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The Federal Law Enforcement -Informer-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

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FLETC Informer Webinar Series

1. Law Enforcement Legal Refresher Training

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

This two-hour block of instruction focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

Date and Time: Thursday July 23, 2015: 2:30 p.m. EDT

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De-Escalation of Force – Some Conclusions after *San Francisco v. Sheehan*

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The Supreme Court's decision in San Francisco v. Sheehan[1] *inched* closer to answering the question about whether a police officer has a legal duty to de-escalate force when confronting an armed, violent, and mentally ill suspect. For the officers, the news was good. Qualified immunity remains a strong defense against claims about what they should have done. But the news for their employing agency was not as good. Whether the agency can be sued under Title II of the Americans with Disabilities Act still depends on the federal circuit.

What happened…? Teresa Sheehan had become a threat to herself and others. She lived in a group home for people suffering from mental illness and was not taking her medications. "Get out of here!" she shouted after a social worker entered her room. "You don't have a warrant! I have a knife and I'll kill you if I have to!" Two police officers were dispatched to the home. *Now* … there is a paradox in the moto, "To Protect and Serve" emblazoned across the sides of so many police cars. The officers had no duty to act -- at least, not a legal duty imposed by the Constitution.[2] Had Officer Holder and Sergeant Reynolds ignored the call, they would have avoided nearly seven years of litigation.

The officers' duty to act was triggered when they entered Sheehan's room. Entering her "home" was a *Fourth Amendment* search; the force the officers would use to take her into custody was a *Fourth Amendment* seizure. The *Fourth Amendment* requires police officers to perform objectively reasonable searches and seizures. Entering a home without a warrant is presumptively unreasonable, but so far, so good, for the officers. This was an emergency, a reasonable exception to the warrant requirement. Sheehan was a threat to herself and others. She had threatened the social worker and what happened next confirmed that she posed a threat to anyone coming inside her room. When the officers opened the door, Sheehan grabbed a knife. She raised it over her head and came forward forcing the officers to retreat and close the door behind them. But still … *so far, so good*. Sheehan was alone in her room, and the officers were outside in the relative safety of the hallway.

Most of the litigation would be focused on what the officers did next. Rather than wait for backup or try to de-escalate the situation, Holder and Reynolds re-entered Sheehan's room. Predictably, Sheehan charged the officers with the knife. *Predictably* (Sheehan's lawyer would argue) the officers shot her. Pepper spray had not worked, and the officers shot to save themselves. Sheehan survived, miraculously, and she sued. The officers were sued for *Fourth Amendment* violations and their employing agency under Title II of the Americans with Disabilities Act (ADA). Both claims were supported by the same facts; specifically, that the officers should have waited and de-escalated the situation instead of charging back into Sheehan's room.

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[1] *City and County of San Francisco v. Sheehan*, 575 U.S. ___ (2015), 135 S. Ct. 1765 (U.S. 2015).

[2] Private citizens generally do not have a constitutional right of protections from other citizens even if the officers or their agency know about the danger and could provide it. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), 109 S. Ct. 998 (U.S. 1989).

The Supreme Court dismissed the case against the officers. Holder and Reynolds requested qualified immunity - - their defense to *standing trial* for a constitutional tort. Qualified immunity is like an implied contract between police officers and the federal court system. It goes like this:

We, the officers, promise to follow the U.S. Constitution. And we, the courts, promise to put officers on notice about what is *not* constitutional. The court will dismiss the case against the officer absent some act or course of conduct that violated a *clearly established* constitutional right.

The officers' appeal to the Supreme Court was over the lower court's decision to deny them qualified immunity and to make them stand trial. The United States Court of Appeals for the Ninth Circuit believed there was enough room for a jury to find that the officers violated Sheehan's *clearly established* right not to be provoked into the deadly encounter. Be clear: The question was not whether the officers' initial entry into Ms. Sheehan's room was reasonable. The Ninth Circuit conceded that it was. In addition, the court concluded that deadly force to seize Ms. Sheehan - - viewed at least from the standpoint *of the moment of the shooting* - - was also reasonable. So, no need for a trial over that, either. The question was over the Circuit's "provocation doctrine." In the Ninth Circuit, officers can be liable for an otherwise reasonable use of deadly force *if they intentionally or recklessly provoked the deadly confrontation*. That issue would have been left up to a jury, had the Supreme Court not granted certiorari.

The Supreme Court reversed the Ninth Circuit. Even assuming the officers provoked the encounter - - and even assuming the provocation was unconstitutional - - the law was not clear, as the Court did not find any robust consensus of precedent that would have put a reasonable officer on notice about when it was reasonable, or not, to enter Sheehan's room. Qualified immunity is designed to protect all but the plainly incompetent or those who knowingly violate the law. It is not exactly a noble standard to live up to, but it has a purpose in situations where police officers are likely to face public ridicule for not acting and personal liability when they do - - particularly with suspects who are predictably, unpredictable. That the law be clear is an exacting standard that keeps the *Fourth Amendment's* objective test from fading into one where juries are allowed to second-guess police officers when things go wrong.

The ADA claim against the agency will proceed to trial. There is a circuit-split about whether an officer's employing agency can be sued under the ADA in a case like this.[3] The Supreme Court was going to resolve the split and answer whether Title II of the ADA requires police officers to accommodate an armed, violent, and mentally ill suspect in the course of bringing her into custody. Unfortunately, the parties did not properly brief the question and the Court saved it for another day. As a result, that kept the ADA claim how the lower court left it.

The Ninth Circuit sided with the other circuits that held the ADA applies to *anything* a public entity does, which would include taking someone like Sheehan into custody. While the Court agreed that an accommodation may not be reasonable, it held that a jury should make the

[3] Individuals in their personal capacities are not subject to suit under Title II, which provides redress only from public entities. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 484 (8th Cir. 2010).

decision here.[4] Because Sheehan was alone inside her room, and the officers outside, less confrontational tactics may have been available; therefore, a jury could find that Sheehan was *denied the benefits of the services, programs, or activities of a public entity*.[5]

Predictions..? Cases like *Sheehan* will happen again. Research on mental health epidemiology shows that mental disorders are common throughout the United States, affecting tens of millions of people each year, and that overall, only about half of those affected receive treatment.[6] When they do, there will be no winners. There never are in a case where someone calls the police for help and the police are forced to shoot the person needing it. Winning will be left to training. Columbine, Sandy Hook, and the Washington Navy Yard shootings prompted active shooter training - - training that plants the file in the officer's brain to ask questions like, "Where is the suspect?" and "Who else is inside?" Getting less press, but happening *at least* as often are people like Sheehan who barricade themselves behind closed doors and promise harm to anyone coming in. "Does she pose a danger to anyone else?" would seem just as an important *file* to plant. And if she does not, why not wait and see if the passage of time will defuse the situation? The law gives police officers a lot of breathing room to make a plan. There is no duty to act; however, when they do, qualified immunity remains a strong defense against claims from plaintiffs who want the perfect answer.

[4]The Ninth, Tenth, and Eleventh Circuits have held that the ADA applies to arrests. See *Sheehan v. City and County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014) reversed in part *City and County of San Francisco v. Sheehan*, 575 U.S. ___ (2015), 135 S. Ct. 1765; *Bircoll v. Miami-Dade Co.*, 480 F.3d 1072 (11th Cir. 2007); *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999). But not every circuit agrees that an arrest is a *service, program, or activity of a public entity*. The Fifth Circuit held that the ADA does not apply to arrests or other on-the-street responses made by law enforcement until the scene is safe. *Hainze v. Richards*, 207 F. 3d 795 (5th Cir. 2000).

[5] Title II of the ADA provides that "no qualified individual shall, by reason of such disability, be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132.

[6] That National Institute of Mental Health: http://www.nimh.nih.gov/

CASE SUMMARIES

United States Supreme Court

Elonis v. United States, 575 U.S. ___(2015), 2015 U.S. LEXIS 3719 (U.S. June 1, 2015)

Elonis posted to Facebook rap lyrics he created which contained graphic and violent language concerning his estranged wife, co-workers and law enforcement officers. Elonis included disclaimers with his posts stating the lyrics were "fictitious," not intended to depict real persons, and that Elonis was exercising his *First Amendment* rights. Elonis' wife and others referenced in the posts felt threatened by their content and contacted law enforcement. Elonis was arrested and charged with violating *18 U.S.C. § 875(c)*, which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another.

At trial, Elonis argued the government was required to prove his subjective intent to threaten under the true threat exception to the *First Amendment*. Elonis argued his Facebook posts were not threats, but protected speech because he did not subjectively intend the posts to be threatening. However, the district court instructed the jury that Elonis could be found guilty if a reasonable person would forsee that his (Elonis') statements would be interpreted as a threat. The jury convicted Elonis on four of the five counts.

On appeal, the Third Circuit Court of Appeals affirmed Elonis' convictions, holding that *Section 875(c)* required only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

The United States Supreme Court reversed the Third Circuit Court of Appeals. The jury was instructed the government only needed to prove that a "reasonable person" would regard Elonis' posts as threats in order to convict him. Such a "reasonable person" standard is a familiar feature of civil liability in tort law; however, it is does not take into account Elonis' mental state when he transmitted the posts to Facebook. Having criminal liability rest upon whether a "reasonable person" considered Elonis' posts threatening would allow Elonis to be convicted on a negligence standard. The court added that a defendant cannot be held criminally liable for mere negligence and that the government must establish the defendant's intent at the time of the crime.

Click **HERE** for the court's opinion.

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Circuit Courts of Appeal

Second Circuit

United States v. Watson, 2015 U.S. App. LEXIS 8377 (2d Cir. N.Y. May 21, 2015)

Two police officers were directed to locate and arrest Butler for third-degree robbery. The officers were provided a photograph of Butler as well as Butler's race, height, weight, hair color and age. In addition, approximately one-year earlier, one of the officers, Vaccaro, had arrested Butler and spent 15 to 30 minutes with him during processing. While looking for Butler, Officer Vaccaro approached a man, later identified as Watson, and asked him for identification, explaining to the man that he looked like Butler. Watson denied being Butler and told Officer Vaccaro that he kept his identification in his jacket pocket. Vaccaro removed the identification from Watson's pocket and then asked Watson if he had any contraband. After Watson denied possessing contraband, Vaccaro frisked him and removed a firearm from Watson's waistband and crack cocaine from his pocket. Officer Vaccaro arrested Watson, later claiming that he was not certain the man he arrested was not Butler, until after Watson was fingerprinted at the police station.

The government indicted Watson on cocaine and weapon possession charges.

The district court granted Watson's motion to suppress the drugs and firearm evidence. The court held the physical disparities between Butler and Watson were too significant for the officers' mistake of identity to be objectively reasonable, and that the officers did not actually believe that Watson was Butler.

The Court of Appeals agreed with the district court's conclusion that a reasonable officer, once he had a chance to view Watson up close, could not have reasonably believed he was Butler as the men had materially different facial features, skin tones, heights, and ages.

Click **HERE** for the court's opinion.

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Fifth Circuit

United States v. Conlan, 2015 U.S. App. LEXIS 7956 (5th Cir. Tex. May 14, 2015)

Over a one-year period, Conlan sent a series of threatening emails and text messages to a woman he dated as a teenager. An arrest warrant was issued for Conlan for harassment, and officers learned that he was registered in a local motel. After the officers saw Conlan's vehicle in the parking lot, they had the motel manager call Conlan to the front desk where they arrested him. When an officer asked Conlan if he wished to get anything from his room before being taken to the police station, Conlan said yes. Officers accompanied Conlan to his room and retrieved his wallet. While in Conlan's room, the lead investigator saw a laptop computer and two cell phones lying on the bed and ordered another officer to seize them. A subsequent search revealed the cell phones had been used to call the victim's workplace and obtain directions to her house, and the laptop used to conduct Internet searches for the victim's name. The officers also searched Conlan's car, which was located in the motel parking lot and seized a loaded handgun and riot stick.

Conlan filed a motion to suppress the items seized from his motel room. By having the manager summon him to the front desk, Conlan argued the officers created the situation where he would be without his effects and forced into requesting a return to his room. Conlan also argued the officers unlawfully searched his car without a warrant.

First, the court held that if the officers wanted access to Conlan's room, they could have executed the arrest warrant there. In addition, the court found there was no evidence to suggest the officers pressured Conlan into returning to his room. Finally, when Conlan told the officers he wanted to return to his room, the officers did not violate the *Fourth Amendment* by accompanying him there.

Next, the court held the officers made a lawful plain view seizure of Conlan's cell phones and laptop computer because the incriminating nature of these items was immediately apparent. The incriminating nature of an item is "immediately apparent" if an officer has probable cause to believe that the item is either evidence of a crime or contraband. Here, the lead investigator who ordered the seizure of Conlan's laptop and cell phones had first-hand knowledge of Conlan's harassing electronic communications; therefore, he had probable cause to believe these items constituted evidence of the crime of harassment.

Finally, the court held the warrantless search of Conlan's vehicle was lawful. Before locating Conlan at the motel, the officers knew that Conlan had recently driven his car past the victim's house. This act formed part of Conlan's course of criminal conduct and provided the officers with probable cause to believe the vehicle was evidence and an instrumentality of the crime of harassment. Consequently, the officers were entitled to impound and search Conlan's vehicle.

Click **HERE** for the court's opinion.

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De La Paz v. Coy, 2015 U.S. App. LEXIS 7977 (5th Cir. Tex. May 14, 2015)

Customs and Border Patrol (CBP) agents took Frias and Garcia de la Paz into custody when, during separate traffic stops, the men admitted to being illegal aliens. Frias and Garcia filed *Bivens* lawsuits against the agents, claiming the agents violated the *Fourth Amendment* by stopping them only because they were Hispanic.

The court consolidated the cases and following the Ninth and Second Circuits held that *Bivens* actions are not available for claims that can be addressed in civil immigration and removal proceedings. The court found that the Immigration and Nationality Act (INA) and its amendments include provisions specifically designed to protect the rights of illegal aliens and provide remedies for violations of those rights. As a result, the court held that once the legislature had chosen a remedial scheme, the separation of powers doctrine prevents federal courts from supplementing it.

Click **HERE** for the court's opinion.

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Sixth Circuit

Northrup v. City of Toledo Police Dep't, 2015 U.S. App. LEXIS 7868 (6th Cir. Ohio May 13, 2015)

An individual called 911 and reported that he saw a man, later identified as Northrup, walking down the street "carrying a gun out in the open." When Officer Bright responded, he saw Northrup and his family walking their dog and he noticed that Northrup had a handgun in a holster on his hip. Bright approached the group, asked Northrup to hand the dog's leash to his wife, and Northrup complied. At this point, according to Bright, Northrup pulled out his cell phone and moved his hands back toward his firearm, in what Bright believed to be a "furtive movement." Bright asked Northrup to turn around with his hands over his head, but rather than comply, Northrup asked Bright why he was there. Without answering, Bright unsnapped Northrup's holster and seized Northrup's firearm. After disarming Northrup, Bright demanded Northrup's driver's license and concealed-carry permit. Northrup gave Bright his driver's license, but Northrup's wife told Bright to "look up the permit" himself. Suspecting Northrup had committed the offense of "inducing panic," Bright then placed Northrup in handcuffs and placed Northrup in his squad car. Bright conducted a record check and discovered Northrup possessed a valid concealed-carry permit, which made it legal for Northrup to carry the firearm on his hip. After approximately thirty minutes, another officer arrived and Bright released Northrup with a citation for "failure to disclose personal information," a charge, which was later dismissed.

Northrup sued Officer Bright and other member of the police department, alleging a number of constitutional violations as well as state law torts.

Officer Bright argued he was entitled to qualified immunity because he had reasonable suspicion to believe that Northrup was engaged in criminal activity by visibly carrying a firearm in his holster, and because he was responding to a 911 call. As a result, Bright claimed he was justified in disarming, detaining and issuing Northrup the citation.

The court disagreed. *Ohio Rev. Code § 9.68(C)(1)* clearly permits the open-carry of firearms. In addition to making the open-carry of firearms legal, Ohio law does not require gun owners to produce or even carry their licenses for inquiring police officers. In fact, the court found the Ohio Attorney General previously issued an opinion in which he stated, "The open-carry of firearms is a legal activity in Ohio." "If an officer engages in a conversation with a person who is carrying a gun openly, but otherwise is not committing a crime, the person cannot be required to produce identification." In addition, the court noted when an officer observes a person openly carrying a firearm in a place where it is legal, the officer cannot conduct a *Terry* stop to determine if the person legally possesses the firearm. In other words, in a place where it is lawful to possess a firearm, unlawful possession "is not the default status." The court concluded it was not reasonable for Officer Bright not to know the parameters of this unambiguous statute.

In addition, for a valid *Terry* frisk, clearly established law required Officer Bright to establish evidence that Northrup might be armed and dangerous. However, all Bright ever saw was that Northrup was legally armed. The court found that to allow *Terry* stops and frisks under the facts of this case would effectively eliminate *Fourth Amendment* protections for lawfully armed persons. While open-carry laws may put police officers in awkward situations, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets, and

the Toledo Police Department has no authority to disregard this decision, nor the protections provided by the *Fourth Amendment* by detaining every person who lawfully possesses a firearm.

Finally, Northrup disputed Officer Bright's claim that Northrup made a "furtive movement" toward his firearm during the encounter. The court commented that only a jury could decide this disputed fact, and not the court.

Click **HERE** for the court's opinion.

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United States v. Lichtenberger, 2015 U.S. App. LEXIS 8271 (6th Cir. Ohio May 20, 2015)

Officers arrested Lichtenberger at the home he shared with his girlfriend, Holmes, for failing to register as a sex offender. After his arrest, Holmes hacked into Lichtenberger's personal computer and discovered a number of images of child pornography. Holmes contacted the police, and when an officer arrived, he asked Holmes to boot up the laptop and show him what she had discovered. Holmes showed the officer several folders on Lichtenberger's laptop and then opened several of them to show the officer the images contained within. After the officer recognized the images to be child pornography, he asked Holmes to shut down the laptop. The officer then obtained a warrant for the laptop and its contents.

The government indicted Lichtenberger for receipt, possession and distribution of child pornography. Lichtenberger moved to suppress all evidence obtained pursuant to the officer's warrantless search of his laptop with Holmes.

First, the court recognized the *Fourth Amendment* only protects against "governmental action" and is does not apply to a search or seizure, even an unreasonable one, conducted by a private individual who is not acting as an agent of the government. Second, where a warrantless search by the government follows a private search, the scope of the warrantless government search cannot exceed the scope of the initial private search. Here, the court found the scope of the officer's warrantless search exceeded the scope of Holmes' private search conducted earlier that day. At the suppression hearing, Holmes testified that she could not recall if the images she showed the officer were the same images she had viewed during her earlier search. In addition, the officer testified that he may have asked Holmes to open files that were different than the ones she had previously viewed. Consequently, the court concluded there was no "virtual certainty" that the officer's warrantless search of Lichtenberger's laptop was limited to the files containing the images from Holmes earlier search. As a result, the court held the officer's warrantless search of Lichtenberger's laptop exceeded the scope of the private search, in violation of the *Fourth Amendment*, and ordered the laptop evidence and evidence obtained pursuant to the search warrant be suppressed.

The court added that the need to confirm the laptop's contents on-site was not immediate. First, Lichtenberger could not access the computer because he had been arrested. Second, the images on the computer were not in danger of being deleted, or altered. Finally, neither the computer nor its contents posed an immediate threat to the officer or others once it was seized.

Click **HERE** for the court's opinion.

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Seventh Circuit

United States v. Ruiz, 2015 U.S. App. LEXIS 7645 (7th Cir. Ill. May 8, 2015)

While conducting surveillance on the target of a drug investigation, officers saw Ruiz get into the target's vehicle, which was parked at a local mall. Ruiz got out of the vehicle after two or three minutes and got into a car that was parked nearby. Once inside the car, the officers saw the car's brake lights activate and Ruiz manipulate some of the driver controls in the vehicle such as those for the air conditioner, windshield wipers and the windows. The officers then saw Ruiz reach behind the seat and appear to put something in the rear passenger area of the car. One of the officers testified that based on his training and experience in drug investigations that hidden or trap compartments in vehicles can be opened by manipulating the controls of the vehicle as Ruiz had done.

The officers followed Ruiz after he drove away from the mall and requested a marked police car attempt to develop independent probable cause to stop Ruiz. During this time, the officers noticed that Ruiz's car had Wisconsin license plates but that Ruiz drove past the on-ramp for the interstate that led back to Wisconsin. Ruiz eventually parked in a residential driveway with a "for rent" sign in the yard without committing any traffic infractions and allowed the marked police car to drive past. Once the marked police car was out of sight, the original officers saw Ruiz manipulate the driver controls and reach around into the rear of his car as he had done in the mall parking lot. As Ruiz began to back out of the driveway, the officer in the marked police car drove back past Ruiz. Ruiz immediately stopped his car and shifted it into park.

At this point, the original officers, in plainclothes, approached Ruiz's car and identified themselves as police officers. Ruiz gave the officers his driver's license, which listed his address as a city in southern Texas. Ruiz told the officers he parked in the driveway because he was interested in the house as advertised as being for rent, and that he had previously been at the mall visiting a furniture store. In response to the officers' questions, Ruiz denied having drugs or hidden compartments in his car and consented to a search of it. After a ten-minute search revealed no drugs, the officers asked Ruiz if he would follow them to the nearby police station so the officers could have a drug-sniffing canine check his car. Ruiz agreed, and followed the officers to the police station in his car. Once at the station, the officers told Ruiz they thought they had seen him operating a trap door in his car while parked at the mall. In response, Ruiz admitted his car had two traps and opened them for the officers. Inside the traps, the officers recovered heroin. Afterward, Ruiz signed a written waiver of his *Miranda* rights and made incriminating statements to the officers.

After the government charged Ruiz with possession with intent to distribute heroin, he filed a motion to suppress the evidence discovered in his car.

First, Ruiz argued the officers violated the *Fourth Amendment* because the officers did not have reasonable suspicion to approach and detain him while he was parked in the residential driveway and that the duration of the stop was unreasonable.

The court disagreed, noting Ruiz's actions, when considered together, provided the officers with reasonable suspicion to believe Ruiz was involved in criminal activity. First, Ruiz had a brief encounter with the target of a drug investigation in the mall parking lot, and then Ruiz

entered his car and manipulated the driver controls in a manner consistent with the operation of a trap. Second, Ruiz passed the on-ramp to the interstate, which would have taken him to Wisconsin. Third, Ruiz pulled into the residential driveway and repeated the same steps as he had done in the mall parking lot consistent with the operation of a trap. Finally, when Ruiz began backing out of the driveway, he stopped and put his car into park. This behavior was consistent with the behavior of someone attempting to evade notice by the police, and not consistent with the behavior of a person looking at the house as a potential renter. The court further held the duration of the stop, thirty minutes, was reasonable as all of the officers' actions and questions were related to investigating Ruiz's potential involvement in illegal drug activity.

Second, Ruiz argued his initial encounter with the officers was custodial; therefore, all of the statements he made before receiving *Miranda* warnings at the police station should have been suppressed.

The court disagreed, holding that Ruiz was not in custody for *Miranda* purposes prior to receiving the *Miranda* warnings inside the police station. First, the encounter between the officers and Ruiz occurred in a public area, and the officers spoke to Ruiz in a calm, courteous manner. Second, the officers were in plainclothes and they did not display their weapons or use any force against Ruiz. Third, the officers' unmarked vehicles did not block the driveway where Ruiz had parked his car. Fourth, the officers let Ruiz drive his car to the police station, and allowed him to retain possession of his driver's license and cell phones. Finally, once at the police station, the officers allowed Ruiz to park in a public lot rather than a secure lot and then the officers spoke to Ruiz beside his car in the public lot.

Third, Ruiz argued that his consent to drive to the police station and then open the traps was not voluntary.

Again, the court disagreed, finding the officers used no physical coercion, they spoke to Ruiz in a calm conversational manner and Ruiz readily agreed to drive his car to the police station.

Click **HERE** for the court's opinion.

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Eighth Circuit

United States v. Hurd, 785 F.3d 311 (8th Cir. Minn. 2015)

In the early morning hours, in a high-crime area, two patrol officers saw a car stopped in the middle of the street with Hurd standing outside the car next to the driver's side window. Based on the high-crime location, the darkness of the area where the car was parked, the cold temperature, and the absence of houses or buildings on the block, the officers suspected a drug transaction was taking place. After the officers pulled their vehicle behind the parked car, Hurd approached the officers with his hands in his jacket pocket. The officers exited their vehicle and ordered Hurd to remove his hands from his pockets. Hurd initially took out his hands, but then put them back in his pockets a few seconds later. Hurd continued to approach the officers with his hands in his pockets, despite continued orders by the officers to remove them. The officers then grabbed Hurd and placed him over the hood of their vehicle. When Hurd continued to refuse to take his hands out of his pockets, one of the officers

reached into Hurd's pocket and removed a loaded, cocked, .45-caliber pistol. The officers arrested Hurd, who was indicted for being a felon in possession of a firearm.

Hurd moved to suppress the pistol, arguing the officers lacked reasonable suspicion to support a *Terry* stop and lacked reasonable suspicion to believe he was armed and dangerous to justify a *Terry* frisk.

The court disagreed. The officers saw a car parked on a dark road, in the middle of the night, in a high-crime area, with no houses or businesses around with Hurd standing next to the driver's side window. Based on these facts, along with the officers' experience, the court held the officers had reasonable suspicion to believe criminal activity was afoot; therefore, the *Terry* stop of Hurd was lawful.

The court further held that Hurds' placement of his hands in his pockets and his refusal to remove them as he walked toward the officers provided reasonable suspicion to believe Hurd was armed and dangerous; therefore, the officers were justified in conducting the *Terry* frisk.

Click **HERE** for the court's opinion.

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Grider v. Bowling, 2015 U.S. App. LEXIS 7716 (8th Cir. Mo. May 11, 2015)

Officer Bowling responded to a disturbance at a fast-food restaurant between Grider and another person. When he arrived, Bowling saw Grider, who had walked across the street from the restaurant to eat his meal in his car. Bowling approached Grider, who was wearing a knife on his hip, and asked Grider to exit his vehicle. After Grider refused, Bowling forcibly removed Grider from the car, placed him on the ground with his knee on his back, and handcuffed him. While Grider was held on the ground, Officer Reece arrived. Reece ran toward Bowling and Grider, and without saying anything to Bowling, kicked Grider in the head. The officers later found an open bottle of whiskey in Grider's car.

Grider sued, claiming that the officers, among other things, used excessive force in violation of the *Fourth Amendment* when they arrested him. Grider also claimed that Officer Bowling was liable for the injuries he suffered after being kicked in the head by Officer Reece, arguing that Bowling had a reasonable opportunity to intervene

The court held that Officer Bowling was entitled to qualified immunity.

First, the court recognized that police officers have the right to use some degree of physical force to effect a lawful arrest and that reasonable applications of force may cause pain or minor injuries with some frequency. Here, the court held it was objectively reasonable for Officer Bowling to forcibly remove Grider from his vehicle and put him on the ground after Grider refused to exit his vehicle while in possession of a knife.

Second, the court held while it is clearly established that an officer who fails to intervene to prevent the unconstitutional use of force by another officer may be held liable for violating the *Fourth Amendment*, there was no evidence to show that Officer Bowling was aware of Officer Reece's kick before it occurred. Consequently, because Bowling was not involved in the allegedly unconstitutional acts of Reece, he could not have violated Grider's constitutional rights based on Reece's use of excessive force.

Click **HERE** for the court's opinion.

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United States v. Beckmann, 2015 U.S. App. LEXIS 8016 (8th Cir. Mo. May 15, 2015)

Two officers went to Beckmann's house to verify his address and to ensure that Beckmann was complying with the conditions related to his status as a convicted sex offender. While in Beckmann's house, one of the officers saw a computer tower and two external hard drives underneath a desk. The officer asked Beckmann if he could search the computer and Beckmann consented. The officer noticed that both external hard drives were connected to the tower, but the power cord to one of them was unplugged from the wall. The officer plugged the power cord to the unplugged external hard drive back into the wall and began to search the computer and the two external hard drives. During his search, the officer discovered file names suggesting child pornography. The officers seized the computer tower as well as both external hard drives and applied for a warrant to search all of the items.

The government obtained the search warrant on August 15, 2011. Under the terms of the warrant, the government was required to search the computer and external hard drives on or before August 29, 2011. Execution of the warrant required a forensic analyst to copy and search existing and deleted computer files. The forensic analyst began analyzing the seized computer in November 2011 and the external hard drives in January 2012. The analyst located over 2,000 images of child pornography on the external hard drive that the officer had plugged into the wall.

In July 2013, the government indicted Beckmann for possession of child pornography.

The officer subsequently filed the search warrant return of inventory with the district court in November 2013. The officer stated that he did not intend to prejudice Beckmann or delay the proceedings, but that he had just forgotten to file the return of inventory.

Beckmann filed a motion to suppress the evidence discovered on the external hard drive. Beckmann argued that it was unreasonable for the officer to believe that the scope of Beckmann's consent to search his computer extended to a search of the unplugged external hard drive.

The court disagreed, holding that it was reasonable for the officer to believe that Beckmann's consent to search the computer tower included consent to search the connected but unplugged external hard drive. The officer's belief was reasonable based on the common understanding that the term "computer" encompasses the collection of component parts involved in a computer's operation, and the fact that the external hard drive was attached to the computer tower. In addition, Beckmann did not explicitly limit the scope of his consent to search his computer tower, nor did he object when the officer plugged the external hard drive into the electrical outlet and began searching.

Beckmann also moved to suppress the evidence discovered on the external hard drive, arguing the government violated *Federal Rule of Criminal Procedure 41*. *Rule 41* states, in part, that a "warrant must command the officer to . . . execute the warrant within a specified time no longer than 14 days" and the "officer executing the warrant must promptly return it." Beckmann argued that the government failed to satisfy the requirements of *Rule 41* because

there was a two to five month delay in executing the warrant and a two-year delay in filing the return of inventory.

The court found that the government violated *Rule 41*; however, it held that suppression of evidence was not the proper remedy unless Beckmann established the government acted in reckless disregard of the rule, or if he suffered some prejudice because of the violation. The court concluded the government did not exhibit reckless disregard of *Rule 41* because of the length of time typically required to conduct computer analysis in child pornography cases. However, the court added, the best practice would have been for the government to file a motion seeking additional time to execute the warrant. The court further held Beckmann suffered no prejudice, as probable cause continued to exist and the evidence located on the computer did not become stale or deteriorate.

Finally, the court held the officer's two-year delay in filing the return of inventory was due to inadvertence rather than deliberate and intentional disregard for the rules.

Click **HERE** for the court's opinion.

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Peters v. Risdal, 2015 U.S. App. LEXIS 8609 (8th Cir. Iowa May 26, 2015)

Officers arrested Shannon Peters for violating a "no-contact" order and transported her to jail. At the booking counter, Peters became agitated, shouted at the officers and refused to answer several medical screening questions designed to determine whether she presented a risk of suicide.

The officers decided to terminate the booking process because of Peters' behavior and escorted her to a holding cell. Once at the holding cell, Officer Michelle Risdal determined Peters presented a risk of harm to herself. Specifically, Officer Risdal was concerned that Peters could harm herself with the strings of her swimsuit, which she was wearing under a shirt and sweatpants. Officer Risdal then ordered Peters to remove her clothing. When Peters refused, two male officers entered the holding cell and told Peters to follow Officer Risdal's commands. After Peters continued to refuse, the officers placed a paper jumpsuit over Peters and Officer Risdal removed Peters' clothing. After Officer Risdal removed Peters' clothing, Peters was left in the cell with the paper jumpsuit.

Peters sued the officers, claiming they violated the *Fourth Amendment* when they forcibly removed her clothing in the holding cell.

The court disagreed. Concern for a detainee's safety can justify requiring a detainee to undress and change into a paper jumpsuit. Here, the officers knew that Peters was visibly upset, and that she refused to respond to medical screening questions designed to determine whether she posed a threat of harm to herself. The court concluded that under these circumstances, it was objectively reasonable for the officers to believe that Peters presented a risk of harm to herself if she was permitted to retain the strings on her swimsuit.

The court further held the manner in which the officers removed Peters' clothing was reasonable. First, the officers gave Peters the chance to change into the paper jumpsuit, in a holding cell, away from public view, with a female officer alone. When Peters refused to comply with Officer Risdal's instruction to remove here clothing, she was given a second opportunity to change on her own. Finally, after Peters' non-compliance, the officers covered

her with the paper jumpsuit while Officer Risdal removed Peters' clothing. The court held the officers' conduct reasonably limited the extent to which Peters' body was exposed to the officers.

Click **HERE** for the court's opinion.

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United States v. Omar, 2015 U.S. App. LEXIS 8708 (8th Cir. Minn. May 27, 2015)

The government suspected Omar was involved in helping others travel from Minnesota to Somalia to receive training by al Shabaab, a terrorist organization. As part of the investigation, agents with the Federal Bureau of Investigation (FBI) interviewed three witnesses who identified Omar from photographs as the person known to them as "Shariff" who organized their trips to Somalia.

An FBI agent showed the first witness eighty-five photographs, one at a time. After displaying each photograph, the agent asked the witness whether he knew the person in the photograph. When the agent showed the witness Omar's photograph, the witness identified Omar, without hesitation, as the person he knew as "Shariff." Omar's photograph was the eighty-third photograph shown to the witness.

During a second interview approximately fourteen-months later, an agent showed the same witness twenty-nine photographs following the same procedure as before. When the agent displayed Omar's photograph, the witness again identified Omar as the person he knew as "Shariff" without hesitation.

During a third interview with the same witness approximately seventeen-months later, after the witness mentioned the name "Shariff," an agent showed the witness a photograph of Omar, which the witness identified as the person he knew as "Shariff."

FBI agents interviewed with two other witnesses and conducted similar photographic identification procedures with those witnesses. Both witnesses identified photographs of Omar as the person they knew as "Shariff."

After a federal grand jury indicted Omar on several terrorism-related offenses, Omar moved to suppress the identification evidence, arguing that the pre-trial identification procedure by which the witnesses identified him violated the *Fifth Amendment Due Process Clause*.

The court held the pre-trial identifications of Omar that occurred during the interviews with the three witnesses did not violate Omar's right to due process. The agents showed the witnesses a series of photographs, one at a time, and after each photograph was displayed, the agents asked the witnesses an open-ended question about whether the witness knew the person in the photograph. This identification procedure did not imply that Omar was the person in the photograph nor did it impermissibly suggest that Omar had engaged in criminal activity. Omar's photograph was one in a series of photographs about which the witnesses were asked a non-suggestive question. The court concluded such an identification procedure was not impermissibly suggestive in violation of the *Due Process Clause*.

The court further held it was not improper for the agent to show the first witness Omar's photograph during his third interview after the witness mentioned the name "Shariff." The

court concluded that by this point the witness had already identified Omar as "Shariff" without hesitation under circumstances that were not unduly suggestive.

Click **HERE** for the court's opinion.

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Tenth Circuit

United States v. Pettit, 2015 U.S. App. LEXIS 7923 (10th Cir. Utah May 13, 2015)

A Utah Highway Patrol Trooper conducted a traffic stop after he saw Pettit drive across the fog line multiple times. Pettit told the trooper he was not the owner of the vehicle. Pettit explained that he had flown to California to pick up his friend's car, which he was driving back to Kansas. During the encounter, Pettit was extremely nervous, with his whole arm shaking when he handed the trooper a Missouri driver's license, which was labeled "Nondriver." Pettit also gave the trooper a California driver's license. When the trooper ran a check on the licenses, he discovered that both were suspended. The trooper then obtained Pettit's consent to search his car, but he did not find any contraband during a cursory inspection of some luggage located in the trunk. Approximately eleven minutes into the stop, the trooper completed his paperwork and wrote a ticket; however, the trooper did not return Pettit's driver's licenses or hand him the ticket. Instead, the trooper questioned Pettit further about his travel plans and his relationship with the owner of the car. The trooper then obtained Pettit's consent to search the entire car and found $2,000 in a suitcase in the trunk. The trooper also discovered from his dispatch that Pettit had multiple arrests for felonies and other drug offenses. Fifteen minutes after the trooper completed Pettit's original traffic ticket, two canine officers arrived, and their drug-sniffing dog alerted on Pettit's vehicle. A further search revealed over two kilograms of cocaine hidden in a spare tire in the trunk.

The government indicted Pettit for possession with intent to distribute cocaine.

Pettit moved to suppress the cocaine, arguing the officer violated the *Fourth Amendment* by unreasonably prolonging the duration of the traffic stop without reasonable suspicion to believe Pettit was involved in criminal activity.

The court disagreed. The court concluded the trooper's justification for the stop ended when the trooper completed his paperwork and wrote Pettit's ticket, approximately eleven-minutes into the stop. However, the court found during this time, the trooper established reasonable suspicion to believe that Pettit was engaged in criminal activity, which allowed the trooper to extend the duration of the initial stop to conduct his investigation. The court noted that Pettit's abnormal nervousness, unusual travel plans, and multiple suspended driver's licenses, by themselves might not provide reasonable suspicion; however, when taken together they established reasonable suspicion to support Pettit's extended detention.

Click **HERE** for the court's opinion.

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