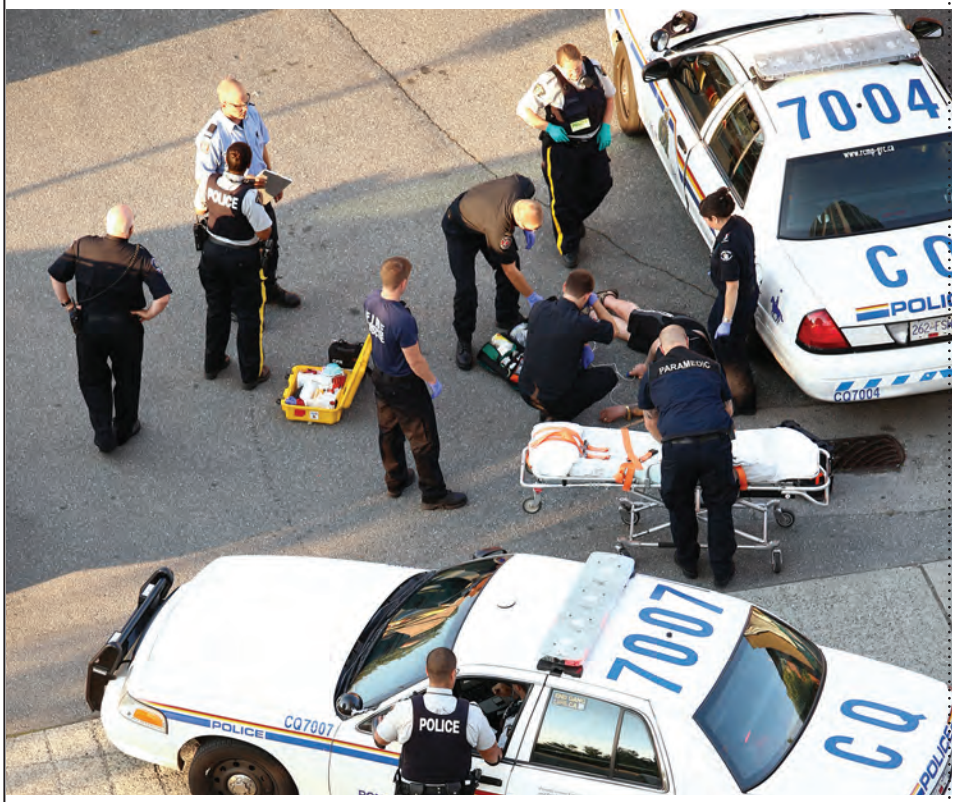
Defending Excessive Force Actions: A Step by Step Approach to Defending Law Enforcement Officers Accused of Using Excessive Force

By: Lisa Maki, Senior Assistant Corporation Counsel, Boston Law Department



Not since the 1992 Los Angeles riots over the acquittal of four Los Angeles police officers charged with beating Rodney King, has the issue of the use of force by police officers captured the national audience. The shooting death of Michael Brown, an unarmed black teenager in Ferguson Missouri, in August 2014, has changed the landscape in how municipalities and police departments must deal with the use of force by police officers. No longer will the public simply accept the officer's version of events as true. In fact, police officers will face heightened scrutiny when explaining the justification for their use of force.[1] It is in this new era of smartphone video recordings and the public's demand for government transparency that municipalities and police departments must confront excessive force actions. This paper will provide a roadmap in defending excessive force actions against police officers under the public microscope.

I. Assessing the Complaint: What Constitutional Right Did The Use Of Force Infringe?[2]

The first step upon receiving a complaint that brings allegations against an individual police officer[3] for excessive force is to determine what constitutional right was allegedly infringed. Oftentimes, this determination can be made by identifying the plaintiff's liberty status.[4] Depending on the plaintiff's liberty status, i.e., whether the plaintiff was a free citizen, a pretrial detainee (not yet convicted, but awaiting trail), or a prisoner (convicted), different constitutional standards apply to the level of force used by the officer.

An excessive force claim brought by a free citizen is judged by either the Fourth Amendment objective reasonableness standard or the Fourteenth Amendment substantive due process "shock the conscience" standard.[5] An excessive force claim brought by a pretrial detainee is subject to the Fourteenth Amendment objective[6] reasonableness standard. And finally, a convicted prisoner's excessive force claim is analyzed under the Eighth Amendment cruel and unusual punishment standard.

A. *The Plaintiff Was A Free Citizen, But Was He "Seized" Within The Meaning of The Fourth Amendment?*

In order for a plaintiff to have a claim for excessive force under the Fourth Amendment, he must show that (1) he was "seized" within the meaning of the Fourth Amendment; and (2) that the force was objectively unreasonable.[7] Thus, if the plaintiff was a free citizen at the time the force was used, it must then be determined whether the plaintiff was "seized" within the meaning of the Fourth Amendment.[8] In other words, just because a free citizen was subjected to force by a police officer does not *necessarily* mean that the Fourth Amendment objective reasonableness standard will apply. Thus, in order for the use of force to be analyzed under the Fourth Amendment reasonableness standard, a seizure must have occurred.[9]

The Supreme Court has defined a "seizure" under the Fourth Amendment the following ways: (1) a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen;" (2) "a reasonable person would have believed that he was not free to leave" and the person in fact submitted to the assertion of authority of the police officer; and (3) "there was a governmental termination of freedom of movement through means intentionally applied."[10]

Thus, if the plaintiff was not the intended target of a police officer's use of force, for example (1) was an innocent bystander shot by police; (2) was bystander injured as a result of a crash involving a high speed pursuit; or (3) was subjected to use of force outside the context of an arrest or a detention, the Fourth Amendment will not be implicated. But, if the means in which the officer used in his attempt to "seize" the individual results in a different detention than the officer had

originally intended, a seizure has still occurred.[11] For example, if an officer sets up a road block to stop a high speed pursuit intending to force the driver to voluntarily stop at the road block, but instead the driver crashes into the road block and dies, the driver was "seized" within the meaning of the Fourth Amendment because the road block was the means, or "instrumentality," that the officer intended to bring about the seizure.

II. The Substantive Due Process Clause: The "Shock the Conscience" Standard

If the plaintiff was not "seized" within the meaning of the Fourth Amendment, that, however, does not end the analysis. Claims for excessive force outside the context of an arrest are analyzed under the Fourteenth Amendment substantive due process standard.[12] Outside of the Fourth Amendment "search" or "seizure" context, the Supreme Court has recognized that an excessive-force claim may be based on substantive due process under the Fourteenth Amendment.[13] "The standard for showing excessive force in violation of the Fourteenth Amendment, therefore, is higher than that required to show excessive force in violation of the Fourth Amendment." [14]

III. The Fourth Amendment Reasonableness Standard: *Graham v. Connor*

In *Graham v. Connor*, 490 U.S. 386, (1989), the Supreme Court set forth the standard for analyzing excessive force claims under the Fourth Amendment. The *Graham* Court explained that determining whether the force used to effect a particular arrest was reasonable required a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing government interests at stake.[15]

The *Graham* Court formulated a test to determine "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." [16] The *Graham* Court identified three factors to assist in determining whether under the "totality of the circumstances" the force used was objectively reasonable:

1. **the severity of the crime;**
2. **the immediate threat that the suspect posed to themselves, others, or the officers; and**
3. **whether the suspect was actively resisting or evading arrest.**[17]

The *Graham* Court also recognized that "[n]ot every push or shove, even it if may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."[18]

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.[19]

An officer's subjective intent is irrelevant. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[20] "The test of reasonableness is not capable of precise definition or mechanical application."[24] When a plaintiff asserts claims for both unlawful arrest and excessive force, the Court must "analyze the excessive force claim without regard to whether the arrest itself was justified."[22]

Each of the three *Graham* factors informs the ultimate question of objective reasonableness: whether a reasonable officer presented with the same circumstances, regardless of his or her subjective intent, would have taken the same course of action.[23]

IV. Deadly Force

The use of deadly force is also governed by the Fourth Amendment reasonableness standard. Whether the use of deadly force is reasonable "turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation."[24] Deadly force is reasonable when:

1. **the suspect poses an immediate threat of serious physical harm to the officers or others;**
2. **the suspect committed a crime involving the infliction of threatened infliction of serious harm, such that his being at large represents an inherent risk to the general public;**[25] **and**
3. **The officers either issued a warning or could not have done so before using deadly force.**[26]

The reasonableness of the use of deadly force must be determined "from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight."[27]

V. Beyond Excessive Force

A. Duty to Intervene

Even if the defendant officer did not actually participate in the use of force, he may still be held liable for failing

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Lisa Skehill Maki is a Senior Assistant Corporation Counsel for the City of Boston Law Department where she represents public officials and police officers at all stages of litigation in state and federal courts. She concentrates on civil rights litigation involving police misconduct and employment discrimination. She was recognized as an Up and Coming Lawyer by *Massachusetts Lawyers Weekly* in 2013. Attorney Maki graduated from Suffolk University Law School where she was a staff member and editor of the Suffolk University Law Review.

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to intervene to prevent the use of excessive force. A police officer has a duty to intervene to prevent the use of excessive force if he is informed of facts that establish a constitutional violation and is able to prevent that violation.[28] Therefore, a police officer may be sued for both his own use of excessive force on the plaintiff or his failure to take reasonable steps to attempt to stop the use of force by fellow officers.[29]

"An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used; (2) that a citizen has been unjustifiably arrested; or (3) that any constitutional violation has been committed by a law enforcement official."[30] "Failure to intercede results in liability where an officer observes excessive force is being used or has reason to know that it will be."[31] "'In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring.'"[32]

B. Failure To Provide Medical Treatment

Oftentimes, a Fourth Amendment excessive force claim is accompanied by a Fourteenth Amendment due process claim for failure to provide medical treatment. The Supreme Court has held that Officers are required to "provide medical care to persons . . . who have been injured while being apprehended by the police."[33]

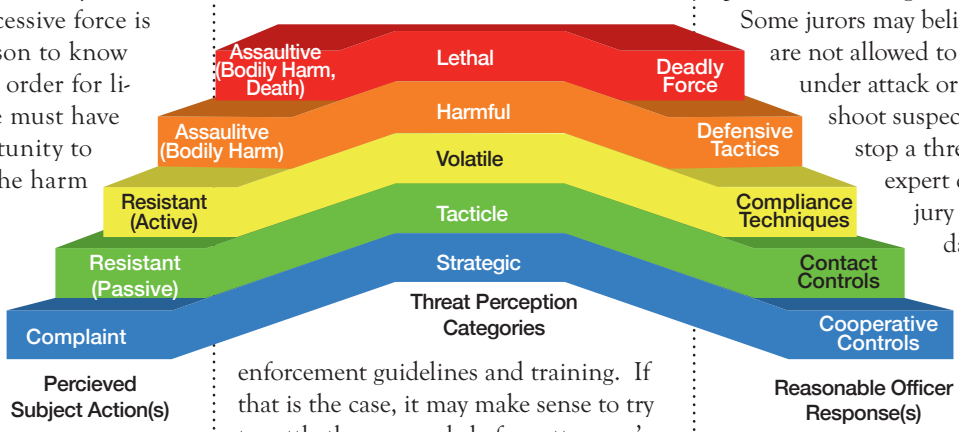
VI. You Have Determined the Legal Landscape: Now What?

A. Motions to Dismiss

A defense attorney must decide at the outset whether the Complaint is subject to a motion to dismiss. Excessive force claims are some of the most factual and circumstantial-dependent claims to defend, which require significant discovery in order to establish whether conduct was reasonable. Filing a motion to dismiss that has an unlikelihood of success may serve only to drive up the plaintiff's attorneys' fees which may increase the cost of settlement later on.

B. Understanding Use of Force

It is important to develop a theme for your case early on. In order to do this, it is important to have a firm understanding of use of force principles. One of the best ways to do this is to consult with a use of force expert. A use of force expert can be an instructor from the state or municipality's police academy or a private law enforcement expert on the use of force—oftentimes retired police officers. Although case law *may* shed light on whether the use of force was reasonable, no two use of force cases are identical. So, consult with a use of force expert prior to discovery. A use of force expert may determine that the force was excessive based on law enforcement guidelines and training. If that is the case, it may make sense to try to settle the case early before attorneys' fees start to pile up.



If, on the other hand, the use of force expert finds that the use of force was reasonable it is important to understand how to present the reasonableness of the use of force to the Court at summary judgment and/or to a jury. Many law enforcement agencies[34] rely on a use of force "model" or a use of force "continuum."[35] Therefore, it is important to understand the principles guiding officers in their decisions to use force.

In addition to consulting with an expert, it is important to gather information on the defendant officer's training at the academy and the policies and procedures of the police department. Although police department procedures and guidelines do not establish the constitutional standard, courts have found that such guidelines and procedures are relevant to the Fourth Amendment "reasonableness" standard.[36]

C. Experts

A use of force expert can be extremely helpful at trial in excessive force cases. Although the defendant officer can and should testify as to his training, departmental rules and procedures, and his understanding of the appropriate levels of force, the jury may be skeptical of his testimony given that he is the one accused of using excessive force. Jurors will likely expect the defendant officer to say that which best serves his defense. Expert witnesses lessen this problem.[37]

Policing is a profession and officers undergo significant training and retraining in the use of force. Jurors may come to service with impressions of use of force by police officers from the media, movies, and novels without consideration of the specialized training officers undergo. Some jurors may believe that officers are not allowed to use force unless under attack or that they should shoot suspects in the leg to stop a threat. A use of force expert can inform the jury that national standards in policing do not require shots to the leg or for an officer to wait to be attacked before using force and why these preconceived notions would significantly increase the risk to the safety of both the public and police officers. Experts can also be helpful in resolving disputes of facts in deadly force cases by ballistic reconstruction.

Use of force experts can teach the jury that use of force is strategic and tactical rather than an emotional response to a resisting suspect. Educating the jury on the spectrum of perceived resistance/threat from a suspect, i.e., compliant, passive resistance, active resistance, and assaultive resistance along with the appropriate corresponding response to each level of resistance, i.e. verbal commands, pepper spray, taser, distraction techniques, pain compliance techniques, and deadly force is essential in a post-Ferguson world.

Finally, experts may be allowed to opine as to whether the use of force was appropriate based on law enforcement standards. Although reasonable conduct under law enforcement standards does not compel a finding of Fourth Amendment reasonableness, such testimony is highly relevant and persuasive.

If an expert is cost prohibitive, departmental policies on the use of force and training manuals can be very effective in educating the jury as to the guidelines governing force. Many department guidelines are comprehensive and define the levels of resistance along with the correlating levels of force that officers are allowed to use to overcome that resistance. Demonstrating at trial that an officer followed departmental rules when using the force in question can be a significant step towards showing that the force was "reasonable."

In addition to an expert on the use of force, forensics experts can also be helpful. For example, in a situation where an officer has used deadly force, a forensics/ballistics expert may be able to recreate the scene to demonstrate how the scenario unfolded at the time of the shooting from the officer's perspective. Medical experts are also useful in excessive force cases. Medical experts can opine as to whether certain alleged injuries were pre-existing, the possible causes of injuries,[38] and, in shooting scenarios, perhaps the position of the suspect when he was shot.

VII. Qualified Immunity—Staging the Defense

Prior to embarking on discovery, a defense attorney must know what the clearly established law is with respect to the level of force in question. It is also important to determine to what extent the Court views the "totality of circumstances" when determining the reasonableness of the use of force. Some Circuit Courts only look to the use of deadly force at the moment the force was used.[39] Other Circuit Courts consider the events leading up to the need to use deadly force to determine reasonableness.[40]

For example, if it is a case involving a taser, it is critical to know (1) what authorities[41] the Circuit Court considers for purposes of qualified immunity; (2) the level of factual similarity[42] the Circuit Court considers; (3) all cases in which it was held that the use of a taser was objectively unreasonable; and (4) the time frame in which the court looks to in determining reasonableness.

In order for the Court to grant the officer qualified immunity for particular use of a taser, the facts and circumstances must be substantially different from cases where the use of the taser was found to be objectively unreasonable—otherwise the officer would have known that his conduct was unlawful. With those cases in mind, you will need to seek out facts to differentiate your case from those in which the use of the taser was found to be unreasonable.

Defense attorneys should also shape their discovery plan with these *Graham* reasonableness factors in mind: (1) the severity of the crime; (2) whether the plaintiff posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting or attempting to evade arrest by flight. For deadly force cases, it is important to establish facts to show that the officer had probable cause to believe that a suspect posed a threat of serious physical harm to the officer or others.

Perhaps the defense is that the officer mistook a fact, i.e., mistakenly believed that the plaintiff was going to resume his attack and/or flight when he was really submitting, or that the plaintiff was armed when he was in fact unarmed. It is crucial to establish every incremental move made by the plaintiff up to and including the time the force was used. Even if the officer was mistaken in the amount of force he used, he will be entitled to qualified immunity if the mistake was reasonable.[43]

A. Discovery

Discovery requires that the defense attorney depose the plaintiff and interview/depose any and all witnesses. If the plaintiff is deposed before anyone else, he will be locked into a story early on. Deposing the plaintiff after the officers and/or other witnesses gives the Plaintiff an opportunity to favorably shape his testimony. Be sure to have conducted enough of an investigation before the plaintiff's deposition to know which questions must be asked. Consider videotaping the plaintiff's deposition and ask the plaintiff to demonstrate the exchange. Oftentimes, plaintiffs fall victim to exaggerating their story in the deposition in the hopes of getting a large settlement. Exaggerated claims undercut the credibility of the Plaintiff at trial, especially if it has been acted out on camera.

In addition to depositions, video footage (dash cams, body cams, surveillance video, etc.) can be very revealing. Allegations of excessive force oftentimes arise many years after the incident—meaning crucial video evidence has since been deleted. Plaintiff's medical records are crucial in excessive force cases because the records will contain the plaintiff's first report of the use of force which may contradict the allegations later. Furthermore, a record of minor or *de minimis* injuries may contradict the plaintiff's exaggerated allegations of brutal force. Dispatch recordings which may have captured the officer's description of the events in real-time may also prove valuable. Photos of the scene, police reports, the booking photos of the plaintiff, use of force forms, and visible injury reports are also critical in defending an excessive force case.

In addition, obtain a copy of the plaintiff's criminal record. Had the officer ever arrested the plaintiff before? Was the officer familiar with the plaintiff's criminal background at the time the force was used? These facts may prove significant at trial. On the other hand, plaintiffs' attorneys routinely request the internal affairs and personnel files of the officers. Because public records laws vary state to state, it is important to know what information is confidential and what is public with respect to police officer personnel and internal affairs files. For example, in Massachusetts, closed internal affairs investigations are considered public record, while records of discipline against the officer are confidential.[44]

B. Summary Judgment

Summary judgment is typically the first opportunity the defense attorney has to raise the issue of qualified immunity because excessive force cases are so factually and circumstantially depen-

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dent. Summary judgment in an excessive force case should be submitted where the undisputed facts taken in the light most favorable to the plaintiff[45] show that the officers did not violate a constitutional right, or that the law was not clearly established, or that an objectively reasonable officer could have concluded (even mistakenly) that his conduct did not violate the plaintiff's constitutional rights.[46] Video evidence such as body cams or dash cams may prove critical at the summary judgment stage. If the video depicts the incident from the perspective of the officer, the court does not have to take the plaintiff's version of events as true if it is contradicted by the video.[47]

Arguing qualified immunity at the summary judgment stage requires careful attention to the disputed and undisputed facts. In cases of deadly force, where there are no witnesses to contradict the officers' version of events, courts can look to circumstantial evidence such as physical evidence or inconsistencies among the officers' testimony, to determine whether there is a credibility determination to be resolved by a jury.[48] At the summary judgment stage, the district court determines which facts a jury could reasonably find from the evidence presented by the litigants.[49]

An officer has a right to interlocutory appeal if he is denied qualified immunity.[50] The Appeals Court however, may not review factual determinations by the district court but rather only issues of law.[51]

VIII. Officer Credibility

Post-Ferguson, officer credibility has declined based on the numerous videos showing officers engaged in the use of excessive force.[52] Video evidence of police misconduct has demonstrated to the public at large that police misconduct actually *does* happen.[53] Therefore, juries may be skeptical of officer testimony in civil rights trials involving the use of force.[54] After all, in order for the officer to justify his use of force, the jury must believe the officer's testimony that the plaintiff had committed a serious crime or was resisting arrest or engaged in threatening conduct.

The defense attorney wants to be sure to keep out any and all prior allegations of misconduct and/or discipline for prior misconduct because it would be unduly prejudicial propensity evidence. If the excessive force case involves a *Monell* claim against the municipality, be sure to bifurcate the two portions of the case for trial so that any allegations of prior misconduct against the officer (that may be relevant to the *Monell* claim for failure to supervise and/or discipline) be kept out during the "constitutional phase" of the trial. Otherwise, allowing the jury to hear that the officer has prior allegations of misconduct against him would prevent the officer from receiving a fair trial. Of course, any finding that the officer had been disciplined for "untruthfulness" would be allowed into evidence for impeachment purposes.

Finally, some officers testify better than others. A nervous police officer could be mistaken for an untruthful witness. Therefore, it is imperative that a defense attorney seek out corroborating evidence by third party witnesses, recordings, or videos during the discovery phase. Although other officers may have also witnessed the incident, their testimony may also be viewed skeptically, i.e., the "blue wall" of silence. If corroborating evidence does not exist, substantial effort must go into preparing the officer for testimony and cross-examination. In a "he said, he said" case, credibility is everything.

IX. Using the Facts Affirmatively At Trial

In order to defend the use of force, a defense attorney must use the facts to show that the force used was reasonable. That is because the use of force in any given police case is almost always a reaction to the plaintiff's conduct. So at trial, a defense attorney needs to shape the trial around the *Graham* factors in order to show that it was the *plaintiff's actions* or inactions that caused the Officer to use that particular level of force. Discuss the *Graham* factors in the opening and closing. The officer will need to be able to articulate at trial with particularity the conduct of the plaintiff at the time the force was used.

A. Graham Factors Applied:

In *Kinne v. Pierre, et al.* USDC No. 2012 cv 11466-RWZ, the Plaintiff, Sarah Kinne, a young female painter and art teacher, parked illegally in a pharmacy parking lot while running errands. A short time after she left the parking lot, a tow truck operator began towing her car by lifting the rear of her vehicle in the air. While the car was still raised in the air, but before the tow truck driver had begun driving away, the Plaintiff returned and, upon observing that her car was about to be towed, jumped into the driver's seat demanding that it be released to her. The tow truck operator called 911 and two police officers responded. When the officers arrived they asked the Plaintiff to get out of the vehicle. She responded by screaming for help to passersby, yelling that the police and tow truck driver were stealing her car, and that her civil rights were being violated. The officers then threatened to arrest her if she did not get out of the car. She responded by rolling up her window and placing her keys in the ignition. At that point, one officer opened the car door, reached in and handcuffed one of her hands. He was unable to secure the second handcuff because she was flailing her arms and kicking her legs. While the officers were trying to pull her out, one officer held on to the chain of the handcuffs. The officers were eventually able to pull her out of the car by her arms and leg, bring her to the ground and place her under arrest.

The Plaintiff sued the officers alleging that they had used excessive force by pulling on the chain of the handcuff that had been attached to her wrist, causing permanent ligament damage to her right wrist. The Plaintiff, an artist/painter, claimed that she was no longer able to paint due to the chronic pain in her right wrist.

Severity of the Crime:[55]

> Misdemeanor—disorderly conduct. Because disorderly conduct is not considered a serious crime, this factor weighed in favor of the Plaintiff. The focus of the defense was therefore, shifted to the second and third *Graham* factors: threats to safety and resistance to arrest.

Threat to Public and Officer Safety:

The Plaintiff's screams for help that her car was being stolen had caused dozens of onlookers to congregate in a busy downtown parking lot creating a risk that onlookers could be struck by an unknowing vehicle entering and/or exiting the parking lot.

Although the Plaintiff, a young woman of approximately 120 lbs was not a physical threat to two male officers, both of whom weighed over 200 lbs, the Plaintiff's screams for help that her car was being stolen put the officers at risk of being attacked by an angry mob that may incorrectly perceive that she is being carjacked and/or being attacked by police.

The other threat posed to the officers was that they were trying to pull a noncompliant person out of a car that had been lifted by a tow truck. If the struggle between the plaintiffs and the officers caused the car to fall, they could all have been seriously injured. Finally, had the Plaintiff been able to turn the ignition and hit the gas, both the officers and the Plaintiff would have been seriously injured.

Actively Resisting or Evading By Flight:

The Plaintiff was passively resisting by refusing to get out of the car. The Plaintiff was actively resisting by flailing her arms and legs once the officers placed a handcuff on her. The Plaintiff was also attempting to evade the arrest by flight when she attempted to start the car.

Here, the jury was also presented with evidence on the Boston Police Department's rules and procedures for handcuffing. The rules stated that officers are never to let go of a handcuff that is only attached to one hand of a suspect because handcuffs can be used as weapons. The reason the officer held on to the handcuff? Not to inflict pain or cause injury. But rather, to prevent an actively resistant suspect from using a loose handcuff as a weapon.

The case resulted in a defense verdict.

In *Fedorishin v. Leahy, et al.* SUCV No. 2011-04623, the Plaintiff sued an officer for excessive force when he arrested him for disorderly conduct outside a night club by grabbing him out of a crowd of people, throwing him against the hood of a police cruiser, and kneeing him in the thigh. The entire incident was caught on video. The case went to trial in June 2015.

Severity of the Crime:

Misdemeanor—disorderly conduct. This *Graham* factor was in Plaintiff's favor.

Threat to Safety:

None. Prior to the arrest, the Plaintiff had been arguing with the police over the lawfulness of his friend's arrest and had his back turned and was walking away when he was arrested, had not been informed that he was under arrest until he was grabbed, and was unarmed.

Resisting/Evading Arrest:

The video showed very little resistance other than what appeared to be verbal resistance by the Plaintiff after he had been thrown against the cruiser.

Viewing the video at first glance, the force appears to be excessive. The Plaintiff is not a safety threat, he does not appear to be resisting. He is unaware that he is under arrest until he is grabbed from behind and swung onto the hood of the cruiser and the video does not depict any physical resistance.

At trial, the defense introduced the Boston Police Department rules and procedures on use of force to show that (1) officers are trained to use the hood of a police cruiser in order to gain control of a suspect; and (2) that a knee strike is a technique used when a suspect is resisting handcuffing.

The testimony regarding the officer's use of the knee strike was that the Plaintiff had been resisting the handcuffing by stiffening his arms and refusing to allow his hands to be placed together so that handcuffs could be applied.

The department rules demonstrated that this type of resistance is called "active resistance" and officers are trained to use "distraction techniques," such as knee strikes, in response to situations where the arrestee is offering "active resistance" in order to gain compliance. The officer testified that he was trained not to force a suspect's hands together against the suspect's will because it could cause serious injury to the suspect's shoulder, i.e., dislocation and torn ligaments, and that knee strikes were more effective in gaining compliance without any injury to the suspect.

The case resulted in a defense verdict.

Qualified Immunity At Trial

The Defendant is entitled to raise the defense of qualified immunity throughout the trial, at the close of plaintiff's case and the close of all the evidence. The Defendant can also raise qualified immunity after a plaintiff's verdict. However, at that juncture, the facts are construed in the light most favorable to the verdict. Therefore, in many cases, special juror interrogatories can assist in determining what facts the jury actually found. For example, the special interrogatories could ask the jurors whether they found that the plaintiff was actively resisting, or whether the officer applied force before or after handcuffing. Specific factual determinations by the jury at trial *may* assist in obtaining qualified immunity after trial if a verdict comes back in the Plaintiff's favor if the facts found by the jury do not demonstrate a clearly established constitutional violation.

Excessive Force Cases—Some Examples:

Unintentional Excessive Force: In *Stamps v. Town of Framingham*. 2016 WL 457153 (1st Cir. 2016), the First Circuit denied qualified immunity to an officer who accidentally shot and killed the plaintiff on the grounds that his conduct leading up to the accidental shooting—pointing a gun at the head of a compliant, unarmed, non-threatening individual who was not suspected of any criminal activity with the safety off and his finger on the trigger. There, several police officers were executing an early morning search war-

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rant when one of the officers accidentally shot and killed the plaintiff—a 68 year old man who had been laying prone on the ground with his hands in the air and was not suspected of any criminal wrongdoing. In denying the officer qualified immunity, the First Circuit held that the officer's conduct leading up to the accidental shooting—"pointing his loaded assault rifle at the head of a prone, non-resistant, innocent person who presents no danger, with the safety off and a finger on the trigger"—constituted excessive force in violation of the plaintiff's Fourth Amendment rights.

Use Of Force On Compliant/Non Resisting Suspects Excessive: Courts have generally held that the use of force above and beyond regular handcuffing, i.e., tackling, throwing to ground, slamming against car, is a clearly established violation of the Fourth Amendment where the suspect is compliant, subdued, and non-threatening.[56]

Handcuffing: Courts have held that handcuffing can constitute excessive force if the plaintiff complained that the handcuffs were too tight and the overly tight handcuffing resulted in an injury[57]

Handcuffing Pre-Existing Injuries: In *Hunt v. Massi*, 773 F.3d 361 (1st Cir. 2014), the First Circuit granted qualified immunity to the defendant officers who refused to handcuff the plaintiff in front after he told them that he had just undergone abdominal surgery and showed them his scar because the arrestee did not have clearly established right to be handcuffed with his hands in front of him when it would not have been obvious to reasonable officer that his abdominal scar would prevent him from putting his hands behind his back.

Detainment In Extreme Temperature: Some courts have held that detaining a person in extreme temperatures can violate the Fourth Amendment.[58]

Tasers: In *Lash v. Lemke*, the D.C. Circuit outlined the clearly established law amongst the Circuit Courts with respect to Tasers:

Unreasonable Use of a Taser: The use of a Taser against a person who is not resisting arrest or merely passively resisting may violate that person's rights.[59] The use of a Taser may also violate an individual's rights even in the face of resistance if the officer uses the Taser to excess, such as firing multiple times after the officers have gained control of the scene. [60]

Reasonable Use of a Taser: "There is no clearly established right for a suspect who actively resists and refuses to be handcuffed to be free from a Taser application."[61] "Courts generally hold that the use of a taser against an actively resisting suspect either does not violate clearly established law or is constitutionally reasonable."[62]

Deadly Force on a Knife Wielding Suspect: In *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), relying on a similar Tenth Circuit case, the Tenth Circuit denied qualified immunity to an officer who shot and tasered a knife wielding plaintiff on the grounds that although the plaintiff had refused to drop the knife, he had not charged the officer, had not moved aggressively at the officers, and was not within striking distance. Therefore, the officer did not have probable cause to believe that the plaintiff posed a threat to the officer's life.

Deadly Force—Highspeed Pursuit: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[61] Therefore, as it stands, officers do not violate the Fourth Amendment if they shoot at a fleeing vehicle as long as the continued flight posed a risk to officer or the public's safety. In the line of cases granting qualified immunity to officers who have used deadly or potentially deadly force in cases of high speed chases, the plaintiff has driven recklessly, almost always at speeds in excess of 100 mph, and have not demonstrated any intent on ending the chase.

Notes

1. Ty Burr, *The Most Important Movies of 2015 Were Not In Any Theater,* The Boston Globe, December 28, 2015 (commenting on national impact of recent videos depicting excessive force).
2. "In addressing an excessive force claim brought under Section 1983, analysis begins by identifying the specific constitutional right infringed by the challenged application of force. . . The validity of the claim must then be judged by reference to the specific right, rather than to some generalized 'excessive force' standard." Graham v. Connor, 490 U.S. 386, 394 (1989).
3. Non law enforcement government employees can also be sued pursuant to Section 1983 for the use of excessive force. *See* Wallace by Wallace v. Batavia Sch. Dist. *101*, 68 F.3d 1010 (7th Cir. 1995) (student discipline cases may be brought against teachers under the Fourth or Fourteenth Amendments).
4. Although claims brought by free citizens who have been subjected to force by the police will generally be analyzed under the Fourth Amendment, the Fourth Amendment does not apply to such claims where the police officer uses excessive force against an unintended free citizen. Brower v. County of Inyo, 489 U.S. 593, 596-597 (1989).
5. *Graham*, 490 U.S. at 386; County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998).
6. In *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472 (2015), the Supreme Court announced that the standard to be applied to excessive force cases for pretrial detainees is whether "the force purposely or knowingly used against him was objectively unreasonable." "This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time and must account for the 'legitimate interests [stemming from the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 2471-73 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)); Bell v. Wolfish, 441 U.S. 520, 540 (1979).
7. *Graham*, 490 U.S. at 394-96 (1989).
8. *See* Michigan v. Summers, 452 U.S. 692, 696 (1981). A Fourth Amendment seizure occurs only when there is a governmentally caused termination of freedom of movement through means intentionally applied. Brower v. County of Inyo, 489 U.S. 593, 596-597 (1989).

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons... Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 20 (1968). "When the actions of the police do not show an unambiguous intent to restrain . . . a seizure occurs if, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Brendlin v. California, 551 U.S. 249, 255 (2007).

9. Circuit courts have held that the use of force outside an arrest does not implicate the Fourth Amendment. *See* Cummings v. McIntire, 271 F.3d 341, 344 (1st Cir. 2001); *see also* Rodriguez v. Phillips, 66 F.3d 470, 476 (2d Cir. 1995) (where plaintiff was neither arrested nor an inmate, neither her Fourth or Eighth Amendment rights were implicated). McCoy v. Harrison, 341 F.3d 600, 605-06 (7th Cir. 2003) (rejecting argument that "seizure occurs with 'the slightest application of physical force'" and finding that no seizure occurred where plaintiff "immediately" walked away after physical altercation). *But see* Acevedo v. Canterbury, 457 F.3d 721, 725 (7th Cir. 2006) (finding seizure because blow to the head temporarily rendered the plaintiff unconscious). *See also* Smith v. Dept. of Gen. Servs. 2005 WL 1563505, at *2, 9 (M.D.Pa. 2005), *aff'd,* 181 Fed. Appx. 327 (3d. Cir. 2006) (district court rejected argument that plaintiff was seized when police sergeant grabbed his elbow and berated him, resulting in a sprained shoulder and months of medical treatment because plaintiff was able to break free and leave sergeant's presence. The Third Circuit affirmed, holding that "the solitary act of momentarily grabbing [plaintiff's] elbow was not a seizure," notwithstanding the brief physical restraint and the resulting injury). *See* 181 Fed.appx. at 329-330; *see also* Gottlieb v. Laurel Highlands Sch. Dist. 272 F.3d 168, 172 (3d Cir. 2001) (holding push by school administrator of student that propelled her backwards into a door was not the "type of detention or physical restraint that we require to effectuate a seizure" under the Fourth Amendment).

10. California v. Hodari *D.* 499 U.S. 621 (1991).

11. Brower v. County of Inyo, 489 U.S. 593, 595-600 (1989); Stamps v. Town of Framingham, 2016 WL 457153 (1st Cir. 2016),

12. County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998).

13. *Lewis,* at 843-45. This protection, however, shields individuals from only arbitrary and oppressive uses of force. Carr v. Tatangelo, 338 F.3d 1259, 1271 (11th Cir. 2003). Put simply, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis,* 523 U.S. at 846, (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). The standard governing Fourteenth Amendment excessive-force claims is "shocks the conscience." *Id.,*

14. Fennell v. Gilstrap, 559 F.3d 1212, 1217 (11th Cir. 2009). The Supreme Court has indicated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis,* 523 U.S. at 849.

15. *Graham*, 490 U.S. at 396. (internal citations omitted).

16. *Id.* at 397.

17. *Id.*

18. *Id.* (quoting Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir. 1973)).

19. *Id Graham,* 490 U.S. at 396.

20. *Id* at 396-97.

21. Freeman v Gore, 483 F.3d 404, 417 (5th Cir. 2007)

22. *Graham*, 490 U.S. at 397.

23. *Id.*

24. Although the "prevent escape" language from *Graham* remains good law, most police departments significantly restrict the use of deadly force to prevent escape. *High Risk Critical Tasks In Law Enforcement, Legal and Liability Issues,* Legal and Liability Risk Management Institute, Ryan, Jack (2010)

25. Penley v. Eslinger, 605 F.3d 843, 850 (11th Cir. 2010) (citing Tennessee v. Garner, 471 U.S. 1, 11-13 (1985)

26. Plumhoff v. Rickard, 134 S.Ct. 2012, 2020 (2014).

27. Montano v. City of Chicago, 535 F.3d 558, 569 (7th Cir. 2008).

28. Phillis v. Community Ins. Corp., 678 F.3d 513, 519-20 (7th Cir. 2012); Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008).

29. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994)

30. Jean-Laurent v. Wilkerson, 461 Fed. Appx. 18, 24 (2d Cir. 2012)

31. *Id.*

32. City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983).

33. The attached chart is the Use of Force Model used by the Boston Police Department.

34. *Id.*

35. Stamps v. Town of Framingham, 2016 WL 457153 at * 11 n.4 (1st Cir. 2016); (citing Jennings v. Jones, 499 F.3d 2, 11-16, 19-20 (1st Cir. 2007)) (noting that evidence regarding officer training "is relevant both to the. . . question of whether there was a violation at all and to the . . . question . . . of whether a reasonable officer in [the defendant's] circumstances would have believed that his conduct violated the Constitution."). *See also* Young v. County of Los Angeles, 655 F.3d 1156, 1162 (9th Cir. 2011); Torres v. City of Madera, 524 F.3d 1053, 1057 (9th Cir. 2008) (agreeing that the following "factors [had been] relevant to the reasonableness determination" in a case where an officer unintentionally fired his pistol when he meant to fire his Taser: "(1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training") (citing Henry v. Purnell, 501 F.3d 374, 383 (4th Cir. 2007)); Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) ("Although . . . training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable."). *But see, e.g.,* Moreno v. Taos Cty. Board of Commissioners, 587 Fed.Appx. 442, 446 (10th Cir. 2014); Thompson v. City of Chicago, 472 F.3d 444, 453-55 (7th Cir. 2006). Just as a violation of departmental procedures does not deem the conduct constitutionally unreasonable, compliance with police department procedures does not render the conduct constitutionally reason-

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able. *See* Smith v. Kansas City Missouri Police Department, 586 F.3d 576-581-82 (8th Cir. 2009). Cf. City and County of San Francisco, v. Sheehan, 135 S.Ct. 1765 (2015) ("even if an officer acts contrary to her training, however. . . that does not itself negate qualified immunity where it would otherwise be warranted.")

36. Fed. R. Civ. P. 26(a) requires a party to disclose the identity of any expert witness and to provide a written, signed report of that expert at least 90 days prior to trial.

37. Miranda-Rivera v. Toledo-Davila, – 2016 WL 563070 (1st Cir. 2016) (opposing expert witnesses opining as to cause of plaintiff-decedent's injuries).

38. Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. 2003) (declining to analyze the circumstances preceding the use of force); Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.").

39. St. Hilaire v. City of Laconia, 71 F.3d 20 (1995) (holding that If the actions of the officers leading up to the need to use deadly force were unreasonable, then the ultimate use of force may be found unreasonable as well); Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999) (considerations of objective reasonableness should not automatically exclude "all context and causes prior to the moment" force is used); Allen v. Muskogee, 119 F.3d 837, 840-41 (10th Cir. 1997) (if the officer's pre-force conduct was "immediately connected" to the suspect's threat to use force, it is considered for purposes of determining objective reasonableness).

40. Courts of Appeal differ in what authorities they will look to in order to determine whether the right at issue was clearly established. For example, the First Circuit looks to all available case law, *see* Hatch v. Dep't. for Children, Youth & Their Families, 274 F.3d 12, 23 (1st Cir. 2001), while the Eleventh Circuit looks only to case law from the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the state's highest court. Jenkins v. Talladega City Bd. of Education, 115 F.3d 821, 826 n.4 (11th Cir. 1997). Although some Courts consider decisions by the district courts, the Supreme court has cautioned that "district court decisions — unlike those from the courts of appeals — do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity," and therefore "[m] any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity." Camreta v. Greene, 131 S.Ct. 2020, 2033 n. 7 (2011).

41. The Supreme Court has cautioned courts "not to define clearly established law at a high level of generality," and reiterated that "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" Mullenix v. Luna, 136 S.Ct. 305, 308 (2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001). The "correct inquiry" in the Fourth Amendment context is "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted.'" *Id.* at 309 (quoting Brosseau v. Haugen, 543 U.S. 194, 200 (2004).

42. Loch v. City of Litchfield, 689 F.3d 961, 966 (8th Cir. 2012) (An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment.)

43. Worcester Telegram and Gazette Corp., v. Chief of Police of Worcester, 58 Mass.App.Ct. 1 (2003).

44. Graham, 490 U.S. at 397.

45. "Qualified immunity shields government officials from civil damages liability unless he official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." Taylor v. Barkes, 135 S.Ct. 2042, 2044 (2015). Under this standard, "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent ... placed the statutory or constitutional question beyond debate." City and County of San Francisco, LCV. Sheehan, 135 S.Ct. 1765, 1774 (2015). The right in question must be defined with a sufficient degree of particularity. *Id.* At the summary judgment stage, an officer is entitled to qualified immunity "[i]f even on plaintiffs' best case, there is no violation of their rights, or the law was not clearly established, or an objectively reasonable oFfficer could have concluded (even mistakenly) that his or her conduct did not violate their rights." Stamps v. Town of Framingham, 2016 WL 457153 (1st Cir. 2015) (quoting Mlodzinski v. Lewis, 648 F.3d 24, 27 (1st Cir. 2011).

46. Scott v. Harris, 550 U.S. 372, (2007);

47. In *Pauly v. White*, 2016 WL 502830 at * 16 (10th Cir. 2016), the Tenth Circuit denied summary judgment to defendant officers on the grounds that a genuine dispute of fact existed even though there was no witness testimony to contradict the officers' version of events—that the decedent pointed a gun and fired it at them. The Court held that circumstantial evidence, such as physical evidence inconsistencies in the officer's testimony, would require credibility determinations that should not be made on summary judgment. The Court noted that "since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'" *Id.* (quoting Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)).

48. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995).

49. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

50. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995).

51. Jeffrey Jones, *In U.S., Confidence in Police Lowest in 22 Years*, http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx (last visited March 2, 2016).

52. Gallup survey data from 2011-2014 measuring Americans' confidence in the police shows that 59% of white Americans have a great deal or quite a lot of confidence in the police, compared with 37% of black Americans. The police are among the three high-

est-rated institutions out of 17 tested in terms of whites' confidence, behind only the military and small business. Among blacks, police drop to seventh on the list, behind not only the military and small business, but also the presidency, the church or organized religion, the medical system, and television news. http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx (last visited March 2, 2016); Burr, *The Most Important Movies of 2015 Were Not In Any Theater*, The Boston Globe, December 28, 2015.

53. Recent videos of police misconduct have changed things significantly in terms of the prior public perception that police officers were "correct in what they were doing." Now jurors may be more skeptical of police use of force. Zusha Elinson and Dan Frosch, *Cost of Police Misconduct Cases Soars in Big US Cities*, Wall Street Journal, July 15, 2015 http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834 (last visited March 3, 2016).

54. "[M]ore force is appropriate for a more serious offense and less force is appropriate for a less serious one." Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir. 2002).

55. Malor v. Whiting, 489 Fed. Appx. 78, 85-86 (6th Cir. 2012) (the use of violence against a subdued and non-resisting individual has been clearly established as excessive, regardless of whether the individual had been placed in handcuffs); Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341 (1st Cir. 1995) (excessive force where officer arrested woman for trespassing in a fast food restaurant by "suddenly and violently grabbed woman from booth and across table, bruising her legs in the process."); Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003) (IRS agent confronted woman inside her home and when she demanded to see warrant "grabbed her by her arms, forcibly threw to the ground and, twisting her arms, placed handcuffs on her wrists").

56. *See e.g.*, Morrison v. Board of Trustees of Green Twp., 583 F.3d 394, 399 (6th Cir. 2009) (the test to determine when a plaintiff has established an excessive force claim based on handcuffing is: (1) the plaintiff complained that the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced "some physical injury" resulting from the handcuffing); Wall v. County of Orange, 364 F.3d 1107, 1112 (9th Cir. 2004) ("overly tight handcuffing can constitute excessive force."); Freeman v. Gore, 483 F.3d 404, 417 (5th Cir. 2007) ("minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force."); Kopec v. Tate, 361 F.3d 772, 778 (3d Cir. 2004) (denying qualified immunity in overly-tight handcuffing excessive force claim) (collecting cases).

57. Burchett v. Kiefer, 310 F.3d 937, 945 (6th Cir. 2002).

59. *See, e.g.*, Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009).

60. *See, e.g.*, Meyers v. Baltimore County, 713 F.3d 723, 735 (4th Cir. 2013).

58. Goodwin v. City of Painesville, 781 F.3d 314, 325 (6th Cir. 2015).

61. Abbott v. Sangamon County, Ill., 705 F.3d 706, 727 (7th Cir. 2013). *See also* Hagans v. Franklin County Sheriff's Office, 695 F.3d 505, 509-510 (6th Cir. 2012) (observing that courts generally find that "[i]f a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a [T]aser to subdue him"). *See also* Aldaba v. Pickens, 777 F.3d 1148, 1158 (10th Cir. 2015) (finding that "where the subject actively resisted a seizure, whether by physically struggling with an officer or by disobeying direct orders, courts have held either that no constitutional violation occurred or that the right not to be tased in these circumstances was not clearly established"). Furthermore, officers were granted qualified immunity in excessive force claims where they had tased individuals who were actively resisting arrest. *See, e.g.*, De Boise v. Taser Int'l, Inc., 760 F.3d 892, 897 (8th Cir. 2014); Buchanan v. Gulfport Police Department, 530 Fed. Appx. 307, 314 (5th Cir. 2013). Hoyt v. Cooks, 672 F.3d 972, 797-980 (11th Cir. 2012).

62. Mullenix v. Luna, 136 S.Ct. 305 (2015); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) Scott v. Harris, 550 U.S.372 (2007).

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