening to shoot himself and her with what looked like a small machine gun. Officers Zachary, Lloyd, Newell and Wilson, upon climbing the stairs to the apartment, ordered Graves to either raise his hands or to let them see his hands. Graves showed his hands while pressing the gun to his temple. Graves said that he told Zachary that he just wanted to die. Zachary, in his statement, did not report hearing anything, but Newell reported that he heard Graves say something. That fact and other material facts were disputed.

The two important issues in dispute are whether Zachary ordered Graves to drop the gun and whether he was incapacitated before the second shot was fired. What was undisputed was that Graves never verbally threatened the officers, never pointed the gun at them, and did not move in an aggressive manner. He sat still with his eyes closed, his hands up and put the gun to his head when Zachary fired.

The essential issue was whether the second shot which struck him in the chest was necessary or whether Graves appeared to be in any condition to fire his weapon. Graves and Lloyd said that he did not slump down and appeared to be in a condition to fire his weapon. Graves claimed that he was down and

incapacitated. None of the other officers' statements corroborate Graves' condition between the first and the second shots.

The second question was whether Zachary ordered Graves to drop the weapon. Zachary claims he did while Graves claimed he did not. Beseck, the girlfriend, claims she just heard yelling and Wilson the officer, furthest away, claims that he heard Graves issue the order. The other officers did not mention that they heard Zachary order Graves to drop the weapon.

Zachary's argument that the fact that Graves possessed the gun posed a sufficient threat justifying the firing of both shots. The Court found that although police have good reason to be wary of a suspect who has just been shot, merely having a gun in one's hand did not mean, per se, that one is dangerous.

Note: This case concerned the denial of qualified immunity on summary judgment. The Court's finding of disputed issues of fact relied substantially on the various statements of the officers. Although these statements were not necessarily inconsistent they lacked factual support on crucial issues. Upon further inquiry the officers may flesh out their statements, however, undoubtedly plaintiff's counsel will dispute their later testimony based on their failure to report on such crucial issues in their statements.

Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008)

Drug task force officers decided to stop Kirby in his vehicle because he was known to be a violent, paranoid individual who outfitted his residence with surveillance equipment and, according to informants, opened the door to his home only with a pointed gun and made visitors undress to prove that they were not wearing police wires. After stopping Kirby, the officers claimed that he moved his vehicle in a manner posing a risk of serious physical injury or death resulting in their fatally shooting Kirby. The officers' version of the events was supported by a motorist who had pulled up and parked behind Moore, another motorist at the scene of the event. The district court denied the officer's motion for summary judgment based on Moore's account which supported plaintiff's claim that none of the officers was being subjected to the risk of serious physical injury or death. According to plaintiff's version of events, Kirby's vehicle was moving slowly in a nonaggressive manner trying to maneuver so as to avoid hitting any persons or vehicles. Further, according to the motorist's statement one of the officers placed himself in potential danger by moving toward the rolling vehicle rather than fleeing or simply remaining where he was. The court cited prior decisions indicating that where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive. The Court found that the Supreme Court decision of Brosseau v. Haugen was inapplicable as in that case Haugen started his vehicle and began to drive in reverse toward parked cars containing occupants, thereby creating a substantial risk of danger.

ADA

Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000)

Police received a 911 call requesting transport of Hainze who allegedly was suicidal, under the influence of alcohol and antidepressants, carrying a knife and threatening to commit suicide. Officers arrived at a convenience store and observed Hainze holding a knife and not wearing shoes despite the cold temperature. The officer drew his weapon and ordered Hainze away from a pickup truck he was standing next to. Hainze responded with profanities and began walking toward the officer. Two other officers also drew their weapons. Officer Allison twice ordered Hainze to stop, but he continued to advance within 4–6 feet at which point Allison fired two shots into his chest. Approximately 20 seconds elapsed from the time the officers arrived till the shooting.

Hainze was convicted of aggravated assault. In addition to claims against the officers he also brought official capacity claims for failing to adopt or enforce policies to adequately handle individuals who are mentally ill in a crisis situations, as well as failure to establish a policy or train deputies to protect the well being of mentally ill individuals. Hainze alleged that, "Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use less than deadly force, and never attempted to create any opportunities for the foregoing to occur." The court rejected these allegations.

> …"(We hold that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officer's to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.)"

See Also, Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999).

Bates v. Chesterfield County, Virginia, 216 F.3d 367 (4th Cir 2000)

Plaintiff, an autistic teenager, was stopped by an officer who had reasonable suspicion to believe that he may have trespassed and might have been intoxicated on alcohol or drugs. When the plaintiff physically resisted, the officers attempted to control him and called for assistance. During the subsequent struggle plaintiff bit, spit at, kicked and scratched the officers.

The court found that the initial stop was based on adequate reasonable suspicion and that the use of force from start to finish was reasonable under the *Graham* analysis. Plaintiff assaulted the police officers, was an immediate threat to their safety and was actively resisting arrest. Although plaintiff was fiercely resisting the officers, they did not pepper spray or use their batons against him and he suffered minimal injury.

Plaintiff also claimed that the officers' violated ADA, in that they should have been aware of his autism and should have taken this condition into account when interacting with him. The court refused to undertake an independent ADA inquiry following their 4th Amendment analysis that the force used by the officers was reasonable in light of all the circumstances including their use of force after they learned of the plaintiff's autism. "Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual."

FALSE ARREST AND MALICIOUS PROSECUTION

Brown v City of Huntsville, Ala., 608 F.3d 724 (11th Cir. 2010)

Brown claimed that she was falsely arrested by officers who claimed she was playing loud music in her car in a Walmart parking lot and had to be ordered three times to turn the music down. The court found that the defendant officers were entitled to qualified immunity as they had arguable probable cause to believe that she had violated the disorderly conduct statute which prohibits unreasonable noise. The court found that the officers were not entitled to qualified immunity regarding the plaintiff's excessive use of force complaint. Plaintiff alleged that the officers pepper-sprayed her, pulled her out of the car and threw her to the ground. The court found that "an objectively reasonable police officer would have known it was unlawful to use pepper spray and other force against arrestee who was suspected only of a minor offense (playing music too loud), was not threatening the officer or the public, was not attempting to flee, and had communicated her willingness to be arrested." At 739 (The officers dispute these facts.)

The court cited a number of prior cases with comments favorable to the use of pepper spray including; "pepper spray is a permissible way to disable a suspect without causing permanent physical injury." "Indeed, pepper spray is a very reasonable alternative to escalating a physical struggle with an arrestee." "Given that pepper spray ordinarily causes only temporary discomfort, it may be reasonably employed against potentially violent suspects, especially those suspects who have already assaulted another person and remain armed."

Brown told a friend, Sonia, to video what the officers were doing to her. Prior to this Brown claims she told the officer she was recording his actions on her mobile phone. Her phone was damaged during the altercation and allegedly not returned to her. Sonia recorded three 10 second video clips on his mobile phone. He was approached by an officer who requested his phone but Sonia refused. The officer then arrested Sonia and took the cell phone. It was returned several days later but two of the clips had been erased. Sonia's lawsuit for false arrest was dismissed as the claims were erroneously brought

against, NOT the actual arresting officer but the officers who arrested Brown. The court assumed for the purposes of this case that the arrest of Sonia was unconstitutional.

The court also discussed the duty of officers present to intervene, however, found that the use of force against Brown took place so quickly that the officers would not have had a realistic opportunity to intervene. Supervisory liability and liability issues concerning officers who are present but did not participate was also discussed.

Manganiello v City of New York, 612 F.3d 149 (2nd Cir. 2010)

Acosta and Manganiello were special police in a condominium complex in the Bronx. On February 12, 2001, Acosta was fatally shot and the plaintiff, Manganiello, was arrested and prosecuted for the offense. A jury awarded plaintiff $1,426,261 in compensatory damages, $75,000 in punitive damages and $215,037 in attorneys' fees. The Court of Appeals upheld the judgment. The court found that an indictment by a grand jury creates a presumption of probable cause that may be rebutted only by evidence that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.

The court found that the defendant detective misrepresented that the plaintiff had not been seen leaving the building when, in fact, two NYPD officers reported that they saw him leave the building prior to the shooting. The detectives report also indicated that the plaintiff told him he knew of no one with any problems with Acosta. In fact, the plaintiff told him that Acosta had been assaulted or threatened by members of the bloods or other local thug. There was no record that the detectives followed up on this information. The record also indicated that the defendant made only superficial inquiries of a taxi passenger who was overheard telling someone he had been present at the shooting and had seen the shooter. There was also evidence presented to the jury that the defendant promoted a witness to the ADA despite knowing that the witness had already lied to him about the plaintiff.

"In sum, looking at the evidence as a whole, the jury could permissibly infer that Agostini was determined simply to make a case against Manganiello, and that in order to do so Agostini refrained from making inquiry into other possible suspects, ignored evidence that was inconsistent with his belief that Manganiello was guilty, declined to inform the ADA of, or to document, any exculpatory evidence or inconsistencies in the statements of witnesses who agreed to inculpate Manganiello, secured one statement inculpating Manganiello by agreeing not to disclose the witnesses known criminal activities to the proper authorities, and included in some of Agostini's own reports supposedly factual statements adverse to Manganiello that were contradicted by persons having firsthand knowledge of the facts."

In short, Agostini's investigation was myopic included false statements and he appeared to have coerced an inculpatory statement from an unwilling person. In light of the four-year period from the time of the arrest to acquittal, his loss of a job and profession and his subsequent psychological problems the Court of Appeals found the amount of the award to be reasonable.

Portis v. City of Chicago, Ill. 613 F.3d 702 (7th Cir. 2010)

From May 2000 through May 2004 the Chicago police made approximately 1,000,000 arrests. Approximately 36,000 of these arrests were for fine only offenses. A class action was brought claiming that the Chicago police held individuals in custody for the fine only offenses for an unreasonable amount of time. The District Court created a two-hour rule for such detentions. The appellate court reversed this decision basing it on the reasonableness case-by-case analysis discussed in County of Riverside v. McLaughlin 500 U.S. 44 (1991). The court noted that even if the state or city had adopted a time limit between arrest and release on bond, the enforcement of these rules would be a matter of state law and the fourth amendment does not create remedies for violations of state or local law.

Harrington v. City of Nashua, 610 F.3d 24 (1st Cir. 2010)

Harrington had a sexual encounter with a coworker. Over two months later her fiancé, finding out about the incident in which Harrington claimed she was raped, urged her to make a complaint. Unbeknownst to her the coworker had complained to the police that he had received a menacing telephone call accusing him of the rape. Plaintiff arrived at the police station at approximately 9:30 PM and was interviewed for more than an hour by police. She thereafter was interviewed by a detective who she alleges refused her requests to go home and the presence of a female victim/witness advocate. She also claims he lied to her saying that the coworker had videotaped the sexual encounter and that officers in another room were watching the video. The interrogation lasted until 12:22 AM. At the end of the interview she waved her Miranda rights and retracted her allegations of rape. She was arrested for filing a false report and released at 2 AM. Her claim of false imprisonment was dismissed as she failed to file the claim within the three-year statute of limitations. The court discusses a number of claims plaintiff attempted to make to exempt herself from the statute of limitations.

With regard to the malicious prosecution claim, the plaintiff points to the fact that the defendant admitted in the answer to the complaint that the arrest was pursuant to his swearing out and filing of the complaint. Although the pleading admitting the fact alleged is usually treated as a binding judicial admission, in this case the admission was not clear and was contradicted by the undisputed fact that the arrest was without a warrant. Because an arrest without warrant is made before the issuance of any legal process, such arrest does not form part of the fourth amendment seizure upon which a 1983 malicious prosecution claim can be premised. Because the plaintiff did not suffer any post-arraignment deprivation of liberty her malicious prosecution claim failed.

Williams v. Sirmons, 307 Fed.Appx. 352 (11th Cir. 2009)

Plaintiff was stopped by Deputy Sirmons after running a red light on her way to the hospital because she was pregnant and bleeding. Officer Sirmons ignored her explanation, took her license and other paperwork back to his cruiser to write a citation at which point the plaintiff sped away driving to the hospital emergency room bay. As she got out of her car, Sirmons grabbed her arm and told her she was going to jail. She broke away, ran to the emergency room door where she yelled, "help! I am pregnant and bleeding." Sirmons wrapped his arms around her and brought her to the ground after which Deputy

Mills placed his knee on top of Williams and handcuffed her. At a patrol car a nurse examined her and she was taken into the hospital where she staved off premature labor and was released ten days later.

Although Sirmons had probable cause to arrest her, the Court found that when officers take the totality of the circumstances into consideration, they should have known that the plaintiff was not acting willfully to flee, but rather was acting under necessity. A reasonable officer would have known that Williams flight was justified by the affirmative defense of necessity and duress and that the deputies lacked arguable, much less, actual probable cause, for the arrest.

The Court considered this use of force *de minimis* and noted that even *de minimis* use of force may amount to a constitutional violation if the plaintiff is particularly vulnerable and suffers serious physical injury. In this case, Williams was miraculously not harmed. Although the Court found that the deputy's behavior was reprehensible, they concluded that summary judgment was appropriate on the use of force claim.

White v. McKinley, 605 F.3d 525 (8th 2010)

Tina accused the plaintiff, her ex-husband, of sexually assaulting his 12 year old stepdaughter. The defendant, Richard McKinley, was assigned the investigation and although it was disputed, claims that on March 25, 1988, his phone call to Tina was their first contact. During the investigation he reviewed the daughter's diary but did not take it as evidence or report its existence in his investigative report. In April, Richard developed strong romantic affection for Tina and asked her out. At this time the prosecutor had already filed charges and Richard remained a lead investigator. In May the relationship became sexual and Richard told the police chief who urged him to stop the affair and tell the prosecutor. Richard told the prosecutor only that he met Tina for a single date. The prosecutor did not disclose the information with regard to this "date" to the defense. In the fall of 1998, the prosecutor learned of the ongoing relationship when Tina and Richard announced their engagement. Prior to his January 1999 deposition, Richard met with the prosecutor who told him to answer questions honestly and said he would cough to signal when Richard needed to disclose the affair. When Richard was asked if he had any personal interest in the case, he stated that he did not and the prosecutor did not signal him. Consequently, the plaintiff never learned of the affair before his first criminal trial. A few months after White's conviction, Tina moved in with Richard and married him in July of 2000. This revelation led to a reversal of the conviction, a second trial which ended deadlocked and a third trial which ended in acquittal.

The plaintiffs "BRADY" allegations focused on the defendants' failure to disclose the diary containing potentially exculpatory evidence and for failing to disclose his intimate relationship with the ex-wife of the accused. The court concluded that his failure to preserve the evidence constituted a denial of the plaintiff's right to due process. The court agreed with the district judge who found that the defendant's actions met the bad faith standard as he deliberately steered the investigation to benefit his love interest.

The Court held that "no reasonable police officer in Richard's shoes could have believed that he could deliberately misrepresent the nature and length of his relationship with Tina, or that he could deliberately fail to preserve or disclose a child victim's diary containing potentially exculpatory information."

The Court also found sufficient evidence to support the conspiracy claim against Richard and Tina finding sufficient facts to support the plaintiff's claim that Tina and Richard reached a meeting of the minds to withhold exculpatory information from the prosecutors and the plaintiff.

At trial the jury found in favor of White assessing actual damages of 14 million dollars and punitive damages against both McKinley and Tina of one million dollars each. After trial McKinley argued that he had no obligation to preserve exculpatory evidence if he told the prosecutor. The 8th Circuit rejected this opinion and furthermore found there was ample evidence that McKinley did not truthfully tell the prosecutor about the evidence he claims to have revealed. He also claimed the award of punitive damages violated his due process rights in light of his net worth of only $31,000.00. The Court noted that the most important factors to consider in a due process analysis include the degree of reprehensibility of the defendant's conduct and the ratio of punitive damages to the actual harm inflicted to the plaintiff. The Court found that the award of punitive damages was not plain error.

SEARCH & SEIZURE

Dickerson v. Napolitano, 604 F.3d 732 (2d Cir. 2010)

Operation Stinking Badges was designed to interdict fraudulent documents, police parking placards, and law enforcement style badges that may be used to gain unauthorized access to federal facilities. Three plaintiffs were arrested for attempting to enter a federal building in New York carrying badges that resembled shields carried by the New York City police. One badge contained the words" New Jersey Firearms Academy Chief", another was a City Transit Authority badge that the plaintiff was no longer authorized to carry, and the third contained the words Security Agent but was similar to a police badge. These badges were not used to gain access to the building. The arrests were challenged claiming that the statute and in particular the city ordinance were unconstitutional as overly broad and vague. These claims were rejected. The defendants submitted substantial evidence that replica badges made to look like NYPD shields were used to commit crimes and gain unauthorized access to federal facilities.

The warrantless search of the defendants was found to be lawful under the "special needs exception." The court found no case law for the proposition that police cannot conduct a limited search upon entry to a public building for the purpose of identifying fake badges, much less authority for the proposition that entry searches must be limited to searches for weapons. The evidence presented established that the searches were a legitimate means of ensuring the safety of federal buildings because objects that resemble badges, even if not displayed, present a significant security risk in the event the bearer gains access to the building.

The court identified four tests to determine the reasonableness of the special needs exception. (1) the weight and immediacy of the government interest, (2) the nature of the privacy interest that is

compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest. In applying these tests the court found the government interest in protecting federal buildings is substantial; the search in question is minimally intrusive, involving little more than passage through a metal detector; and the searches appear to have been, to some extent, effective in locating bogus badges. The only factor weighing in the plaintiff's favor was their privacy interest in not being screened upon entering a government building. "While we recognize the plaintiffs do maintain a privacy interest in not being screened upon entrance to a building, this interest has routinely been found to be reasonably overcome in comparable searches evaluated and upheld by this and other courts. McWade v. Kelly, 460 F.3d 260 (2d Cir. 2006)

Coffin v. Brandau, 614 F. 3d 1240 (11th Cir. 2010)

Deputy Lutz went to Coffin's home to serve an order of temporary injunction against repeat of violence which required Coffin to surrender any firearms or ammunition. The garage door and front bay window curtains were open allowing him to see inside the garage and home. He approached the house in full uniform, rang the doorbell and Mrs. Coffin told him her husband was in the bathroom. After waiting a few minutes he stood in front of the bay window and waved the paperwork over his head to get Mrs. Coffin's attention. After hearing a man say, "What did he want?", and hearing Mrs. Coffin scream at him to get off the property he called for assistance. Deputy Stacy Brandau arrived, knocked on the door and after receiving no answer stood near the open garage door. When Mrs. Coffin pushed the automatic button to shut the door Brandau stepped into the garage breaking the electronic eye beam causing the door to stay open. She then went to the entry door leading from the garage to the house. Mrs. Coffin opened the entry door steps in the garage and yelled at the deputies to leave her property. When she told them Mr. Coffin was not home they told her she was going to jail and attempted to handcuff her. Mr. Coffin came into the garage, hit Brandau and then attempted to pull his wife inside the house. They all entered the kitchen were a physical altercation took place.

Plaintiff sued claiming an illegal entry into their garage. The district court held that the deputy's warrantless entry into the coffins garage constituted a fourth amendment violation. However, the court found that the law was not clearly established at the time of the incident and therefore, the deputies were entitled to qualified immunity. The appellate court agreed finding that it was not clearly established that an entry of a garage even when attached to a home is the same as an entry of the home. Applying the four Dunn factors the court found it was not clear that the garage constituted curtilage. The garage was proximate to the home, however, no steps were taken to protect the interior of the garage from observation of people passing by and there was no evidence that the garage was being used for intimate purposes.

Junkert v. Massey, 610 F.3d 364 (7th Cir. 2010)

In Junkert the court evaluated the sufficiency of probable cause in a warrant to search the home of an attorney who represented a burglar and drug dealer. After finding that the warrant barely had sufficient probable cause the court noted that "law enforcement officials should be cautious when permitted to search places where information protected by recognized privileges may be stored, such as the offices of

lawyers or medical practitioners, so as not to invade those privileges in an unauthorized manner. It is equally as important that when a magistrate is asked to issue a warrant authorizing the search of such place, the judicial authority should be even more cautious, if possible, to make sure that any warrant issued is carefully drawn, so as to not allow the police to blithely rummage through privileged information unrelated to the subject of the search.

Hanson v. Dane County, Wis., 608 F.3d 335 (7th Cir. 2010)

The dispatcher returned a 911 call but received no answer. Officers entered the home without permission finding the plaintiff, his wife and two daughters ages 15 and 13. After learning that there had been a heated argument and the plaintiff had bumped his wife, who dialed 911, the plaintiff was arrested for domestic battery. Plaintiff claimed the police officers violated the family's fourth amendment rights by entering the home without probable cause and refusing to leave when his wife asked him to. The court found that a 911 call provides probable cause for entry if a return call goes unanswered. An unanswered emergency call back may imply that the caller is unable to pick up the phone because of injury, illness, or threat of violence. Any of these possibilities supplies probable cause and an exigent circumstance that dispenses with the need for war.

Police officers requested to leave under such circumstances are not required to discontinue their investigation and the fourth amendment does not contain a least restrictive alternative rule. In this case the wife told the officers she did not remember why she called. Her obvious false statements plus her nervous demeanor led police to think that she had been threatened or feared retaliation should she give honest answers. The police acted reasonably by continuing their investigation and questioning the husband and wife out of each other's presence. Given the husband and wife's lack of cooperation it was reasonable for the officers to question the children out of the presence of their parents. Although police may not act arbitrarily when questioning children, it was reasonable in this case to attempt to find out what had occurred. The fact that the questioning took place out of the parents' presence is unavailing. Privately questioning a witness reduces the risk the suspect would induce a witness to give untruthful answers. "Whether the police should respect parents' objections to questioning their children is a matter for wise police practice, and legislative decision, rather than constitutional – tort litigation under section 1983."

Binay v. Battendorf, 601 F.3d 640 (6th Cir. 2010)

After receiving an anonymous tip of narcotics trafficking in plaintiff's apartment a narcotics canine on December 13th and January 9th indicated positive for narcotics outside of plaintiff's apartment door. The operation plan for executing the search warrant did not anticipate the presence of firearms. Plaintiff's claim that at approximately 8:20 they heard a knock at the door before walking the 7 to 10 steps to answer it. Before getting to the door it was knocked down and six masked men entered the home. The defendants brandished weapons, instructed them not to look at the officers and handcuffed them. Mr. and Mrs. Binay and their son alleged that they were held in handcuffs and at gunpoint for approximately an hour. No narcotics were found. Mr. Binay testified that after being handcuffed he asked what was going on but "they just ignored us".

The court found that the officers were not entitled to qualified immunity as issues of fact remained regarding the amount of force used during the course of the search. Plaintiffs had no criminal record, cooperated, posed no immediate threat and did not resist or attempt to flee. Questions remain as to whether holding the plaintiffs at gunpoint or keeping them in handcuffs was objectively reasonable. Adding to the environment of intimidation and terror was the allegation that the officers wore masks.

The Court noted that each defendant's liability must be assessed individually based on their own actions. To hold the officers liable, the plaintiff must prove that the officer (1) actively participated; (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force. As a general rule, mere presence at the scene of a search without a showing of direct responsibility for the action will not subject the officer to liability.

EXCESSIVE USE OF FORCE

Excessive Force

Miller v. Sanilac County, 606 F.3d 240 (6th Cir. 2010)

Officer's arrest and use of force during the course of a motor vehicle violation raises several common issues. First, the officer claimed that the plaintiff failed a field sobriety test and smelled of alcohol, yet tests showed he had no alcohol or drugs in his system. The Court found questions of fact as the plaintiff could claim that the officer was dishonest. Officers must be honest and objective in performing field sobriety tests and not use typical pat phrases. Of course, in such cases, objective evidence outside of the field sobriety tests indicating possible intoxication should be carefully documented.

Plaintiff claimed that the handcuffs were placed on him too tightly. In order to bring an excessive use of force case for handcuffing, generally, the plaintiff must show that he complained that the cuffs were too tight, that the officer ignored his complaint and that he suffered some injury as a result of the officer's inactions in refusing to loosen the handcuffs. Finally, the plaintiff complained that the officer spun him around, threw him against the cruiser, and kicked his legs out. While this is recognized as a not too uncommon way of placing arrestees in a position for a pat down, Officer would be served not to be too forceful in placing one in such a position in this manner when the arrestee is nonviolent, posing no immediate safety threat to the officer and is not attempting to escape or actively resist.

Aczel v. Labonia, 584 F.3d 52 (2d Cir. 2009)

A jury found that the defendant officer used excessive force and that $12,078.00in damages were proximately caused by the defendant officer. The jury also found that the officer was entitled to qualified immunity. We will not discuss the procedural history, however, the end result was that the district court found for the officer based on the unanimous finding by the jury that the officer was entitled to qualified immunity. The plaintiff appealed claiming the verdict was inconsistent. The court rejected this claim finding that the jury's answer represented a finding of fact as to the damages caused by the officer's use of force but it was not an award of damages. The fact that the officer was found to have used excessive

force does not mean that under the circumstances the defendant could not have objectively believed that his actions were justified.

Guy v. City of San Diego, 608 F.3d 582 (9th Cir. 2010)

The defendant officers claimed that the plaintiff was approached from the front by an officer who yelled police before Guy threw a punch which missed and was pulled to the ground and pepper sprayed while he continued to struggle. Guy claimed he was approached from the back, did not know the person behind him was an officer when he threw the punch and that as his sweatshirt was pulled he could not see that it was a police officer before he was thrown to the ground and handcuffed. While being led across the street he claims he said "Why don't you relax a little bit there, tough guy?" He was again thrown to the ground and pepper sprayed a second time. Plaintiff claimed that the handcuffs were tight and causing painful welts, he had torn skin from his shoulder and face and he was injured when the arresting officer grabbed his thumb. He also claims to suffer excruciating pain from the use of pepper spray.

The jury returned a verdict in favor of the plaintiff and awarded one dollar in nominal damages. The court found that the verdict was not inconsistent as the jury could have found that the injuries received were caused by the officers' reasonable use of force and not necessarily the actions which constituted excessive force. Regarding the issue of attorneys fees, which were not awarded by the District Court, the appellate court determined that on remand there should be a fee award as the jury verdict prompted a tangible benefit by encouraging the City of San Diego to ensure that all of its police officers are well-trained to avoid the use of excessive force, even when they confront a person whose conduct has generated the need for police assistance.

Gray ex rel. Alexander v. Bostic, 613 F.3d 1035 (11th Cir. 2010)

This case was first filed in 2003 and has been to the appellate court four times. The incident involved a school resource officer who took a nine-year-old fourth-grade student into the hallway after she failed to finish an assigned set of jumping jacks and made a physical threat toward her gym teacher. The officer pulled her arms behind her back and handcuffed her. The jury awarded Gray one dollar in damages and the court following the third appellate court decision awarded attorneys fees and expenses in the amount of $70,532.93. The defendant argued, citing Farrar, that when the plaintiff recovers only nominal damages because of their failure to prove an essential element of their claim for monetary relief the only reasonable fee is usually no fee at all. The plaintiff argues that the case was significant in that it sent a clear and unmistakable signal that society will not tolerate an authority figure violating a child's constitutional rights. The plaintiff also claimed that 64 decisions had cited the Gray II. The court discounted this argument as only two of the cases were relevant to the issue regarding alleged excessive force against a child. Moretta v. Abbott, 280 Fed. Appx. 823 (11th Cir. 2008) cited Gray in support of the unlawfulness of tasering a six-year-old boy who was passively standing in the corner of the elementary school principal's office. The other case was an Indiana state case which cited Gray for the proposition that a security or school officer who compels or restrains a student's movement seizes the student for fourth amendment purposes. The court discussed the reasonableness of an award of attorney fees and concluded that on remand the district court should decide whether the plaintiff is entitled to an award of

attorney's fees at all and if so whether she is entitled to an enhancement for the delay in the payment of expenses and fees and, if so, how much.

McKenna v. Edgell, 617 F.3d 432 (6th Cir. 2010)

Officers appeal the jury award to McKenna for $6000 in medical bills and $275,000 for pain-and-suffering later reduced by remittitur to $10,000. The court found the following facts. "The officers arrived at the McKenna residence in response to a 911 call reporting that McKenna might be having a seizure or choking. One of the officers asked Alexandra, McKenna's 14-year-old daughter, whether her father was using drugs, whether he had assaulted her, and whether anything like this had ever happened before. The appropriate response to a medical seizure was not to restrain the subject rather to clear the area and let the episode run its course. Instead of following the procedure, the officers handled McKenna, repeatedly attempted to get him to put on his pants, and tried to force him to rise in the face of his request that they stop. Completely unprovoked by any aggressive or dangerous behavior, they then rolled him over, pinned to my stomach with their knees, and handcuffed his arms behind his back and his ankles. After McKenna had been taken away to the hospital, the officers searched a dresser drawer in his bedroom and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby teeth collection. One of the officers also ran a check on McKenna's license plate.

The officers argued that they should be entitled to qualified immunity relying on prior case law holding that there are no cases applying the fourth amendment to paramedics coming to the aid of an unconscious individual as a result of a 911 call by a family member. In the prior case the court noted that improper medical treatment by a government employee, standing alone, does not violate the fourth or 14th amendment. In this case, based on the above facts, the court found that the officers' actions were closer to that of a law enforcement response than a medical response. Requiring him to put on his pants, inquiring about domestic violence, handcuffing him without any signs of violence, conducting the search in the above manner and running a check of McKenna's license plate was found to be more consistent with a law enforcement response. Therefore, the officers were not entitled to qualified immunity.

Griffin v. Hardrick, 604 F.3d 949 (6th Cir. 2010)

A security camera in booking caught a female arrestee being uncooperative and pulling away from an officer who grabbed her arm. The officer conducted a leg sweep which resulted in the plaintiff falling to the floor and another officer falling on top of her breaking her fibia. Applying Scott, the court determined that a court could observe the video to determine if the officer's conduct was objectively reasonably. The court further found that the plaintiff's loud and lengthy animated conversation gave the officer a reason to believe that force would be necessary to control her. The officer's initial calm demeanor suggested that he was not acting wantonly to inflict pain on her but was attempting to bring her under control.

The expert opinion would be permitted at the summary judgment stage so long as the opinion was not a conclusory assertion about the ultimate legal issues. The fact that the officer was acting according

to established procedure, in undertaking the leg sweep maneuver, in accordance with training, for the purpose of controlling the prisoner was allowable. The fact that the unfortunate accident of a separate officer falling on Griffin fracturing her leg did not support her Section 1983 claim. The plaintiff claimed that the officer said that she "was going to live in his hell" and that she was his "bitch" did not create a genuine of material fact.

Deadly Force

Brothers v. Akshar, 2010 WL 2649814

Officer Akshar testified that he shot Brothers when Brothers sat up and began to lower his weapon towards him and his fellow officer. Because the officer had probable cause to believe the plaintiff posed a significant threat of death or serious physical injury to him and his colleague, his decision to use deadly force was objectively reasonable. Plaintiff claimed that the district court abused its discretion in excluding his expert's testimony. Any error in excluding the expert testimony regarding police safety procedures was of no consequence because the majority of the testimony was not relevant to Brothers excessive use of force claim. Citing Salim v. Proulx, 93 F.3d 86 (2d Cir.1996) "The reasonableness inquiry depends only upon the officers knowledge circumstances immediately prior to and at the moment he made the split second decision to employ deadly force."

Thomas v. Durastanti, 607 F.3d 655 (10th Cir. 2010)

Was Drawing of Weapon by Officer Reasonable?

A trooper stopped a vehicle for driving 45 to 70 in a 30 M.P.H. zone in a convenience store lot. The vehicle's registration was not on file, giving the appearance that the vehicle may be stolen and it was coming from a high crime area. Under these circumstances it was reasonable for the trooper to believe that officer safety required the display of and access to weapons.

Shooting at Occupants in Vehicle Driving Away:

After the vehicle drove away from the trooper, an ATF officer fired a couple of shots as the vehicle advanced toward him. The Court found that the agent's reasonable perceptions, even if they were mistaken, established the existence of exigent circumstances. The Court found the second volley of shots also to be reasonable, even though the vehicle was driving away. These shots were fired seconds after the agent was struck, propelled over the hood of the car and was disoriented. The Court stated that given such a disorienting experience, he had no assurance that the threat posed by the Lincoln had passed; this was a split-second decision concerning the use of deadly force, under hardly ideal circumstances. Even if Agent Durastanti was mistaken, it was a reasonable mistake."

Penley v. Eslinger, 605 F.3d 843 (11th Cir. 2010)

Penley, a fifteen year old boy, brought a modified plastic air pistol that looked like a real weapon, to school. When his teacher learned that he was armed students fled from the classroom. Officer Maiorano took up a position approximately sixty-five feet away from a bathroom where Penley was

found. Penley was seen walking back and forth in the bathroom pointing his weapon at the officer and his own chin. When he pointed the gun directly at the officer, the officer hugged the wall to not get shot. A hostage negotiator arrived but was unsuccessful in convincing Penley to put down the gun. Lt. Weippert, a member of the SWAT team fired a single shot from a scoped semi-automatic rifle, hitting Penley in the head resulting in his death.

The Court affirmed the circuit court's summary judgment in favor of the officer. Applying Graham, the court found that bringing a firearm to school, threatening the lives of others and refusing to comply with officers' commands to drop the weapon are serious crimes. Penley's refusal to drop the weapon supported the conclusion that deadly force was reasonable. In viewing the facts from the perspective of a reasonable officer with the same information the court found that even if members of the public were not subjected to any injury, Weippert would have been justified in using deadly force because he had probable cause to believe that his own life was in peril.

Estate of Escobedo v. Bender, 600 F.3d 770 (7th Cir. 2010)

The Court found that the officers were not entitled to qualified immunity after using teargas and flash bangs and shooting an emotionally disturbed person resulting in his death. At 4:24 a.m., Escobedo called 911 reporting that he was armed with a gun, wanted to shoot himself and asked the dispatcher to contact his psychologist providing her with contact information. He said that he had no intention of harming anyone else including the police. Sergeant Taylor began speaking to Escobedo at 4:55 a.m. and after approximately 25 minutes called for the CRT and ERT teams. A negotiator took over the conversation at 5:42 a.m. during which Escobedo again repeated that he was suicidal and armed and asked to speak with his psychologist because he needed help and wanted medicine for his drug addiction. The sergeant in charge of CRT spoke with the psychologist but never invited him to the scene or asked him to assist. The psychologist indicated that he did not think that Escobedo had a history of using weapons or attempting suicide. It was decided that an entry into Escobedo's apartment would be made as there would be an increasing number of persons in the downtown area, near the apartment.

At 8:33 a.m. teargas rounds were fired through Escobedo's apartment and after ten minutes another set of rounds was fired. The negotiator and others had to leave the apartment building because the fumes became too heavy. Escobedo at that point tried to call the original officer's cell phone five times over an eleven minute period. Officer's breached the apartment door and deployed clear out canisters containing more teargas. They then deployed flash bangs and not finding anybody in the living room or kitchen, forced entry into the bedroom deploying more flash bangs. Escobedo was observed sitting on the floor of the closet with a gun pointing upside down to his head. When ordered to drop the gun, he began to lower it. Two officers fired their weapons resulting in Escobedo's death.

Plaintiff's expert testified that the use of force was premature and based on flawed priorities. Traffic could have been re-routed with minimal inconvenience and traffic concerns should not have played a role in the decision to use force. He also opined that using teargas twelve times the amount needed for incapacitation was clearly excessive.

The court explained that the two ways to find officers not entitled to qualified immunity are finding that officers were on notice that their actions would amount to a Constitutional violation because of closely analogous case law or that their acts amounted to a patently obvious Constitutional violation.

The court did not believe that the officers had a legitimate reason to conclude that the use of teargas and flash bang devices was acceptable. Escobedo was not posing an immediate threat to the officers or the public and the stand-off had lasted only three hours. The tactical decision makers did not have all of the relevant and critical information regarding the negotiations. Escobedo had not committed a crime and the only reason for his seizure was for a mental health watch. He did not have a violent history and although he may have posed some level of threat because he was armed and under the influence of drugs, he did not threaten to harm anyone but himself. Contributing to their opinion was the amount of teargas deployed and the use of flash bangs in the teargas filled room that was darkened to the point where they had no knowledge of the location of the person inside.

After citing closely analogous cases indicating that the use of teargas was unreasonable, the court discussed their concern over the overuse of flash bangs. The use of flash bang devices should be limited and is not appropriate in most cases. When flash bangs are used officers should look inside the area to ensure that no one will be injured and carry a fire extinguisher to extinguish any fires. Although flash bangs may be justified in some circumstances, for example when potentially violent people are believed to be in the premises, police cannot automatically use flash bangs when executing drug searches. The court quoted prior dicta, "the use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, and the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher."

Less Lethal

Mann v. Taser International, Inc., 588 F.3d 1291 (11th Cir. 2009)

At approximately 8:00 a.m. Melinda Fairbanks smoked methamphetamine with her husband John. Around 2:00 p.m. while unloading scrap metal at a family rental property, Melinda became agitated and delusional arguing with her husband. She entered a neighbor's home asserting that it belonged to her and called 911 claiming that the neighbors were in her home and had stolen things. She began ransacking causing extensive damage. Three officers arrived to find Melinda wandering in the backyard screaming about demons and devils stealing her treasure. One of the officers recognized her from a prior arrest and knew she was a methamphetamine user.

Upon attempting to handcuff, she became combative, screaming and kicking and attempting to head butt the deputies. Her sister and mother in law told the officers that she was sick and needed to go to the hospital instead of jail. After handcuffing Melinda and placing her in the squad car, the officers decided to link two sets of handcuffs to make her more comfortable as she was a large woman. This allowed Melinda to dig into her pockets prompting the officers to remove her to search for weapons or contraband. Outside the vehicle, she began slamming her head against the car and again attempting to hit,

kick, head butt and spit at the deputies. While being placed in the patrol car, she kicked with such force that she fell out of the open door landing on her hand and neck, prompting the deputies to call EMS. Prior to arrival of EMS, she was tasered three times with no effect, leading the deputies to question whether the device was working properly. She did suffer second degree burns to her left breast and back of her earlobes consistent with the use of a taser. Due to her combative nature, EMS was unable to examine Melinda and left later claiming that they assumed the police would bring her to the hospital. Instead officers, at approximately 4:00 p.m., brought her to jail. Approximately thirty seconds prior to her arrival, she stopped kicking and screaming and was taken from the cruiser unresponsive and with labored breathing. Approximately 19 minutes later, EMS was called and took her to the hospital where approximately five minutes after arrival she suffered cardiac arrest and died. The Court granted summary judgment for all defendants.

Taser International: The plaintiff's medical expert testified that he could not say that taser didn't contribute to some degree to Melinda's death, but could not to a reasonable degree of medical certainty declare that Melinda would have survived that day but for use of the taser. He opined that Melinda's death was caused by excited delirium. Plaintiff's claim against Taser failed as there was no admissible evidence to support their claim that the use of the taser caused Melinda's death.

Claims Against Deputies: The court found that based on Melinda's violent, aggressive and prolonged behavior evidencing a danger to herself or others, the nature and quality of the use of force, namely the use of a taser, was appropriate, given the countervailing government interest of safety and compliance. The court noted that Melinda was warned to stop and the taser was used only after she refused to comply.

In order to prove deliberate indifference to a serious medical claim, plaintiff must show a serious medical need, defendant's deliberate indifference to that need, and causation between the indifference and the plaintiff's injury. The medical need must be one that if left unattended, posed a substantial risk of serious harm. The mere fact that plaintiff's sister and mother in law claims she was sick and needed to go to the hospital , coupled with the officer's knowledge of her past methamphetamine use did not amount to a serious medical need. "The constitution does not require an arresting police officer or jail official to seek medical attention for every arrestee or inmate who appears to be affected by drugs or alcohol." Burnette v. Taylor, 533 F.3d 1325, 1331 (11th Cir. 2008) citing Estate of Hocker v. Walsh, 22 F.3d 995, 1000 (10th Cir. 1994). Because there was nothing in the record to suggest that the deputies were aware that Melinda's condition could lead to death if nor promptly treated and the fact that they took measures to call EMS after she fell off of a patrol car and later at the jail when they realized she needed medical help, refuted the claim of deliberate indifference to a serious medical need.

Brooks v. Seattle, 599 F.3d 1018 (9th Cir. 2010)

The court found that three contact tasers on a pregnant woman who refused to sign her motor vehicle citation and get out of the car, were not unreasonable. The plaintiff was stopped for speeding, refused to sign an infraction and accused one of the officers of being a racist. She continued to refuse to sign the citation after the sergeant arrived who instructed the officers to "book her". The officers explained that the taser would hurt "extremely bad", she continued to refuse. The first discharge was to

her thigh through her sweatpants. She stiffened her body and clutched the steering wheel yelling and honking the car's horn. The other two were to her shoulder and neck.

The court referred to the department training which described a drive stun as a level one tactic and a dart mode as the level 2 to be employed only against aggressive resistance. The court cited two recent decisions, Mattos v. Agarano, 595 F.3d 1082 (9th Cir. 2010), in which the use of the contact taser was reasonable against a woman who interfered with her husband's arrest for domestic violence. The second case was Bryan v. McPherson, 590 F.3d 767 (9th Cir. 2009), holding that the shooting of a taser gun at a disoriented, half naked man while stopping him for a seatbelt violation, constituted excessive force. In this case, applying Graham the court found that the severity of the crime (refusing to sign her name to the notice amounting to obstruction) and threat posed (no threat or danger and some possible but unlikely threat to the officers by remaining in the car) and resistance which was considered active, justified the officer's pain compliance use of the taster, especially given the multiple warnings and the plaintiff's repeated refusal to comply.

Cook v. City of Bella Villa, 582 F.3d 840 (8th Cir. 2009)

Chief Locke stopped Diane Cook for crossing over double yellow lines three times. Also in the car were her husband Michael and two adult female friends. Because Diane appeared to be intoxicated, the Chief attempted to administer field breath and sobriety tests but wasn't able to due to Diane's belligerent and uncooperative behavior. Diane claims she was thrown against the car twice. During the course of what the husband perceived to be an inappropriate pat down, he hollered at the chief and began to come toward him at which point the chief shot taser darts into his chest.

In determining the reasonableness of use of force, the court turned to language and prior precedent stating that, "the use of taser inflicts a painful and frightening blow, and when inflicted without legitimate reason, supports constitutional violation." Keying on the phrase, "inflicted without legitimate reason", the court cited several fourth amendment less lethal cases:

Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009) finding that tasing of a frightened woman who called a 911 operator and was tased after disobeying the officer's demands to terminate the call was unreasonable, as incidents involving relatively minor crimes when suspects are not actively resisting or attempting to flee does not justify the use of a taser.

Lawyer v. The City of Council Bluffs, 361 F.3d 1099 (8th Cir. 2004) finding reasonable, the deployment of pepper spray inside a stopped vehicle after the officer reached his arm in the window to unlock the door and the driver began rolling up the window.

Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004), finding use of taser to be reasonable when officer was confronted with a hostile, belligerent and uncooperative truck driver who five times refused to comply with the officers' demands to secure paperwork and the use of the taser may well have prevented a physical struggle and serious harm to either.

In this case the chief was alone when confronted with a rapidly escalating confrontation involving four occupants of a motor vehicle. Diane Cook was noncompliant and sarcastic, her husband and one of the other females were yelling and shouting at the chief and the husband stepped out of the vehicle and took steps toward the chief. "Under these tense, evolving circumstances a reasonable officer on the scene may have responded in the same manner as Chief Locke."

The court also noted that Mrs. Cook did not sustain any injuries from being thrown against the vehicle and Mr. Cook's injuries were de minimis.

Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009)

During a motor vehicle stop, Sandra Brown's husband was pulled out of the vehicle, thrown against the side of the vehicle and handcuffed during a motor vehicle violation stop. Sandra who had called 911 was told by the officer to get off the phone. According to the officer he noticed two glasses at Sandra's feet, possibly containing alcohol and believed she might be intoxicated. She refused to comply with the officer's order to unbuckle her seatbelt and get off the phone which resulted in the officer applying the taser and drive stun to her upper right arm for approximately two to three seconds.

The officers suspected that Sandra had committed an open bottle violation, she at most posed a minimal safety threat and was not actively resisting or attempting to flee. The court found that Sandra was entitled to be free from excessive force under the facts and circumstances in this case.

Howell v. Sheriff of Palm Beach County, 349 Fed.Appx. 399 (11th Cir. 2009)

Off duty Sheriff's Deputy, Howell, was at a party when other sheriffs received an anonymous compliant about loud music. When the on duty deputies arrived in the backyard they shouted at Howell, "You need to turn that fucking music off now." Howell responded, "You don't have to talk to me like that. I am a fucking deputy just like you." Howell was then sprayed. The court found that the deputy had fair and clear warning that the conduct alleged violated the Constitution.

> Courts have consistently concluded that using pepper spray, is reasonable, however, where the plaintiff was either resisting arrest or refusing police requests such as requests to enter a patrol car or go to the hospital. Furthermore, as a means of imposing force, pepper spray is generally of limited intrusiveness, and it is designed to disable a suspect without causing permanent physical injury. Indeed, pepper spray is a very reasonable alterative to escalating a physical struggle with an arrestee.

Such circumstances were not present in this case.

Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009)

Grawey was one of two men ejected from a bar for fighting. While talking to Officer Saad, he started to walk away and after the officer deployed pepper spray, began to run. At some point he stopped

running, put his hands against the wall, and waited for the officer to arrive. When Saad caught up, he discharged the pepper spray at a distance closer than the three feet. While on the ground Officer Davis turned Grawey over by twisting his leg, resulting in a fracture.

The court found that Saad's discharging pepper spray was unreasonable as taking the plaintiff's facts as true, he had not been told he was under arrest, was not resisting and Saad violated department policy by spraying him in the face at such a close distance. Officer Davis' use of force was also unconstitutional even though there were no analogous cases as a reasonable officer would have known that turning over a limp and unconscious detainee's body using leverage from the twisting of his foot is a use of excessive force.

MISCELLANEOUS

Conn v. City of Reno, 572 F.3d 1047 (9th Cir. 2009)

Plaintiffs' mother committed suicide by hanging herself with a bed sheet in defendant's jail cell. The court found that the defendants were not entitled to summary judgment based on the following analysis.

The Plaintiffs presented sufficient evidence of their mother's subjective, serious medical need. **Serious Medical Need** is defined as "if the failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain…a heightened suicide risk or an attempted suicide is a serious medical need."

Two days prior to the incident she had been taken to jail under protective custody and while in the wagon attempted to wrap a seatbelt around her neck and yelled, "You lied to me. Just kill me. I'll kill myself." The officers did not report this incident and she was released after four hours. She was returned to jail the following day and the morning after, committed suicide.

The defendants claim that because she had had several medical evaluations several days before and after the transport in the wagon, and only one evaluation found her to be at risk of serious harm, was evidence that she did not present a serious health risk. The Court countered that this evidence created an issue of fact especially since the subsequent evaluations were done without any awareness of her attempted suicide in the wagon which may have had an effect on the evaluations.

The Court next found that there was sufficient evidence of proof that the defendants' response to the need was deliberately indifferent. "To be liable under the 8th Amendment for denial of medical treatment to a detainee an official must know of and disregard an excessive risk to inmate health and safety."

The fact of the attempted choking in the wagon plus the officers' awareness of her prior mental and emotional instability produced a subjective awareness that the decedent was at acute risk of harm and suffered a serious medical need. In addition the rookie officers' comments about the way he and the

veteran officer handled the situation and failed to report what occurred in the wagon was further evidence of the subjective awareness of the seriousness of the victim's condition.

The Court then determined that the officers' indifference could be found to be both cause and fact and proximate cause of the suicide. If the officers had properly responded to the choking incident and threat of suicide by taking her directly to a hospital, or even reporting the incident to jail personnel, she would have either been taken to the hospital by the jail personnel or placed under a suicide watch.

The Court also found that the plaintiffs had sufficient evidence of a failure to train as the City of Reno failed to produce any evidence of training its officers in suicide prevention or the identification of suicide risks. There was evidence that officers predicatively face situations where they must assess and react to suicide risks. The 18 year veteran defendant testified that over the course of his career he has encountered between 500 and 1,000 people threatening to kill themselves. Because police officers frequently take mentally ill detainees to hospitals, failure to train on how to identify and when to report a suicide risk produces a highly predictable consequence that a police officer's failure to respond to such serious risks will likely lead to constitutional violations. There was an adequate showing that had the City trained its officers, violation of the decedent's constitutional rights could have been avoided. The Court also found sufficient evidence to support a claim of failing to adopt and implement policies with regard to suicide threats.

Sitzes v. City of West Memphis, Arkansas, 606 F.3d 461 (8th Cir. 2010)

Officer Wright responded to a Wal-Mart after a 911 call was received at approximately 4:00 p.m. from a man claiming that two people claiming to be Wal-Mart security officers had stolen $55.00 from him. The man also called back alleging that the robbers had assaulted him. Wright was travelling at a speed of approximately 80 to 90 M.P.H. passing vehicles when he approached an intersection. A vehicle in front of him was occupied by Brittany Sitzes and her younger sister Shelby. As they turned left in front of the police cruiser, which allegedly did not have its lights or siren on, they were struck by the cruiser killing Brittany and severely injuring Shelby. The Court granted summary judgment to the officer finding that the intent to injure required under the substantive due process analysis of the County of Sacramento v. Lewis was not present. The Court did unanimously agree that the officer may not insulate substantive due process liability merely by claiming that he believed he was responding to an actual emergency and in some cases the deliberate indifference test might apply.

Dissenting opinion noted that Officer Wright had been involved in a substantially similar motor vehicle accident a week prior to this accident in which he was speeding through an intersection without lights and siren on. He was warned that his status as an officer was under advisement and was off-duty until the day of the accident.

Harrington v. County of Suffolk, 607 F.3d 31 (2d Cir. 2010)

Plaintiff's son claimed that the Suffolk Police Department conducted a negligent investigation involving the death of their son in a tragic car accident. They based their argument on the Suffolk County Code which provided a duty of the police department to "preserve the public peace, prevent crime, detect

and arrest offenders, protect the rights of persons and property and enforce all laws and ordinances applicable to the County." Applying Supreme Court and Second Circuit precedent, the Court explained that in order to have a property interest protected by the due process clause, the plaintiff must have a legitimate entitlement created by existing rules or understandings that stem from an independent source such as a state law. Further, an entitlement must be of an individual nature. The Court concluded that the plaintiffs did not have a protected property interest in the investigation into their son's death. A duty to investigate criminal acts almost always involves a significant level of law enforcement discretion which precludes a finding of a legitimate claim of entitlement. The code in question does not create a constitutional protected property interest in an adequate police investigation because it confers a benefit that is merely discretionary and confers a benefit to the public in general, rather than to any individual.