Law Enforcement Civil Rights Liability

OK Police Chiefs & Command Staff (10/2021)

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Legal Liability - Overview

Lawsuits against cops usually incorporate two types of legal liability:

Federal Civil Rights Liability (42 U.S.C. §1983)

State Tort theories of recovery

Legal Liability - §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

42 U.S.C. §1983 (enacted in 1871)

Legal Liability - §1983

Color of Law

- **Violation made possible only because the wrongdoer is clothed with the authority of state law. West v. Atkins, 487 U.S. 42 (1988).**

- ***Badge of Authority*. Not all on-duty actions by public employees are taken under color of law. Schaffer v. Salt Lake City, 814 F.3d 1151 (10th Cir. 2016).**

Legal Liability - §1983

Individual (personal) liability for Officer's but only for their own actions (or inactions).

Agency (City) Liability:

- ***Respondeat Superior*** **does not apply.**

- **Agency is only liable if it *caused* the violation by way of a *Policy*, *Practice* or *Custom*. Monell v. NYC Pub. Dept. of Social Services, 436 U.S. 658 (1978).**

Legal Liability - §1983

Causation vs. Participation

- **Officers who act in reliance on what proves to be the flawed conclusions of a fellow Officer are shielded from liability. Felders ex rel. Smedley v. Malcom, 755 F.3d 870 (10th Cir. 2014).**

- **Plaintiff must identify what each person did that violated their rights. Good as to one is not good as to all. Matthew v. Bergdorf, 889 F.3d 1136 (10th Cir. 2018).**

Legal Liability - §1983

Individual Policymaker Liability

- **Policymaker can only be personally liable if they 1) issued or continued a policy, 2) that *caused* the violation and 3) they *knew* that the harm would occur. Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010).**
- **Must be an actual policymaker**
  - **Unilateral authority to change policies vs. being constrained by policies issued by others. Scope of actual authority is key.**
- **Creates Monell liability for the employing entity.**

Legal Liability - §1983

Individual Supervisor Liability:

Personal participation is an essential allegation in a 1983 claim. A supervisor cannot be held vicariously liable for the constitutional violations of subordinates. Direct participation, however, is not necessary. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.

Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019)

Legal Liability - §1983

- **Why §1983 Claims are so Dangerous:**
  - **Individual Liability**
  - **Uncapped Liability**
    - **Punitive Damages**
    - **Attorney Fees**
  - **2 Year Statute of Limitations**

Legal Liability - §1983

Qualified Immunity – Plaintiff must prove:

- **Constitutional Right Exists, and**
- **Constitutional Right was Clearly Established**
  - **Based on *their* facts**
- **Protects individuals, not Entities/Agencies.**
- **Video can eliminate fact disputes. Scott v. Harris, 550 U.S. 372 (2007).**

Legal Liability - §1983

Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. … We have repeatedly told courts not to define clearly established law at too high a level of generality. … It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted. … Such specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.

Bond v. City of Tahlequah, _ S.Ct. _ (October 18, 2021)

Legal Liability - §1983

Oklahoma Governmental Tort Claims Act:

- **Public employer has a duty to defend and indemnify employees sued in a §1983 claim if they acted within the scope of their employment.** 51 O.S. §162.
- **Scope of employment = good faith.** 51 O.S. §152(12).
  - **"It is unlikely (though theoretically possible) that a plaintiff could overcome these [Qualified Immunity] hurdles where an officer acted in good faith." Kingsley v. Hendrickson, 576 U.S. 389 (2015).**
- **OMAG's coverage is based on the GTCA protection.**

Big Picture

Why does this matter

What can you do to protect your agency

- ***CULTURE eats STATEGY for Breakfast***
- **Problems Lying In Wait**

A Jury, but not of *your* peers…

Topics We Will Cover

- **4th Amendment**
  - **Use of Force**
  - **Detainment and Arrests**
  - **Searches**
  - **Traffic Stops**
- **Liability for Emergency Vehicle Operations**
- **1st Amendment Retaliatory Arrests**

Use of Force

- **Tennessee v. Garner**, 471 U.S. (1985)

  - **Cannot use deadly force unless the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officers or others.**

Use of Force

Graham v. Connor, 490 U.S. 386 (1989)

- **Objective Reasonableness test**
  1. **Severity of the Crime**
  2. **Immediate Threat to Safety**
  3. **Actively Resisting or Evading Arrest**

Use of Force

Graham v. Connor, 490 U.S. 386 (1989)

- **Objective Reasonableness test**

"Must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … Reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."

Use of Force

Est. of Larsen v. Murr, 511 F.3d 1255 (10th Cir. 2008)

- **Graham #2 (degree of threat) is the most important factor in deadly force cases. Evaluated look at:**

  1. **Ofc. Order suspect to drop weapon; compliance**
  2. **Hostile motions with weapon toward officer**
  3. **Relative distance**
  4. **Manifest intent of suspect**

Use of Force

4th Amendment only applies to intentional UOF.

- **Accidentally ramming a car is not EF. Lindsey v. Hyler, 918 F.3d 1109 (10th Cir. 2019).**
- **Liability turns on whether you hit your intended target, not whether the intended target was the right person. *Compare* Childress v. City of Arapaho, 210 F.3d 1154 (10th Cir. 2000) & Carabajal v. City of Cheyenne, 847 F.3d 1203 (10th Cir. 2017) with Huff v. Reeves, 996 F.3d 1082 (10th Cir. 2021).**

Use of Force

Harte v. Bd. of Comm'rs of Cty. of Johnson, 864 F.3d 1154 (10th Cir. 2017) & Est. of Redd v. Love, 848 F.3d 899 (10th Cir. 2017)

- **Excessive *Show* of Force (without physical contact) implicates the 4th Amendment.**
- **Elevated show of force is only reasonable if the Officers had a factual basis believe a threat existed.**
- **Drugs, alone, does not mean violence. Harte.**
- **Prior violent interactions with someone who may be at the property during the service is sufficient. Redd.**

Use of Force

Non-Compliant Suspects:

Elevated force (e.g. OC or Taser) can only be used on a passively non-compliant, non-threatening suspect after warnings have been given so long as there is a safety concern, such as passing motorists. ***Compare*** **Mecham v. Frazier, 500 F.3d 1200 (10th Cir. 2007) & Davis v. Clifford, 825 F.3d 1131 (10th Cir. 2016)**

Use of Force

Non-Compliant Suspects:

Verbal warning should be given to non-threatening, non-complaint subjects before significant force is used. Cavanaugh v. Woods Cross City, 625 F.3d 661 (10th Cir. 2010); Casey v. City of Federal Heights, 509 F.3d 1278 (10th Cir. 2010); Lee v. Tucker, 904 F.3d 1145 (10th Cir. 2018).

You must give the suspect time to process and respond to the warning! Emmett v. Armstrong, 973 F.3d 1127 (10th Cir. 2020).

Use of Force

Non-Compliant Suspects:

Beware inconsistent commands! Where one Officer yells "get on the ground" and another yells "put your hands up" the subsequent use of elevated force (beanbag) can be deemed to be excessive force. Myers v. Brewer, 773 Fed.Appx. 1032 (10th Cir. 2019).

Use of Force

Once the threat is gone:

- **Once suspect is subdued, continued application of body weight to the torse of a prone suspect is excessive force. Weigel v. Broad, 544 F.3d 1143 (10th Cir. 2008).**

Use of Force

Once the threat is gone:

- **UOF often involves "rapidly evolving" facts. When the facts justified the use of elevated/deadly force but then change and the threat is reduced/gone, Officers must respond *reasonably* to the change in facts.**

- **If there is a question about whether the Officers had a reasonable amount of time to process and adapt to the changing facts / reduction in the threat, a jury must decide if they responded reasonably. McCoy v. Meyers, 887 F.3d 1034 (10th Cir. 2018).**

Use of Force

Once the threat is gone:

"[T]he district court failed to consider that allowance needs to be made for the fact that the officer must make a split-second decision. The Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately. … Perhaps a suspect is just pulling out a weapon to discard it rather than to fire it. But waiting to find out what the suspect planned to do with the weapon could be suicidal. … Viewing the video, no jury could doubt that Dodge made his decision to fire before he could have realized that Valverde was surrendering." **Est. of Valverde v. Dodge, 967 F.3d 1049 (10th Cir. 2020).**

Use of Force

Time = a Precious Gift

Bad Tactics = Bad Outcomes

Good Tactics = Good Outcomes

Use of Force

Evaluation of objective reasonableness under Graham is based on the facts in the moment force was used.

In the 10th Circuit, Courts must also evaluate where the Officers reckless and deliberate conduct created the need to use elevated force. Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997).

- **Allen allows an objectively reasonable UOF (under Graham) to be deemed to be excessive force.**
- **Application: Tactics (or lack thereof) could be used to create an Excessive Force claim.**

Use of Force

Reckless provocation doctrine under Allen involves situations where Officers had time, distance and/or cover.

Pauly v. White, 874 F.3d 1197 (10th Cir. 2017): Reckless approach to a home allowed the Court to find EF when Officers shot and killed a subject who was pointing a gun in their direction. Granted Q.I. only after a *Supreme bench slap* of the 10th Cir.

Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019): Officer recklessly ran 100 yards towards suspect armed with a bat resulting in a finding of EF when the suspect turned and came at the Officer with the bat. Denied Q.I. based on Allen.

Use of Force

Clark v. Colbert, 895 F.3d 1258 (10th Cir. 2018)

- **Taking advantage of time / distance / cover and developing a plan can help you avoid reckless provocation.**

- **"No reasonable juror could find the officers' use of pepperballs to be a reckless provocation. At best, the officers wrongly predicted how Clark would react to the pepperballs. To say they should have known the plan would create a need to shoot Clark is to indulge in the very sort of hindsight revision the law forbids."**

Use of Force

Bond v. City of Tahlequah, 981 F.3d 808 (10th Cir. 2020) *reversed* City of Tahlequah v. Bond, _ S.Ct. _ (October 18, 2021)

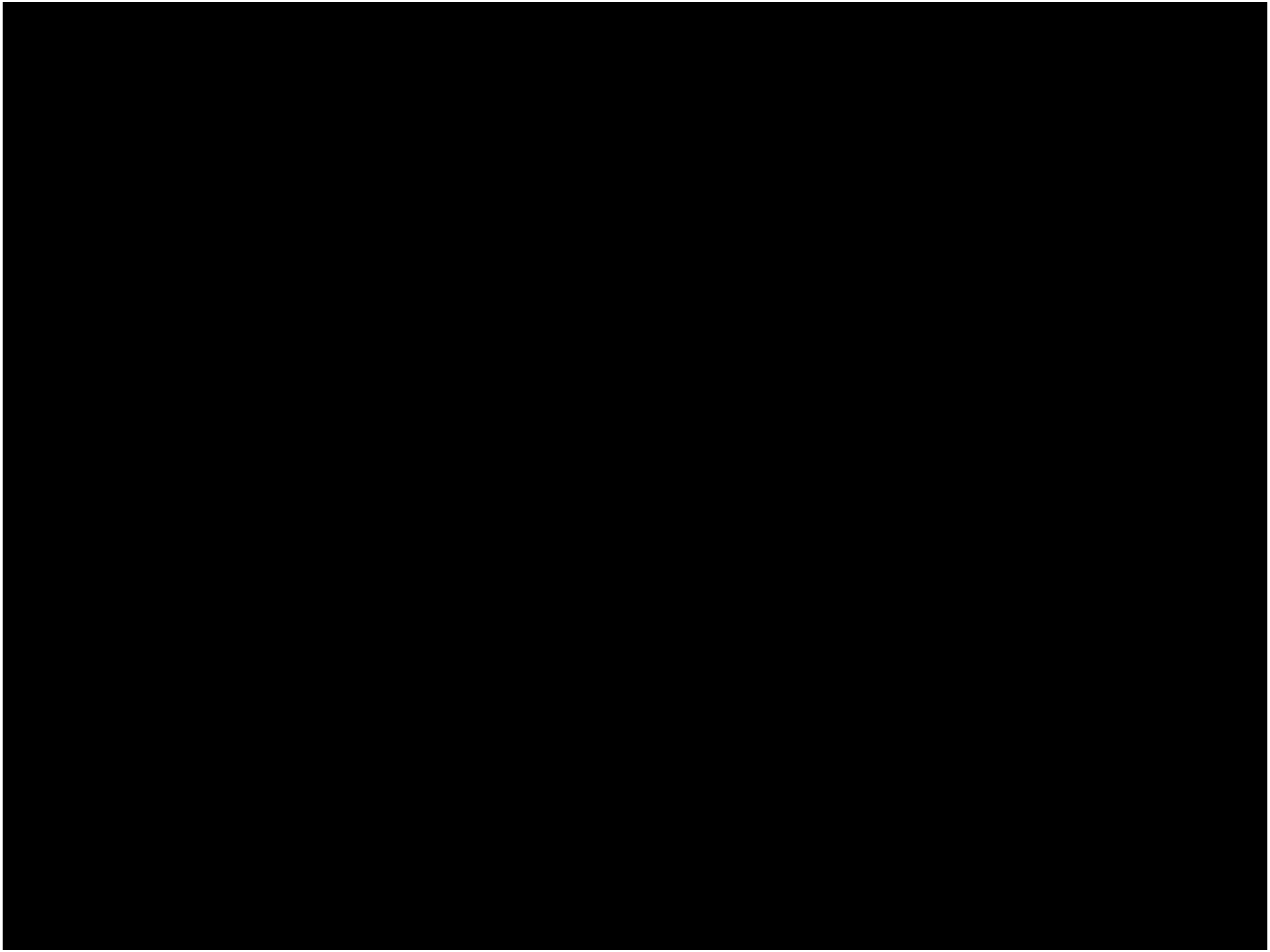
- **10th Cir. denied Q.I. finding reckless provocation when Officers attempted an unlawful Terry pat of an unarmed subject and then cornered him in *someone else's* garage, leading him to grab a weapon. *C/f* Co. of Los Angeles v. Mendez, 137 S.Ct. 1539 (2017).**

- ***"The Tenth Circuit contravened those settled [Q.I.] principles here. Not one of the decisions relied upon by the Court … comes close to establishing that the officers' conduct was unlawful. … Suffice it to say, a reasonable officer could miss the connection between [the cases cited by the 10th Circuit] and this one."***

Use of Force

Bond v. City of Tahlequah, 981 F.3d 808 (10th Cir. 2020) *reversed* City of Tahlequah v. Bond, _ S.Ct. _ (October 18, 2021)

- ***"We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law."***



False Arrest

False Arrest is an arrest without probable cause.

Guilt or innocence is irrelevant

A No Contest / *Nolo Contendre* plea is an admission of probable cause. Delong v. Oklahoma, 1998 OK CIV APP 32

False Arrest

Civil Rights: Liability where PC is lacking

- **PC is evaluated objectively, without regard to subjective Officer motivations. Manzanares v. Higdon, 575 F.3d 1135 (10th Cir. 2009).**

- **No PC for the crime you arrested them for? Question is whether an objectively reasonable Officer would have understood there was PC for *any* arrestable offense. Apodaca v. City of Albuquerque, 443 F.3d 1286 (10th Cir. 2006).**

False Arrest

Civil Rights: Liability where PC is lacking

- **Officer who makes a good faith mistake of fact or law does not violate the 4th Amendment. Illinois v. Rodriguez, 497 U.S. 177 (1990) & Heien v. North Carolina, 574 U.S. 54 (2014)**
- **No Charges filed? Doesn't matter. 4th Amendment not violated if PC even arguably existed. Culver v. Armstrong, 832 F.3d 1213 (10th Cir. 2016)**

False Arrest

Civil Rights: Liability where PC is lacking

- **Officers not required to rule out innocent explanations for behavior. Rife v. OK DPS, 854 F.3d 637 (10th Cir. 2017)**

- **PC evaluated based on the totality of the circumstances, the whole picture not just by viewing each fact in isolation. District of Columbia v. Wesby, 138 S.Ct. 577 (2018)**

False Arrest

Maresca v. Bernalillo Co., 804 F.3d 1301 (10th Cir. 2015)

- **False Arrest & EF are separate claims**
  - **In a false arrest, there will be damages resulting from any degree of restraint.**
  - **Different from saying you used too much force in arresting me. In the EF context, PC is presumed.**

Co. of Los Angeles v. Mendez, 137 S.Ct. 1539 (2017)**: objectively reasonable UOF does not become unreasonable because of a separate 4th A violation.**

Seizure: Person

- **Terry v. Ohio, 392 U.S. 1 (1968): exception to warrant requirement for seizures where officers have reasonable suspicion of criminal activity to detain (effect a seizure) based on less than probable cause.**
- **Test:**
  - **Justified at its inception**
  - **Officer's actions reasonably related in scope to the circumstances which justified the seizure.**

Seizure: Person

- **Florida v. Royer**, 460 U.S. 491 (1983)
  - **Consensual encounters are not seizures.**
  - **"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."**

Seizure: Person

- **Seizure effected by show of show of authority or by use of physical force. A seizure occurs by a show of authority if 1) there is a show of authority & 2) the citizen submits. US v. Salazar, 609 F.3d 1059 (10th Cir. 2010)**
- **A show of authority is not a seizure without actual submission. Brendlin v. California, 551 U.S. 249, 254 (2007)**
- **Shooting and hitting a suspect is a seizure even if there is no submission (i.e. they get away). Torres v. Madrid, 141 S.Ct. 989 (2021).**

Seizure: Person

- **Objective test for show of authority: would a reasonable person have felt free to leave or terminate the encounter. Examples:**
  - **Telling a citizen to "stop". U.S. v. Hernandez, 847 F.3d 1257 (10th Cir. 2017).**
  - **Pulling up with red/blues on, U.S. v. Gaines, 918 F.3d 793 (10th Cir. 2019), but not take down lights, U.S. v. Tafuna, 5 F.4th 1197 (10th Cir. 2021).**
  - **Failing to return ID during consensual encounter. U.S. v. Latorre, 893 F.3d 744 (10th Cir. 2018).**

Seizure: Person

- **Cannot detain a person just to identify them. Delaware v. Prouse, 440 U. S. 648 (1979) & Brown v. Texas, 443 U.S. 47 (1979)**

- **No 4th (or 5th) A violation to ask ask for ID/DL when Officer has reasonable suspicion to detain. *See* Hiibel v. Sixth Judicial District Court, 542 U.S. 177 (2004):**

  - **"The Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions."**

Seizure: Person

- **Cannot detain a person just to identify them. Delaware v. Prouse, 440 U. S. 648 (1979) & Brown v. Texas, 443 U.S. 47 (1979)**

- **No 4th (or 5th) A violation to ask ask for ID/DL when Officer has reasonable suspicion to detain. *See* Hiibel v. Sixth Judicial District Court, 542 U.S. 177 (2004):**

  - **Oklahoma is not a Stop & ID State.**

  - **Obstruction is a fertile ground for False Arrest claims.**

Seizure: Car on the Road

- **To stop a vehicle, officer must have reasonable suspicion to believe:**
  - **Traffic or equipment violation. U.S. v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995) (en banc).**
  - **Other criminal activity is afoot. U.S. v. Whitley, 680 F.3d 1227 (10th Cir. 2012)**
- **Kansas v. Glover, 140 S.Ct. 108 (2020): Reasonable suspicion to believe that the registered owner of a vehicle is the one who is operating it absent other information dispelling this assumption. If the owner is suspended or revoked, the car can be stopped.**

Seizure: Car on the Road

- **Chambers v. Maroney, 399 U.S. 42 (1970)**
  - **Vehicle can be impounded from a public roadway if there is probable cause to believe the vehicle contains contraband or evidence of criminal activity.**
  - **Purpose of the seizure is to allow Officers to obtain a warrant. Practically, this would only apply if we were unable to effect a Carroll P.C. search.**

Seizure: Car on the Road

- **Colorado v. Bertine**, 479 U.S. 367 (1987)
  - **Impounding a vehicle from a public roadway is a reasonable community caretaking function. The Court allows for "the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."**
  - **We are impounding the car because it is on the roadway and could obstruct traffic or be a hazard. We are not impounding the car so that we can search for evidence.**

Seizure: Car on the Road

- **U.S. v. Sanders, 796 F.3d 1241 (10th Cir. 2015)**
  - **Community caretaking impounds must be justified by a reasonable, non-pretextual rationale. Factors to consider:**
    1. **Property owner consulted (if on private property)?**
    2. **Any alternative to impoundment like a permissive driver who is capable of driving/moving the vehicle?**
    3. **Vehicle implicated in a crime? &**
    4. **Consent of vehicle owner/driver?**

Seizure: Car on Private Property

- **U.S. v. Sanders, 796 F.3d 1241 (10th Cir. 2015)**
  - **When the car is on private property, community caretaking role is minimized.**
  - **In addition to the requirement for a reasonable, non-pretextual rationale (and the 4 factors), a community caretaking impound from private property violates the 4th Amendment if it is not authorized by a standardized policy adopted by the agency.**

Seizure: Car on Private Property

- **Impoundment from parking lot ok due to legitimate concerns about vandalism. U.S. v. Johnson, 734 F.2d 503 (10th Cir. 1984).**
- **Impoundment from parking lot not justified because the driver/arrestee's friend was with him, had a license, and could drive the vehicle away. U.S. v. Pappas, 735 F.2d 1232 (10th Cir. 1984).**
- **Impoundment of a vehicle parked in a way that obstructs the flow of traffic in/out of the private property justified. U.S. v. Trujillo, 993 F.3d 859 (10th Cir. 2021).**

Seizure: Car on Private Property

- **Failing to consult the private property owner invalidates the impound. U.S. v. Venezia, 995 F.3d 1170 (10th Cir. 2021). Question is whether we actually consulted the owner, not whether we correctly inferred their preference. U.S. v. Woodard, 5 F.4th 1148 (10th Cir. 2021).**

- **Impounding a vehicle from their own private property is an unlawful community caretaking impound. This is true even where there might be justifications like a concern for vandalism since the car is at their own residence. U.S. v. Chavez, 985 F.3d 1234 (10th Cir. 2021).**

Seizure: Home

- **Illinois v. McArthur**, 531 U.S. 326 (2001)
  - **A seizure occurs when there is some meaningful interference with a possessory interest in property. Preventing a person from entering their home is a seizure of the home.**
  - **Seizure of a home is reasonable if Officer's have P.C. to believe the home contains evidence of a serious crime that might destroyed. The seizure is only reasonable if you are working diligently obtain a search warrant.**

Seizure: Home

- **US v. Shrum**, 908 F.3d 1219 (10th Cir. 2018):
  - **Cannot prevent a person from going into their home with no P.C. to believe there is evidence in the home and no effort being made to secure a warrant.**
  - **Police engaged in a *"fishing expedition to see what sort and how big of fish the police might catch."***
  - ***"We have news for the Government. No such thing as a 'crime scene exception,' let alone an 'unexplained death scene exception,' to the Fourth Amendment exists."***

Searches

- **Pre-1967: little case law with a scattershot approach to evaluating when a search occurs.**
- **Katz v. U.S., 389 U.S. 400 (1967): 4th Amendment "protects people, not places". Test is whether the government violated a person's "reasonable expectation of privacy" to gain information.**
- **U.S. v Jones, 560 U.S. 400 (2012): Katz did not replace the *historical test*: whether the Government physically trespassed/intruded on persons, houses, papers or effects to obtain information.**

Searches: Home

- **4th Amendment protections are greatest in the home. Cars and persons subject to lesser protections.**

- **Florida v. Jardines, 569 U.S. 1 (2013)**
  - **"[W]hen it comes to the Fourth Amendment, the home is first among equals."**
  - **Curtilage – area immediately surrounding and associated with the home – is legally considered part of the home for 4th Amendment purposes.**
  - **4th Amendment prohibits bringing drug detection K9 up to the front door (i.e. within the curtilage).**

Searches: Home

- **U.S. v. Carloss, 818 F.3d 988 (10th Cir. 2016)**
  - **Jardines was about K9s not Cops. It recognized that there is an implied license for anyone, including Officers, to knock on the front door, including entering the curtilage to do so.**
  - **The implied license to enter the curtilage to knock on the door *could* be revoked by the homeowner.**
  - **In this case, the *numerous* "No Trespassing" signs in yard and on the front door would not have conveyed a message to the public that the implied license to enter the curtilage to knock on the front door had been revoked.**

Searches: Home

- **Collins v. Virginia, 138 S.Ct. 1663 (2018)**
  - **Automobile exception does not apply to a vehicle that was parked within the curtilage of the home.**
  - **4th Amendment violated when officers entered the curtilage in a location that was not on the path to the front door to lift a tarp covering a motorcycle to get a tag #.**
  - **Officers physically intruded into the home (curtilage) for the purpose of obtaining information (tag #).**

Searches: Home

- **U.S. v. Suggs, 998 F.3d 1125 (10th Cir. 2021)**
  - **Plain view exception only applies if the Officer was lawfully present in a location when they observed an item in plain view.**
  - **4th Amendment violated when and Officer was within the curtilage and observed firearms inside a vehicle that was also within the curtilage. Search warrant obtained based on the observation was invalidated.**
  - **Observation was made while the Officer was serving a search warrant at the home. That initial warrant was invalidated, making the Officer's presence unlawful.**

Searches: Home

- **Soza v. Demsich**, 13 F.4th 1094 (10th Cir. 2021)
  - **Standards for searches and seizures can be different.**
  - **Fresh/hot pursuit allows Officers to enter a home so long as they started the arrest attempt outside the home.**
  - **Officers lawfully entered the home to complete an arrest where the attempt to arrest commenced while the suspect was outside the home but within the curtilage.**
  - **Holding was based on U.S. v. Santana, 427 U.S. 38 (1976) which pre-dated Jardines. 10th Cir. : Only the Supreme Court can decide if Jardines implicitly overruled Santana.**

Searches: Home

- **Lange v. California, 141 S.Ct. 2011 (2021)**
  - **Santana provides a *per se* authorization to enter a home under fresh/hot pursuit if the arrest is for a felony.**
  - **No *per se* rule authorizing entry in pursuit of misdemeanants.**
  - **Entry is only justified if there is an exigency, such as a threat to others, destruction of evidence, or to prevent the suspects escape from home. Exigencies relate to practicalities and lack of time to obtain a warrant.**

Searches: Home

- **Caniglia v. Strom**, 141 S.Ct. 1596 (2021)
  - **No community caretaking exception to the warrant requirement, at least as to the home. Entry and/or search must be justified by traditional exigent circumstances (or consent).**
  - **Consent: must be freely and voluntarily given. Court didn't reach this issue, but suggested that lying to obtain consent could make the consent involuntary**

Searches: Home

Protective Sweeps

- **Lawful in 2 situations:**
  1. **Incident to arrest, but only areas (including closets) near the arrest to from which an attack to be launched.**
  2. **Elsewhere in the house if there are specific, articulable facts supporting a reasonable belief that someone dangerous remains in the house.**

Maryland v. Buie, 494 U.S. 325 (1990)

Searches: Home

Protective Sweeps

- **Not a full search. Quick, cursory inspection of the premises, permitted when police officers reasonably believe, based on specific and articulable facts, that the area to be swept harbors an individual posing danger to those on the arrest scene. US v. Soria, 959 F.2d 855 (10th Cir. 1992).**

- **It's about what you know, not what you don't know. Buie second exception has to be based on actual knowledge. You can't search because you don't know if someone dangerous might be in the house. US v. Nelson, 868 F.3d 885 (10th Cir. 2017).**

Searches: Home

- **Arizona v. Hick**, 480 U.S. 321 (1987)
  - **Exigent Circumstances authorizes Officers to enter a home if they have a factual basis to believe someone is in imminent danger.**
  - **Once in the home, Officers may engage in a search that is limited to the exigency which justified the entry.**
  - **Looking for bad guys, not serial numbers. Moving or picking up a stereo to get its SN violated the 4th Amendment as it was unrelated to the exigency.**

Searches: Home

Consent

- **If any tenant is present, their objection controls over the consent of a co-tenant. Georgia v. Randolph, 547 U.S. 103 (2006)**
- **If the objecting tenant is removed after an arrest, the co-tenant can consent to a search. Fernandez v. California, 571 U.S. 292 (2014)**

Searches: Home

Dissipation of Probable Cause

- **Evaluation of P.C. (and reasonable suspicion) is ongoing through an encounter. New information can bolster or dissipate probable cause (or reasonable suspicion).**
- **Information obtained while the warrant is being signed can dissipate P.C., rendering the warrant (once signed) invalid. U.S. v. Dalton, 918 F.3d 1117 (10th Cir. 2019).**
- **Information obtained while serving a warrant can dissipate P.C., rendering the warrant invalid at that point. Harte.**
- **Would a Judge still sign the warrant based on the new info?**

Searches: Person

- **Terry v. Ohio, 392 U.S. 1 (1968): pat frisk is a search, but justified when reasonable suspicion exists to believe suspect may be armed and dangerous. Limited by the exigency (officer safety), so limited to searching for a weapon.**

Searches: Person

Search Incident to Arrest

- **A *contemporaneous* search authorized to seize weapons or other threats to officers and to prevent the destruction of evidence of the crime. Chimel v. California, 395 U.S. 752 (1969)**
- **Can search 1) arrestee's person and 2) places within his/her immediate control at the time of the arrest. U.S. v. Edward, 632 F.3d 633 (10th Cir. 2001)**
- **Can "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Arizona v. Gant, 556 U.S. 332 (2009)**

Searches: Person

Search Incident to Arrest

- **Exigency authorizes and limits our ability to conduct a search of areas within the arrestee's immediate control.**
- **If a bag/container is no longer in the arrestee's immediate control and they cannot gain access to it, the exigency authorizing a search incident to arrest is gone.**
- **Officers unlawfully searched an arrestee's purse incident to arrest where the search occurred when the person was in cuffs being walked away from the purse because they could not access the purse to destroy evidence or gain access to a weapon. U.S. v. Knapp, 917 F.3d 1161 (10th Cir. 2019).**

Searches: Person

Search Incident to Arrest

- **The exigency authorizing the search has to be present to authorize the search. As such, Officers can seize a cell phone on an arrestee's person, but cannot search its digital content since any concern about destruction of evidence can be mitigated. There is no exigency which makes obtain a warrant impractical. Riley v. California, 134 S.Ct. 2473 (2014).**

Searches: Person

Abandoned Property

- **Property abandoned by a suspect in a public place can be searched without violating the 4th Amendment if the abandonment was voluntary and there is no objective basis to believe the suspect retained an expectation of privacy in the object. U.S. v. Ruiz, 664 F.3d 833 (10th Cir. 2012).**

- **When a person voluntarily abandons property in a public place, it doesn't matter if they intended to come back to get it – they gave up any objectively reasonable expectation of privacy after discarding it in a public place while running from Officers. U.S. v. Sanchez, 13 F.4th 1063 (10th Cir. 2021).**

Searches: Data

- **Carpenter v. U.S., 138 S.Ct. 2206 (2018)**
  - **Justice Alito's *minority* opinion in Jones found that the government violated a Katz privacy interest by continuous monitoring of a vehicle via a GPS for 3 weeks. Justice Sotomayor signed onto both the majority (Scalia's) opinion and Alito's minority opinion.**
  - **Relying on Alito's minority opinion from Jones, the Court concluded that accessing historical Cell Site Location Information (CSLI) showing 7 days of a citizen's location was a search because, unlike GPS data for a car, CSLI shows *everywhere* the person (not car) went. 3rd Party doctrine did not apply to CSLI. A warrant was required.**

Law Relating to Traffic Stops

U.S. v. Madrid, 713 F.3d 1251 (10th Cir. 2013)

- **A traffic stop is a seizure under the 4th Amendment, but it is in the nature of an investigative detention rather than an arrest. As such, only reasonable suspicion is required to effect a stop.**

Soza v. Demsich, 13 F.4th 1094 (10th Cir. 2021)

- **forceful measures (handcuffs and guns) normally transform a detention into an arrest unless Officers have a factual basis to believe such measures are reasonably necessary for the safety of officers or bystanders.**

Law Relating to Traffic Stops

- **Warrant not required to search auto when there is P.C. to believe that there is contraband or evidence in the vehicle. Carroll v. U.S., 267 U.S. 132 (1925)**

- **PC car search limited to searching for the contraband you have PC to believe is there. Limits where you can search and what you can inspect (credit cards vs. weed). U.S. v. Saulsberry, 878 F.3d 946 (10th Cir. 2017).**

Law Relating to Traffic Stops

- **Rodriguez v. U.S., 575 U.S. 348 (2015): cannot extend a traffic stop to wait for a K9 without reasonable suspicion of other criminal activity.**

- **U.S. v. Pettit, 938 F.3d 1374 (10th Cir. 2015) & U.S. v. Moore, 795 F.3d 1224 (10th Cir 2015): delay based on reasonable suspicion is justified**

- **Odd but plausible travel plans are not enough, while contradictory travel plans may establish reasonable suspicion. U.S. v. Lopez, 849 F.3d 921 (10th Cir. 2017) & U.S. v. Mendoza, 817 F.3d 695 (10th Cir. 2016).**

Law Relating to Traffic Stops

- **Timing matters: asking about travel plans or checking a VIN are fine, unless you do so after you have already prepared the ticket. U.S. v. Gomes-Arzate, 981 F.3d 832 (10th Cir. 2020).**

- **The 10th Circuit focuses on the mission of a traffic stop. Delay for reasons related to the stop are reasonable while delays unrelated to the mission of the stop (and not based on independent reasonable suspicion) are unreasonable and delay the completion of the mission of the stop.**

Law Relating to Traffic Stops

Pennsylvania v. Mimms, 434 U.S. 106 (1977): **Driver can be ordered to exit the vehicle on a routine traffic stop without offending the 4th Amendment.**

Maryland v. Wilson, 519 U.S. 408 (1997): **Mimms applies to passengers.**

Arizona v. Johnson, 555 U.S. 323 (2009): **Can Terry pat passenger with suspicion they are armed and dangerous.**

U.S. v. Guerrero-Espinoza, 462 F.3d 1302 (10th Cir. 2006): **if stop turns into a consensual contact as to the driver, you need to let the passenger know they are free to leave.**

Law Relating to Traffic Stops

Byrd v. U.S., 138 S.Ct. 1518 (2018)

- **Driver of a rental car had a reasonable expectation of privacy in a vehicle even though they were not authorized to be driving the vehicle under the rental agreement because they had the renter's permission.**