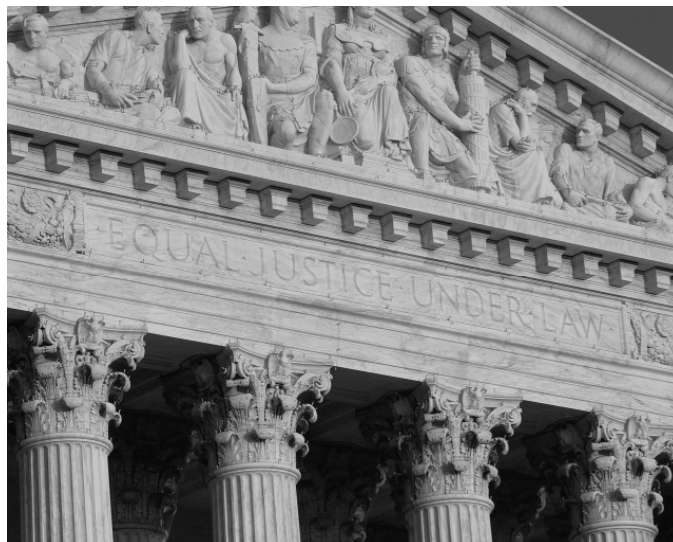




University of Connecticut Center for Continuing Studies  
One Bishop Circle, Unit 4056, Storrs, CT 06269-4056



**IACP Legal Officers Section**  
**42 U.S.C. §1983**  
**Civil Liability Update**  
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*Presented by:*

**Elliot B. Spector, Esquire**

Society & Justice Program  
860-486-9004

[Elliot.Spector@uconn.edu](mailto:Elliot.Spector@uconn.edu)

## **Table of Contents – Civil Liability Update 2008-2009**

<u>Vondrak v. City of Las Cruces</u> , 535 F.3d 1198 (10 <sup>th</sup> Cir. 2008) . . . . .	1
<u>Torres v. City of Madera</u> , 524 F. 3d 1053 (9 <sup>th</sup> Cir. 2008) . . . . .	1
<u>Zivojinovich v. Barner</u> , 525 F.3d 1059 (11 <sup>th</sup> Cir. 2008) . . . . .	2
<u>Fogarty v. Gallegos</u> , 523 F.3d 1147 (10 <sup>th</sup> Cir. 2008) . . . . .	2
<u>Hinojosa v. Butler</u> , __ F.3d __ , 2008 U.S. App. Lexis 22282 (5 <sup>th</sup> Cir. 2008) . . . . .	4
<u>Green v. New Jersey State Police</u> , 246 Fed.Appx. 158 (3 <sup>rd</sup> Cir. 2007) . . . . .	5
<u>Weigel v. Broad</u> , __ F.3d __ , 2008 U.S. App. Lexis 21877 (10 <sup>th</sup> Cir. 2008) . . . . .	5
<u>Hudspeth v. City of Shreveport</u> , 270 Fed.Appx. 332 (5 <sup>th</sup> Cir. 2008) . . . . .	6
<u>Ingle ex rel. Estate of Ingle v. Yelton</u> , 264 Fed.Appx. 336 (4 <sup>th</sup> Cir. 2008) . . . . .	7
<u>Beckett v. Crabtree v. Hair</u> , 2008 WL 6472305, 2008 U.S. App. Lexis 22393 (10 <sup>th</sup> Cir. 2008) . . . . .	7
<u>Ramirez v. Knoulton</u> , 542 F.3d 124 (5 <sup>th</sup> Cir. 2008) . . . . .	8
<u>Graves v. Zachary</u> , 277 Fed.Appx. 344 (5 <sup>th</sup> Cir. 2008) . . . . .	9
<u>Williams v. City of Grosse Pointe Park</u> , 2008 WL 274872 , 2008 Mich. App. Lexis 256 (Unpub.) . . . . .	9
<u>Kirby v. Duva</u> , 530 F.3d 475 (6 <sup>th</sup> Cir. 2008) . . . . .	10
<u>Reed v. Rose</u> , 285 Fed.Appx. 234 (6 <sup>th</sup> Cir. 2008) . . . . .	10
<u>Njang v. Montgomery County, Maryland</u> , 279 Fed.Appx. 209 (4 <sup>th</sup> Cir. 2008) . . . . .	11
<u>Mesa v. Prejean</u> , 543 F.3d 264 (5 <sup>th</sup> Cir. 2008) . . . . .	12
<u>Chelios v. Heavener</u> , 520 F. 3d 678 (7 <sup>th</sup> Cir. 2008) . . . . .	12
<u>Bates v. Harvey</u> , 518 F.3d 1233 (11 <sup>th</sup> Cir. 2008) . . . . .	13
<u>Reese v. Herbert</u> , 527 F.3d 1253 (11 <sup>th</sup> Cir. 2008) . . . . .	14
<u>Torres v. City of Los Angeles</u> , 540 F.3d 1031 (9 <sup>th</sup> Cir. 2008) . . . . .	15
<u>Pineda v. Toomey</u> , 533 F.3d 50 (1 <sup>st</sup> Cir. 2008) . . . . .	16
<u>D’Angelo v. Kirschner</u> , 2008 WL 2873532, 2008 U.S. App. Lexis 15482 (2d Cir. 2008) . . . . .	16
<u>Gilles v. Repicky</u> , 511 F.3d 239 (2d Cir. 2007) . . . . .	17
<u>Williams v. Town of Greenburgh</u> , 535 F.3d 71 (2d Cir. 2008) . . . . .	17
<u>White v. McKinley</u> , 514 F.3d 807 (8 <sup>th</sup> Cir. 2008) . . . . .	18
<u>Dominguez v. Hendley</u> , __ F.3d __ , 2008 U.S. App. Lexis 20577 (7 <sup>th</sup> Cir. 2008) . . . . .	18
<u>Parsons v. City of Pontiac</u> , 533 F.3d 492 (6 <sup>th</sup> Cir. 2008) . . . . .	19
<u>Fogel v. Collins</u> , 531 F.3d 824 (9 <sup>th</sup> Cir. 2008) . . . . .	20
<u>Beck v. City of Upland</u> , 527 F.3d 53 (9 <sup>th</sup> Cir. 2008) . . . . .	21
<u>Montano v. City of Chicago</u> , 535 F.3d 558 (7 <sup>th</sup> Cir. 2008) . . . . .	21
<u>Startzell v. City of Philadelphia</u> , 533 F.3d 183 (3 <sup>rd</sup> Cir. 2008) . . . . .	22
<u>Eidson v. Owens</u> , 515 F.3d 1139 (10 <sup>th</sup> Cir. 2008) . . . . .	23
<u>Peals v. Terre Haute Police Department</u> , 535 F.3d 621 (7 <sup>th</sup> Cir. 2008) . . . . .	24

## **EXCESSIVE FORCE**

### **Vondrak v. City of Las Cruces, 535 F.3d 1198 (10<sup>th</sup> Cir. 2008)**

Dr. Vondrak was stopped at a sobriety check point and said that he had had a beer about three or four hours earlier. Upon being directed to pull over to the side of the road, he was approached by another officer, and their conversation, which was on audiotape, recorded him admitting that he had one beer three hours ago. The officer arrested him after determining that he failed the field sobriety and nystagmus test. Officer McCants double locked the handcuffs, and claims that he heard nothing occur over the course of the evening which lead her to believe that the plaintiff had suffered any injury from the handcuffs. The plaintiff claims that he told officers a half dozen times that the handcuffs were too tight and that his wrists were hurting and going numb. After his blood alcohol level tested at 0.00, he was held for another one and one half hours, during which time he asked for the handcuffs to be loosened, as they were hurting. A photograph of his wrist taken by a police department employee, showed his wrists as being red but there were no cuts or scrapes. After being charged with driving under the influence, he was released and went to the emergency room. He claims that the injury interfered with his ability to practice as an orthodontist and to play golf. He was diagnosed by a neurologist and an orthopedist as having permanent nerve damage.

The court determined that the plaintiff's statement about having a beer three hours ago provided at least arguable reasonable suspicion to conduct a field sobriety test. The court also concluded that the officer was entitled to qualified immunity on the illegal arrest claim, but not on the use of force claim. "In some circumstances unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight." *Cortez*, 478 F. 3d 1129. The court cited cases from the first, sixth, seventh, eighth and ninth circuits regarding the right to be free from unduly tight handcuffing. It also found that the accompanying police officer who was in close proximity to the initial handcuffing could be held liable for failing to intervene.

### **Torres v. City of Madera, 524 F. 3d 1053 (9th Cir. 2008)**

The defendant officer opened the back door and told the handcuffed arrestee inside the cruiser to stop yelling and kicking the back window of the patrol car or he would be tased. She reached for her taser, which was located below her glock, but mistakenly drew the glock, firing at the arrestee's center mass, mortally wounding him. The court agreed with the 4<sup>th</sup> Circuit's ruling in *Henry v. Purnell*, 501 F. 3d 324(4<sup>th</sup> Cir. 2007) that the relevant inquiry was whether the officer's mistake in using the glock rather than the taser was objectively reasonable. It adopted the same five factors to determine the reasonableness of the defendant's actions. "(1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; (5) whether the defendant's conduct caused the officer

to act with undue haste and inconsistently with that training.” The Court remanded the case to the District Court to determine the reasonableness under Graham.

The Court also noted the split in the Circuits with regard to whether the officer’s actions would be judged under the Fourth Amendment. The plaintiff had been in custody for over 45 minutes, and therefore, under the continuing seizure rule, the officer’s actions would be considered under the Fourth Amendment. The continuing seizure rule has been adopted by the 2<sup>nd</sup>, 3<sup>rd</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Circuits, and rejected by the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup>.

**Zivojinovich v. Barner, 525 F.3d 1059 (11th Cir. 2008)**

Two plaintiffs sued for excessive force which occurred during their removal and arrest from a New Year’s Eve party at a hotel. Justin claimed that the officers used excessive force by gripping his arms as he was being escorted out of the hotel. Because this was a de minimus use of force the Court first determined whether or not the arrest was lawful, as using de minimus force during an unlawful arrest would be excessive. In this case even though the plaintiff’s resistance to arrest was passive the Court found sufficient probable cause to justify the arrest and, therefore, determined that the application of de minimus force without more would not support the claim of excessive force.

The Court cited Rodriguez v. Farrell, 280 F.3d 1341 (11<sup>th</sup> Cir. 2002) in finding that “using an uncomfortable hold to escort an uncooperative and potentially belligerent suspect is not unreasonable.

Alex claimed the officers used excessive force when they tased him as he was being lead out of the hotel in handcuffs. At the time they used their Taser guns his nose had been broken and he sprayed blood when he spoke. Although Alex testified that it was not his intent to spray blood at the officers, the court viewed the situation from the perspective of a reasonable officer who could have believed that the use of a Taser to subdue a suspect who repeatedly ignored police instructions and continued to act in a belligerent manner was not excessive.

**Fogarty v. Gallegos, 523 F.3d 1147 (10<sup>th</sup> Cir. 2008)**

Videotapes were taken of a demonstration near the University of New Mexico in days leading up to the invasion of Iraq. At most there were 500 to 1,000 individuals present and the Albuquerque Police Department had approximately 75 officers to control their activities. At some point protestors began to leave an area where their gathering was sanctioned. The police made announcements over a loudspeaker system ordering protestors to either disperse or return to University property. Some of the protestors, including Fogarty, were drumming during the protests, which may have been a factor in some not hearing the announcements. Following the deployment of teargas, most protestors complied with the repeated order except for a handful that remained on the streets. A videotape indicated that Fogarty was arrested after the teargas had been deployed.

Fogarty claimed that as he was kneeling on some steps, when four or five officers approached him. He was then taken into custody. He claims he had difficulty walking because

the drum was attached to his belt and that as he walked closer to the teargas he suffered an acute bronchospasm due to his asthmatic condition. He also claimed that his hand was bent in a “hyperflexion position” resulting in a torn tendon. He also claimed that he was struck with a pepper ball fired from a rifle. Despite the videotape evidence, thirty depositions and extensive discovery, no witnesses could positively identify the arresting officers.

The Appellate Court affirmed the District Court’s denial of qualified immunity on the false arrest count based on the defendants’ denial that they were involved in the arrest of Fogarty, and therefore, they could not contradict his statement that he was not drumming in an excessively loud manner or for the purpose of inciting the crowd to violence. Also, the fact that he may have been in a crowd of individuals who were breaking the law was not sufficient to justify his arrest.

Applying the Graham standards to the above alleged use of force, the Court found the defendants were not entitled to qualified immunity. The severity of the alleged crime, disorderly conduct is a petty misdemeanor; there was no evidence that Fogarty posed an immediate risk to the safety of the officers or others by merely drumming peacefully; and there was no evidence that he was actively resisting arrest or attempting to evade arrest as the record did not indicate that any officer had notified him that he was under arrest or that he was asked to come along peacefully.

#### **Individual Liability:**

The Court next addressed the personal liability of each defendant who each claimed that they were not personally involved in the arrest or use of force against Fogarty. The Court began by noting that individual liability under Section 1983 must be based on personal involvement in the alleged constitutional violation. It then explained that personal involvement could be found if the plaintiff showed sufficient evidence to indicate that the defendant failed to intervene to prevent a fellow officer’s use of excessive force, or a supervisor may have acted or failed to act thereby being held liable for a subordinate’s constitutional deprivations.

#### **Captain John Gonzales:**

Captain Gonzales supervised the department’s response to the protest. The Appellate Court agreed with the District Court’s finding that as incident commander who planned the response, ordered certain arrests and controlled the deployment of chemical munitions and less lethal projectiles, that Gonzales could be held liable under Section 1983 as a supervisor.

#### **Sergeant Steven Hill:**

The District Court found that Hill as supervisor of the SWAT team supervised the arrest and was present when a group of officers were dispatched to carry out the arrest, which raised an inference of duty to intervene. With regard to his realistic opportunity to prevent an attack the court found that Fogarty’s description of the arrest lasting between three and five minutes coupled with the District Court’s finding that Hill was present for the arrest, supported the Court’s denial of qualified immunity.

**Sergeant Donald Keith:**

The Court did find that Sergeant Keith who was in the vicinity and supervised APD officers was entitled to qualified immunity as the plaintiff presented no evidence that he ordered, directed or even knew of the arrest or the deployment of a non-lethal projectile against him. Absent allegations of personal direction or actual knowledge or acquiescence, Keith was entitled to qualified immunity.

**Officers Dave Hubbard and Nick Gonzalez:**

Although both disclaimed playing any role in arresting Fogarty they were members of the team charged with arresting the drummers resulting in the District Court's finding of sufficient circumstantial evidence of actual personal involvement. The Appellate Court on interlocutory appeal could not second guess the District Court's factual determinations.

**Hinojosa v. Butler, \_\_\_ F.3d \_\_\_, 2008 U.S. App. Lexis 22282 (5<sup>th</sup> Cir. 2008)**

When Officer Butler stopped the plaintiff for a motor vehicle violation the plaintiff ran from the vehicle, claiming that he fled for his safety after hearing a sudden whack against the window frame as the officer approached. Hinojosa had consumed four beers, had an outstanding warrant for his arrest and continued driving for a little while prior to stopping for the officer. He claimed that while being apprehended Butler struck him on the leg, back, head and groin with his baton, and he suffered numerous welts and bruises and a broken finger. A jury returned a verdict in favor of Butler. Hinojosa appealed, claiming that the District Court erred in preventing him from cross examining Butler about his prior conduct in front of the jury. The trial Court's ruling was based on its knowledge that Butler intended to claim his 5<sup>th</sup> Amendment rights with regard to his prior conduct. The Court cited U.S. Supreme Court precedent indicating that rulings with regard to an invocation of the 5<sup>th</sup> Amendment before criminal trial and civil trial differed. At criminal trial there is a risk that the jury will assign culpability by assuming the defendant has something to hide from his mere silence while at a civil trial the 5<sup>th</sup> Amendment does not forbid adverse inferences against parties.

The Appellate Court determined that the plaintiff was entitled to a new trial with respect to his excessive force claim as credibility was paramount at trial. Butler's prior discipline included admitted dishonesty in explaining why he had fired a service weapon, his alleged violation of internal rules in order to protect a city employee, his dishonesty in claiming that his patrol car was involved in a collision, and the fact that he resigned following these incidents. This type of evidence was highly probative as to his credibility.

The Court rejected the appeal with regard to the municipal liability claims, finding that although the department may have been negligent in not aggressively monitoring Butler or in not investigating officer's conduct without a formal complaint, such evidence did not demonstrate deliberate indifference to the officer's use of excessive force. Also, the fact that there were 258 complaints of excessive force between 2001 and 2005 and only 18 officers disciplined did not

demonstrate that the City tolerated officer misconduct. There was no reason for a fact finder to conclude that most of the incidents complained of actually involved an officer's use of unconstitutional force or whether the number of complaints was high, relative to other metropolitan police departments.

**Green v. New Jersey State Police, 246 Fed.Appx. 158 (3<sup>rd</sup> Cir. 2007)**

The plaintiff, Green, was driving home late at night with his girlfriend and her two children when they were pulled over for speeding. Green, who did not have any identification, was asked to get out of the car. (He provided officers with a false name and later tests revealed that his blood alcohol level was over the legal limit, and he had marijuana in his system.) While handcuffed in the backseat of the cruiser, he complained that he had to use the bathroom immediately but was told that he would have to wait until he got to the police station. He implored the officer to allow him to urinate and began to curse and yell when other troopers asked his girlfriend to step out of the car.

Green again claimed that he was going to urinate and somehow slipped the handcuffs in front of him and unzipped his pants. Green claims that one of the four officers present violently grabbed him by the neck, choking him while commanding him to get out of the car. Another officer sprayed Green with pepper spray while repeatedly commanding him to exit the vehicle. Green resisted wedging himself in the car resulting in what he claims were punches and kicks and two strikes of a flashlight on the head. Officers eventually extracted Green from the car, threw him on the ground and according to Green, kned him in the back and kicked him in the ribs and buttocks. There were two videotapes of the incident.

The majority of the Appellate Court agreed with the District Court that three allegations were not refuted by the videotapes which could support Green's claim of the excessive force. First, Green claimed that the officer violently grabbed him by the throat before asking him to exit the vehicle; second, his claim that an officer hit him twice in the head with the flashlight requiring stitches; and third that Green was pulled from the car, thrown to the ground, kned and kicked several times.

The dissenting judge queried what the majority expected the officers to do when Green, who was drunk, threatening to urinate in the back of the vehicle, was cursing and yelling and acting in an aggressive and combative way, after getting his handcuffs in front of his body and refused to get out of the car. He notes that the videotape revealed that the officers backed away from the car and asked Green if he was going to get out of the car or continue to resist, but Green still refused to exit. The videotape also showed three officers struggling to pull Green out of the car as best they could.

**Weigel v. Broad, \_\_\_ F.3d \_\_\_, 2008 U.S. App. Lexis 21877 (10<sup>th</sup> Cir. 2008)**

Weigel's vehicle struck the rear of a trooper's car occupied by two troopers and came to rest on the median strip. After determining that the plaintiff was not injured, the troopers were waiting with the plaintiff to cross the highway, instructing him several times to stay out of the traffic. Weigel, instead, ran straight out in front of a van and was struck in the chest by the side

view mirror. He continued to cross the interstate as if he was trying to commit suicide. Trooper Henderson tackled Weigel on the ground and with the assistance of Trooper Broad and bystanders was able to handcuff the plaintiff. While on the ground, the bystander bound Weigel's feet with plastic tubing or a cord found in his vehicle. While being restrained, Trooper Broad applied pressure to Weigel's upper body by placing one or two knees and his hands on his upper body. One of the bystanders placed himself on top of Weigel's legs while Henderson went to his cruiser to warm his hands. When it appeared as though Weigel was in cardiac arrest there were attempts to resituate him with no success.

In denying the officers qualified immunity the court cited Cruz v. City of Laramie, 239 F.3d 1183 (10<sup>th</sup> Cir. 2001). In Cruz, the court stated "officers may not apply the hogtie technique when an individual's diminished capacity is apparent" and stated that similar future conduct was prohibited. Because of this case there was extensive training provided to officers on the risks of positional asphyxia. The Court cited training materials, videos and Power-Point presentations, as well as testimony from the troopers' training instructor regarding a relevant memorandum distributed discussing the Cruz decision. The Court concluded that "the law was clearly established that applying pressure on Mr. Weigel's upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxia associated with such actions." The Court cited cases from the 6<sup>th</sup> and 9<sup>th</sup> Circuits indicating that it is clearly established that putting substantial or significant pressure on a suspect's back while the suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force."

**Hudspeth v. City of Shreveport, 270 Fed.Appx. 332 (5<sup>th</sup> Cir. 2008)**

This is one of the best cases describing officer perception supported by videotape evidence. The plaintiff in the case was shot after threatening officers with a cell phone. Although there are cell phones capable of firing bullets, this fact did not enter into the Court's reasoning.

Hudspeth and three officers in separate cruisers, engaged in a pursuit as Hudspeth who was believed to be driving while intoxicated, ran a red light and was driving while talking on a cell phone. The pursuit ended in a convenience store parking lot. Three videos from the cruisers separately told very different stories, however, collectively showed Hudspeth holding a small silver phone in two hands with his arms outstretched as if he was aiming a gun. He was approached by an officer who tried to grab him, but he pulled away. As he continued to walk away, two shots were fired. Hudspeth walked further and then suddenly turned, holding the cell phone again as if he were aiming a handgun. Two officers then shot Hudspeth in the back killing him.

The Court ruled in favor of the officers finding that the videotapes provided indisputable evidence of what transpired. The Court determined that it was irrelevant that Hudspeth was unarmed and that he was shot in the back. The videotaped evidence demonstrated that the officers' actions were objectively reasonable and that his constitutional rights had not been violated.



On another note, the Court had initially dismissed Hudspeth's mother's and siblings' claims based on familial association finding that they have no standing.

**Ingle ex rel. Estate of Ingle v. Yelton, 264 Fed.Appx. 336 (4th Cir. 2008)**

The District Court ordered discovery on the possibility that there were videotapes. All of the individual officers denied having an operational camera and internal affairs investigation found no evidence of a videotape. On appeal, the plaintiff argued that the District Court should have extended discovery to identify all police vehicles equipped with cameras and a deposition of one of the officers whose cruiser appeared to have an object on top of her dashboard. The Court rejected these arguments as there was substantial discovery, the plaintiff was attempting to identify an officer in an unidentified vehicle that might have recorded the incident and the plaintiff had ample time to depose the officer as they had the photos of her cruiser since 2003.

The Court also rejected the plaintiff's argument that the officers were not entitled to qualified immunity because physical evidence suggested that the window of the vehicle was closed which would interfere with the Christopher's ability to aim a shotgun at the officers. The Court found that the officers were entitled to qualified immunity as they knew that Christopher was suspected of a domestic shooting, had fled the officers at high speed, pointed his shotgun at an officer and refused to surrender and finally, available evidence indicated that he lowered or pointed his shotgun at the officers when they began to fire and even if the window was closed, there was no guarantee of safety when the gun was pointed at the officers.

**Beckett v. Crabtree v. Hair, 2008 WL 6472305, 2008 U.S. App. Lexis 22393 (10<sup>th</sup> Cir. 2008)**

Deputy Hair approached the truck stopped on the shoulder of the highway, observing the plaintiff who seemed extremely stressed or under the influence, and had a syringe and an open knife on the passenger seat. Shortly after exiting the vehicle the plaintiff fled into a dark field. At one point the plaintiff stopped assuming a fighting stance. Deputy Hair drew his Taser and ordered him to get on the ground but plaintiff took off running again. Deputy Hair eventually found plaintiff crouched behind some weeds and after he refused his commands to get on the ground, drew his baton and tried to hit him on the thigh. During the ensuing struggle, Crabtree attempted to grab Hair's gun and then wrested away his flashlight, striking Hair on the back of the head. Dazed and believing that Crabtree was going to kill him with the flashlight Hair drew his gun and fired four shots which could be heard on the audio tape.

The Court found that Deputy Hair's use of deadly force was objectively reasonable. Plaintiff's law enforcement expert, based on the ballistic report, theorized that at the time the shots were fired the plaintiff had ceased his aggression, was not posing any further threat and had distanced himself possibly in an attempt to escape. Viewing the facts most favorable to the plaintiff the court assumed that the distance was 21 feet and concluded that the distance alone did not create a genuine issue of material fact precluding summary judgment, as it presented only one factor to be considered.

The court also rejected the dependence on policies and procedures indicating that the deputy's decision to initiate a foot pursuit without waiting for help recklessly created the need to use deadly force. The court determined that even if the deputy's decisions amounted to an error in judgment they were nothing more than negligence and not actionable under 1983. His actions were neither reckless nor deliberate conduct during a seizure which reasonably created a need to use such force.

Finally the plaintiff claimed that the court improperly relied on the subjective belief that the deputy was in fear of his life and failed to consider that the deputy may have shot Crabtree in retaliation for striking him on the head. The court found a lack of evidence supporting plaintiff's inference and noted that speculation and conjecture that an officer might have overreacted was insufficient to create a constitutional violation.

**Ramirez v. Knoulton, 542 F.3d 124 (5<sup>th</sup> 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 (5<sup>th</sup> 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.

**Williams v. City of Grosse Pointe Park, 2008 WL 274872, 2008 Mich. App. Lexis 256 (Unpub. Mich. App.)**

The Court relied on a police video in granting summary judgment to defendant officers. Officer Miller and Sergeant Hoshaw responded to a citizen complaint of three persons in a green Dodge Shadow who were tampering with cars. They determined that the Shadow was stolen. At

approximately 7:14 p.m., Hoshaw positioned his cruiser in front of the Shadow and Miller behind it. Hoshaw approached the Shadow, stuck his gun in the driver's side window pointing it at Williams' head. Williams accelerated to move around the cruiser, drove over the curb onto the sidewalk as Hoshaw, holding onto the vehicle was knocked down as it accelerated. Miller fired several rounds paralyzing Williams.

Viewing the video from Miller's prospective, Williams was undeterred by having a weapon pointing at his head, acted without regard for Hoshaw's safety, was intent on escape and willing to risk the safety of officers, pedestrians, and other drivers. Miller was faced with the difficult choice of using deadly force to apprehend the suspect who had demonstrated a willingness to risk injury to others or to allow the suspect to flee and take the chance that he would further injure Sergeant Hoshaw or innocent civilians. Miller had only an instant in which to decide which course of action to take and the Court did not believe that any rational juror could conclude that his actions were unreasonable.

**Kirby v. Duva, 530 F.3d 475 (6<sup>th</sup> 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.

**Reed v. Rose, 285 Fed.Appx. 234 (6<sup>th</sup> Cir. 2008)**

Defendant officers Clark and Rose received a dispatch of reported drug activity. Upon parking behind the car that fit the description with two men inside they claimed they saw furtive movements which involved the people turning back looking at them and then reaching downward.

Rose ordered the driver, Mays, out of the car at gunpoint and handcuffed him. Clark ordered the passenger, Robinson out of the car, but before he was able to handcuff him,

Robinson took off running down the street. Clark tackled Robinson during which Officer Clark stated that Robinson got on top of him, punched him in the face and reached for his gun. As they wrestled over the gun, Clark fired a single shot striking Robinson in the chest and killing him.

Bessy Mathis, a resident, claims that she saw the struggle and that Robinson was never on top of Clark nor did she see Robinson punch Clark. She said that Robinson did not wrestle with Clark, try to get away or reach for his gun. Instead, she said, Robinson put his hands in the air when Clark tackled him, and that Clark had his knee on Robinson when Rose ran over and shot Robinson.

The Appellate Court denied defendants' interlocutory appeal finding disputed issues of fact. The Court rejected Clark's claim that Mathis' testimony should be discredited in its entirety because the coroner's report showed that the shot was fired within a ¼ inch of Robinson's chest and the fact that she claims she did not see Robinson grab Clark's gun does not mean that, in fact, it did not happen.

**Njang v. Montgomery County, Maryland, 279 Fed.Appx. 209 (4<sup>th</sup> Cir. 2008)**

On the morning of August 4, 2004, Njang went to his Aunt's house where he knocked on the window of her ground floor apartment peering into the window. Shortly after he was shot once in the chest resulting in his death. The Court granted Officer Marchone's motion for summary judgment based on her account of the events which were confirmed by two nearby witnesses.

The Court considered that Officer Marchone knew that there had been a series of recent first floor burglaries in the complex where perpetrators gained entry through ground level windows. When Marchone approached Njang, she asked him some preliminary questions and then initiated a pat-down. Njang pulled away and brandished a box cutter. The officer drew her handgun and commanded him to drop the weapon. Njang advanced upon her with the box cutter in front of him; as she backed up against her police cruiser, he was only two feet away. She warned him that she would shoot, and finally did.

Plaintiff claimed that the blade of the box cutter was not extended and, therefore, there was no threat of danger to the officer. The Court responded that the proper test is whether a reasonable officer in Marchone's position would have perceived Njang's actions to be threatening. The officer testified that the object in his hands looked like a knife to her and one witness thought that the object was a box cutter and another confirmed that it looked like a knife.

The court rejected as unsupported plaintiff's other two claims that Njang did not intend to threaten the officer and that the officer may have been motivated to deploy more force than necessary because Njang had questioned her authority as a female police officer.

## **FALSE ARREST**

### **Mesa v. Prejean, 543 F.3d 264 (5<sup>th</sup> Cir. 2008)**

Moments after advising the plaintiffs, owners of a restaurant, to move chairs and tables obstructing a sidewalk Officer Prejean walked across the street and arrested an individual for disturbing the peace due to intoxication. Mesa crossed the street approaching Prejean who was writing his report to discuss the table and chair issue and to object or inquire about the arrest. Mesa complied with Prejean's order to wait on the sidewalk. Mesa's wife Tarazona then approached Prejean and asked about the arrest and discussed the movement of the chairs and tables. She admits that the officer told her twice to get out of the street and move on. After crossing the street to the opposite sidewalk the officer claims she began yelling about the media and that she was going to have his job continuing to complain about the way she was treated. When the officer informed her that she was under arrest and started to move toward her Mesa moved toward him in what the officer described as an aggressive manner. Two other officers became involved in restraining Mesa, who was bleeding and taken to the hospital. Less than one minute passed between Tarazona's comments and the point where she and Mesa were detained.

The Court denied the officer's Motion for Summary Judgment, finding disputed issues of fact regarding what he said, how quickly Tarazona moved and whether a reasonable officer could have thought an arrest could be made for her failure to move from the sidewalk.

The Court also denied the officer's Summary Judgment Motion on Tarazona's First Amendment claim. "The freedom of individual's verbally to oppose or challenge police actions without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state."...The First amendment protects a significant amount of verbal criticism and challenge directed at police officers. *City of Houston v. Hill, 482 U.S. 451(1987)*. "Courts need to be alert to arrests that are prompted by constitutionally protected speech, even when the arrestee's words are directed at a police officer performing official tasks. Trained officers must exercise restraint when confronted with a citizen's anger over police action."

### **Chelios v. Heavener, 520 F. 3d 678 (7<sup>th</sup> Cir. 2008)**

The defendant Sergeant and several other officers responded to shots fired in an area of the plaintiff's bar. Plaintiff complied with the officer's request to close down the bar. At some point the plaintiff heard a witness tell a female police officer that a shooting had not occurred in the bar's parking lot. The sergeant claimed that Mr. Chelios approached him, called him a liar, and said the police were fabricating the entire incident. The Sergeant walked away to control the crowd as two patrons began to fight. About five minutes later, the plaintiff came up to him and began to yell, telling the Sergeant that the gunshots had not been fired on his property, and that he should speak to the female officer. The plaintiff was agitated and pointed his finger in the Sergeant's face, poking him in the chin with his outstretched finger. Another person pulled Mr. Chelios away. Sergeant Heavener ordered him to get back. As Chelios continued to walk away the sergeant yelled, "I am going to lock your ass up." At the point when Chelios attempted to

open the door to enter the bar Sergeant Heavener grabbed his shoulder informing him that he was under arrest causing the plaintiff to drop to his knees, where he was handcuffed.

The Court determined that Sergeant Heavener was not entitled to qualified immunity under the false arrest claim as the plaintiff disputed the fact that he touched Heavener on the chin and or ever had any contact with him prior to the arrest. With regard to the excessive force claim the Court found that according to the plaintiff Sergeant Heavener put his arms around his neck, grabbed his shoulders and spun him around and then two officers and a Sergeant tackled him to the ground. Under this version of facts the plaintiff had not committed any crime or presented any sort of threat to the officers or others. Under this version of the facts the defendant would not be entitled to qualified immunity.

**Bates v. Harvey, 518 F.3d 1233 (11<sup>th</sup> 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.

**Reese v. Herbert, 527 F.3d 1253 (11<sup>th</sup> Cir. 2008)**

It is undisputed that Reese, the apartment owner and caretaker, approached officers who had arrested one of his tenants for domestic violence. He approached the officer who was near the vehicle containing the arrestee and asked if it was necessary for all the vehicles to remain at the scene, as his other tenants could not get to their apartments. Herbert replied that it was necessary and told Reese to leave or he would be going to jail. Herbert claimed that he explained it was a domestic call and said everything was ok and that plaintiff could leave. When told that he was not leaving, that he was the landlord and he wanted to know who was in charge, Herbert told him that Getty was in charge and was inside. Getty also told others in the area to leave. He said that Reese told him for a third time that he was not leaving because he was the landlord and was then told he was under arrest at which point Herbert grabbed his arm. Reese pulled away and a wrestling match ensued with both crashing up against the wall of the apartment. Three other officers then joined in on the struggle, during which the plaintiff received multiple contusions of the chest and abrasions to lower extremities, neck and back, a small fracture to his elbow, a chip fracture to his wrist bone, and an internal rotation injury to his wrist. These facts were taken from the defendant officer's testimony. The Court first discussed some evidentiary rulings in the summary judgment including affirming the exclusion of the plaintiff's expert's affidavit as being untimely and the Court's considering summary judgment based on the defendant's statement of facts as plaintiff failed to include specific citations to evidence in his response to the statement of undisputed facts. The Court did consider portions of independent witness affidavits indicating that the plaintiff was not resisting and that the officers punched and kicked the plaintiff while all four officers were on top of him.

The dispositive issue was whether Herbert had arguable probable cause to arrest Reese. It found that no reasonable officer could have believed that probable cause existed to arrest Reese for obstruction as only ten minutes had elapsed from the time of the arrest in the domestic violence dispute and Reese's request to speak with an officer in charge in a calm voice and demeanor. Herbert's, (whose role at the time was to stand by the prisoner) duties were not impeded or hindered. An arrest for obstruction cannot be predicated upon a refusal to clear a general area beyond a zone of police operation. "For speech to rise to the level of obstruction, it must be reasonably interpreted to be a threat of violence to the officer, which would amount to obstruction or hindrance." In the absence of probable cause, Herbert was not justified in using any force against Reese.



Applying the *Graham* factors in Reese's favor; (1) the crime was a misdemeanor of minor severity, (2) Reese was lying face down on the ground not posing an immediate threat of harm to anyone, and (3) was not actively resisting or evading arrest. The Court found defendant's use of force was wholly disproportionate to the response to the situation. The Court also noted the fact that the plaintiff was pepper sprayed stating "Courts have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else".

**Torres v. City of Los Angeles, 540 F.3d 1031 (9<sup>th</sup> Cir. 2008)**

Four detectives were involved in an investigation of a gang related shooting. One of the four passengers in the shooter's vehicle identified her boyfriend, Santillan, as the driver and Castaneda as the shooter. She was unable to identify the third male passenger, but gave a general description as a fifteen or sixteen year old with a complexion darker than hers and very overweight. Six weeks after the shooting detectives obtained additional information from school officials and a school resource officer that this generic description fit the plaintiff who was known to be associated with the other members in the vehicle, but not known to have been a member of their gang. Detective Hickman, unable to find sufficient photos for this six photo array only included one other chubby young Hispanic male in the array. When it was shown to Hernandez she looked at for five to ten minutes and then was asked to write near the photo she was selecting, her thoughts. She stated, "I circle the person in #6 because he looks more likely to the other guy in the car." Detectives Roberts and Park who participated in the identification procedure told Detective Raines that Hernandez had identified Torres as the third male passenger. They immediately went to Torres' home and arrested him. Following 162 days of incarceration, the case against Torres was dismissed.

During the civil trial the judge entered an order dismissing the case following defendant's oral motion for judgment as a matter of law.

The Appellate Court affirmed dismissal on behalf of Detective Hickman because he was not an "integral participant in the alleged constitutional violation." In other words, there wasn't sufficient evidence to show some fundamental involvement in the conduct that allegedly caused the violation. Detective Hickman was not present during the arrest and did not instruct the other detectives to arrest Torres nor was she consulted before the arrest was made.

The dismissal was also affirmed on behalf of Detective Raines as, at the time of the arrest, she had been informed by other detectives that Hernandez had positively identified Torres. "...where an officer has an objectively reasonable, good faith belief that he is acting pursuant to proper authority, he cannot be held liable if the information supplied by other officers turns out to be erroneous." Citations omitted. "The lynchpin is whether the officer's reliance on the information was objectively reasonable."

The dismissal was reversed on behalf of the other defendants. Based on the limited evidence indicating that the plaintiff was the passenger in the car including the inadequate identification procedure, there was no probable cause to justify his arrest. Further, even if he had

been identified as a passenger in the car, the ultimate question was whether he acted in concert with the shooter. His mere presence in a vehicle in which a crime was being committed, did not amount to an offense. Mere presence cases require acquittal in the absence of evidence of intentional participation. Here there was no evidence to show that the plaintiff, in any manner, took part in the shooting.

**Pineda v. Toomey, 533 F.3d 50 (1<sup>st</sup> Cir. 2008)**

Police engaged in a pursuit of an individual believed to have been involved in a homicide earlier that evening. An officer saw an occupant of the vehicle run into Unit 81 of a housing project. Within minutes of Officers knocking on the door, five to seven were in the apartment. They were directed to the back of the apartment where they found Serrano, the driver of the pursued vehicle hiding in a closet, sweating profusely and trying to hide his clothing. Plaintiff who was standing in his boxer shorts near the front door was arrested, taken to the police station and processed. Pineda estimated that approximately 45-70 seconds elapsed from the time he opened the door until he was arrested and removed from the apartment. A homicide detective quickly determined that neither he nor the man involved in the high speed chase were involved in the homicide. Sergeant Watts and Toomey were disciplined for failing to supervise, and were sued for false arrest and illegal search of the apartment. The record revealed that neither sergeant was in the apartment at the time of the arrest, that they were in the apartment for only a few minutes and they observed another supervisor directing officers from other districts, who they assumed was in charge. The court affirmed the summary judgment determining that the plaintiffs failed to present evidence establishing that the Sergeant's actions amounted to "supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference..."

**D'Angelo v. Kirschner, 2008 WL 2873532, 2008 U.S. App. Lexis 15482 (2d Cir.2008)**

A state police official responsible for distributing military equipment to law enforcement agencies was arrested for taking bribes and distributing equipment to parties not eligible to receive it. Following a nolle, he sued various state officials. The district court found probable cause to support the larceny charge based on D'Angelo's alleged improper gift of a meat grinder. Because there was a finding of probable cause on this charge, it was unnecessary to determine whether there was probable cause on the other charges in order to dispose of the false arrest claims. D'Angelo argued that because there were no rules or standards with regard to the distribution of the materials, the State could not prove intent to commit any crime. In essence, he argued that there was an innocent explanation for his conduct. The Appellate Court found that an innocent explanation does not negate probable cause citing Panetta v. Crowley, 460 F.3d 388 (2d Cir. 2006).

The district court also found that the probable cause for the arrest on the larceny charge also defeated the malicious prosecution claim as to that charge. "Ordinarily, in the absence of exculpatory facts which became known after an arrest, probable cause to arrest is a complete defense to a claim of malicious prosecution. The Appellate Court found that a finding of probable cause to arrest as to one charge does not necessarily defeat a claim of malicious

prosecution as to the other criminal charges, therefore, the case was remanded to the district court for a determination as to whether or not probable cause existed for the other charges.

**Gilles v. Repicky, 511 F.3d 239 (2d Cir. 2007)**

At approximately 8:30 a.m., Officer Repicky was assigned to the department's counterterrorism unit that had knowledge of an Alert 4, "VBIEDS" (vehicle-borne improvised explosive devices). He observed a van driven by the plaintiff driving approximately 65 m.p.h. Upon running the plate, he learned that it had been stolen. Approximately twenty to thirty minutes into the stop, he learned that the plate had in fact not been stolen, and by that time had inspected cardboard barrels in the van depicting nothing suspicious. He also had a narcotics and bomb dog sniff the van without alerting. He checked the plaintiff's license and registration was informed by her that she owned a store and had a shipping service for her customers. She also produced invoices indicating that the barrels contained food and clothing to be shipped to Jamaica and Haiti. After this, the plaintiff was held at the roadside for approximately an hour and then directed to accompany the officers to police headquarters where she was detained for another hour and a half. According to Repicky, he requested the plaintiff to accompany him to headquarters voluntarily to enable her to use the bathroom as it was evident that she had begun to menstruate heavily. Although she drove her own van, there was a police vehicle in front and behind her.

The ultimate question was whether the officers had arguable probable cause. "If, on the undisputed facts, Repicky unreasonably concluded that he had probable cause or if disputed material issues of fact precluded a determination of probable cause, then summary judgment was inappropriate." At 88. The Court concluded that factors which may be indicative of a seizure include, "the threatening presence of several officers; the display of a weapon, the physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room." Citing Brown v. Oneonta, 221 F.3d 329 (2d Cir. 2000). Under these circumstances it was objectively reasonable for plaintiff to believe that she was in custody and the officer's probable cause dissipated as to the officer's initial investigation leaving them no reason to conclude that plaintiff had committed a crime other than speeding.

**Williams v. Town of Greenburgh, 535 F.3d 71 (2d Cir. 2008)**

The plaintiff was informed that he did not have permission to return to the Town Community Center and if he did he would be arrested. He subsequently was arrested for trespass but was acquitted when the Court determined that he lacked adequate notice because a verbal notification lacked a definitive time. Plaintiff first claimed that his expulsion from the Center violated his right to liberty under the Fourteenth Amendment. The Court recognized an individual's fundamental right to travel within a state, that this right protects movement between places but has no bearing on any access to a particular place. Turning to the false arrest and malicious prosecution claims, the court noted that "in order to prevail on a Section 1983 claim against the state actor for malicious prosecution, a plaintiff must show... the proceeding was commenced or continued against him, with malice and without probable cause, and was

terminated in his favor.” The reasonableness of the officer’s belief that the plaintiff was trespassing was not undermined by the subsequent acquittal. A mistake about relative facts also does not undermine the existence of probable cause. In this case, the mistake about the adequacy of the underlying warning did not negate probable cause.

**White v. McKinley, 514 F.3d 807 (8<sup>th</sup> Cir. 2008)**

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.

**Dominguez v. Hendley, \_\_\_ F.3d \_\_\_, 2008 U.S. App. Lexis 20577 (7<sup>th</sup> Cir. 2008)**

The plaintiff was awarded \$9,630,000.00 after having spent four years in prison for a sexual assault which was followed by exoneration upon discovery that the semen on the victim’s

underwear did not match. Defendant, Hendley, first argued that the plaintiff's claim was barred by the statute of limitations. The court first explained that claims for false arrest or unlawful search accrue at the time of the violation citing Wallace v. Kato, 549 U.S. 384 (2007). The plaintiff's claim in this case was a due process violation based on alleged denial of a fair trial which is not barred under Heck. Plaintiff's right to sue under this claim accrued after his criminal conviction was set aside.

Hendley next claimed that he was entitled to qualified immunity as his actions were not the proximate cause of the plaintiff's harm. He cited numerous circuits that held that police officers who provide truthful information to subsequent decision makers in the criminal justice system cannot be held liable under Section 1983 for alleged wrongful convictions. Townes v. City of New York, 176 F.3d 138 (2d Cir. 1999). He argued that the superseding cause doctrine applies in the absence of evidence that an officer mislead or pressured officials who could be expected to exercise independent judgment. This claim failed as the court found sufficient evidence to allow the jury to find that Hendley did not provide truthful information and did mislead the official who could be expected to exercise independent judgment. First, he allegedly never told the prosecutor about any show up used in the identification of Dominguez. Second, he withheld exculpatory information including a hospital report made by the victim which differed significantly from her later accounts.

Hendley also argued that the plaintiff had not proved that the arrest was without probable cause. The court found that this was not relevant as this was not a false arrest claim, but a question as to whether Hendley took actions before or after the arrest that caused Dominguez to receive any unfair trial. The unfair trial claim could be proved through three separate courses of conduct including withholding material exculpatory information, causing an unreliable identification procedure to be used at trial or fabricating evidence.

Hendley made a number of other claims but possibly the most significant one was the submission of prejudicial memo from the prosecutor's office. The memo from the chief of the felony division instructed prosecutors to scrutinize cases carefully, especially Hendley's because of questions about his credibility. The memo directed prosecutors reviewing felony cases to "1) refuse to approve cases involving confessions supposedly obtained by Hendley without recorded or written confessions unless the case is prosecutable without the confession; (2) refuse to approve charges in cases where Hendley interviewed key witnesses, until the accuracy of the purported statements was verified; (3) require corroboration in any case where Hendley handled physical evidence or would be called to testify about his observations."

**Parsons v. City of Pontiac, 533 F.3d 492 (6<sup>th</sup> Cir. 2008)**

The Appellate Court overturned the summary judgment granted by the district court finding that documentary evidence contradicted a number of key factors relied upon by the district court. One essential fact was not discovered by the police until after the arrest and a couple of other facts were taken out of context.

Addressing the probable cause issue, the Court noted that police may not "make hasty, unsubstantiated arrests with impunity, nor simply turn a blind eye toward potentially exculpatory

evidence known to them in an effort to pin a crime on someone.” Also, “an arresting agent is entitled to qualified immunity if he or she could reasonably (even if erroneously) had believed that the arrest was lawful, in light of clearly established law, and the information possessed at the time by the arresting agent.” Since the existence of probable cause presents a jury question unless there is only one reasonable determination possible, the Court denied the officers qualified immunity.

**Fogel v. Collins, 531 F.3d 824 (9<sup>th</sup> Cir. 2008)**

Officers responded to an anonymous call that a van parked in an apartment complex had the following words painted on it: “I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST! PULL ME OVER! PLEASE, I DARE YA... ALLAH PRAISE THE PATRIOT ACT... FUCKING JIHAD ON THE FIRST AMENDMENT! P.S. W.O.M.B. ON BOARD!” The arriving sergeant determined that the messages on the van were just political satire and returned to the police station after taking photographs. His captain believed that the words painted on the van constituted a criminal act, that the van needed to be moved from its location and the incident should be handled as a bomb threat. The owner of the van was found in the apartment house, had no criminal record, and was described by the officers as mild-mannered. DHS indicated they were familiar with Fogel as a local anti-government type person who was considered to be a local nut. Fogel was arrested and was told that he could only retrieve his van if he removed or painted over the writings. The district attorney’s office declined to press charges and Fogel recovered his van after painting over the messages.

The Court cited Terminiello v. City of Chicago, 337 U.S. 1 (1949), “It is well-established that the First Amendment protects speech that others might find offensive or even frightening. ‘Speech’ may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.” The Court also noted that the Supreme Court has recognized a ‘true threat exception to the first amendment’. Watts v. United States, 394 U.S. 705 (1969). In most true threat cases the threatening speech is targeted against a specific individual or communicated directly to the subject of the threat. In this case, the Court found that Fogel’s message was at most, hyperbolic rhetoric on a matter of public concern. His messages were not directed toward any particular person or communicated as a protest against government policy, therefore, the words on his van were protected by the First Amendment.

Although the police violated Fogel’s First Amendment Rights by arresting him and impounding his van, the Court found that the officers were entitled to qualified immunity. The Court stated that there were no cases that were identical to or with closely comparable facts in which a person in post-September 11 environment satirically proclaimed himself or herself as a terrorist in possession of weapons of mass destruction. Although the Court stated that it was not suggesting that the First Amendment provides less protection than before September 11<sup>th</sup>, it did recognize that what might have been previously been understood as relatively harmless before September 11<sup>th</sup>, might be understood as a real threat in the immediate aftermath of September 11<sup>th</sup>.

**Beck v. City of Upland, 527 F.3d 53 (9<sup>th</sup> Cir. 2008)**

At the time of a long dispute over removal of rubble and a zoning investigation plaintiff ran into the Chief of Police at a public function and told him to get the investigating officer off his ass. During the brief ensuing discussion the Chief said, “We should have taken care of you a long time ago,” to which the plaintiff responded “ You don’t know who you are dealing with” both the Chief and a Sergeant who was with him believed that Beck was threatening their position or employment as police officers. Based on the Sergeant’s report of the incident a district attorney generated a criminal complaint charging the plaintiff with threatening. The Court determined that there was no probable cause for the complaint and that both the investigating Sergeant and the Chief who knew the report was being done could be held liable. The case discusses the application of a prosecutor’s independent judgment in breaking the chain of causation between an unconstitutional act of an official and the constitutional harm suffered by a plaintiff. They determined that this defense which was applied in Hartman v. Moore, 547 U.S. 250 (2006) to First Amendment claims is also applicable in a Fourth Amendment claim. It determined that in order to rebut the presumption of independent prosecutorial judgment the plaintiff must prove the absence of probable cause.

**Montano v. City of Chicago, 535 F.3d 558 (7<sup>th</sup> Cir. 2008)**

Multiple plaintiffs sued a number of officers for false arrest and excessive force, which occurred during Mexican Independence day, in Chicago’s Little Village neighborhood. The Court found summary judgment as to the plaintiffs who did not deny holding beer in front of officers and were arrested for suspicion of drinking in public. They also found sufficient basis for qualified immunity for one of the female plaintiffs who repeatedly complained to officers about the treatment of her husband and brother and was unsuccessfully ordered by an officer to leave the scene or be arrested. Given the crowd situation it was not objectively unreasonable for the officer to believe that she was aggravating an already chaotic and hazardous situation in the crowd that had gathered.

Plaintiffs’ claims of failure to intervene failed with regard to the use of force in driving the police van in an erratic manner as to injure the plaintiffs, as they failed to produce sufficient evidence that either officer had reason to know excessive force was being used or had a realistic opportunity to intervene.

The plaintiffs *Monell* claims also failed, as the only support for a policy of condoning excessive force was the case of a single flashlight strike to a suspect who died shortly thereafter. The police board concluded that the force was not excessive because the suspect may have attacked the officer with a board, the suspect died of cardiac arrhythmia and the suspect did not suffer an injury to either the brain or skull. The plaintiff’s claim of deliberate indifference to the need for an early warning system also failed, as the plaintiff did not show a widespread issue with problem officers.

Finally, the Court overturned the District Court’s Dismissal of the case based on plaintiff’s perjury. The definition of perjury is “false testimony concerning a material matter

with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” The Appellate Court excused many of the inconsistencies in the plaintiff’s deposition and later, trial testimony, finding insufficient evidence to suggest that the inconsistencies were willful material falsehoods. The inconsistencies included testimony regarding whether one plaintiff saw another plaintiff being beaten, the plaintiff claimed at trial that he was hit in the face or head with a flashlight where at deposition he testified that the officer tried, but failed to hit him in the face, the plaintiff denying at trial that he punched an officer but at deposition admitted that one of his hands got contact with an officer, and the plaintiff claiming that he was strip searched at the police station but at deposition stated that he did not recall being searched. Even if some of the plaintiffs perjured themselves, the Court found the sanctions of dismissing the case against the other plaintiffs would not have been justified.

**Startzell v. City of Philadelphia, 533 F.3d 183 (3<sup>rd</sup> Cir. 2008)**

Eleven plaintiffs affiliated with an organization known as Repent America, claimed officers violated their First and Fourth Amendment rights when they were arrested during a counter-protest to a “Philly Pride” event to celebrate “National Coming Out Day” for lesbians, gays, bisexuals and transgendered individuals. Based on the police legal advisor’s opinion, the City rejected Philly Pride’s request to keep anti-gay demonstrators out of the area they had been permitted to use. The legal advisor also told officers assigned to the event that they were to protect everyone’s First Amendment rights. The plaintiffs were videotaped near the main stage of the event singing loudly, playing instruments, displaying large signs and using microphones and bullhorns in an attempt to drown out the platform speakers. They also congregated in the middle of the walkway and blocked access to vendors. When requested to move, they relocated approximately a block away, but still within the permit area. The supervisor and the legal counsel told them to move again, further away, and the plaintiffs refused, leading to their arrest.

The Appellate Court cited a number of U.S. Supreme Court cases relevant to the plaintiff’s rights and the authority of police to take enforcement action under such circumstances.

...the very core of the first amendment is that the government cannot regulate speech because of its message, its ideas, its subject matter, or its content.” Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

In Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), the Supreme Court held that the First Amendment protected the right of parade organizers to exclude other groups that expressed messages that the organizers did not agree with. Hurley did not apply in this case because the event was free and open to the general public.

The Court noted that the issuance of a permit to use a public forum does not transform its status, noting a line of cases holding that in traditional public fora the State may not prohibit all communicative activity and the denial of the exercise of first amendment rights in such public places cannot constitutionally be denied broadly and absolutely. Hague v. CIO, 307 U.S. 496



(1939); Frisby v. Schultz, 487 U.S. 474 (1988) and Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).

The Court then cited a number of cases allowing the government to impose content-neutral time, place, or manner restrictions justified without reference to the content of the regulated speech when such restrictions are narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of the information. Ward v. Rock Against Racism, 491 U.S. 781 (1989), Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) and Poulos v. New Hampshire, 345 U.S. 395 (1953).

Other cases justifying police action include Cox v. Louisiana, 379 U.S. 536 (1965) holding that “a state or municipality had the right to regulate the use of City streets to assure the safety and convenience of the people and their use and the concomitant right of the people of free speech and assembly.” And Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) holding “[T]he right of free speech...does not embrace a right to snuff out the free speech of others.” “As a general matter, it is clear that a State’s interest in protecting the ‘safety and convenience’ of persons using a public forum is a valid governmental objective.” Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

This case was one in which there was sufficient probable cause to believe the plaintiffs had committed disorderly conduct and therefore the Court did not have to determine whether other charges for failure to disperse and obstructing a public passage were supported by probable cause as it is sufficient in a false arrest case to establish probable cause, for a single offense.

The officers actions were not based upon the content of the plaintiff’s speech which would have been prohibited pursuant to Texas v. Johnson, 491 U.S. 397 (1989); Brown v. Louisiana, 383 U.S. 131 (1966) and Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). Their actions in ordering the plaintiffs to move further away was also a narrowly tailored restriction which served a significant government interest and, given the location they were asked to move to, they had alternative channels of communication. They also, prior to being asked to move, had alternative ways to express themselves without causing disruption.

**Eidson v. Owens, 515 F.3d 1139 (10<sup>th</sup> Cir. 2008)**

Officer/Attorney, who had previously advised the plaintiffs, responded to a complaint that the Eidsons were growing marijuana. Owens, an attorney who was also a reserve deputy sheriff, who had apparently provided legal advice to the Eidsons, informed Kim Eidson that her son had provided information that they were growing marijuana. In reality this information had come from the mother and grandmother of a girl dating Eidson’s son. Kim confessed at that point that she had some plants back there. Owens then asked for consent to conduct the search, stating that if they did not consent other deputies would obtain a warrant and they would wait as long as three days at the end of the driveway while a warrant was obtained.

The Eidsons claimed that the consent was not valid for three reasons. First, the consent search was tainted by the threat of detention that essentially amounted to an arrest if the consent was refused. This claim was discounted as probable cause for Kim Eidson’s arrest had already

been derived from her confession. Second, that Owens' statement that the son had turned them in, indicating that the unlawful conduct had been exposed by someone with direct knowledge of it, rather than the son's girlfriend's mother and grandmother, was improperly coercive. The Court discounted this claim as Owens' statement, although incorrect, was not made in an attempt to trick or deceive the Eidsons; Third, that Owens told the Eidsons that if they insisted on a search warrant that a judge would go harder on them and that they would be considered uncooperative. This assertion was coercive as it indicated that there were punitive ramifications if the Eidsons were to exercise their constitutional rights to refuse consent. Finally, plaintiffs complained that the consent was obtained from an attorney who, in the past had provided legal advice to them. The Court determined that even if the threat of detention was minimized, the remaining circumstances were sufficient to invalidate her consent. The Court did find qualified immunity as in the unusual circumstances present in this case, had never occurred in a similar case. Therefore, there was no clearly established law which led to the Court's conclusion that Owens was entitled to qualified immunity.

**Peals v. Terre Haute Police Department, 535 F.3d 621 (7<sup>th</sup> Cir. 2008)**

Plaintiff claims that he was arrested in retaliation for a misconduct complaint that he submitted and that during the arrest police officers conducted an unlawful search. The Court affirmed the Summary Judgment on behalf of the officers on the retaliatory claim finding that the plaintiff failed to show a causal connection between the official's retaliatory animus and subsequent injury. The Court explained that the plaintiff must show that the non-prosecuting official acted in retaliation and induced the prosecutor to bring charges that would not have been initiated without his urging. In addition the plaintiff must prove that no probable cause existed for the underlying charge.

Peals claims that when he was arrested in his garage the officers unlawfully conducted a search by looking around the garage as if they were searching for something and one of the officers entered his home. He did not allege that any officer opened or otherwise manipulated anything in the garage or the house, or that the search extended beyond a brief visual inspection of areas immediately adjoining the garage. The Court found that the factual allegations did not go beyond the permitted protective sweep as described in Maryland v. Buie, 494 U.S. 325 (1990). Plaintiff also claimed that the presence of canines in his garage was unconstitutional. The Court found that as a general rule, canine units trained to protect officers and apprehend suspects may accompany police officers and that canine units trained to detect contraband do not conduct a search when they sniff an area where they are lawfully present.