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The seal of the Harris County Sheriff's Office is a five-pointed star. The outer ring of the star contains the text "SHERIFF" at the top, "HARRIS COUNTY" on the left, "THE STATE OF TEXAS" on the right, and "SHERIFF'S OFFICE" at the bottom. In the center of the star is a circular emblem featuring a five-pointed star and the number "1".

2024 FOURTH QUARTER

CONTEMPORARY CASE LAW AND CRITICAL ISSUES IN LAW
ENFORCEMENT AND CORRECTIONS BULLETIN

SUBMITTED BY THE

POLICY AND PLANNING UNIT

OF THE HCSO OFFICE OF RESEARCH AND DEVELOPMENT

Page 3: THE FIFTH CIRCUIT ON SEARCH WARRANTS, CURTILAGE, AND AUTOS—Bailey vs. Ilies. A Facebook post that was intended to be funny wasn't so funny when deputies in Louisiana said it was a threat- and led to a lot of trouble at a suspect's residence without a warrant. That was less funny still.

Page 8: THE FIFTH CIRCUIT ON USE OF FORCE AND QUALIFIED IMMUNITY— Betts vs. Brennan. A tremendous amount of guidance lies in this case study of the reasonable use of force as well as when qualified immunity applies for public servants.

Page 13: THE ELEVENTH CIRCUIT ON EXCESSIVE FORCE AND SUPERVISOR LIABILITY—Ingram vs. Kubik. A veteran with PTSD is contacted by law enforcement after he cuts himself, and excessive force gets used. Make sure you do the right thing for the right reason, particularly when the overarching idea is to help the subject. Also, this is a case study in why an agency needs to track its uses of force and take appropriate personnel actions.

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Page 25: THE ELEVENTH CIRCUIT ON SEARCH WARRANTS, CURTILAGE, AND ACCURATE WARRANTS—U.S. vs. Bryant. Errors can happen, but beware that they don't affect probable cause. Also remember to use the most accurate terms possible when describing specific things, such as firearms (*just because it looks like an "AK-47" doesn't mean it IS one... pet peeve. Sgt. E.L.)*

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THE FIFTH CIRCUIT ON SEARCH WARRANTS, CURTILAGE, AND AUTOS

Bailey vs. Iles.

On August 25, 2023, the Fifth Circuit Court of Appeals decided *Bailey v. Iles*^[i], which serves as excellent review of the law related search warrants, curtilage, and the automobile exception to the search warrant requirement. The relevant facts of *Bailey* are as follows:

Bailey lives in Rapides Parish in central Louisiana. On March 20, 2020-during the first month of the COVID-19 pandemic-he posted this on Facebook: (in summary) – that RPSO deputies would shoot them if they were “infected”-or to RPSO deputies- that the “infected” would shoot back-. .^[ii]

Bailey intended the post as a joke and did not intend to scare anyone. The “hashtag” “#weneedyoubradpitt” referenced the zombie movie World WarZ, starring Brad Pitt. Bailey included the hashtag to “bring light to the fact that it was a joke.” He was bored during the COVID-19 lockdown and used Facebook to keep in touch with friends and “make light of the situation.”

Bailey’s post was in response to another friend-Matthew Mertens- posting a joke about COVID, and Mertens understood Bailey’s post to be a joke. The two continued to post comments underneath Bailey’s post. Merterns posted “lol and he [referring to Bailey] talking about my post gonna get flagged he wins.” Bailey posted “this is your fault” and “YOU MADE ME DO THIS.” Another person, who Mertens later identified as Bailey’s wife, also jokingly commented “I’m reporting you.”

Shortly after Bailey posted, Detective Randell Iles was assigned by the Rapides Parish Sheriff’s Office (RPSO) to investigate. Iles’ supervisors were concerned that the post was a legitimate threat; Iles testified at his deposition that he thought that the post was “meant to get police officers hurt.” Iles looked at the post and the comments and concluded that Bailey had committed “terrorizing” in violation of Louisiana Revised Statute § 14:40.1. Iles had no information regarding anyone contacting RPSO to complain about the post or to express fear, or if any disruption had occurred because of the post.

Without seeking an arrest warrant, Iles and numerous RPSO deputies went to Bailey’s house and arrested him. According to Bailey, he was working in his garage when as many as a dozen deputies with bullet proof vests and weapons drawn approached him and ordered him to put his hands on his head, after which Iles told him to get on his knees and handcuffed him. While Bailey was handcuffed, one of the deputies (not Iles) told him that the “next thing [you] put on Facebook should be not to fuck with the police” and the deputies laughed.

Iles advised Bailey of his rights, took a brief statement, and told him he was being charged with terrorizing. Bailey told Iles that the Facebook post was a joke and apologized. In a supplemental investigative report completed after the arrest, Iles recounted that Bailey told him he had “no ill will towards the Sheriff’s Office; he only meant it as a joke.” Bailey deleted his Facebook post after Iles told him that he could either delete it himself or the RPSO would contact Facebook to remove it.

Iles later filled out an affidavit of probable cause for arrest without a warrant, noting that Bailey had been arrested for “Terrorizing” in violation of statute number “14.40.1.” Under the heading “probable cause and facts of arrest,” he wrote that “the suspect put up a Facebook post that Rapides Parish Sheriff’s Office has order to ‘Shoot on Sight’ due to the Corona Virus outbreak. Arrested without incident.” Iles testified at his deposition that he determined that the Facebook post was criminal based solely on the words of the post itself, and not based on anything Bailey told him.

RPSO announced Bailey’s arrest on its own Facebook page, and he was identified in news reports as having been arrested for terrorism. Bailey’s wife paid a bond to bail him out of jail. The district attorney subsequently dropped the charges and did not prosecute Bailey. [\[iii\]](#)

Bailey filed suit in federal court and alleged that Detective Iles violated his rights under the First and Fourth Amendments, as well as state law claims. Iles filed a motion for summary judgment and the district court granted the motion, dismissing all claims against the officers and detectives. Bailey appealed to the Fifth Circuit Court of Appeals.

The issues on appeal were as follows:

1. Whether Bailey’s Facebook post was protected speech under the First Amendment?
2. Whether Detective Iles violated the Fourth Amendment when he arrested Bailey without a warrant for “terrorizing” under Louisiana law?
3. Whether Detective Iles violated the First Amendment when he arrested Bailey based on the content of his Facebook post?

The court of appeals then discussed qualified immunity and stated:

The qualified immunity inquiry includes two parts”: (1) “whether the officer’s alleged conduct has violated a federal right”; and (2) “whether the right in question was ‘clearly established’ at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct.” *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019). ***An officer is entitled to qualified immunity “if there is no violation, or if the conduct did not violate law clearly established at the time.”*** *Id.*

For a right to be “clearly established,” “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). ***“The defendant’s acts are held to be objectively reasonable unless all reasonable officials in the defendant’s circumstances would have then known that the defendant’s conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.”*** *Thompson v. Upshur Cnty.*, 245 F.3d 447, 457 (5th Cir. 2001) (emphasis in original). ***“The central concept is that of ‘fair warning’: The law can be clearly established ‘despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.’”*** *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). [\[iv\]](#)

On appeal, the court examined (1) whether the detective violated Bailey’s constitutional rights, and (2) whether the right was clearly established such that every reasonable officer in the same situation would have known he was violating the constitution, for both the First and Fourth

Amendment claims. If the answer to the first prong of the qualified immunity test is “no” (no constitution right was violated), the officer will be granted qualified immunity. If the answer is “yes” (the constitution was violated), then the officer will receive qualified immunity unless every reasonable officer in the same situation would have known he was violating the constitution.

Issue One: Whether Bailey’s Facebook post was protected speech under the First Amendment?

The court first examined the legal principles relevant to this issue and stated

[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” United States v. Alvarez, 567 U.S. 709, 716 (2012) (quoting Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotation marks omitted)). The First Amendment’s protections apply to jokes, parodies, satire, and the like, whether clever or in poor taste. See, e.g. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 54 (1988). That said, the First Amendment does not protect all speech, nor has it ever.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942). “Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar.” Alvarez, 567 U.S. at 717 (cleaned up). Two categories are relevant here: (1) “advocacy intended, and likely, to incite imminent lawless action”; and (2) “true threats.” Id. (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); Watts v. United States, 394 U.S. 705 (1969))[\[v\]](#)

The court then examined the two exceptions to the First Amendment’s protections, particularly (1) inciting imminent lawless action and (2) true threats.

Inciting Imminent Lawless Action

The court of appeals examined precedent from the Supreme Court and explained the standard that must be met for speech to qualify as “inciting imminent lawless action” and therefore not be afforded the protection of the First Amendment. The court stated:

Applying the Supreme Court’s incitement precedents, our court has emphasized that “encouragement of conduct that might harm the public such as the violation of law or the use of force” is protected by the First Amendment unless it is “directed to inciting or producing imminent lawless action” and is “likely to incite or produce such action.” Herceg v. HustlerMag., Inc., 814 F.2d 1017, 1021-22 (5th Cir. 1987). “The crucial element to lowering the [F]irst [A]mendment shield is the imminence of the threatened evil.” Id. at 1022.[\[vi\]](#)

The court further explained that:

[E]ven language that had a “tendency to lead to violence” was protected by the First Amendment because such language did not meet the stringent bar for words “intended to produce, and likely to produce, imminent disorder.” Id. at 109; see also Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (“The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”)[\[vii\]](#)

Thus, if the speech has a “*tendency to lead to violence*” or “*encourage unlawful acts*” it is still considered protected speech under the First Amendment. The court also noted that speech that “*amounted to nothing more than advocacy of illegal action at some indefinite future time*” was also considered protected speech under the First Amendment. In order to lose the protection of the First Amendment, the speech must be “***intended to produce, and likely to produce, imminent disorder.***”

The court of appeals then considered Bailey’s Facebook post in light of the above legal principles and held that the post was a “joke in poor taste” but did not rise to the level of incitement so as to lose First Amendment protection.

True Threats

The court next examined what constituted “true threats” such that speech would lose the protection of the First Amendment. The court stated:

“True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). ***In deciding whether speech is an unprotected “true threat,” context is critical. See Watts, 394 U.S. at 706, 708 (considering the context, the expressly conditional nature of the statement, and the reaction of the listeners when evaluating whether a statement is a true threat).*** [\[viii\]](#)

Thus, the court will consider the context of the speech, the conditional nature of the speech, and the reaction of people that heard or read the speech in order to determine if the speech is a “true threat” and not afforded the protections of the First Amendment.

The court of appeals then examined Bailey’s Facebook post in light of the above rule and held the post did not constitute a “true threat.” Specifically, the court stated

On its face, Bailey’s post is not a threat. But to the extent it could possibly be considered a “threat” directed to either the public-that RPSO deputies would shoot them if they were “infected”-or to RPSO deputies- that the “infected” would shoot back-it was not a “true threat” based on context because it lacked believability and was not serious, as evidenced clearly by calls for rescue by Brad Pitt. For the same reason, Bailey did not have the requisite intent to make a “true threat.” [\[ix\]](#)

Thus, since Bailey’s speech did not reach the standard for “inciting” and did not reach the standard of a “true threat,” the Facebook post was considered protected speech under the First Amendment. Therefore, the decision of the district court was reversed regarding this issue.

Issue Two: Whether Detective Iles violated the Fourth Amendment when he arrested Bailey without a warrant for “terrorizing” under Louisiana law?

The court of appeals first examined the legal principles relevant to this issue and stated

It is well established that under the Fourth Amendment a warrantless arrest must be based on probable cause. *United States v. Castro*, 166 F.3d 728, 733 (5th Cir. 1999) (en banc). ***“Probable cause exists when the facts and circumstances within the arresting officer’s personal knowledge, or of which he has reasonably trustworthy information, are sufficient***

to occasion a person of reasonable prudence to believe an offense has been committed.” Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir. 1988) (quotation marks and citation omitted). “As a corollary, moreover, of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.”[\[x\]](#)

The court also examined the Louisiana “terrorizing” statute for which Bailey was arrested. It requires an “intentional communication” that the “commission of a crime of violence is imminent” with the “intent of causing members of the general public fear for their safety...”[\[xi\]](#)

The court further discussed the specific facts known to Detective Iles at the time of Bailey’s arrest. The facts were:

(1) his supervisors asked him to investigate the post; (2) the content of the post itself; (3) Bailey was the author; (4) the comments below the post; (5) Bailey’s statement to Iles that he meant the post as a joke and had no ill will toward RPSO; (6) nobody reported the post to law enforcement; and (7) the general social conditions during the early onset of the COVID-19 pandemic.[\[xii\]](#)

The court of appeals held that there was not probable cause to believe that Bailey violated the “terrorizing” statute, based on (1) the context of the post (it was meant to be a joke), (2) the fact that nobody reported the post to law enforcement and stated that it caused fear, and (3) the fact that Bailey was arrested in March 2020, prior to widespread, violent protests against police that began in May 2020.

Therefore, Bailey satisfied the first prong of the test to defeat qualified immunity, particularly, he established a Fourth Amendment violation.

The court then set out to examine the second prong of the test to defeat qualified immunity, particularly, if the law was clearly established such that any reasonable officer would have known he was violating the Fourth Amendment.

The court noted that the plain meaning of the text of the statute and the state case law that interpreted the statute were sufficient to put a reasonable officer on notice, under the facts of Bailey’s case, that there was not probable cause and therefore the law was clearly established.

As such, Detective Iles was not entitled to qualified immunity on the Fourth Amendment claim, and the decision of the district court was reversed regarding this claim.

Issue Three: Whether Detective Iles violated the First Amendment when he arrested Bailey based on the content of his Facebook post?

The court first examined the legal principle relevant to this issue. The court stated:

The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action against an individual in retaliation for the exercise of protected speech activities.” Keenan v. Tejada, 290 F.3d 252, 258 (5th Cir. 2002).[\[xiii\]](#)

Thus, there are two types of First Amendment claims. First, there is a claim related to a direct infringement of a person’s protected speech. Second, there is a claim for adverse governmental

action (such as an arrest) for exercising protected speech. This is known as a First Amendment retaliation claim. The court of appeals noted that, under the facts of Bailey's case, either claim could be asserted.

The court of appeals also discussed the specific elements of a First Amendment retaliation claim that must be proven by a plaintiff. Specifically, a plaintiff must show:

(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct. [\[xiv\]](#)

The district court granted summary judgment to the defendant officers on this claim because the court held that the Facebook post was not protected speech under the First Amendment. However, since the court of appeals held that the Facebook post was protected speech, the first element was satisfied. The second element was satisfied based upon the arrest and the fact that Bailey deleted the post. The court of appeals also stated the third element was satisfied because Detective Iles admitted that he arrested Bailey because of the content of the Facebook post, therefore the arrest was "substantially motivated" by Bailey's exercise of protected speech.

Thus, for the reasons discussed above, the court of appeals held that Bailey established a First Amendment violation and satisfied the first prong of the test to defeat qualified immunity.

The court also held that the law was clearly established based on Supreme Court precedent, that Bailey's speech did not amount to "incitement" or "true threats", the only categories of speech not afforded First Amendment protection.

Therefore, the court held that Detective Iles was not entitled to qualified immunity on the First Amendment claim and the decision of the district court was reversed.

THE FIFTH CIRCUIT ON USE OF FORCE AND QUALIFIED IMMUNITY

Batts vs. Brennan

Officers are often faced with situations where a person is non-compliant and refuses to follow lawful orders. Officers are faced with making decisions on what type of force to use in these situations, and guidance from the caselaw always notes that use of force cases are very dependent on the specific facts of the case at issue. In 2022, the Fifth Circuit Court of Appeals decided *Betts v. Brennan* [\[ij\]](#), which is instructive regarding the use of a conducted energy weapon (CEW), which, in this case, was a Taser. The facts of *Betts*, taken directly from the case, are as follows:

Early in the afternoon of November 23, 2018, Officer Brennan stopped Betts for speeding. Brennan exited his cruiser and asked Betts to exit his truck. Initially, Betts complied. Once Betts was outside the truck, Brennan explained he had stopped Betts for going thirteen miles per hour over the speed limit. Betts immediately disagreed, arguing there was "no way" he was going that

fast. After a short exchange, Betts sat back down in the driver's seat of the truck. Although continuing to maintain he had not been speeding, Betts remarked: "That's fine, I ain't going to argue with you." Brennan asked Betts for his license, insurance, and registration while Betts sat in the truck, angled toward Brennan.

Betts, continuing to argue about the stop, handed the documents to Brennan. Brennan then stepped away from the truck, creating distance between himself and Betts, and asked Betts to stand at the back of the truck. Betts refused, saying: "I'm fine . . . I'm not causing you no threat . . ." Brennan moved slightly closer and, over Betts's protests, told him to "go walk to the back of the truck or I'm going to make you walk to the back of the truck." Betts replied that Brennan had no reason or authority to order him to do that. This exchange continued for several seconds, with Brennan repeatedly commanding Betts to walk to the back of the truck and Betts refusing. Betts then told Brennan: "I'm not disobeying . . . I'm not causing you no threat. I've done this before." Brennan responded by stating: "For my safety and your safety, I'm asking you to step to the back of the truck."

Betts began shouting that Brennan was lying. Brennan disagreed. Amid this verbal struggle, Betts told him: "If you tase me, I'm going to sue you." Betts repeated he was "not being aggressive" and "not even reaching for [his] phone." As the argument continued, Brennan leaned closer to the truck and grasped Betts's arm while again ordering him to exit. Betts jerked his arm away and told Brennan not to touch him. He again stated he did not have to exit the truck and claimed Brennan was becoming aggressive. At the same time, Betts slung one foot out of the vehicle. Brennan again tried to approach Betts, and Betts kicked his foot out, stood up to exit, and clenched his fist. While doing so, Betts told Brennan he "might want to call [his] people."

Again stepping away from the truck, Brennan shouted to Betts to turn around and put his hands behind his back. Betts stood near the driver's compartment at a 45-degree angle away from Brennan with his hands raised over his head. Brennan repeatedly ordered Betts to put his hands behind his back, and after several commands Betts did so. Brennan then repeatedly told Betts to turn and face him. Betts did not do so but instead kept his body at an angle. Brennan repeated this command several more times, warning Betts that he would tase him if Betts did not comply. When Betts did not comply, Brennan deployed his **taser**, hitting Betts in the upper leg.

Betts screamed and fell to the ground. Brennan ordered Betts to turn over on his stomach, and Betts complied. Brennan then handcuffed Betts, warning that if he continued to resist Brennan would tase him again. As Brennan handcuffed Betts and sat him up, Betts began shouting profanities: "You just damn shot me for fucking nothing . . . you owe me, you fucked up . . . I'm getting something out of this . . ." The entire encounter—from the initial stop to Betts's arrest—lasted about four minutes. Betts later pled guilty to resisting arrest. [\[ii\]](#)

Betts sued Trooper Brennan and the Louisiana State Police for federal and state law claims. We will only discuss the federal claim, which was excessive force in violation of the Fourth Amendment. Trooper Brennan filed a motion for summary judgment based on qualified immunity. The district court denied his motion because, according to the district court, the offense was minor, Betts posed little threat, and was, "at most, passively resisting." Trooper Brennan appealed to the Fifth Circuit Court of Appeals.

The court of appeals first discussed qualified immunity and stated:

An officer merits qualified immunity unless (1) he “violated a statutory or constitutional right of the plaintiff” and (2) “the right was clearly established at the time of the violation.” Dyer v. Houston, 964 F.3d 374, 380 (5th Cir. 2020)[iii]

For a right to be “clearly established,” it must be sufficiently clear such that every reasonable officer in the same situation would have known he was violating the Constitution.

The court of appeals then examined the legal principles relevant in evaluating whether a use of force is reasonable under the Fourth Amendment. The court stated:

Our vantage point is “the perspective of a reasonable officer on the scene, rather than . . . the 20/20 vision of hindsight.” Graham, 490 U.S. at 396. Various factors guide the analysis, including “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.” Ibid. Additionally, we consider “the relationship between the need [for force] and the amount of force used.” Joseph, 981 F.3d at 332 (cleaned up) (quoting Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009)). Facing an uncooperative arrestee, officers properly use “measured and ascending actions that correspond to [the arrestee’s] escalating verbal and physical resistance.” Id. at 332-33 (quoting Poole v. City of Shreveport, 691 F.3d 624, 629 (5th Cir. 2012)) (cleaned up).[iv]

The court of appeals started their analysis of Betts’s case by examining the three factors from *Graham v. Connor*, which are (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the officers or other, and (3) whether the suspect actively resisted or attempted to evade arrest by flight.

The court noted that, in this case, “the extent of Betts’s resistance is the most important” factor in analyzing whether it was reasonable to use the Taser. The court also noted that Betts’s crime, a traffic violation, was minor, and since the officer was alone and Betts was confrontational, he posed “some threat to the officer’s safety.

The court then set out to examine Betts’s level of resistance. Betts alleged that he was “at most, passively resisting” at the time he was Tased. The court of appeals stated:

[W]e “have paid particular attention to whether officers faced active resistance when they resorted to a taser.” Cloud, 993 F.3d at 384. But the line between active and passive resistance is sometimes hazy and must be judged in light of the “necessarily fact-intensive” nature of the inquiry. Deville, 567 F.3d at 167.[v]

The court of appeals then cited, by way of examples, various cases regarding use of a Taser and the outcome. The court stated:

For instance, we have found tasing excessive when an arrestee “did no more than pull his arm out of the officer’s grasp.” Cloud, 993 F.3d at 385 (citing Ramirez, 716 F.3d at 372, 378; Trammell v. Fruge, 868 F.3d 332, 341-42 (5th Cir. 2017)). We have also said “officers could not tase someone who had not committed a crime, attempted flight, or disobeyed any commands, and who may have only provoked police with an ‘off-color joke.” Ibid. (citing Newman v. Guedry, 703 F.3d 757, 762-63 (5th Cir. 2012)). On the other hand, we have found tasing not excessive where a suspect “resists arrest or fails to follow police orders” or “resist[s]” an officer’s attempt to handcuff him. Ibid. (citing Buchanan v. Gulfport

Police Dep't, 530 F. App'x 307, 314 (5th Cir. 2013) (*per curiam*); *Collier v. Montgomery*, 569 F.3d 214, 219 (5th Cir. 2009)). ***And we have relied on another circuit's decision finding tasing justified when an arrestee "used profanity, moved around and paced in agitation, and repeatedly yelled at [an officer]" while refusing a series of verbal commands.*** *Id.* at 385 n.6 (alteration in original) (quoting *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004)).[\[vi\]](#)

The court of appeals then stated that they disagreed with the district court's opinion that Betts only offered "passive resistance" to Trooper Brennan. This was based upon several relevant facts that were observable on video. The facts were as follows: (1) Betts was initially confrontational with the trooper and became increasingly so as the incident progressed; (2) Betts repeatedly contested the reason that he was stopped (speeding); (3) Betts ignored "dozens" of Brennan's commands to walk to the rear of his vehicle; (4) Betts disputed the officer's authority to require him to exit his vehicle; (5) Betts accused the officer of lying; (6) Betts batted the trooper's hand away when the trooper tried to escort him out of the car; (7) Betts dared the trooper to Tase him; and (8) Betts warned the trooper to call back-up. The court considered the most significant factor to be the fact that Betts refused to exit and walk to the rear of his vehicle, because weapons can be hidden in a vehicle. Trooper Brennan explained that it was for his safety and Betts's safety, and Betts accused the trooper of lying. Thus, the court concluded this was more than mere passive resistance.

The court also examined other factors that supported the reasonableness of the use of the Taser. First, the court of appeals noted that the trooper first tried to use verbal requests and commands and even tried to grab Betts's arm to escort him from the vehicle, rather than immediately resorting to the use of the Taser. The court stated:

[Trooper Brennan] did not tase as a first resort. That is, he did not "immediately resort[] to [the taser] . . . without attempting to use physical skill, negotiation, or even commands." *Newman*, 703 F.3d at 763; see also *Trammell*, 868 F.3d at 342 ("This Court has several times found that the speed with which an officer resorts to force is relevant in determining whether that force was excessive to the need."). ***To the contrary, Brennan "properly use[d] 'measured and ascending actions that correspond[ed] to [Betts's] escalating verbal and physical resistance.'" Cloud*, 993 F.3d at 384 (quoting *Joseph*, 981 F.3d at 332-33). *Brennan tried to get Betts to stand behind the truck by invitation, explanation, command, and even by grasping his arm. And Brennan warned Betts more than once that he would be tased if he did not comply with his orders. Only when all those lesser options appeared to have failed did Brennan use his taser.***[\[vii\]](#)

Second, Trooper Brennan tased Betts only once. After the first cycle of the Taser, Betts ceased resisting and complied with handcuffing; thus, further force was not necessary and was not used. The court stated that this showed "a reasonable relationship between the need for force and the amount of force used," noting that force that is "reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased."[\[viii\]](#)

The court of appeals then held that Trooper "Brennan did not violate the Fourth Amendment by tasing Betts one time in order to arrest him."[\[ix\]](#) Therefore, the plaintiff failed to establish a constitutional violation, which is necessary for him to defeat the officer's qualified immunity.

The court of appeals also set out to examine the second prong of the qualified immunity analysis, particularly whether the law was clearly established. The court stated:

[A] right is ‘clearly established’ only if it ‘is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’” *Cunningham v. Castloo*, 983 F.3d 185, 191 (5th Cir. 2020) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015)).[\[x\]](#)

Betts argued that another Fifth Circuit case, *Hanks v. Rogers*,[\[xi\]](#) clearly established that the trooper violated his rights under the Fourth Amendment. The court of appeals described the facts of *Hanks* as follows:

[A]n officer stopped Hanks and ordered him to exit his vehicle. 853 F.3d at 741. After arguing for about a minute, Hanks eventually complied with the officer’s orders to walk behind the vehicle, place his hands on the trunk, and put his hands behind his head. Id. at 742. Standing behind Hanks with taser drawn, the officer then ordered Hanks to “go to [his] knees.” Ibid. Hanks responded “for what?” and asked whether he was under arrest, but the officer only repeated his command. Ibid. Hanks then “made a small lateral step with his left foot,” his hands remaining behind his back. Ibid. The officer suddenly “rushed towards Hanks and administered a blow to Hanks’s upper back or neck,” knocking him onto the trunk and to the ground. Id. at 743. Hanks was then handcuffed and issued a traffic ticket. Ibid. A police investigation later determined that Hanks was “compliant,” that the officer failed to communicate whether Hanks was under arrest, and that the blow to Hanks’s back was “not objectively reasonable . . . based on [Hanks’s] lack of resistance.”[\[xii\]](#)

In *Hanks*, the Fifth Circuit denied the officer qualified immunity because “suddenly resorting to physical force was clearly excessive and clearly unreasonable” in this situation, given Hanks’s passive resistance by refusing to kneel for twenty seconds after being told to kneel. The court of appeals also noted that Hanks’s “small, lateral step” was not accompanied by signs of flight or violence, in that he didn’t turn his body as if to flee or move his hands, which were folded behind his back. Thus, in *Hanks*, the Fifth Circuit held:

[W]e found it clearly established law that an officer cannot “abruptly resort[] to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation.” *Id.* at 747.[\[xiii\]](#)

The court of appeals then compared and contrasted the facts of Betts’s case from *Hanks*. First, although Hanks initially refused to walk to the rear of his vehicle, he eventually did so; Betts did not. Second, Hanks offered no physical resistance; Betts batted the troopers’ hand away and stated, “Don’t touch me.” Third, Hanks asked the officer some questions, such as if he was under arrest; Betts argued with the trooper, called him a liar, dared him to use his Taser, and warned the trooper he should call for backup. Fourth, Hanks was “blindsided” by an “abrupt blow to his back;” Betts was repeatedly warned he would be tased and was only tased after he refused to comply with numerous orders. Fifth, a police investigation determined that Hanks was “compliant;” Betts was seen on video being repeatedly non-compliant, he “was tased and not struck,” and he ultimately pled guilty to resisting arrest.

Thus, the court of appeals held that *Hanks* did not clearly establish that Brennan was unreasonable in his use of the Taser against Betts.

Therefore, the court of appeals reversed the decision of the district court and remanded the case so the court could grant qualified immunity to Trooper Brennan.

THE ELEVENTH CIRCUIT ON EXCESSIVE FORCE AND SUPERVISOR LIABILITY

Ingram vs. Kubik

On April 7, 2022, the Eleventh Circuit Court of Appeals decided *Ingram v. Kubik*[\[i\]](#), which is instructive regarding excessive force and supervisor liability. This is Part One of a two part series. This article will discuss the law related to excessive force. The relevant facts of *Ingram* are as follows:

Ingram is an Iraq War veteran who suffers from post-traumatic stress disorder. In October 2017, while suffering from a mental-health crisis, Ingram cut his wrist with a knife at his home. His girlfriend called the Veterans Affairs suicide hotline, which contacted law enforcement. Deputy Louis Kubik and another deputy from Madison County, Alabama, were dispatched to assist Ingram.

When the deputies arrived, Ingram was calm. The deputies searched him multiple times. They confiscated the knife with which Ingram had cut himself. After the search, the deputies knew that he was unarmed.

“Ingram assured the deputies [that] he was no longer suicidal” and “never expressed any desire to harm himself or any other person during his encounter with the deputies.” He “insisted that the deputies either arrest him or leave.” Both the deputies and Ingram’s mother “tried to convince Ingram to let them take him to a residential program through . . . [Veterans Affairs] that Ingram’s mother wanted him to attend.” When Ingram asked the deputies if he was under arrest, the “deputies told [him] . . . that he was not.” Ingram reiterated “that he would cooperate with any arrest if that [was] what they wanted to do.”

Because the deputies would not leave, Ingram left through the back door “on his third try.” “Ingram ran into a cotton field behind the house, and the deputies followed.” Ingram eventually stopped running and “let the deputies catch up to him.” “The deputies told Ingram that if he would go back to his house and refuse medical treatment,” the deputies would leave. “Ingram agreed to walk back to the house . . . and speak directly with [medical] personnel.” As they walked back, Ingram stated “multiple times that if he was being arrested, the[deputies] should . . . let him know and he would go voluntarily,” but “[t]he deputies repeatedly told Ingram he was not under arrest.”

When they reached the yard, “Ingram held his hands over his head and told [medical] personnel . . . that he was refusing medical treatment.” The deputies knew that Ingram was unarmed and posed no threat to them. “Without warning, [Deputy] Kubik then grabbed Ingram under his armpits, picked Ingram up, and slammed Ingram to the ground head first, causing Ingram to suffer a serious neck injury.” Ingram alleges that Kubik’s decision to body slam “Ingram was motivated by hostility toward Ingram due to Ingram’s mental illness.” Ingram was taken to the hospital. “A surgeon removed Ingram’s C-2 vertebra and replaced it with a metal rod. The surgeon also fused Ingram’s C-3 and C-4 vertebrae.”

“Despite widespread knowledge of th[is] incident up the chain of command” that included then-Sheriff Blake Dorning, “the incident was not . . . investigated, and the deputy was not disciplined.”

Failure to investigate excessive force incidents “ha[d] been Dorning’s standard operating procedure”; “[e]ven obviously-unconstitutional . . . actions of his deputies [were] immune from investigation and discipline.” Ingram’s lawyer learned from discovery in other lawsuits “that formal internal investigations of officer misconduct were not conducted,” and after he requested “records of internal investigations of deputy misconduct,” he was “told no such records existed.” During Dorning’s tenure, the Sheriff’s website “identified no person or division to contact with a complaint [against] a deputy.”

The complaint provides examples of excessive force that were allegedly not investigated. In one “well-publicized revenge beating,” “Dorning refused to investigate and discipline the deputies involved,” despite being “fully informed” of the incident, “including the revenge beating and cover-up.” “Dorning learned that numerous deputies of various ranks were involved in the beating or its planning, in the cover-up, or in both.” Despite that knowledge, and even though a policy and procedure manual required him to investigate, “Dorning took no action against any of the involved deputies” and “did not . . . initiate an internal affairs investigation.” Dorning similarly “refused to investigate serious allegations related to [six] deaths at the Madison County Jail.” And Ingram points to five other incidents that were “approved as a matter of routine through the chain of command without any investigation.”

Dorning’s inaction was “a matter of routine and de facto policy” of “approv[ing] the force used and never initiat[ing] further investigation.” “Thus, no officer was disciplined, let alone terminated, for excessive force or for otherwise violating a citizen’s constitutional rights during Dorning’s 16-year tenure.” As a result of that policy, “[d]eputies under Dorning’s command learned that their justifications for using force and other unlawful actions would never be questioned and that they could act with impunity.” Ingram alleges that “[t]hrough explicit instruction and long-established custom, Dorning established a custom or policy that incidents of possible, likely, or known misconduct were not investigated, with the foreseeable result that deputies like Kubik believed they could get away with violating Ingram’s rights.” Kubik believed that “he would not have to face any investigation and that he could act with impunity”.^[iii]

Ingram filed suit in federal court and alleged the Deputy Kubik violated his Fourth Amendment rights to be free from an unlawful seizure and excessive force, and that former Sheriff Dorning violated his rights by being deliberating indifferent to numerous incidents of excessive force such that his deliberate indifference caused Kubik to use excessive force against him. Kubik and Dorning filed motions for qualified immunity. The district court granted qualified immunity for both Deputy Kubik and Sheriff Dorning. Ingram appealed to the Eleventh Circuit Court of Appeals.

Issue One: Are Deputy Kubik and Sheriff Dorning entitled to qualified immunity for Ingram’s claim that he was seized unlawfully under the Fourth Amendment?

Government officials are entitled to qualified immunity for discretionary acts unless the plaintiff alleges sufficient facts to show (1) that the government official violated the plaintiff’s rights, and (2) the right was clearly established such that any reasonable officer in the same position would have known he was violating the plaintiff’s rights. The law is considered clearly established where there is factually similar case law from the Supreme Court, the Eleventh Circuit Court of Appeals or the highest court in the state to give the officers fair warning that their conduct was unlawful. Additionally, the law can be clearly established if, under the facts of the case, it is plainly obvious to a reasonable officer that he is violating the plaintiff’s rights.

The court of appeals then set out to determine if Kubik and Dorning were entitled to qualified immunity in Ingram's case. The court of appeals first examined the legal principles related to seizing people who are undergoing a mental health crisis. The court stated:

*The Fourth Amendment protects people from unreasonable . . . seizures.” Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011). **Mental-health seizures are reasonable under the Fourth Amendment when the officer has probable cause to believe that the seized person is a danger to himself or to others. Id. “[T]he correct legal standard to evaluate whether an officer had probable cause to seize a suspect is to ask whether a reasonable officer could conclude that there was a substantial chance,” see Washington v. Howard, 25 F.4th 891, 902 (11th Cir. 2022) , “of dangerous behavior,” Roberts, 643 F.3d at 906 (internal quotation marks omitted).***[\[iii\]](#)

The court of appeals then examined the facts relevant to this issue. The court noted that (1) Deputy Kubik was dispatched to a 911 call of a possible suicide attempt, (2) Ingram had cut his wrist with a knife, (3) Ingram's mother thought that the situation was dangerous enough to merit calling 911 and taking Ingram to VA mental health program, and (4) Ingram's behavior after the deputies arrived was erratic when he fled into a cotton field.

Based upon the above facts, the court of appeals held that Deputy Kubik had probable cause to believe Ingram was a danger to himself and as such, it was reasonable under the Fourth Amendment to seize him.

Therefore, Kubik and Dorning are entitled to qualified immunity on the unlawful seizure claim, as Kubik did not violate the plaintiff's rights because he had probable cause to seize Ingram.

Issue Two: Is Deputy Kubik entitled to qualified immunity for Ingram's Fourth Amendment excessive force claim for body slamming Ingram?

While Deputy Kubik could lawfully seize Ingram, the seizure must still be conducted reasonably under the Fourth Amendment. The court of appeals noted the relevant legal principles and stated

*A citizen's Fourth Amendment right to be free from unreasonable . . . seizures includes the right to be free from the use of excessive force in the course of an arrest.” Weiland v. Palm Beach Cnty. Sheriff's Off., 792 F.3d 1313, 1326 (11th Cir. 2015) . . .A determination that an officer used excessive force “requires careful attention to the facts and circumstances of each particular case” while “recogniz[ing] that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” Graham, 490 U.S. at 396. **We apply the “Graham framework” to mental health seizures even though they “do[] not involve a criminal arrest.” Mercado v. City of Orlando, 407 F.3d 1152, 1157-58 (11th Cir. 2005). Under that framework, the force used by an officer is reasonable only if it is “reasonably proportionate to the need for that force, which is measured by [1] the severity of the crime, [2] the danger to the officer [or others], and [3] the risk of flight.” Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir. 2002); see for application of force, the relationship between the need and amount of force used, and the extent of the injury inflicted by the arresting officer.” Helm v. Rainbow City, 989 F.3d 1265, 1273 (11th Cir. 2021) (citing Lee, 284 F.3d at 1198 & n.7).***

The court then set out to determine if qualified immunity was warranted. The court examined (1) whether the deputy violated the Fourth Amendment by using excessive force, and (2) if the law was clearly established such that a reasonable officer in this case would have known he was violating the constitution.

Deputy Kubik argued that it was reasonable to body slam Ingram because it “had the immediate effect of immobilizing” Ingram and prevented him from being a further threat. Kubik noted that Ingram was a former military veteran and had behaved erratically by running into the cotton field.

The court of appeals noted that all three factors from *Graham v. Connor* weigh in favor of Ingram. First, Ingram was not committing a crime. Second, the deputies had already searched Ingram, removed his knife, and determined that he was no longer armed. Third, after he surrendered, there is no indication that he “made any threatening moves toward” the deputies. Thus, he did not pose a danger to the deputies. Fourth, before Kubik body slammed Ingram, Ingram allegedly had his hands above his head and made no attempt to flee or resist. Thus, the court of appeals stated that Kubik was not actively resisting the deputies and had ceased his flight. As such, the court stated the need for force was low and the amount of the force used and injury were significant.

Therefore, the court of appeals held that the plaintiff satisfied the first prong of the test to defeat qualified immunity, particularly that the deputy violated Ingram’s rights under the Fourth Amendment.

The court then examined if the law was clearly established. The court stated:

We have held that police officers cannot employ gratuitous and seriously injurious force against non-resisting suspects who are under control. See, e.g., Saunders v. Duke, 766 F.3d 1262, 1265 (11th Cir. 2014) (“We have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.”); Lee, 284 F.3d at 1200 (relying on “the clear and obvious principle that once an arrest has been fully secured and any potential danger or risk of flight vitiated, a police officer cannot employ . . . severe and unnecessary force”). And we have explained that “the same rationale applies to the use of gratuitous force when the excessive force is applied prior to the handcuffing but in the course of the investigation.” See Stephens v. DeGiovanni, 852 F.3d 1298, 1328 & n.33 (11th Cir. 2017); see also Patel, 959 F.3d at 1340 (citing DeGiovanni, [*1253] 852 F.3d at 1328 n.33) (rejecting the “argu[ment] that our precedent prohibiting the use of gratuitous and excessive force against non-resisting suspects applies only when the suspect is handcuffed”). Based on precedents that preceded Kubik’s conduct, we have explained that “our case law is clear that serious and substantial injuries caused during a suspect’s arrest when a suspect is neither resisting an officer’s commands nor posing a risk of flight may substantiate an excessive force claim.” Sebastian, 918 F.3d at 1310-11 (examining case law from 1997 to 2017); see also Patel, 959 F.3d at 1343 (“[O]ur cases establishing this principle date to at least 2000.”).^[iv]

The court of appeals then discussed specific, relevant case law. First, the court discussed *Smith v. Mattox*,^[v] in which a suspect raised a baseball bat in a threatening manner at an officer. The officer drew his weapon and ordered the suspect to drop the bat. The suspect dropped the bat and ran. The suspect then ceased flight and followed the officer’s command to “get down” and

“docilely submitted” to arrest. The officer then allegedly forcefully put his knee in the suspect’s lower back, “with a grunt and blow,” and broke the suspect’s arm while handcuffing him. The court of appeals stated:

Smith established that if an arrestee demonstrates compliance, but the officer nonetheless inflicts gratuitous and substantial injury using ordinary arrest tactics, then the officer may have used excessive force” even if the arrestee “was initially recalcitrant and even acted aggressively toward the officer.” Sebastian, 918 F.3d at 1311. [\[vi\]](#)

The court of appeals also examined *Mercado v. City of Orlando*, [\[vii\]](#) in which a wife called 911 and reported that her husband was armed with a knife and threatening suicide. Officers arrived and found the subject sitting on the kitchen floor while holding a knife to his own heart. The officers ordered him to drop the knife at least twice but he refused, although he made no threatening moves toward the officers. After about 30 seconds, an officer, without warning, shot the subject in the head with a rubber projectile, which caused brain injuries.

The officer argued that the use of force was justified because suicidal subjects sometime make erratic or unpredictable moves that could pose a risk to their safety. The court of appeals noted:

Despite the subject’s being armed and not under control, we reasoned that there was “no indication that [the subject] made any threatening moves toward the police,” and that he “was not actively resisting arrest,” “struggl[ing] with the police,” or “posing an immediate threat to [them]” before an officer used seriously injurious, lethal force. Id. at 1157-58. Most of these facts were true of Ingram. But unlike the subject in Mercado, Ingram behaved less erratically, was compliant, was not an immediate threat to himself or to the deputies, and was known to be unarmed. [\[viii\]](#)

The court then noted that Ingram was unarmed, ceased his flight, was not threatening the officers or actively resisting arrest, had his arms above his head and had previously stated that he would cooperate with being arrested. Thus, he was less of threat than *Mercado*, in which the court denied qualified immunity.

The court of appeals then stated:

To be sure, Ingram behaved erratically when he ran into the cotton field. But using seriously injurious force against “even a previously fractious arrestee” is unlawful if at the time of arrest he “was offering no resistance at all.” Smith, 127 F.3d at 1420; see also *Mercado*, 407 F.3d at 1157. And it is of no moment that Ingram was not yet under physical control in that circumstance. See *DeGiovanni*, 852 F.3d at 1328 n.33. ***Kubik’s headfirst body slam was a “gratuitous use of force” against someone who was “not resisting arrest” that our precedents have established “constitutes excessive force.”*** Hadley, 526 F.3d at 1330. ***We conclude that “our case law bars [Kubik’s] alleged actions with sufficient clarity to put any reasonable officer on notice” that the use of seriously injurious force against a compliant, docile, non-resisting, and unarmed subject like Ingram “constituted excessive force.”*** Sebastian, 918 F.3d at 1311. *Kubik is not entitled to qualified immunity based on these allegations.*

As such, Ingram satisfied the second prong of the qualified immunity test. Therefore, Kubik was not entitled to qualified immunity on the excessive force claim.

The court then looked at the questions regarding supervisor liability in this case.

Issue One: Did Ingram state a plausible claim for supervisory liability?

Government officials are entitled to qualified immunity for discretionary acts unless the plaintiff alleges sufficient facts to show (1) that the government official violated the plaintiff's rights, and (2) the right was clearly established such that any reasonable officer in the same position would have known he was violating the plaintiff's rights. The law is considered clearly established where there is factually similar case law from the Supreme Court, the Eleventh Circuit Court of Appeals or the highest court in the state to give the officers fair warning that their conduct is unlawful. Additionally, the law can be clearly established if, under the facts of the case, it is plainly obvious to a reasonable officer that he is violating the plaintiff's rights.

The court of appeals then set out to determine if Sheriff Dorning was entitled to qualified immunity in Ingram's case. The court of appeals first examined the legal principles related to supervisory liability and stated:

Supervisory officials are not vicariously liable under [section 1983](#) for the unconstitutional acts of their subordinates. [Hartley v. Parnell](#), 193 F.3d 1263, 1269 (11th Cir. 1999). Plaintiffs must instead allege that the supervisor, through his own actions, violated the Constitution. [Ashcroft v. Iqbal](#), 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Because Ingram does not allege that Dorning was present or involved in the altercation, Dorning is liable under [section 1983](#) only if "there is a causal connection between [his] actions . . . and the alleged constitutional deprivation." [Hartley](#), 193 F.3d at 1269 (internal quotation marks omitted).

Causation "may be established and supervisory liability imposed where the supervisor's improper custom or policy results in deliberate indifference to constitutional rights." [Id.](#) (alterations adopted) (internal quotation marks omitted). "A plaintiff can also show that the absence of a policy led to a violation of constitutional rights." [Piazza](#), 923 F.3d at 957. "Either way, though, to prove that a policy or its absence caused a constitutional harm, a plaintiff must point to multiple incidents, or multiple reports of prior misconduct by a particular employee." [Id.](#) (citation omitted). And allegations of a single incident of unconstitutional conduct cannot state a claim for supervisory liability, even when the conduct involves several subordinates. [Id.](#) at 957-58.[\[iii\]](#)

The court of appeals then examined the facts relevant to this issue. It is important to note that, at this stage of the litigation, the court of appeals must assume that the plaintiff's factual allegations are true and then must determine if those facts state a plausible claim.

Sheriff Dorning argued (1) that the facts presented by Ingram fail to state a plausible claim and (2) even if Ingram does state a plausible claim, that he is entitled to qualified immunity.

In his complaint, Ingram alleged that there was a causal connection between Dorning's conduct and the excessive force used by Kubik against Ingram. Specifically, the causal connection alleged was that Dorning established a policy of failing to investigate incidents of "possibly, likely, or known misconduct," and that failure to investigate caused the foreseeable result that deputies such as Kubik believe they could get away with violating Ingram's rights.

The court then examined the facts alleged in Ingram's complaint to determine if the facts, if true, establish a plausible claim. Ingram alleged multiple incidents of prior excessive force by deputies

that were not investigated by Dorning. First, Ingram alleged there was a “well publicized revenge beating,” which Dorning knew about, but he did not initiate an internal affairs investigation or discipline the deputies involved. Second, Ingram identified five other incidents that were “approved as a matter of routine through the chain of command without any investigation.” The court noted that in one of those incidents, a deputy punched a drunk, misdemeanor arrestee in the face twice, breaking the arrestee’s orbital socket. Ingram also alleged that Dorning received a copy of all use of force reports and “approved of the excessive uses of force without having” them investigated. Third, Ingram alleged that in Dorning’s 16-year tenure as sheriff, no officer was disciplined or terminated for excessive force. Fourth, during that same time, the department’s website “identified no person or division to contact with a complaint against a deputy.” Fifth, the plaintiff’s attorney requested “records of internal investigations of deputy misconduct” and was told “no such records existed” despite a “policy and procedure manual” that requires investigations of complaints of misconduct. Additionally, the incident involving Kubik and Ingram was also not investigated despite Dorning’s knowledge of the incident.

In light of the above reasons, the court of appeals stated:

The allegations of “multiple reports of prior misconduct,” [Piazza, 923 F.3d at 957](#), with no investigation by Dorning “allow[] the court to draw the reasonable inference,” [Iqbal, 556 U.S. at 678](#), that there is a causal connection between Dorning’s failure to investigate any allegations of serious misconduct and Kubik’s belief that he could act with impunity. The factual allegations, if true, establish the “absence of a policy” of investigating excessive force violations, see [Piazza, 923 F.3d at 957](#), of which Dorning had knowledge, see [Rivas v. Freeman, 940 F.2d 1491, 1495-96 \(11th Cir. 1991\)](#) (“[T]he district court’s findings regarding [the] Sheriff[’s] . . . failure to establish policies and procedures [were] supported” by “evidence at trial which established that [he] knew of prior instances of [misconduct], but allowed his deputies to [engage in that misconduct].”). And the complaint relies on more than the incident at issue to establish the custom or policy. See, e.g., [Piazza, 923 F.3d at 957-58.](#)[\[iv\]](#)

Thus, Ingram stated a plausible claim of supervisory liability, which satisfies the first prong of the test to defeat qualified immunity.

Issue Two: Was the law clearly established such that a reasonable officer in Sheriff Dorning’s position would have known he was violating Ingram’s rights?

The court of appeals then set out to determine if the law was clearly established such that a reasonable officer in Dorning’s position would have known he was violating Ingram’s rights.

The court stated that they have clearly established that a custom of allowing excessive force provides the “requisite fault” to provide an inference that a supervisor has ratified such conduct. Specifically, the court stated:

A supervisor can be held liable for implementing or failing to implement a policy that causes his subordinates to believe that they can permissibly violate another’s constitutional rights if the subordinates then do so based on that belief. See [Hartley, 193 F.3d at 1269](#). As we have explained, the complaint adequately alleges that one of Dorning’s subordinates used excessive force and that there is a causal connection between that excessive force and Dorning’s policy of allowing such force. And **this Court has clearly established that**

“a custom of allowing the use of excessive force . . . provides the requisite fault[,] . . . as a persistent failure to take disciplinary action against officers can give rise to the inference that a [supervisor] has ratified conduct.” [*Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 \(11th Cir. 1985\)](#). That ***“allegation would [also] provide the causal link between the challenged conduct and the . . . policy, because [the officer] would have been acting in accordance with the policy of allowing or encouraging excessive force.”*** *Id.* This principle applies both to municipalities and supervisors ***“responsible for disciplining police officers and setting police department policy.”*** *Id.* It follows that Ingram’s complaint states a claim that Dorning violated his clearly established constitutional rights.

As such, Ingram satisfied the second prong of the qualified immunity test. Therefore, Sheriff Dorning was not entitled to qualified immunity on the excessive force claim.

THE FIRST CIRCUIT ON SUPERVISOR LIABILITY

Saldivar vs. Racine

In the world of private business, the doctrine of *respondeat superior* can make an employer liable for the torts committed by their employees in the scope of their duties. However, this doctrine is not applicable to supervisors in law enforcement agencies. In 2016, the First Circuit Court of Appeals decided *Saldivar v. Racine*,[\[i\]](#) which is instructive regarding supervisory liability for police supervisors. The relevant facts of *Saldivar*, taken directly from the case, are as follows:

In early June 2011, Elba Saldivar, a resident of Fall River, contacted the Fall River Police Department and reported that her child had been harassed at school. The Police Department assigned Officer Anthony Pridgen to investigate the incident.

Pridgen arrived at Saldivar’s apartment in his marked police cruiser and in full uniform and told Saldivar he needed to question her as part of his investigation. Saldivar allowed Pridgen into her apartment.

Upon entering the apartment, Pridgen pulled out his service handgun and pointed it at Saldivar. He then grabbed Saldivar and assaulted, battered, and raped her. He told Saldivar he would kill her and her children if she reported the assault.

Despite Pridgen’s threats, Saldivar reported the assault to the Police Department, and the Department conducted an investigation. The investigation uncovered security camera footage at Saldivar’s housing complex that showed a police cruiser parked next to one of the buildings in that complex and Pridgen entering and leaving that building. A subsequent search of Pridgen’s police locker led to the seizure of various items, including two condoms and two packages of “Extenze” tablets.

Pridgen resigned from his job as a Fall River police officer on June 28, 2011. In September of that same year, the Bristol County, Massachusetts, District Attorney’s office informed Saldivar that it would not prosecute Pridgen.

The complaint also sets forth the following allegations concerning how Pridgen had been disciplined by the Police Department on various occasions prior to the alleged assault in February 2007, he was suspended for thirty days –a punishment later reduced to a written warning and training — for failing to abide by Department policy in handling a domestic violence call. A few

months later, in October 2007, Pridgen was suspended for five days without pay for violating the Department's sick leave policy. And, according to his disciplinary record, in January 2011, he was suspended for a day for violating the "[r]oll call/[leave benefit] policy." Pridgen was also reprimanded seven times between September 2003 and June 2011 for "[f]ailure to log & submit [e]vidence [f]orm," "attention to duty," "absence from duty/late," "cruiser accident," "pursuit policy," "tardiness," and "reports."

Pridgen's final disciplinary action came in June of 2011, shortly after the alleged rape and assault. At that time, he was suspended for five days without pay for allowing his license to carry his service handgun to lapse for five years. [\[iii\]](#)

Saldivar filed suit in federal court for a variety of constitutional and state law claims. The claims discussed in this article are as follows: (1) the suit against Pridgen, former police chief Daniel Racine, and the City of Fall River for violating her constitutional rights under *Section 1983*, and (2) the suit against City for state law claims for negligent hiring and supervision. Pridgen never appeared in court and a \$600,000 default judgment was awarded against him in favor of Saldivar. Chief Racine and the City filed a motion to dismiss the claims against each and the district court granted the motions.

Saldivar subsequently filed an appeal with the First Circuit Court of Appeals regarding the dismissal of her *Section 1983* claim against Racine, her *Section 1983* claim against the City, and her negligent hiring, training, and supervision claim against the City.

The court first noted that to survive a motion to dismiss, the plaintiff must allege sufficient facts to state a claim that is "plausible on its face." In evaluating whether a claim is plausible, the court conducts a two-step analysis. First, the court separates the factual allegations from the conclusory legal allegations. Second, the court must determine if the factual allegations are "sufficient to support the reasonable inference that the defendant is liable." [\[iii\]](#)

1. *Is former-Chief Racine liable under Section 1983 for a violation of Saldivar's constitutional rights?*

The court of appeals first noted the legal principles relevant to this issue and stated

[A] supervisor is not liable under § 1983 for the actions of a subordinate on a respondeat superior theory. See Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). Rather, the supervisor is liable for the subordinate's actions if the subordinate's behavior led to a constitutional violation and if "the supervisor's action or inaction was affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference." Estate of Bennett v. Wainwright, 548 F.3d 155, 176-77 (1st Cir. 2008) (brackets omitted) (quoting Pineda v. Toomey, 533 F.3d 50, 54 (1st Cir. 2008)). . . In order for a police supervisor to be deemed "deliberately indifferent," the supervisor must have "actual or constructive knowledge" of a "grave risk of harm" posed by the subordinate and fail to take "easily available measures to address the risk." Camilo-Robles v. Hoyos, 151 F.3d 1, 6-7 (1st Cir. 1998). [\[iv\]](#)

Thus, in order to link the supervisor's inaction to the constitutional violation, (1) the supervisor must have "actual or constructive knowledge" of a "grave risk of harm" posed by the subordinate and (2) the supervisor must fail to take measures to address the risk.

Saldivar alleged that Pridgen's lengthy record of policy violations indicates that he had a propensity for not following police regulations and might not follow regulations in the future. Pridgen's disciplinary history was as follows: (1) in February 2007 he received a written warning and training for failing to properly handle a domestic violence call; (2) in October 2007, he was suspended for five days without pay for violating the sick leave policy; (3) in January 2011, he was suspended for one day without pay for violating the roll-call/leave benefit policy; (4) between 2003 and 2011, he was reprimanded seven times for failing to log evidence, attention to duty, absence from duty/late, vehicle accident, pursuit policy violation, tardiness, and report writing; and (5) in June 2011, he was suspended for five days without pay for allowing his license to carry his service handgun lapse for five years.

The court of appeals noted that, while Pridgen had a number of policy violations prior to his alleged assault and rape of Saldivar, his specific violations were not of the nature that would indicate that Pridgen had a propensity for violence, such as assault and rape. Saldivar argued that allowing his firearms license to lapse made it plausible that Pridgen would use it to commit a violent crime, however the court of appeals disagreed and stated that the lapse of the firearms license would not indicate that Pridgen posed a "grave risk" of violence.

The court of appeals then held

[U]nder the Iqbal standard, the complaint must set forth facts that make the § 1983 claim plausible. Id. at 678. And, here, we do not believe the facts that have been set forth suffice to make it plausible that the supervisor — Racine — is liable under § 1983 for the horrific conduct by Officer Pridgen that is alleged. [\[v\]](#)

As such, the court of appeals affirmed the decision of the district court in granting the motion to dismiss on this claim.

The Bottom Line:

- A supervisor is liable for the action of his subordinates (1) if the supervisor directly participates in the unconstitutional actions or (2) if the supervisor is aware of an employee's propensity to engage in a specific type of unconstitutional conduct and the supervisor takes no action to discipline and/or train that officer such that the future risk posed by the officer is mitigated. This failure to take action is said to be "deliberately indifferent" to the rights of the plaintiff, and the plaintiff will allege that the deliberate indifference caused the violation.
- Generally, if a supervisor takes action to mitigate the risk posed by the employee, even if that action later turns out to be ineffective, the supervisor will not be held to be deliberately indifferent and will not be liable for the actions of the subordinate [see *Shaw v. Stroud*, 13 F.3d 791 (4th 1994) holding although [the supervisor's] actions may not have been the most effective and although he might have done more, such a rule is not the standard by which we judge [the supervisor's] conduct. In short, [the supervisor] simply did not exhibit the "tacit authorization" of or "deliberate indifference" to constitutional injuries" required for § 1983 supervisory liability].

- Under *Shaw v. Stroud*, the Fourth Circuit described three elements of supervisory liability as follows:

“The plaintiff must show (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed “a pervasive and unreasonable risk” of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show “deliberate indifference to or tacit authorization of the alleged offensive practices,” and (3) that there was an “affirmative causal link” between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.”

Also discussed were the claims against the City for violating the plaintiff’s rights under *Section 1983* and state law claims for negligent hiring and supervision.

The court first noted that to survive a motion to dismiss, the plaintiff must allege sufficient facts to state a claim that is “plausible on its face.” In evaluating whether a claim is plausible, the court conducts a two-step analysis. First, the court separates the factual allegations from the conclusory legal allegations. Second, the court must determine if the factual allegations are “sufficient to support the reasonable inference that the defendant is liable.”[\[iii\]](#)

I. Is the City of Fall River liable under Section 1983 for a violation of Saldivar’s constitutional rights?

The court of appeals first noted that the Supreme Court outlined the requirements to hold a municipality liable under Section 1983 in *Monell v. Dep’t of Social Services*.[\[iv\]](#) The court then discussed the legal requirements and stated:

Monell held that although a municipality may not be held liable under a theory of respondeat superior for an employee’s constitutional violation, it may be held liable when “execution of [the municipality’s] policy or custom . . . inflicts the injury” and is the “moving force” behind the employee’s constitutional violation. Id. at 694. “Official municipal policy includes,” among other things, “the acts of [the municipality’s] policymaking officials.” Connick v. Thompson, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011); see also Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). . .

A City is liable under Monell for the acts of a final policymaker only if those acts constitute deliberate indifference. See Connick, 563 U.S. at 61; Young v. City of Providence, 404 F.3d 4, 26 (1st Cir. 2005). [v]

Saldivar argued that, since Chief Racine was the final policy maker for the city police department, and since he made the final decisions related to Pridgen’s retention, supervision, discipline, and training regarding his disciplinary violations, she has stated a plausible claim that the city had a “policy” of retaining Pridgen, who posed a “grave risk.”

The court of appeals noted that in order for Saldivar to state a plausible claim, she must state facts that show that Chief Racine acted with “deliberate indifference” in his decisions related to Pridgen’s previous disciplinary violations. The court of appeals stated:

In order for a police supervisor to be deemed “deliberately indifferent,” the supervisor must have “actual or constructive knowledge” of a “grave risk of harm” posed by the subordinate and fail to take “easily available measures to address the risk.” Camilo-Robles v. Hoyos, 151 F.3d 1, 6-7 (1st Cir. 1998).[\[vi\]](#)

Thus, to state a plausible claim, Saldivar must allege facts sufficient to show that Chief Racine had actual or constructive knowledge that Pridgen’s prior conduct or disciplinary history showed that he posed a “grave risk of harm.”

Saldivar alleged that Pridgen’s lengthy record of policy violations indicates that he had a propensity for not following police regulations and might not follow regulations in the future. Pridgen’s disciplinary history was as follows: (1) in February 2007 he received a written warning and training for failing to properly handle a domestic violence call; (2) in October 2007, he was suspended for five days without pay for violating the sick leave policy; (3) in January 2011, he was suspended for one day without pay for violating the roll-call/leave benefit policy; (4) between 2003 and 2011, he was reprimanded seven times for failing to log evidence, attention to duty, absence from duty/late, vehicle accident, pursuit policy violation, tardiness, and report writing; and (5) in June 2011, he was suspended for five days without pay for allowing his license to carry his service handgun lapse for five years.

The court of appeals noted that Pridgen’s specific policy violations were not of the nature that would indicate that Pridgen had a propensity for violence, such as assault and rape.

As such, the court of appeals affirmed the decision of the district court in granting the motion to dismiss on this claim.

II. Is the City of Fall River liable for negligence under the Massachusetts Tort Claims Act?

The court of appeals first noted that the *Massachusetts Tort Claims Act* provides, in part, that:

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances . . .[\[vii\]](#)

Additionally, the court noted that:

*To state a negligence claim under Massachusetts law, a plaintiff must allege that (1) the defendant owed the plaintiff a duty of reasonable care; (2) the defendant breached that duty; (3) damage resulted; and (4) the defendant’s breach caused that damage. See *Jupin v. Kask*, 447 Mass. 141, 849 N.E.2d 829, 834-35 (Mass. 2006). In addition, under Massachusetts law, a determination “[w]hether negligent conduct is the proximate cause of an injury depends . . . on **whether the injury to the plaintiff was a foreseeable result of the defendant’s negligent conduct.**” *Kent v. Commonwealth*, 437 Mass. 312, 771 N.E.2d 770, 777 (Mass. 2002).*[\[viii\]](#)

Further, the court of appeals examined what is required for “foreseeability” under Massachusetts’ law. The court stated:

[T]he Massachusetts Supreme Judicial Court has held that where the kind of harm alleged is violent, the violent nature of that harm must be a reasonably foreseeable result of the defendant’s

negligence in order for that defendant to be liable for that harm. Moreover, in cases in which a plaintiff alleges that an employer is liable under a theory of negligent supervision for the intentional tort of an employee, Massachusetts courts have required that the employer have known, or at least should have known, that the employee might harm someone in the same general manner in which the employee is alleged to have harmed the plaintiff.

Thus, Saldivar must allege facts that show that it was foreseeable, based on Pridgen's prior conduct, that he would assault and rape a woman, as he alleged did to her.

Saldivar argued that Chief Racine breached his duty to her by (1) not properly training Pridgen, (2) not requiring him to have direct supervision, and (3) by not terminating his employment based on his lengthy disciplinary history. The court of appeals stated that, even if Chief Racine's conduct amounted to negligence, Saldivar must still prove that her injury was foreseeable, and based on the fact that none of Pridgen's previous violations involved violence behavior, these previous violations are insufficient to state a plausible claim that Racine should have reasonably foresaw his response to Pridgen's previous violations could have resulted in Saldivar's alleged assault and rape.

Therefore, the court of appeals affirmed the district court's grant of the defendant's motion to dismiss on this claim.

THE ELEVENTH CIRCUIT ON SEARCH WARRANTS, CURTILAGE, AND ACCURATE WARRANTS

U.S. vs. Bryant

On October 19, 2023, the Eleventh Circuit Court of Appeals decided *the United States v. Bryant*^[i], which serves as excellent review of the law related search warrants, curtilage, and inaccurate information in the search warrant affidavit. The relevant facts of *Bryant* are as follows:

On July 8, 2020, a state judge in Osceola County, Florida, issued an arrest warrant for Bryant for aggravated assault with a deadly weapon, among other offenses, arising from a shooting in May 2020. Believing that Bryant was outside the county, local law enforcement requested assistance from U.S. Deputy Marshal Andy Deacon, the federal warrants coordinator in Fort Pierce, Florida. Deacon organized a team to execute the arrest warrant at a single-family residence on Avenue K in Fort Pierce, where Bryant's mother lived and where multiple officers had previously encountered Bryant. That address was also listed on the arrest warrant. The arrest team included ATF Special Agent Seth Christy and Detectives Christopher Jadin and Marc Stotler of the St. Lucie County Sheriff's Office.

On July 9, 2020, the arrest team converged on the residence after officers saw Bryant pull up in a Nissan sedan and park in the driveway next to the house. Jadin approached Bryant, who was sitting in the driver's seat, and conducted an arrest. The passenger, Shaun Cole, was standing outside by the car. Jadin saw that the door of the house near where Bryant had parked was ajar.

Not long after, Bryant's mother arrived on the scene. She notified law enforcement that a child could be inside her house, so Deacon went inside with her to check. They did not see a child, but

Deacon saw a Glock handgun in Bryant's mother's bedroom, some firearm paraphernalia in the house, and a box for a handgun in the open closet of another bedroom.

Christy approached Bryant's mother outside the residence, seeking to obtain her consent to search the home for evidence related to the May 2020 shooting. At that time, Christy was recording the events using his cell phone, which he had placed in a chest pocket. Bryant's mother was on the phone when Christy came over, and she was overhead saying that Bryant and Cole "just came in from out of town" after having been gone for "over a week," and that she was "tired of all this bulls—" and had told him "to leave" and not "even come back to this . . . place." After ending the call, Bryant's mother confirmed to Christy that she owned and kept several guns in the house, including a 9mm under her pillow, but she denied owning any weapon that shot .40 or .380 ammunition, which had been used in the shooting.

Bryant's mother gave consent for a small group of officers to search the house. But first she wanted to get her keys back from either Bryant or Cole. She said, "We literally just left the store. They have my keys. One of them have my keys.... So, if you can get my keys, it's got a pink thing. That's my key." She repeated that same point—that Bryant and Cole together had recently obtained her keys—multiple times. She also said that they had her phone, which was found in Bryant's possession.

The officers eventually recovered the keys and returned them to Bryant's mother. Jadin testified that the keys were taken from Bryant's pocket. But it appears he was mistaken about that. Based on Christy's cell phone video footage, the district court found that the officers obtained the keys from Cole.

Christy, Deacon, and Stotler entered the house with Bryant's mother. Christy asked which room was Bryant's, and Bryant's mother responded that he "don't stay here with me," did not "live here," and was "barely here," and instead was staying with his girlfriend. But she agreed with Christy's statement that Bryant "stays here sometimes," and she said he had slept there "over a week ago." She identified one of the rooms as where he slept. A search of that room did not reveal any firearms or personal items belonging to Bryant.

Christy asked to check the caliber of the guns in the house, and Bryant's mother took him first to her bedroom, where the 9mm was located. Meanwhile, Stotler walked into a third bedroom and saw, in an open closet, a Crown Royal bag on a shelf near a box for an FN handgun. Stotler notified Christy and opened the bag, which contained two "AK-47"-style magazines and corresponding ammunition. In that bedroom, the officers also saw men's clothing and equipment consistent with Bryant's music career.

In discussing the firearms she owned or possessed, Bryant's mother initially did not mention an FN gun. She also incorrectly stated that 9mm magazines were in the Crown Royal bag. She later claimed, once Christy mentioned an FN gun, that she previously had owned and sold an FN gun. The FN gun box was significant to Christy and Stotler because they had seen a photo of Bryant, posted to social media a few weeks earlier, with what appeared to be an FN Five-Seven (5.7 mm) handgun in his pocket.

After the consent search, the officers decided to seek a state search warrant. Soon after, Detective Randy Walker of the St. Lucie Sheriff's Office arrived on the scene to draft the warrant affidavit. While writing the affidavit, Walker spoke to and questioned the officers on the scene, including Christy, Deacon, Jadin, and Stotler. These officers did not proofread what Walker wrote, but

nothing suggests he inaccurately described what they told him. The details of the warrant affidavit will be discussed in more detail below.

A state-court judge issued a warrant to search the “residence, curtilage, outbuildings, and conveyances, and persons located on said curtilage” for evidence of the crime of possession of a firearm by a convicted felon, Fla. Stat. § 790.23. Based on the warrant, officers searched not only the house but also the Nissan sedan that Bryant had parked in the driveway. Inside a bag in the Nissan’s trunk, officers recovered a loaded FN Five-seven handgun and a receipt with Bryant’s name on it.[\[iii\]](#)

Bryant filed a motion to suppress and argued that the search warrant failed to establish probable cause to search his car, and that there were material misrepresentations or omissions in the search warrant affidavit. The district court denied the motion to suppress, and Bryant appealed to the Eleventh Circuit Court of Appeals.

On appeal, the court examined whether the search of Bryant’s vehicle was reasonable under the search warrant for the residence. Bryant argued that searching his car exceeded the scope of the search warrant. Specifically, he argued that the search warrant did not expressly establish a nexus between his car and the criminal activity, but rather concentrates upon the house and the room in which the FN box was observed.

The court first noted the legal principles relevant to this issue and stated

Search warrants must be supported by probable cause and describe with particularity the place to be searched and the items to be seized. U.S. Const. amend. IV. When the place is a residence, the probable-cause affidavit must establish “a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity.” United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002).

As a reviewing court, we must ensure that the affidavit “provide[d] the magistrate with a substantial basis for determining the existence of probable cause”—that is, that “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).[\[iii\]](#)

For the reasons discussed below, the court of appeals held that the search of the car was reasonable and did not warrant suppression of the gun. First, the court noted that the search warrant authorized “a search of the residence, and its ‘curtilage, outbuildings, and conveyances, and persons located on said curtilage for items and contraband as listed.’”[\[iv\]](#) This included a search for firearms and ammunition. The court held that, since the car was a “conveyance” that was located within the home’s curtilage (on the driveway), its search was expressly authorized by the search warrant.

Second, the court noted that the search warrant affidavit did provide a “substantial basis” for searching the car. The court explained that Bryant was arrested at the car, the nature of the arrest warrant (it involved aggravated assault with a weapon), the recent photo of Bryant with an FN handgun, the FN box in the room in which he slept, and the car being located within the curtilage of the residence were sufficient to establish a nexus between the car and the evidence sought.

Thus, the search of the car was reasonable under the Fourth Amendment.

The court also examined the alleged misrepresentations or omissions in the search warrant affidavit and whether those merit suppress of evidence. The court noted the relevant legal principles and stated

An affidavit supporting a search warrant is presumed valid.” United States v. Whyte, 928 F.3d 1317, 1333 (11th Cir. 2019). Under Franks, a defendant may overcome that presumption and obtain suppression of evidence obtained pursuant to the warrant by proving two things: (1) the affiant intentionally or recklessly made misrepresentations or omissions in the affidavit; and (2) absent those misrepresentations or omissions, probable cause would have been lacking. Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978);[\[v\]](#)

The court of appeals then examined the evidence and held that, if there were inaccuracies, they were caused by unintentional error, rather than being intentional or reckless, as required by the first element of the rule from *Franks* above. Further, the court noted that none of the alleged inaccuracies would negate probable cause for the search. Therefore, suppression was not warranted.

As such, the court of appeals upheld the denial of the motion to suppress.

THE FOURTH CIRCUIT ON FOURTH AMENDMENT RIGHTS OF PAROLEES

U.S. vs. Lenhart.

On August 23, 2023, the Sixth Circuit Court of Appeals decided the *United States v. Lenhart*[\[ij\]](#), which is instructive regarding the Fourth Amendment rights of parolees. The relevant facts of *Lenhart* are as follows:

In late May 2019, officers from the Northern Ohio Violent Fugitive Task Force sought to locate Lenhart, an Ohio parolee, and execute two outstanding warrants for his arrest. Those warrants stemmed from Lenhart’s (1) failing to charge or physically removing his electronic ankle monitor, leaving his whereabouts unknown to the Ohio Adult Parole Authority, and (2) leading local police on a high-speed chase. Lenhart was last known to be with his girlfriend, Alexa Curtan, at her house in Parma, Ohio.

On May 30, 2019, Parma Police Sergeant Nathan Savetski, a task-force member, spoke with Curtan’s teenage daughter in an effort to find Lenhart. Curtan’s daughter informed Savetski that that she had not seen her mother in two days, which was unusual and concerning. Curtan’s daughter also told Savetski that she believed that her mother was with Lenhart and that they were likely traveling in her mother’s Chevrolet Traverse. Later that day, an acquaintance of Curtan’s informed Savetski that Lenhart and Curtan had been at her residence that morning; they drove Curtan’s Traverse; Lenhart and Curtan were arguing with each other and using drugs; and Lenhart possessed a firearm and verbally threatened Curtan’s safety.

Based on this information, the Parma Police Department’s dispatch contacted OnStar to locate Curtan’s Traverse. OnStar provided the task force with a general location for the Traverse. Using this information, the officers located the Traverse in a residential driveway in Cleveland, Ohio. Shortly after locating the vehicle, officers saw Curtan leave the residence, confronted her, and learned that Lenhart was inside the residence. After a standoff, Lenhart surrendered to the

officers. Lenhart had two rounds of .38 caliber ammunition in his pocket, and a protective sweep of the residence recovered a .38 caliber firearm.[\[iii\]](#)

Lenhart was ultimately charged under federal law with being a felon in possession of ammunition and firearm. Lenhart filed a motion to suppress and argued that the officer violated his rights under the Fourth Amendment when they obtained the location information from OnStar without a search warrant. The district court denied his motion and held that a parolee subject to electronic monitoring did not have a reasonable expectation of privacy in his location. He entered a guilty plea with the right to appeal.

On appeal, he argued that the district court erred in denying his motion to suppress. The court of appeals first examined the legal principles relevant to Lenhart's case. The court stated:

[A] person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search. Byrd v. United States, 138 S. Ct. 1518, 1530, 200 L. Ed. 2d 805 (2018). ***To have a Fourth Amendment interest—or put another way, to have Fourth Amendment “standing”—the person claiming the constitutional violation needs to have “had a ‘legitimate expectation of privacy in the premises’ searched.”*** *Id.* at 1526 (quoting Rakas, 439 U.S. at 143). ***This legitimate expectation of privacy exists only if “the defendant exhibited an actual subjective expectation of privacy” and “the defendant’s subjective expectation of privacy is ‘one that society is prepared to recognize as reasonable.’”*** United States v. Gillis, 358 F.3d 386, 391 (6th Cir. 2004) (quoting United States v. Knox, 839 F.2d 285, 293 (6th Cir. 1988)).[\[iii\]](#)

Thus, in order to claim that his rights under the Fourth Amendment were violated by the warrantless tracking of the vehicle in which he was an occupant, Lenhart must demonstrate that he had a reasonable expectation of privacy in his location. The court stated:

The government rightly points out that Lenhart’s status as a parolee reduced his expectation of privacy. See Samson v. Cal., 547 U.S. 843, 855, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (concluding that parolees have a “substantially diminished expectation of privacy”). ***Although the Supreme Court has expressly declined to hold that a parolee categorically has no expectation of privacy in any context, see id. at 850 n.2 . . . Lenhart, as a parolee who was subject to electronic monitoring as a condition of his parole, had no reasonable or legitimate expectation of privacy in his location, see United States v. Lambus, 897 F.3d 368, 412 (2d Cir. 2018).***[\[iv\]](#)

Thus, the court held that Lenhart, as a parolee, did not have a reasonable expectation of privacy in his location. Lenhart argued that he restored his reasonable expectation of privacy when he improperly failed to charge or removed his ankle monitor. The court explained, however, that this just demonstrated that Lenhart had a subjective expectation of privacy, or simply put, a personal belief that his location should be private. The court of appeals noted that subjective expectation of privacy is not legitimate or reasonable if it stems from doing something illegal, such as failing to charge or removing an ankle monitor.

Therefore, the court of appeals affirmed the denial of the motion to suppress.



KNOWLEDGE IS POWER

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