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Police Use of Non-Deadly Force
A Survey of the Circuits

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INTRODUCTION

Use of Force Generally

Under federal law, the amount of force used by law enforcement officers is governed generally by the principles embodied in the Fourth Amendment to the United States Constitution. The United States Supreme Court in *Graham v. Conner* [1] enunciated the standard that controls use of force cases today.[2] The general rule is that all force used by a law enforcement official against a citizen up to and during the course of an arrest must be based on an objective reasonableness standard. In other words, a police officer is entitled to use that amount of force which is reasonably necessary to effectuate a lawful arrest. This standard applies to the force used during an investigatory stop, an arrest, or other "seizure" of a free person. Thus, a use of force claim brought by **a free citizen** is properly asserted under the Fourth Amendment and may be brought against a municipality, a police officer, or other state actor under 42 U.S.C. § 1983.

The due process clauses of the Fifth and Fourteenth Amendments are not applicable to a plaintiff's false arrest and excessive force claim in the context of a seizure or other investigatory stop.[3] In *Graham*, the Supreme Court rejected the test known as "shocks the conscience" as delineated in *Johnson v. Glick*,[4] which is applicable to Fifth and Fourteenth Amendment claims. The Court concluded that when the claim involves a law enforcement officer's use of excessive force, whether deadly force or non-deadly force, during the course of an arrest,

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[1] 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 243 (1989).

[2] *See Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985), where the United States Supreme Court applied the Fourth Amendment to the use of deadly force where the police shot at a fleeing felon. The Court, applying the objective reasonableness standard, concluded that deadly force could be used if it was necessary to prevent the escape of a fleeing felon suspect and the police officer had probable cause to believe that the suspect posed a significant threat of death or serious injury to the officer or a third party.

[3] *Graham*, 490 U.S. at 395.

[4] 481 F.2d 1028 (2nd Cir. 1973).

investigatory stop, or other form of seizure of a free person, such claim is analyzed under the Fourth Amendment and the reasonableness standard. Claims relating to conduct **after an arrest** is made are generally governed by the Fourteenth Amendment.

Further, the Eighth Amendment is not applicable to claims filed by a free citizen for actions up to and during an arrest. The Eighth Amendment, which embodies the cruel and unusual punishment clause, is applicable to a person after he or she is convicted of a crime and requires that the plaintiff establish that the prison officials used force in a "maliciously and sadistically" manner.[5]

Recently in *Scott v. Harris*,[6] the United States Supreme Court discussed the application of the use of force standard set forth in *Tennessee v. Garner* and made it clear that there are two types of force: **force that is reasonable and force that is unreasonable.** The case involved a high speed chase which resulted in the serious physical injury to the suspect who was operating the car the police were chasing. The question before the Court was whether a deadly force analysis required anything more or less than an analysis of other uses of force. The Court in *Harris* noted that *Garner* did not "establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' " Instead, the *Harris* Court stated that "*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test . . . to the use of a particular type of force in a particular situation." [7] Thus, the Court concluded that in determining the ultimate question, all that mattered was whether the officer's use of force was reasonable. While this case seems to provide needed guidance for law enforcement officials faced with the circumstances of an escaping suspect and the decision to engage in a high-speed chase, the decision remains fact specific and does not set forth a hard and fast test.

Qualified Immunity and the Use of Force

In 1982, the United States Supreme Court set forth a general rule to protect individual public officials against claims asserting federal constitutional violations under the doctrine known as "qualified immunity." Most public officials are entitled to "qualified immunity," which protects them from financial liability and from the burdens associated with litigation, if the conduct in which they allegedly engaged "does not violate…clearly established…constitutional rights of which a reasonable person would have known." [8] Thus, this protection is "an immunity from suit rather than a mere defense to liability…." [9]

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[5] *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986).
[6] 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).
[7] *Scott*, 127 S. Ct. at 1177.
[8] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).
[9] *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

Under the defense of qualified immunity, an official may have engaged in an act that violates a constitutional right, but yet still be immune from liability where the official has made a reasonable mistake about the lawfulness of the conduct. The policy objectives behind protecting public officials charged with civil rights violations from unlimited exposure to litigation concern issues of fairness and deterrence for individual defendants and the cost to society as a whole: "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." [10] Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[11] In focusing on these concerns, the Court in *Harlow* concluded that public officials may be held liable only where the conduct is such that a reasonable official would have understood that his conduct violated clearly established constitutional rights.[12]

In developing the standard for qualified immunity, in 2001 the Supreme Court in *Saucier v. Katz* [13] attempted to provide clear guidance to the lower courts on how to articulate the qualified immunity test as follows:

> A court required to rule upon the qualified immunity issue must consider, then, this the threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? . . .
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> * * *
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> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law

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[10] *Harlow*, 457 U.S. at 814.

[11] *Id*, (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (CA2 1949), *cert. denied*, 339 U.S. 949 (1950).

[12] *Id*. at 818.

[13] 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The Supreme Court granted certiorari in the Ninth Circuit case of *Katz v. United States*, 194 F.3d 962 (9th Cir. 2000), and clarified the test for qualified immunity stating that it should be decided at the earliest possible stage. The Court determined that the Ninth Circuit's analysis of qualified immunity did not allow for the fact that an officer might make a reasonable mistake as to whether the conduct violated the Fourth Amendment. The Court noted that there is a standard of reasonableness for qualified immunity which is distinct from the standard of reasonableness embodied in the Fourth Amendment. Thus, the Supreme Court overruled the Ninth Circuit cases treating the standard as the same and holding that in an excessive force case, the first question is whether there was a constitutional violation, and if so, the second question is whether there is immunity based on a determination of whether the law was clearly established at the time. *Saucier*, 533 U.S. at 212-213.

> and to allow officers to avoid the burden of trial if qualified immunity is applicable.[14]

The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that her conduct was unlawful in the situation she confronted. Thus, there must be a determination on the facts that the public official violated a particular constitutional right. Only then does the court determine whether the conduct was objectively reasonable in light of the then-clearly established constitutional principles.

The concept of qualified immunity has been sometimes problematic for the courts to address and the two-part question has often merged into one question, with the court skipping the essential threshold inquiry - - which is whether or not a constitutional violation has even occurred.

Recently, the Supreme Court accepted certiorari in *Callahan v. Millard County*,[15] and has directed the parties that, in addition to the questions presented by the petition, to address a specific question of whether the Court's decision in *Saucier v. Katz* should be overruled.

In the *Callahan* case before the federal district court, the appellant arrestee had filed a civil rights action against various municipal entities and law enforcement officers arising out of a police raid of his home. He claimed that his Fourth Amendment rights were violated during the raid. The lower court granted summary judgment in favor of the cities, counties, and officers and held that the officers were entitled to qualified immunity. The issue before the Tenth Circuit concerned whether the Fourth Amendment allowed an undercover officer to summon back-up officers within a home after the officer had been invited into the home with consent, where the consent was given by an informant within the home. While the substantive issue concerning the "consent-once-removed" doctrine is at the heart of this case, the Supreme Court clearly has decided to take another look at the qualified immunity test it set forth in *Saucier*. It remains to be seen what the Court will do with the qualified immunity test as it now exists.

APPLICATION OF THE USE OF FORCE STANDARD
A CIRCUIT SURVEY

First Circuit
(Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)

In ***Berube v. Conley***,[16] the Court of Appeals for the First Circuit reversed the district court's denial of summary judgment to three officers. In Lewiston,

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[14] *Id*. at 201.
[15] 494 F.3d 891 (10th Cir. 2007), *cert. granted*, *Pearson v. Callahan*, 2008 U.S. LEXIS 2865 (March 24, 2008).
[16] 506 F.3d 79 (1st Cir. 2007).

Maine, on a dark and rainy December evening in 2003, plaintiff Berube sat in his car in a vacant lot and attempted to commit suicide. He was interrupted when a car pulled up behind his. Berube assumed the vehicle was a police car, and being perturbed, he drove to a parking area behind a police station and figured he would "raise a little hell." Officer Conley walked out of the station when she heard yelling and screaming and the sound of car windows being smashed. She came within ten feet of Berube who appeared very agitated. The officer radioed for back-up. When Conley saw Berube raise a shiny object in his hand, she yelled at him to stop and put his weapon down. Believing Berube would strike her, the officer fired at him until he fell to the ground. Two other officers arrived, heard the gunshots, and saw Berube lying on the ground with his back to them, hands not visible. The officers saw a metallic object in Berube's right hand as he rolled over. Knowing that they had heard shots, they believed Berube to be armed and ready to shoot. Again he was ordered to stop moving and show his hands. When he did not, the officers fired upon him until he stopped trying to get up. The shiny metallic object turned out to be a hammer.

Berube filed a § 1983 action against all three officers alleging use of excessive force. The district court determined that there was a dispute of fact as to whether Berube posed a threat while he was on the ground and whether a reasonable officer would shoot him repeatedly while he was on the ground. Berube did not deny that he had a hammer and that he did not comply with officers' orders, but he had a witness who directly disputed the officers' version of facts.

The Court of Appeals found that the fact that Berube was convicted of criminal threatening established that he possessed a weapon of some sort. The appellate court found that even though Conley may have continued to fire while Berube was on the ground, Conley's actions were reasonable because in the short time that elapsed, she made split-second decisions in responding to an immediate threat. Her actions were reasonable even though she "may have failed to perfectly calibrate the amount of force required to protect herself." The other officers' actions were also found to be reasonable because the decision to fire their weapons at Berube was based on what they observed in a matter of seconds on a rainy night and not whether Berube had earlier held up a hammer.

In ***Cummings v. McIntire***,[17] the First Circuit dealt with a claim of excessive use of force but analyzed it under the Fourteenth Amendment and not the Fourth, noting that the force used **was not in the context of seizure**. Instead of applying the "objective reasonableness" standard of the Fourth Amendment, the court looked to the standard of "shock the conscience" applicable to the Fourteenth Amendment.

On October 4, 1998, police were present to direct traffic and the runners who were participating in a race in Portland, Oregon. One of the intersections along

[17] 271 F.3d 341 (1st Cir. 2001).

the route of the race was the scene of very heavy traffic. At times, the police had to stop the cars so that runners could proceed, and at other times, runners were stopped. Mr. Cummings was traveling in his car looking for Arcadia Street. When he approached the busy intersection, he saw that the race was going on, so he parked his car in a nearby parking lot and exited his car to ask one of the race volunteers for directions. He was directed to Officer McIntire, who was busy managing the traffic. The officer had his back to Cummings and was looking back and forth watching the runners and the cars. Cummings moved toward the officer and tried politely to get the officer's attention. When it looked safe, Cummings asked his question. According to Cummings, the officer turned toward him and shoved him hard, telling him to get out of there. Cummings twisted but did not fall. However, he felt severe pain in his back, leg, and foot and subsequently underwent back surgery.

Cummings filed suit for deprivation of his right to be free from excessive force under the Fifth and Fourteenth Amendments. The lower court found that the conduct did not "shock the conscience" as was required by the standard set forth by the Supreme Court and First Circuit for Fourteenth Amendment claims. On appeal, the court noted that since the claim for excessive force did not arise out of a seizure, the Fourth Amendment's reasonableness standard was not applicable. Rather, the court concluded that the matter was properly analyzed under the substantive due process principles of the Fourteenth Amendment. Here, the court found that the officer's conduct was reactive rather than reflective, was careless and unwise, but was not done with the purpose to harm, even though Cummings suffered a severe injury. The officer was juggling drivers and runners in a busy location to ensure their safety. While the conduct may have seemed over reactive and unreasonable, it did not constitute "brutal" or "inhumane" conduct necessary to establish a due process violation.

Second Circuit
(Connecticut, New York, Vermont)

The Second Circuit vacated summary judgment where the lower court rejected a plaintiff's claim of excessive force during an arrest involving several police officers. In ***Maxwell v. City of New York,***[18] plaintiff Maxwell and her friend were at a bar in Greenwich Village when they became involved in a verbal dispute with the nightclub's bouncer. The dispute escalated into a physical altercation during which time Maxwell allegedly hit the bouncer over the head with her backpack causing injury to the bouncer's head. Officer Mannuzza and his partner arrived on the scene about 3:23 a.m. and arrested Maxwell for assault. However, Maxwell alleged that the officers violently and unnecessarily jerked her around by the handcuffs while she was cuffed from behind. She also claimed that Mannuzza shoved her into his police car head first, causing her head to strike the metal partition between the front and back seats. She claimed she was taken to

[18] 380 F.3d 106 (2d Cir. 2004).

the hospital after 4.00 a.m. where she was treated for a headache and pain in her lower back and left arm.

In analyzing the application of force, the Second Circuit noted that, under the *Graham* standard, the question was whether the officers acted objectively unreasonable in light of the facts and circumstances confronting them at the time. The question before the appellate court was whether Maxwell's claim could survive summary judgment based on discrepancies presented by her evidence. The district court had rejected Maxwell's excessive force claim because the court concluded that her deposition testimony had refuted her own claim that she was propelled head first into the metal partition of the police car. However, on appeal, the court noted that although Maxwell did not remember exactly how she was "shoved" into the cruiser, there was sufficient testimony based on Maxwell's deposition answers that she had suffered injury to her forehead when she was "shoved" into the police car. The court noted that if there was a plausible explanation for discrepancies in a party's testimony, the court considering a summary judgment motion should not disregard any later testimony simply because an earlier account may have been ambiguous, confusing, or simply incomplete. The court also noted that Maxwell's friend provided a declaration indicating that the officer had violently shoved Maxwell into the police car head first. The court found that there was sufficient evidence in dispute for a jury to assess Maxwell's account as to what occurred during her arrest and vacated summary judgment.

In ***Kerman v. City of New York***, [19] plaintiff Robert Kerman appealed from orders of the United States District Court for the Southern District of New York granting summary judgment as to several police officers and judgment as a matter of law in favor of one defendant police officer whom the arrestee alleged violated his rights under the First and Fourth Amendments when he was forcibly restrained and taken to a hospital against his will.

Kerman's girlfriend, concerned about his mental health, called 911 and reported that Kerman was drunk, acting crazy, and possibly had a gun. She did not identify who she was or what her relationship was to Kerman. Viewing the facts in the light most favorable to Kerman, the record showed that the police responded to the call and rang the doorbell, pounded on the door, and announced their presence for several minutes. Kerman, who was in the shower, finally heard the doorbell and came to the door dressed only in a towel. He was not aware that the police were at his door so he opened the door a crack. According to Kerman, the officers slammed the partially open door into his forehead, knocking him to the floor. The officers then jumped on Kerman's back, grabbed and pulled his arms behind him, and handcuffed him. Also, one of the officers allegedly held a gun to his head and told him that if he did not hold still he would blow his brains out. Kerman initially resisted, but then realized that his attackers were police officers. At that point, he stopped struggling.

[19] 261 F.3d 229 (2d. Cir. 2001).

The officers dragged Kerman on his stomach up a short flight of stairs, pulled him up, and pushed him against a wall. As a result of the scuffle, Kerman stood naked. Officer Crossan, the lieutenant in charge and present throughout the encounter, was holding the door to Kerman's apartment open and people had gathered to see what was happening. Kerman was kept handcuffed and naked for an hour while the police searched his apartment. He alleged that when he complained the handcuffs were too tight, one of the officers yanked on them, making them tighter. In another interaction, Officer Crossan demanded to know where the gun was hidden and grabbed Kerman by the face and pulled upward. The officers would not let Kerman put on clothing. Also during the search, there was phone contact with Kerman's psychiatrist, but the officers hung up on her and never verified Kerman's mental health. Before transporting him to the hospital, the officers insisted that Kerman be placed in a restraint bag. Kerman alleges that this was retaliation for his threats to sue police for their conduct. Finally, Kerman asked to be taken to a certain hospital where his doctor could oversee his care. Instead, Crossan insisted that Kerman be taken to a different hospital, where he was held overnight for observation and released the following day. The officers disputed the facts presented by Kerman.

The district court granted summary judgment for all but one of the officers on plaintiff's claims for unreasonable search and seizure, excessive force, First Amendment retaliation, and state law tort claims. The court granted judgment as a matter of law for the remaining officer, despite a jury verdict for Kerman. On appeal, the Second Circuit addressed a number of issues including the warrantless entry, the initial seizure, excessive force, the hospitalization, and retaliation for protected speech, jury verdict inconsistencies, and the state law claims. The court found qualified immunity shielded the officer on the warrantless entry claim, because the law at the time in 1995 was unclear whether a 911-call tip gave probable cause for the warrantless invasion of a plaintiff's residence.[20] But the court found that there were material questions of fact requiring a trial as to the excessive force claim as well as the other claims. Thus, judgment as to those other claims was reversed and remanded for a trial.

The court reviewed the trial court's decision on excessive force in two parts – first the excessive force claim regarding the forced entry and initial seizure and then the force used after the initial seizure, including the handcuffing, verbal abuse, and use of the restraint bag. The appellate court agreed with the trial judge that the officers were entitled to summary judgment as to the forced entry and use of force for the initial seizure. The court noted that based on the 911 call, the police were not unreasonable in choosing to enter by force and immobilize Kerman as quickly and safely as possible. However, because there were such contrasting accounts as to what Kerman and Crossan said about the officers' conduct following the initial seizure, the court stated that it must be left to a jury

[20] The court concluded that now officers are on notice that the law prevents the police from relying on an anonymous call to 911. *Id.*, 261 F.3d at 236-38.

to decide what degree of force was used and whether it was reasonable. Certainly, if a jury credited Kerman's version of the facts, the use of force might be considered to be objectively unreasonable.[21]

Third Circuit
(Delaware, New Jersey, Pennsylvania, U.S. Virgin Islands)

In ***Kopec v. Tate***,[22] the Third Circuit reversed a grant of summary judgment in a case dealing with injuries from constricting handcuffs. Michael Kopec and his girlfriend were trespassing on a frozen lake at the apartment complex in Pennsylvania where the girlfriend lived. Officer Tyrone Tate arrived in response to an anonymous call and ordered the two to get off the ice. Kopec and his girlfriend complied. Tate did not intend to charge them with trespassing, but needed information from Kopec in order to file a report. Kopec refused to give his name, address, and phone number and instructed his girlfriend to refuse as well. Tate, annoyed at Kopec for his refusal, arrested Kopec for disorderly conduct. Kopec was handcuffed behind his back.

Within seconds of the handcuffing, Kopec began to lose feeling in his right hand, and he asked Tate to loosen the handcuffs. Tate ignored the request, and placed Kopec next to the patrol car. Tate then went to interview the girlfriend. Kopec repeatedly complained to Tate about the pain and asked him to remove the handcuffs, which Tate ignored. Kopec began to faint and fell to the ground, and when he asked Tate again to remove the handcuffs, Tate said, "I'll be there in a minute." But Tate did nothing. Kopec said it was ten minutes before Tate finally loosened the handcuffs. Kopec claimed to have suffered permanent nerve damage in his right wrist as a result of the handcuffing. The district court granted Tate summary judgment on the basis of qualified immunity.

On appeal, Tate did not dispute that a seizure had occurred, so the only question was whether the force Tate used to effect the seizure was reasonable under the Fourth Amendment standard. The court applied the three-part *Graham* test weighing the severity of the crime, the immediate threat to the safety of the officer or others, and resisting arrest or attempting to evade arrest by flight. Relying on a previous Third Circuit case,[23] the court stated that in making an assessment on reasonableness, the court should also consider whether the suspect is violent or dangerous, the duration of the action, whether the action takes place in context of effecting the arrest, the possibility that the suspect may be armed, and the number of people involved.

The court stated that the facts in the light most favorable to Kopec, if true, would establish that Tate's use of force was excessive and violated the Fourth

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[21] *Kerman*, 261 F.3d at 239-240
[22] 361 F.3d 772 (3rd Cir. 2004).
[23] *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

Amendment. In addition, the court found that Tate was not in a dangerous situation involving serious crime or armed criminals. [24]

In ***Mellott v. Heemer***,[25] the Third Circuit reversed a denial of summary judgment and found no constitutional violation for plaintiffs' claim that marshals used excessive force when they pointed loaded guns at their heads, back, and chests. Bonnie and Wilkie Mellott owned and operated a diary farm in Pennsylvania. Their son Kirk also lived on their land. The Mellotts had financial problems which led them into bankruptcy. The bankruptcy court issued an order for the Mellotts to vacate their land, but they refused. Eventually, the United States Marshal Service was directed to remove the Mellotts. Deputy Marshal Don Heemer was in charge of the five marshals who were assigned the duty. Prior to going to the property, Heemer was given the following information about the Mellotts: the bankruptcy court had requested additional security for the Mellotts' hearings; a county supervisor had reported that Wilkie had chased him off the property and had displayed a handgun; Wilkie had threatened to shoot any federal agent that came on his property; the Mellotts reportedly owned numerous firearms; Kirk had recently suffered a head injury which made him unstable; and Kirk had declared that they would not leave the farm. On the way to the farm for the eviction, the marshals picked up two uniformed state troopers. The marshals wore bulletproof vests and were authorized to use a shotgun and a semi-automatic rifle during the eviction because of concerns they might meet armed resistance.

When the marshals arrived at the Mellotts' house and knocked on the door, Bonnie opened the door and Heemer pointed a gun in her face, pushed her into a chair, and kept the gun pointed at her.[26] Another marshal entered the house, "pumped a round into the barrel" of his shotgun, ordered Wilkie to sit, not move, and keep his mouth shut. There were others at the Mellotts' home and they were also subjected to having guns pointed at them. The district court denied the marshals' motion for summary judgment.

The Court of Appeals for the Third Circuit, reversing the denial of summary judgment, weighed the three factors from *Graham* and found that the scale ultimately tipped in favor of the marshals. Looking first to the "severity of the crime" factor, the court found that the Mellotts were not being arrested for a violent crime, but were ordered to leave their property. The court noted, however, that such an event can become emotionally charged. The second factor, "active resistance," was in favor of the Mellotts because there was no evidence of resistance during the eviction. The third factor, "threat to the safety of officers or

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[24] While the court found that Tate violated Kopec's Fourth Amendment rights, the court took pains to guard against its opinion being overread resulting in a flood of handcuffs claims. "Thus, if Tate had been engaged in apprehending other persons or other imperative matters when Kopec asked him to loosen the handcuffs our result might have been different." *Kopec*, 361 F.3d at 777.

[21] 501 F. 3d 374 (4th Cir. 2007).

[25] 161 F.3d 117 (3rd Cir. 1998).

[26] The court considered the facts as related by the Mellotts. The marshals disputed almost every factual allegation.

others," weighed heavily in favor of the marshals. Given the information the marshals were told prior to the eviction, it was objectively reasonable for the marshals to load and point their weapons to discourage resistance and ensure their own safety. Given all the circumstances, the court determined that plaintiffs' Fourth Amendment rights were not violated.

Fourth Circuit
(Maryland, North Carolina, South Carolina, Virginia, West Virginia)

The Fourth Circuit is considered one of the most conservative circuits when it comes to appellate decision-making. In the law enforcement context, the court has often found officers' conduct objectively reasonable under a variety of circumstances. In ***Henry v. Purnell***, [27] the court addressed the mistaken use of a firearm by an officer who believed he was using his Taser. Deputy Sheriff Robert Purnell of Somerset County, Maryland, was attempting to stop Frederick Henry from fleeing by using his Taser to effectuate the seizure. Purnell mistakenly drew his firearm from his holster and shot and wounded Henry. As a result, Henry filed an action for federal and state constitutional claims alleging that the deputy violated his rights to be free from excessive force during arrest. Purnell filed a motion for summary judgment which the trial court denied, concluding there was a dispute of fact. Purnell appealed.

The Fourth Circuit conducted an analysis under *Saucier* and stated that the first question which must be answered is whether the facts, when viewed in Henry's favor, establish that the officer used excessive force in arresting Henry, thus violating his Fourth Amendment right. Purnell initially agued that since he did not "seize" Henry, there could be no Fourth Amendment violation. As the facts revealed, the deputy went to Henry's last known address with the intention of arresting him on an arrest warrant for failing to obey a court order relating to child support. When the deputy arrived at the address, Henry lied to the officer about his identity. Subsequently, Purnell saw Henry driving a truck and pulled him over. When he ordered Henry out of the truck, Henry fled. Purnell then pulled his firearm, believing it was his Taser, and shot at Henry in the elbow. He did not realize it was his firearm until after his weapon was discharged and immediately told Henry and another on the scene that he did not mean to shoot with his gun but had grabbed the wrong weapon.

The Fourth Circuit concluded that a seizure had occurred because Purnell had "unquestionably terminated Henry's freedom of movement by means of force when he shot him. . . ." Although Purnell argued that he did not terminate the movement "through force intentionally applied," the court rejected that argument and found that Purnell had the specific intent to stop Henry and that he did so by the very instrumentality that he put into motion.[28] In other words, he intended to stop Henry by firing a weapon. The fact that he made a mistake and grabbed the

[26] 501 F.3d 374 (4th Cir. 2007).
[28] *Id*. at 380 (citations omitted).

wrong weapon did not change the fact that a seizure occurred.

Although the appellate court affirmed the lower court's ruling that a seizure had occurred, it concluded that the issue of mistake was relevant to the inquiry of whether the seizure was reasonable and directed the district court to take another look at the reasonableness inquiry.[29] The court remanded the case to the district court instructing it to first determine whether Henry met his burden of showing that the conduct of the officer in mistakenly grabbing his firearm, and not the intended Taser, was unreasonable under the totality of the circumstances. The court pointed out that the factual dispute the lower court had relied upon had to do with training issues and a discovery dispute and that a determination of that dispute may have an impact on the district court's analysis as to whether Purnell violated Henry's constitutional rights, *i.e.*, whether the seizure was unreasonable. Once that determination was made, Purnell would have the opportunity to present his qualified immunity defense, if necessary.[30]

In the recent case of ***Orem v. Rephann***,[31] the Fourth Circuit, in what some might consider a deviation from its more conservative rulings, addressed the use of a Taser and discussed when it is appropriate to analyze an excessive force case under the Fourteenth Amendment instead of the Fourth Amendment. In West Virginia, Sonja Orem was arrested for disrupting and assaulting a deputy when he served her with a protective order. Orem was under the influence of prescription drugs, marijuana, and alcohol. She became enraged and destructive when she found out that she would not be allowed to see her son for six months. Three officers restrained her, placed her in handcuffs, and secured a hobbling device around her ankles. She was placed in Deputy T.E. Boyles' police car and the hobbling device strap was secured through the front and back doors of his cruiser. During the transport to the jail, Orem yelled, cursed, and banged her head against the window. She eventually loosened the strap on the hobbling device. Boyles pulled to the side of the road in order to tighten the strap. Although Boyles had not requested assistance, Deputy Rephann voluntarily followed Boyles' police vehicle. Rephann knew Orem and was aware that she had been charged with battery and obstruction of a police officer and was reportedly "unruly or combative." Rephann stopped behind Boyles' cruiser and approached the cruiser with his Taser gun drawn.

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[29] The court noted that while it had not considered a case involving facts similar to those before it, there were several cases where mistakes made by officers during an arrest situation were found to have been reasonable for Fourth Amendment purposes. *Id.* at 382 – 383. *See* cases cited including *Maryland v. Garrision*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987); *Mazuz v. Maryland*, 442 F.3d 217 (4th Cir. 2006); and *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001).

[30] On June 17, 2008, the United States District Court for the District of Maryland (Motz, J.) granted Defendant's Motion for Summary Judgment, finding that the seizure effected as a result of weapon confusion was reasonable under the Fourth Amendment. Consequently, the immunity issue was not reached. The court's published opinion can be found at __ F. Supp. 2d __, 2008 WL 2437951 (D. Md., June 17, 2008) (Civil No. JFM-04-979). Plaintiffs have appealed this most recent ruling to the Fourth Circuit.

[31] 523 F.3d 442 (2008).

While Boyles attempted to tighten the strap of the hobbling device, Rephann opened the rear door and engaged Orem in conversation. During the exchange of words, the deputy warned her to calm down. After she yelled foul language, he shocked her twice with the Taser – once under her left breast and once in her left inner thigh. Orem was 27 years old and weighed 100 pounds; Rephann weighed 280 pounds. The incident was recorded on Rephann's dashboard camera.

Orem sued Rephann alleging that he had used excessive force while she was being transported to the jail. The district court denied the deputy's motion for summary judgment on the basis that the deputy's use of force was unreasonable and violated Orem's Fourth Amendment rights. The deputy filed an interlocutory appeal.

The Court of Appeals for the Fourth Circuit found that the district court erred in analyzing Orem's excessive force claim under the Fourth Amendment's "objective reasonableness standard." Citing to *Riley v. Dorton*,[32] the court reiterated that the Fourth Amendment only "governs claims of excessive force during the course of an arrest, investigatory stop, or other 'seizure' of a person." On the other hand, the Due Process Clause of the Fourteenth Amendment covers excessive force claims of a pretrial detainee or arrestee. Although the line can be fuzzy when the Fourth Amendment protection ends and the Fourteenth Amendment begins, the court found that because Orem was already arrested and was being transported to jail, the Fourteenth Amendment applied.

To succeed on an excessive force claim under the Fourteenth Amendment, Orem must show that Deputy Rephann "inflicted unnecessary and wanton pain and suffering." In determining whether a constitutional violation occurred, the court looks at factors such as (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

The court found that Orem's behavior was "reprehensible" and noted that a reasonable jury could infer that Rephann's actions were not a good faith effort to restore order, but were wanton and unnecessary. Of importance was the discussion of Rephann's motives. Unlike the Fourth Amendment where motives are not evaluated, under the Fourteenth Amendment, motive is a relevant factor to determine whether use of force is excessive. The court held that a reasonable juror could find that Rephann's use of force was done for the very purpose of harming and embarrassing Orem especially since Rephann used the Taser almost immediately in response to Orem's profanity, then stated that she needed to respect officers, and tased her twice in sensitive body areas.

[32] *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir. 1997)

The court also rejected Rephann's argument that summary judgment should be granted because the Taser was applied for only a few seconds, and Orem suffered *de minimus* injury. The court found that Orem suffered electric shock, pain, and a permanent sunburn-like scar on her thigh. This was likened to "torment without marks" which the Supreme Court has considered in deciding excessive force claims under the Eighth Amendment. [33]

Fifth Circuit
(Louisiana, Mississippi, Texas)

In addressing a claim of excessive force based on allegations that deputies placed handcuffs too tightly on the arrestee, the Fifth Circuit reversed the District Court for the Eastern District of Texas on a denial of summary judgment as to an excessive force claim in ***Freeman v. Gore***.[34] Interestingly, the court affirmed the ruling denying the deputies' motion for summary judgment on the claim of an unlawful arrest. Police deputies arrived at the mobile home of Kevin Freeman to serve a felony arrest warrant but found their knocks on the door unanswered. Eventually, they made contact with Freeman's sister, Sheila, when she stepped out of the house next door to Kevin's. She informed the deputies that Kevin was not home. Kevin then appeared and began yelling at the deputies. The deputies asked Sheila if they could search her home and she refused. They told her that they would arrest her if she did not let them search her home. She refused and the deputies placed her under arrest, handcuffed her, and placed her in the back of one of the patrol cars. It was disputed how long she was in the car without air conditioning or ventilation. There was disagreement as to whether the deputies could search Sheila's home without a warrant. Eventually, the deputies were told they could not search the home and could not arrest her. Sheila was then released from the patrol car and the handcuffs were removed.

Sheila Freeman filed suit against the deputies alleging that they unlawfully arrested her and used excessive force during the arrest. The deputies filed a motion for summary judgment asserting that Freeman did not establish a constitutional violation and that, even if she did, they were entitled to qualified immunity. The lower court concluded that Freeman did show that a Fourth Amendment violation occurred with regard to her arrest. As to the excessive force claim, the lower court found that Freeman's allegations created a triable issue of fact.

On appeal, the Fifth Circuit agreed with Freeman that the deputies did not have probable cause to arrest her. Further, the court concluded that no reasonable officer would have believed that there was probable cause to arrest Freemen. However, the Fifth Circuit concluded that Freeman's excessive force claim failed.

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[33] The court also denied summary judgment on qualified immunity, stating that there was a violation of a well established constitutional right and that there were two reasonable officers on the scene, neither of whom felt the need to use a Taser.

[34] 483 F.3d 404 (5th Cir. 2007).

To state a claim for excessive force, a plaintiff must show that her injury is more than *de minimis*. The court noted that just because the deputies' arrest of Freeman was unlawful, it did not follow that any force they used was necessarily excessive. According to the court, the excessive force claim was a separate claim from the unlawful arrest claim and must be analyzed without regard to whether the arrest was justified or not. Freeman's most substantial injury was that she suffered bruising to her hand and arms from the handcuffs being applied too tightly. The court noted that it has previously held that minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional violation based on excessive force. The court then concluded that the lower court incorrectly denied the deputies' motion for summary judgment on the excessive force claim and reversed that part of the order.

In ***Tarver v. City of Edna***,[35] the Fifth Circuit was asked to address an excessive force issue arising out of an incident where two police officers employed by the City of Edna, Texas, placed Fred Tarver in a police car during a custody dispute. Tarver filed suit against the officers and the city for unlawful arrest and excessive force in violation of his Fourth and Fourteenth Amendment rights. As the result of a domestic custody dispute and a call for police assistance, Officer Bubela was dispatched on the call. Upon arrival, the officer learned that a man had taken his son and left him with the child's grandmother who refused to return the boy to the child's mother. During the course of dealing with several family members, Fred Tarver (the child's grandfather) arrived on the scene as did the police chief. Eventually, Officer Bubela took Tarver into custody at the direction of the police chief and placed him in a patrol car. Tarver alleged that he attempted to use his phone, but the officers knocked the phone out of his hands and forced handcuffs on him. Then, according to Tarver, Bubela slammed the car door on Tarver's foot, refused to provide some ventilation in the police car for Tarver who had several ailments, slammed the car door on Tarver's head, and repeatedly stated that he did not care about any of Tarver's aliments. While on the scene, the police chief decided that Tarver should be released, and he was.

On the issue of excessive force, the lower court had determined that Officer Bubela was not entitled to qualified immunity as to the claims relating to slamming the car door on Tarver's foot and head. The Fifth Circuit agreed. While the court concluded that the allegations relating to injuries from handcuffing did not rise to a constitutional violation under § 1983, the court found differently as to the slamming of the car door on the foot and head. The court stated that Tarver must show that he was injured as a direct and proximate result from a use of force that was "clearly excessive" and the excessiveness was "clearly unreasonable." Tarver did show that he suffered injury to his cervical spine that was caused by the conduct of Bubela. He also presented adequate support to raise a question of material fact as to whether Bubela's behavior was unreasonably excessive. According to Tarver, the officer intentionally and angrily slammed the door on this foot and then on his head. Further, there were

[35] 410 F.3d 745 (5th Cir. 2005).

several witnesses who indicated that they opened the door for Tarver to provide some needed ventilation and that the officer refused to open windows. In analyzing this claim, the court recognized that careful attention must be given to the particular facts and circumstances which, in the instant case, showed that the severity of the crime at issue was minimal, that Tarver did not pose an immediate threat to anyone's safety, and that there did not appear to be any evidence that Tarver was trying to escape police custody. Based on these circumstances, the court concluded there was a genuine dispute of material fact, and summary judgment was correctly denied by the lower court as to that issue.

Sixth Circuit
(Kentucky, Michigan, Ohio, Tennessee)

In ***Burchett v. Kiefer***,[36] plaintiffs Charles and Carla Burchett claimed that constitutional violations arose out of an incident where Charles Burchett was seized, handcuffed, and placed in a police car while officers executed a search warrant at his next-door neighbor's, who happened to be his brother. The Ohio trial court granted defendant's motion for summary judgment holding that no reasonable jury could find that defendants had violated plaintiffs' rights. The Sixth Circuit Court of Appeals affirmed in part and reversed in part.

Sheriff Kiefer, deputies, and agents of the Bureau of Criminal Identification (BCI) participated in executing a search warrant for drugs on the house next door to Burchett's house. At the time the unmarked cars pulled into his brother's driveway, Burchett walked over to his property line to get a better view. He saw three individuals wearing black clothes, two with masks, and no identification, walk around the back of his brother's house with weapons. One individual saw Burchett and yelled for him to get on the ground. Fearing for the safety of his baby who was on his porch in a swing, Burchett turned and ran to his porch. The individual, who was an agent for the BCI, said he saw Burchett standing in the yard with something black in his hand which looked like a weapon. Burchett turned and ran, and the agent gave chase. When the agent and other officers reached the porch, the object in Burchett's hand lay on the porch. The "weapon" was a pair of sunglasses.

The officers handcuffed Burchett, but had difficulty getting the handcuffs on because Burchett kept twisting and turning. When the officers led him off the porch, Burchett fell. Burchett stated that the officers pushed him "very roughly" into a patrol car. The officers left Burchett in the patrol car for about three hours while they executed the search. It was a very hot day, and although the windows were down initially, the officers closed the windows and turned off the air conditioner. Despite repeated requests to roll down the window, the officers refused.[37] Sheriff Kiefer observed Burchett in the car in an enraged state. Burchett showed his swollen and blue hands to the sheriff who told him to calm

[36] 310 F.3d 937 (6th Cir. 2002).
[37] *Id*. at 940.

down. When he did he calm down, he was released from the car, "sopping wet from sweat."

Burchett filed suit, but all defendants moved for and were granted summary judgment. On appeal, Burchett argued that the officers had no right to detain him; and when they did, they used unreasonable force. In addressing the first issue, the Sixth Circuit held that officers are permitted to detain an individual who approaches a property being searched, stops at the property line, but flees when officers instruct him to get down on the ground. There was no Fourth Amendment violation for Burchett's detention. [38]

The court then turned to Burchett's claim of Fourth Amendment violations due to the alleged excessive use of force in handcuffing him and subjecting him to three hours in an unventilated car. The court found no violation for the handcuffing. Although in other cases, the Sixth Circuit has allowed a plaintiff to get to a jury on the tightness of handcuffs, in this case, Burchett only complained once and then the sheriff offered to remove the handcuffs if Burchett would "calm down." Burchett complied and so did the sheriff. Therefore, there was no constitutional violation.

Burchett also complained that detaining him in extreme heat for three hours in a police car with the windows rolled up constituted excessive force. Here, the court agreed: "…unnecessary detention in extreme temperatures, like those that could be reached in an unventilated car in ninety-degree heat, violates the Fourth Amendment's prohibitions on unreasonable searches and seizures." The court found that the officers' denial of his repeated requests to roll down the windows to give him air "indicates a wanton indifference to this important safety factor." [39]

In ***Smoak v. Hall***, [40] the Sixth Circuit explained how an arrest without probable cause giving rise to a constitutional violation does not, in and of itself, lead to civil liability. In this case, poor communication resulted in bad judgment calls and tragic results. James Smoak and his family were returning home to South Carolina from Tennessee. After stopping for gas, Smoak accidentally left his wallet on top of his station wagon and drove away. Another motorist called the Tennessee Highway Patrol (THP) to report that a green station wagon going

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[38] The court discussed the holding in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), where the Court ruled that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id*. at 705. The Sixth Circuit, in another case, had expanded the *Summers* holding by stating that "occupants" include nonresidents, and that it is permissible for officers to detain individuals who arrive at the scene of a permitted search, even if they were not present when the search began. *See United States v. Fountain*, 2 F.3d 656, 663 (6th Cir. 1993*); United States v. Bohannon*, 225 F.3d 615, 616 (6th Cir. 2000). In Burchett's case, even though he was on his own property and never "arrived" at the premises to be search, the court applied this expanded ruling.

[39] *Burchett v. Kiefer*, 310 F.3d at 945.

[40] 460 F.3d 768 (6th Cir. 2006).

about 110 mph had just passed her, and there was money flying all over the road. The dispatcher sent troopers to the scene. They reported that they had found some money. The THP dispatcher also called a dispatcher for local law enforcement and told him about the speeding green station wagon. The THP dispatcher inquired if there had been any reports of a robbery. Two dispatchers down the line reported that the station wagon was probably involved in a robbery.[41] A THP trooper spotted the green car and followed it for eight miles, never observing any traffic offense. He was told to wait for back-up and then stop the station wagon for a felony stop, "…possible armed robbery." The Smoak family was ordered to get out of the wagon, and they were put on their knees and handcuffed. While being handcuffed, officers pointed assault rifles at them, which admittedly was a departure from normal procedures.

The Smoaks repeatedly asked why they were being stopped, and at one point, they asked the officers to shut the car's doors because the two family dogs were inside. One door was shut, but before the other one was closed, one dog got out and began to run around. The dog was shot and killed. James Smoak was horrified and jumped up at the sight of his dead dog. He claimed the officers forcibly pushed him to the ground injuring his knee and head. The Smoaks were put in separate police cruisers, and the dashboard videotape showed two of the officers grinning and laughing. It took almost ten minutes after the officers learned that there had been no robbery and James Smoak was not wanted for anything, before the handcuffs were removed. As the Smoaks drove away, one officer was captured on videotape saying, "I wish I had never stopped that f…ing car."

The Smoaks brought a Fourth Amendment suit against two sets of defendants: the city, officers, and dispatchers from local law enforcement and the THP troopers and dispatchers. The former were dismissed by stipulation. The trial court denied summary judgment to defendants on the excessive force claim, and defendants filed an interlocutory appeal.

The Sixth Circuit set out to determine whether the Smoaks' constitutional rights were violated through unreasonable seizure and/or excessive force. As to the *Terry* stop, the court found that the troopers had a reasonable suspicion sufficient to conduct the stop, based on the report of a vehicle traveling at a high rate of speed and money on the highway.[42]

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[41] The THP dispatcher heard that the amount of money found was $445, and that information led him to believe that the occupants of the station wagon had not been involved in a robbery. He never relayed this information.

[42] But the use of guns pointed at the Smoaks, the insensitive refusal to shut the car doors to protect their pets, and the prolonged detention in the police cars after their innocence was determined, exceeded the reasonable suspicion of an objective trooper. The court found that the intrusiveness of the seizure violated the Smoaks' Fourth Amendment rights because it became an arrest without probable cause. The court then granted defendants qualified immunity because it found that they had a "good-faith defense."

On the claim of excessive force once the stop was made, the court found that the force used was excessive. In many cases, the level of resistance is what triggers the amount of force to be used. Here, no reasonable officer would think that it was appropriate to throw a handcuffed man on the ground who only reacted to seeing his pet killed and who in all respects was compliant. The appellate court upheld the trial count's denial of qualified immunity.

Seventh Circuit
(Illinois, Indiana, Wisconsin)

In ***Bell v. Irwin***,[43] Douglas Bell, in a drunken state, threatened his wife who then phoned the police for help. By the time the police arrived, the couple had resolved their differences and asked the police to leave. Forty minutes later a neighbor called to say the wife had been knocking on neighbors' doors seeking safety. An officer returned and the wife asked for help, saying the husband had torn up the house. The husband refused to let the officer in the house or to come out to talk. A background check on Bell revealed that he had a history of arrests for domestic violence, unlawful use of weapons, obstruction of justice, and drunk driving. The wife said he had also attempted suicide. Through a window, the police could see that the husband held many knives. He even threw some out of the window toward the police. Bell stated that he would kill any officer who entered the house and then kill himself. Local police called the state police for help.

State police officers Crow and Irwin arrived and continued negotiations with Bell to no avail. Crow authorized Irwin to fire beanbag rounds if necessary.[44] Bell opened the front door, threatened to blow up his home, and leaned forward toward propane tanks with what appeared to be a cigarette lighter. Irwin fired the beanbag rounds at Bell. The first three rounds staggered Bell, and the fourth brought him down. One of the rounds hit Bell in the head.

Bell sued Irwin for a violation of his Fourth Amendment rights alleging that the force used was excessive under the circumstances. He also sued Crow for failing to prevent Irwin from using excessive force. The Illinois trial court granted summary judgment to the officers. Bell had argued that he did not make explicit threats to the officers, and he did not try to ignite the propane tank. Even resolving all factual disputes in favor of Bell, the court thought it was a reasonable use of force to end the confrontation before Bell harmed himself or others. The court said Bell should have thanked the officers rather then sued them. The Court of Appeals for the Seventh Circuit agreed.

On appeal, Bell argued that only a jury was empowered to determine whether the officers' conduct was reasonable. The court found that Bell

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[43] 321 F.3d 637 (7th Cir. 2003).

[44] Beanbag rounds are designed to knock a suspect down and inflict blunt trauma. The rounds do not penetrate the skin or damage internal organs any more than a kick or punch would.

attempted to equate constitutional tort litigation with common law tort litigation, where negligence can be a matter of degree to be resolved by a jury. The court stated that "constitutional tort" is a misnomer because the Constitution is not a form of tort law; instead it creates legal rules. "Under the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, *not* how they appear in the courtroom to a cross-section of the civilian community." [45] In upholding the trial court's summary judgment decision, the court emphasized that under *Graham*, questions of Fourth Amendment violations are to be decided by the court. "But when material facts (or enough of them to justify the conduct objectively) are undisputed, then there would be nothing for a jury to do *except* second-guess the officers, which *Graham* held must be prevented. Since *Graham*, we have regularly treated the reasonableness of force as a legal issue, rather than an analog of civil negligence." [46]

The Seventh Circuit upheld an Indiana district court's summary judgment in favor of campus police officers in ***Smith v. Ball State University***.[47] Derek Smith, who suffered from juvenile diabetes, was a student at Ball State University in Indiana. One day at the student center, he went into a diabetic shock, and campus police officers Rhonda Clark and Craig Hodson were called. They noted Smith's medical ID bracelet and called an ambulance. Smith was treated and released.

Four days later, Smith again went into diabetic shock, but this time he was driving a car. A campus bus driver reported a possible drunk driver who had driven on the sidewalk and narrowly missed several pedestrians. A student who worked as a parking attendant went to investigate and reported that Smith was in the driver's seat with the car's motor still running. The student tapped on the window, but reported that Smith was unresponsive. The student then called for campus police and stated that the driver was incoherent and needed an ambulance. The student may have mentioned that the driver appeared to be drunk or on drugs.

Ball State police officers John Rogers and John Foster arrived at the scene. Foster opened the passenger door, turned off the ignition, and asked Smith to get out of the car. When Smith did not respond, Foster then forcibly used a "straight arm bar" and extracted Smith from the car with the help of Rogers. At this point in time, Hodson, who had responded earlier to the call at the student union, arrived and observed what he thought was a struggle between Smith and the two officers. Hodson tackled Smith and the two officers. Smith was pushed to the ground and handcuffed. Only when Smith was brought to a sitting position did Hodson recognize him as the diabetic student he had attended to four days earlier. Smith's roommate came to the scene, identified Smith, told the officers that he was a diabetic, and pointed to the medical ID bracelet. Clark, who with Hodson had helped Smith at the student union, also came. Despite all the information the officers had that Smith was a diabetic, they kept him handcuffed until EMS

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[45] *Id.* at 640 (emphasis in original).
[46] *Id.* (emphasis in original).
[47] 295 F.3d 763 (7th Cir. 2002).

arrived. Smith sustained scratches and bruises on his face, marks on his wrists, and a bump on his head. Smith sued the university and all four officers for violation of his Fourth Amendment rights.[48] The trial court held that Smith's detention was an investigatory stop, not an arrest. The detention was found to be reasonable. On the excessive force claim, the trial court granted summary judgment in favor of the officer because the use of minimal force to remove Smith from his vehicle was necessitated due to his unresponsiveness, and the use of handcuffs was reasonable. Smith appealed to the Seventh Circuit Court of Appeals.

Smith challenged the lower court's finding that the stop was not a formal arrest requiring probable cause and that the force was reasonable. The appellate court found that the circumstances of this case justified an investigatory stop. The court also disagreed with Smith's argument that after the car was turned off, there was no probable cause to forcibly remove him from the car and handcuff him. The court concluded that it was reasonable under the Fourth Amendment to order a driver to exit his vehicle during an investigatory stop.

Smith claimed that excessive force was used three times: (1) the forced removal from the car; (2) the tackling to the ground; and (3) the use of handcuffs. The court held that the officers were justified in ordering Smith from the car and in removing him when he did not respond. When Hodson arrived, it was reasonable for him to misconstrue Smith's unresponsiveness as resisting and requiring minimal use of force. Finally, the use of handcuffs was reasonable and even though the officers did not remove the handcuffs after learning of Smith medical condition, "the use of force was measured, brief and appropriate to accomplish the purposes of the investigatory stop…." [49]

Eighth Circuit
(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)

Defendant police officer successfully challenged a decision of the Arkansas District Court which denied a motion for summary judgment based on a violation of the plaintiff's Fourth Amendment rights. In ***McCoy v. City of Monticello***,[50] the Eighth Circuit Court of Appeals reversed the trial court and held that, under the circumstances presented, the officer's actions were reasonable and no constitutional violation occurred.

Ronnie McCoy and his wife celebrated New Year's Eve at a club in Monticello, Arkansas. Just before midnight, they left the club. Road conditions were slippery as snow and ice covered the roadway. McCoy's truck fishtailed out

[48] The university, its board of trustees, and its police department were all granted summary judgment under the Eleventh Amendment. Only the officers remained as defendants.
[49] *Id*. at 771.
[50] 342 F.3d 842 (8th Cir. 2003).

of the parking lot and was observed by police officers Ouellette and Hollinger. Although the officers activated lights and siren, McCoy claims he drove for a mile thinking the officers were in pursuit of another vehicle. The police car passed McCoy's vehicle and pulled in front of it. McCoy swerved to miss the police cruiser and landed his car in a ditch. McCoy exited his vehicle with his hands in the air. He had no weapon. Hollinger fell on the ice. Ouellette, arms raised up and clasped over his head, ran towards McCoy. When he was within a few feet of McCoy, Ouellette slipped on the ice and fell. His gun discharged and a bullet struck McCoy in the chest, severely injuring him. McCoy was never charged with a crime.

McCoy filed a § 1983 action against the police officers and municipal defendants, including the city. The district court granted summary judgment to the municipal defendants, but denied Ouellette's motion for summary judgment reasoning that a genuine issue of fact existed as to whether it was reasonable for Ouellette to have his gun drawn as he approached McCoy. The police officer appealed.

The Eighth Circuit concluded that the district court was correct in finding that a seizure had occurred because the officers intended to stop McCoy's vehicle and to restrict his freedom by a show of authority "intentionally applied." Further, when Ouellette drew his gun, the intent was to cause McCoy to submit to the officer's authority by threat of force, thereby satisfying the "through means intentionally applied" standard. In response to this display of force, McCoy left his truck and raised his hands, thereby establishing a seizure. A seizure, however, does not necessarily give rise to § 1983 liability. Based on the circumstances of this case, the court held that the seizure was reasonable, and therefore, no Fourth Amendment violation occurred.

The appellate court then considered the reasonableness of Ouellette's other actions. The relevant inquiry was not whether it was reasonable for the officer to fire his weapon, but whether it was reasonable for him to have drawn his gun in the first place. This is because everyone agreed that the shooting was accidental and not intentional. The court found that, given the circumstances, the act of drawing the weapon was reasonable.

The more interesting question was, after an intentional seizure has occurred, does an accidental shooting implicate a Fourth Amendment violation? Relying on decisions from other circuits, the court agreed that it does not. The Fourth Amendment protects individuals' rights only from intentional conduct, not acts that are accidental or result from negligence.

In ***Dennen v. City of Duluth***,[51] the Eighth Circuit affirmed summary judgment on an excessive force case regarding an officer's off-leash use of a police canine. Nicholas Dennen was a 20 year old college student at the

[51] 350 F.3d 786 (8th Cir. 2003).

University of Minnesota when he became rather intoxicated at a college party. At 2:30 a.m., Officer Steven Peterson was on patrol in his cruiser and spotted Dennen walking down a street. The officer thought Dennen was behaving curiously. When the officer made a u-turn, Dennen took off running and disappeared in a backyard area known for criminal activity. Peterson decided to investigate, and got out of the cruiser with Citus, a police dog. Not knowing what he would face, the officer said he took the dog "for my own protection." Because he was not tracking or apprehending Dennen, the officer did not put the dog on a leash or give him any commands.[52] Citus stopped and indicated that he had picked up a human scent in a wooded area. Shortly thereafter, Citus was put on a leash. When Peterson heard a movement, he identified himself, announced the presence of Citus, and ordered Dennen to come out of the woods. Thereafter, Peterson heard a loud crash. Upon investigation, Peterson found Dennen lying face down at the bottom of a ravine. Dennen suffered a severe head injury and was in a coma for several weeks. Toxicology reports indicated a blood alcohol level of .227 and a presence of barbiturates and amphetamines. When he recovered, Dennen had no memory of the event.

Dennen sued Peterson and the City of Deluth alleging that Peterson's use of Citus without a leash was an excessive use of force in violation of the Fourth Amendment. The trial court granted defendants summary judgment. The Eighth Circuit affirmed, stating that no case could be found holding that "it is a per se excessive use of force to use a canine without a leash."[53] Indeed, the court cited to situations where a leash would not be required, especially where officer safety is concerned.

Dennen relied on a Fourth Circuit case, *Vathekan v. Prince George's County*,[54] where a police canine was released in a house, found, and bit an innocent bystander. The Fourth Circuit held that the law was well-established that a release of a police dog without warning and allowing the suspects or innocent persons to surrender was an excessive use of force. In *Vathekan*, however, the officer intentionally deployed the dog; here, the Eighth Circuit pointed out, Citus was never deployed. The court found that Peterson's actions were objectively reasonable, and no Fourth Amendment violation occurred.

Ninth Circuit
(Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington)

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[52] The City of Deluth did not have a policy of whether a dog must be on a leash when tracking, although most are leashed for that activity.
[53] *Id.* at 791.
[54] 154 F.3d 173 (4th Cir. 1998).

The Ninth Circuit, known for its more liberal decisions, especially compared to those of the Fourth Circuit, reviewed a case involving the use of pepper spray, which has become an important tool for law enforcement officers to use as an alternative to other use of force options. While it has significantly reduced injuries to suspects caused by impact weapons, pepper spray is a level of force an officer can use to effectuate an arrest or other seizure and, thus, is subject to court review as to the reasonableness of its use. In ***Headwaters v. County of Humboldt,***[55] a group of passively resisting protestors had locked themselves together in a demonstration at a lumber company in California. Deputy sheriffs were called to the demonstration and used pepper spray on the nonviolent protestors to force them to release themselves from lock-down devices. They applied the pepper spray directly to the protestors' eyes. The officers refused to allow the protestors to wash out their eyes with water unless they released themselves. The deputies also threatened that the pain would get worse, and authorized full blasts, despite the maker's warning against spraying from three feet away or less.

The Ninth Circuit had previously heard the case and reversed the trial court's grants of qualified immunity and summary judgment. However, the United States Supreme Court granted certiorari, vacated the judgment, and remanded this case to the appellate court for further consideration in light of *Saucier v. Katz,*[56] where the Supreme Court set forth the manner in which to proceed when state officials assert qualified immunity in a § 1983 excessive force action. After reviewing the facts again in light of *Saucier*, the Ninth Circuit reaffirmed its conclusion that the officers were not entitled to qualified immunity.

Relying on *Graham v. Connor,* the court pointed out that the Fourth Amendment permits law enforcement officers to use only such force to effect an arrest as is "objectively reasonable" under the circumstances. The court recognized that "the essence of the *Graham* objective reasonableness analysis" requires a balancing test between the force which was applied against the *need* for such force. In following the Supreme Court's application of qualified immunity under *Saucier*, the court stated that it would be clear to a reasonable officer that repeated use of pepper spray was excessive under the facts and circumstances of this case and that it was not needed to subdue, arrest, or safely and quickly remove people without pain or injury. The court went on to note that even absent any direct precedent for the use of pepper spray in this manner, the officers violated clearly established Fourth Amendment rights by using objectively unreasonable force in the circumstances to arrest the protesters who did not actively resist arrest but instead were peaceful, easily moved, and did not threaten or harm the officers.

In another Ninth Circuit case, the federal appellate court was faced with the question of whether the pointing of a handgun by a police officer at a citizen

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[55] 276 F.3d 1125 (9th Cir. 2002).
[56] 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

violates the Fourth Amendment under any circumstances. In ***Robinson v. Solano***,[57] plaintiff James Robinson was a 64-year old retired police officer from San Francisco. He lived on a five-acre parcel of land in a semi-rural area where he raised livestock. One morning, Robinson observed two dogs on his fenced property attacking and killing his livestock. He took a shotgun and shot the dogs, killing one and wounding the other. The wounded dog ran and Robinson attempted to search for it. In doing so, he went on a public road, still carrying his shotgun. He saw one of his neighbors and learned that she owned the dogs. Robinson tried to explain to the neighbor what had happened, but the neighbor was angry, and the two engaged in a heated conversation. Robinson left and returned to his house.

The neighbor went home and called the police. The police responded to a call that there was a male who had just shot two dogs and was in the middle of the street yelling and holding a gun. However, by the time the officers arrived on the scene, Robinson was at his house. When he observed a number of police cars on the public roadway outside his house, he began to walk towards the officers to explain what happened. At the time, Robinson was not carrying the shotgun. As he approached the officers, he gave his name and told them that he was the man involved with shooting the dogs. Officer Cauwells claimed that Robinson appeared agitated, and he and another officer unholstered their guns upon first seeing him. Cauwells then pointed his gun at Robinson's head from a distance of about six feet and ordered Robinson to put his hands up. Robinson did as he was told, and the officer moved closer and placed his gun within three to four feet of Robinson's head. At this point, two other officers approached Robinson and handcuffed him and placed him in a cruiser. He was subsequently released after the officers determined that Robinson had not committed any crime.

In analyzing the pointing of the gun at Robinson's head, the court determined that the action was an unjustified and an unreasonable use of force. When Robinson approached the police officers, he was peaceful, did not have shotgun, and the officers could clearly see that he had no weapon. He had not committed any crime. However, the court first looked to see whether or not any constitutional violation was committed. The court concluded that there was a violation but indicated that if a violation had occurred, the officer may still be entitled to qualified immunity. Reviewing the facts under the qualified immunity test set forth by the Supreme Court in *Saucier v. Katz*, the court looked to whether the officers knew or should have known that their actions violated a clearly established constitutional right. The court concluded that the officers were entitled to qualified immunity because at the time of this incident in 1995, the law was not clearly established. However, the court pointed out that now the law is clearly established and if an officer points a gun towards "the head of an apparently unarmed suspect during an investigation" such action "can be a violation of Fourth Amendment, especially where the individual poses no

[57] 278 F.3d 1007 (9th Cir. 2000).

particular danger." [58]

Tenth Circuit
(Colorado, Kansas, Oklahoma, New Mexico, Utah, Wyoming)

In ***Casey v. City of Federal Heights***,[59] Edward Casey went to the courthouse in Federal Heights, Colorado, to contest a traffic ticket. He was unsuccessful and told the judge he wanted to appeal. The judge then handed Casey his court file and told him to take it to the cashier's office to pay. Casey had left his money in his truck, so he sent his eight-year-old daughter to the restroom, and he headed for the parking lot. A court clerk saw him and told him he could not remove the file from the courthouse. He replied that his daughter was in the bathroom, and he would be right back. Thereupon, he left the building—still holding the file.[60] The clerk alerted Officer Kevin Sweet.

Sweet moved to intercept Casey as he tried to return to the courthouse with money in hand. Sweet told him to return to his truck, but Casey said he needed to get back to his daughter and return the file to the cashier. Sweet then asked Casey for the file. Casey held out his briefcase with the file "clearly visible," but Sweet declined to take the file. Casey then moved around Sweet to return to the courthouse. Without further discussion or explanation, Sweet grabbed Casey and put his arm in a painful arm-lock. Casey was confused and moved his arm without breaking the officer's grip and started to walk to the courthouse with the file. Sweet then jumped Casey ripping Casey's shirt. Although Casey asked Sweet what he was doing, Sweet never told him he was under arrest or to stop resisting. At this point, Officer Lor arrived in a patrol car and assessed the situation. Determining that Casey "needed to be controlled," Lor fired her wire-attached Taser at him. Lor said she observed the situation for two to three minutes but other witnesses said she was there only for only a few seconds before firing her Taser.

Several additional officers arrived at the scene, and witnesses said Casey was taken to the ground, handcuffed tightly, and had his face banged into the concrete. One officer tased Casey by discharging the Taser directly into him. (Lor discharged her Taser again, but the errant shot hit another officer, and she was told to "put the thing away.") Casey was finally overpowered and was placed in a patrol car.

Casey was charged with two misdemeanors: resisting arrest and obstructing a peace officer. Later he was also charged with "obstructing government operations," to which he pled guilty. Casey filed suit for excessive force under

[58] *Robinson*, 278 F.3d at 1015.
[59] 509 F.3d 1278 (10th Cir. 2007).
[60] The removal of the file may have been a misdemeanor under Colorado law, but because the claim of excessive force was independent from the lawfulness of the arrest, the court did not dwell on it.

the Fourth Amendment and 42 U.S.C. § 1983. The suit was against Sweet and Lor, the city, and the chief of police. The district court granted summary judgment to the officers, and found with no officer liability, the city and chief were not liable either. Casey appealed.

The Court of Appeals applied the *Graham* standard—whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them—and the three-part test: whether the crime is severe, whether there is an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The court found that Casey's conduct did not involve a severe crime (indeed, removing the court file may not have been a crime at all). Nor did Sweet have any reason to believe that Casey posed an immediate threat to the safety of anyone. Three eyewitnesses stated that Sweet, not Casey, was the aggressor and that Casey was not violent during the entire encounter. Finally, Casey was not actively trying to evade arrest or flee. In fact, he was trying to get back to the courthouse to return the file. The court also found it troubling that Sweet never told Casey he was under arrest. Given all the facts and circumstances in the light most favorable to Casey, the court held that Sweet's use of force was excessive and violated Casey's rights under the Fourth Amendment.

As to Casey's excessive force claim against Lor for the use of a Taser, the court applied the same *Graham* test and found that when Lor arrived on the scene, she used her Taser almost immediately and without warning. The court held that "it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force—or a verbal command—could not exact compliance." [61]

Based on the force used against him, Casey also sued Sweet under § 1983 for "his failure to intervene and prevent the use of excessive force by his fellow officers." Citing to prior Tenth Circuit cases, the court held that, "a law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983. [62] The court found that Sweet should have known that the force used by the other officers was excessive, especially since Casey had not tried to fight or flee and given the "triviality of the offense." The court stated that Sweet "had some responsibility to keep his initial use of force from turning into a melee." [63] Summary judgment was reversed as to all defendants.

In ***Mecham v. Frazier***, [64] the Tenth Circuit Court of Appeals heard an interlocutory appeal on a denial of summary judgment on the grounds of qualified immunity to two Utah police officers. The appellate court found no excessive use

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[61] *Casey*, 509 F.3d. at 1286.
[62] *Id*. at 1283.
[63] *Id.*
[64] 500 F.3d 1200 (10th Cir. 2007).

of force when an officer used pepper spray to get a motorist out of her vehicle.

Around noon on a day in February, State Trooper Sean Frazier pulled Lemanda Mecham over as she drove on an interstate. [65] Frazier told Mecham that she was being stopped for going five miles over the speed limit and for not wearing her seat belt. Mecham gave Frazier her registration and an Arizona license. When Frazier ran a check on the license, he learned that the Mecham's Arizona license was suspended, but that she had a valid Utah license. When Mecham denied having a Utah license, Frazier told Mecham that she could not drive and that her vehicle would be towed. Frazier was explaining the citation when Mecham answered a cell phone call from her mother. Frazier told her to end the conversation, but she refused. Fraizer announced that he would arrest Mecham unless she cooperated. When she again refused, Frazier called for a tow truck.

When the tow truck arrived, Mecham refused to get out of her vehicle after and stated that she would sit in her car until her mother arrived. Fraizer called for back-up, and Officer Johnson arrived a few minutes later. Fraizer explained the situation to Johnson and both officers approached the vehicle, Frazier at the driver's side and Johnson at the passenger's side. Fraizer told Mecham that if she did not get out of the car, he would physically remove her. She again refused. Whereupon, Fraizer sprayed Mecham in the face with pepper spray, opened the car door, and pulled her out. The officers took Mecham to the rear of the car, put her on the ground, and handcuffed her. After receiving medical assistance, Mecham was taken to jail and booked. Later all charges were dropped. From the time Frazier stopped Mecham until the incident was resolved took about 50 minutes.

Mecham alleges that the officers used excessive force in violation of her Fourth Amendment rights. The officers sought summary judgment on a claim of qualified immunity, but the district court denied the motion stating that the question of objective reasonableness was one for the jury to decide. The Court of Appeals disagreed, stating that while the jury may need to decide objective reasonableness when there are disputed issues of fact, the question is not one for the jury where the facts are uncontroverted. "Whether the officers acted reasonably, however, is a legal determination in the absence of disputed material facts." [66]

The court applied *Graham's* three-part test: the severity of the crime, the potential threat posed by the suspect to the safety of the officer and others, and the suspect's attempt to resist or evade arrest. The court held that in view of the last two factors—safety concerns and resistance to arrest—the officers' conduct in

[65] The facts of the case were essentially undisputed since the trooper's cruiser had a dashboard camera which recorded the incident.

[66] *Id*. at 1203 citing to *Medina v. Cram,* 252 F.3d 1124, 1131 (10th Cir. 2001).

this case was reasonable. The court found that the initial traffic stop was justified, and what should have been a routine encounter turned into a 50+ minute ordeal resulting in an arrest. The court listed all the ways Mecham resisted arrest and determined that the use of force was reasonable. This determination was reinforced by the issue of safety concerns.[67] The court held that because of Mecham's disregard for the officers' instructions, the length of the encounter, and the implausibility of Mecham's rationale for not cooperating, the officers' use of force was justified. "The force used here, while unfortunate, was not excessive."

Eleventh Circuit
(Alabama, Florida, Georgia)

In ***Beshers v. Harrison***,[68] the police in Georgia received a phone call from a store clerk indicating that there was an intoxicated individual who had stolen some beer from the store after the clerk had refused to sell the alcohol to the individual. After receiving a description of the individual, the officers observed a person who matched the description and attempted to make a traffic stop. However, the individual refused to stop and began weaving in and out of traffic, crossing the center lane and driving at a high rate of speed. Ultimately, the driver collided with another vehicle. After the collision, the individual continued to evade the police. Ultimately, the driver came in front of a police cruiser, at which time the cruiser clipped the driver's vehicle causing it to flip over. The individual died on impact.

The decedent's estate filed a lawsuit under 42 U.S.C. § 1983 against the City of Toccoa, the Toccoa Chief of Police Frank Strickland, and several Toccoa police officers claiming a violation of the decedent's Fourth Amendment right to be free from unreasonable searches and seizures. The lower court granted the individual defendant police officers' motion for summary judgment, concluding that there was no Fourth Amendment seizure. Alternatively, the court concluded that if there was a constitutional violation, the individual defendants were entitled to qualified immunity.

On appeal, the Court of Appeals for the Eleventh Circuit addressed whether the officer who allegedly terminated the high speed chase by causing the decedent's vehicle to crash had violated the decedent's Fourth Amendment rights to be free from unreasonable seizure. The court affirmed the granting of summary judgment, but concluded that no constitutional violation occurred. However, the court analysis differed from that of the lower court.

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[67] Mecham was stopped on a narrow shoulder of a busy interstate, a few feet from the edge of the highway. Mecham also remained in the driver's seat with the keys in the ignition and in control of the car all the while refusing to cooperate. The court also found that Mecham's explanation for not getting out of the car implausible. She claimed that she doubted Fraizer's identity and feared he was using a pretense to get her out of the car.

[68] 495 F.3d 1260 (11th Cir. 2007).

The court noted that, in order to establish an excessive force claim, a plaintiff must first show that the decedent was "seized" within the meaning of the Fourth Amendment. Looking to the principles set forth by the Supreme Court in *Brower v. County of Inyo*,[69] the court stated that Fourth Amendment seizure occurs when " 'there is a governmental termination of freedom of movement through means intentionally applied.' " In this case, the court, viewing all facts in the light most favorable to the non-moving party, concluded that the police officer had intentionally collided with the suspect, thereby creating a Fourth Amendment seizure.

The court next had to decide whether the force used was reasonable under the totality of the circumstances. The court relying on *Graham v. Connor*, stated that the question was whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. The court also relied on *Scott v. Harris*, and concluded that the officer's alleged use of deadly force to stop the suspect did not violate his Fourth Amendment rights. From the officer's perspective, he had reason to believe that the individual was a danger to the pursuing officer and others and was driving under the influence of alcohol. He was weaving in and out of the traffic, crossing the double yellow line, driving on the wrong side of the road, and forcing others off the road. The court held that the police officer had intentionally used force to seize the individual, but that the use of that force was reasonable because the suspect driver had intentionally placed himself and the public in danger by his unlawful and reckless actions and that he ignored multiple warnings by the police.

In ***Vinyard v. Wilson and Stanfield,*** [70] Terri Vinyard filed a civil action against Sheriff Wilson and Officer Stanfield of the Sheriff's Office in Walker County, Georgia, alleging that they violated her Fourth Amendment right by using an excessive amount of force during her arrest. Officer Stanfield stopped by Vinyard's house to notify her that her neighbor made a complaint that Vinyard's son had given beer to the neighbor's son. At the time Stanfield came into contact with Vinyard, she and others were attending a cook-out at Vinyard's home. The officer warned her not to give any beer to the neighbor's son.

Afterwards, Vinyard left the party to get her son and then passed by the complaining neighbor's house at which time she became involved in an unpleasant exchange of words with the neighbor. Stanfield returned to Vinyard's house and began to question her about the contact with the neighbor. Vinyard claimed that Stanfield refused to listen to her, and he placed her under arrest, handcuffing her behind her back. During transport, Stanfield and Vinyard exchanged verbal insults. Stanfield then stopped his cruiser, opened the rear door, and sprayed Vinyard with two or three bursts of pepper spray. The size of Vinyard compared to the size of the officer was significant to the court in its

[69] *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989).
[70] 311 F.3d 1340 (11th Cir. 2002).

analysis: Vinyard was five feet, three inches tall and 130 pounds, and Officer Stanfield was six feet tall, weighing 200 pounds. Stanfield admitted spraying Vinyard but claimed it was only one burst of pepper spray. He also testified that she was verbally abusive, kicking the back seat of his patrol car and rear window, and beating her head against the driver seat rear window. Stanfield charged Vinyard with disorderly conduct and obstructing a law enforcement officer.

In Vinyard's civil action alleging a § 1983 excessive force claim, the lower court granted summary judgment to the arresting officer and the sheriff on basis of qualified immunity. However, on appeal, the Eleventh Circuit considered the issue of qualified immunity, noting that the threshold inquiry was whether the plaintiff's allegations, if true, established that a constitutional violation occurred.[71] The court then noted that once it has been determined that a constitutional right had been violated under the plaintiff's version of facts, the next step is to determine whether the right was clearly established.[72] Thus, in *Vinyard*, the court determined that the first issue was whether Officer Stanfield's conduct in using the pepper spray during the jail ride violated Vinyard's constitutional rights.

Unlike the recent Fourth Circuit case in *Orem v. Rephann*, where the court applied the Fourteenth Amendment to similar facts, the Eleventh Circuit used Fourth Amendment analysis under *Graham v. Connor*. [73]

In this case, the court determined that all the *Graham's* factors weighed heavily in Vinyard's favor as to the force used during the ride to jail. Crimes of disorderly conduct and obstruction were minor crimes, and Vinyard posed no serious threat to the safety of the officer, much less any immediate threat. The court found that there was no evidence that Vinyard resisted the initial arrest or actually attempted to flee at any time.[74] Looking at the facts and circumstances most favorable to Vineyard, the court concluded that "it was abundantly clear to us that during the jail ride Stanfield 'used force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham*.' "[75] The court also noted that the courts "have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else." [76]

Finally, once the court determined that there was a violation of Vinyard's constitutional rights, the court determined that, while there was no pre-existing case in 1998 which involved facts materially similar to the situation Stanfield was in, especially in the use of pepper spray, facts-specific precedents are not always

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[71] *Vinyard* at 1346. *See also Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2513, 1553 L. Ed. 2d 666 (2002).
[72] Citing to *Saucier v. Katz* , 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).
[73] *But see Orem* where the Fourth Circuit determined Plaintiff was a pretrial detainee.
[74] *Vinyard*, 311 F.3d at 1347-1348.
[75] *Vinyard*, 311 F.3d at 1348, quoting *Lee v. Ferraro*, 24 F. 3d 1188, 1198 (11th Cir. 2002).
[76] *Id.* (citations omitted).

needed to overcome qualified immunity. In reviewing the entire analysis, the court concluded that "no objectively reasonable police officer could believe that, after Vinyard was under arrest, handcuffed behind her back, secured in the back seat of a patrol car with a protective screen between the officer and the arrestee, an officer could stop the car, grab such arrestee by her hair and arm, bruise her, and apply pepper spray to try to stop the intoxicated arrestee from screaming and returning the officer's exchange of obscenities and insults during a short four-mile jail ride.[77] The court concluded that Stanfield was not entitled to summary judgment.

D.C. Circuit

In ***Arrington v. United States of America***,[78] Derrek Arrington admitted that he inappropriately engaged police officers by fleeing from a lawful traffic stop. He claimed, however, that his constitutional rights were violated because after the police captured, restrained, disarmed, and handcuffed him, he was severely beaten for ten minutes. The officers did not dispute that they used "exceptional" force against Arrington, but claimed their actions were justified to disarm an individual whom they believed had just shot a fellow officer. The district court granted summary judgment to the officers; the Court of Appeals reversed and remanded.

U.S. Park Police officers John Daniels and Martin Yates stopped Arrington because the vehicle he was driving did not have a front license plate. The officers noticed a bag in the car that appeared to contain drugs, and they confirmed that it was cocaine. Arrington was ordered out of the car, but instead of complying with the order, he drove off, dragging Daniels with him. The officer freed himself after 75 years and joined Yates in a car chase after Arrington. Arrington crashed into a median, abandoned the vehicle and, armed with a gun, ran from the officers. Meanwhile Sergeant Rick Murray, on patrol with the D.C. police, witnessed Arrington crash his vehicle and flee with Daniels in pursuit. Murray joined Daniels, and the officers caught Arrington trying to climb a fence. At this point in the event, the stories of what happened are very different.

Arrington claimed that Daniels slammed him against the fence causing Arrington to drop his weapon where the gun accidentally discharged. The officers proceeded to throw him on the ground, handcuff him, then kick and punch him repeatedly. The beating lasted about 10 minutes and was so severe that Arrington drifted in and out of consciousness. When he woke, a dog was biting his leg. The officers offered a different version of what happened. Daniels stated that he got Arrington off the fence, and Murray punched him in the ribs in order to restrain him and get him handcuffed. Before the handcuffs went on, Arrington raised his hand and shot Daniels in the face. Murray tackled Arrington and Yates joined in hitting Arrington to get him to release the gun. A canine officer arrived and ordered his dog to apply controlled bites to appellant's leg. It

[77] *Id.*
[78] 473 F.3d 329 (D.C. Cir. 2006).

was almost 10 minutes before Murray could disarm Arrington. A jury convicted Arrington on two of four counts. Two subsequent juries deadlocked on the remaining charges. Arrington brought a civil rights claim and the district court granted summary judgment to the officers. Arrington appealed.

The principal question before the appellate court was whether the officers who inflicted bodily harm on Arrington used more force than was reasonably necessary. The court found there to be a genuine dispute of material facts. The court reversed the summary judgment awarded to the officers and remanded the case for trial. The officers' version would support a finding that the use of force was reasonable. However, the evidence, taken in the light most favorable to Arrington, would certainly support a violation of the Fourth Amendment. Those facts would also preclude a qualified immunity defense.