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# THE FEDERAL LAW ENFORCEMENT - INFORMER -

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer)*. The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or [FLETC-LegalTrainingDivision@dhs.gov](mailto:FLETC-LegalTrainingDivision@dhs.gov). You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting <https://www.fletc.gov/legal-resources>.

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# **FLETC Informer Webinar Schedule**

## **1. History of Indian Law (1-hour)**

Presented by Robert Duncan, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico. ([robert.duncan@fletc.dhs.gov](mailto:robert.duncan@fletc.dhs.gov))

There are three sovereign entities in the United States – federal, state, and tribal. Tribal governments are unique among the three, as they possess a separate sovereignty that has never been formally incorporated into the American constitutional framework, and the discussion of “Indian” and “non-Indian” concepts as matters of political recognition distinguishable from racial, genetic, cultural, or ethnic identity are especially important in light of public interest as well as upcoming Supreme Court cases involving Indian Country Criminal Jurisdiction. This webinar will discuss the history behind recognition through political status—especially in criminal jurisdiction—and why concepts unique to Indian law exist in a historical context.”

**Wednesday November 7, 2018: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific and**

**Wednesday November 28, 2018: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific**

To participate in this webinar on either date: <https://share.dhs.gov/artesia>



## **2. Kalkines and Garrity Overview (1-hour)**

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.  
([John.Besselman@fletc.dhs.gov](mailto:John.Besselman@fletc.dhs.gov))

John Besselman will look at these two important cases and how they affect the government's ability to obtain statements from its employees that may be suspected of criminal activity.

**Thursday November 8, 2018: 2:30 pm Eastern / 1:30pm Central / 12:30 pm Mountain / 11:30 am Pacific**

To participate in this webinar: <https://share.dhs.gov/fletclgd0124/>



## **3. Warrantless Searches - No PC Required!**

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia.  
([John.Besselman@fletc.dhs.gov](mailto:John.Besselman@fletc.dhs.gov))

There are several well recognized (and some not so well recognized) exceptions to the Fourth Amendment's Search Warrant requirement. This 45-minute overview will examine

those exceptions in which probable cause is not even required. We will discuss the frisk, SIA, consent, inventory and inspection exceptions and how they fit into the flow of the Fourth Amendment's limitation on governmental actions. A training certificate will be available upon completion of the training.

**Tuesday November 13, 2018: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific**

To participate in this webinar: [https://share.dhs.gov/warrantlesssearch\\_nopc/](https://share.dhs.gov/warrantlesssearch_nopc/)



#### **4. Protective Sweeps (1-hour)**

Presented by Paul Sullivan and Patrick Walsh, Attorney-Advisors / Branch Chiefs, Federal Law Enforcement Training Centers, Glynco, Georgia. ([patrick.walsh@fletc.dhs.gov](mailto:patrick.walsh@fletc.dhs.gov))

Entering a dwelling with a warrant in hand can be a dangerous activity. When can an officer search the premises to see if any dangerous persons are present? When are officers limited in where they can look? Find answers about the law on “protective sweeps” in this webinar. Paul Sullivan and Patrick Walsh will discuss when you can search a dwelling for persons during the execution of arrest and search warrants.

**Wednesday November 14, 2018: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific and**

**Tuesday November 27, 2018: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific**

To participate in this webinar on either date: <https://share.dhs.gov/walsh/>



#### **5. Use of Force in Medical Emergencies (1-hour)**

Presented by Mary M. Mara, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico. ([mary.m.mara@fletc.dhs.gov](mailto:mary.m.mara@fletc.dhs.gov))

This webinar presents legal aspects of use of force during medical emergencies following a recent decision by the Sixth Circuit Court of Appeals ([Estate of Hill v. Miracle, 853 F.3d 306 \(6th Cir. 2017\)](#)). Police officers frequently encounter medical conditions which cause otherwise law-abiding citizens subjects to act in an erratic, aggressive and sometimes combative manners: diabetes, epilepsy, mental illness and excited delirium. When confronted with such a scenario, an officer must quickly assess the situation and, when appropriate, employ force to protect themselves, the patient, and other emergency responders providing necessary medical care.

**Wednesday November 14, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific**

To participate in this webinar: <https://share.dhs.gov/artesia>



## 6. Briefing Skills - Meetings with a Purpose (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia. ([John.Besselman@fletc.dhs.gov](mailto:John.Besselman@fletc.dhs.gov))

In this webinar, we will discuss the basics of briefing the client (or your boss or your associates or . . .). The lost art of getting to the point is useful not just for the lawyers in the crowd. See what John and the leaders of the field say about how to say less and mean more.

**Thursday November 15, 2018: 2:30 pm Eastern / 1:30pm Central / 12:30 pm Mountain / 11:30 am Pacific**

To participate in this webinar: <https://share.dhs.gov/briefingskills/>



## 7. Wi-Fi and the Law (1-hour)

Presented by Patrick Walsh, Attorney-Advisor / Branch Chief, Federal Law Enforcement Training Centers, Glynco, Georgia. ([patrick.walsh@fletc.dhs.gov](mailto:patrick.walsh@fletc.dhs.gov))

When can law enforcement intercept Wi-Fi signals during a criminal investigation? This webinar will examine the few cases that look at the use of technology to intercept Wi-Fi, and make educated guesses on issues that have not yet been resolved. Join us for a look at *Moocher Hunter*, *Shadows* and other technology described in court cases that analyze when and how officers can lawfully use or intercept Wi-Fi to further their investigations.

**Tuesday November 20, 2018: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific**

**Thursday November 29, 2018: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific**

To participate in this webinar on either date: <https://share.dhs.gov/walsh/>



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3. If you do not have a HSIN account, click on the button next to “Enter as a Guest.”
4. Enter your name and click the “Enter” button.
5. You will now be in the meeting room and will be able to participate in the event.
6. Even though meeting rooms may be accessed before an event, there may be times when a meeting room is closed while an instructor is setting up the room.
7. **If you experience any technical issues / difficulties during the login process, please call our audio bridge line at (877) 446-3914 and enter participant passcode 232080 when prompted.**

## FLETC Talks

A brief review of United States Supreme Court cases involving a variety of Constitutional issues relevant to law enforcement officers.

1. **Graham v. Connor**: Use of Force / Objective Reasonableness Standard.  
<https://www.youtube.com/watch?v=zhtQovjR2C0>
2. **Carroll v. United States**: Warrantless searches of automobiles (Carroll Doctrine/ Mobile Conveyance Exception/Automobile Exception).  
<https://www.youtube.com/watch?v=sF0BY7nBvck>
3. **Overflights**: Legal issues concerning Unmanned Aerial Vehicles (UAVs/Drones).  
[https://www.youtube.com/watch?v=rcppCxR\\_Lto](https://www.youtube.com/watch?v=rcppCxR_Lto)
4. **Katz v. United States**: Fourth Amendment searches and the reasonable expectation of privacy (REP) test.  
<https://www.youtube.com/watch?v=LS79Qz4TmV4>
5. **Arizona v. Gant**: Search Incident to Arrest (vehicles).  
<https://www.youtube.com/watch?v=p-Ts09utgKQ>
6. **Government Employees and Free Speech**  
[https://www.youtube.com/watch?v=W6EBfL9\\_oPY](https://www.youtube.com/watch?v=W6EBfL9_oPY)
7. **Minnesota v. Dickerson**: Plain-Touch Doctrine.  
<https://www.youtube.com/watch?v=3s4bDZ83krw>
8. **O'Connor v. Ortega**: Government Workplace Searches.  
<https://www.youtube.com/watch?v=WeTm3GrzR4Q>
9. **Detective McFadden**: Terry Stops/Terry Frisks.  
<https://www.youtube.com/watch?v=AVDv0EZFv3s>
10. **Michigan v. Long**: Frisking vehicles for weapons.  
<https://www.youtube.com/watch?v=wh8ZlhmWWgl>

# Supreme Court Preview

## **Nielsen, Secretary of Homeland Security v. Preap**

Decision below: [831 F.3d 1193 \(9th Cir. 2016\)](#)

Title 8 U.S.C. § 1226(c) mandates that certain immigrants be detained while the government determines whether they should be removed from the United States. Specifically, 8 U.S.C. § 1226(c)(1) states that the secretary of the Department of Homeland Security “shall take into custody any alien who— [is inadmissible or deportable on certain specified statutory grounds], when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.”

In this case, Mony Preap and Bassam Khoury are both lawful permanent residents with previous criminal convictions that make them eligible to be removed from the United States. Both men served their criminal sentences and upon release returned to their families. Years later, immigration authorities took them into custody and initiated removal proceedings against them. Because they were not detained “when ... released” from criminal custody, Preap and Khoury claimed they were not subject to mandatory detention under § 1226(c).

The Ninth Circuit Court of Appeals held that Congress’ use of the word “when” in § 1226(c) conveyed immediacy. Consequently, the court held that the mandatory detention provision of § 1226(c) applied only to those criminal aliens detained promptly after their release from criminal custody, not to aliens like Preap or Khoury who were detained long after. The Government appealed to the Supreme Court.

The issue before the Court is:

1. Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from custody, the Department of Homeland Security does not take him into immigration custody immediately.

The Court heard oral argument in this case on October 10, 2018.

Oral Argument – Transcript:

[https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/16-1363\\_h315.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/16-1363_h315.pdf)

Oral Argument – Audio: [https://www.supremecourt.gov/oral\\_arguments/audio/2018/16-1363](https://www.supremecourt.gov/oral_arguments/audio/2018/16-1363)

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## **Gamble v. United States**

Decision Below: [694 Fed. Appx. 750 \(11th Cir. 2017 - unpublished\)](#)

In 2015, a police officer in Mobile, Alabama conducted a traffic stop and found a handgun in Gamble’s car. The state of Alabama prosecuted Gamble for illegal possession of a firearm. Gamble was convicted and served one year in prison. The federal government subsequently charged Gamble with being a felon in possession of a firearm in regard to the same 2015 traffic stop.

Gamble argued that Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibited the federal government from prosecuting him for the same conduct for which he had been prosecuted and sentenced by the state of Alabama.

The district court and the Eleventh Circuit Court of Appeals disagreed and Gamble was convicted. In an unpublished opinion, the Eleventh Circuit Court of Appeals stated, “the Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns.” The court added that until the Supreme Court overturns [Abbate v. United States](#), the 1959 case in which the Court outlined the “dual sovereign” doctrine, the Double Jeopardy Clause does not prevent different sovereigns (a state government and the federal government) from punishing a defendant for the same criminal conduct. Gamble appealed to the Supreme Court.

The issue before the Court is:

1. Whether the “separate sovereigns” exception to the double jeopardy clause should be overruled.

The Court will hear oral argument in this case on December 5, 2018.

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### **Nieves v. Bartlett**

Decision Below: [712 Fed. Appx. 613 \(9th Cir. 2017 - unpublished\)](#)

Russell Bartlett sued two Alaska State Troopers under 42 U.S.C. § 1983 for false arrest and excessive use of force, in violation of the Fourth Amendment as well as for retaliatory arrest, in violation of the First Amendment. The district court granted the troopers qualified immunity and dismissed Bartlett’s claims against the troopers. Bartlett appealed.

The Ninth Circuit Court of Appeals held that the troopers were entitled to qualified immunity for Bartlett’s false arrest claim because they had arguable probable cause to arrest Bartlett for harassment, disorderly conduct, resisting arrest, or assault under Alaska law. The court further held that the troopers were entitled to qualified immunity for Bartlett’s excessive use of force claim because the troopers’ limited use of force to effect Bartlett’s arrest was objectively reasonable.

However, the court ruled that the troopers were not entitled to qualified immunity on Bartlett’s retaliatory arrest claim. The district court previously dismissed this claim because the troopers had probable cause to arrest Bartlett. However, the Ninth Circuit Court of Appeals had previously held that a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest. (See [3 INFORMER 13 - Ford v. City of Yakima](#)) As a result, the court held that the district court improperly dismissed Bartlett’s retaliatory arrest claim. The troopers appealed to the Supreme Court.

The issue before the Court is:

1. Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983

The Court will hear oral argument in this case on November 26, 2018.

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# CASE SUMMARIES

## Circuit Courts of Appeal

### **Sixth Circuit**

#### **United States v. Pyles, 2018 U.S. App. LEXIS 26238 (6th Cir. KY Sep. 17, 2018)**

A Kentucky State trooper noticed a car traveling 63 miles per hour in a 70-miles per hour zone, while other vehicles on the road were going much faster. The trooper followed the car and ran its license plate number through a computer database. The trooper discovered the car's owner, Angela Burdine, had an outstanding arrest warrant. Although the trooper could see the car contained three or possibly four occupants, he could not tell the gender of the individuals in the backseat.

The trooper stopped the car and as he approached, he saw Joshua Pyles stuffing something under a pile of clothes in the back seat. When one of the occupants rolled down a window, the trooper smelled marijuana. After back up officers arrived, they searched the car and found methamphetamine, marijuana, and a loaded handgun.

The government charged the three occupants of the car, Joshua Pyles, Jason Whitis, and Robbie Whitis with drug and firearm offenses.

Pyles filed a motion to suppress the evidence seized from the car. Pyles argued that the stop violated the Fourth Amendment because the trooper knew the car contained only three males, not Angela Burdine, a female, the registered owner for whom the warrant had been issued.

The court noted that once an officer discovers that a car's owner has an outstanding arrest warrant, the officer needs only reasonable suspicion that the owner is in the vehicle to conduct a lawful traffic stop. To establish reasonable suspicion, an officer may infer that the registered owner of a car is in the car, unless the officer has information to the contrary.

In this case, the court held that the trooper had reasonable suspicion to conduct the traffic stop. First, the trooper knew that Angela Burdine owned the car, and he knew that she had an outstanding arrest warrant. Second, the trooper knew the car had at least three or four occupants. Finally, before the trooper stopped and approached the car, he could not determine the gender of the back-seat passenger and could not tell whether there were more passengers in the car.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/17-6334/17-6334-2018-09-17.pdf?ts=1537209017>

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## **Ninth Circuit**

### **United States v. Peterson, 2018 U.S. App. LEXIS 25029 (9th Cir. WA Sep. 4, 2018)**

Police officers arrested Peterson on outstanding misdemeanor warrants. During the arrest, Peterson twice broke away from the officers and tried to escape on foot. After securing Peterson in the back of a patrol car, an officer searched Peterson's backpack and found a stolen handgun. The officers transported Peterson to jail where he was booked on charges of unlawful possession of a firearm and possession of a stolen firearm, both felony offenses.

The government charged Peterson with being a felon in possession of a firearm.

Peterson filed a motion to suppress the handgun.

The district court held that, under the circumstances, the warrantless search of Peterson's backpack was not justified as a search incident to his arrest. Instead, the district court held that the handgun would have inevitably been discovered during an inventory search at the time of booking.

On appeal, Peterson argued that the search of his backpack was not inevitable. Peterson claimed that if the officers had not unlawfully searched his backpack incident to arrest, they would have only had cause to book him on his misdemeanor warrants, for which he would have posted bail and avoided the inventory search altogether.

The Ninth Circuit Court of Appeals agreed that Peterson's backpack would not have been subject to an inventory search had the officers only arrested him for his misdemeanor warrants. The court found that Peterson presented evidence that he would have been able to post bail for his misdemeanor offenses, thereby avoiding the booking and inventory search process.

However, the court found that the officers would have booked Peterson for obstructing law enforcement officers or resisting arrest even if they had not discovered the handgun in Peterson's backpack. As a result, because bail had not yet been set on those charges, the court concluded that Peterson would have been taken into custody upon booking, and the contents of his backpack would have been inventoried. The court concluded that under these circumstances, officers would have inevitably discovered the handgun.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/17-30084/17-30084-2018-09-04.pdf?ts=1536080538>

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### **Scott v. Cty. of San Bernardino, 2018 U.S. App. LEXIS 25568 (9th Cir. CA Sep. 10, 2018)**

A middle school assistant principal asked a school resource officer to counsel a group of girls who had been involved in ongoing incidents of bullying and fighting. School officials gathered the girls in a classroom and when the officer arrived, he attempted to mediate the conflict between the students. After the officer concluded that the girls were being unresponsive and disrespectful, the officer told the girls that he was not "playing around," and that taking them to jail was the easiest way to "prove a point" and "make them mature a lot faster." The officer then told the girls that he was going to arrest them for unlawful fighting in violation of California Penal Code § 415. The officer called for backup and when another officer arrived, the officers arrested seven girls,

who were then handcuffed, transported to the sheriff's department, and released to their parents. The school took no disciplinary action against the girls and no criminal charges were filed.

Three of the girls sued the officers claiming that arresting them without probable cause violated the Fourth Amendment and state law.

The district court denied the officers qualified immunity and the officers appealed.

The Ninth Circuit Court of Appeals agreed with the district court and held that the officers were not entitled to qualified immunity.

First, the court held that it was unreasonable to arrest the students because the officers only had generalized allegations that some of the students had been bickering and fighting, not specific information. At most, the officers knew that one of the girls had been in a fight on campus one month prior. Second, the school resource officer told the students that he was arresting them to "prove a point" and to "teach them a lesson." The officer added that he "did not care" who was at fault. The court found that the officer's clearly stated justification for the arrests was to punish perceived disrespect, and was not related to the commission of a crime. The court concluded that an arrest meant only to "teach a lesson" and to arbitrarily punish perceived disrespect toward the officer violated the Fourth Amendment.

Second, the court held that at the time of the incident, no reasonable officer could have reasonably believed that the law authorizes the arrest of a group of middle school students to "prove a point."

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/16-55518/16-55518-2018-09-10.pdf?ts=1536598930>

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**Ioane v. Hodges, 2018 U.S. App. LEXIS 25569 (9th Cir. CA Sep. 10, 2018)**

In June 2006, special agents with the Internal Revenue Service (IRS) Criminal Investigation Division obtained a warrant to search Michael and Shelly Ioane's residence for records, computers, computer-related equipment, and computer storage devices. When the agents arrived, they told Michael and Shelly they could remain on the premises if they cooperated with the agents conducting the search. However, the agents told the Ioanes that if they chose to leave the premises they would not be allowed to return. Michael and Shelly remained on the premises and sat in the kitchen while the agents conducted the search.

At some point early in the search, Michael needed to use the bathroom. A male agent escorted Michael to the bathroom and conducted a quick search of the bathroom for weapons before exiting and closing the door behind him. The agent stood outside the closed bathroom door while Michael relieved himself.

Approximately thirty minutes later, Shelly told the agents that she needed to use the bathroom. Agent Jean Noll escorted Shelly to the bathroom, and when Shelly stepped inside and started to close the door, Agent Noll told Shelly that she had to come inside too. Agent Noll then told Shelly to remove her clothing so that she could make sure Shelly did not have anything hidden on her person. When Shelly objected, Agent Noll stated that she needed to make sure Shelly could not hide or destroy anything and that this was standard procedure. Shelly, who was wearing a long sundress, pulled up her dress so Agent Noll could see that she was not hiding anything. Afterward, Agent Noll made Shelly hold up her dress while she relieved herself, using one hand to hold up

her dress and the other to pull her underwear down. Agent Noll faced Shelly while she used the bathroom, and when Shelly finished, Agent Noll escorted her back to the kitchen.

Shelly Ioane sued Agent Noll for violating her Fourth Amendment right to bodily privacy for monitoring Shelly while she used the restroom. After the district court denied Agent Noll qualified immunity, Agent Noll appealed.

The Ninth Circuit Court of Appeals agreed with the district court that Agent Noll was not entitled to qualified immunity.

As an initial matter, the court recognized that under the Fourth Amendment individuals have the right to bodily privacy. Next, the court found that the scope of Agent Noll's intrusion into Shelly's bodily privacy right was significant. Finally, the court held that none of the reasons Agent Noll offered for justifying the intrusion into Shelly's right to bodily privacy were supported by the facts.

First, the agents did not detain the Ioanes when they arrived to execute the search warrant. Instead, the agents told the Ioanes they were free to leave, but if they left, they would not be allowed back into the house. The court concluded that if Agent Noll legitimately feared that Shelly might destroy evidence in the bathroom, the agents would not have allowed her to leave the residence where she could have destroyed evidence elsewhere.

Second, Agent Noll claimed that monitoring Shelly was necessary to ensure that Shelly did not have anything dangerous concealed in her clothing. However, the court noted that the search warrant authorized only a search of the premises, not the individuals on the premises. In addition, Agent Noll did not argue that she had a reason to believe that Shelly was armed, except for claiming that the agents had found other weapons on the premises. The court added that even if Agent Noll had an objectively reasonable belief that Shelly was armed and dangerous, this belief only would have justified a frisk for weapons, not the intrusion into bodily privacy that occurred here.

Third, Agent Noll claimed that other safety concerns justified her monitoring Shelly while she used the bathroom, namely, that Shelly could have gained access to the rest of the house through a second door in the bathroom, putting the other agents or herself at risk. The court was not convinced as by the time Shelly needed to use the bathroom another agent had already checked the bathroom for weapons. In addition, Agent Noll offered no explanation as to why watching Shelly use the bathroom was the only way to eliminate the risk that Shelly might flee given that other agents could have been directed to stand outside the bathroom's second door. Finally, the court commented that Michael, who was the subject of the investigation, had already been permitted to use the bathroom while a male agent stood outside the door.

The court further held that at the time of Agent Noll's actions in June 2006 an individual's right to bodily privacy had been clearly established; therefore, Agent Noll was not entitled to qualified immunity.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/16-16089/16-16089-2018-09-10.pdf?ts=1536598929>

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## **Eleventh Circuit**

### **Glasscox v. Argo, 2018 U.S. App. LEXIS 25839 (11th Cir. AL September 12, 2018)**

Bob Glasscox was driving his pickup truck on an interstate highway when he experienced an episode of diabetic shock. Physically unable to control his truck, Glasscox began driving erratically at high speeds. After other motorists reported Glasscox's driving, the Argo Police Department dispatched Officer Moses to the scene.

Officer Moses activated his emergency lights and siren and pursued Glasscox for approximately five miles. During this time, Glasscox was traveling 80 miles per hour in a 70 mile per hour speed zone, and was weaving from the left lane onto the median, narrowly missing several road signs and a guard rail. Eventually, Glasscox stopped and Officer Moses approached his pickup truck with his taser drawn. While yelling at Glasscox to get out of the truck, Officer Moses deployed his taser four times in rapid succession. The incident was captured on Officer Moses' body camera, which recorded Glasscox's attempts, between taser shocks, to comply with Officer Moses' orders.

Glasscox sued Officer Moses and the Argo Police Department under 42 U.S.C. § 1983 for excessive use of force in violation of the Fourth Amendment. After the district court denied qualified immunity, Officer Moses appealed.

The Eleventh Circuit Court of Appeals agreed with the district court and held that Officer Moses was not entitled to qualified immunity. Even assuming that Officer Moses reasonably deployed his taser twice, the court held that a reasonable jury could conclude that the continued tasing, when the video conclusively showed that Glasscox was not resisting, but instead was voicing his desire to comply with the officer's commands, violated Glasscox's Fourth Amendment right to be free from the excessive use of force.

In reaching this conclusion, the court applied the factors outlined in [Graham v. Connor](#) to the facts of the case. The court noted that the severity of the crime in question favored Officer Moses as Glasscox's reckless, dangerous, and elusive driving justified Officer Moses' initial use of force to arrest Glasscox. However, the court found that the repeated taser shocks, issued after Glasscox stopped driving recklessly, were unreasonable because Glasscox was not resisting arrest after the second taser shock and he no longer posed a threat which justified the repeated use of the taser.

The court further held that at the time of the incident it was clearly established that it is unlawful to use a taser repeatedly on an arrestee who is not resisting, even if that arrestee had previously offered resistance and was not yet restrained.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/16-16804/16-16804-2018-09-12.pdf?ts=1536782473>

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