Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

November 2016

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. 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 Series

1. **Protective Sweeps**

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

   This webinar will explore in-depth the warrantless "protective sweep" doctrine as it has evolved from *Maryland v. Buie*. We will discuss the rule generally, and then look at differences in the application of the doctrine in different situations by reviewing cases from the various circuits.

   Date and Time: Monday December 5, 2016 2:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

2. **Law Enforcement Legal Refresher Training**

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

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

   Date and Time: Thursday December 8, 2016 8:00 a.m. EST

   To join this webinar: https://share.dhs.gov/informer

3. **Self-Incrimination and *Miranda***

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

   This webinar will discuss the *5th Amendment's Self Incrimination Clause*, and provide an overview of when *Miranda* is required.

   Date and Time: Monday December 19, 2016 2:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

Bruce's Brownbag Webinar

Each week, Bruce Barnard selects a very recent Federal case that is "hot off the press" and discusses the impact and possible lessons learned for law enforcement officers. This webinar series is intentionally offered over the lunch break, so pack your lunch on Wednesday, eat at your desk, and join us for an interesting discussion on cases involving the legal aspects of law enforcement. **The site is always running and you can download slides and recordings of previous webinars in the archives on the site.** We hope to see you every Wednesday!

1. **Wednesday December 7, 2016 - 11:45 a.m. to 12:15 p.m. (EST)**
2. **Wednesday December 14, 2016 - 11:45 a.m. to 12:15 p.m. (EST)**
3. **Wednesday December 21, 2016 - 11:45 a.m. to 12:15 p.m. (EST)**
4. **Wednesday December 28, 2016 - 11:45 a.m. to 12:15 p.m. (EST)**

To join Bruce's Brown Bag Webinar: https://share.dhs.gov/bbw

FLETC Informer Rewind Wednesday

When the training schedule does not allow us to provide a "live" webinar, please join us for the broadcast of a previously aired webinar.

1. **Wednesday December 7, 2016 - 12:15 a.m. to 1:15 p.m. (EDT)**
   Cops, Canines, and Curtilage

2. **Wednesday December 14, 2016 - 12:15 a.m. to 3:15 p.m. (EDT)**
   Law Enforcement Legal Refresher Training (from December 8, 2016)

3. **Wednesday December 21, 2016 - 12:15 a.m. to 1:15 p.m. (EDT)**
   Understanding the New DOJ Profiling Guidelines (from April 2016)

4. **Wednesday December 28, 2016 - 12:15 a.m. to 1:15 p.m. (EDT)**
   Self-Incrimination and Miranda (from December 19, 2016)

To join a Rewind Wednesday webinar: **https://share.dhs.gov/informer**

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Please check the FLETC Webinar Schedule and News section at: https://share.dhs.gov/informer for updates and the most current webinar-related news.

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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 webinar.
6. Even though meeting rooms may be accessed before a webinar, there may be times when a meeting room is closed while an instructor is setting up the room.
7. Meeting rooms will be open at least one-hour before a scheduled webinar.
8. Training certificates will be provided at the conclusion of each webinar.

Supreme Court Preview

Fourth Amendment: Use of Force / Qualified Immunity / *Bivens*

Hernandez v. Mesa
Decision Below: 785 F.3d 117 (5th Cir. 2015); http://cases.justia.com/federal/appellate-courts/ca5/11-50792/11-50792-2015-04-24.pdf?ts=1430136043

A United States Border Patrol Agent Jesus Mesa, Jr., standing in the United States, shot and killed Sergio Hernandez Guereca, a fifteen-year old Mexican citizen, standing in Mexico. Hernandez's parents filed a lawsuit against Agent Mesa, his supervisors, and the United States government. The lawsuit alleged that Agent Mesa violated the *Fourth Amendment* by using excessive force against Hernandez, and the *Fifth Amendment* by depriving Hernandez of due process.

The Fifth Circuit Court of Appeals held that Agent Mesa was entitled to qualified immunity on the *Fourth Amendment* excessive force claim. The court concluded the *Fourth Amendment's* protection against excessive force did not apply to Hernandez because Hernandez was a Mexican citizen who lacked any real connection to the United States, and he was in Mexico when Agent Mesa shot him. Concerning Hernandez's *Fifth Amendment* claim, the court held that it was not clearly established at the time of the incident that Agent Mesa's conduct was unlawful.

Hernandez appealed, and the United States Supreme Court agreed to hear the case.

The issues before the Supreme Court are:

1. What standard should courts apply to determine whether the *Fourth Amendment* applies outside the United States.

2. May qualified immunity be granted or denied based on facts, such as the victim's legal status, which are not known to the officer at the time of the incident.

3. Whether Hernandez can bring a claim against Agent Mesa under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

The Court has not yet scheduled oral arguments in this case.

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Bank Fraud: *18 U.S.C. § 1344(1)*

Shaw v. United States
Decision Below: 781 F.3d 1130 (9th Cir. 2015); http://cases.justia.com/federal/appellate-courts/ca9/13-50136/13-50136-2015-03-27.pdf?ts=1427475665

Shaw had access to Stanley Hsu's bank statements, which contained Hsu's personal information. Using Hsu's personal information, Shaw opened an email account in Hsu's name, and then used this email account to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. Shaw subsequently transferred money out of Hsu's bank account into the PayPal account he controlled.

The government charged Shaw with Bank Fraud under *18 U.S.C. § 1344(1)*.

The Bank Fraud Statute, *18 U.S.C. § 1344*, makes it a crime to knowingly execute a scheme:

(1) To defraud a financial institution, or

(2) To obtain money, funds, credit, assets or other property held or owned by a financial institution by false pretenses or fraud.

Shaw argued that a prosecution under *§ 1344(1)* required the government to prove the defendant intended the bank to be the primary financial victim of his fraud, as a majority of the federal circuits have held. Shaw claimed the government did not satisfy this requirement, as Shaw intended his primary financial victim to be Hsu, a bank customer.

The district court disagreed, as did the Ninth Circuit Court of Appeals, which adopted the minority view, and affirmed Shaw's conviction.

Shaw appealed, and the United States Supreme Court agreed to hear the case to resolve a split among the circuits.

The issue before the Court is:

1. Whether a scheme to defraud a financial institution under *18 U.S.C. § 1344(1)*[1] requires proof of specific intent not only to deceive, but also, to defraud a bank.

The Court heard oral arguments in this case on October 4, 2016.

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[1] In *Loughrin v. United States*, 134 S.Ct. 2384, 2387 (2014), the Supreme Court interpreted *18 U.S.C. § 1344(2)*, and held that it does not require the government to prove that the defendant intended to defraud the bank.

CASE SUMMARIES

Circuit Courts of Appeal

Fifth Circuit

United States v. Turner, 2016 U.S. App. LEXIS 18480 (5th Cir. October 13, 2016)

An officer stopped a car driven by Henderson for a traffic violation. During the stop, the officer discovered Turner, a passenger, had an outstanding warrant for his arrest. The officer ordered Turner to exit the car, and when he did, the officer saw an opaque plastic bag protruding from under the front passenger seat. The officer placed Turner in his patrol car and then asked Henderson what was inside the bag. Henderson handed the officer the bag, which contained over 100 gift cards. Henderson told the officer Turner bought the cards, but denied having a receipt for the purchase.

After the officer spoke with other officers about their experiences with stolen gift cards, the officer seized the cards as evidence of suspected criminal activity. A subsequent warrantless scan of the magnetic strips on the backs of the gift cards revealed that at least forty-three cards had been altered. Specifically, the numbers encoded on the magnetic strips did not match the numbers printed on the front of the cards.

The government charged Turner with aiding and abetting the possession of unauthorized access devices.

Turner filed a motion to suppress the gift cards.

First, Turner argued the warrantless seizure of the gift cards violated the *Fourth Amendment*.

The court disagreed. The court held that the officer conducted a valid plain view seizure of the gift cards. For a lawful plain view seizure, the officer must have lawful authority to be in the location from which he viewed the evidence, and the incriminating nature of the evidence must be "immediately apparent." The incriminating nature of an item is immediately apparent if the officer has probable cause to believe the item is either evidence of a crime or contraband.

The court held the officer had probable cause to believe the gift cards were contraband or evidence of a crime. Fist, the officer saw a plastic bag containing over 100 gift cards that appeared to have been concealed under the front passenger seat. Second, Henderson admitted to not having receipts for the gift cards, and told the officer that he and Turner had purchased the gift cards from an individual who sold them "for a profit." Finally, the officer conferred with other officers who had experience with large numbers of gift cards being associated with drug dealing, fraud, and theft.

Next, Turner argued that scanning the magnetic strips on the backs of the gift cards without first obtaining a search warrant violated the *Fourth Amendment*.

Again, the court disagreed. The court joined the other circuits that have considered this issue[2] and concluded that Turner did not have a reasonable expectation of privacy in the information encoded

[2] See *U.S. v. Bah*, 794 F.3d 617, 633 (6th Cir. 2015), 8 Informer 15; *U.S. v. De L'Isle*, 825 F.3d 426, 432-33, (8th Cir. 2016), 7 Informer 16.

on the magnetic strips on the back of the gift cards. First, companies that issue gift cards and credit cards encode a small amount of information in the magnetic strip on the backs of the cards, which can only be altered by using a device not commonly possessed by most people. Second, the purpose of gift cards and credit cards is to facilitate commercial transactions. Finally, third parties, such as cashiers, will often do the same kind of "swiping" of the gift and credit cards as law enforcement did in this case.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/15-50788/15-50788-2016-10-13.pdf?ts=1476401433

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United States v. Ramirez, 2016 U.S. App. LEXIS 18540 (5th Cir. Tex. Oct. 14, 2016)

At 9:30 p.m. on a Wednesday, Border Patrol agent Espinel was sitting in his patrol car in the median of U.S. Highway 77 approximately forty-five miles north of the Mexican border, several miles south of the Sarita immigration checkpoint. Agent Espinel had been an agent for six years and had been patrolling this stretch of Highway 77 near Raymondville, Texas for more than nine months. Highway 77 is a known smuggling route and Agent Espinel had made over 150 alien arrests in this area. In addition, Agent Espinel knew that Tuesday, Wednesday, and Thursday nights saw the most smuggling activity, with smugglers dropping off aliens south of the Sarita checkpoint, typically using SUVs or pickup trucks.

Agent Espinel saw Ramirez drive past in a Ford F-150 pickup truck, and noticed that Ramirez appeared to "duck down" as he passed. Agent Espinel also saw three or four passengers in the back of the truck who "ducked down" when they saw him. Agent pulled behind Ramirez and saw heads in the back of Ramirez's truck "popping up and down." Agent Espinel activated his emergency lights and pulled Ramirez over. As he was stopping, Agent Espinel saw two passengers get out of the truck and run away. Agent Espinel detained Ramirez and the four remaining passengers, two of whom turned out to be illegal aliens.

The government charged Ramirez with transporting illegal aliens.

Ramirez argued that Agent Espinel did not have reasonable suspicion to stop him.

The court disagreed. A roving Border Patrol agent may stop a vehicle if he has reasonable suspicion to believe the vehicle is involved in illegal activity. Here, Agent Espinel was an experienced officer who had been patrolling Highway 77 near Raymondville for almost one year. Next, Agent Espinel saw Ramirez's truck forty-five miles north of the border, well south of the Sarita checkpoint. Agent Espinel saw Ramirez and his passengers acting as if they were very nervous when they saw him. Finally, Ramirez was driving a type of vehicle known to be popular among smugglers, on a highway, and on a day of the week popular among them. Based on these factors, the court held that Agent Espinel had reasonable suspicion to stop Ramirez.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca5/15-40887/15-40887-2016-10-14.pdf?ts=1476487832

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Sixth Circuit

United States v. Pacheco, 2016 U.S. App. LEXIS 19495 (6th Cir. October 28, 2016)

An officer received a tip from a confidential informant (CI) that two Hispanic men in a silver Lincoln Navigator were moving narcotics from a specific apartment complex that evening. The apartment complex was located in an area known for drug trafficking, gun violence and gang activity. The officer set up surveillance in an unmarked police car, and within forty-five minutes, he saw a silver SUV exit the apartment complex parking lot. The officer followed the SUV, verified that it was a silver Lincoln Navigator, and that it contained two Hispanic male occupants. After the SUV failed to properly signal a turn, the officer requested an officer in a marked patrol car conduct a traffic stop.

A marked police car, with two uniformed officers followed the SUV and conducted a traffic stop after the SUV briefly crossed the double-yellow line. During the stop, one of the officers approached the SUV and encountered Pacheco, who was in the front passenger seat. The officer asked Pacheco for identification, but Pacheco did not respond. Instead, Pacheco rummaged through the glove compartment, ruffling papers, but removed nothing. The officer noticed that Pacheco was extremely nervous, would not make eye contact with him, and that Pacheco kept glancing over at his left leg, near the center console. Knowing the glove box, the floorboard area, and the center console are all often used to conceal weapons, the officer asked Pacheco to exit the vehicle. Pacheco did not respond or comply with this order. The officer asked Pacheco to exit the vehicle a second time, and opened the door for him. Pacheco got out of the vehicle and the officer immediately conducted a *Terry* frisk. On Pacheco's right side, the officer felt a large "chunk of money on his right cargo pocket. When the officer went to frisk Pacheco's left side, he saw the top of a brick-like object, wrapped in brown paper and tape, protruding approximately one inch out of the top of Pacheco's left cargo pocket. As the officer patted this area down, he could feel that the object in the cargo pocket was "like a solid brick," and was approximately six to eight inches long. Based on these observations and his experience, the officer believed the object in Pacheco's pocket was brick cocaine. The officer seized the suspected brick cocaine and the currency.

The government charged Pacheco with possession with intent to distribute cocaine.

Pacheco filed a motion to suppress the cocaine and currency seized from him during the stop.

First, the court held the officers conducted a lawful stop of the SUV. The officers received information from another officer that the driver of the SUV failed to properly signal a turn and they also saw the driver briefly cross the double-yellow line. Even if the uniformed officers' motivation for stopping the SUV was to assist in the investigation of a drug case, the two traffic violations justified the officers in stopping the SUV.

Second, the court noted that during a traffic stop, it is well established that an officer may order passengers out of the vehicle pending the completion of the stop.

Third, the court held the officer established reasonable suspicion that Pacheco might be armed and dangerous; therefore, he was entitled to conduct a *Terry* frisk. The court concluded that Pacheco's extreme nervousness, his failure to acknowledge the officer's presence, his failure to obey the officer's commands to produce identification and exit the car, as well as the time of day and the high-crime nature of the neighborhood supported the officer's belief that Pacheco might be armed.

Fourth, the court held the seizure of the cocaine and currency from Pacheco's pockets was lawful. During a *Terry* frisk for weapons, an officer may seize objects believed to be contraband as long as:

> (1) The officer is in a lawful position from which he views or feels the object; (2) the object's incriminating nature is immediately apparent; and (3) the officer has lawful right of access to the object.

Here, because of the traffic stop, Pacheco's removal from the vehicle, and *Terry* frisk of his person were lawful, the court held that the officer was in a lawful position to view and then feel the contraband. In addition, the officer had a lawful right to access the contraband, as it was discovered before the *Terry* frisk was completed. Finally, the court found that the incriminating nature of the seized items was immediately apparent to the officer. After removing the large "chunk of money" from Pacheco's right cargo pocket, the officer noticed a brick-like object partially sticking out of his left cargo pocket. The officer saw the object was wrapped in brown paper and bound together with tape. When the officer frisked the pocket, he discovered the brick was solid and around six to eight inches long. Combining his sight and his touch with his training and experience, the officer concluded "within seconds" that the object in Pacheco's left cargo pocket was probably brick cocaine.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/16-3376/16-3376-2016-10-28.pdf?ts=1477693836

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Eighth Circuit

United States v. Walker, 2016 U.S. App. LEXIS 18651 (8th Cir. Minn. Oct. 18, 2016)

Two officers on patrol stopped Walker's car after they saw that it had a cracked windshield they believed obstructed the driver's vision, in violation of *Minnesota Statues § 169.71(a)(1)*. The officers approached the car, and when Walker rolled down the windows, the officers smelled the odor of fresh, unburned marijuana. The officers searched the car and found a glass pipe, along with a rock-like substance they believed to be cocaine, underneath the driver's seat. The officers arrested Walker, and then continued to search his car. In the trunk, the officers found a 12-gauge shotgun, a box containing shotgun shells, and a high-capacity rifle magazine filled with ammunition.

The government charged Walker with being a felon in possession of a firearm and ammunition.

Walker filed a motion to suppress the evidence seized from his car. First, Walker argued the windshield was not cracked to the extent that it impeded the driver's view; therefore, the officers did not conduct a lawful traffic stop.

The court disagreed. The court noted that the district court found the officer's testimony that he believed the crack in the car's windshield obstructed the driver's view, to be credible. Even if the officer was mistaken, the court held the officer's observations regarding the severity of the crack provided a reasonable basis to believe that Walker was violating *§ 169.71(a)(1)*.

Walker further argued the officers impermissibly extended the duration of the stop beyond the time necessary to investigate the cracked windshield.

Again, the court disagreed. Here, the officers smelled unburned marijuana immediately after Walker lowered the car's windows. This information provided the officers a reason to detain Walker that was independent of the cracked windshield. In addition, smelling the unburned marijuana provided the officers probable cause to conduct a warrantless search of Walker's car under the automobile exception to the *Fourth Amendment's* warrant requirement. Consequently, the court held the officers lawfully detained Walker and searched his car after the initial traffic stop.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2921/15-2921-2016-10-18.pdf?ts=1476804646

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Eleventh Circuit

Fish v. Brown, 2016 U.S. App. LEXIS 17778 (11th Cir. Fla. Oct. 3, 2016)

Anthony Fish and Margo Riesco were involved in a relationship for approximately two years. After Fish ended the relationship, Riesco told Fish that she wanted to retrieve her personal belongings from Fish's house. Before going to Fish's house, Riesco stopped at the local sheriff's office and requested a law enforcement escort because she "feared for her safety." As a result, Deputy Harrison and Deputy Loucks were separately directed by a supervisor to meet Riesco at Fish's house.

The deputies met Riesco and followed her as she drove her car to the rear of Fish's house. Riesco parked next to Fish's vehicle, exited her car and walked up to a glass door that opened into a sunroom. The deputies followed Riesco as she opened the unlocked glass door and walked into the sunroom. Riesco then knocked on an interior wooden door and called out to Fish. Fish opened the wooden door, where he saw the deputies standing behind Riesco. Riesco greeted Fish and told him that she brought the deputies with her "to watch so I don't steal nothing of yours, okay?" Fish responded, "all right," and allowed Riesco and the deputies to enter his house. One of the deputies asked Fish what personal items Riesco had in his house, and Fish replied that everything Riesco left was in a drawer in a bedroom that adjoined the living room and kitchen area in which the parties were standing. From the kitchen area, Deputy Harrison saw a large revolver hanging in its holster from one of the bedposts through the open bedroom door. Deputy Harrison also saw a number of other long guns under the bed. Deputy Harrison knew that Fish was prohibited from possessing firearms by the terms of a domestic violence injunction entered by a state court judge a month earlier. Deputy Harrison arrested Fish for possessing firearms in violation of the domestic violence injunction.

The criminal charges against Fish were eventually dismissed, and he filed a lawsuit against Deputies Harrison and Loucks. Among other things, Fish claimed the deputies violated the *Fourth Amendment* by entering his house without a warrant or consent.

The district court held that Deputies Harrison and Loucks were entitled to qualified immunity, and Fish appealed.

The Court of Appeals agreed with the district court and held the deputies were entitled to qualified immunity. The deputies followed Riesco around to the back of Fish's house where she parked next to Fish's vehicle. Riesco entered the sunroom through an unlocked door to the interior wood door and knocked. Consequently, the deputies reasonably could have believed that the sunroom was "impliedly open to use by the public" for the purpose of gaining access to the interior areas of the house.

Next, the Court of Appeals agreed with the district court, which found that Fish consented to the deputies entry into the interior of his house from the sunroom. Fish responded by saying "all right," when Riesco told him that she brought the deputies with her so she could make sure she did not steal anything from his house. By affirmatively responding to Riesco's introduction of the deputies, fish gave what any reasonable person would have considered explicit verbal consent for the officers to enter his house. In addition, neither deputy invoked his authority as a law enforcement officer by demanding entry or brandishing a weapon to obtain Fish's consent to enter. Instead, the deputies just followed Riesco into the house after Fish said it was "all right."

Finally, the Court of Appeals agreed with the district court, which held that the deputies made a plain view seizure of the firearms from Fish's house. After lawfully entering Fish's house, Deputy Harrison saw the firearms through an open bedroom door. The incriminating nature of the firearms was immediately apparent to Deputy Harrison, as he knew of the existence of the domestic violence injunction against Fish and that such injunctions prohibited the possession of firearms.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/15-12348/15-12348-2016-10-03.pdf?ts=1475512283

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Wate v. Kubler, 2016 U.S. App. LEXIS 18365 (11th Cir. Fla. Oct. 12, 2016)

James Barnes and his aunt, Paula Yount, went to the beach to conduct a baptismal ritual. While in the water, Barnes, who was 5 feet 10 inches tall and weighed 290 pounds, began acting erratically by flailing his arms and yelling loudly about a demon. Officer Tactuk responded to the disturbance and spoke with Yount about the situation. Officer Tactuk ordered Barnes out of the water, believing that he had probable cause to arrest Barnes for battery on Yount. Barnes refused, and a violent struggle ensued between Officer Tactuk and Barnes. After approximately five-minutes, Officer Tactuk pulled Barnes from the water, and with assistance from three bystanders, secured Barnes in handcuffs. Officer Tactuk radioed for assistance, stating that he had a violent, mentally ill person in custody. Although handcuffed, Barnes continued to struggle, and Officer Tactuk deployed pepper spray into Barnes' face.

A short time later, Officer Kubler arrived. At this point, Barnes was lying on his back, screaming, yelling and struggling with Officer Tactuk, who was straddling him. Officers Kubler and Tactuk rolled Barnes onto his stomach so they could re-position the handcuffs. Barnes continued to resist by kicking the officers and biting Officer Tactuk's hand. Officer Kubler warned Barnes to stop resisting, or he was going to tase Barnes. Barnes ignored Officer Kubler and continued to resist. Officer Kubler issued Barnes a second warning, which he ignored. Officer Kubler then deployed his Taser against Barnes. Officer Kubler activated his Taser against Barnes five times for 5, 3, 5, 4, and 5 seconds respectively, over a two-minute period. By this time, Barnes had stopped moving

and did not appear to be breathing. The officers removed the handcuffs and began to administer CPR on Barnes. Barnes was transported to the hospital where he died two days later.
Barnes personal representative, Wate, filed a lawsuit against Officers Kubler, Tactuk and their respective agencies. Wate claimed the officers violated the *Fourth Amendment* by using excessive force against Barnes. After the state agencies and Officer Tactuk settled with Wate, those claims were dismissed. Officer Kubler filed a motion for summary judgment, claiming that he was entitled to qualified immunity.

The district court held that Officer Kubler was not entitled to qualified immunity, and Kubler appealed.

To prevail against an officer's motion for summary judgment based on qualified immunity, a plaintiff must allege the officer's conduct was unconstitutional, and that the law was clearly established so as to provide the officer fair warning that such conduct was unconstitutional. In addition, the court is bound to consider the facts as alleged by the plaintiff to be true. The court does not weigh the evidence presented by the parties, nor does it determine which witnesses to believe if conflicting accounts of an incident are provided, as those are both functions of the jury.

Against this backdrop, the Court of Appeals agreed with the district court that Officer Kubler was not entitled to qualified immunity. The court noted that the critical period to determine whether Officer Kubler's use of the Taser on Barnes constituted excessive force spanned two minutes, from just before Kubler deployed the Taser until the time of the fifth activation. While witness accounts varied, several witnesses testified that Barnes had stopped resisting and had become still during this period. However, Officers Kubler and Tactuk testified that Barnes continued to resist violently throughout all activations of the Taser. Considering the evidence as alleged by the plaintiff to be true, the record in the district court established that while the first or second Taser deployment might have been reasonable, there was competent unambiguous evidence presented that by the third tasing, Barnes was handcuffed, immobile and no longer resisting. Consequently, a reasonable officer in Kubler's position would conclude that Barnes did not pose a threat to the officers and further shocks were unnecessary. The court found that if the jury credited this version of events, it could find that Officer Kubler's continued deployment of his Taser against Barnes constituted an unreasonable use of force.

The court further held that at the time of the incident, it was clearly established law that it was unreasonable to repeatedly deploy a Taser against a handcuffed, non-resisting person.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca11/15-15611/15-15611-2016-10-12.pdf?ts=1476280884

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