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Work Session III: The Changing World of Qualified Immunity – When Can You Shoot? Advising The Police On Use of Force And Accommodations

Use of Force

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Use of Force
Deadly/Non-Deadly

Any review on law enforcement's use of force must begin by outlining the Constitutional authority on use of force by law enforcement officers. The basic rule governing use of force is that all uses of force by a law enforcement officer against a free citizen must meet an objective reasonableness standard. Free citizens are distinguished from sentenced prisoners due to the fact that sentenced prisoners are subjected to the differing standards of 8th Amendment law, specifically "cruel and unusual punishment," while free citizens fall under the 4th Amendment right to be free from unreasonable seizures.

The constitutional parameters on the use of objectively reasonable force are drawn from two foundation cases decided by the United States Supreme Court. The first case, *Tennessee v. Garner*[1] reviewed a Tennessee state statute that allowed officers to shoot any fleeing felon. The facts involved the death of Garner, a juvenile, as he fled from an unoccupied residential burglary after stealing a purse and $10.00. The United States Supreme Court held that statutes which allowed law enforcement officers to shoot "any fleeing felon" were unconstitutional. The Court then announced those circumstances where it would be objectively reasonable for law enforcement officers to use deadly force.

The Court concluded that it would be objectively reasonable for a law enforcement officer to use deadly force **when faced with an imminent danger of serious bodily harm or death to the officer or some third party who is present at the scene.** The Court further concluded that it would be objectively reasonable to use deadly force to prevent escape in cases where the officer **had probable cause to believe that the fleeing suspect had been involved in a violent felony involving the infliction or threatened infliction of serious bodily harm or death.** The Court also asserted that officers should give a **WARNING** where feasible.

It should be noted at the outset that most law enforcement agencies in the United States are more restrictive with respect to use of deadly force than a strict reading of the language from *Garner*. Most agency policies that have a provision for preventing the escape of a violent felon require that officers have articulable facts to conclude that the suspect poses either a **threat to public safety by their escape** or **an imminent threat to public safety by their escape.**

[1] *Tennessee v. Garner*, 471 U.S. 1 (1985).

The reach of the *Garne*r decision was dramatically diminished when the United States Supreme Court decided *Scott v. Harris* in 2007.

Victor Harris was clocked speeding by a deputy while driving a vehicle that was actively registered to him. When the deputy attempted to pull Harris over, Harris fled. The result was a six-minute pursuit that traveled nine miles. During the pursuit which reached speeds of 90 miles per hour, Harris crossed the center line, placing other motorists at risk and passed through two red lights. The court noted that during the pursuit Harris maintained control of his vehicle and even used his turn signals during his movements while being pursued. At one point he collided with a police cruiser that attempted to block his path in a parking lot.

During the pursuit, Deputy Scott sought a supervisor's permission to use the PIT maneuver against Harris to stop the chase. The court noted that Scott had not been trained in the Precision Immobilization Technique at the time. A supervisor authorized Scott to "take him out." At that point Scott determined that he was traveling too fast to use the PIT maneuver so he decided to ram Harris straight on instead. Harris was rendered a quadriplegic as a result of the crash caused by the ramming.

In describing the P.I.T. maneuver the court adopted various descriptive definitions that may not be consistent with the generally-accepted practices in law enforcement.

The court asserted: "PIT--defined by the district court as "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight "safely." See, e.g., Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speeds on wide straight-aways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT "is not applicable in every situation, the key to its effective use is to carefully choose a favorable spot before attempting PIT and to first consider the possible effects on other traffic and pedestrians"); National San Diego Police Department Use of Force Task Force Recommendations, Executive Summary at 37 ("Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible.")." **[It should be noted that the definition of the P.I.T. maneuver adopted by the 11th Circuit is not consistent with agency policy and training on P.I.T. since many agencies do not put a speed-cap on the P.I.T. maneuver.]**

In adopting this descriptive framework for the P.I.T. maneuver, the court dismissed the supervisor from the lawsuit. Finding, as reported by Deputy Scott that the P.I.T. maneuver was not done in this case, the court concluded that the maneuver authorized by the supervisor, a P.I.T. was not carried out. Since the Deputy rammed, rather than employing the P.I.T. the supervisor did not have liability.

It should be noted at the outset that the deputy stopped Harris' movement by a means intentionally applied, thus, there was a seizure for 4th Amendment purposes. In reviewing the officer's conduct under the 4th Amendment, the court examined whether it was reasonable to ram Harris at a high rate of speed under the circumstances that the deputy faced. In analyzing the facts here the court noted that deadly force is "force that creates a substantial risk of causing death or serious bodily injury…Like other instrumentalities, the use of an automobile cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately to cause death or serious bodily injury." The court concluded that a jury could decide that the ramming here could constitute deadly force.

The court identified the deadly force standards from *Tennessee v. Garner,* 471 U.S. 1 (1985): "(1) where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others, or if the suspect threatens the officer with a weapon **or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm and (2) if deadly force is necessary to prevent escape and (3) and if, where feasible, some warning has been given." It should be noted that most police agencies, through policy, require that the subject also poses some imminent or immediate danger to others by their escape. This is not a constitutional requirement, but has become a generally accepted practice in law enforcement.**

In applying the deadly force standard to this case, the court recognized that ramming a vehicle at high speed may cause serious bodily harm or death, "Moreover, none of the limited circumstances identified in Garner that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction or serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others… None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite crime involving the infliction or threatened infliction of serious physical harm…Indeed neither Scott nor Fenninger [the supervisor]

had any idea why Harris was being pursued. **The use of deadly force is not reasonable in a high-speed chase based only on speeding and evading arrest…A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the substantial threat of imminent physical harm that Garner requires before deadly force can be used."**

The United States Court of Appeal for the 11th Circuit did not consider whether actions by Harris during the pursuit enhanced the danger to public thus justifying a heightened law enforcement response.[2] Additionally, many law enforcement agencies, through policy and training, direct officers to consider the subject's additional criminal actions during the pursuit in the evaluation process as a consideration justifying the continuation of the pursuit.[3]

The court of appeal also examined whether or not Harris' continued flight posed a danger of serious bodily harm or death to other motorists such that deadly force would be justified to neutralize the threat to innocent motorists. The court rejected an argument that Harris posed this type of threat in stating: "We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists of the road…Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." The court concluded, by looking at the facts in the light most-favorable to Harris, that Harris was not a serious threat to other motorists. As such, the court denied Deputy Scott summary judgment and qualified immunity setting up the appeal to the United States Supreme Court.

[2] See, Boveri v. Town of Saugas, 113 F. 3d 4 (1st Cir. Mass. 1997) ("To be sure, as the chase progressed, the Honda's wild driving plainly created an escalating risk of harm to bystanders—but the officers' continuation of the pursuit must be judged against the exigencies of the situation that had developed. The law enforcement interest in apprehending the Honda had grown, as had the danger to the public inherent in leaving a reckless (potentially inebriated) driver on the road.")

[3] See e.g. Jefferson County Colorado (CALEA ACCREDITED) Policy 752 Vehicular Pursuit: Directing officers to consider: "Any actions the suspect(s) may have taken since the inception of the pursuit. This includes any 'new' violations of criminal statutes e.g. felony eluding."

The issue presently before the Supreme Court involving the concept of "ramming" is addressed in law enforcement agency policies around the country. The majority of these policies limit the use of ramming to those circumstances where deadly force would be justified. The question is, does the serious danger created by the fleeing motorist justify the use of deadly force to eliminate the threat? An interesting note is that agencies that address ramming generally allow it in the deadly force situation, while those that prohibit ramming do so citing the damage which occurs to police vehicle including the possibility that the air-bag will deploy rendering the police vehicle incapable of continuing the pursuit. Additionally, while agencies allowing the P.I.T. maneuver are somewhat limited due to the requirement of training that accompanies the use of this technique, more agencies allow ramming yet almost none mention training for such a tactic.

In *Scott v. Harris,*[4] the United States Supreme Court diminished the reach of the *Garner* rule in holding: "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." 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."

In October of 1995, the United States Justice Department added an "imminence" requirement to the deadly force (prevent escape) provision policy governing federal law enforcement officers. This policy was adopted by the United States Department of Treasury, thus creating a uniform policy for all Federal law enforcement personnel.

The foundation case on all use of force is *Graham v. Connor.*[5] In *Graham,* the Court devised an analytical formula for reviewing all uses of force to determine the objective reasonableness of a particular use of force. All uses of force, deadly and non-deadly, are to be judged by the totality of the circumstances. The totality of the circumstances to be considered are only those circumstances known to the officer at the time the force was used without the benefit of 20/20 hindsight.

The most important aspect of *Graham* is the three factor test by which all uses of force are to be judged. First, **How serious was the offense that the officer suspected was or had been committed?** Second, **Did the suspect pose a physical threat to the officer or some other person present at the scene?** Third, **Was the suspect actively resisting or attempting to evade arrest by flight?** Where an officer's use of force is consistent with an affirmative response to the 2nd or 3rd question or where the

[4] *Scott v. Harris,* ___U.S.___, 127 S.Ct. 1769 (2007).
[5] *Graham v. Connor* 490 U.S. 386 (1989).

officer is dealing with a serious offense, the ultimate use of force is more likely to be reasonable.

Many use of force issues have developed since *Garner* (1985) and *Graham* (1989) but the United States Supreme Court has provided little further guidance with respect to use of force. At the same time law enforcement has added an arsenal of use of force tools to its tool box. The reasonableness of these tools and use of force methods must be derived form lower court decisions and developing trends.

Handcuffing

Burchett v. Kiefer exemplifies how a court will review the use of handcuffs and the method by which detainees are held.[6] In *Burchett*, officers executing a search warrant on the home of Charles Burchett's brother, observed Charles running from the property to his home that was next door. Charles' explanation for this flight was that his child was in a swing on his porch and he wanted to get the child out of harm's way after observing the police approach. Charles Burchett was apprehended, handcuffed and placed in the backseat of a cruiser. Although the cruiser had been running with its windows down, the officers shut the vehicle off and rolled the windows up after placing Burchett in the vehicle. Burchett was left in the vehicle for three hours while the officers conducted the search of Charles' brother's home. The court noted that by all accounts the temperature on the day in question was in the 90s.

In its analysis the 6th Circuit Court of Appeal noted that while executing a search warrant, police have the authority to detain those on the premises while the search is conducted.[7] The court further noted that it was reasonable to handcuff Burchett who, by his own admission was somewhat resistant. The court then analyzed the reasonableness of the officer's conduct with respect to the tightness of the handcuffs which caused Burchett's hand to go numb and turn blue. The court found that the actions of the officers were reasonable after concluding that as soon as Burchett complained about the tightness of the handcuffs, the cuffs were removed.

Burchett did complain about the temperature in the vehicle and asked that the windows be rolled down during his three hour detention. The court asserted that *"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 search and seizures."* In balancing the facts of this case, the court pointed out that the government's interest in effecting the seizure in this case would not justify Burchett's detention in the unventilated vehicle. The court reported that

[6] *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002).
[7] See, *Michigan v. Summers*, 452 U.S. 692 (1981).

officers had *"many equally effective alternative ways of detaining Burchett that would not have subjected him to excessive heat, but their denial of his request that they roll down the windows to allow him air indicates a wanton indifference to this important safety factor."* It is important to note that the court distinguished the vehicle detention from the tight handcuffs based on the fact that the officers had notice of the unventilated hot vehicle and refused to take steps to ensure Burchett's safety. The court reversed the lower court's summary judgment in favor of the two officers who were aware of Burchett's predicament in the police vehicle.

A second case from the United States Court of Appeal for the 6th Circuit also examined excessive use of force in the context of police use of handcuffs.[8] In *Baskin,* officers were involved in an arrest of two women who were involved in a disturbance at a service station. Baskin, who observed the arrest, stated that he criticized Officer Smith after observing him choking and kicking one of the women. A second officer took the woman to a police car at which point Smith's focus shifted to Baskin. When Baskin failed to leave the scene quickly enough, Officer Smith arrested Baskin for disorderly conduct. Baskin was handcuffed so tightly that his wrists were bleeding. Baskin was left in the handcuffs for 45 minutes outside the county jail and although Baskin complained to officers and officials at the county jail, no steps were taken to provide medical attention or to loosen the handcuffs.

At the outset the court noted that the arrest of Baskin for his verbal criticism of Officer Smith violated the First Amendment, thus Baskin was arrested without probable cause. The court then cited cases that stand for the proposition that *"excessive force claims can be maintained for cuffing and individual's wrists too tightly."*[9] The court concluded that Baskin had alleged sufficient facts to support the lower court's decision to deny summary judgment in favor of the officer.

A recent case from the United States Circuit Court of Appeals for the 9th Circuit demonstrates that officers may utilize handcuffs while they conduct an investigation, notwithstanding that it later turns out that the persons handcuffed were not involved in the crime.[10] In *Ward v. Gates*, officers investigating a bank robbery in progress handcuffed two people that were in the bank who did not appear to have business there. The two individuals remained handcuffed while the officers conducted a sweep of the bank and for an additional twenty minutes while the officers checked out the stories of the handcuffed duo.

The court concluded that the initial handcuffing of these two individuals was reasonable under the circumstances facing the officers at the time. The

[8] See, *Baskin v. Smith*, 50 Fed. Appx. 731 (6th Cir. 2002).
[9] See, Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001), *Martin v. Heidman*, 106 F.3d 1308 (6th Cir. 2001).
[10] See, *Ward v. Darryl Gates et. al,* 52 Fed. Appx. 341 (9th Cir. 2002).

officers had reason to believe a violent felony was occurring and due to the unexplained presence of these two individuals the officers had reason to suspect that these individuals were involved in criminal activity. The court went on to note that once the sweep was completed and it was determined that the two handcuffed individuals were not armed; the continued detention in handcuffs may have been unreasonable. The court granted the officer's qualified immunity on this second issue.

A case from Prince George's County Maryland exemplifies how inappropriate handcuffing can lead to a constitutional violation.[11] In *Robles,* two officers responded to a noise complaint at 3:30 in the morning. The officers found three men drinking beer and after obtaining their identification, the officers arrested Robles for an outstanding traffic warrant in the neighboring Montgomery County. Not wanting to do a formal transfer of Robles to Montgomery County due to the time and paperwork involved, the officers attempted to have an officer from Montgomery County meet them at the County line for an "*informal transfer*." These attempts were unsuccessful due to Montgomery County's response that their agency was too busy to send an officer. The two officers then did what is sometimes referred to in police parlance as a "They did what?" The officers drove Robles to a shopping plaza in Montgomery County and tied him to a metal pole using three pairs of flex-cuffs. The officers included a note explaining the warrants, which they left at Robles' feet. Without identifying themselves, the officers then contacted the Montgomery Police Department via a pay telephone and reported the situation. Officers from Montgomery County arrived at the parking lot ten to fifteen minutes later and took Robles into custody.

In its analysis of the case, the court first pointed out that under the law of the 4th Circuit, Robles claim stems from the conditions of his confinement as a pretrial detainee under the Fourteenth Amendment's due process clause and not as a Fourth Amendment seizure claim since the seizure was complete at the moment of arrest. In order to prevail under the Fourteenth Amendment due process clause, a person making a claim would have to establish that the *"officers' actions amounted to punishment and were not merely 'an incident of some other legitimate governmental purpose'…(internal cites omitted)…and that the injury resulting from their actions were more than de minimis (minor)."*

In reviewing the facts presented here, the court concluded that the *"police behavior here was not reasonably related -indeed it was entirely unrelated-to any legitimate law enforcement purpose. Nothing the officers did served to enhance their own safety or the safety of others, or to insure the presence of [Robles] at trial."* The court continued: *"Even a so-called prank that fails to serve any legitimate governmental objective can constitute a due process claim."*

[11] See, *Robles v. Prince George's County Maryland*, (4th Cir. No. 01-1662, 2002).

The court went on to examine whether Robles could establish the requisite level of injury necessary to meet the *"more than de minimis"* element of his claim. Robles had testified that he had trouble sleeping and was afraid to leave his home following these events. He also stated that he was humiliated and felt frightened and vulnerable when left alone and immobilized in the parking lot. The court asserted that "while Robles' injury certainly needs to be something more than trifling, 'mental and emotional distress caused by the denial of due process itself is compensable under §1983.'" The court concluded as a matter of law that Robles' Fourteenth Amendment rights to due process had been violated.

The court gave the officers involved qualified immunity on this Fourteenth Amendment violation holding that the law was not clearly established at the time the officers tied Robles to the pole. The court asserted: "Going forward, officers are now on notice that the type of Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose implicates federal due process guarantees. The court upheld damages awarded to Robles based upon his state law claims against the two officers.

Managing the Risk of Handcuffs

An essential function of risk management is to identify risks that expose a public agency and its employees to liability exposure. In law enforcement, these risks are often identified by tracking the lawsuits that are filed challenging particular types of police conduct. Once a risk is identified it may be avoided or, at the very least, controlled. This section examines recent decisions dealing with the use of handcuffs in order to identify some specific risks associated with handcuffing and make particular recommendations to diminish these liabilities.

Consider two cases recently reported in the media. The first involved a Florida neuro-surgeon, Angelo Gousse. Dr. Gousse was visiting Los Angeles for a conference at the UCLA Medical Center when he got lost attempting to find his hotel in Santa Monica. Dr. Gousse was pulled over by the police in a high-risk traffic stop. When he asked the officers what was wrong he was informed that he was driving a stolen vehicle. Dr. Gousse begged the officers to check the paperwork in the vehicle's glove compartment which would prove that he had just rented the vehicle from Budget Rental. The officers did not check the paperwork. Dr. Gousse continuously complained about the tightness of his handcuffs, but officers failed to loosen the cuffs.

A lawsuit was filed against the police as well as Budget Rental Car. Dr. Gousse's injury included a licensing restriction on his ability to perform certain surgeries. The initial jury award in Dr. Gousse's case was 33 million

dollars with the LAPD to pay 14.2 million and Budget Rental to pay 18.8 million dollars. The judge has since vacated the jury's award; however the case exemplifies how critical handcuffing can be from the liability standpoint.

More recently, police in Highland Park, Texas have come under criticism for handcuffing and arresting a 97-year-old woman for a minor traffic warrant. It should be noted in this case, the elderly woman was handcuffed in the front rather than behind her back. According to new reports of the incident, the police responded that they have a "no-exceptions" policy. After a week of negative publicity, the agency announced a change in the handcuffing policy.

At the outset it must be recognized that courts have consistently held that handcuffing is a use of force and as such must meet the reasonableness requirements of *Graham v. Connor*. *Graham's* three-part test on the reasonableness of any use of force considers (1) the severity of the offense suspect; (2) whether the suspect posed an immediate threat to the officer or others; and (3) whether the suspect was actively resisting or attempting to evade arrest by flight. One can imagine a court's application of the three-part test to a 97-year-old being arrested for violating a traffic law.

Identified Risk 1-**Tightness of Handcuffs**

A case decided by the United States Court of Appeals for the 3rd Circuit provides a good example of a court's consideration of the use of handcuffs for a minor offense coupled with the application of the cuffs being too tight.[12] *Kopec v. Tate* involved a man and a woman who had trespassed on a frozen lake at an apartment complex where the female lived. Officer Tate responded to an anonymous call and told the couple to get off the lake. The couple complied. Officer Tate decided to document the couple's names. When the man, Michael Kopec, refused to give his name, Officer Tate arrested him for disorderly conduct.

Within seconds of being handcuffed, Kopec lost the feeling in his right hand. Kopec began asking that the handcuffs be loosened. Kopec's several requests were ignored for almost ten minutes before Tate loosened the cuffs. In the resulting lawsuit, Kopec claimed nerve damage that required treatment by a hand surgeon for more than a year.

In its review of Kopec's excessive force (handcuffing) claim, the court applied the three-part test from *Graham.* The court noted that Kopec's offense was minor and the officer was not initially going to arrest him. Kopec offered no threat and made no attempt to resist or escape. The court concluded that if Kopec's claims were true, specifically that Tate had put the cuffs on too tightly and refused to respond to Kopec's complaints, excessive force would be established. The court also rejected Officer Tate's qualified immunity claim citing numerous court decisions holding that excessively tight handcuffs may constitute excessive force under the Fourth Amendment.

[12] *Kopec v. Tate*, 361 F.3d 772 (3rd Cir. 772 2004).

Identified Risk 2-**Person with Pre-Existing Injury**

In *Aceto v. Kachajian and Lavoie.*[13] the United States District Court of Massachusetts considered a lawsuit that challenged the handcuffing of an arrestee who had informed the arresting officers of a pre-existing injury that was not visible to the officers.

Michelle Aceto, described by the court as a small woman, was arrested on May 23, 2000 for an outstanding warrant for failure to pay a fine for speeding. The warrant was thirteen-years-old, having been issued in 1987. Aceto, informed the arresting officers that she had recently suffered an injury while playing hockey and could not be handcuffed behind her back without suffering further injury. The arresting officers handcuffed Aceto in the front and took her to their station for booking. After being in the police station for approximately forty-five minutes, Officer Kachajian began the process of transporting Aceto to court. Aceto informed the officer of her pre-existing injury as she had done with the arresting officer and provided the officer with the names of her two doctors who could be called to verify the injury. Kachajian indicated that he would check her documentation. A short time later, Kachajian returned and ordered Aceto to place her hands behind her back to be handcuffed.[14] While Officer Kachajian, assisted by Officer Lavoie, handcuffed Aceto "something popped." Aceto was later diagnosed with a herniated disk.

In analyzing the facts of this case, the court noted that handcuffing a non-threatening, non-flight risk and cooperative arrestee who has been arrested for a minor crime and who has informed the police of a pre-existing injury may constitute excessive force. The court cited numerous court decisions from jurisdictions holding that where police are aware of a pre-existing injury to an arrestee; the injury must be taken into account before requiring the arrestee to be handcuffed behind his or her back. The court allowed the case to go forward to trial and refused to grant the officer qualified immunity. The court rejected qualified immunity by citing cases dating back to 1993 as well as the department policy in this case as placing the officers on notice regarding constitutionality of their conduct. It should be noted that there are numerous cases on point dealing with police handcuffing of persons with pre-existing injuries or disabilities where handcuffing may exacerbate the pre-existing injury or cause a new injury.[15]

Identified Risk 3-**Handcuffing for Officer Safety**

In cases where officers report that a person was handcuffed for "officer-safety" purposes the officer must be able to articulate facts and

[13] *Aceto v. Kachajian,* 240 F.Supp. 2d 121 (Dist. Mass. 2003).

[14] This matter was on summary judgment, thus the court is considering the facts as reported by Aceto to be true, the officers in the case indicated that Aceto was actually handcuffed in front of her body.

[15] See, *Bermudez v. Ahrens*, 2002 U.S. Dist. LEXIS 14367 (N.Dist. ILL. 2002); and *Eason v. Anoka-Hennepin East Metro Narcotics and Violent Crimes Task Force,* 2002 U.S. Dist. LEXIS 10645 (2002).

circumstances that would lead a reasonable officer to believe that there is a reasonable safety concern.

Fakorzi v. Dillard's Inc. and the City of Coralville,[16] provides an example of how this recurring law enforcement task will be analyzed by a court. The case involved an arrest at Dillard's Department Store of some individuals who were passing bad checks. As officers prepared to transport the individuals to the police station, they received an additional call that another person, Fakorzi, had attempted to pay by check but the check had been declined. The officers believed that Fakorzi may be involved with the group already under arrest when in fact she had merely hit a store limit on using checks as a payment method. Officers responded into Dillard's and almost immediately handcuffed Fakorzi and her companion Cornejo. The pair remained handcuffed for approximately thirty minutes before the officers determined that they were not involved in any wrongdoing. Fakorzi and Cornejo filed suit against all of the parties involved.

In its analysis, the court determined that the officers had reasonable suspicion to stop Fakorzi and Cornejo based on the prior arrest and the report from the police department's dispatcher regarding the declined check. The court then analyzed the handcuffing in terms of the *Graham* use of force analysis. First, the suspected crime was passing bad checks, not generally a crime of violence. Second, the court noted that the officer did not frisk Fakorzi or Cornejo thus, concluding that the officer must not have suspected that either was armed. The court concluded that there was no articulable safety threat to the officer and that the stop should have been conducted without the handcuffing and thirty-minute detention. The court refused to release the City of Coralville from the suit after determining that handcuffing is a recurring police task that if not properly trained is likely to lead to constituional vioaltions. The court concluded that a jury would decide if the City had properly trained its officers on the proper use of handcuffs.

Avoiding/Controlling Risk

The risk of liability with respect to the proper use of handcuffs can be avoided, or at least diminished, by sound policy and training. Enitities that have sound policy that is enforced and proper training with respect to handcuffs are nearly impenetrable from a loss based on a constitutional violation through hancuffing.[17]

From a policy and training perspective, officers should be given some discretion on handcuffing, particularly when officers are dealing with vulnerable classes such as the elderly, those with disabilities and those

[16] *Fakorzi v. Dillard's Inc. and the City of Coralville*, 252 F.Supp 2d 819 (S.Dist. Iowa 2003).

[17] See, *Shelton v. City of Taylor*, 2004 U.S. App. LEXIS 2007 (6th Cir. 2004) (concluding that city's policy granting officers discretion in how prisoners are handcuffed depending on the particular circumstances precludes plaintiff's claim against the city alleging unconstitutional policy.)

arrestees who indicate that they have a pre-existing injury. This discretion may include the option of frontal handcuffing. There have been cases where officers have assisted an elderly arrestee in putting their hands together behind their backs only to damage stiff and brittle bones. A bit of discretion may have avoided these injuries.

Additionally officers must be trained that handcuffing is a "use of force" and must be supported by articulable facts and circumstances that would support its use. In light of numerous cases on point, policy and training should stress the need for officers to double-lock handcuffs after insuring that the handcuffs are not too tight as to potentially cause injury. Officers who adhere to these policy and training issues will also avoid personal liability risk with respect to their handcuffing of prisoners.

The best way to avoid liability is to identify risks and take steps to avoid or control those risks. The risk of liability with respect to handcuffing can be greatly diminished by sound policy and training that considers, from an historical perspective those issues which have already been identified in previous cases. Agencies should not wait until it is their turn in the liability barrel in order to make changes that would have kept them out of the barrel to begin with.

Action Steps:

Review Policy and Training:

Do officers have some discretion when dealing with vulnerable classes such as the elderly, the injured or disabled, or emotionally disturbed persons?

Does policy and training dictate double-locking and checking for tightness?

Do Officers indicate in arrest report narrative that suspect was "handcuffed/double-locked"?

Does policy and training dictate an immediate response to a suspect's complaints with respect to tightness of handcuffs?

Does Policy and training require officers to articulate the need for handcuffing in "officer safety" situations or are all contacts automatically considered "officer safety" issues?

Empty Hand Control

In *Grauerholz v. Adcock,* the United States Court of Appeal for the 10th Circuit reviewed the conduct of police officers who used empty hand controls in the arrest of a seventy-nine year old woman.[18] Selda Gauerholz was arrested following a dispute with her tenant who was moving out and had not made a final rental payment. Officers were called after Grauerholz, with her

[18] *Grauerholz v. Adcock*, 51 Fed. Appx. 298 (10th Cir. 2002),

cane in hand blocked a stairwell from the tenant's apartment and refused to move. Grauerholz was arrested for battery on an officer, allegedly with her cane, disorderly conduct and resisting arrest after refusing the officer's order to move from the stairwell and allow the tenant egress. The officers carried Grauerholz down the stairs. She stated that she was dropped, though not injured, when one of the officers needed to stop at the bottom of the stairs to catch his breath. She was then carried from the porch to a police car. She testified that she screamed because the officers were hurting her; she was also embarrassed by the fact that her skirt rode up to her waist as the officers carried her and placed her in the police car.

Applying the analysis from *Graham v. Connor*, the court concluded that the amount of force used by the officers in this case was both minimal and reasonable. By Grauerholz's own admission the officers were forced to pick her up and carry her after she refused to walk. The court noted that this case *"presents the classic situation in which a plaintiff's own actions in reaction to a legitimate law enforcement encounter…justify the subsequent actions of the law enforcement officers involved."* Grauerholz also sought relief based on a state tort claim of *"negligent use of force."* The court noted that Kansas did not recognize such a tort and thus the state claim was dismissed as well.

Taser

Over the past few years, the use of Tasers® (electronic restraining/compliance device) has become more common among law enforcement agencies nationwide. As the use of Tasers® becomes more prevalent, law enforcement agencies can expect claims to be made regarding their use. As with any use of force, courts will look at three factors in determining if a particular use of force is objectively reasonable. First, how serious was the offense that the officer suspected at the time the officer was in contact with the individual; second, did the suspect pose an active threat to the officer or others; and third, was the suspect actively resisting or attempting to evade arrest by flight. These three factors, announced in *Graham v. Connor,* are the basis for judging all uses of force during arrest. Law enforcement officers would be well-advised to consider these three factors in determining whether or how much force is appropriate in any given circumstance.

Draper v. Reynolds,[19] which involved the use of a Taser®, exemplifies how a court will review this type of force. Stacy Draper filed a lawsuit against Deputy Clinton Reynolds alleging a civil rights violation arising out of a motor vehicle stop and his arrest, during which Deputy Reynolds used a Taser on Draper. The reason for the initial stop was an improperly illuminated registration plate light.

[19] *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004).

In his lawsuit Draper alleged that Reynolds shined a flashlight in his eyes during a traffic stop and he politely asked Reynolds to refrain from doing so. The initial contact between Reynolds and Draper took place at the side of Draper's truck and could not be seen on the police cruiser's video recorder. Their initial conversation could not be heard on Reynolds's audio recorder either. Draper alleged that Deputy Reynolds used harsh language in this initial contact at the side of the truck.

Deputy Reynolds then ordered Draper to come to the back of his truck. At that point all activity and all audio were recorded by the police vehicle's equipment. The tape showed an uncooperative and belligerent Draper who refused to comply with several polite commands by Deputy Reynolds to produce paperwork from the truck. As many as five times Draper would start toward the truck to retrieve the paperwork, but then would turn and return toward Deputy Reynolds in what Reynolds described as a "threatening" manner which put Reynolds on "the defensive." On the fifth occasion, with Draper yelling and returning toward Reynolds, the deputy discharged his Taser® at Draper's chest. Draper fell to the ground, was handcuffed and taken into custody. In his allegation of excessive force, Draper alleged that if Deputy Reynolds had simply informed him that he was under arrest he would have complied, thus there was no need to employ the Taser®.

In rejecting Draper's claim of excessive force the court held: "Reynolds's use of the taser gun to effectuate the arrest of Draper was reasonably proportionate to the difficult, tense and uncertain situation that Reynolds faced in this traffic stop, and did not constitute excessive force. From the time Draper met Reynolds at the back of the truck, Draper was hostile, belligerent, and uncooperative…Draper used profanity, moved around and paced in agitation, and repeatedly yelled at Reynolds." The court noted that a verbal arrest command and attempt to handcuff such a hostile individual as Draper may have escalated the situation into a "serious physical struggle" which was avoided by the use of the Taser®.

Some of the more significant cases involving the TASER® involve accidental circumstances. One of the most significant of these accidental cases occurred in Madera, California. An officer, while trying to gain control of a handcuffed suspect who was in the backseat of a police vehicle and kicking at the door attempted to TASE the suspect. Unfortunately the officer, who was wearing her TASER® " on the strong side of her body, accidentally pulled out her Glock® and killed the 22 year-old prisoner. A lawsuit against the police officer and department are pending in this case. In addition, the police department is suing TASER® International, arguing that the company failed to advise the agency against officers wearing the less-lethal weapon cross-draw on the weak-side. It should be noted that training materials from TASER® strongly recommend carrying this tool weak-side, but leaves the ultimate decision to the agency.

A recent case from the United States Court of Appeal for the 4th Circuit addressed this very issue. In *Henry v. Purnell,* 119 Fed. Appx. 441 (4th 2005), the court reviewed a trial court's refusal to give a deputy summary judgment and qualified immunity where the deputy testified that he attempted to stop Mr. Henry during the course of an arrest by using his Taser®, but he had accidentally pulled out his firearm instead. As the result of his firing of his handgun Mr. Henry received a gunshot wound to his elbow.

In refusing to dismiss the claims against the deputy, the court noted that the Taser® and the handgun are markedly different and the fact that the deputy did not immediately acknowledge that the shooting was accidental. More than 60 seconds went by before the deputy indicated that the shooting was accidental. The court concluded that a jury would have to decide the credibility of the deputy in indicating that the shooting was accidental.

An issue that was not addressed by the court was the fact that the deputy did intend to seize Mr. Henry, although he used the wrong weapon, thus, his use of force was arguably by a means intentionally applied. As such it was arguably a physical seizure even if the deputy was mistaken in his choice of weapons to apply that force.

Other accidental cases have occurred where officers have observed an officer pull his or her TASER® (M26) and due to similar appearance to a firearm have assumed a deadly force situation and responded with deadly force. This type of accidental circumstance is addressed in training plans by requiring officers who are preparing to use the TASER® to shout "TASER" to place other officers on notice. In addition, TASER® provides yellow striping for black-finish models and also makes the (M26) in a yellow-finish. Anecdotal responses by agencies that utilize the yellow-finish models indicate that the distinct yellow is highly effective when dealing with suspects because while they know an officer would not be justified in shooting his or her firearm, they recognize that the officer may use the yellow TASER®.

A recent case from Joplin, Missouri seems to be the result of a Taser® accident of a different type.[20] Two officers from the Joplin Police Department responded to a report a suicidal man. The man, David Riley was in his backyard when officers arrived. As Officers Greg Batson and Tim Nielson approached, Riley ran into his home. The officers pursued Riley into the house. At some point while in the home, one of the officers fired his Taser® at Riley. Unfortunately, Riley had open natural gas running in the home, apparently as part of his suicide attempt. While, authorities had not concluded at the time of this writing that the Taser® had sparked the explosion, local officers familiar with the case, speculated that the Taser®

[20] "Taser Fired Before Explosion," The Joplin Globe August 14, 2004.

had ignited the explosion. The two officers were severely burned in the explosion and Riley had died as the result of his injuries from the explosion.

As the law on Taser® use continues to develop, law enforcement must stay abreast of current research and case law to determine the reasonableness of its use in particular cases. Some of the additional developing issues include where the Taser® fits in the use of force continuum; Taser® compatibility with pepper-spray; and what role, if any, the use of a Taser® plays in sudden-custody death cases. The most recent model policy from the International Association of Chiefs of Police places "electronic control devices" on the same level as pepper spray.[21]

A recent study from British Columbia examined most of the current information known to law enforcement on the impact of Taser® and the possibility that some persons may suffer serious bodily harm or death following a confrontation with the police in which a Taser® is deployed.[22] The study acknowledges that some persons involved in confrontations with law enforcement sometimes die as the result of the fight. The study identifies the reason for many of these deaths as based in the fact that the person fighting with law enforcement is suffering from "excited delirium." "Excited Delirium" is defined as: "a state of mind begetting irrational and often violent behavior in some persons subsequently apprehended by law enforcement officers by use of a Taser." It is also noted that persons suffering from "excited delirium" often had been using cocaine, "a drug that causes heart arrhythmias," and the fact of cocaine use may be unknown to law enforcement at the time. The study points out that some of the issues raised by "excited delirium" with Taser® is not just a police issue, due to the fact that changes in medical protocols for emergency medical services may also assist in avoiding serious bodily harm or death following a deployment.

Some of the more common injuries with electronic control device deployment were the secondary injuries received when a subject falls to the

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[21] International Association of Chiefs of Police, Model Policy-"Electronic Control Devices" January 2005:

C. Deployment

1. The ECW is generally analogous to Oleoresin Capsicum (OC) spray on the use of force continuum, and decisions to use an ECW involve the same basic justification. As such, the device is prohibited from being used:
   a. In a punitive or coercive manner.
   b. On a handcuffed/secured prisoner, absent overtly assaultive behavior that cannot be reasonably dealt with in any other less intrusive fashion.
   c. On any suspect who does not demonstrate their overt intention (1) to use violence or force against the officer or another person or (2) to flee in order to resist/avoid detention or arrest (in cases where officers would pursue on foot).
   d. In any environment where an officer knows that a potentially flammable, volatile, or explosive material is present (including but not limited to OC spray with volatile propellant, gasoline, natural gas, or propane).

[22] "Taser Technology Review" British Columbia, Office of the Police Complaint Commissioner, Final Report June, 2005.

ground as the result of the deployment. This possibility requires officers to consider environmental factors when using the electronic control device, for example, is the subject standing at the top of a stairwell such that he or she may fall down the stairs as the result of the deployment. The British Columbia study noted that there has also been a trend of musculoskeletal injuries caused by powerful muscle contractions when the Taser® is deployed.

One additional matter that is currently being debated is the level of product-testing that was conducted on the (M26) model. It has been suggested that a great deal of testing was done on early models as well as the newest model (X26), but very little testing was done on the (M26). It is suggested that if the agency has purchased the (M26) model that the agency follow this debate closely. At the same time, the agency should document its own uses including training uses in order to establish an internal documentation of safe uses.

Electronic Control Device Force Continuum/Policy-Training Issues: (These recommendations are based upon model policies as well as studies conducted throughout the United States and Canada [see British Columbia Study/IACP Model Policy Previously Cited])

- Electronic Control Device must be worn weak-side.
- Electronic Control Device deployment should not be considered for the passively resistant subject-active resistance/active aggression should be required.
- Officers must be trained concerning ability of electrical charge to act as an ignition for combustible materials. (Note: Officers have been seriously injured and or killed after deploying a Electronic Control Device in the presence of open natural gas during suicidal person call)
- Multiple Electronic Control Device deployments against an individual increases the likelihood of serious injury where the individual is suffering from other symptoms such as cocaine intoxication. Policy and training should encourage officers to minimize the successive number of discharges against an individual where possible.
- Agencies should recognize however, particularly where back-up officers are unavailable where multiple applications may be necessary.
- A contributing factor to serious injury or death is the level of a subject's exhaustion. Studies recommend that when an officer believes that control of a subject will be necessary and met with resistance, deployment of the Electronic Control Device should be considered early on in the event so that the person has not reached a level of exhaustion prior to the Electronic Control Device's use.
- In cases where subject is actively resisting an officer's attempt to take them into custody but not threatening the officer with an

assault-it is recommended that the Electronic Control Device be used in the “push stun mode.”

- Officers should avoid firing toward eyes/head/genitals
- The preferred targeting is the center mass of the subject’s back., however it is recognized that it is not always possible to get behind the subject.
- Where back-targeting is not possible-the secondary area is chest and legs-Officers should be discouraged from chest targeting when dealing with a female subject.
- Officers should be prohibited from using the device as punitive measure.
- A warning prior to discharge is not always necessary for this type of force to be considered reasonable, model policies as well as courts have noted that giving a subject a warning may enhance the danger to the officer and the subject by giving the subject time to avoid the deployment
- The device should never be used on a handcuffed person to force compliance unless the subject poses a violent threat to the officer through physical conduct and cannot otherwise be controlled.
- Electronic Control devices are best placed along with pepper-spray in a use of force continuum.
- Officers should consider the location and environment of the subject. i.e. Is the subject at the top of a stairwell such that when incapacitated by the Electronic Control Device-they fall down the stairs causing a collateral injury.
- Officers should be aware that a subject’s heavy clothing may impact the effectiveness of the electronic control device.
- Officers should consider whether the subject has been exposed to combustible elements that may be on their person such as gasoline. The use of a Electronic Control Device on such persons may cause an ignition and fire.
- Officers should consider the particular subject and any vulnerabilities they may have such as: a person who is small in stature will be more dramatically impacted; some agencies have been criticized as well as sued for use on pregnant women and the elderly.
- Alternative tactics should be utilized where the officer has prior information that the subject suffers from a disability which would increase the danger to that person by using the Electronic Restraint Device. i.e. A person at the scene tells an officer that the subject has a heart condition.
- Agency policy/training must address removal of darts from a person who is brought under control by deployment. Where there is any difficult, removal should be conducted by medically trained personnel.
- All persons who have been the subject of a Electronic Control Device deployment should be cleared medically or at the very least

monitored for a period of time with a focus on symptoms of physical distress. It should be noted that studies indicate that persons who suffer from excited delirium may not be immediately impacted and the onset of difficulty may occur a period of time after the police control event.

Mandatory Medical Clearance at Hospital:

- Persons struck in a sensitive area-eyes, head, genitals, female breasts.
- Where officer cannot safely remove darts in accordance with training.
- Persons who do not appear to have fully recovered after a short period of time (Model Policies use a ten-minute time limit however officers who observe unusual physical distress should immediately call for medical assistance and should not wait the ten-minute recovery period recommended by some of the model policies,
- Persons who fall into one of the vulnerable classes such as juveniles, pregnant women, persons who are small in stature, persons who officers become aware have a pre-existing medical condition that increases danger and the elderly.
- Subject who request medical assistance.

Documentation Issues

- Agencies should document all Electronic Control Device use including those cases where a subject complies once threatened with such a device. By documenting the non-discharge uses, an agency establishes officer judgment and control as well as the deterrent effect of this tool.
- Photographs of the effected area, should be taken following the removal of darts from the subject to document any injury. Where the push-stun method has been used, photographs are extremely important due to the increased potential for this method to cause scarring.
- Supervisory personnel should be notified and review all Electronic Control Device deployment for consistency with policy and training.
- Darts/Cartridges should be properly stored and maintained as evidence following a discharge.
- Officer must be required to complete a “response to active resistance/ECD discharge form” following use.
- Policy should require supervisory/agency/ and training review of all uses.
- Where there is any indication of lasting injury, claim or complaint internal data from device should be maintained.

An examination of Taser© use cases reveals that most of these cases are resolved by a simple review of the three part test in accord with the facts known to the officer at the time they used force. In a case from Texas, an officer sought to be dismissed from a lawsuit involving his Taser© use.[23] It should be noted that the case, as reported by the court was on a summary judgment motion, thus, the facts as reported by the court are the facts alleged by the plaintiff and may not reflect what actually happened. On summary judgment the court has no choice but to adopt the alleged facts.

On July 11, 2003, Naomi Autin, a 59 year old went to her brother's house to check the mail. She knocked at the door in an attempt to raise her brother. She became concerned because she had reason to believe that the occupant was seriously ill. Naomi Autin could hear the loud television, but could not get a response at the door. She tried using a brick to knock louder, but still no one answered.

Naomi then went to a neighbor's house and borrowed the telephone to try calling her brother's home. When no one answered she called the Baytown Police Department for assistance. An officer responded to the scene. When Autin told the officer that she wanted his assistance in getting someone to answer the door, the officer responded that he could not make anyone come to the door. Autin then dismissed the officer and went back to knocking on the door with the brick.

Upon observing Autin approaching the door with the brick, the officer attempted to tase her. The Taser© misfired. The officer then attempted to touch tase Ms. Autin, but reported that the device malfunctioned a second time. The second attempt led to dart penetrating Ms. Autin's skin. The officer continued to touch tase Autin, forcing her to the ground, during the take-down Autin struck her head on a pole and suffered a severe head laceration. The use of force against Autin by this officer led to a lawsuit claiming excessive force.

In analyzing the case the court walked through the *Graham* analysis. First, how serious was the offense that the officer suspected Autin of committing? The court noted that the crime was "at best, criminal mischief." The court noted that in judging the reasonableness of the use of force, "it should not be forgotten that Autin was fifty-nine years old and five feet two inches tall." The court went on to assert that Ms. Autin, while at the door with the brick, had her back to the officer and posed no physical threat to him. Further, she was not actively resisting the officer or attempting to evade arrest by flight.

[23] *Autin v. City of Baytown,* 2005 U.S. App. LEXIS 29098 (5th Cir. 2006).

In conclusion, the court denied the officer summary judgment and qualified immunity. The court noted that the facts considered may not be accurate, but at this stage of the proceedings, they must take the plaintiff's facts as true. The court held that if the circumstances surrounding this use of force are found to be as stated by Autin, the officer's actions violated the constitution and that would be clear to any officer.

Desalvo v. City of Collinsville[24] provides an example of an alleged abuse of force and a Taser. Following a day of watching races at the Gateway International Raceway, Christopher DeSalvo was watching guests of the Holiday Inn do "burnouts" with their vehicles in the rear lot of the hotel.[25] Approximately 100-150 guests were gathered for the show. The gathering and the vehicle "burnouts" prompted the response of the police. Officer Krug, upon responding a second time to the hotel, ordered the crowd to disperse and called for backup. As the crowd began dispersing, Krug confronted an older man who did not immediately disperse. Upon confronting this man, the officer acknowledged, the man began to disperse. The officer demanded identification from the man, which prompted, DeSalvo, to question the officer's conduct. DeSalvo alleged that Krug then threatened to arrest him for obstructing. DeSalvo responded to Krug that he had not committed any crime, at which point DeSalvo was handcuffed and pushed against a police vehicle.

As DeSalvo stood against the police vehicle, he continually questioned Officer Krug as to why he was being arrested. At some point, Officer Krug took out his Taser and test-fired it in the air above DeSalvo's head. This portion of the allegations made by DeSalvo was captured on film by an amateur photographer. In reviewing the film, the court reported that approximately 6 seconds after the testfire, Officer Krug put the Taser on DeSalvo's neck and discharged it because DeSalvo, who was handcuffed, was questioning the propriety of his arrest rather than getting into the police vehicle. The court reported that the officer then placed the Taser on DeSalvo's forehead and threatened to tase him again if he did not immediately get into the car. Before DeSalvo got into the car, the Taser was discharged against his forehead. The court noted from the video that two officers were available to assist Officer Krug as they were standing right next to him and DeSalvo. Two additional officers were within twenty feet.

The court rejected Officer Krug's request for summary judgment and qualified immunity. It should be noted that in doing so, the court was taking all of the facts alleged by DeSalvo as true. (Even those not documented by the videotape). The court concluded that DeSalvo had established two claims that should be considered by a jury. First, he had established a

[24] *DeSalvo v. City of Collinsville,* 2005 U.S. Dist. LEXIS 23180 (U.S. Dist. Ct. S.D. Ill. 2005).

potential false arrest/unreasonable seizure claim, since his questioning of the officer's actions with respect to the confrontation with the old man would not constitute probable cause to believe that DeSalvo had committed a crime. Additionally, DeSalvo had established a claim of excessive force since he was handcuffed and only verbally non-compliant at the time Officer Krug discharged the Taser. It should be noted that the court refused to grant qualified immunity based on Krug's argument that there was no previous case notifying officers that it would be unreasonable to tase a citizen in this manner.

Pepper-Spray

Over the last decade police agencies have turned to the use of pepper-spray as an alternative on their use of force options list. While pepper-spray seems to have significantly reduced injuries to suspects caused by impact weapons, pepper-spray has not been litigation-free.

A high-profile case from the 9th Circuit Court of Appeals established that the use of pepper-spray against passively resistant protestors violates constitutional protections.[26] *Headwaters* involved a group of protestors who were involved in a demonstration at the Pacific Lumber Company. The protestors had locked themselves together with *"black bears."* When sheriff's deputies arrived at the demonstration, the supervisor decided to use pepper-spray on the protestors. The protestors were warned. When they failed to release themselves, officers applied pepper-spray at close range and even used Q-tips to apply pepper-spray to some protestors' eyes. The court noted that officers made no attempt to negotiate with the protestors; did not flush out their eyes though the protestors were screaming in pain; and with respect to at least some of the protestors, the pepper-spray did not cause the protestors to release the lock. The court also noted that when the pepper-spray did not work, officers were able to remove the protestors in pairs on a stretcher in under 2 minutes and cut the locks off using the Makita grinders in less than 10 minutes.

The use of pepper-spray on these protestors was not a split-second decision. In fact, Humboldt County had been dealing with environmental protestors for some time. The county had a special response team to deal with these types of protestors. The response team was trained in the use of Makita® grinders that could be used to cut locking mechanisms such as the *"black bear"* from the protestors. Prior to the events in question Sheriff Lewis and Chief Deputy Philp *"consulted a certified trainer in the use of pepper spray, the county's risk manager, and its district attorney. And they read much of the available literature on the subject."* Lewis and Philp concluded that the use of a lock-down device by an otherwise non-violent protestor who posed no danger to the public, the officer or him/herself constituted *"active*

[26] See, *Headwaters v. County of Humboldt*, (9th Cir. No. 98-17250, 2000).

resistance to arrest" warranting the *"use of pepper spray as a pain compliance technique."*

The United States Court of Appeal for the 9th Circuit began its review of the reasonableness of the use of pepper-spray on non-violent protestors by citing the analysis of *Graham v. Connor.*[27]. The court thus balanced the governmental need to apply the pepper-spray against the countervailing rights of the protestors to bodily integrity. The court began by distinguishing pepper-spray from pain compliance techniques that police officers can immediately terminate upon compliance. The pain from pepper-spray only passes with time and proper flushing, thus compliance would not terminate the infliction of this use of force. In concluding that the actions of the protestors did not justify the use of pepper-spray, the court noted that the protestors could not "*evade arrest*" since they had limited their own mobility; further, they were not actively resisting the officers but merely being passively non-compliant. The need for arrest as a government interest was insignificant since the protestors were only guilty of trespassing, a minor offense. As such, applying the standards from *Graham*, the use of force here was unreasonable.

A second case involving the use of pepper-spray to a non-physical, non-compliance situation confronted by a police officer reached a similar conclusion to the 9th Circuit Court.[28] Mary Martinez was stopped for operating a motor vehicle 10 mph over the speed limit by Trooper Perry Boyd of the New Mexico State Police. The court described Martinez as a 280 pound middle-aged woman. At the time of the stop Boyd noticed that Martinez' license had been defaced; she indicated that children at her school had defaced the license. A computer check by Boyd revealed an active warrant for a Mary Martinez with the same date of birth as the plaintiff in this case.

Trooper Boyd asked Martinez to step out of the car. She verbally refused, indicating that she wanted to see the trooper's identification. By all accounts Martinez never physically resisted the trooper's commands. Trooper Boyd prevailed upon Martinez such that she stepped out of her car and was handcuffed. Trooper Boyd led her back to his cruiser and demanded that she get in. Martinez refused, again stating that she would not comply until she was shown Trooper Boyd's identification. Boyd refused to show her the identification, but instead decided to spray her with mace to force her compliance. Boyd sprayed Martinez as she stood handcuffed on the side of his police car.

The Court of Appeals for the 10th Circuit held that it would be unreasonable to use mace in an effort to force compliance from a person who is restrained in handcuffs and is only being verbally resistant. As in *Headwaters*, the

[27] *Graham*, 490 U.S. 386 (1989).

[28] See, *Mary Martinez v. New Mexico Department of Public Safety*, 47 Fed. Appx. 513 (10th Cir. 2002).

court noted that Boyd had other alternatives available to him such as showing her the identification or waiting for the arrival of backup. At the point she was sprayed she was not physically resisting; she was being arrested on a warrant for a minor offense issued for a person with similar information to her; and she was restrained and thus not a flight risk. Applying the principles from *Graham* the use of force here was unreasonable. The court also refused to grant qualified immunity to the officer, reasoning that any reasonable police officer would know that it is unreasonable to spray a handcuffed, non-physical suspect who was standing beside a cruiser being verbally non-compliant.

The United States Court of Appeal for the 11th Circuit reached a similar conclusion in *Vineyard v. Wilson and Stanfield.*[29] Terri Vineyard filed a lawsuit against Sheriff Wilson and Officer Stanfield of the Walker County Sheriff's office. Vineyard's first contact with Officer Stanfield occurred when Stanfield stopped by Vineyard's house to notify her that a complaint had been made about her son by a neighbor. The neighbor had indicated that Vineyard's son had given beer to his son. Officer Stanfield warned Terri Vineyard and others who were attending a cookout at Vineyard's home not to give beer to the neighbor's son.

Vineyard and two friends left the party and went to get Vineyard's son at another neighbor's house. As they returned with Vineyard's son they passed the complaining neighbor's house and words were exchanged. This prompted Officer Stanfield to return to Vineyard's house. He began to question Vineyard about the altercation with the neighbor but, according to Vineyard, refused to listen to what had transpired. Vineyard was placed under arrest and handcuffed behind her back. On the way to the station a heated exchange took place with insults being hurled like a volley-ball between Vineyard and Officer Stanfield. The exchange concluded when Officer Stanfield stopped the cruiser on a dark road, opened the rear door, pulled Vineyard's head back and sprayed her with two or three bursts of pepper-spray. The court noted that Vineyard is 5'3" tall and 130 lb. while Officer Stanfield is 6'0" tall and 200 lb. Officer Stanfield admitted to spraying Vineyard, but indicated that he sprayed her after she kicked his seat, threatened to get out of the car, and attempted to kick and spit at him.

In analyzing the use of force against Vineyard, the court examined the factors enunciated in *Graham v. Connor. "To balance the necessity of the use of force used against the arrestee's constitutional rights, a court must evaluate several factors, including 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"* The court continued: *"In determining if the force was reasonable, courts must examine (1) the need for the application of force, (2) the*

[29] *Vineyard v. Wilson and Stanfield*. 311 F.3d 1340 (11th Cir. 2002).

relationship between the need and the amount of force used, and (3) the extent of the injury inflicted."… Graham dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight."

The court noted that courts previously addressing the use of pepper-spray 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."*[30] *"Based on Vineyard's account of the facts, it is abundantly clear to us that during the jail ride Stanfield used force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under Graham. Vineyard was arrested for offenses of minor severity, handcuffed, secured in the back of a patrol car, and posing no threat to Officer Stanfield, herself or the public. In addition the jail ride was four miles and relatively short. There was also a glass or plastic partition between Stanfield and Vineyard."* The court concluded that Officer Stanfield was not entitled to summary judgment.

Other issues that should be addressed through policy and training including: hydraulic needle effect; closed ventilation buildings, crowded enclosed areas, and the innocent overspray issues that occur when pepper spray is used.

The hydraulic needle effect occurs when a law enforcement officer holds the can of pepper-spray too close to someone's eyes. Because the pepper comes out in a pressurized stream, serious eye injury may occur if the can is held close to the eye (generally under three feet) and the stream hits the eye directly.

Officers should also be cautioned that if the spray is used in a building with a closed-ventilation heating and air-conditioning system, the use of spray may cause secondary impact throughout the building. Many persons in the building may be temporarily impacted. This can be a particular problem in places like hospitals and schools. Additionally, if dealing with a crowded enclosed area, persons who are unfamiliar with the effects of pepper-spray may become panicked when they began having difficulty breathing. In a case involving a security guard in a Chicago nightclub, twenty-one people were killed in the stampede that resulting from the panic.[31]

Beanbag Rounds

[30] See, Citing, *Headwaters*, 276 F.3d 1125 (9th Cir. 2002), *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001), *Lalonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), and *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994).

[31] "Trial near in deadly nightclub stampede" Chicago Tribune, January 9, 2007.

Another area being carved out through lawsuits is the use of less-lethal weapons. Although the widespread use of beanbag rounds is fairly new to policing, cases contemplating the propriety of their use have been popping up in the media and in the courts. The common theme with less-lethal weapons as with all uses of force is reasonableness. Was it reasonable to use the force employed in the circumstances faced by the officer?

In *Deorle v. Rutherford and the County of Butte,* the court considered the use of a beanbag projectile on an emotionally disturbed person.[32] On September 9th 1996 Richard Deorle was diagnosed with Hepatitis C. After consuming vodka and taking his prescribed medication Richard's behavior became erratic. Believing her husband was suicidal, Mrs. Deorle called 911 for help. Officer Mahon responded but Richard would not allow him in the house without a warrant. Richard remained passive and did not hinder Officer Mahon from removing Mrs. Deorle and the children from the house to a safe location. Officer Mahon called for backup and "at least 13 officers responded." "These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape, and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators."

Deorle, though verbally abusive, was physically compliant and generally followed all the officers' instructions. When a canine team "tested" his behavior by making their police dog bark aggressively at Deorle, he retreated towards his house." "When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting 'kill me' and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down." "Officer Rutherford, who was at the scene for thirty or forty minutes, did not observe Deorle touch, let alone attack, anyone; nor had he received any report of such action on Deorle's part. He did, however, hear Deorle scream at him that he would 'kick his ass.'"

Officer Rutherford, a member of the SIRT team moved in before the arrival of the negotiators. He observed Deorle walking with a plastic crossbow in one hand and a bottle or can of lighter fluid in the other. Deorle began taunting Officer Rutherford, at which point Rutherford ordered Deorle to drop the crossbow. Deorle dropped the bow and began walking toward Rutherford. Rutherford did not order Deorle to drop the bottle or can. As Deorle steadily approached Rutherford; Rutherford "took a little wider stance with my feet to get a good stable base." When Deorle reached a "predetermined" point, Rutherford fired at Deorle with a beanbag round striking him square in the face. Rutherford indicated that he had been aiming for his ribcage. Deorle suffered severe injuries as a result of being shot in

[32] *Deorle v. Rutherford and the County of Butte*, No. 99-17188 (9th Cir. 2001).

the face with the beanbag round. He subsequently filed a lawsuit against Officer Rutherford and the County of Butte, California.

In analyzing the use of beanbag rounds the court noted that such rounds are considered a "long range impact weapon." Although considered a less-lethal force option, Officer Rutherford acknowledged in his testimony that such rounds could be lethal at thirty feet, the distance he was from Deorle when he fired, and further acknowledged that such rounds may be lethal at fifty feet if it were to strike the head or the left side of a person's chest. These rounds are "calculated to stop people who are violent or hostile and are threatening injury or death to themselves or others."

In reviewing uses of force a court will *"measure the government interests at stake by evaluating a range of factors: they include: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others…(3) whether he was actively resisting arrest or attempting to evade arrest by flight and (4) any other exigent circumstances that existed at the time of the arrest."* The court, citing *Graham v. Connor* asserted: *"These factors, however, are simply a means by which to determine objectively the amount of force that is necessary in a particular situation."* In other words, one determines if the force was reasonable by reviewing the factors announced in *Graham.*

Applying the facts of this case to these standards the court recognized that the officers were at Deorle's property without a warrant in an effort to investigate Deorle's peculiar behavior. The officers knew that Deorle was suffering an emotional disturbance and was suicidal. Officer Rutherford, whose stated purpose in moving closer to gather intelligence that would enhance the SIRT team's response decided to hold his ground on Deorle's approach notwithstanding the fact that negotiators were on the way and Deorle had no avenue of escape. Officer Rutherford fired on Deorle without ever ordering Deorle to halt his advance even though Deorle had complied with several commands given by officers including Rutherford. The court concluded that "shooting a person who is making a disturbance because he walks in the direction of a police officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable." The amount of force used by Rutherford was excessive when analyzed against the existing facts and when weighed against the government interest. Notwithstanding the fact that the court could point to no similar case considering this issue, Officer Rutherford was denied qualified immunity on the reasoning that the force used here was obviously excessive.

Seizure at Gunpoint

In *Robinson v. Solano County,* the United States Court of Appeals for the 9th Circuit had an opportunity to review whether a police officer's pointing of a

handgun at a citizen without actually pulling the trigger may violate the Fourth Amendment under some circumstances.[33] The plaintiff in this case was James Robinson, an African-American retired police officer from San Francisco. When the events giving rise to this lawsuit occurred, Robinson was living on a five acre parcel of land in a rural area. Robinson was 64 years old and raised livestock. On the day in question, Robinson observed two dogs on his fenced property killing his livestock. Robinson took a shotgun and shot the dogs. One of the dogs was killed but the second one took off wounded. Robinson searched for the wounded dog. In doing so he went on to the pubic road with the shotgun where he was confronted by his neighbor, who owned the dogs. Though Robinson told the neighbor he did not realize the dogs were hers, an altercation ensued. The neighbor, Mrs. Reyes returned home and called the police.

As a result of Mrs. Reyes' call, the police were dispatched to a call of a man in the "middle of the street with a gun, who had shot two dogs and is yelling at this time." By the time officers arrived, Robinson was in his house. He observed the six police cars and started the 135 foot trip from his house to the public roadway to explain to the officers what had happened. Robinson was not carrying his shotgun. As he approached the officers he gave his name and said that he was the man involved with the dogs. Officer Cauwells pointed his gun at Robinson's head from a distance of six to eight feet and ordered Robinson to put his hands up. As Robinson put his hands up, Cauwell moved to within three to four feet with his gun pointed at Robinson's head. Two other officers handcuffed Robinson and put him in a cruiser where he remained while the officers interviewed Mrs. Reyes and other neighbors. The officers did not search Robinson who was carrying a knife that was never discovered. Robinson was never allowed to explain what had occurred. Robinson was released after the officers determined that he had done nothing illegal.

The court decided that the pointing of a gun at Robinson was an unjustified and excessive use of force. The court pointed out that Robinson was approaching the police peacefully and they could clearly see that he was not armed with a shotgun. Further the court noted that Mr. Robinson had committed no crime by his actions at the outset. After finding that a constitutional violation had taken place, the court concluded that the officers were entitled to qualified immunity because the law was not clearly established at the time of the incident in 1995. The court did point out that the law is now clearly established that pointing a gun toward the "head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger."

[33] *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002).

Use of Canines

On May 8, 2003 the United States Court of Appeal for the 8th Circuit joined a number of other sister circuits in deciding that a warning prior to the use of a police canine is an essential component of the reasonableness inquiry on use of force.[34]

On September 22, 1999, Kuha went out drinking with some friends. On his way home he ran into a curb causing a flat tire. He walked to a friend's house for help and returned with his friend to change the tire. Kuha continued his trip home at approximately 5:30 a.m. when he passed a police car traveling in the opposite direction. When Kuha failed to dim his headlights for the oncoming patrol car, the officer did a u-turn and pulled Kuha over. As the officer approached Kuha's vehicle, Kuha bailed out and ran into a swampy area with dense brush, high grass and foliage. The officer waited for the arrival of backup before beginning a search for Kuha.

Officer Anderson responded to the scene along with his canine partner, "Arco." While searching for Kuha, Officer Anderson had Arco on a leash. After nearly 30 minutes, Arco alerted and bounded into some three foot tall grass. Arco was trained to "bite and hold" until receiving a command to release. When Officer Anderson observed that Kuha was holding Arco's head, he ordered Kuha several times to release the dog's head and further instructed that he would not call the dog off until Kuha followed this command. Once Kuha released the dog, Officer Anderson ordered the dog to release. The entire apprehension lasted approximately ten to fifteen seconds. As a result of the bite, Mr. Kuha's femoral artery was severed and he suffered severe blood loss. He recovered from these injuries and brought a lawsuit alleging excessive force by the officers as well as agency liability with respect to policy and training on the use of canines.

In its review of the claims against the officers, the court began with a straightforward review of use of force as interpreted by the United States Supreme Court in *Graham v. Connor*[35] and *Tennessee v. Garner*[36]. In doing so the court rejected Kuha's argument that the use of a canine amounted to deadly force. The court cited numerous cases, including cases that ended in the death of a suspect at the mouth of a canine, where sister circuits rejected the idea that canines trained to "bite and hold" were instruments of deadly force.[37]

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[34] *Kuha v. City of Minnetonka,* No. 02-1081 (8th Cir. 2003).
[35] 490 U.S. 386 (1989).
[36] 471 U.S. 1 (1985).
[37] See, *Robinette v.Barnes*, 854 F.2d 909 (6th Cir. 1988) (notwithstanding suspect's death, court held that use of properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm'; See also, *Vera Cruz v. City of Escondido,* 139 F.3d 659 (9th Cir. 1998).

Moving beyond deadly force the court reached several conclusions regarding the proper use of a canine. Most importantly, the court concluded:

"a jury could properly find it objectively unreasonable to use a police dog trained in the bite and hold method without first giving the suspect a warning and opportunity for peaceful surrender." The court suggested that while no other circuit has directly addressed this issue, numerous other decisions had considered the warning as part of the reasonableness inquiry.[38] The court also cited to a model IACP policy on use of canines that mandated the issuance of a warning before a canine was used.[39] It should be noted that the trial court had concluded that the officers may have been endangered by such a warning which would give away the officers' position. The 8th Circuit agreed that officer safety was paramount, but rejected the idea that a warning to the suspect would place the officers in any greater risk.

Having concluded that the officer's use of the canine without first giving a verbal warning amounted to a constitutional violation, the court then turned to the qualified immunity issue. Since no case could be found standing for the proposition that a use of a canine without a warning was unconstitutional, the individual officers were entitled to qualified immunity.

Unlike individual officers, agencies are not entitled to qualified immunity. In this case, the court reviewed the agency's policies and training to determine if the policies and training would allow the use of a canine without first warning the suspect. The court noted that the City of Minnetonka's directives on use of canines could be construed to require a warning before a canine was used. The court then turned to the deposition of the chief of police where the chief testified that the use of the canine in this case was consistent with department policy. The court concluded that the testimony of the chief undermined the City's argument that the use of the canine without a warning violated city policy. The court then denied summary judgment for the City and remanded the case for trial after deciding that a jury could reasonably determine that a Fourth Amendment violation had occurred and the "City's policy on police dogs-which authorizes the use of dogs trained only to bite and hold, and which did not mandate a verbal warning in this scenario-caused the constitutional violation."

An underlying issue in this case that must be addressed is the testimony of the chief of police that indicates that the use of the canine was consistent with police policy notwithstanding a directive that arguably would require a

[38] See, *Ruvalcaba v. Los Angelas*, 167 F.3d 514 (9th Cir. 1999) (Officers gave three warnings in both Spanish and English before releasing dog into a closed theatre where a burglary was being investigated.); *Vera Cruz*, 139 F.3d 659 at 660-661 (9th Cir. 1998) (Officer gave two verbal warnings before sending police dog after fleeing suspect who had been harassing restaurant employees); See also, *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998) (the court reversed a summary judgment ruling in favor of an officer where no warning had been given).
[39] International Association of Chiefs of Police National Law Enforcement Policy Center: "Law Enforcement Canines," (May 1992).

warning. Such testimony is best understood in terms of police culture. Where officers are doing legitimate police work, police officials are extremely hesitant to second-guess the actions of the officer. While this may be a sign of leadership, in cases where there is a clear violation of policy and/or training, police leaders are well-advised to note the violation.

Action taken in violation of department policy or training is not automatically a constitutional violation. However, where a constitutional violation is found, even where the individual officer gets qualified immunity, the agency may be held to the assertions of trainers and policymakers as well as findings by the internal affairs division that the officers acted consistent with policy. Irrespective of the written policy, such assertions may lead to a conclusion that the department's custom and practices are different from the formal written policy. Policymakers as well as trainers must have a clear understanding of agency liability in §1983 actions in order to recognize the importance of their testimony with respect to policy and training and the impact they may have on agency liability.

Duty to Intervene In Excessive Force Cases

How should an officer react when he or she observes a colleague commit an act of excessive force in his or her presence? It is a basic principle of supervisory responsibility that supervisors must intervene into subordinate officers conduct, but what about officers of equal rank? Two recent cases make clear that officers who have an opportunity to intervene in an excessive use of force must do so, or risk personal liability for a civil rights violation based upon their failure to intervene.

Samuels v. Cunningham et al.,[40]involved an apprehension by four detectives of the Wilmington, Delaware Police Department. The four detectives had approached Samuels who was leaning into the window of an automobile; as they did so, both the auto and Samuels fled. Samuels was apprehended by the four detectives and handcuffed. After he was handcuffed, a fifth detective, Detective Hall ran up and allegedly punched Samuels in the ribs. Samuels was transported to the hospital and treated for a fractured rib.

Samuels filed suit against the detective who punched him as well as the other detectives who were present when he was punched. His allegation against the four detectives who were merely present was based upon their failure to intervene in the conduct of their colleague. The detectives and the City of Wilmington sought a dismissal of the suit.

In reviewing the case, the court noted the sequence of events and concluded that the four detectives had no reasonable opportunity to intervene in the punch since it was a single punch and there simply was no

[40] *Samuels v. Cunningham*, 2003 U.S. Dist. LEXIS 14479 (Dist. Del. 2003).

way for the four detectives who had apprehended Samuels to anticipate that Detective Hall would punch the handcuffed suspect. The court also dismissed claims against the City of Wilmington. The claims against Detective Hall, who allegedly threw the punch were allowed to proceed to trial.

The second case, decided September 30th 2003, found that the law with respect to officers who have an opportunity to intercede in excessive force is clearly established and may create liability for officers who fail to intervene.[41]

Jones was a passenger in a vehicle that was stopped following a phony car-jacking call to the police. Officer Nichols and Rodriguez of the Hartford CT. Police Department approached the driver, Easterling, while Officer Murtha approached Jones.

After Jones was taken from the car, he protested that he had done nothing wrong. Officer Murtha then allegedly threw Jones to the ground and kicked him several times, including kicks to the face that caused a bloody lip. Murtha then picked Jones up from the ground, kneed him in the groin several times and then ripped his pants off him. It should be noted that the officers acknowledged Jones' bloody lip and ripped-off pants.

The court found that Officer Nichols and Rodriguez had no opportunity to intervene in the kicks, but had opportunity to intervene in the other acts allegedly committed by Murtha.

In refusing to dismiss claims against Rodriguez and Nichols the court asserted: " Police officers have an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated in their presence by other officers." Officers who fail to intervene may be liable for the harm caused by their colleagues.

Note: Many agencies have developed policies requiring officers to report observed excessive force by others and require immediate investigations of all uses of force

Deadly Force

As noted at the outset of this chapter, the foundation case regarding deadly force is *Tennessee v. Garner.*[42] In *Garner* the United States Supreme Court rejected the long-standing common law of the United States that allowed officers to shoot any fleeing felon. The Court held that any state statute that allowed police to shoot any fleeing felon would be unconstitutional.

In *Garner*, the Court held that it would be reasonable for officers to use deadly force under two circumstances:

[41] *Jones v. City of Hartford,* 2003 U.S. Dist. LEXIS 17340 (Dist. CT. 2003).
[42] *Tennessee v. Garner,* 471 U.S. 1 (1985).

- Where the suspect poses an immediate threat of serious bodily harm or death to the officer or some other person present, or;

- To prevent escape when the officer has probable cause to believe that the suspect has committed a violent felony involving the infliction or threatened infliction of serious bodily harm or death.

- In all cases *Garner* requires a warning to be given prior to the use of deadly force where it is feasible to give such a warning.

The generally accepted practice around the country with respect to deadly force in preventing escape is more restrictive than a literal reading of *Garner* since most agencies add a provision that includes that an officer must also believe that the suspect poses either an "immediate" danger or an "imminent" danger to others by his or her escape.[43]

A significant issue which has impacted the use of deadly force is how a court will review "pre-seizure" or pre-shooting conduct. There is a split among the circuits as to how an officer's actions leading up to the need to use deadly force will be viewed or if the pre-shooting conduct will be viewed at all. It should be noted, that the pre-shooting conduct analysis may also be applied as a pre-use of force conduct, since the analysis should be the same.

Pre-Shooting Conduct

> *"Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." Id., at 1190. Courts must not judge officers with "the 20/20vision of hindsight.'" Ibid. (quoting Graham, 490 U. S., at 396).*

> *Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was*

[43] See U.S. DOJ Policy on Use of Deadly Force. In October of 1995, the United States Justice Department added an "imminence" requirement to the deadly force (prevent escape) provision policy governing federal law enforcement officers. This policy was adopted by the United States Department of Treasury, thus creating a uniform policy for all Federal law enforcement personnel.

imprudent, inappropriate, or even reckless." Billington, supra, at 1189. Cf. Saucier v. Katz, 533 U. S. 194, 216, n. 6 (2001) (GINSBURG, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently'" (quoting Roy v. Inhabitants of Lewiston, 42 F. 3d 691, 695 (CA1 1994))). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

City and County of San Francisco et al v. Sheehan, 575 U.S. ___; Slip Op. No.-13-1412 (2015).

In reviewing the reasonableness of the use of deadly force some United States' Circuit Courts of Appeal look beyond the "moment" of the shooting. A court will look at the events which led up to the need for deadly force to determine whether the officer's actions created this need. If the officer placed him or herself in a position of peril (for example - jumping into the path of a fleeing vehicle or unreasonably executing a warrant) which created the need for deadly force, a court may review the officers' actions as cutting against the reasonableness of the ultimate use of deadly force. In *Graham*, the United States Supreme Court concluded that courts should review uses of force by examining the "totality of circumstance" by "stepping into the shoes of the officer" at the "moment" that the force was used. This language has led to disagreement as to what factors should be included in the "totality of circumstances."

First Circuit

The 1st Circuit Court of Appeals in *St. Hilaire v. City of Laconia* adopted this type of analysis in deadly force cases.[44] The court rejected the *"defendants' analysis that the police officers' actions need be examined for 'reasonableness' under the Fourth Amendment only at the moment of the shooting."*

St. Hilaire, involved a pre-planned raid at a business owned by St. Hilaire. The officers, having prior knowledge that St. Hilaire was licensed to carry a concealed firearm, decided that it would be best if uniform officers entered the establishment first and secure St. Hilaire. As is often the case, things do not always go as planned. When the uniformed officers arrived at the business they noticed customers unable to enter due to an early closing. As St. Hilaire walked from the business and got into his car, a plainclothes officer ran toward St. Hilaire with his gun drawn. The story diverges here, with all officers indicating that the plainclothes officer was shouting police and

[44] *St. Hilaire v. City of Laconia*, 71 F.3d 20 (1995).

had his badge in his free hand. St. Hilaire would later question why the officer had not identified himself. As the officer reached the car, St. Hilaire reached for his gun. At that moment in time the officer was in danger of serious bodily harm or death so he fired, shooting St. Hilaire. As uniformed officers and rescue workers attended to the wounded St. Hilaire he repeatedly questioned why the officer had not identified himself. The court noted that such spontaneous utterances have the indicia of reliability because the person is operating under the trauma of the situation and has not had the opportunity to reflect upon the consequences of his or her statements.

The 1st Circuit Court of Appeals refused to simply look at the moment of the shooting and instead concluded that courts should consider any actions undertaken by the officers that may have led up to the need to use deadly force. 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. The court concluded that St. Hilaire's claim should proceed to a jury trial to determine whose story a jury would credit.[45]

Second Circuit

A case from the 2nd Circuit Court of Appeals that remains the standing law on point is *Salim v. Proulx.*[46] The stipulated facts in the case were that Officer Proulx, while working a warrant detail attempted to arrest a 14 year-old who had escaped from a juvenile detention facility. The juvenile, Eric Reyes had twice eluded officers who attempted to arrest him. Prior to his pursuit of Reyes, Officer Proulx had put his service-weapon, his handcuffs and his portable radio in the trunk of his police vehicle and was carrying a .22 caliber handgun in his pocket.

Once again, Reyes fled on foot. Officer Proulx chased and caught Reyes. As Reyes struggled with the officer five or six children between the ages of eight and twelve came to Reyes' assistance and attacked Officer Proulx. This attack included an attempt to get Proulx's gun. Officer Proulx reported that when Reyes grabbed the barrel of the gun, Officer Proulx instinctively grabbed the trigger and pulled it, killing Reyes.

In the lawsuit, it was alleged that the officer either used excessive force or by his actions, created the need to use deadly force. "Plaintiff faults Proulx for various violations of police procedure, such as failing to carry a radio or

[45] See also, *Abraham v. Raso,* 183 F.3d 279 (3rd Cir. 1999) (expressing 'disagreement with those courts which have held that the analysis of reasonableness under the Fourth Amendment requires excluding evidence of events preceding the actual seizure"). See also, *Claybrook v. Birchwell,* 274 F.3d 1098 (6th Cir. 2001) (where officers had a shoot-out with the decedent, then chased him, then shot and killed him; the initial shooting was properly considered in determining the reasonableness of the subsequent shooting).

[46] *Salim v. Proulx*, 93 F.3d 86 (2nd Cir. 1996).

call for backup, and also for failing to disengage when the other children entered the fray." The court asserted: "However, Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. **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."**

Third Circuit

The foundation case in the United States court of Appeal for the 3rd Circuit is *Abraham v. Raso,*[47] The case involved an off-duty police officer who was working an off-duty security detail at a retail shopping mall. The officer, Kimberly Raso of the Cherry Hill Police Department was called by mall personnel in regards to subjects, one of whom was Robert Abraham, who were stealing clothing from the mall's Macy's store.

Officer Raso, accompanied by mall personnel and another off-duty officer followed the suspects to the mall's parking area. A security camera in the parking area showed the officers and the mall personnel walking toward the two individuals and further showed that there were open spaces next to Abraham's parked vehicle.

Robert Abraham, who was being ordered to stop by Officer Raso reached his vehicle and got in. At that point the video equipment did an automatic switch to another location, ending the video of the incident. According to Raso and the witnesses, Abraham drove in reverse from his parking space and struck another parked vehicle. According to some witnesses, Officer Raso then moved in front of Abraham's vehicle and ordered him several times to stop. When Abraham drove forward, Officer Raso shot and ultimately killed Abraham. It should be noted that the witnesses were inconsistent on where Raso was standing and how Abraham drove toward her. Such inconsistency is not unusual in such a split-second shooting case. The plaintiffs alleged that Raso was never in the path of the vehicle and instead alleging that Raso shot at Abraham from the side of his vehicle as he attempted to flee.

In considering a summary judgment motion, the court focused on Abraham's conduct before he "allegedly accelerated toward Raso…" Before its analysis the court asserted: **Before describing those disputes, however, we want to express our disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth**

[47] *Abraham v. Raso,* 183 F.3d 279 (3rd Cir. 1999).

Amendment requires excluding any evidence of events preceding the actual 'seizure.'"[48]

The court asserted: "We are not saying, of course, that all preceding events are equally important, or even of equal importance. Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence [where such is the case] are ordinary ideas of causation, not doctrine about when the seizure occurred.

The court went on to state: "We reject the reasoning of *Bone, Carter* and *Bella* because we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all the factors bearing on the officer's use of force

In applying its interpretation to the shooting of Abraham, the court noted that the pursuit of Abraham in the parking lot was "measured, not frantic." "Even assuming Raso was in front of the car and was in danger at some point, a jury could find, notwithstanding her testimony that she did not fire until it was no longer objectively reasonable for her to believe she was in peril. A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect…We can, of course, readily imagine circumstances where a fleeing suspect would have posed such a dire threat to an officer, thereby demonstrating that the suspect posed a serious threat to others, that the officer could justifiably use deadly force to stop the suspect's flight even after the officer escaped harm's way. But, in our case, if the jury decides that Raso did not fire until safely out of harm's way, the jury could also reasonably decide that Abraham's conduct was not so dangerous as to warrant Raso's use of deadly force."

<u>Fourth Circuit</u>

In a recent case, the United States Court of Appeal for the 4th Circuit reiterated its earlier rulings that pre-seizure [pre-shooting] conduct is not part of its reasonableness inquiry.[49]

In *Huggins v. Weider*, the court examined the shooting death of Charles Huggins following a confrontation with officers of the Lexington County Sheriff's Department. The contact with Huggins began when the Sheriff's Department received a call that Huggins was threatening to set fire to several

[48] Citing: *Cole v. Bone,* 993 F.2d 1328, 1333 (8th Cir. 1993) ("we scrutinize only the seizure itself, not the events leading to the seizure"); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("pre-seizure conduct is not subject to Fourth Amendment scrutiny."); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994).
[49] *Huggins v. Weider*, 2004 U.S. Dist. LEXIS 15932 (4th Cir. 2004).

properties. Upon the arrival of the officers, they confronted Huggins behind his house. Huggins was armed with two knives which he held at his chest at some points and in a menacing manner toward the officers at other points. The officers of the Sheriff's Department continually told Huggins to put the knives down and that they would take him to the hospital to get some help.

Huggins refused to put the knives down, and after a short period of time, he advanced toward Sergeant Weider. Weider warned Huggins not to step any closer or he would be forced to shoot Huggins. Huggins took a step or two more toward Sergeant Weider, at which point Weider shot Huggins. A second officer also fired when Huggins did not halt his advance after the first shot. Huggins death led to a lawsuit alleging a violation of the Fourth Amendment based upon excessive force.

In analyzing the case the court asserted: "Under *Graham*, a court must focus on the moment that force was used. *Greenridge v. Ruffin, 927 F.2d 789, 791-92 (4th Cir. 1991).* **Actions prior to that moment are not relevant in evaluating whether the force used was reasonable.** *Elliot v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996)."*

Greenridge[50] involved an officer's use of deadly force during her attempt to make a prostitution arrest. Officer Ernestine Ruffin was working a prostitution detail when she observed a female she believed to be a prostitute enter a vehicle. Officer Ruffin and other officers followed the vehicle until it parked and then approached it from different directions on foot. Officer Ruffin, in plainclothes but with her badge around her neck, reached the car first. After observing a sex act taking place, the officer pulled the vehicle's door open, identified herself as a police officer and told the two occupants to put their hands in view. When neither occupant complied, Ruffin repeated the order and pointed her revolver at them. At that point, the male, Leonard Greenridge, reached to the backseat and grabbed a long cylindrical item that Ruffin thought was a shotgun. The item turned out to be a wooden nightstick. Ruffin shot Greenridge causing him permanent disabling injuries.

When the lawsuit went to trial, the judge refused to allow Greenridge to introduce evidence of violations of police procedure immediately preceding the shooting. Greenridge alleged that Ruffin "violated standard police procedure for night time prostitution arrests by not employing proper backup and not using a flashlight. Thus, Greenridge was arguing that if the officer had used a flashlight he would have recognized the police, not reached to the backseat and therefore not creating the circumstances of the shooting.

In rejecting Greenridge's appeal, the court quoted language from the United States Supreme Court's decision in *Graham* where the Court asserted

[50] *Greenridge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991).

that reasonableness was to be considered "at the moment" the officer used force. The 4th Circuit court concluded that the events preceding the use of force were irrelevant to the ultimate use of force.

Fifth Circuit

The United States Court of Appeal for the 5th Circuit does not consider pre-seizure conduct when analyzing the objective reasonableness of the use of deadly force.[51]

In *Fraire v. City of Arlington*, the court reviewed an allegation of excessive force in the shooting death of Javier Fraire. Fraire came to the attention of Officer Lowery of the Arlington Police Department when he took a wide swing out of a parking lot and nearly struck vehicles in the opposing lane of travel. Officer Lowery, who was in an unmarked vehicle, further observed that Fraire and another occupant in the vehicle were drinking beer.

The officer followed the duo and called for a marked vehicle to pull them over. Before a marked vehicle arrived, Fraire turned onto a residential street and pulled into a driveway. The passenger, Rodriquez, indicated later that this maneuver was an attempt to trick Lowery. As Lowery approached the vehicle, Fraire sped off. Fraire failed to negotiate a curve at high speed and ended up on someone's front lawn. Officer Lowery approached again, but the vehicle sped off.

Officer Lowery ended up following Fraire into a cul-de-sac where, according to Lowery, Fraire had room to get by his police vehicle. A witness reported that Lowery was in the street about 10 feet from his police car when Fraire drove toward him. When the vehicle closed in, Lowery fired a shot causing the Fraire's truck to change direction and crash on a front lawn. The shot had struck Fraire in the head, killing him.

Officer Lowery was cleared in a department investigation from policy violations but the report indicated that Lowery had made some tactical errors. "Specifically, the investigation found that there was never any need for Lowery to follow the truck into the subdivision because it was a dead end, and that there was never any need for Lowery to get out of his vehicle: 'When he got out of his car and stood in the cul-de-sac, he invited the truck to aim for him.'"

In rejecting the plaintiff's argument that Officer Lowery's tactics made his ultimate use of deadly force unreasonable, the court cited its previous decision in *Young v. City of Killeen.*[52] "There, the district court found that the officer had acted negligently and contrary to good police procedure. On

[51] *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992).
[52] *Young v. City of Killen*, 775 F.2d 1349 (5th Cir. 1985).

appeal, we noted that 'the sense in which [the district court] finds excessive force is that the force would have been avoided if [the policeman] had approached Young as required by proper police procedures.' We found to the contrary, however **that regardless of what transpired up until the shooting itself, Young's movements gave the officer reason to believe, at that moment, that there was a threat of physical harm. We said: 'The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest.'"**

A more recent case from the United States District Court for the Northern District of Texas at Fort Wayne reiterated the position of *Fraise v. Arlington.* In *Davis v. City of North Richland Hills*[53] the court examined a case where police executed a search warrant at the home of Troy Davis. Upon entering the Davis home, an officer observed Davis and believed he had a gun. The officer shot and killed Davis. In the lawsuit, Davis' family challenged the search warrant; the failure of police to knock and announce; and the ultimate use of deadly force against Davis.

In rejecting that portion of the Davis' family's argument that the police tactics created the need to use deadly force the court concluded: "To the extent that plaintiff's are alleging that the officer defendants' force was excessive, in part, because they did not follow police procedures by obtaining a valid search warrant and knocking and announcing their presence before entering, the court notes that the constitutional right to be free from unreasonable seizure has never been equated by the court with the right to be free from a negligently executed stop or arrest. [citing: *Fraire v. City of Arlington*] **In other words, even assuming that the officer defendants were somehow negligent in their actions leading up to the shooting of Troy Davis, such negligence resulting in death does not automatically indicate that a constitutional violation has occurred. The proper inquiry in a claim under the Fourth Amendment for excessive force is to evaluate the circumstances surrounding the actual shooting and <u>not the events leading up to the shooting itself."</u>**

<u>Sixth Circuit</u>

The United States Court of Appeal for the 6th Circuit uses a segmented approach to liability in use of force cases. In other words, the each action during the event is considered as a distinct segment, separate and apart from each other action of the officer(s).

Dickerson v. McClellan,[54] involved a call to the police regarding shots fired at a residence in Nashville, Tennessee. A woman, Margie George,

[53] *Davis v. City of North Richland Hills*, 2003 U.S. Dist. LEXIS 17579 (Northern Dist. Tex., Fort Wayne 2003).
[54] *Dickerson v. McClellan,* 101 F.3d 1151 (6th Cir. 1996).

called to report hearing 9 shots fired in her neighbor's house. The neighbor, Joel Dickerson, was reportedly intoxicated and had fired the shots inside his home.

Two officers responded to the scene and spoke with Mrs. George. The officers did not ask Mrs. George if Dickerson was alone in the house. Officer McClellan and Sergeant Stevens approached the Dickerson home. The external storm door was closed but the inside door was open allowing the officers to see inside the home. The officers observed a telephone cord stretched out beyond their sight and heard a male voice yelling in a threatening manner, but could not make out what the man was saying. **Without knocking or announcing their presence**, the officers entered the house. Upon entering, the officers smelled burnt gunpowder indicating that a gun had recently been fired in the residence. The officers then heard the man state: "I've got something for your ass" and heard the sound of cylinder on a revolver closing. Sergeant Stevens took a position of cover in the house while Officer McClellan ran outside to find cover. Dickerson followed McClellan out of the house and passed by Sergeant Stevens. While there is a dispute among witnesses to the events that occurred next, both officers report hearing Dickerson yell: "I'll get you motherfucker" as he ran toward the front door.

Officer McClellan reported that Dickerson, upon exiting the house, pointed a gun at McClellan. McClellan fired nine times, killing Dickerson. Sergeant Stevens fired four times from inside the house, but according to the facts reported in the case, his shots missed Dickerson. One of the sergeant's shots hit an innocent bystander who was witnessing the event from across the street.

For purposes of the discussion here, the important issue in this case is how the 4th Circuit viewed the officers' failure to knock and announce their presence. This is the type of pre-seizure conduct which a plaintiff may allege, and did allege in this case, created the need to use deadly force. The argument is, had the police knocked and announced their presence, Mr. Dickerson would have known who they were and may have voluntarily submitted to their authority.

The court noted that the plaintiff's argument was that "conduct preceding the shooting is relevant to the issue of the objective reasonableness of the force." One of the plaintiff's arguments to support this position was that the officers should have investigated further before approaching Dickerson's home. The court asserted:

> "We note that the Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances…Plaintiffs also contend that the fact finder

> should consider all of the circumstances preceding the shooting in determining liability for excessive force under § 1983. Specifically, plaintiffs contend that the officers should be held accountable for creating the need to use deadly force by their unreasonable unannounced entry. **The officers respond by posing the question whether a police officer who is negligent in performing some aspect of his pre-entry investigation 'must allow an armed assailant to chase him out of the house and kill him because he created the emergency to which he had to react lethally."**

The court rejected the plaintiffs' argument and segmented the actions of the officers. **The court concluded that "in reviewing the plaintiffs' excessive force claim, we limit the scope of our inquiry to the moments preceding the shooting."** The court indicated that the unannounced entry would be reviewed as a separate claim under the law related to home entries, i.e. was it reasonable for the officers to enter the Dickerson home without a warrant. On this point the court found that the officers had exigent circumstances.

Notwithstanding the court's refusal to consider pre-seizure conduct as part of the excessive force [deadly force] claim; the court refused the officers' motion for summary judgment. The refusal was based on the conflicting testimony between the officers and witnesses as to whether Dickerson posed a danger to the officers at the time of the shooting. As such, the case was remanded to the lower court for a trial.

<u>Seventh Circuit</u>

A case that is consistently cited among all of the federal courts is a case decided by the United States Court of Appeal for the 7th Circuit in 1994.[55] *Plakas v. Drinski*, involved the shooting death of Konstantino Plakas by Deputy Drinski of the Newton County Sheriffs' Department in Indiana.

The facts surrounding this case began when Plakas was involved in a single car collision, rolling his vehicle and ending up in a ditch. As the police and emergency medical personnel responded, Plakas was spotted on the side of the road. The EMT who spotted Plakas convinced him to return to the scene of the accident. Following Plakas' refusal of medical attention, he was arrested for DUI. He was handcuffed behind his back but complained that this positioning was hurting due to some scarring he had on his chest from a previous burn injury.

While being transported, Plakas escaped from the police vehicle and fled to the home of his fiancée's parents. The police entered the home, at which time Plakas picked up a fireplace poker and began threatening the officers. One of the officers was struck in the wrist when he tried to move in on

[55] *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994); cert denied 513 U.S 820 (1994).

Plakas. Plakas then fled the house with officers in foot pursuit. The officers chased Plakas through the woods to a clearing where he was surrounded.

Deputy Drinski began speaking with Plakas and at several points over a fifteen to thirty minute period had Plakas calmed down. At one point Plakas told Drinski, "Either you're going to die here or I'm going to die here." He also invited the officers to shoot him. At some point during the dialogue, Plakas began to charge Deputy Drinksi with the poker over his head. Deputy Drinski began moving backwards but was stopped by the edge of the clearing which was wooded. When Plakas was within two arms lengths, Deputy Drinski fired a single fatal shot to Plakas' chest.

In the lawsuit, Plakas' estate argued that Deputy Drinski had a duty to use alternative methods to apprehend Plakas and the failure to utilize these methods made the ultimate use of deadly force unreasonable. The plaintiffs argued that Drinski could have further retreated and maintained a barrier between them and Plakas; they could have used chemical spray; or, used a canine [that had been offered] to attack Mr. Plakas.

In its review the court pointed out that while there is no precedent in any circuit requiring officers to use all feasible alternatives to avoid the use of deadly force, there are cases holding that where deadly force is reasonable there is no requirement that officers try non-deadly alternatives first. "The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in ordering search and seizure cases."

The court concluded that the time-frame judged in deadly force cases is a very short one. "Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing then no force would have to be used. In this sense, the officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept in constitutional limits, society praises the officer to cause."

The court then instructed that in reviewing these cases it would carve up the incident into segments and judge whether the officer was reasonable at each stage. But, in doing so, it would consider the use of force stage on its own merit as a single segment. The court noted: "Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer."

The United States District Court for the Southern District of Indiana, Indianapolis applied the conclusion of *Plakas* in *Porter v. City of Muncie.*[56] Patricia Porter was 50 years old at the time of her death. While she had suffered from occasional seizures in which she lost consciousness for a number of years, she began developing more significant mental problems shortly before her death.

On the night of her death, Mrs. Porter had a violent episode that led her husband to the decision to take her to the hospital. As he got ready she obtained a butcher knife, refused to go to the hospital and told him to get out of the house before she hurt him.

Mr. Porter called 911 which led to a police response. While enroute, Officer Robbins observed Mrs. Porter walking with a butcher knife in one hand and a meat cleaver in the other. Officer Robbins continually ordered Mrs. Porter to drop the knives as he followed her on foot. Officer Robbins maintained a distance of about 25 feet between him and Mrs. Porter and aimed his gun at her. He continued to shout at her to drop the knife. Mrs. Porter responded at some points for the officer to "leave me alone" and "f you, go ahead and shoot me."

Officer Jent, who had joined Officer Robbins, decided that he would try moving in on Mrs. Porter and deliver a blow with his flashlight to her knife hand while at the same time using a leg-sweep to knock her down. As Officer Jent moved toward Mrs. Porter, Officer Robbins observed Mrs. Porter move in a threatening manner toward Jent and again screamed at her to drop the knife. She continued toward Officer Jent and appeared to Robbins to raise the knife. At that point Officer Robbins fired two shots, fatally wounding Mrs. Porter.

The lawsuit that followed attacked Officer Robbins tactics in approaching Mrs. Porter and alleged that these tactics made the ultimate use of deadly force unreasonable. "Plaintiff's expert witness, Dennis Waller, criticized Officer Robbins for using shouted commands rather than speaking to Mrs. Porter in a calm voice and waiting for other officers to arrive who might have had more experience in dealing with mentally disturbed persons." Mr. Waller also criticized Officer Robbins for having approached to within 15 feet of Mrs. Porter.

In rejecting the plaintiff's attack on tactics the court asserted: "At this point it would be sheer speculation to say that a different approach to Mrs. Porter's behavior would have produced a better outcome." Further, "Officer Robbins also did not act unreasonably, let alone unconstitutionally, before the shooting by closing the distance form Mrs. Porter to about 15 feet. His approach itself, of course, was not excessive force…Officer Robbins also did

[56] *Porter v. City of Muncie,* 2000 U.S. Dist. LEXIS 7385 (S.D. Indiana, Indianapolis 2000).

not violate the Fourth Amendment or act unreasonably when he did not retreat as Mrs. Porter advanced toward him with an upraised butcher knife…The Fourth Amendment dies not require a police officer to retreat when a subject threatens the officer or others with violence." [citing *Plakas v. Drinski*]

Although *Drinski* is regularly cited in police deadly force cases, a more recent case from the United States Court of Appeal for the 7th Circuit seems to open the review of the "totality of circumstances" a bit wider.

In *Deering v. Reich,*[57] the court reviewed the shooting death of "sixty-nine-year-old Reinhold Deering." Mr. Deering had previously been committed to a mental institution and in the months preceding his death he had been acting abnormally. One of the events giving rise to the shooting began when Mr. Deering accidentally backed into a motorcycle with his car. The owner of the motorcycle was willing to let Mr. Deering pay for the gas that spilled from the motorcycle to forget the whole thing. Following Deering's refusal, he was charged with misdemeanor property damage. When he failed to appear in court on this charge, a warrant was issued.

The warrant for Deering's arrest was issued on January 31, 1995. Several hours later, at 11:00 p.m., officers decided to go to Mr. Deering's farm to arrest him for this misdemeanor warrant. The officers arrived at the farm at 12:45 a.m. on February 1st. They parked their vehicles out of sight and snuck up to the house. One officer looked into a window and observed Deering sleeping. A second officer knocked at the door. The officers indicated that they identified themselves at which point Deering responded: "Goddamn Sheriff's Department." Officers then observed that Deering had picked up a rifle or shotgun.

Deering then came outside with the firearm and apparently fired a shot. Deputy Reich thought that another officer had been hit. When Reich shined his flashlight on Deering, he believed that Deering was facing him. He ordered him to drop the gun. Deputy Reich then fired 11 shots at Deering, "killing him when 2 of the shots hit him in the back."

At the outset the court noted that one of the issues in the lawsuit was the "preseizure" conduct of the officers. The court was troubled with the trial court's restrictive view of what constituted the "totality of circumstances" known to the officers at the time of the shooting. "As the instructions [of the trial court] properly note, the reasonableness of Reich's shooting of Deering must be judged by the totality of circumstances. The question is, 'what totality of circumstances'? Or, using the defense phrasing, what is 'seizure' conduct and what is 'preseizure' conduct? **Where, in other words, are the boundaries of the totality of circumstances?**"

[57] *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999).

In its analysis the court asserted: **"The totality of circumstances cannot be limited to the precise moment when Deering discharged his weapon."** The court questioned: "So, in the present case, does the totality of circumstances include, for instance, the fact that the deputies decided to serve the warrant in the middle of the night on an elderly man living alone in a rural farmhouse? Deputy Reich calls such information immaterial 'preseizure' conduct. He points out that in *Carter v. Buscher*[58] we said that 'preseizure conduct is not subject to Fourth Amendment scrutiny.'"

In concluding that some of the "preseizure" information was relevant, the court noted that "reasonableness depends on the information that the officer possesses prior to and at the immediate time of the shooting…What Deputy Reich knew about Deering and the basis for the warrant would seem to fall within these parameters. After all, we can only assume police do not approach the arrest of a jaywalker and a cop killer in the same fashion."

The court went on to note that the reasonableness of a seizure is not restricted to when a seizure is made, but also includes the manner in which the seizure is carried out. "Applied to our case, both the time and manner of the execution of the warrant are part of the totality of the circumstances."

While the court was critical of the trial judge's restriction on evidence with respect to the totality of circumstances, the court concluded that these restrictions were not fatal to the trial court's findings. The court concluded that the plaintiffs were not entitled to a new trial.

Eighth Circuit

In *Rollins v. City of Little Rock,*[59] the United States Court of Appeal for the 8th Circuit reiterated its prior holding that pre-seizure conduct is not part of the Fourth Amendment reasonableness analysis. The facts in *Rollins*, involved the shooting of Norman Rollins. Mary Rollins had called police twice to remove her son, Norman from her beauty salon. Norman was shot by Officer Smith of the Little Rock Police Department during a confrontation while the officer was trying to get Norman to leave. Mrs. Rollins appealed a jury verdict that Officer Smith had acted reasonably based upon the judge's refusal to allow certain pre-seizure evidence to be admitted at the trial.

The 8th Circuit concluded: "…we find no abuse of discretion in the exclusion of evidence of pre-seizure conduct, including a Little Rock Police Department general order on handling mentally ill persons, and a Deadly Force Review Board report completed after the incident…**In this circuit, pre-seizure conduct is not relevant in determining whether there was a Fourth Amendment violation."**

[58] *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).
[59] *Rollins v. City of Little Rock,* 2004 U.S. App. LEXIS 15169 (8th Cir. 2004).

The 8th Circuit cited its prior holding in *Schulz v. Long*[60] which also involved the use of force against a mentally ill person. Steven Schultz was a diagnosed paranoid schizophrenic who had been hospitalized on numerous occasions. On July 17, 1986, Steven began to have an episode in which he became destructive at his home. When his parents were unable to control him, they called his psychiatrist. The psychiatrist suggested that the police be called to assist in getting Steven to a psychiatric hospital.

Two officers responded to the Schulz residence and were informed of Steven's condition; the fact that he was destroying things in the basement; and the fact that he had previously been the subject of an involuntary commitment. Mrs. Schulz further informed the officers that Steven did not have access to weapons and that she did not believe him to be dangerous.

While the two officers spoke to Steven from outside a barricade that Steven had erected, Steven obtained a hatchet. After convincing from the officers, he put the hatchet down. After conversing with the officers for a period of time, Steven agreed to go to the hospital. He went into his room to gather some belongings. One of the officers took the opportunity to remove the hatchet from the area which incensed Steven. He began throwing bricks at the officers. When he ran out of bricks one of the officers attempted to get by the barricade to subdue Steven. When the officer was slowed by the barricade, Steven retrieved a long-handled, double-bladed ax and charged the officer. The officer warned Steven to drop the ax or he would shoot. When Steven got within six to eight feet of the officer, the second officer shot him. Steven ended up three to five feet from the officer.

As part of the lawsuit it was contended that the officers, by their actions in trying to subdue Steven, created the need to use deadly force, thus, rendering the ultimate use of force unreasonable. The plaintiff suggested that the officers should have waited for a supervisor or a SWAT team. Additionally the plaintiff asserted that the officers should have used a lesser-degree of force or followed a policy of only using deadly force as a last resort.

In rejecting the plaintiff's argument, the court asserted: "…we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." The court further rejected the plaintiff's argument that the officers should have used a lesser degree of force or different tactics. The court concluded that this is the type of "Monday morning quarterback" approach that is not allowed under an objective reasonableness analysis.

[60] *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995).

Ninth Circuit

The United States Court of Appeal for the 9th Circuit clarified its analysis of deadly force cases in *Billington v. Smith.*[61] Detective Smith had worked an off-duty job as a security officer following his workday. When he finished, he picked up his wife and daughter from their job as ushers at a Neil Diamond concert and headed home. While driving home, a vehicle squealing its tires passed Smith at a high rate of speed. Detective Smith, operating his unmarked police vehicle pursued the vehicle and notified his department's dispatcher. When the vehicle crashed Detective Smith approached it prior to the arrival of backup officers in order to ascertain whether the driver was injured. He carried his gun in one hand and a 16" flashlight in the other.

While at the car, a fight ensued in which the decedent, Ryan Hennessey, climbed out through the driver's window and grabbed Smith by the throat. During the course of this fight Hennessey was said to be screaming, "Shoot me!" At one point Smith yelled to his daughter to bring him his handcuffs, which were left behind in the patrol car. The struggle continued until Detective Smith shot and killed Hennessey. At the subsequent lawsuit, an expert witness testified to numerous tactical errors that Smith had made which put him in a position of peril and thus, created the need to use deadly force.

The 9th Circuit, citing numerous previous decisions concluded that where *"an officer intentionally or recklessly provokes a violent response, and that provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial constitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of force."* In applying this standard to the facts in this case, the court decided that the tactical errors made by Detective Smith were, at worst negligence, and thus did not rise to the level of a constitutional violation.

Tenth Circuit

The United States Court of Appeal for the 10th Circuit has taken an approach which considers pre-seizure events that are "immediately connected" to the use of force.

In *Romero v. Bd. Of County Commissioners of Lake Colorado,*[62] the court considered a lawsuit filed following the fatal shooting of Richard Romero. The shooting occurred after Deputy DeFabbo of Lake County was

[61] *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002); See *DeBoer v. City of Olympia*, 183 Fed. Appx. 671 (9th Cir. 2006).
[62] *Romero v. Bd. Of County Commissioners of Lake County Colorado*, 60 F.3d 702 (10th Cir. 1995).

dispatched to assist Eagle County by checking on a motorist. When he arrived, he spoke with Richard Romero. Romero appeared to be intoxicated. Deputy DeFabbo notified Eagle County that the motorist appeared intoxicated and that he would stand by until they responded.

While waiting, Romero approached the deputy and asked if he could repair his car. Deputy DeFabbo told Romero that he could repair the vehicle but he could not drive it because of his apparent intoxication. Both the officer and Romero returned to their vehicles. At some point Romero again approached the deputy. The deputy told Romero to return to his car. Romero began toward his car, but abruptly turned and attacked the deputy. He punched DeFabbo in the face and then ran a knife across his body. DeFabbo stepped back and ordered Romero to drop the knife. When Romero advanced Deputy DeFabbo shot him, causing his death.

The theory behind the lawsuit was "that DeFabbo contributed to the circumstances that led to the use of deadly force. Deadly force, plaintiffs claim, would have been unnecessary had DeFabbo arrested and handcuffed Romero, an intoxicated driver, as required by standard police procedure and state law." "Essentially, plaintiffs argue as a matter of law that the shooting should not be viewed as an act of self-defense because DeFabbo put himself in a dangerous situation by not handcuffing Romero. Plaintiffs urge us to look beyond the immediate circumstances of the shooting and evaluate the reasonableness of DeFabbo's actions from the point DeFabbo told Romero he was not free to leave the scene."

In rejecting the plaintiff's theory the court cited to prior decisions that had looked strictly at "the moment in time" and did not consider pre-seizure conduct. In a footnote the court asserted: "**Whether an officer acted reasonably in using deadly force is heavily 'fact dependent.' We recognize that an officer's conduct prior to the suspect's threat of force may be relevant to the reasonableness inquiry if the conduct is 'immediately connected' to the suspect's threat of force."**

The court concluded that Deputy DeFabbo had no reason to fear Romero and therefore his pre-seizure conduct in not handcuffing him was irrelevant to the ultimate use of force.

In *Allen v. City of Muskogee*[63] the United States Court of Appeal for the 10th Circuit applied the "immediately connected" conduct of police officers to a deadly force case involving a suicidal man. Terry Allen left his home following a fight with his wife and children. Before doing so, he took several guns and ammunition. The family dispute was reported to the police and a teletype was sent out advising officers of the description of Mr. Allen's vehicle

[63] *Allen v. City of Muskogee,* 119 F.3d 837 (10th Cir. 1997) cert. denied *Smith v. Allen,* 522 U.S. 1148 (1998).

and the fact that he was armed. It was also learned by the police that Mr. Allen had an outstanding arrest warrant for impersonating a police officer.

Some time later police received a call from Mr. Allen's sister reporting that Mr. Allen was outside her home with a gun and threatening suicide. Officers responded to the scene and found Mr. Allen seated in his car with one foot outside of the vehicle and a gun in his right hand which was rested on the center console. After moving bystanders back the officers moved in and tried to grab the gun from Mr. Allen. As an officer approached from the passenger side, Mr. Allen pointed the gun at him, causing the officer to retreat to a position of cover behind the vehicle. Mr. Allen then swung the gun toward the officers on the driver's side of the vehicle which precipitated the officers' use of deadly force causing the death of Mr. Allen. The entire sequence of events from the time of arrival of the first officers until the shooting was ninety-seconds.

The plaintiff's theory of liability was that the generally accepted police practice with respect to suicidal individuals who do not have hostages is to isolate and negotiate. Thus, rushing the vehicle violated these generally accepted police practices and precipitated the need to use deadly force.

In rejecting the officers' bid for summary judgment the court noted that the "excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include the actions in the moments leading up to the suspect's threat of force…as we stated in *Sevier*[64] 'the reasonableness of [the police officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether the [police officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' **We will thus, consider an officer's conduct prior to the suspect's threat of force if the conduct is '<u>immediately connected</u>' to the suspect's threat of force."** The court concluded that a "reasonable jury could conclude on the basis of some of the testimony presented that the officers' actions were reckless and precipitated the need to use deadly force."

In dealing with pre-shooting conduct in another mental health case, the 10th Circuit distinguished a case where the officer was faced with a dynamic and violent situation of the subject's making when considering the reasonableness of an officer's conduct. In *Jiron v. City of Lakewood,*[65] the United States Court of Appeals for the10th Circuit reviewed the granting of summary judgment in favor of an officer who used deadly force on a fifteen year-old girl with a knife.

[64] *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995).
[65] *Jiron v. City of Lakewood,* 2004 U.S. App. LEXIS 26460 (10th Cir. 2004).

Officer Margaret Halpern responded to a call to investigate two drunk girls who were suspected of stealing a purse. Upon her arrival, one of the girls, 15-year-old Jessica Jiron, fled into her sister's apartment. Jessica a 6-10 inch kitchen knife and fled into a rear bedroom of this second story apartment. Initially Officer Halpern called for backup and waited, however when she heard Jessica attempting to escape out of a window, she entered the bedroom. Officer Halpern observed that Jessica had already managed to cut the window screen. The officer told this young woman to stop at which time Jessica went after the officer causing Halpern to retreat back to the hallway. Jessica then returned to the bedroom and again returned to the bedroom. Officer Halpern continually ordered Jessica to come out into the hallway and drop the knife.

At some point during this standoff, prior to the arrival of other officers inside the apartment, Jessica came out into the hallway holding the knife to her chin and indicating she was going to kill herself. She was no longer hysterical but now had a "fixed, determined stare on her face." Jessica then started toward Officer Halpern prompting the Officer to tell Jessica that she would have to "kill her" if she did not stop. Jessica responded: "Okay, kill me." When Jessica moved to within five feet of the officer she raised the knife over toward Officer Halpern. Officer Halpern then fired at Jessica, wounding her.

In a subsequent civil rights lawsuit brought against the officer, the federal trial court granted summary judgment in favor of Officer Halpern finding that the officer's action were reasonable as a matter of law. On appeal, Jessica challenged, among other things, that the officer's actions in failing to wait for backup and entering the bedroom, created the need to use deadly force and even if at the moment of the shooting the officer's action was justified, the pre-shooting conduct made the shooting unreasonable.

In analyzing this case, the United States Court of Appeal for the 10th Circuit found that Officer Halpern's actions leading up to the shooting were immediately connected to the use of force and thus had to be considered as part of the totality of circumstances. In looking at the officer's decision to go to the bedroom without waiting for backup; the court found these actions to be reasonable based upon the particular facts that the officer faced her. The court specifically cited the fact that Jessica was armed with a knife and on the verge of escaping into public where other officers as well as any other person on the outside of the house may be placed at risk. The court concluded that "Officer Halpern adequately performed her duties as a reasonable law enforcement officer by taking steps to prevent an armed and agitated suspect from escaping."

Eleventh Circuit

In *Menuel v. Atlanta,*[66] the United States Court of Appeal for the 11th Circuit cited approvingly to the 7th Circuit's decision in *Plakas v. Drinski*. In *Menuel*, officers were called due to a mentally disturbed female who was acting violently. Shortly after the arrival of two officers, the female, Jessie Menuel, charged onto the front porch with a butcher knife and swung the knife wildly at the officers. The officers were forced to retreat. When the female returned to the inside of the home, the officers called for a supervisor and backup. The officers conversed with family members who indicated that Ms. Menuel did not have access to any other weapons.

Once the supervisor and backup arrived, the officers devised a plan to take Menuel into custody. One officer was going to knock at her bedroom window, creating a diversion while other officers would break through her locked bedroom door. An additional officer was armed with a vacuum cleaner to throw at Menuel's torso should it be necessary. Unfortunately, as the officers burst through the door, Menuel began firing a .25 caliber firearm at the officers. The officers returned fire, killing Menuel.

In viewing the facts leading up to the use of deadly force, the court concluded that there simply was no seizure prior to the shooting, thus there was nothing on which to base a finding of an unreasonable seizure in the pre-seizure conduct. The court cited to *California v. Hodari D.*[67] which stands for the proposition that no seizure occurs until police apply physical force to stop a person's movement or, in the alternative, police show authority AND the person submits to that authority. Here, prior to the shooting, the police had not physically applied force to Menuel and she had not submitted to their authority. The court refused to consider the pre-seizure conduct as unreasonable since there had been no seizure.

In a more recent case, the 11th Circuit reiterated its position on pre-seizure conduct.[68] The facts in *Carr* began when officers stopped a subject named Henderson. Henderson initially lied to officers about his identity. When Henderson, a parolee, realized his predicament, he offered to make a drug buy at Carr's house for the officers. The officers released Henderson to make the buy and kept him under surveillance as he entered Carr's home. That was the last the officers saw of Henderson. Subsequent to Henderson's entry into the home, the officers learned that he had three active warrants, one of which was for parole violation and escape. The officers, who were now hidden in various bushes around Carr's home, decided that they would arrest Henderson when he came back.

[66] *Menuel v. Atlanta,* 25 F.3d 990 (11th Cir. 1994).
[67] *California v. Hodari D.* 499 U.S. 621 (1991).
[68] *Carr v. Tatangelo,* 338 F.3d 1259 (11th Cir. 2003).

As the officers waited, Carr and Wymbs came out of the house. Carr went up to a vehicle that had blown its horn while Wymbs went to a pay phone down the street. Upon returning, Wymbs detected movement in the bushes and he and Carr began throwing rocks. They later testified to being fearful that the person in the bushes was a subject who had stabbed Carr's brother the previous night. Meanwhile, the officers testified that they heard the distinct sound of "someone racking a round." Two of the officers testified that they observed Carr and Wymbs "pointing a weapon at Officer Tantangelo." The officers, perceiving a threat, began firing their weapons. Carr was wounded prior to running into his home. Wymbs was not wounded. Carr and Wymbs filed a civil rights lawsuit. The trial court granted the officers qualified immunity leading to an appeal by Carr and Wymbs.

In reviewing the grant of qualified immunity, the court noted that in examining a shooting that occurred under rapidly escalating circumstances "reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer. In determining whether the officers in this case are entitled to qualified immunity**, we analyze the precise circumstances immediately preceding Carr's being shot and not the earlier surveillance decisions or the events following the shooting**." The court concluded that the officers actions here were objectively reasonable and thus, upheld the decision of the trial court in granting the officers qualified immunity.

Pre-Shooting Conduct and Dealing with Mentally Impaired Subjects

No Answer to whether ADA Applies when Officers are Dealing with an Armed and Violent Mentally Impaired Subject

Officers entitled to Qualified Immunity on 4th Amendment Claim Regarding Shooting of Mentally Impaired, Violent and Armed Subject-Law Not Clearly Established as to Whether an Officer Must Consider Disability before making 4th Amendment Entry

In City and County of San Francisco v. Sheehan, the United States Supreme Court reviewed an officer-involved shooting that occurred in San Francisco.[69]

The Court outlined the facts as follows:

> In August 2008, Sheehan lived in a group home for people dealing with mental illness. Although she shared common areas of the building with others, she had a private room. On August 7, Heath Hodge, a social worker who supervised the

[69] *City and County of San Francisco et al v. Sheehan*, 575 U.S. ___; Slip Op. No.-13-1412 (2015).

counseling staff in the building, attempted to visit Sheehan to conduct a welfare check. Hodge was concerned because Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating. See 743 F. 3d 1211, 1218 (CA9 2014); App. 23–24.

Hodge knocked on Sheehan's door but received no answer. He then used a key to enter her room and found Sheehan on her bed. Initially, she would not respond to questions. But she then sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether she actually had a knife, and Sheehan slammed the door shut behind him. See 743 F. 3d, at 1218.

Sheehan, Hodge realized, required "some sort of intervention," App. 96, but he also knew that he would need help. Hodge took steps to clear the building of other people and completed an application to have Sheehan detained for temporary evaluation and treatment. See Cal. Welf. & Inst. Code Ann. §5150 (West 2015 Cum. Supp.) (authorizing temporary detention of someone who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled"). On that application, Hodge checked off boxes indicating that Sheehan was a "threat to others" and "gravely disabled," but he did not mark that she was a danger to herself. 743 F. 3d, at 1218. He telephoned the police and asked for help to take Sheehan to a secure facility.

Officer Holder responded to police dispatch and headed toward the group home. When she arrived, Holder reviewed the temporary-detention application and spoke
with Hodge. Holder then sought assistance from Sergeant Reynolds, a more experienced officer. After Reynolds arrived and was brought up to speed, Hodge spoke with a nurse at the psychiatric emergency services unit at San Francisco General Hospital who said that the hospital would be able to admit Sheehan.

Accompanied by Hodge, the officers went to Sheehan's room, knocked on her door, announced who they were, and told Sheehan that "we want to help you." App. 36. When Sheehan did not answer, the officers used Hodge's key to enter the room. Sheehan reacted violently. She grabbed a kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of "I am going to kill you. I don't need help. Get out." *Ibid.* See also *id*., at 284 ("[Q.] Did you tell them I'll kill you if you don't get out of here? A. Yes"). The officers—who did not have their weapons drawn—"retreated and Sheehan closed the door, leaving Sheehan in her room and the officers and Hodge in the hallway." 743 F. 3d, at 1219. The officers called for backup and sent Hodge downstairs to let in reinforcements when they arrived.

The officers were concerned that the door to Sheehan's room was closed. They worried that Sheehan, out of their sight, might gather more weapons—Reynolds

had already observed other knives in her room, see App. 228—or even try to flee through the back window, *id*., at 227. Because Sheehan's room was on the second floor, she likely would have needed a ladder to escape. Fire escapes, however, are common in San Francisco, and the officers did not know whether Sheehan's room had such an escape. (Neither officer asked Hodge about a fire escape, but if they had, it seems he "probably" would have said there was one, *id*., at 117). With the door closed, all that Reynolds and Holder knew for sure was that Sheehan was unstable, she had just threatened to kill three people, and she had a weapon.[1]

Reynolds and Holder had to make a decision. They could wait for backup—indeed, they already heard sirens. Or they could quickly reenter the room and try to subdue Sheehan before more time elapsed. Because Reynolds believed that the situation "required [their] immediate attention," *id*., at 235, the officers chose reentry. In making that decision, they did not pause to consider whether Sheehan's disability should be accommodated. See 743 F. 3d, at 1219. The officers obviously knew that Sheehan was unwell, but in Reynolds' words, that was "a secondary issue" given that they were "faced with a violent woman who had already threatened to kill her social worker" and "two uniformed police officers." App. 235.

The officers ultimately decided that Holder—the larger officer—should push the door open while Reynolds used pepper spray on Sheehan. With pistols drawn, the officers moved in. When Sheehan, knife in hand, saw them, she again yelled for them to leave. She may also have again said that she was going to kill them. Sheehan is "not sure" if she threatened death a second time, *id*., at 284, but "concedes that it was her intent to resist arrest and to use the knife," 743 F. 3d, at 1220. In any event, Reynolds began pepper-spraying Sheehan in the face, but Sheehan would not drop the knife. When Sheehan was only a few feet away, Holder shot her twice, but she did not collapse. Reynolds then fired multiple shots.[2] After Sheehan finally fell, a third officer (who had just arrived) kicked the knife out of her hand. Sheehan survived.

Sometime later, San Francisco prosecuted Sheehan for assault with a deadly weapon, assault on a peace officer with a deadly weapon, and making criminal threats. The jury acquitted Sheehan of making threats but was unable to reach a verdict on the assault counts, and prosecutors decided not to retry her.

Sheehan then brought suit, alleging, among other things, that San Francisco violated the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. §12101 *et seq.*, by subduing her in a manner that did not reasonably accommodate her disability. She also sued Reynolds and Holder in their personal capacities under Rev. Stat. §1979, 42 U. S. C. §1983, for violating her Fourth Amendment rights. In support of her claims, she offered testimony from a former deputy police chief, Lou Reiter, who contended that Reynolds and Holder fell short of their training by not

using practices designed to minimize the risk of violence when dealing with the mentally ill.

Two questions were presented to the United States Supreme Court.

The first question was whether provisions of the Americans with Disabilities Act (42 U.S.C. 12132) "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."

The Court noted that when they granted the appeal in this case, the Court understood San Francisco's argument to be that the ADA (Title II) does not apply to an "officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is not threat to human life." In other words, the ADA should not require an accommodation for an armed and violent individual.
The Court noted that while they granted the appeal on this issue, San Francisco decided to rely on a different argument during their appeal and that the United States Court of Appeal for the 9th Circuit was not presented with this alternate argument when they had decided the case.

Before the United States Supreme Court, San Francisco argued that when a disabled individual poses a "direct threat" to others, they are excluded from ADA accommodation protection. Thus, rather than arguing that the ADA does not apply to an officer's on-the-street decisions with an armed, violent, mentally impaired subject, San Francisco argued that Sheehan was not entitled to an ADA accommodation because she was a direct threat to others.

The Court concluded that it would not decide the ADA part of this case because the City and County of San Francisco had not made the "direct threat" argument in the lower court and therefore had not given the lower court the opportunity to pass on this argument.

The Court noted that the decision not to decide whether the ADA applies to arrests "is reinforced" by the failure of the parties to address whether or not a governmental entity is vicariously liable for money damages based on the acts of its employees under Title II of the ADA. The Court pointed out first, that only public entities are liable for damages under Title II and second, that the Court has never decided whether the governmental entity is vicariously liable for the acts of their employees

II

The second question presented to the Court was whether Officer Reynolds and Officer Holder violated the 4th Amendment through the use of excessive force on Sheehan.

The Court started out by agreeing with the United States Court of Appeal on some points.

First, the Court agreed that the officers did not violate the 4th Amendment when they opened Sheehan's door the first time. Citing prior decisions, the Court noted that officer may make a warrantless entry in order to protect someone from an imminent injury or to

provide emergency assistance to someone who is injured.

Second, the Court asserted that there is no doubt that if Sheehan was not disabled a second entry would have been subject to ongoing and continuous exigency and therefore would be justified. The Court also noted that the officers knew Sheehan was armed and threatening to kill people, thus delaying entry may make the situation more dangerous. The Court concluded that it is reasonable for law enforcement to move quickly where delay would "gravely endanger their lives or the lives of others."
The Court reasoned:

> This is true even when, judged with the benefit of hindsight, the officers may have made "some mistakes." *Heien* v. *North Carolina*, 574 U. S. ___, ___ (2014) (slip op., at 5). The Constitution is not blind to "the fact that police officers are often forced to make split-second judgments." *Plumhoff*, *supra*, at ___ (slip op., at 8).
>
> We also agree with the Ninth Circuit that after the officers opened Sheehan's door the second time, their use of force was reasonable. Reynolds tried to subdue Sheehan with pepper spray, but Sheehan kept coming at the officers until she was "only a few feet from a cornered Officer Holder." 743 F. 3d, at 1229. At this point, the use of potentially deadly force was justified. See *Scott* v. *Harris*, 550 U. S. 372, 384 (2007). Nothing in the Fourth Amendment barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds.

Putting the question in its simplest terms, the majority wrote that the real issue was whether the decision to open the door the second time without attempting to accommodate Sheehan's disability changed an otherwise valid entry into an unconstitutional entry.

The Court noted that San Francisco failed to argue that the second entry was constitutional and instead argued that even if this second entry was unconstitutional; the officers were entitled to qualified immunity because the law was not clearly established.

The Court concluded that because the merits argument that the second entry without accommodating the disability was constitutional was not sufficiently argued, the Court would not decide the merits but would only decide whether the law was clearly established as to whether or not an officer would violate the constitution by making this second entry knowing that Sheehan had a disability.

The majority wrote: "we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law."

The Court found that the officers were entitled to qualified immunity. In doing so, the Court asserted:

> Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id.,* at 1190. Courts must not judge officers with "the 20/20vision of hindsight.'" *Ibid.* (quoting *Graham*, 490 U. S., at 396).
>
> Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Billington*, *supra*, at 1189. Cf. *Saucier* v. *Katz*, 533 U. S. 194, 216, n. 6 (2001) (GINSBURG, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently'" (quoting *Roy* v. *Inhabitants of Lewiston*, 42 F. 3d 691, 695 (CA1 1994))). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

BOTTOM-LINE

1. Court has not decided whether the ADA applies to arrest situations particularly of armed, violent, mentally, impaired subjects
2. Court has not decided whether the violent, armed, mentally impaired subject is exempted from an ADA accommodation because they pose a "direct threat" to others.
3. An entry to provide medical assistance or to prevent imminent harm is reasonable under the 4th Amendment.
4. The law is not clearly established that an officer must try to accommodate a mentally impaired subject when the officer otherwise has justification to make entry.
5. An officer who violates training may still be entitled to qualified immunity where the law is not clearly established as to the officer's conduct.
6. [A plaintiff] "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id.,* at 1190. Courts must not judge officers with "the 20/20vision of hindsight."

Deadly Force to Prevent Escape

Most discussions on law enforcement's use of deadly force focuses on those circumstances where an officer is faced with an imminent threat of

serious bodily harm or death to him or herself or some third party who is present at the scene of some law enforcement event. Little time is usually spent on discussing when an officer may use deadly force to prevent a suspect's escape. A recent case from the United States Court of Appeal for the 9th Circuit reiterated the rule announced in *Tennessee v. Garner.*[70]

Danny Mason, the plaintiff in this case, filed suit after being shot during a pursuit with law enforcement officers. During the pursuit Mason had driven his truck in reverse straight toward a law enforcement officer causing the officer to jump out of the way and land in a cactus. Agent Horan of the DEA observed this apparent assault and fired at Mason as he drove away, attempting to flee. Mason, was charged with, and pled guilty to, assault on the agent with his motor vehicle.

The United States Court of Appeal for the 9th Circuit reviewed the trial court's grant of qualified immunity for Agent Horan. The real question was whether an officer could prevent this type of escape by the use of deadly force. Secondly, if this use of force was not reasonable, then was the law clearly established that the use of deadly force under these circumstances sufficient to put an officer on notice that such a use would violate the Constitution.

In upholding the grant of qualified immunity, the court simply quoted the language from *Tennessee v. Garner:*[71] **"The standard for the use of deadly force against fleeing suspects was articulated by the Supreme Court in Tennessee v. Garner, 471 U.S. 1 (1985). While noting that 'the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable,' the Court held that 'where the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.' Thus, said the Court, 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used to prevent escape' and if warning has been given."**

The court concluded that Mason's use of the vehicle in driving toward the other agent, gave Agent Horan the probable cause to believe that Mason had been involved in the type of violent felony contemplated by *Garner* and thus, his use of deadly force to prevent Mason's escape was protected by qualified immunity.

[70] *Mason v. Horan*, 2003 WL 22000316 (9th Cir. 2003) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).
[71] *Tennessee v. Garner*, 471 U.S. 1 (1985).

Many deadly force policies from police agencies around the country more significantly restrict the use of deadly force as a means to prevent escape. A common theme in many policies prohibits the use of deadly force when officers are dealing with assaults by means of a motor vehicle. This case provides an example of a court's current interpretation of the law as it relates to the constitutional use of deadly force. It is also an example of how agency policies are sometimes more restrictive than the law.

In *Martin v. Dishong,* the United States Court of Appeal for the 4th Circuit refused to give police officers qualified immunity in a deadly force case.[72] In April of 2000 a deputy sheriff from Georgetown County, South Carolina observed the decedent, Matthew Martin and believed he was going to illegally dump trash. As the deputy approached him, Martin fled in his truck. Shortly after, a second deputy observed Martin and began pursuing him. This pursuit concluded at an intersection where Deputy Dishong and a second deputy had set up a roadblock. "The deputies assert that when Martin reached the roadblock, he rammed Dishong's vehicle, backed up, collided with the vehicle again, backed up a second time, and then drove forward toward Dishong's vehicle once more. By contrast, Martin's wife alleges that Martin collided with Dishong's vehicle accidentally and then tried to turn away from the roadblock. It is undisputed that Dishong fired several shots at Martin during these events, that the other two deputies fired at his tires, and that a shot fired by Dishong caused Martin's death." Evidence was offered by the wife of Matthew Martin indicating that Dishong was in a safe position at that time of the collision. This evidence was contrary to Officer Dishong's evidence indicating he was in the path of the vehicle.

Deputy Dishong argued in his appeal of the district court's denial of qualified immunity that even if the fatal shot was fired as Martin was driving away from the roadblock, the shooting would still be justified under the escape provision of *Garner.* That provision allows the use of deadly force to prevent the escape of a violent felon when officers have probable cause to believe that the suspect has been involved in a violent felony involving the infliction or threatened infliction of serious bodily harm or death and by his or her escape poses a danger of serious bodily harm or death to others. The Court in *Garner* asserted that a warning should be given where possible. The court noted that Deputy Dishong had argued in the summary judgment proceeding that he had been in imminent danger due to his position in the path of Martin's vehicle and had not raised the escape provision to justify the fatal shooting. The court concluded that the trial court was correct in denying summary judgment and qualified immunity to Deputy Dishong and the case was remanded for trial.

Following further proceedings at the trial court level, the United States Court of Appeal for the 4th Circuit re-considered Deputy Dishong's argument

[72] *Martin v. Dishong I,* 2003 U.S. App. LEXIS 1489 (4th Cir. 2003).

that he could use deadly force to prevent Martin's escape since Martin had committed violent felonies by trying to ram Dishong and he had already proven to be a risk of harm to others by driving at high speeds to avoid arrest.[73] Dishong argued that Martin's flight at high-speed would pose a risk to others.

> In analyzing the case the court stated: "Under the second prong of *Garner*, the use of deadly force was permissible if Martin posed a danger to others. Certainly, Martin's high-speed flight through a residential neighborhood posed such a danger. And once he had freed himself from the corral of police vehicles, which apparently occurred shortly before the fatal shot was fired, Martin could have resumed his risky flight."

The court concluded: "Applying this standard, we conclude that a reasonable officer in Dishong's circumstances, at the time of the fatal shooting could validly have inferred that Martin posed a continuing danger to others." The court granted qualified immunity on what it referred to as the "second prong" of *Garner* that by escape the suspect poses a risk to others. The court found it unnecessary to reach the "third prong" of *Garner* "which permits the use of deadly force to prevent the escape of a [violent] fleeing felon."

Shooting at Vehicles

Shooting at Vehicle Leading to Driver's Death Did Not Violate Fourth Amendment

Law enforcement officers shooting into vehicle following an initial pursuit and to prevent a further pursuit did not violate the Fourth Amendment.[74]

The United States Supreme Court outlined the facts of *Plumhoff v. Rickard* as follows:

Near midnight on July 18, 2004, Lieutenant Joseph Forthman of the West Memphis, Arkansas, Police Department pulled over a white Honda Accord because the car had only one operating headlight. Donald Rickard was the driver of the Accord, and Kelly Allen was in the passenger seat. Forthman noticed an indentation, "'roughly the size of a head or a basketball'" in the windshield of the car. He asked Rickard if he had been drinking, and Rickard responded that he had not. Because Rickard failed to produce his driver's license upon request and appeared nervous, Forthman asked him to step out of the car. Rather than comply with Forthman's request, Rickard sped away.

Forthman gave chase and was soon joined by five other police cruisers driven by Sergeant Vance Plumhoff and Officers Jimmy Evans, Lance Ellis, Troy Galtelli, and John Gardner. The

[73] *Martin v. Dishong II*, 2004 U.S. App. LEXIS 14195 (4th Cir. 2004).
[74] Plumhoff v. Rickard, 572 U.S. ____ , slip op. 12-1117 (5/27/14).

officers pursued Rickard east on Interstate 40 toward Memphis, Tennessee. While on I–40, they attempted to stop Rickard using a "rolling roadblock," but they were unsuccessful. The District Court described the vehicles as "swerving through traffic at high speeds," and respondent does not dispute that the cars attained speeds over 100 miles per hour. During the chase, Rickard and the officers passed more than two dozen vehicles.

Rickard eventually exited I–40 in Memphis, and shortly afterward he made "a quick right turn," causing "contact [to] occu[r]" between his car and Evans' cruiser. As a result of that contact, Rickard's car spun out into a parking lot and collided with Plumhoff's cruiser. Now in danger of being cornered, Rickard put his car into reverse "in an attempt to escape." As he did so, Evans and Plumhoff got out of their cruisers and approached Rickard's car, and Evans, gun in hand, pounded on the passenger-side window. At that point, Rickard's car "made contact with" yet another police cruiser. Rickard's tires started spinning, and his car "was rocking back and forth," indicating that Rickard was using the accelerator even though his bumper was flush against a police cruiser. At that point, Plumhoff fired three shots into Rickard's car. Rickard then "reversed in a 180 degree arc" and "maneuvered onto" another street, forcing Ellis to "step to his right to avoid the vehicle." As Rickard continued "fleeing down" that street, Gardner and Galtelli fired 12 shots toward Rickard's car, bringing the total number of shots fired during this incident to 15. Rickard then lost control of the car and crashed into a building. Rickard and Allen both died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase.

A lawsuit was brought against the officers alleging excessive force for shooting the driver Rickard. It should be noted that there was a lawsuit brought on behalf of the passenger as well but issues relating to the passenger were not before the Court. In the Federal District Court as well as the United States Court of Appeals for the 6th Circuit, the officers lost their motions to have the case dismissed on summary judgment and qualified immunity ground. Summary judgment means that even looking at Rickard's case as stated by Rickard, the officers did nothing wrong under the Constitution. Qualified immunity means that irrespective of whether the officers' actions were wrong or not, the law was not clearly established and the case should be dismissed because the officers were not on notice that their actions were wrong.

On appeal to the United States Supreme Court, the officers argued that there actions were constitutional and even if they weren't the law was not clearly established on the issue of shooting into vehicles under this type of circumstance. The plaintiff put two main arguments before the Court, first, it was excessive force to use deadly force to terminate the chase, and second, even if officers were justified in firing their weapons, they went too far with the number of shots they fired.

The Court began by citing *Scott v. Harris*[75], where the Court held that an officer's attempt to stop a dangerous high-speed car chase that poses a threat to the public at large does not violated the Fourth Amendment even if the officer's attempt places the driver of the fleeing vehicle in danger of serious bodily harm or death. The Court in this case found no reason why ramming a car at 90 mph was any different than the officers here shooting at the vehicle to stop the chase.

[75] *Scott v. Harris*, 550 U.S. 372 (2007).

In reaching this particular part of the decision, the Court noted Rickard's outrageous reckless driving, fleeing at 100 mph, passing more than two dozen cars forcing many of them to alter their course. The Court went on to note that even when Rickard was temporarily halted for three seconds the chase did not end as the wheels of Rickard's car could be seen spinning on the videotape from one of the police cars. Additionally Rickard's car was moving and reversed. The Court concluded that the videotape showed that while the chase was momentarily halted, it was not over as Rickard continued to try and break free from the three police vehicles and ultimately succeeded. The Court reasoned:

Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path underscores the point. In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in Scott, the police acted reasonably in using deadly force to end that risk.

In dealing with the plaintiff's second argument contending that officers were not justified in continuing to shoot at the vehicle, the Court asserted:

It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended… Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

The Court noted that with respect to the reasonableness of the shots fired plaintiff argued that it was unreasonable due to the presence of the passenger Kelly Allen. In dealing with this argument the Court made clear that Fourth Amendment rights are personal in nature and cannot be vicariously asserted. In other words, Rickard does not get to claim it was unreasonable to shoot him because Allen's rights might be violated. The Court asserted that Allen's presence in the vehicle does not in any way enhance Rickard's Fourth Amendment rights. The Court wrote: "*After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit."*

The Court went on to hold that even if they had found that the officers' actions violated the Fourth Amendment, the officers still would have been entitled to qualified immunity because at the time of the shooting the law was not clearly established.

The Court citing prior case law held:

We think our decision in Brosseau v. Haugen, 543 U. S. 194 (2004) (per curiam) squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. In Brosseau, we held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent possible harm to "other officers on foot who [she] believed were in the immediate area, . . . occupied vehicles in [the driver's] path[,] and . . . any other citizens who might be in the area."

Brosseau makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger.

Thus, in a decision with not dissents the Court held that the officers' decision to stop this vehicle's continued high-speed flight did not violated the Fourth Amendment. It is noted that the decision was 9-0 but not unanimous because there was some disagreement on rationale.