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TABLE OF CONTENTS

INVESTIGATIVE DETENTION

EMOTIONALLY DISTURBED PERSONS

DEADLY FORCE

LESS LETHAL

SEARCH AND SEIZURE

FAILURE TO PROTECT

FALSE ARREST/MALICIOUS PROSECUTION

MISCELLANEOUS

INVESTIGATIVE DETENTION

Rodis v. City and County of San Francisco, ____ F.3d ___ (9th Cir. 2007)

Rodis was an attorney and elected local official who lived within two blocks of the drugstore where he was arrested. He gave the cashier a hundred dollar bill which she thought might be counterfeit. The manager took the bill and compared it with others which appeared different. He then used a counterfeit detector pen which indicated that it was authentic. Still, he called the police. Three patrol officers and a sergeant arrived. The sergeant knew the plaintiff and his position in the community. Deciding it would be necessary to contact the Secret Service, they brought plaintiff to the police department. After communicating with a Secret Service agent, it was determined that the bill was not counterfeit.

The Court determined that the officers were not entitled to qualified immunity. Possession of counterfeit currency with intent to defraud requires (1) possession of counterfeit money; (2) knowledge that the money is counterfeit; and (3) possession with intent to defraud. Officers did not have, nor did they make any attempt to determine whether the plaintiff had any reason to believe that the money was counterfeit or that he intended to defraud. At the time of the arrest Rodis had another hundred dollar bill which was accepted by the store, and the detector pen indicated that it was authentic. Further, his being an attorney and a locally elected public official who lived close by also diminished probable cause.

Humphrey v. Mabrey, 482 F.3d 840 (6th Cir. 2007)

Defendants, two bicycle patrol officers, received information from Weaver, who was in a helicopter, that a PT Cruiser with a gun on board was headed in their direction, in connection with an investigation involving a threat with a gun. They observed the helicopter following the PT Cruiser and stopped a line of traffic with the PT Cruiser at the end. They approached with their guns drawn, yelled at plaintiff to get out and as one provided cover, the other reholstered, grabbed plaintiff's wrist pulling him out of the car, patting him down and started to handcuff him when the plaintiff stated he had an injured thumb. He was not resisting and the officers left the injured hand un-cuffed. The cover officer holstered his gun, shined his flashlight, entered the car searching for the gun, and within less then five minutes released the plaintiff. During a ½ hour period between the original 911 call, and the stop, there had been conflicting information amongst the searching officers and the dispatcher including whether the suspect was on foot, or in a PT Cruiser, the direction of travel and license plate number of the vehicle and whether the vehicle was being driven by the suspect or his friend.

The Court explained that this case must be evaluated under the collective knowledge doctrine. The Supreme Court explained in Hensley, "Effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer

to another and then officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information. The actions of the stopping officers will be judged on what information was clear or should have been clear at the time of the incident and what information the officer reasonably was entitled to rely on in deciding how to act. In this case, the helicopter's identification of the car as, "probably it", in the area of the criminal activity was sufficient for the officers to decide to quickly stop the reported gun bearing vehicle.

The Court also found that the officer's use of force was reasonable in the context of a qualified immunity analysis. The officers could have reasonably believed that it was lawful as quickly as possible for them to point their guns at the suspect, quickly and forcibly remove him from the car and restrain him without stopping the process to obtain a fuller description. The officers' de-escalation was also noted as they holstered their guns, did not harm the plaintiff and were careful not to aggravate a pre-existing thumb injury. The Court also evaluated the helicopter operator's qualified immunity. Although his identification of the PT Cruiser was in retrospect, unreasonable, he was acting on fairly limited information from three to five hundred feet in the air, had come on duty when the search was already in progress and, therefore, although his mistakes were unfortunate, they were not so egregious that the Court would consider them as plainly incompetent or mistakes no reasonable officer would have made under the circumstances.

Cortez v. McCauley, 478 F.3d 1108 (10th Cir. 2007)

The Sheriff's Department received a phone call from the hospital stating that a woman had brought her 2 year old daughter to the hospital as the child complained that her babysitter's boyfriend had hurt her pee pee. Four officers were dispatched to the residence without further investigation. At approximately 1:00 a.m., the officers knocked on the door waking the plaintiffs, Rick and Tina Cortez. Rick was ordered to exit his house, was handcuffed, read his Miranda rights and placed in the back of a patrol car where he was questioned. Tina arrived at the front door while her husband was being placed in the patrol car. She headed toward the bedroom to make a telephone call but an officer entered the home, seized her by the arm and physically escorted her to a separate patrol car where she was subjected to questioning. An officer did allow her to use his cell phone but seized the keys to the house and would not let them return for approximately an hour. Subsequent investigation revealed the complaining mother had had a verbal altercation with the plaintiffs who ran a childcare center and told her that her child could no longer attend. Detectives at the hospital learned that there was no evidence of penile penetration and the two potential sources of vaginal irritation may have been urine stained underwear or bubble bath.

The Appellate Court affirmed the District Court's finding that Rick Cortez' investigative detention quickly became a full custody arrest. The only information which arguably implicated him was a statement attributed to a two year old child relayed from the child's mother to a nurse. The officers clearly did not have probable cause. Further, police officers may not ignore easily accessible evidence. Officers have a duty to investigate and make an independent probable cause determination based on their investigation. Here the officers had readily available

witnesses, physical evidence and medical diagnosis forthcoming. Defendants conducted no investigation and relied on the flimsiest of information conveyed by a telephone call. The Court did conclude that the officers were entitled to qualified immunity on Rick's excessive force claim. They first determined that any damages resulting from force in executing the arrest would be subsumed in the false arrest claim in that he would not be able to prevail on an independent excessive force claim because the redness to his wrists, which appeared the next day, amounted to a de minimis injury insufficient to support a separate excessive force claim.

The Court determined that the seizure of Tina Cortez amounted to an investigative detention and there was no reasonable suspicion to support her detention. Considering the factors in the light most favorable to the plaintiffs, there was a substantial and unjustified invasion of Tina's personal security that hardly could be considered de minimis. She did not resist, was no threat to the officers and could not have destroyed evidence.

Winterrowd v. Nelson, 480 F.3d 1181 (9th Cir. 2007)

The plaintiff claimed that troopers used excessive force in patting him down during a motor vehicle stop. The troopers stopped plaintiff because they suspected his plates were invalid. Plaintiff was under the erroneous belief that he did not have to register his vehicle in the State of Alaska. He was ordered out of his car for a pat down and when the officers ordered him to put his hands behind his back he explained that he couldn't because he had a shoulder injury. The officers then forced him down upon the hood of his car and forced his right arm up as Winterrowd screamed in pain. The trooper allegedly pumped his arm up and down and after several seconds plaintiff fell to the ground.

The Court recognized prior precedent allowing officers to pat individuals down when they plan to have them sit in a patrol car, because of the officer's proximity to the suspect which presents safety concerns. The Court also noted that officers conduct scores of traffic stops and numerous pat downs and inevitably some individuals will make claims that they have injuries which police officers do not have to accept as true. However, officers under such circumstances should conduct pat downs in a manner which will not exacerbate the injury to the suspects.

The Court rejected a number of the officer's reasons for the pat down. The blanket statement by officers that they fear for their safety is not enough to justify use of force. The officers expressed concern because they removed 20-25 pens and pencils from Winterrowd's person, but removing items which are lawful to possess but which might be used as a weapon does not justify a pat down, otherwise officers would be allowed to pat down any motorist who has a pen or a set of keys or any other object which might possibly be used as a weapon. Officers cited Winterrowd's previous belligerent attitude and dislike for police. This could not suffice because there was no evidence of any threat or prior violent behavior in any previous encounter. Finally, the officers claimed that Winterrowd called them jackbooted thugs, armed mercenaries and cowards. The Court noted that the plaintiff was well within his rights to make such statements. "While police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment."

Reeves v. Churchich, 484 F.3d 1244 (10th Cir. 2007)

Seven officers, some armed with rifles, went to an apartment upstairs from the plaintiff's residence to execute a felony arrest warrant on an individual suspected of assaulting his estranged wife who had access to firearms. Plaintiffs Alicia Reeves and her fourteen year old daughter Ashlee were in their apartment downstairs. Ashlee, who had just gotten out of the shower, saw police officers with guns outside her bedroom window. One of them said, "hold it right there" at which time she grabbed her towel and ran into the living room to wake her mother who was napping, who told her to go back into her room and get dressed. Ashley observed a rifle barrel through her open barred window. She heard someone say, get down on the ground but instead of doing so, she reached up, closed the blinds and ran out of the room. Alicia went outside with her dog, saw an officer pointing a gun at her and stated, "Don't point that gun at me. What is the problem? What's going on?" There were other words back and forth including allegedly an officer telling her, "Get back in your apartment, bitch." She refused, demanding to know what was going on. The suspect was not found in the apartment upstairs when the officers left. The plaintiffs claimed that they were seized by the officers' words and actions and pointing their guns at them.

Applying Terry, "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen, then we conclude that a seizure has occurred.", the Court determined that the plaintiffs did not submit to either the physical force or show of authority and therefore, neither plaintiff was seized.

The plaintiffs also claimed an illegal search based on the rifle being placed through the bedroom window. The Court, following a lengthy discussion with prior precedent, concluded, "Churchich's insertion of his rifle into the interior of the Reeves' home and following Ashlee's movement with it was not a search because the rifle was incapable of obtaining information and did not obtain any information beyond that which was observed by Churchich standing in the common area. Nor did the insertion of the rifle through the window enable Churchich to see that which would not otherwise be visible."

EMOTIONALLY DISTURBED PERSONS

Meyer v. Board of County Commissioners of Hartmond 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."

Mann v. Yarnell, ___ F.3d ___ (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.

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.

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.

DEADLY FORCE

Ngo v. Storlie, 495 F.3d 597 (8th Cir. 2007)

After being shot, plaintiff, an undercover gang task force officer, attempted to run after the suspect but fell to the ground. Just after falling to the ground, he was shot six times by a responding patrol officer. The Court found that Ngo had sufficient evidence to support his claim that the officer's actions were not objectively reasonable. Before arriving at the scene, Officer Storlie received a text message that an undercover strike force member was doing surveillance in the area. An hour later, he heard Ngo say that he had been shot and described the suspect as a black male, black jacket and white tennis shoes, and that he was in plain clothes. A reasonable officer would have known there was a plain clothes officer near the scene of the shooting. He would have seen the Asian American officer kneeling in the street under a street light waving his hands above his head. There was a pistol in Ngo's right hand when his hooded sweatshirt was pulled down partially revealing his bullet proof vest with his police microphone hanging. As the patrol car stopped, a reasonable officer would have seen Ngo fall forward, dropping his pistol to the ground with his left hand clutching his chest. A reasonable officer would have recognized that Ngo did not pose an immediate threat to the officer's safety or the safety of others. He had dropped his weapon, was not reaching for one, was not resisting or attempting to evade arrest. Further, Storlie did not attempt to give Ngo any commands or warnings before firing. A warning under these circumstances was feasible and a failure to take an extra moment to assess the situation added to the unreasonableness of Storlie's actions.

Curley v. Klem, 2007 WL 2404803

During the evening of November 20, 1997, Bailey shot and killed a Long Branch police officer and stole a police car. A short time later he stole a Camry from a woman at a gas station. Trooper Klem chased Bailey who shot one of the troopers and a bullet that struck Klem's windshield. Klem lost sight of Bailey and, unbeknownst to him, when Bailey's car approached a toll plaza at the George Washington Bridge it crashed into a Pathfinder. As Klem walked by the Camry, he looked in the rear seat, saw that the airbag had deployed, but did not see Bailey who had shot himself after the accident. Instead, he observed a toll collector pointing in the direction where he saw a black male with a gun in his hand. He testified that he shouted three times for the man with the gun to drop it and then fired his shotgun hitting Curley in the leg. Curley was a Port Authority police officer who was responding from the opposite direction in uniform, but without a hat. He had driven up to the scene in his marked police car and after reaching the plaza, turned his sirens off but left his lights on. In the first go around the Appellate Court overruled the District Court's grant of summary judgment in favor of Klem, finding issues of disputed fact. The jury found that Curley did not repeatedly point his gun at Klem and was not raising his gun towards Klem. They found that Klem's failure to look in the Camry was not objectively reasonable and that Klem did not act in an objectively reasonable manner during the confrontation. They also found that Klem's mistake in firing his weapon was objectively reasonable. The Appellate Court affirmed a judgment in favor of Klem based on qualified immunity.

The Court first discussed at length the two step qualified immunity analysis dictated in Saucier v. Katz. It then addressed the unresolved issue as to whether or not the qualified immunity issue should be resolved by the court or a jury. The 1st, 4th, 7th and 11th Circuits have indicated that qualified immunity is a question of law reserved for the court. The 5th, 6th, 9th and 10th Circuits have permitted the question to go to juries while the 2nd and 8th have answered the question both ways. While suggesting that this question should be left to the jury, the Court determined that as phrased, the jury interrogatory presented an essentially factual question regarding the constitutional violation. "Was Trooper Ron Klem's mistake in firing his weapon objectively reasonable?" The majority opinion acknowledging, "The great pressure and intensity inherent in a police officer's hot pursuit of a suspect known to be armed and highly dangerous…." The Court found sufficient evidence to support the jury's verdict on the objective reasonableness of the trooper's actions.

Adams v. Spears, 473 F.3d 989 (9th Cir. 2007)

After running several stop signs, 18 year old Alan Adams engaged officers in a pursuit referred to as "a rapid Sunday drive" as he generally drove within the speed limit, slowed for some stop signs and actually stopped for others. Three county officers and two highway patrol officers followed him. Paul Spears, a highway patrol officer, decided to join in on the pursuit, left his assigned post without permission and picked up a county probation officer who was his occasional partner. He took over the lead and attempted to ram Adams' vehicle once and did ram it twice before it finally stopped. The other patrol vehicles cut off any possible avenue of escape. Officer Rivera approached Adams' vehicle, broke out the side window with the intention of spraying him, however, as he was doing this, Spears, standing in front of Adams' vehicle drew his service weapon and fired six rounds as the vehicle backed up at speeds of no more than four to five miles per hour. An investigation revealed that Spears violated a number regulations including not wearing his body armor, not receiving permission to have the probation officer ride as a passenger and chase, leaving his assignment without authorization, entering the pursuit without receiving permission and failing to communicate with any of the other units engaged in the chase. He also rammed the vehicle without permission and failed to take into consideration the final resting place of the vehicles after the ramming. Two officers at the scene testified they saw no reason why Spears should have shot Adams. Relying on Brosseau v. Hogan, Spears claimed he was entitled to summary judgment. In reviewing Brosseau and the cases the Supreme Court relied on, the Court found that this shooting was outside of the hazy border between excessive and acceptable force. Instead they applied Tennessee v. Garner, determining that the shooting of an unarmed non-dangerous suspect to prevent the suspect's flight is a violation of the Fourth Amendment.

Thompson v. Chicago, 472 F.3d 444 (7th Cir. 2006)

Following an apparent drug sale, pursuit and a collision, several officers struggled with Scott Thompson who stood 6'1" and weighed approximately 330 lbs. Officer Hespey admits that during the struggle, he placed his arm around the plaintiff's neck; however, he states that he did not apply pressure. Paramedics arriving at the scene believe that he stopped breathing due to

a large amount of blood blocking his airway. An autopsy indicated that he died as a result of asphyxia due to a chokehold but he was also suffering from cardiovascular disease and opiate intoxication. The Appellate Court discussed the testimony of a number of well known national experts. An instructor at the Academy testified that a chokehold would constitute deadly force and would be unwarranted against a suspect resisting arrest such as Thompson, and that chokeholds would be contrary to officers training in department procedures. One of the plaintiff's experts opined that the officers, instead of applying a chokehold, could have tackled him, pepper sprayed or even used a baton below the waste, but admitted that even though the officers are not trained in the use of a chokehold, that they may use it when their life is in jeopardy. The jury returned a verdict in favor of the defendants.

Plaintiffs appealed claiming that the District Court erred in refusing to admit the department's general orders regarding use of force. The Court found that under Federal Rule of Evidence 401 the judge was well within his discretion excluding this evidence as irrelevant. The Court cited prior precedent, holding that the violation of these regulations or even state law is completely immaterial as to the question of whether a violation of the federal Constitution had been established. In Wren v. United States, the Supreme Court concluded that because police rules, practices and regulations vary from place to place and from time to time, they are an unreliable gauge by which to measure the objectivity and/or reasonableness of police conduct. The Court also concluded that the general orders were properly excluded regarding the state wrongful death claim under Rule 403. Rule 403 provides discretion to exclude evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Adherence to the general order has little or no bearing on whether the officer breached his duty of care in apprehending Thompson, therefore, evidence about the specifics of the orders might very well contributed to unfair prejudice and would have caused confusion regarding the plaintiff's wrongful death claims.

The Court also upheld the ruling excluding expert testimony from an inspector and sergeant of the Office of Professional Standards, regarding whether Officer Hespey violated the Fourth Amendment by using excessive force. Regarding the reasonableness of the officer's use of force would have been of little value except as to possibly causing confusion and a substantial risk of prejudice. The jury after hearing all of the evidence was in as good a position as the experts who judged whether the officers used reasonable force.

Williams v. City of Grosso Pointe Park, ___ F.3d ___ (6th Cir. 2007)

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.

Jiminez v. All American Rathskeller, Inc., ___ F.3d ___ (3rd Cir. 2007)

At approximately 1:30 a.m. a group of males, including a student from Penn State University, were in the parking lot of a bar when one began to urinate. Several employees confronted the group, including a security guard who was on top of plaintiff, Serrano, with his knee in his back, when officers arrived. When the officer began to handcuff Serrano, he realized that he was unresponsive. Serrano was pronounced dead on arrival at the hospital. It was undisputed that he died of asphyxia; however, plaintiff's expert said that he died based on the security guard's weight on his body due to positional asphyxia, while the defendant's expert who performed the autopsy testified that he died of asphyxia by aspiration or of vomitus. He concluded that the death was accidental and substantial alcohol intoxication was a contributing factor.

A Monell claim was brought against the municipality claiming a custom of permitting liquor license employees to act as auxiliary police force by handcuffing and restraining persons until the police arrive. The owner of the Rathskeller testified that his employees restrain individuals for defensive purposes only and denied that they took actions to prevent persons from leaving the area. The police officers and the Chief also denied that there was a policy or custom of encouraging or permitting security personnel to detain individuals until the police could arrive. At odds with this evidence was an affidavit submitted by the owner of the Rathskeller months after his deposition stating that members of the staff had been asked on several occasions by the Borough Police Department to hold people until they got there. The Court determined that this affidavit did not create an issue of fact and referred to it under the "sham affidavit doctrine." The Court cited cases from eight other circuits which have adopted this doctrine. It concluded that the affidavit was not competent evidence because it contradicted prior deposition testimony.

Henry v. Purnell, ____ F.3d ____ (4th Cir. 2007)

This case presents the interesting question of whether a police officer who mistakenly uses a gun when he believed he was drawing a taser would be subjected to a deadly use of force or less lethal analysis.

Officer Purnell went to Henry's address to arrest him pursuant to a warrant for failing to obey a court order to pay child support. Henry avoided arrest by lying about his identity. Three days later Purnell, now knowing that Henry had lied, saw him in a passing truck. When Purnell

stopped Henry and took him out of the truck, Henry fled. Purnell, intending to discharge his taser, accidentally pulled his glock shooting Henry in the elbow. It was stipulated that he made this mistake. The Court determined that a seizure occurred in accordance with the recent Supreme Court decisions of Scott v. Harris and Brendlin v. California. The Court noted that the level of force that a plaintiff claims to be excessive is a level of force that a law enforcement officer intentionally uses. This case is unusual in that Purnell did not intend to use the glock. Therefore, based on a number of cases allowing officers room for honest mistakes, it appears that the mistaken understanding will bear on the reasonableness of the officer's use of force. The Appellate Court remanded the case for further discovering regarding the training Purnell received with the glock and taser.

Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007)

Officer Mattingly was working undercover, observed by Officer Thomerson and wired so that other officers could hear him as he made transactions. 19 year old Michael Newby approached him, possibly to sell narcotics. Other suspects on the scene reached into Mattingly's car and took money and ran away. As Newby bent down to pick up a twenty dollar bill, Mattingly attempted to arrest him and a struggle ensued. Although Mattingly claims that he drew his weapon during the struggle and a shot was fired, eyewitnesses dispute this claim. The eyewitnesses indicated that when Newby began to run away, Mattingly shot at him between three to five times. Three shots hit Newby in the back. The officer claimed that Newby, while running away, checked his waistband and was feeling for his gun. Although Newby was ultimately found to have a firearm in his waistband, there were a number of disputed facts which indicated there was no reason for Mattingly to believe he had a weapon including his failure to say anything about a gun when communicating over the wire. When Thomerson and another officer approached to handcuff Newby, Mattingly did not warn either officer that Newby might be armed. Newby died from his injuries. The Garner test was applied. "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." The Court concluded when giving the facts most favorably to the plaintiff, Mattingly did not have probable cause under Garner. The Court judged his actions at the moment he fired the shots, as an officer's prior errors in judgment did not make a shooting unreasonable, as long as the officer acted reasonably during the shooting itself and in the few moments directly preceding it. Therefore, the question is whether Mattingly had probable cause to believe that Newby posed an imminent danger as he ran away.

Mattingly contended that trained police officers know that drug dealers, especially crack cocaine dealers, usually carry guns. The Court would not accept this general notion that crack dealers are dangerous. Newby's second crime was resisting arrest and fleeing the scene. Such actions in of themselves do not justify the use of deadly force. Finally, Mattingly never warned Newby that he might be shot as required by Garner. The Court noted that all of the cases cited by the defendant involved officers who knew that the suspects had weapons and had reason to believe that the weapon would be used against the officer or others. The Court also went on to cite several cases indicating that even when a suspect has a weapon, but the officer has no reason

to believe that the suspect poses a danger of serious physical harm to himself or others, deadly use of force is NOT justified.

Livermore ex rel Rohm v. Lubelan , 476 F.3d 397 (6th Cir. 2007)

Two marijuana cultivators operating the Rainbow Farms Campground were shot and killed by a multi agency operation during which Crosslin and Rohm set fire to the out buildings on Rainbow Farms and barricaded themselves in their residence.

The Circuit Court denied qualified immunity based on issues of disputed fact including the following:

Ballistic evidence demonstrated that Lubelan shot Rohm in the back contradicting Lubelan's contention that the decedent was aiming toward the armored vehicle. Witness testimony indicated Rohm was right handed, contradicting Lubelan's testimony that the rifle was in his left hand. Lubelan's premise that the shooting was necessary to protect the two officers whose upper torsos were exposed out of the armored vehicle was contradicted by those officers' statements that their vehicle was repositioning in a covert location while they were inside at the time the shots were fired, and Lubelan's own testimony that he did not see officers in the armored vehicle when he fired. Finally, plaintiff's law enforcement practice expert testified that the fatal incident was triggered by the unjustified and reckless decision to rush the suspect without warning at a time when he was trapped and did not pose any imminent threat.

The Court determined that even though defendants would not concede the plaintiff's version of facts for the purposes of the interlocutory appeal, they still had jurisdiction if the defendant raises a purely legal question as to whether the facts alleged support a claim of violation of clearly established law. After considering the totality of the facts the Court held that Lubelan acted reasonably in firing at Rohm. They found that Rohm posed a serious threat because he helped cause a standoff that led to Crosslin's death by setting fire to the buildings, he was present when Crosslin fired shots at a news helicopter and rather than surrendering as agreed upon, he exited his burning residence with a rifle. Officers were told that the residence was wired with explosives and it was undisputed that Rohm was holding the rifle as the fatal bullet hit the rifle stock of Rohm's gun before entering his chest. Plaintiff also claims that the incident commander acted recklessly in creating circumstances which led to the shooting by ordering snipers to shoot Rohm if he raised the weapon at the LAV, by failing to warn Rohm that he would be fired upon, and by rushing the assault on Rohm. The Court determined that all of these actions occurred in the hours and minutes leading up to Rohm's killing and that prior case law instructs courts to disregard these events and to focus on the "split-second judgments" made immediately before the officer used allegedly excessive force. Because the only force used against Rohm were the shots fired by the sniper, decisions made by the commander were immaterial and not sufficient basis for a claim under the Fourth Amendment. Prefacing this issue was the court citation of Plakas v. Drinski, "…all such cases begin with a decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to

cause and which, if kept within constitutional limits, society praises the officer for causing." 19 F.3d 1143, 1150 (7th Cir. 1994).

LESS LETHAL

Jennings v. Jones, ___ F.3d ___ (1st Cir. 2007)

Jennings, a member of the Narraganset Indian Tribe, claimed officers used excessive force against him when arresting him for disorderly conduct during the execution of a search warrant to seize cigarettes. The Appellate Court overturned the District Court's judgment as a matter of law of the jury's award of $301,100.00 in compensatory damages for excessive force. There was testimony by witnesses who indicated that Trooper Jones continued twisting Mr. Jennings' ankle after he had been subdued and had informed the trooper that his ankle hurt due to a prior injury. Officer Delaney, an instructor at the State Police Training Academy, testified that it would be reasonable for an officer to continue the use of the ankle turn control technique, even after a suspect stops kicking. The focus for the case, however, was not the continued hold but increasing the use of force after Jennings had ceased resisting for several seconds and stated that the force Jones was using was hurting his previously injured ankle. "When an individual has been forcibly restrained by several officers, he has ceased resisting arrest for several seconds, and has advised the officers that the force they are already using is hurting a previously injured ankle, we cannot think of any basis for increasing the force used to such a degree that a broken ankle results. At the time of Jones' actions, both existing case law and general Fourth Amendment principals had clearly established that this use of force was excessive in violation of the Constitution."

Davis v. City of Las Vegas, 478 F.3d 1048 (9th Cir. 2007)

Officer Miller responded to a casino security office where the plaintiff was being held in handcuffs for trespassing. After patting plaintiff down, Miller asked if he could search his pockets. Plaintiff refused, but Miller attempted to reach in his pockets causing the plaintiff to rotate his hips away in an attempt to prevent the search. Miller allegedly slammed Davis' head into the wall leaving a sizable dent in the sheetrock, then throwing him onto the floor, placing his knee in his back, turning him over and punching him in the face. Plaintiff suffered a fractured neck. Applying the Graham standard, the Court determined that Davis was not entitled to qualified immunity.

1. Trespassing is a relatively minor offense;
2. Plaintiff did not pose an immediate threat to Miller or anyone else because he was handcuffed, was surrounded by security guards and was not carrying any weapons;
3. Plaintiff was not actively resisting but only resisting Miller's unlawful attempts to seize his wallet;
4. Miller punched him in his face when he was already sprawled flat on the floor with handcuffs behind him.

The Court also noted that even assuming the search of the pockets was lawful, there were less abusive methods of conducting the search.

Zellner v. Summerlin, 494 F3d 344 (2d Cir. 2007)

Zellner, a sixty year old adjunct professor who was chair of a local anti-bias task force was called to a demonstration at the construction of a new housing development. A large crowd and numerous state troopers were at the site. Zellner claimed that after introducing himself to Major Webber and briefly discussing an injunction on the construction, he turned and Trooper Summerlin grabbed him from behind using excessive force against him while arresting him for disorderly conduct and interfering. The troopers claimed that after the introduction and brief discussion Zellner sat on the ground in the driveway blocking incoming fuel trucks and called out to others to join him. The testimony of troopers and a number of demonstrators supported either version of the facts. A videotape gave little assistance in clarifying these disputed facts. The jury in its ten question multipart verdict form, found no probable cause for the arrest and no excessive force and awarded $40,000.00 against each defendant and punitive damages which were later determined to be $5,000.00 against the Major and $500.00 against the trooper. The District Court granted Defendants' motion for judgment as a matter of law based on qualified immunity and denied Zellner's motion for a new trial on his excessive force claim.

The Appellate Court overruled the District Court finding that it had employed facts not favorable to the plaintiff. "Once the jury has resolved any disputed facts that are material to the qualified immunity issue, the ultimate determination of whether the officers' conduct was objectively reasonable is to be made by the court." On a motion for judgment as a matter of law, the court is not permitted to find, as a fact, a proposition that is contrary to a finding made by the jury. The Court did cite the recent Supreme Court decision of Scott v. Harris, that determined "Incontrovertible evidence relied on by the moving party, such as a relevant videotape whose accuracy is unchallenged, should be credited by the court on such a motion if it so utterly discredits the opposing party's version that no reasonable juror could fail to believe the version advanced by the moving party."

This decision also discussed the difference between probable cause and arguable probable cause, the collective knowledge doctrine and a prior ruling indicating that the absence of probable cause for an arrest will not necessarily make any subsequent use of force per se excessive.

Calvi v. Knox County, 470 F.3d 422 (1st Cir. 2007)

Officers responded to a 911 call about a woman brandishing a knife in a house. Several unrelated people lived at the house including Calvi. It was learned from the other tenants that Calvi began yelling at one of the other tenants because he made faces at her and at one point she snatched a butcher knife from the sink board. Upon arresting Calvi one of the tenants told the officer to be gentle because she was frail and had recently undergone elbow surgery. The officer placed handcuffs on Calvi, double locked them behind her back and transported her to jail. During the five to six minute drive she did not complain, however, she was crying. Calvi

claimed that the officer who fingerprinted her repeatedly pushed her fingers down hard in spite of being told that she had a hand deformity. She claims that the fingerprinting caused her injuries to her wrist and surgically repaired finger. The only claim worth addressing is the one against the arresting officer. The Court determined that the handcuffing was reasonable as the officer was responding to a call involving a person brandishing a knife in a dangerous manner. Even if the officer had known that Calvi had a hand deformity, there was no evidence that he applied any excessive force. He was merely exercising standard police practice which called for cuffing an arrestee's hand behind her back and his decision not to deviate from this practice was a judgment call. The handcuffs were on Calvi no more time than was reasonably necessary to transport her to the lock up. Therefore, the officer was entitled to qualified immunity. Interestingly, Calvi failed to sue the officer who fingerprinted her.

Graham v. Hildebrand, 203 Fed.Appx. 726 (7th Cir. 2006)

The Grahams, two black brothers and their sister, were pushing and shoving with a crowd of over fifty people who were yelling racial epithets. Officer Bennett placed his hand on Lee Graham's shoulder in what he described as a field interview position. Lee swatted his hand away and pushed him at which point Bennett said he told Lee he was under arrest. When the sister stood between them, Bennett disbursed his pepper spray. The Grahams claimed that they were pushing to defend themselves against the crowd. A jury acquitted the Grahams, but their civil suit for false arrest failed based on a finding that the officers had at least arguable probable cause.

Viewing the facts in the light most favorable to the Grahams, the court denied Bennett qualified immunity on the excessive use of force claim. It is their contention that they were not resisting arrest or interfering with the officer at the time that Bennett sprayed them without warning. The court suggested that if Bennett had employed his pepper spray to stop them from fighting with others, qualified immunity may have been available; however, Bennett claimed that they were resisting and the Grahams claimed that he never gave them an opportunity to comply with his order prior to deploying his pepper spray.

The court listed a number of other circuit decisions evaluating an officer's use of pepper spray. *See Jackson v. City of Bremerton,* 268 F.3d 646, 652-53 (9th Cir.2001) (holding that use of pepper spray was reasonable given individual's active interference with officers); *Wagner v. Bay City,* 227 F.3d 316, 324 (5th Cir.2000) (holding that use of pepper spray was reasonable where individual was resisting arrest); *Monday v. Oullette,* 118 F.3d 1099, 1104-05 (6th Cir.1997) (holding that use of pepper spray was reasonable where officer warned that he would discharge it if individual did not cooperate); *Ludwig v. Anderson,* 54 F.3d 465, 471 (8th Cir.1995) (holding that use of pepper spray was reasonable where individual refused to obey police orders). At the same time, other courts also have held that the gratuitous use of pepper spray-when an individual is in custody or otherwise passive-is excessive. *See Vinyard v. Wilson,* 311 F.3d 1340, 1348 (11th Cir.2002) (holding that use of pepper spray was excessive where individual was handcuffed in patrol car and posed no threat to officers); *Headwaters Forest Def. v. County of Humboldt,* 276 F.3d 1125, 1130 (9th Cir.2002) (holding that use of pepper spray on

peaceful protestors who refused to unchain themselves was excessive; pepper spray was clearly unnecessary to subdue, remove, or arrest them).

DeLeone v. City of Corpus Christie, ____ F.3d ___ (5th Cir. 2007)

DeLeone appealed the dismissal of his case pursuant to Heck v. Humphrey. He claims that he had a verbal argument with his wife and challenged the police officer's order that he leave the home. The police officer sprayed him with chemical spray and while he was blinded, began striking him with a baton. He put the police officer into a bear hug on his knees. He then backed off with his hands in the air and was shot by the police officer who fired over his wife's shoulder while their child was near his leg. He was arrested for aggravated assault. Following a judicial review of the evidence the Court found sufficient evidence to substantiate the defendant's guilt beyond a reasonable doubt and entered an order for, "deferred adjudication". Deferred adjudication is the equivalent of a number of dispositions of state courts where there is no conviction and after a period of time with no intervening action, the case is dismissed. The Appellate Court found two arguments to apply Heck. First, the order deferring adjudication is a functional equivalent of Heck. Relying on the recent Supreme Court ruling of Wallace v. Kato, where the Court held that a District Court may properly stay a false arrest claim that is brought before a criminal case has ended, means that Heck would not apply under this argument. The second argument is that a deferred adjudication is a final judicial act even if it is not a finding of guilt. The Court found that the Texas courts have accorded finality to these orders and therefore, a deferred adjudication is a conviction for the purposes of Heck's favorable termination rule. The Court also determined that DeLeone's excessive force claims were inseparable from his other claims and therefore were properly dismissed.

Baker v. City of Hamilton, Ohio, 471 F.3d 601 (6th Cir. 2007)

This case involved two alleged claims of gratuitous use of force. In the first, Officer Taylor chased a drug suspect on foot finding him hiding in some bushes. According to the plaintiff, he stood out from the bushes with his arms out and surrendered. Taylor then hit him in the head with his asp and when the plaintiff asked why the officer responded, "That's for running from me." He was then struck across the knees.

In the second case, a seventeen year old boy who had violated the Town's curfew with some friends ran from the police. Officer Taylor again gave chase and after yelling, "Stop or I'll shoot", the plaintiff slowed down screaming, "I'm stopping!" Officer Taylor hit the plaintiff on the back of the head with his asp, tackled him, sat on his back, and placed him in a chokehold. Other arriving officers also hit plaintiff in the legs with their batons.

Amazingly, the District Court granted summary judgment for the defendants. The Appellate Court overruled this decision in these parallel cases where one plaintiff had surrendered and the other was in the process of surrendering, and force was used after both parties were no longer resisting and both plaintiffs were struck in the head with asps. The Court cited a number of cases in the Sixth Circuit Court of Appeals finding the use of force after a suspect has been incapacitated or neutralized to be excessive as a matter of law. "There was

simply no governmental interest in continuing to beat plaintiff after he had been neutralized, nor could a reasonable officer had thought there was."

The Court also noted that even if the striking with the asp could have been deemed reasonable, a blow to the head may constitute excessive force. It cited a number of cases which distinguish the area where a person is struck finding a greater risk of liability when a suspect is struck in a sensitive and vitally important part of their body.

Blankenhorn v. City of Orange, 485 F.3d 463 (9th Cir. 2007)

Approximately seven months earlier, Blankenhorn who had been known to be a gang member was issued a "notice forbidding trespass" at the shopping mall. After a struggle, he was arrested for trespass and resisting arrest and held in custody for three months before the charges were dismissed. The court found that based on the known trespass order and his believed gang membership, police had probable cause to arrest him for trespass. The court found that the officers were not entitled to qualified immunity on the malicious prosecution claim. Citing Smiddy v. Varney, 665 F2d 261 (9th Cir. 1981) the court reiterated that, "where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." Viewing the facts in the light most favorable to the plaintiff, (claim that the officers provided false statements to the prosecutor with regard to his taking a combative stance with clenched fists and one officer's failure to include the fact that he punched plaintiff several times during the altercation) he could overcome the presumption of prosecutorial independence with regard to the resisting charge.

The court also found that the officers were not entitled to qualified immunity on the use of force claims. Although neither tackling nor punching the suspect to make an arrest necessarily constitutes excessive force, the court found that the group tackle of the plaintiff could be considered excessive force if the jury believes he did not take a combative stance, clench his fists or otherwise make any threatening gestures and that the officers made no attempt to handcuff him prior to taking him to the ground.

The court also did not find that the use of hobble restraints could be deemed excessive as the lack of forewarning of the use of force that swiftness and the violence of the gang tackle could be considered provocative and the officers did not allege nor did a video show that Blankenhorn struck out at any of the officers or mall patrons. The officers who claimed that he struck Blankenhorn several times because Blankenhorn refused to remove his arms from beneath his body also failed since the video did not clearly show one way or the other whether Blankenhorn pinned his arms underneath his body.

Chaney v. City of Orlando, Fla., 483 F.3d 1221 (11th Cir. 2007)

Chaney claims he was stopped by Officer Cute allegedly because the rear license tags were obscured by a plastic cover. Chaney claimed that as he stepped out of the car, Officer Cute told him "get back in the fucking car". He sat back in the driver's seat and asked why he was

being stopped, at which point Officer Cute reached into the vehicle to pull the keys out of the ignition, but when Chaney attempted to stop him from placing his hand over the ignition, Chaney was grabbed by the arm, placed in a choke hold and pulled out of the vehicle. After being dropped to the ground, Cute placed his knee between Chaney's shoulder blades and placed one handcuff on Chaney's wrist. He then held a taser to Chaney's head stating "do you want some?" When, again being asked what he was doing, Cute stood up tasing Chaney. Chaney rolled over onto his back and attempted to sit up, but Cute tased him a second time and rolled him back on his stomach prior to placing his foot on Chaney's head squishing it to the pavement and placing the other handcuff on his loose hand. Upon being led to a cruiser, he attempted to ask an onlooker to call his mother when Cute grabbed a pressure point on his throat near his Adam's apple and told him, "don't say a fucking word." Cute then slammed Chaney's head onto the trunk of the police car. He was taken to a nearby location where a sergeant asked him a series of questions and the taser hooks were removed from his back. Chaney asked if the sergeant could drive him to the station instead of Cute, but the sergeant refused indicating that the arresting officer had to take him to the station. Chaney was charged with operating a vehicle with an obscured license and resisting an officer without violence. The traffic offense resulted in a not guilty finding and the resisting charge was nolled.

In the civil rights trial the jury found sufficient probable cause for the arrest, but that Cute used excessive force awarding nominal damages of $972.15 for compensation for medical treatment, bond and defense of the traffic citation, and $100,000.00 in punitive damages. The district judge relying on the jury's interrogatories entered judgment in favor of Officer Cute and the City of Orlando.

The Appellate Court overturned this ruling noting that a renewal of a motion for judgment as a matter of law must be based upon the same grounds as the original request for judgment as a matter of law at the close of evidence and prior to the case being submitted to the jury. Therefore, the trial court erred in relying on the post trial findings of the jury.

SEARCH AND SEIZURE

Walcyzk, et al. v. Rio, et al., 496 F.3d 139 (2d Cir. 2007)

On 8/30/99, Officer Hebert responded to a trespassing complaint made by plaintiff, Thomas Walcyzk. Walcyzk had a long standing property dispute with Barberino Realty and was complaining about Barberino's employees trespassing on his property. He told Hebert that the police were not taking the action needed to avoid a "blood bath". Hebert reported the complaint to Barberino whose attorney requested extra police presence during work hours. In the early spring of 1999, the police received a copy of a court decision holding that Walcyzk had no interest in the subject property. In the late winter of 1998 and early spring of 1999 Walcyzk came to the police department to speak with Captain Rio about the land dispute and told him "if you guys don't comply with what I am telling you, I'll take matters into my own hands." Captain Rio advised him against any illegal actions to which Walcyzk responded that he would "do what he had to do to protect his property." An arrest warrant for threatening and a search

warrant for plaintiff's weapons were prepared. The arrest and search warrant affidavits included information about previous incidents involving threatening behavior.

- 9/15/96: Walczyk's brother complained that Walcyzk had pushed him and threatened to shoot him. No arrest was made.
- 2/15/92: Walcyzk was arrested for cruelty to animals when he shot a neighbor's cat.
- 12/8/90: Neighbors complained that Walcyzk was shooting guns on his property.
- 7/30/90: Walcyzk was arrested for threatening a motorist who followed him home when he retrieved an A-K assault rifle loaded with twenty rounds.
- 3/24/88: Walcyzk threatened Barberino employees with an AR 15 assault rifle. He fought officers prior to being arrested.

The affidavit listed eight weapons including a mini 14, AR 15 and a MAK-90.

Walcyzk was arrested while officers executed search warrants retrieving sixty firearms in his home and eighteen firearms from his parents' home across the street, as well as, 2,600 rounds of ammunition and other items related to firearms. His conviction for disorderly conduct, reckless endangerment and improper firearms storage was reversed by the Appellate Court holding that the warrant which supported the seizure of the weapons was not supported by probable cause. The Walcyzks sued and the District Court denied the officers' Motion for Summary Judgment. The Appellate Court rejected without merit Walcyzk's contention that the challenged warrant affidavits on their face failed to state probable cause for his arrest or the search of his home. The court then addressed the alleged material admissions which lead to the denial of qualified immunity by the District Court. The District Court indicated that the defendants' failure to disclose that the warrant preparer had not spoken directly to Officer Hebert who would have revealed that he personally did not feel threatened by Walcyzk's blood bath statement was a material admission. The Appellate Court found the conclusion unconvincing both as a matter of law and fact. The law permitting one law enforcement officer to rely on the report of another in applying for a warrant nowhere requires direct consultation to ensure that the officer reviewing the report ascribes facts that the reporter intended. Further, at criminal trial, Hebert testified that he understood Walcyzk's comment to be a threat against Barberino employees.

The second alleged material admission was the defendants' failure to disclose that none of Walcyzk's prior conduct had resulted in a conviction for threatening. The Court found this admission to be "hardly relevant". The probability that his blood bath statement constituted a threat of violence was not undermined by lack of a prior conviction for threatening. "The law does not demand that an officer applying for a warrant volunteer every fact that arguably cuts

against the existence of probable cause as long as he does not omit circumstances that are crucial to his evaluation." Brown v. D'Amico, 35 F.3d 97, 99 (2nd Cir. 1994).

The Court denied the officer qualified immunity regarding the search of Walczyk's mother's home. Police records indicated that Walczyk maintained residences at both addresses, however, the affidavit omitted the fact that he had not resided at his mother's home for more than seven years. That omitted information was relevant to an assessment of probable cause, as there were no facts indicating that he had ever stored or retrieved firearms from his parents' home.

Walcyzk also complained that the bail amount of $10,000.00 was excessive. The Appellate Court affirmed the District Court's ruling that the officers were entitled to absolute immunity because the setting of bail is a judicial function.

Campbell v. Miller, ___ F.3d ___ (7th Cir. 2007)

Officer Dooley recognized a man from previous drug investigations conduct a hand to hand drug transaction while with two other people. As he approached, they scattered. He provided a description of the individual over the radio. Approximately two blocks away, Officer Miller saw Campbell, who fit the description, walking up a driveway. When Miller told him to stop, Campbell responded, "no, you have me messed up.", and began to back away. He was told to stop a second time but continued to back away, later testifying that he did so to get near a friend's house so that someone could observe what was happening. After Campbell ignored the second order to stop, Miller drew his weapon telling Campbell to get on the ground. Campbell dropped something which was later retrieved and found to be marijuana. Officer Dooley arrived but was unable to positively identify Campbell since he had not gotten a good look at the suspect's face and hair. A pat down and pocket search revealed nothing. The officers escorted Campbell to a backyard where they undid Campbell's belt buckle, pulled his pants part way down, leaned him forward, separated his buttocks and did a visual inspection. This was observed from the kitchen window by the home owner. They then had him sign a summons and released him.

The jury returned a verdict in favor of Miller and the City concluding that the officers had reasonable suspicion that drugs or other contraband would be revealed by the search. Plaintiff urged the Court to apply Knowles v. Iowa which refused to extend the search incident to arrest bright line rule to noncustodial arrests. The Court did find that because the arrest was noncustodial the police needed a higher threshold of reasonableness to support the search. Although there was no protective reason for the strip search, they did find reasonable suspicion that Campbell was concealing contraband and thus under Bell v. Wolfish, the strip, then visual body cavity search is justified by reasonable suspicion that the arrestee is concealing contraband or weapons.

Unfortunately, the Court found that the strip search was conducted in an unreasonable manner because the police failed to afford Campbell the dignity of conducting such an offensive search in a private place. They cited a number of cases across the country where courts uniformly condemned intrusive searches performed in a public place. The Court granted

Campbell's motion for judgment as a matter of law and remanded the case for further proceedings on damages.

With regard to municipal liability the Court evaluated the police department policy on searching arrestees which did not distinguish between arrests where one was taken into custody with those where a citation was issued. However, there was no evidence that the City policy dictated that arrestees had to be searched in a public place, but since this was the only aspect of the search which violated the Constitution there was nothing to indicate that the strip search of Campbell in public was influenced in any way by the City's policy or practice.

Wilson v. Acquino, 233 Fed. Appx. 73 (2d Cir. 2007)

The Court affirmed a jury award of $5.00 in nominal damages and $25,000.00 in punitive damages for a strip search. Assuming defendants lawfully arrested Wilson, the manner of their search was unconstitutional as a matter of law. Defendants claim that the strip search was necessary to prevent Wilson from destroying drugs that were concealed on his person. However, Wilson had been subjected to two routine searches at the arrest scene which failed to reveal any weapons or contraband and a canine present that appeared interested in the interior of Wilson's car was not used to screen his person, nor did it show any interest in him. Also, there were no exigent circumstances indicating a need to transport Wilson to a private office rather than the police station to conduct any further search. Finally, evidence submitted indicating that Wilson was familiar with the defendants prior to the incident, that they abused him with obscenities and suggested that he was a drug dealer without regard to any belief that he was actually in possession of drugs and that he was punched and kicked during the forcible removal of his clothing and physically taunted supported the award of punitive damages.

The Court also found that the admission of evidence that one of the officers had been disciplined by the police department was within the Court's discretion for the purposes of attacking the officer's credibility. The officer testified that he thought his actions were in compliance with department rules and regulations.

McClish v. Nugent, 483 F.3d 1231 (11th Cir. 2007)

Holmberg and McClish, who live in a trailer home, had a property dispute which resulted in their neighbors calling the police. McClish reacted angrily to the presence of the deputies saying, "the sheriff's office is a bunch of Nazis… this is America, a man can have rights on his own property." Plaintiffs alleged that Deputy Terry became hostile when asked to leave the property and refused to leave until Deputy Groves persuaded him to walk away. Upon returning to the station, Terry decided to arrest McClish, but didn't return to make the arrest until over seven hours from the time of the incident. Upon returning to execute the warrantless arrest, Terry knocked on the door. McClish claims that he had just gotten out of the shower and put on a bathrobe before answering the door. Upon opening the door, Terry reached into the house, grabbed him and forcibly pulled him out onto the porch. Terry allegedly refused his request to get dressed. At the time of the arrest, McClish was seventy-five years old.

Although McClish claimed excessive force based on too-tight handcuffing and Holmberg claimed that he was sprayed with mace on two occasions which caused eye damage, the central issue on appeal was whether or not Terry's reaching across the threshold to arrest McClish was lawful. The majority and concurring opinions disagreed as to whether or not the officer's action was unconstitutional but both, relying on ancient common law concluded that an officer reaching across a person's threshold who has voluntarily opened their door would not be violating clearly established law. Evidencing that the ancient principal that a man's home is his castle, the opinions cited William Pitts, 1763 speech before the House of Commons. "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter-all his force bears, not cross the threshold of the ruined tenement!" The majority opinion concluded that reaching across the threshold amounted to a warrantless entry and because there was no exception, based on consent or exigent circumstances, that such action amounted to a Fourth Amendment Violation. McClish did not completely surrender or forfeit his expectation of privacy when he opened the door including the right to be secure within his home from a warrantless arrest. The concurring opinion relying on Santana determined that there was no expectation of privacy in the immediate doorway area after McClish voluntarily opened the door.

Boykin v. Van Buren Tp., 479 F3d 444 (6th Cir. 2007)

Plaintiff was wrongfully accused of stealing a $5.00 drill from a department store. Police officers arrested him in his home, brought him back to the store where it was discovered that he had actually paid for the drill. The court found that his false arrest claims failed because the officers had adequate probable cause to believe that he committed the offense. In a long footnote, they discussed the failure of plaintiff's counsel to pursue the Fourth Amendment violation alleging the unreasonable arrest at his home. The videotape showed that Officer Hayes told Boykin, "I am trying to avoid coming into your home and dragging you out of our home… and we are going to do that if you don't listen to us." The court explained that these coercive statements amounted to a constructive entry into Boykin's home in violation of Payton v. New York, and subsequent cases which warn police not to deploy overbearing tactics that essentially force an individual out of his home. The police were at the plaintiff's home because he allegedly stole a $5.00 drill. There was no reason to believe that he would be a flight risk or danger to others and there was ample time for the officers to obtain a proper warrant had they deemed that an arrest was necessary under the circumstances. Because Boykin's counsel failed to argue the Payton warrantless arrest issue before the District Court or on appeal, the issue was waived.

Freeman v. Gore, 483 F.3d 404 (5th Cir. 2007)

Deputies attempted to serve a felony arrest warrant on Kevin Freeman's mobile home. They knocked and then called his telephone. His sister answered his mobile phone while she was in the house next door which belonged to her mother, the plaintiff. The mother emerged from the house and began yelling at the deputies who asked if they could search her home. She responded not unless they had a search warrant, at which point the deputy said he could arrest her if she did not permit a search of her home. She said, "Go ahead". Deputy Gore instructed

another deputy to handcuff her and place her in the patrol car. She claims she was left in the patrol car on a hot day, without air conditioning or ventilation for about 30-45 minutes, and that they knew she had a heart condition but did not allow her to retrieve her nitroglycerin. Officers dispute these claims. Gore contacted his lieutenant who told him that he could not arrest plaintiff and could not search her house without a warrant. Gore disagreed, but upon being informed by his sergeant that he could neither search nor arrest, Gore released Freeman from the patrol car and removed the handcuffs. Gore was ultimately fired for failing to file a timely report and untruthfulness.

The Appellate Court affirmed the District Court's denial of summary judgment on the unlawful arrest claim but reversed the denial of summary judgment on the excessive force claims. The Court found that Michigan v. Summers which carries limited authority to detain occupants of a premises while a proper search is being conducted did not help the officers because the plaintiff was in her own home, not Freeman's. (Steagald v. United States – arrest warrant does not give officers authority to search home of third party even if officers have probable cause to believe that suspect is within.) The deputies argued that they had probable cause to arrest Freeman for interfering with their duties. The Court disagreed finding that speech conduct is specifically exempted as a criminal act and that the plaintiff merely emerged from her home yelling and screaming and she verbally refused to allow the officers to search her home. "…a reasonable officer would have known that he could not lawfully search Freeman's home and Freeman was not, therefore, interfering with the exercise of any authority granted to the deputies by law." The Court also determined that Freeman's refusal to consent to a warrantless search of her home was insufficient to provide probable cause to arrest her for hindering apprehension.

The Court did find that the officers were entitled to qualified immunity on the excessive force claim. They determined that Freeman's injury must be more than de minimis. The fact that the arrest was unlawful did not necessarily mean that the use of force was excessive. The only claimed injury was bruising on her wrists and arms because of the handcuffs and allegedly being left in the police vehicle for 30-45 minutes.

Note: Although the 5th Circuit found that such actions and injury were insufficient to state a constitutional claim for excessive force, many jurisdictions have ruled otherwise.

Elliot v. Lator, 497 F.3d 644 (6th Cir. 2007)

Troopers investigating a robbery learned from an officer with the area narcotics enforcement team the address of a possible residence of the suspects. When Wilson was deposed during the civil case, he conceded that his information was not first hand, and he did not know whether it was recent or more than a year old. The residence which he identified was in fact occupied by Steve and Glenda Elliot and their three children. Plaintiffs allege that Troopers Lator and Taylor failed to comply with the knock and announce rule, entered the home with weapons drawn ordering the entire family to the floor, handcuffed Steven Elliot, stepped on Glenda's hand and destroyed plaintiff's furnishings while they held the family at gun point. The entire search lasted 45 minutes. Although the defendants raised qualified immunity as an

affirmative defense, they did not file a motion to dismiss or a motion for summary judgment. Instead, the plaintiffs filed a motion for summary judgment which was granted on one count indicating that the search warrant was not supported by a proper showing of probable cause to believe that contraband or evidence of a crime would be found at the location and that the troopers could not rely upon the magistrate's issuance of the search warrant as grounds for qualified immunity.

The defendants attempted to file an interlocutory appeal based on qualified immunity claiming that there were disputed issues of fact. The Appellate Court found that it did not have jurisdiction essentially because the qualified immunity defense protected officers from the burden of litigation which was the very reason that government defendants are entitled to an interlocutory appeal. In this case, the granting of the defendants' motion would have the opposite effect of requiring them to face trial and therefore, the court did not have jurisdiction.

Bruce v. Beary, ___ F.3d ___ (11th Cir. 2007) 2007 WL 2492101

Sheriff's Department received a complaint from an individual who believed that he had purchased a stolen car from plaintiff's body repair/salvage yard. Officers conducted an administrative search of the salvage yard. Warrantless administrative searches are an exception to the Fourth Amendment's search warrant rule. In New York v. Burger, the Supreme Court rejected the idea that an administrative inspection may be used to gather evidence as part of what is, in reality, a criminal investigation. The Court cited a number of cases from various circuits applying this rule. In this case, the Court ruled that the administrative search was unlawful as the officers did not have probable cause of a crime and the mere suspicion would have been insufficient for them to obtain a warrant.

The Court did find that the manner of the search was unconstitutional. Twenty officers conducted a search lasting eight hours. They arrived in unmarked vehicles surrounded the property and blocked exits with their vehicles. The SWAT team entered with automatic shotguns and side arms. All of the employees were subjected to pat downs and prolonged detentions. In light of the fact that there was no evidence that would lead the officers to believe that they would meet with resistance or defiance, such a massive show of force and excessive intrusion was more akin to a criminal raid than an administrative inspection. The Court also found that the inspection of plaintiff's premises was unlawful from its inception and in its execution and that nothing discovered in the ensuing search could have been used to support probable cause to arrest Bruce or to seize property.

The claims against the Sheriff in his official capacity remain unresolved. The two primary claims were whether he failed to adequately train his officers in the proper execution of an administrative inspection and whether his decision, as a policy maker, refusing to return plaintiff's property after a court issued the property returned, subjected him to liability as the final policy maker.

Watson v. Abington, TP, 478 F.3d 144 (3rd Cir. 2007)

Watson, an African-American, leased a storefront from 28 year retired officer Gerald Kelly, who owned a restaurant tavern next door. Kelly told officers that he planned to sell the tavern to Watson and alleged that they joked that they would raid the place so he could buy it back real cheap. Watson died, but Kelly claimed that officers of the department on numerous occasions raided the tavern and frequently stopped patrons for no reason at all. The Appellate Court overturned the District Court's dismissal of the Fourth Amendment claims based on its understanding that searches of a closely related industry such as the Tavern could be conducted pursuant to an exception to the warrant requirement.

The Court explained that the expectation of privacy in commercial premises is different from that of a home and the expectations are particularly attenuated in property of closely regulated industries. This exception is a narrow one and warrantless inspections are deemed reasonable only if three criteria are met. (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made, " (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme,'" and (3) "'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant'". The Court found issues of fact as to whether the exception applied in this case as the record was devoid of any proof that liquor control was actually involved in the sweeps or that, as defendants had claimed, the sweeps were conducted pursuant to a special state funded program.

Testimony of plaintiff, Kelly, addressed the issue of a history of racial profiling in the police department while he was there. Because he retired five years before the evidence of racial profiling occurred, his testimony was deemed to be insufficient to support a claim against the chief or the municipality concerning the existence of unlawful policy or custom which was the proximate cause of the injuries suffered.

Marshall v. Columbia Lea Regional Hosp. , 474 F.3d 733 (10th Cir. 2007)

Marshall, believing that he was about to be stopped by a racist police officer, drove two miles before coming to a stop in front of his residence. He made a number of complaints with regard to the manner in which he was treated by the officer, but ultimately the issue in the case was whether or not the officers taking him to the hospital for a nonconsensual blood test was lawful. A jury awarded Marshall compensatory damages of $90,000.00 and punitive damages against two officers cumulatively in the amount of $400,000.00. On appeal, the defendants did not dispute that they violated Marshall's Fourth Amendment rights by forcing him against his will to produce a blood sample. However, they claim that they were entitled to qualified immunity as the constitutional right was not clearly established at the time. The Court compared this case to Schmerber in which the Supreme Court held warrantless compulsory blood tests are unreasonable unless supported by both probable cause and exigent circumstances. It is well-settled that the scope of a warrantless search must be commensurate with the rationale that accepts the search from the warrant requirement. Unlike the defendant in Schmerber who refused a breathalyzer test, Marshall had submitted to two breathalyzer tests, the results of which

were negative. Because breathalyzer tests and blood tests are of similar evidentiary value the Court found that the officers were not entitled to qualified immunity, as they had fair warning of exigent circumstances required under federal law. The Court also noted that in Schmerber the defendant was subjected to prosecution for a felony because of an injury to a passenger. Here the police had no accident and the only suspicion of intoxication was based on the smell of liquor on the defendant's breath and his admission that he had one drink and he partially failed some of the field sobriety tests.

Whitaker v. Garcetti, 486 F.3d 572 (9th Cir. 2007)

An attorney and two sets of drug suspects alleged that the Los Angeles Police Department's wiretaps were unlawful. Their first claim was that the warrant was obtained by "judicial deception" which violates the Fourth Amendment. Although the Court found that the defendants stated an adequate claim, the drug suspects who had been convicted of drug offenses were barred by Heck. Therefore, this claim could proceed only with regard to the plaintiff attorney. Plaintiff's second claim was that the hand off procedure was unlawful. When officers conducting an electronic surveillance discovered imminent criminal conduct instead of taking action themselves, they would transmit this information to another unit which would be instructed to conduct an investigation and surveillance to observe illicit conduct and then either make an arrest or apply for a warrant with independent probable cause. The Court expressed no view on the constitutionality of the hand off procedure because the claim was not properly presented to the District Court.

FAILURE TO PROTECT

Lockhart-Bembery v. Sauro, ____ F.3d ____ (1st Cir. 2007)

Around 8:30 a.m. plaintiff's Cadillac Seville lost power and stopped on the side of a highway near an incline at a curve with limited visibility. When Officer Sauro arrived five to ten minutes later she told him that she had called for AAA. He told her that because of the dangerous position of the vehicle she would have to move it or he would have it towed. After pushing the car into a position where it partly blocked the driveway, the officer allegedly yelled at her, "That's not where I told you to put it!", and motioned vaguely to another location. This time the car started to roll, resulting in the plaintiff falling on her face and the car colliding with some trees. Plaintiff was medevaced to a hospital with broken bones and head trauma. The jury awarded nominal damages of $1.00.

The Appellate Court analyzed the Fourth Amendment claim under the caretaking doctrine. It noted that the community caretaking doctrine gives an officer great flexibility but their actions must be within the realm of reason. It concluded that no reasonable fact finder could have concluded that Sauro's actions were NOT within the realm of reason. Plaintiff's vehicle was in a position of danger and the officer gave her the option of having the vehicle towed or moving it herself. Police are entitled to remove disabled vehicles from the streets and even if Officer Sauro could have selected a less intrusive way to fulfill this responsibility, the law did not require him to do so.

The Court also found that the plaintiff failed to produce sufficient evidence to support her state-created danger theory. First, the State did not create the danger as the plaintiff chose to move the vehicle herself rather than have it towed. Also, there was no special relationship with the State that could give rise to greater duties on the part of the police. Even if the first prong of the state-created danger theory had been proven, the officer's actions are not "shocking to the conscience". The Court cited more egregious cases that were found not to be "conscience shocking" including an officer who pushed a citizen in the road causing serious injuries when the citizen approached to ask for directions and a case where a teenage murder witness was gunned down on the eve of trial after being subpoenaed to testify and the prosecutors promised protection.

Burella v. City of Philadelphia, ___ F.3d ___ (3rd Cir. 2007)

George Burella, a ten year veteran of the Philadelphia Police Department, shot and seriously injured his wife, the plaintiff, and then shot and killed himself. The Court recounts approximately three years preceding this incident of physical and emotional abuse including numerous assaults of his wife, an attempted suicide, threats to kill his wife and their son, numerous referrals to EAP and psychological evaluations and treatments, admission to a psychiatric hospital and several protective orders. The police department was aware and, in fact, involved, with many of these incidents.

The Court applying DeShaney, found there was no substantive due process violation.

Plaintiff attempted to distinguish her procedural due process claim from Town of Castlerock v. Gonzalez by indicating the statutory language in Philadelphia differed by stating the police shall arrest the defendant for violating an order. The Court rejected this argument citing Supreme Court language focusing on the deep-routed nature of law enforcement discretion even in the presence of seemingly mandatory legislative commands. It also noted the Court's determination that even if a domestic violence statute mandated an arrest, it would not necessarily mean the victim would have an entitlement to an arrest.

The Court also rejected the plaintiff's state-created danger claim which was based on the continual refusal to enforce court orders and follow state law requiring Burella's arrest together with their false direction that there was nothing they could do. The Court did not accept her attempted characterization of the officers' alleged wrongdoing as an affirmative misuse of authority. Finally, the Court rejected her equal protection claim finding that she failed to provide evidence of unequal treatment of domestic violence victims as opposed to others.

Hudson v. Hudson, 475 F.3d 741 (6th Cir. 2007)

Braddick and two of her friends were killed by her estranged husband after allegedly making complaints over a period of two years for violations of protective orders which were allegedly not acted on by the police. The District Court denied officer's qualified immunity focusing on the compulsory verb "shall" in the Tennessee statute. The Court citing Town of

Castlerock v. Gonzalez, noted that seemingly mandatory statutes and police discretion frequently co-exist. Although calling for mandatory arrests the statute also requires the officers to have reasonable cause to arrest which requires police to exercise at least some discretion. The Court found no substantive due process violation as the protective order did not create a special relationship between police officers and the individual who petitioned for that order and that the officer's alleged inaction did not amount to an affirmative act that created or increased the risk of a special danger to the victim as distinguished by the public at large. Following Castlerock, mandatory enforcement of a protective order does not give petitioner an entitlement to its enforcement nor does it resemble any traditional concept of property, therefore, the plaintiff had no procedural due process claim.

Carver v. City of Cincinnati, 474 F.3d 283 (6th Cir. 2007)

Cincinnati officers and EMT's responded to a 911 call of a suspected cardiac arrest. They found a female dead on the floor. Lying on the couch in the same room was Carver. The apartment was secured as a crime scene and all those present were asked to leave. Officers took the keys to the apartment from her roommate and left Carver on the couch, asleep, unconscious, or passed out. The police found oxycontin and other prescription pill bottles in the apartment. Carver died on the couch. Plaintiffs claim that the officers should have known that Carver was in imminent danger because he had overdosed on drugs, and sued for failure to protect.

The Court evaluated this case under DeShaney, and first found that Carver was not in custody and therefore this exception to the general duty rule did not apply with regard to the state-created danger exception. The Court explained that a plaintiff must allege, "(1) an affirmative act that creates or increases risk that the decedent would be exposed to private acts of violence; (2) a special danger to the decedent, such that the defendants' acts placed decedent specifically at risk; and (3) that defendants knew or should have known their actions specifically endangered the decedent." Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

Plaintiff claimed that the affirmative act was the officer's action in cutting off his access to private aid. Although the officers removed everybody from the apartment and controlled the keys, there was no evidence that any of the persons present were aware of Carver's overdose or that anyone made any attempt to enter the apartment to rescue Carver.

Andujar v. Rodriguez, 486 F.3d 1199 (11th Cir. 2007)

Officers pursued Andujar and his accomplices who hijacked a freight truck at gunpoint. Andujar jumped from the truck and fled into a residential area hiding in the yard. A police canine located him, bit onto his upper thigh and dragged him from the yard to the street. The officers called for medical assistance and two paramedics arrived, cleaning the wounds and wrapping Andujar's thigh in a sterile bandage. He was then transported to the police department for booking. He claimed that officers on the way to booking poked his wound causing it to bleed. Following the booking process he was transferred to the hospital for medical treatment. Andujar claimed that the officers acted with deliberate indifference when they did not immediately transport him to the hospital for further medical treatment before booking. The test

for liability on such a claim is whether the plaintiff had a serious medical need and the officers acted with deliberate indifference to that need. A serious medical need was defined as, "one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Assuming that the medical needs were serious, Andujar failed to prove that the officers knew of a risk of serious harm and disregarded that risk with gross negligence. When he was taken to booking his wound had been attended to and at that time, his bleeding had ceased. Andujar also attempted to claim that the officers violated department policy; however, the Court recognized that failure to follow procedures does not, by itself, rise to the level of deliberate indifference.

FALSE ARREST/MALICIOUS PROSECUTION

Mannoia v. Farrow, 476 F.3d 453 (7th Cir. 2007)

Christine Mannoia provided police with a child support order indicating that she was the custodial person. There was no custody order. She complained that her husband abducted their child, left his job and moved to Hawaii. After completing the investigation confirming this information, the investigating officer consulted with the State's Attorneys who determined there was sufficient factual basis for a charge of child abduction. Detective Farrow appeared before the judge representing there was a valid order granting Christine custody but did not show the judge the child support order. After the charges were dropped the plaintiff brought a false arrest and malicious prosecution claim. Plaintiff submitted an affidavit from a police procedure expert who offered the opinion that no reasonably well trained police officer given these facts would have believed that there was probable cause to arrest Mr. Mannoia.

The Appellate Court found that because the plaintiff was arrested pursuant to a facially valid warrant, he could prove a violation of his constitutional rights only if a reasonable well trained officer should have known that the information would have failed to establish probable cause or the officer knowingly or intentionally or with a reckless disregard for the truth made false statements to the judicial officer and that the false statements were necessary for a determination of probable cause. Based on the fact that Farrow had discussions with the State's Attorney's Office before appearing before the judge, the Court found that he was entitled to qualified immunity. The State's Attorneys testified that Farrow's comments regarding the meaning of the order would have had no impact on their evaluation concluding that the support order satisfied the requirements of the child abduction statute. "Consulting a prosecutor may not give an officer absolute immunity…but it goes far to establish qualified immunity." Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004). Because Farrow consulted the State's Attorney, he reasonably believed the support order constituted a valid custody order and any statements that he may have made to the judge regarding the order reflected his reasonable belief.

Pitts v. D.C., ___ F.3d ___ (DC Cir. 2007)

After two senior citizens were violently robbed at an apartment building, an employee of the apartment building said he saw the perpetrator and followed the man who told him to back up and started to run away. Officers Adam and Baxter who heard a description saw an individual

matching the description get into a car. They followed the individual who failed to fully stop at some stop signs, but who was not speeding. After stopping the vehicle, the officers confirmed the plaintiff's clothes and the physical description matched the descriptors of the robber and found a hunting knife and BB gun in his vehicle. A show up identification with the two senior citizens resulted in the female being certain that he was not the person and her husband indicating that he wasn't sure but didn't think so. The apartment employee said he couldn't make a positive identification because the plaintiff's hair was longer and curlier than the robber's. In the meantime, Lt. Eaves reviewed the building's security videotapes and based on what he observed, told the officers that he was confident that plaintiff was the robber. Two other detectives conducted a brief investigation into plaintiff's alibi. Plaintiff indicated that he was a courier and made some deliveries on that date. There was conflicting evidence as the detective indicated that an embassy employee, where a delivery was made, told him that he hadn't seen the plaintiff that day, however, when the employee testified he said he told the officers that the plaintiff had been at the embassy on the day of the robbery. Plaintiff was arrested, and the next day, Officer Adams gave prosecutors an affidavit which contained a detailed description of a robbery, but did not mention the negative identifications or Mr. Pitts' alibi. Pitts spent 10 days incarcerated before the government dismissed the criminal charges.

The jury awarded $100,000.00 to Mr. Pitts and $50,000.00 to his wife in compensatory damages and $1,000.00 in punitive damages against each officer. The Court explained that in previous cases they had indicated that show up identifications are often problematic because they are inherently suggestive. The fact that both victims provided negative identification was strong evidence of the plaintiff's innocence. The fact that the physical description and clothing matched that of the robber was negated by the witness's negative identifications. The fact that the plaintiff was in his vehicle and drove away from the scene approximately eight minutes after the robbery had taken place, was of little significance since if he had done the robbery, it was likely that he may have fled from the scene much earlier. The fact that he had a knife and BB gun in his car was explained by the plaintiff in that he was a courier who needed these items to protect himself, and the victims did not allege that the robber had used any weapons.

Defendant officers claimed that they are protected from liability for malicious prosecution because they acted in reliance upon the advice, of counsel. Court cited prior precedent citing, "proof that person who institutes a criminal proceeding placed the facts fully and fairly before counsel and acted upon his advice is a good defense to the charge is want of probable cause. This defense was unavailable to the officers because they failed to tell the prosecutors several key facts and therefore, did not place the facts fully and fairly before counsel. The Court affirmed the judgment against the officers including punitive damages finding that a reasonable jury could have concluded that Officers Adams and Baxter acted with recklessness or willful disregard of Mr. Pitts' rights.

Russo v. City of Bridgeport, 479 F.3d 196 (2d Cir. 2007)

An unmasked person committed an armed robbery of a gas station. The cashier described the suspect as a white male in his late thirties between 5'6" and 5'8" tall, medium build with a very short blonde crew cut. Still photographs were made from the security video

camera and the cashier identified Russo as the suspect. Russo was 27 years old, 6 feet tall, medium build, weighing 200 lbs., with brown hair, but was balding. Russo claimed that during the interrogation he told the officers to check the videotape to see whether the perpetrator had body tattoos. Russo had been arrested on a previous occasion by the Department and a report described tattoos on his arms. Defendants allegedly informed him that they watched the videotape that showed the perpetrator had tattoos. In fact, the videotape showed the perpetrator's arms without tattoos. Unable to make bond, Russo remained in custody for more than seven months. He asked his attorneys to view the videotape to prove his innocence. On September 18, 2002, Russo was charged with first degree robbery. On November 1, 2002, Russo's counsel moved for production of any exculpatory material. An investigator from the State's Attorney's Office learned sometime after November 25, 2002, that the tape had been locked in Officer DePietro's desk drawer. The state investigator watched the tape and determined he could not see the perpetrator clearly and on January 3, 2003, he requested a laboratory enhancement which was received on January 22, 2003. In April, Russo's attorney viewed the videotape and finally, on April 22, 2003, due to defense counsel's insistence, the prosecutor actually watched the videotape resulting in a nolle the following day.

The Court found that Officer DePietro and Detective Barona were not entitled to qualified immunity. The undisputed evidence showed that both had responsibility for investigating the robbery, that DePietro took control of the surveillance tape, viewed the tape, prepared stills from the tape, served as the affiant in the warrant, obtained the warrant and retained the original videotape in his desk drawer. When both officers questioned Russo, they learned of his distinctive physical characteristics, watched the un-enhanced surveillance tape and represented to Russo that they could see the perpetrator's arms with tattoos. Citing the Supreme Court ruling of Baker v. McCollam, and cases from the 11th, 9th, 5th and 7th circuit court of appeals, the court held that plaintiff's constitutional rights were violated due to his sustained detention stemming directly from the officers' refusal to investigate available exculpatory evidence.

The Court concluded, "…in light of (1) the length of time of Russo's wrongful incarceration, (2) the ease with which the evidence exculpating Russo – which was in the officers' possession, could have been checked and (3) the alleged intentionality of DePietro's and Barona's behavior, that Russo had sufficiently alleged that he was unreasonably seized."

With regard to their supervisor, Sergeant Sherbo's liability, the court determined that although he took DePietro's oath for the arrest warrant application, assigned and supervised DePietro the investigation and made the determination that it was unnecessary to view the tape personally, that he was entitled to summary judgment as there was no evidence presented that he was on notice of Russo's tattoo based claim of innocence.

Summary judgment was appropriate with respect to an officer who merely responded to the robbery, wrote an incident report and had a year earlier arrested Russo and recorded his tattoos in the arrest report, as his conduct as described in the facts, did not result in a constitutional violation.

The City, in answering the complaint, admitted that, "all individual defendants… acted toward the plaintiff in accordance with custom, policy and practice." The Court interpreted this as an admission that if Officers DePietro and Barona are ultimately held to have violated Russo's constitutional rights then municipal liability against the City would be appropriate.

Peet v. City of Detroit, ___ F.3d ___ (6th Cir. 2007)

Three men robbed several individuals in close proximity and shot two of them, killing one and seriously injuring the other one. Prior to the incident, one of the suspects gave his phone number to the friend of one of the victims who later observed the incident. While tracking down the pager number of Spencer, police learned of Peet who upon being interviewed, admitted to having witnessed a crime committed at the location. He was identified in a line up by the witness and was thereafter arrested on a warrant. At a preliminary hearing a judge determined probable cause existed to hold him. During the pendency of the case, evidence developed which was exculpatory in nature including statements from two of the victims which did not link Peet or Spencer to the crime and additional line ups which failed to produce positive identifications. Additionally, prints found on the murder victim's vehicle did not match either suspect. They were acquitted of all charges approximately one year after being arrested.

The Appellate Court found that the police had probable cause to arrest both Peet and Spencer based on the witness' statement and identification. Based on the Supreme Court decision in Beck, the Court determined that post-arrest evidence does not show that probable cause was lacking when the police arrested the plaintiffs.

Plaintiffs argued that the police had a duty to release them the moment new exculpatory evidence came to light. The Court disagreed finding no authority requiring a release under the Fourth Amendment the moment sufficiently exculpatory evidence emerges. It noted that such a role would give investigators the responsibility to reevaluate probable cause constantly with every additional witness interview and scrap of evidence collected. It recognized that as investigations progressed, the strength of evidence against the suspect may frequently change.

Wilson v. Morgan, 477 F. 3d 326 (6th Cir. 2007)

Officer Walker investigated a disturbance at Emert's residence. Blizzard, Emert's son, told him that Judy Wilson had fired a gun in the house, a gun was missing from the house and that Wilson had left in a red jeep with two people. (It was later learned that Olson, Hertz' daughter had caused the disturbance and fired the shots.)

A team of officers responded to the location where the red jeep was registered. Walker stayed at the scene of the disturbance and spoke to Emert who told him that Donna Wilson had permission to stay at the house, that he did not want to press charges and requested that the police, "slow things down." Meanwhile, the other officers observed a woman in the red jeep, and a male, walk outside of the house. They arrested the male, Davis and shortly thereafter, Hertz and Wilson. They then went inside the house to conduct a protective sweep. Plaintiffs were held for an hour before being taken to jail to where they were released about midnight after

giving statements without charges being filed. The jury returned verdicts in favor of the defendants on the 1983 claims, but awarded damages for false arrest and imprisonment under Tennessee law.

Plaintiffs appealed claiming, among other things, that exculpatory facts were discovered prior to the arrest including that the homeowner, Emert, did not want to press charges, that there was some indication that Blizzard was mistaken and that the suspect who shot up the house, was staying there with the permission of the owner.

The court ruled that one of the factors in determining probable cause of the arresting officers was whether THEY KNEW the exculpatory facts. At trial it was clear that the officers at the scene of the arrest did not know of the exculpatory evidence known by the officers at the scene of the disturbance. After determining that the officers at the scene had sufficient probable cause to make the arrest the court determined that the officers were under no duty to investigate further or look for additional evidence which may exculpate the accused. Nor did the officers give any credence to a suspect's story. Although officer's cannot turn a blind eye to potentially exculpatory evidence, they are not required to believe a plaintiff's alibi or investigate it before determining probable cause to arrest exits.

Officers were not required to call Emert as the plaintiffs requested, nor were they required to make separate probable cause determinations at each step of the arrest. The fact that charges were not filed did not mean there was no probable cause to arrest.

The court also found that the protective sweep of the home pursuant to Buie was reasonable as the officers observing lights being turned on and off in the house, had reason to believe that there was an additional suspect and the firearm in question had not been found.

Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007)

Officer Robinson attended a town meeting at the request of the Chief. The Chief was being sued by the Plaintiff's family for allegedly taking away towing business because they opposed the Chief's plan to extend police jurisdiction. During an exchange with the Town Supervisor, Plaintiff complained that his family was being screwed. When the Supervisor said he disagreed, Plaintiff responded, "That is why you're in a goddamned lawsuit." The Supervisor told him not to use the Lord's name in vain. Officer Robinson said something which led to Plaintiff responding, "you stay out of it, I am not talking to you." Plaintiff was arrested under disorderly person and obscenity statutes. The charges were dismissed and plaintiff sued. The appellate court recognizing that probable cause is an element of a malicious prosecution charge (Hartman v. Moore, 126 S.Ct. 1695, 1699 (2006)) found that there was no probable cause for the arrest.

It first evaluated a statute prohibiting indecent or obscene conduct in a public place including indecent language in the presence of woman or children; cursing and swearing by using the name of God, Jesus Christ or the Holy Ghost and disturbance of lawful meetings.

Citing a number of Supreme Court decisions, the court found universal agreement that a major purpose of the First Amendment is to protect free discussion of governmental affairs. "The First Amendment reflects 'a profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The Court then went on to explain that fighting words are not protected under the First Amendment and the Amendment also permits restrictions on cognitive speech and other limited areas where there is slight social value to the speech which is outweighed by the social interest in order and morality. For example, outlawing cross burning done with the intent to intimidate. Virginia v. Black, 538 U.S. 343 (2003). The Court concluded that no reasonable officer would believe that the statutes in question were constitutional as applied to plaintiff's political speech during a democratic assembly. Further, no reasonable peace officer would believe that mild profanity while peacefully advocating a political position could constitute a criminal act. Finally, because of the feud between the police department and the family, the Court found that a jury could conclude that the arrest was in retaliation for constitutionally protected conduct and, therefore, possibly, a violation of plaintiff's First Amendment rights.

Dissenting Opinion:

The dissenting judge put himself in the officer's shoes and stated that if the officer had carried a lap top equipped with legal research he would not have known that it was clearly established that he could not enforce laws which had been on the books for seventy-five years and withstood two constitutional challenges. "To my knowledge, the Supreme Court has never rejected a claim of qualified immunity to a police officer who enforced the statute that had not been declared unconstitutional at the time of the citizen-police encounter." The dissenting judge cited similar decisions from the 2d, 4th, 7th, 9th, 11th and D.C. Circuits. "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." Pierson v. Ray, 386 U.S. 547, 555 (1967).

Skop v. Atlanta, 485 F.3d 1130 (11th Cir. 2007)

The plaintiff arrived home during a thunderstorm to find a police cruiser partially blocking her driveway. She claims she tried to explain to the officer several times that she wanted him to move his car so she would get into her driveway, but the officer yelled at her "do you realize that I can arrest you for obstruction?" She replied that this was her driveway, I just need you to move up a foot, at which point the officer arrested her. The officer claims that he was not aware that she wanted to get into her driveway and thought she wanted to drive down the street. In addition to the false arrest claim Skop's car was towed away and she claims she was humiliated while being handcuffed in the police department as her summer blouse had been soaked through and her breasts were visible through the fabric.

The Court determined that a reasonable officer could not conceivably have thought that he had even arguable probable cause to arrest Skop for obstruction. The idea that her brief

inquiry provided the basis for an arrest is contrary to the First Amendment which "protects a significant amount of verbal criticism and challenge directed at police officers…" "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Houston v. Hill, 482 U.S. 451 (1987).

Officer Brown also claimed that he had probable cause to arrest the plaintiff for refusing to comply with his lawful order to park his car on the side of the street and walk home. Plaintiff disputed that he ever told her this and the Court found contradictory evidence with regard to this allegation. First, the officer was continually turning cars away telling no one else to park on the side of the road. Second, he reported to his sergeant that he was afraid to let the plaintiff walk down the street, yet in testimony stated that he told her to park the car on the side of the road and walk down the street. Given the disputed issues of fact, the officer was not entitled to qualified immunity. The Court concluded that if the plaintiff's account was true, the officer's actions constituted abuse of authority and a violation of her Fourth Amendment rights.

Hampton v. Oktibbeha Hunting Sheriff's Department, 480 F.3d 358 (5th Cir. 2007)

The defendant, Officer Gitchell entered an alternative school with an arrest warrant for a student. He was confronted by plaintiff, Hampton, the director of the school, who asked to see a warrant before he retrieved the student. The officer, believing that the State's juvenile records law prohibited him from showing the document to Hampton, called on his radio and then waived the warrant in Hampton's face which allowed Hampton to see the student's name, at which time the student was retrieved. After arresting the student, Gitchell and another deputy and supervisor who had arrived at the scene went to the station to discuss the matter with Sheriff Bryan. It was determined that Gitchell should submit an affidavit for the arrest of Hampton claiming that he unlawfully obstructed the arrest and refused to turn over the student. The Appellate Court overturned the conviction finding that Hampton merely requested to see the warrant and there were no threats, violence or refusal to cooperate.

All four officers were sued and the District Court denied qualified immunity to all of the defendants. The Appellate Court upheld the denial of qualified immunity as to Gitchell, as "a reasonable officer would know that lying to a judge in order to procure an arrest warrant was unlawful." As to the others, the Court explained that, "liability for procurement of a warrant is appropriate against, (1) the affiant officer or (2) "an officer who actually prepares the warrant application with knowledge that a warrant would be based solely on the document prepared", such an officer is in a position to see the whole picture, to understand his responsibility and thus fully assess probable cause questions. The court fully explained that although there were issues of fact as to the roles the others played in the investigation in providing some information, those facts are not material to the warrant claim because none of the evidence suggests that the officers prepared or presented the warrant or were fully responsible for its preparation or presentation.

Spencer v. Staton, 489 F.3d 658 (5th Cir. 2007)

Bernice Spencer, along with her husband and some other relatives were questioned with regard to a robbery/murder. She had been in Louisiana for only a couple of days arriving from California to see an ailing aunt. The day after their questioning the Spencers returned to California. Defendants learning that they had left and fearing they were attempting to flee, obtained arrest warrants including one for Bernice as an accessory after the fact for armed robbery and 1st degree murder. The Court described this warrant as "a text book example of a facially invalid, barebones affidavit" that included Spencer's biographical and contact information and stated nothing more than the charged offense, accompanied by a conclusory statement that he had assisted her husband and brother in law in evading Louisiana authorities. It was not supported by factual basis for probable cause.

The Court discussed the law in some circuits which allows officers to supplement their affidavits with oral testimony based on personal knowledge and investigation before a judicial officer. The judge's and affiant's sworn deposition statements were insufficient to demonstrate that the affiant's testimony constituted sufficient facts to support probable cause, nor did it allege that the statements that he provided were made under oath.

Jenkins v. City of New York, 478 F.3d 76 (2d Cir. 2007)

Following a series of robberies and a homicide which officers believe were conducted by the same person and several of them with an accomplice, found a vehicle that had been stolen by the first robbery victim and used in subsequent robberies. Property belonging to one of the robbery victims as well as fingerprints of Derek Blyther were found in the vehicle. Officers arrested Blyther and plaintiff Jenkins in Blyther's apartment. Jenkins was identified by witnesses and victims and held for almost eight months. At that point, Blyther told the District Attorney that Dickson, not Jenkins, was the perpetrator in the murder and accomplices in the robberies were various crack heads. Following court hearings the case against Jenkins was dismissed after he had spent nearly nine months in prison.

In defense of the false arrest claims, officers argued that they acted on probable cause. They claimed probable cause based on the following facts: (1) when they knocked on Blyther's door, both he and Jenkins attempted to escape and were tackled. The Court did not accept this as both Blyther and Jenkins deny any attempt to escape and there was nothing noted in the use of force or any reports suggesting that either attempted to escape.

(2) Jenkins generally matched the plaintiff's descriptions. The Court found that the only two common characteristics were that the perpetrator was male and black. The other descriptions were greatly varied, with ages from 16 to 30, height, from 5'7" to 6'3" and weight from 140 lbs. to 200 lbs. Therefore, the arrest of Jenkins at Blyther's apartment was not based on probable cause.

Chambers, a witness to the murder, testified that he picked Jenkins out of the line up because the police told him he had to pick someone out and he just wanted to go home and the

police were forcing him to pick somebody out. Therefore, the police could not rely on this identification to develop probable cause.

Two separate robbery victims were also brought in for a line up around 6 p.m. on the date of the arrest. They were told that police had caught the person who had robbed them and indicated that the belongings of the victims were found in the suspect's possession. They did not clarify that the suspect was Blyther and both of the victims were kept in a room together communicating as to what the officers told them. Both picked out Jenkins. The Court concluded that although the line up was tainted, it was not so flawed as to undermine probable cause. Therefore, the officers were entitled to qualified immunity after the victims' erroneous identification.

Miller v. Prince George's County, Maryland, 475 F.3d 621 (4th Cir. 2007)

During the course of its investigation of a burglary/theft, the defendant detective obtained information indicating that the suspect was a white male under twenty-five. He claimed in his affidavit that the license plate was given to him by an eyewitness. The eyewitness subsequently denied that he ever turned over a tag number to the detective. Apparently the detective obtained a tag number from the computer records of the African American plaintiff whose identifying information was placed in the warrant without the detective establishing a link between that number and the get away car or the white suspect. The court determined that these misrepresentations and omissions were material and the detective was not entitled to qualified immunity. The detective also argued that he should be entitled to qualified immunity because he was not the arresting officer. The court found that he could not shield himself from liability for the natural consequences of his use of intentionally or recklessly false material misstatements and omissions to obtain the arrest warrant.

Jordan v. Mosley, 487 F.3d 1350 (11th Cir. 2007)

Deputy Mosley's wife asked her uncle, plaintiff Jordan, who was a heavy equipment operator, to use a contractor's backhoe (hired to dig a well for Mosley) to clean up the area and dig a hole for a fish pond. While complying with his niece's request, the backhoe was damaged, including a flat tire and a broken hydraulic cylinder. When the contractor discovered the damaged backhoe, he insisted that Deputy Mosley pay for it. Plaintiff offered to pay for half, but Deputy Mosley insisted that he pay for the entire amount. When plaintiff would not do so, the deputy reported the damaged contractor's backhoe to Deputy Crockett without informing him that his wife had asked his uncle to use the backhoe.

Crockett made out an arrest warrant for plaintiff who was taken to jail where Deputy Mosley was the chief jailer. Mosley told plaintiff's wife that if she paid $1,355.00 including restitution for the damaged backhoe, that the plaintiff would be released and the charges would dropped.

Remarkably, the 11th Circuit Court of Appeals found that even based on the above facts, Mosley had probable cause. Plaintiff contended that Mosley lacked probable cause because he

had no reason to believe the plaintiff intentionally damaged the backhoe. The 11th Circuit explained that no police officer can truly know another person's subjective intent, and that officers do not have a duty to prove every element of a crime before making an arrest. This was a general intent crime and therefore, the only requisite intent of the crime is a general intent to do the act. The Court cited 9th Circuit precedent indicating that probable cause of intent is only necessary for a specific intent crime and the Second Circuit which has held that the suspect's state of mind can be inferred from circumstantial or indirect evidence. The Court also rejected plaintiff's claim that given his niece's request, he had apparent authority to use the backhoe. The Court explained that under the law of probable cause no police officer has a duty to resolve a legal question before seeking out an arrest.

Fox v. Desoto, 489 F.3d 227 (6th Cir. 2007)

Plaintiff, an internal revenue agent, was removed from an airplane for unruly behavior. The Court determined that the arresting officer had probable cause, and that he had information that the plaintiff was armed, had refused to show the flight captain his credentials and had been removed from the flight for causing a disturbance. At the gate, he was uncooperative, would not speak to security personnel, refused to identify himself or answer any questions. The other passengers began gathering to watch the officer ask Fox to come with him, took his arm at which point he stood up, pulled away and reached for his right side where he kept his credentials and his weapon. These actions gave the officer probable cause to believe that Plaintiff had committed the act of disorderly conduct and justified his placing the plaintiff in a bar-arm hold and taking him to the ground.

The court applied that the statute of limitations as enunciated in Wallace v. Kato, 127 S.Ct. 1091 (2007). Wallace restated the finding in Heck v. Humphrey that a claim of malicious prosecution does not accrue until the underlying conviction is invalidated. However, the statute of limitations for a claim of false arrest begins to run at the time the claimant becomes detained pursuant to legal process.

John v. City of El Monte, ___ F.3d ___ (9th Cir. 2007)

John, a fifth grade public school teacher with 30 years of experience and an unblemished record went to the principal with a note that she intercepted from Ashley, a ten year old student to another student stating she hoped "Ms. John dies today, like poison her or something." And that John was a "fucken perv" and a "lesbian bitch". Defendant officer with ten years experience and extensive training including advanced interview techniques interviewed Ashley at the police department. She described, in some detail, how while alone with John, John placed her hand on her breast and near her vaginal area. Relying on his training, he found characteristics consistent with a credible victim. When he attempted to speak to the plaintiff, she told him that her attorney said that the police should make a record that I requested an attorney. The officer then determined that he could not interview her and arrested her. She was confined for thirty six hours before the District Attorney declined to prosecute her. The Appellate Court overturned the District Court's denial of qualified immunity finding that the officer had probable cause based on

Ashley's allegations and his experience and special training in dealing with sexual abuse of children and advanced interviewing techniques.

There was concern about the haste in making the arrest and the possibility that further investigation might have resulted in his determining not to make the arrest, however, the determination that he had acted on probable cause provided him with qualified immunity.

Reynolds v. Jamison, 488 F.3d 756 (7th Cir. 2007)

Plaintiff claimed that the officer violated his constitutional rights by not allowing him to retrieve a copy of a protective order indicating there was an exception which allowed him to be within 500 feet of his girlfriend for the purposes of visiting his grandparents. The officer who had investigated the original incident which led to the protective order, relied on the original victim's complaint to a sergeant that plaintiff was in violation of the order. Plaintiff's claim that the officer should have spoken directly to the victim was unavailing as the officer can rely on information conveyed by a sergeant. Further, while in route to the scene, the officer on his computer retrieved details of the order of protection which showed no exception. After pulling the plaintiff over he also verified the order of protection through the law enforcement agency database. The Court noted that once the officer had probable cause, he was under no constitutional obligation to further investigate plaintiff's possible innocence. "If officers were required to determine exactly where the truth lies before acting, the job of policing would be very risky financially as well as physically." (Cite omitted). "Police would respond by disbelieving witnesses (or not acting on allegations) lest they end up paying damages, and the public would suffer as law enforcement declined."

Washington v. Haupert, 481 F.3d 543 (7th Cir. 2007)

Officers responding to a domestic violence call arrested both Claire and Leon Washington for domestic battery. The officers claim that Claire said she and her husband had been arguing, had thrown water and juice on each other and that her husband had grabbed her shoulders and hands and pushed her into the kitchen. She claims that she grabbed a chair and tried to hit her husband in an attempt to defend herself. The officers reported that Leon stated that he had been asleep when Claire jumped on him and said, "You wanna fight mother f*****". She scratched him on the back of the neck, after which he went downstairs with Claire and they wrestled over a chair. Officers took nine photographs of the home including a knocked over chair and scratches on Leon. These disputed facts, the photographs and the transcript of the 911 call which provided Claire saying "Uh, my husband, uh, tryin' to fight me." were insufficient to provide probable cause to support the officers' summary judgment motion. The Washington's claimed that they told the police officers that they were just playing around.

Al Franklin v. Miami University, 214 Fed.Appx. 509 (6th Cir. 2007)

Al Franklin was cleaning restrooms at Miami University when a co-worker, Johnston, entered the restroom. Franklin had placed signs giving notice that he was cleaning the restrooms and that other restrooms should be used. When Johnston entered, Franklin asked him to refrain

from using the restroom. In the presence of his manager, Franklin moved close to Johnston's face in a threatening manner, screamed at him and told him that he, "should knock the f—k out of him." Johnston and the manager told police that Franklin had threatened co-workers and had a hot temper. Officer Fox, observing that Johnston took the threat to his safety seriously, arrested Franklin for criminal menacing within an hour of the incident.

The appellate court reversed the district court's denial of qualified immunity. It noted that eyewitness statements based on firsthand observations are generally entitled to a presumption of reliability and veracity. It also discounted plaintiff's claim that the officer did not sufficiently investigate the incident because he failed to interview him. The court noted that once probable cause is established, officers are under no duty to investigate further or look for additional evidence which may exculpate the accused nor should a plausible explanation require the officers to forego arrest pending further investigation.

The dissenting judge believed that Officer Fox ignored exculpatory facts which clearly indicated that this was a very simple argument which should not have left Johnston feeling threatened.

Johnson v. Knorr, 477 F.3d 75 (3d Cir. 2007)

The Court addresses the issue as to whether or not an officer might be held liable for false arrest or malicious prosecution when a plaintiff is charged with multiple offenses and at least one of the offenses is based on probable cause. Generally, if multiple charges arise out of a single incident and there is probable cause to arrest for one of the charges, officers will be insulated from liability for false arrest. This would be true because the plaintiff would have been lawfully arrested and seized under the valid charge. However, the same cannot be said with a malicious prosecution claim. If additional charges would lead to additional burdens on the defendant he may proceed with his malicious prosecution claim. This is especially true where the plaintiff has claimed that the officer fabricated information leading to the additional charges.

MISCELLANEOUS

Beshers v. Harrison, 495 F.3d 1260 (11th Cir. 2007)

Police responded to an attempted theft of beer from a convenience store. Beshers had been in the store to buy liquor earlier in the day when the clerk refused to sell him beer as he appeared to be intoxicated. The officer viewed the video surveillance observing the suspect's truck which he later observed turn out of a gas station on a busy four lane road with shopping centers, restaurants, hotels, etc. The officer activated his emergency lights and a few hundred yards later, Beshers pulled into a shopping center, stopped to let a passenger out and then continued down the road at speeds of approximately 10 mph above the speed limit. Eventually four cruisers were involved in the pursuit. Beshers repeatedly swerved into oncoming traffic, drove on the shoulder and at one point collided with a civilian vehicle before turning down another road and accelerating. He then crossed the double line at least six times on this road maintaining speeds between 55 and 65 mph. When one of the officers attempted to block

Beshers by swerving in front of him, Beshers' truck rammed the back of the police cruiser. As Beshers attempted to pass the cruiser, it clipped the rear quarter of his truck causing it to flip several times resulting in his death. On November 17, 2004, the District Court granted a motion for summary judgment as to all defendants. After oral argument before the Appellate Court, the Supreme Court issued the decision in Scott v. Harris, 127 S.Ct. 1769 (2007). Following Scott, the Appellate Court found that even assuming that the officer intentionally used force resulting in Beshers' death, such use of force was reasonable.

The Court first explained that the Garner preconditions on use of deadly force (1) that police have probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm and (2) the reasonable belief that the use of deadly force is necessary to prevent the escape and (3) that officers give warning about the possible use of deadly force, if feasible; do not apply when deadly force is used to terminate a high speed car chase. In a ramming case, the risk of bodily harm to the suspect must be weighed against the government interest in ensuring public safety in eliminating the threat caused by the fleeing suspect. After weighing the probability of injuring or killing numerous bystanders against the larger probability of injuring or killing a single person, the Supreme Court stated, "we think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was [the suspect], after all who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high speed flight that ultimately produced a choice between two evils that [the officer confronted]."

The Court also noted the Supreme Court's rejection of the notion that police can protect the public by ceasing a pursuit, explaining that calling off a pursuit does not guarantee a suspect will stop driving recklessly and may create perverse incentives for individuals to flee and drive recklessly to evade arrest. A police officer's use of deadly force to stop a high speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment.

Foraker v. Chaffinch, ___ F.3d ___ (3d Cir. 2007)

Three employees of the firearms training unit repeatedly complained about the heating, ventilation and air conditioning system at the range. They reported that the conditions were intolerable and were specifically concerned with health and safety issues. After the range was closed down a state auditor reviewed the issues and met with the plaintiffs. Their attorney read their statements to the auditor and the local news, as the troopers were not permitted to speak to the press without approval of their supervisors. A day later they were ordered to submit to an examination to determine whether they were fit for duty and two of them were placed on light duty. The day before the Supreme Court decided Garcetti v. Ceballos, the jury returned a verdict for the plaintiffs. The Delaware State Police moved for judgment as a matter of law which was granted by the District Court.

Plaintiffs claim that their action is not controlled by Garcetti, because the First Amendment protects their right to petition the government. The Court described the history of the Petition Clause, concluding that it is separate from the right of free speech under the First

Amendment. It explained that formal petitions are defined by their invocation of a formal mechanism of redress. Thus "lawsuits, grievances and workers' compensation claims are all examples of formal petitions." The formal petition does not require the officers to show that the subject matter of the petition involves a matter of public concern. The Court cited a number of cases concerning petitions including several that indicated even less formal mechanisms, such as a letter may constitute a petition. Unfortunately for the plaintiffs, their internal complaint through informal channels did not constitute a petition. Two of the plaintiffs claimed that their speech to the state auditor qualified for protection under the petition clause, however, the court disagreed finding that they were ordered to cooperate and statements made under compulsion do not comport with the basic principal of freedom underlying the petition clause.

The plaintiffs also claimed that their speech was not covered under Garcetti because they are firearms experts and their speech was related to health and safety concerns and exposed incompetence and wrongdoing. The Court again disagreed finding that Garcetti addressed the question of whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties. The Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." The firearms trainers were acting within their job duties when they expressed concerns through the chain of command about the conditions of the firearms range. The Court also found that they were acting within their job duties when they were ordered to give statements to the state auditor.

See v. City of Elyria, ___ F.3d ___ (6th Cir. 2007)

Plaintiff, union president, claimed that he was disciplined twice in retaliation for making statements in a newspaper advertisement criticizing the chief and contacting the FBI to report alleged illegal or immoral activity within the police department. In addressing the issue of public concern, the Court did not mention Garcetti with regard to any part of the alleged speech. The Court found that as a matter of law, See's conversations with the FBI about corruption, were clearly matters of public concern protected under the First Amendment. It also found that the District Court's taking into consideration the issue of the truthfulness of the statements was relevant as a factor in striking an appropriate balance between the employee's right to free speech and the employer's interest in an efficient administration. Plaintiff sufficiently alleged conduct by the chief that if true would constitute a violation of his First Amendment rights and the chief was not entitled to qualified immunity as there remained an issue of material fact as to whether a reasonable official could have believed the officer's statements were knowingly or recklessly false.

Hardeman v. Kerr County Texas, 2007 WL 2264113 (C.A. 5 (Tex))

Plaintiff, in inmate of Kerr County sued the County after an officer entered her cell and forced her to perform oral sex on him and then took her into the shower where he forcibly raped her. The facts supporting the plaintiff's hiring claim were that when Officer Marrero applied for a job as a jailer, his application did not indicate that he had been fired from his prior employment

as a police officer for a school district, nor was there any evidence that the department had contacted his prior employer, which would have led to a discovery that he was fired for making improper advances toward high school female students. This claim failed as there were no grounds to find that the alleged rape was a plainly obvious consequence of hiring Marrero. There was no history of violence, sexual or otherwise, and it would have required an enormous leap to connect improper advances toward female students to sexual assault. In order for plaintiff to succeed on such a claim, she would have to show that there was a strong connection between the background of the applicant and the specific violation alleged.

With regard to failure to supervise, the record indicated that not long after being hired administrators counseled Marrero for putting his hands on inmates and being too friendly with females. Ten days later, he admitted calling a female ex-inmate to establish a sexual relationship and was suspended for two days. He was also counseled for taking females back to their cells without another officer present and for referring to them as bitches. This was insufficient to support a claim that a municipal custom, rule or policy resulted in a violation of the plaintiff's constitutional rights. In fact, the County presented evidence of a policy prohibiting sexual misconduct and requiring male guards to either have another present when checking on females or at least notifying the control room so that monitoring could take place. Given the counseling and discipline for his misconduct, it cannot be found that the County acted with deliberate indifference. At most, it could be argued that it was negligent in not firing Marrero, however, negligence is insufficient to support a constitutional claim.

Anderson v. Blake, 469 F.3d 910 (10th Cir. 2007)

Police disclosure of a videotape depicting plaintiff's rape to the local news media was a clearly established violation of her privacy rights. In Whalen v. Roe, the "Supreme Court held that the constitutional right to privacy includes an individual interest in avoiding disclosure of personal matters…"

A person's legitimate expectation of privacy depends in part upon the intimate or otherwise personal nature of the material that the State possesses. Such interest is balanced against the compelling State interest in its disclosure. The court cited a number of privacy cases including expectation of privacy in a diary, undressing before a guard, answering questions about sexual history and information about one's transsexualism.

Defendant officer argued that the video was not protected because it contained evidence of a crime. The case cited for this proposition relied on three key points including, the plaintiff's own suspected criminal activity for trading sex for a reduction in legal fees; the video being destined to become public as it was to be used as evidence at trial against the plaintiff, and the plaintiff waived many privacy interests by describing the contents of the tape at a press conference. The government may disclose private information if it can demonstrate a compelling interest and if it uses the least intrusive means of disclosure. "Whether a particular government need or a particular manner of disclosure is sufficient to overcome the expectation of privacy is necessarily a question of degree."

Chesher v. Mayer, 477 F.3d 784 (6th Cir. 2007)

This case concerns the potential liability of the Chief Coroner and other members of the Coroner's Office for allowing an independent photographer to photograph at least 17 dead bodies, many of which were depicted in unnatural artistic poses. Claims of conspiracy and emotional distress as well as issues of statutory immunity are discussed.

Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007)

Wray spent eight years in prison following his conviction for robbery and possession of weapons which was overturned by the Appellate Court based on an unduly suggestive police identification procedure. The Appellate Court reversed the denial of summary judgment.

Officer Weller argued that he cannot be held liable for the conviction or incarceration because, even assuming the suggestive identification, superseding acts on the part of both the prosecutor and judge broke the chain of causation between his conduct and the violation of Wray's constitutional rights. The Court explained that there was no constitutional right not to be subjected to an unconstitutionally suggestive identification. Rather, it is the admission of testimony on the identification which violates a defendant's right to due process. "In the absence of evidence that Officer Weller misled or pressured the prosecution or trial judge, we cannot conclude that his conduct caused the violation of Wray's constitutional rights; rather, the violation was caused by the ill considered acts and decisions of the prosecutor and trial judge."

Explaining its decision, the Court relied on Townes v. City of New York, 176 F.3d 138 (2d Circuit 1999), where the plaintiffs sued officers who conducted an illegal search seeking damages for a subsequent conviction and incarceration. The Court ruled that the officers' conduct violated the plaintiff's right to privacy for which he may be entitled to nominal damages, however, it declined to allow recovery against the officer for the conviction and incarceration holding that the trial judge's decision to admit the evidence constituted a superseding cause. In this case, Officer Weller's conduct was not itself a constitutional violation and the constitutional violation was caused by an intervening actor.

While an officer may be held liable, for the foreseeable intervening forces which result in a constitutional violation, such as where the officer misleads or coerces a prosecutor or judge absent such a situation, there is a gross disconnect between the officer's conduct and the injury for which the plaintiff seeks recovery.

Jenkins v. Bartlett, 487 F.3d 482 (7th Cir. 2007)

Immediately following an officer's shooting a suspected drug dealer who had fled on foot from a vehicle, jumped in another vehicle and attempted to drive over the officer striking him, leading to his being shot seven times by the officer, the officer was taken to the police department for an interview. The police liaison officer who was president of the Police Association met with the officer and his attorney. Plaintiff's counsel sought to call the liaison as a witness, but defense counsel claimed attorney/client privilege and work product production.

The Court affirmed the District Court's ruling that attorney/client privilege prevented such testimony. The Court explained that because the privilege is in derogation of the search for truth, it is construed narrowly. Ordinarily, the presence of a third party would destroy the attorney/client privilege. There are exceptions that apply to agents of the attorney such as paralegals, investigators, secretaries, and members of the office staff and others who assist the attorney providing legal services such as outside experts including attorneys, interpreters or polygraph examiners. Also, there may be an exception for others who assist the attorney by transmitting or interpreting attorney/client communications or assist with formulating opinions with the lawyer based on client communications. In this case, the liaison and the officer testified that she was there solely to assist the attorney as he prepared to represent the officer. The liaison assisted the attorney in gathering information and assuring that the representation followed department rules. She also helped to facilitate communications between the officer and the attorney.

The case also discussed plaintiff's attempt to exclude defendant's experts based on improper disclosure and Daubert and also rejected plaintiff's Monell claims.

Belcher v. Norton, ___ F.3d ___ (7th Cir. 2007)

Belcher and Gleason's 1998 minivan's transmission failed on the highway. It was towed and impounded. Several days later, they arrived at the tow yard to retrieve some personal items from the van. The owner of the yard told them they could only remove court documents from the van. When Belcher began removing a radio the owner informed them they were not allowed to leave the premises until either paying the fees or signing the title of the vehicle over to the tow company. Four Caucasian employees prevented them from leaving the premises. The acting marshal for the Town of Orland arrived and upon being asked to summon a trooper stated, "There is no need to call a state trooper, I am the law." Norton repeatedly told them that they could not leave until they paid the fee or signed over the title. Finally, he told them, "Either sign the title over, or you will be arrested for disorderly conduct." As the deputy began to approach Belcher with handcuffs Ms. Gleason agreed to sign over the title.

The Appellate Court agreed with the District Court finding that the plaintiffs were seized by Norton. The court also found that the seizure was unreasonable and that the officers were not entitled to qualified immunity because although the lien statute gave the tow company a lien on the vehicle, it had no lien on its contents.

The court also found that Norton's actions constituted a procedural due process violation. His forcing her to sign over title deprived her of her property as his acts were unauthorized and there was no adequate state law remedy that could provide her with meaningful relief. Interestingly, the reason she had no remedy was because the state tort claims act provided immunity to Norton under state law.

Finally the court ruled that Norton's extorting the van from the plaintiff by threatening to use his power of arrest if they did not comply was shocking to the conscience constituting a substantive due process violation.

Baker v. Chisom, 2007 WL 2416362

The 8th Circuit first explained its minority view that plaintiffs must specifically plead individual capacity claims. If a plaintiff is silent as to the capacities or if the body of the complaint contains no clear statement or specific pleading of individual capacity, defendants may assume that they are sued in their official capacities. Other Circuits have adopted a flexible approach to this issue.

With regard to the official capacity claim, the plaintiff on appeal argued that he presented sufficient evidence of official capacity because the county had no policies regarding the use of chokeholds or tasers. In its first action, the District Court issued a final order dismissing, on the merits, the official capacity claims. The Court noted that the doctrine of *res judicata* bars plaintiff from suing a succession of public officials on the same official capacity claim. Therefore, a court ruling on an official capacity claim for one defendant will apply to all.

Galen v. County of Los Angeles, 477 F.3d 652 (9th Cir. 2007)

Defendants increased plaintiff's bail from $50,000.00 to $1 million dollars following his arrest for domestic violence. The purpose was to ensure the safety of his fiancée who had required medical treatment for her injuries and there was a belief that the offense was likely to continue. Also plaintiff, as an attorney, could easily meet the $50,000.00 bond. Plaintiff claimed a violation of his Eighth Amendment right regarding excessive bail claim based on his allegation that the amount was 2000% higher than the default amount for this violation and excessive when comparing it to bonds for more serious offenses. In Salerno, the Supreme Court explained that the clause does not provide a right to bail. The Court rejected the proposition that the Eighth Amendment prohibits the government from pursuing compelling interests outside of flight in determining bail. Instead, the bail clause limits the government's conditions of release or detention in excess of the perceived evil it seeks to prevent. In other words, bail may not be excessive in light of the valid interest the State seeks to protect or invalid interests. Because the plaintiff failed to offer evidence that would tend to show that the enhanced bail was imposed for improper purpose or excessive in light of the purpose for which it was set, he failed to meet his burden of proof. Excessive bail does not require that it be beyond one's means, only that it be greater than necessary to achieve the purpose for which bail is imposed.

Plaintiffs claims that the deputies deliberately or recklessly mislead the bail deviation unit with a number of false representations failed, as these representations were either true or there was insufficient evidence that they were presented to the bail deviation unit.

Attorneys' Fees were awarded to the defendants for post discovery litigation. The Court found that the standard for prevailing for a civil rights defendant to acquire attorneys' fees was that the plaintiff's action was unreasonable, frivolous, meritless or vexatious. Although the Court found that at the close of discovery the plaintiff's claims against the deputies did not meet this standard, it did find that it should have been clear that plaintiff failed to uncover evidence

indicating that the County had a policy or practice designed to ensure the setting of excessive bail or that the officers were properly trained, and therefore, the County was entitled to the award of Attorneys' Fees for the Monell claims.

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