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§ 1983 – Fourth Amendment Update

Use of Force Case Law

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Fourth Amendment – Use of Force – Case Law Update

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Use of Force, Generally

Flournoy v. City of Chicago, 829 F.3d 869 (7th Cir. July 21, 2016)

- Jury verdict finding that SWAT officers acted reasonably in deploying a flash bang device in a residence that was the subject of a narcotics search warrant was supported by the evidence presented at trial.

The plaintiff was injured when she was a guest in a residence that was the subject of a search warrant by the Chicago Police Department. Officers obtained the warrant to search the residence of a suspected narcotics dealer, and asked for the assistance of the SWAT team in executing the warrant. When making entry into the residence, a member of the SWAT team deployed a flashbang device to allow officers to enter the residence and control any occupants inside. The plaintiff was standing nearby when the flashbang was deployed, and her leg was injured as a result of the explosion of the device.

At trial, officers testified that they utilized the SWAT team at the residence because the residence was known to be occupied by a narcotics dealer who protected his operation by carrying a gun on his person. He was identified as a possible convicted felon, and known to be accompanied by other individuals who were also involved in the drug trade. The apartment was located in a high-crime area, and officers were concerned for their safety from nearby residents as well. The jury found that the deployment of the flashbang device was a reasonable amount of force to ensure the officers' safety during the execution of the search warrant. The Seventh Circuit Court of Appeals affirmed the jury's verdict.

Courtright v. City of Battle Creek, 839 F.3d 513 (6th Cir. Oct. 14, 2016)

- Plaintiff arrestee sufficiently alleged excessive force in handcuffing.

The plaintiff was arrested for a felony assault charge, and when officers sought to handcuff him, according to the complaint, officers forcefully grabbed the plaintiff's arms and pulled them behind his back, despite the plaintiff informing the officers that he had prior rotator cuff injuries and shoulder surgeries, and despite the plaintiff's repeated complaints of pain.

The Sixth Circuit Court of Appeals upheld the denial of the defendant officers' Rule 12(b)(6) motion, which asserted that the plaintiff's claims must be dismissed because they failed to establish that the plaintiff was physically injured by being handcuffed behind his back. The Court pointed to Sixth Circuit authority that supported the proposition that excessively forceful or unduly tight handcuffing could amount to a Constitutional violation. *See Baynes v. Cleland*, 799 F.3d 600, 613-14 (6th Cir. 2015). Furthermore, the Court pointed out that there was Sixth Circuit authority that found that the right not to be handcuffed in an objectively unreasonable manner is clearly established. *Marvin v. City of Taylor*, 509 F.3d 234, 247 (6th Cir. 2007). Therefore, the Court upheld the dismissal of the Rule 12(b)(6) motion as to the claim of excessive force, finding that the plaintiff had sufficiently plead his claim.

Hunt v. Massi, 773 F.3d 361 (1st Cir. Dec. 10, 2014)

- The right to be handcuffed in the front of the body is not firmly established.

Officers went to the plaintiff's home to serve an arrest warrant on the plaintiff. Officers had knowledge that the plaintiff had recently been arrested for his involvement in a narcotics distribution ring. When the officers encountered the plaintiff in his bedroom and told him he was under arrest, the plaintiff asked that he be handcuffed in the front of his body due to a recent stomach surgery. Officers informed the plaintiff that they could not handcuff the plaintiff in that manner, and told him to stand up and put his hands behind his back. The plaintiff admitted that thereafter, he became angry and that he struggled with officers, who brought the plaintiff to the floor and forcefully placed him in handcuffs behind his back. The officers filed for summary judgment, asserting that they were entitled to qualified immunity for their actions. The First Circuit Court of Appeals agreed, finding that there is no firmly established Constitutional right to be handcuffed in the front of the body.

The Court recognized in its opinion that it may be excessive force for an officer to handcuff someone behind their back if that handcuffing is accomplished despite the existence of an obvious injury that would result, such as in circumstances where the officer is aware of an obvious injury to the suspect's arm or shoulder. Under the facts of this case, however, where the arrestee was uncooperative, and where he alleged an injury that was not obviously impacted by his handcuffing, the Court found that whether to handcuff him according to policy was a judgment call, and therefore officers were entitled to qualified immunity.

There is some disagreement among the circuits as to what would constitute excessive force in handcuffing certain arrestees behind their backs. This case contains a helpful recitation of the current state of the law in the Second, Sixth and Tenth Circuits as well.

Use of Deadly Force

Stamps v. Town of Framingham, 813 F.3d 27 (1st Cir. Feb. 5, 2016)

- Denial of summary judgment for officer who pointed a loaded rifle at a compliant individual with the safety off and his finger on the trigger. The rifle accidentally discharged, resulting in the death of the individual.

This case involved the accidental shooting death of a Stamps, who was present inside a residence during a SWAT team execution of a search warrant. During the search warrant, a SWAT officer was charged with controlling Stamps while other officers continued clearing the residence. While the search warrant involved narcotics violations, and targeted two drug dealers who were thought to live in Stamps' home, Stamps was not suspected of engaging in criminal activity or of being dangerous, and he was fully cooperative with officers' commands to lay prone on the ground with his arms above his head. The officer charged with controlling Stamps during the execution of the warrant did so by pointing his loaded rifle at Stamps' head with the safety off and his finger on the weapon's trigger. The parties agreed that the weapon discharged accidentally, causing Stamps' death.

The officer filed for summary judgment, arguing that Stamps' executor could not proceed on a claim of excessive force because the use of force was not "by means intentionally applied," as required before the Fourth Amendment reasonableness inquiry is triggered. *See Brower v. Cty. of Inyo*, 489 U.S. 593 (1989). Agreeing that there was no dispute that the weapon discharge was accidental, the First Circuit Court of Appeals nonetheless applied a Fourth Amendment analysis to the incident, finding that *Brower* commands that the Fourth Amendment can be triggered if, during the effectuation of a seizure, an officer unintentionally discharges his firearm.

The Court pointed to other circuits that have utilized this approach, including the following cases: *Estate of Bleck ex rel. Churchill v. City of Alamosa*, 540 Fed. Appx. 866 (10th Cir. 2013); *Watson v. Bryant*, 532 Fed. Appx. 453 (5th Cir. 2013); *Torres v. City of Madera*, 524 F. 3d 1053 (9th Cir. 2008); *Henry v. Purnell*, 501 F.3d 374 (4th Cir. 2007); *Tallman v. Elizabethtown Police Dep't*, 167 Fed. Appx. 459 (6th Cir. 2006). The Court further opined that its opinion is commanded by the Supreme Court's *Brower* decision.

Applying Fourth Amendment analysis, the Court determined that a reasonable officer would have known that "pointing his loaded assault rifle at the head of a prone, non-resistant, innocent person who presents no danger, with the safety off

and a finger on the trigger," constitutes excessive force. Therefore, the officer was not entitled to summary judgment on his qualified immunity defense.

Fenwick v. Pudimott, 778 F.3d 133 (D.C. Cir. Feb. 13, 2015)

- Grant of summary judgment for officers who shot at the plaintiff while he was attempting to flee from the officers in a vehicle, and after the plaintiff had struck an officer with the vehicle.

Officers involved in enforcing an eviction order in the District of Columbia observed the plaintiff, who was sixteen-years-old, struggling to properly park his vehicle before entering an apartment building. Officers observed that the vehicle's door lock was broken, and suspected that the plaintiff was driving a stolen vehicle. As officers were nearby, the plaintiff reappeared and walked toward the vehicle. Officers called to the plaintiff and asked him to stop and speak with them, however, the plaintiff entered the vehicle and attempted to drive away. Officers surrounded the vehicle with their weapons drawn and ordered the plaintiff to stop, but he did not. In the process of attempting to flee, the plaintiff struck one of the officers with his side mirror. Two officers opened fire, hitting the plaintiff with four bullets. The plaintiff was charged and found to have committed the crime of armed assault.

The D.C. Circuit Court reversed the district court's ruling that the officers who shot the plaintiff were not entitled to qualified immunity, finding that the officers would not have had fair notice that their actions were unlawful given the Supreme Court's decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004), wherein officers were entitled to qualified immunity in using deadly force against a suspect who attempted to flee from officers in a vehicle, and that the plaintiff had failed to establish that the facts of his case were different from the facts in *Brosseau*.

Mendez v. Cty. of Los Angeles, 815 F.3d 1178 (9th Cir. Mar. 2, 2016)

- Denial of qualified immunity for deadly use of force that followed an unlawful entry into the decedent's residence.

Officers sought warrantless entry into a home based upon reports that a wanted individual was recently seen near the residence. Officers split up, with some officers proceeding to the front door of the home to speak with the resident, and others entering the backyard of the property through a fence. Officers searched three sheds in the backyard, and approached a fourth structure described by the Court as a shack surrounded by an air conditioning unit, electrical cord, and personal belongings.

Officers entered the shed without knocking or announcing their presence, and encountered a man and a woman inside. The man held a BB gun in his hand, and when officers saw the BB gun, they perceived it to be a firearm. Officers fired a total of 15 shots into the shed, shooting and injuring both individuals inside.

The district court denied qualified immunity on the Mendez' claims that officers violated the Fourth Amendment in making entry into their shed without a warrant, and in failing to knock and announce prior to entry. The district court awarded damages for the unlawful entry, the knock and announce violation, and the resulting use of force. Applying the provocation theory, the court determined that, although the officers' actions did not constitute excessive force pursuant to the *Graham v. Connor*, 490 U.S. 386 (1989) analysis, damages were nonetheless appropriate for the injuries caused from the shooting because the officers had brought about the conflict with the Mendez' through the Fourth Amendment violation.

The Ninth Circuit Court of Appeals overruled the district court as to the denial of qualified immunity for the knock and announce violation, finding that because officers approached the front door of the home and announced themselves, it was not clearly established that officers approaching a separate structure on the same property were obligated to knock and announce for a second time.

The Court affirmed the district court's denial of qualified immunity as to the unlawful entry claim, and held that it was proper for the court to award damages for the shooting that occurred. Referring to the theory of recovery as "our circuit's provocation theory," the Circuit Court held that liability attached in this case because "the deputies' unconstitutional conduct 'created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable.'" *Id.* at 1193, *quoting Espinosa v. City and Cty. of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010).

Collar v. Austin, 659 Fed. Appx. 557 (11th Cir. Sept. 2, 2016)

- Summary judgment appropriate for campus police officer who used deadly force against a student under the influence of drugs, despite evidence that less lethal means were available to the officer to subdue the student.

A University of South Alabama officer who encountered Collar while he was exhibiting bizarre behavior due to having ingested narcotics shot Collar as he was approaching the officer aggressively. On appeal of the district court decision that the officer was entitled to qualified immunity, Collar's parents asserted that summary judgment was inappropriate because a reasonable jury could find that the officer used excessive force by choosing to discharge his firearm instead of first attempting to subdue Collar with pepper spray, and because a reasonable jury could find the officer's actions excessive because there was a second officer nearby who could have assisted the officer in subduing Collar.

The Eleventh Circuit Court of Appeals upheld the grant of qualified immunity, finding that, although there was evidence that a second responding officer was nearby when the officer fired the fatal shot, there was no evidence that the second officer was close enough to be in a position to assist while Collar was aggressively approaching the involved officer. Further, the Court found that the officer's decision not to reach for his pepper spray, which was housed on the right side of his body along with the holster for his service weapon, thereby requiring that the officer holster his firearm in order to access the pepper spray, all while moving backwards to ward off Collar's attack, was a decision that a reasonable officer would have made.

Johnson v. City of Philadelphia, 837 F.3d 343 (3rd Cir. Sept. 20, 2016)

- Officer entitled to summary judgment for using deadly force against a man who attacked the officer who was high on PCP, despite the plaintiff's argument that the officer was at fault for the confrontation because he initiated the altercation.

An officer on patrol observed Kenyado Newsuan who was standing in the street naked. Newsuan was high on PCP. When Newsuan observed the officer he began to walk toward a residence. The officer engaged verbally with Newsuan, calling for him to "come here." In response, Newsuan began cursing at the officer and flailing his arms. Continuing to ignore the officer's commands to come to the officer, Newsuan entered the residence. A short time later, Newsuan exited the residence and began to run toward the officer yelling. The officer shot Newsuan after Newsuan attacked the officer, slamming him into multiple vehicles and trying to take control of his handgun.

At issue on appeal was whether summary judgment was appropriate in the case because of the plaintiff's contention that the officer unreasonably initiated the confrontation that led to the fatal altercation under circumstances where it would have been more reasonable to call for backup and deescalate the situation. Finding that there was no evidence upon which a reasonable jury could conclude that the officer's approach and initial commands to Newsuan were the cause of Newsuan's injuries, the Third Circuit Court of Appeals upheld the dismissal of the case.

Williams v. Deal, 659 Fed. Appx. 580 (11th Cir. Oct. 26, 2016)

- Use of deadly force found reasonable despite plaintiff's argument that the officer provoked a violent reaction by pushing the decedent back into his vehicle when he attempted to exit the vehicle during a traffic stop.

Melvin Williams ran a stop sign within view of an officer who then attempted to conduct a traffic stop on Williams. After taking a circuitous route and eventually pulling into the driveway of a residence, Williams jumped out of his vehicle as if he intended to flee. The officer gave Williams commands to get back into his vehicle, and Williams moved towards the officer instead of returning to the vehicle. The officer knew Williams both from prior personal contacts, and also from information provided to him by fellow officers. The officer knew that Williams had previously been involved in narcotics crimes, and that he was a convicted felon. The officer thought that Williams had previously been convicted and imprisoned for armed robbery and aggravated assault, and that he was currently under investigation for trafficking in stolen guns. Days before his interaction with Williams, the officer learned that Williams had pistol-whipped his girlfriend. The officer was also aware of threats that Williams had recently made against a fellow officer; specifically that the next time the officer tried to pull Williams over or come to his house "would be the last time."

On the date of the incident, when Williams exited his vehicle and started toward the officer, the officer tried to push Williams back into the car. A protracted fight ensued, much of which was captures on the officer's in-car video system. During the fight, Williams hit the officer on the head several times with a closed fist, and Williams grabbed the officer's forearm holster, making several violent jerking motions. Williams was able to get the holster unsnapped, but the officer was able to free himself from Williams. As the officer was creating distance, Williams then punched the officer on the back of his head or his neck. After that punch, the officer pulled his firearm and shot Williams as he was again advancing toward the officer.

Williams' estate brought suit, ultimately arguing that the officer's stop of Williams' vehicle was unconstitutional, and that this Constitutional violation was the proximate cause of Williams' death. Alternatively, Williams' estate argued that the officer's act of pushing Williams back into his vehicle was an unconstitutional use of force that proximately caused Williams' death. Based upon both arguments, Williams' estate argued that the officer was not entitled to summary judgment because a reasonable jury could find that the officer's Constitutional violation resulted in an unreasonable amount of force being used against Williams.

The Eleventh Circuit Court of Appeals found that both the stop of Williams' vehicle and the officer's actions in trying to push Williams back into his vehicle were constitutional uses of force due to the commission of the traffic violation

and the officer's knowledge of Williams, his prior criminal history, and his recent threats toward other law enforcement officers. The Court held that because the amount of force employed by the officer in attempting to push Williams into his vehicle was Constitutional, and because the officer's response to Williams' aggressive and assaultive behavior was objectively reasonable, the officer was entitled to summary judgment.

Tasers

Lash v. Lemke, 786 F.3d 1 (D.C. Cir. May 15, 2015)

- Summary judgment granted for officer who utilized taser on a protestor which was captured on video because the video refuted the plaintiff's factual assertions that supported his claim of excessive force.

United States Park Police officers in Washington D.C. deployed a taser on a protestor involved in the Occupy DC movement in 2012. The plaintiff, who was part of the protest encampment at McPherson Square, encountered officers while the officers were in the encampment handing out notices to protestors that the Park Police was planning to enforce no-camping restrictions in the park the following day. The plaintiff confronted the officers, challenged them, and tore down some notices that the officers had posted in the encampment. The officers ordered him to stop and he complied. While he was walking away from officers, he shouted profanities as them. Several of the officers began to follow the plaintiff, and at this point witnesses began to film the officers' actions. The plaintiff retreated from the officers, insisting that he had done nothing wrong and demanding to know why the officers were following him. An officer caught up to the plaintiff and grabbed one of his arms from behind. A second officer seized the plaintiff's right arm, and the plaintiff struggled to free himself from the officers. A third officer approached the plaintiff from behind and tasered him in the back once. The plaintiff fell to the ground and was handcuffed. The plaintiff was charged with disorderly conduct.

The plaintiff alleged that the officers' use of the taser against him was an excessive use of force, asserting that he was being compliant with officers at the moment that he was tasered. The D.C. Circuit Court reviewed the grant of summary judgment in favor of the officers, upholding the district court's determination that the officers used reasonable force in effecting the plaintiff's arrest. The Court found that there was no genuine dispute of fact as to what occurred, even in light of the plaintiff's assertion that he was compliant when he was tasered, because the entire event had been captured on video, and the video recording established that no reasonable jury could find for the plaintiff.

Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst, 810 F.3d 892 (4th Cir. Jan. 11, 2016)

- The right to be free from the excessive force employed in use of taser in drive stun mode against non-threatening individual is firmly established.

Officers were called to a hospital after Armstrong refused to accept mental health treatment when taken to the hospital by a family member. Officers encountered Armstrong near the hospital, where he was observed eating grass and dandelions and extinguishing cigarettes on his tongue. After officers confirmed and communicated to Armstrong that a commitment order had been issued requiring him to participate in a mental health evaluation, Armstrong wrapped his arms and legs around a stop sign post. Within about 30 seconds, the officers told Armstrong that if he did not let go of the post he would be tasered. Armstrong did not let go, and during an approximately 2-minute period, he was tasered in drive stun mode 5 times. The purpose for the taser use was pain compliance, however, the use of the taser made Armstrong resist more. Eventually three officers and two hospital security employees were able to pry Armstrong from the post. While officers were putting handcuffs and leg restraints on Armstrong, he complained that he was being choked. After officers secured him, they realized that he was not breathing. He died shortly afterwards.

The officers argued at summary judgment that they were entitled to qualified immunity. The Fourth Circuit Court of Appeals found that the use of the taser violated Armstrong's Fourth Amendment right to be free from an excessive use of force, but that the right was not clearly established at the time the officer used the taser. Thus, the officer was granted immunity from suit by the Fourth Circuit even though his action was unconstitutional.

The Court then announced that officers in the Fourth Circuit are now on notice that this type of taser use is unconstitutional. The basis for the Court's holding was that "[a] police officer may only use serious injurious force, like a taser, when an objectively reasonable police officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force. At bottom, 'physical resistance' is not synonymous with 'risk of immediate danger.'" *Id.* at 905. The fact that this case involved an individual who was only a danger to himself, was mentally ill, and who actively resisted in a manner that did not involve a risk of danger to others, coupled with the fact that the officers deployed the taser within 30 seconds of Armstrong's initial resistance, was important to the Court's analysis. The Court stated that some use of force was appropriate, such as the officers physically pulling Armstrong off of the post, however, the use of the taser to force pain compliance in a situation where the circumstances did not pose an immediate danger to the officers or members of the public was excessive.

Smith v. LePage, 834 F.3d 1285 (11th Cir. Aug. 25, 2016)

- The use of a taser against an individual thought to be armed with a knife who disobeys officers' commands was not excessive force, and officers involved were entitled to sovereign immunity on claims related to taser use, although a genuine dispute of material fact existed as to whether the subsequent shooting of the individual was excessive force.

Officers were called to Smith's home after Smith broke into his home upon return from vacation. Smith had arrived home early due to an argument with his wife while on vacation. Smith's wife called the home and told the babysitter, who was watching the Smiths' children while they were away, not to allow Smith into the home. Smith threw a large rock through the back door and took a kitchen knife upstairs to break into two bedroom doors that were locked during the vacation. The babysitter left the home, with the Smith children remaining inside, and contacted the police.

Officers entered the home with their guns drawn and announced themselves. Smith was observed at the top of the stairs with the kitchen knife in his hands. Smith refused officers' commands to drop the knife and come downstairs, saying that he was in his own home and would only drop the knife if officers put their guns down.

One officer fired his taser at Smith, and Smith ran into the bathroom, where he barricaded himself. Officers removed the children from the home and attempted to negotiate with Smith at the closed bathroom door. Eventually, officers kicked the bathroom door down, and an officer tasered him for a second time. Officers testified that Smith was in possession of the knife prior to the second taser deployment. Smith was not incapacitated by the second taser deployment, and retreated to a closet within the bathroom. According to the officers, Smith charged out of the closet with the knife raised and slashing, prompting officers to shoot Smith. Smith died from his injuries.

The district court denied the officers' claim of qualified immunity as to the shooting because there was a dispute of material fact over whether Smith was in possession of the knife while he was in the bathroom. Smith's son testified that Smith dropped the knife outside of the bathroom as a result of the first taser deployment. The officers were granted qualified immunity as to Smith's excessive force claims for both taser deployments. The Eleventh Circuit Court of Appeals affirmed the district court's ruling, and as to the taser deployments found that summary judgment was appropriate because "where a suspect appears hostile, belligerent, and uncooperative, use of a taser might be preferable to a physical struggle causing serious harm to the suspect or the officer." *Id.* at 1294, quoting *Fils v. City of Aventura*, 647 F.3d 1272, 1290 (11th Cir. 2011).

Implication of Mental Health Crisis on Officers' Use of Force

City and Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015)

- Officers entitled to sovereign immunity on claims of unlawful entry and excessive force, but Court declined to rule on the issue of whether the municipality that employed the officers had an obligation pursuant to the Americans With Disabilities Act (ADA) to provide reasonable accommodations to Sheehan prior to the officers' use of force.

Officers were called to a group home in San Francisco for that housed people with mental illness. Sheehan was in her room, had stopped taking her medication, and quit speaking to her psychiatrist. The house manager reported that she had stopped changing her clothes or eating. The house manager knocked on her door and received no response, then used the key to enter the room. Sheehan yelled that she had a knife and that she would kill the manager.

While the manager was waiting for officers, he cleared the building and completed an application for a mental health detention order. Officers arrived and knocked on Sheehan's door, told Sheehan why they were there, and when she didn't respond they used the key to gain entry.

Sheehan grabbed a kitchen knife with a 5-inch blade and yelled that she was going to kill the officers. The officers retreated and called for additional backup. During the time they were waiting, the officers began to fear that Sheehan was inside either obtaining more weapons, or escaping out of the fire escape. They determined that they needed to go back into the room before backup arrived to secure Sheehan. The officers made a second entry into the room and found that Sheehan still had the knife. One officer pepper sprayed her, which had no effect; another officer shot Sheehan twice.

Sheehan brought claims against the individual officers who used force against her, arguing that their use of force was excessive in violation of her Fourth Amendment rights. Sheehan also brought a claim under the Americans With Disabilities Act, 42 U.S.C. § 12132, against San Francisco, arguing that it should have accommodated her disability during her arrest. The case was appealed to the U.S. Supreme Court after the Ninth Circuit Court of Appeals denied summary judgment, however, prior to oral argument before the Supreme Court, San Francisco abandoned their argument as to the ADA accommodation claim, arguing instead that Sheehan could not assert the ADA because she is not a qualified individual with a disability; an argument they had not made in the Ninth Circuit case. As such, the Supreme Court held that the ADA claim could not properly be decided by the Court, only ruling on the officers' individual claims, and whether the officers were entitled to qualified immunity.

As to the issue of qualified immunity, the Supreme Court held that the officers were entitled to immunity on Sheehan's Fourth Amendment claims because they did not violate the Constitution by entering Sheehan's room, nor did they use excessive force once they entered for the second time. The Court remanded for further proceedings the issue of whether San Francisco had an obligation to reasonably accommodate Sheehan's disability pursuant to the ADA. Prior to trial, the case was settled, therefore, the Ninth Circuit's decision, finding that the ADA did apply to Sheehan's encounter with the officer, is final.

Zucker v. City of Farmington Hills, 643 Fed. Appx. 555 (6th Cir. Mar. 14, 2016)

- Officer entitled to qualified immunity in using taser against an individual who he was attempting to take into custody for a mental health evaluation because the right of an active resister to be free from taser is not firmly established.

Robert Zucker, who suffered from bipolar disorder, was tasered by an officer attempting to take him into custody for a mental health evaluation after Zucker's daughter provided information to police that gave officers probable cause to believe that Zucker was a danger to either himself or others. Specifically, Zucker's daughter reported that Zucker was in his apartment with a firearm, that he had shown the firearm to his daughter and informed her that he had a right to defend his family and his property against anyone who would seek to enter the apartment, and that he was manic and delusional. When officers approached the apartment and sought to take Zucker into custody, Zucker began to move his hands toward his jacket pockets and tried to reenter his apartment. An officer grabbed Zucker's arm to prevent him from reentering the apartment and to prevent him from reaching into his pocket, and both fell to the floor. Zucker then reached into his jacket in a manner that led a second officer to believe that he was wearing a shoulder holster. After Zucker did not comply with officers' demands to remove his hand, the second officer tasered Zucker.

The Sixth Circuit Court of Appeals affirmed the district court's grant of summary judgment to the officers, finding that Zucker was attempting to resist officers' attempts to take him into custody. After a review of controlling authority, including *Hagans v. Franklin Cty. Sheriff's Ofc.*, 695 F.3d 505 (6th Cir. 2012), the Court held that it is not firmly established in the Sixth Circuit that officers cannot utilize a taser on an individual who is actively resisting arrest. *See also, Caie v. West Bloomfield Twp.*, 485 Fed. Appx. 92 (6th Cir. 2012); *Williams v. Sandel*, 433 Fed. Appx. 353 (6th Cir. 2011).

Martinez v. City of Pembroke Pines, 648 Fed. Appx. 888
(11th Cir. Apr. 21, 2016)

- Officer entitled to qualified immunity in using deadly force against an individual who he was attempting to take into custody for a mental health evaluation.

The plaintiff became involved with officers and paramedics after his girlfriend called 911 to report that the plaintiff was unresponsive, turning blue, and foaming at the mouth. Ultimately, it was revealed that the plaintiff was experiencing a convulsive seizure that would cause him to enter a postictal state. This medical event is characterized by an individual being unaware of his actions after a seizure, and resulting behavior can be aggressive or violent.

An officer arrived after paramedics were on scene, and found the plaintiff in a bedroom within his home. The plaintiff was pacing the room, waving his arms and yelling. The officer had all other personnel leave the room and attempted to calm the plaintiff for three or four minutes. During this time, the plaintiff continued to yell and wave his hands, and he began opening drawers as if he were looking for something. At one point, the plaintiff leaned into a closet and began moving items around, again as if he were looking for something. The officer believed that the plaintiff was experiencing a mental health crisis that would require the officer to take the plaintiff into custody to transport him to a location where he could receive that evaluation. The officer secured a handcuff on one of the plaintiff's wrists, however, the plaintiff immediately began to struggle with the officer, and struck the officer multiple times on the head with the loose handcuff, causing serious injuries to the officer. A violent struggle ensued, involving a second officer who tasered the plaintiff, and the plaintiff continued to struggle with the officers and attempt to flee. Eventually, the plaintiff went to the kitchen where he continued to refuse officers' commands to lay down. The plaintiff suddenly advanced on the officer, and the officer shot the plaintiff in the stomach. Even after the plaintiff was shot and tasered several times, he continued to fight with officers until he slipped and fell and officers were able to restrain him.

The plaintiff's excessive force claim was premised partially on his assertion that the officer was not justified in shooting the plaintiff because, according to the plaintiff, when he advanced on the officer, he had no intention of hurting the officer. According to the plaintiff, the fact that he was experiencing a medical or mental health emergency weighed in favor of requiring the officer to deploy non-deadly force. The Eleventh Circuit Court of Appeals disagreed, finding that the officer made an objectively reasonable to deploy his firearm based upon the

totality of the plaintiff's behavior and the injuries the officer had already suffered. The Court stated that the officer "was not required to try and divine Plaintiff's subjective intent. Nor was he required to wait and see what might happen if he allowed Plaintiff to advance further." *Id.* at 894, citing *McCormick v. City of Ft. Lauderdale*, 333 F.3d 1234 (11th Cir. 2003); *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007).

Rucinski v. Cty. of Oakland, 655 Fed. Appx. 338 (6th Cir. July 6, 2016)

- Officers entitled to qualified immunity in using deadly force against an individual alleged to be a danger to himself, citing the U.S. Supreme Court's opinion in *Sheehan*, 135 S. Ct. 1765, described above.

Jeremy Rucinski, who suffered from multiple mental health disorders, including schizophrenia and bipolar disorder, got into an argument in his home with his girlfriend. In response, Rucinski pulled a knife from his pants pocket and threatened his girlfriend with the knife. The girlfriend fled to a bathroom and called 911. She reported to dispatch that Rucinski was schizophrenic and was having a breakdown. She stated that he had a knife, that he'd retreated to the garage with the knife, and that she was worried that he was going to hurt himself.

Officers arrived and entered the garage, finding Rucinski in the back corner of the garage. Rucinski pulled his knife on the officers, opened it, and said "bring it on" as he began walking toward one of the officers. Officers commanded him to drop the knife and got within five feet of an officer with his knife brandished. An officer fired her taser at Rucinski, and at nearly the same time a second officer fired her gun, shooting and killing Rucinski. The officer who shot Rucinski later testified that she was unaware that Rucinski had been tasered when she fired the shot.

In litigation, Rucinski's estate argued that the officers were not entitled to qualified immunity based on existing Sixth Circuit precedent because all prior Sixth Circuit deadly force cases involved officers using deadly force against individuals who were being arrested for committing a crime, whereas the officers who encountered Rucinski were doing so because of his mental health crisis and possible danger to himself. The Sixth Circuit Court of Appeals found that, due to Rucinski's aggressive behavior when the officers arrived on scene, officers acted in an objectively reasonable manner by tasering and shooting Rucinski. *See Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009); *Gaddis v. Redford Twp.*, 364 F3d 763 (6th Cir. 2004); *Rhodes v. McDaniel*, 945 F.2d 117 (6th Cir. 1991).

The estate also argued that the officers were liable because they took action once on scene without undertaking a full investigation into what was happening, and they arranged to encounter Rucinski by deploying bad tactics, thus creating the circumstances that led to the use of deadly force. Citing the U.S. Supreme Court's *Sheehan* decision, the Court held that plaintiffs "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Sheehan*, 135 S. Ct. at 1777.

Hughes v. Kisela, 841 F.3d 1081 (9th Cir. Nov. 28, 2016)

- Denial of summary judgment for officers who shot and injured a woman with bipolar disorder who was approaching a second woman while armed with a knife.

Officers with the University of Arizona Police Department responded to a report for a person with a knife who was hacking at a tree. Upon arrival, they observed the plaintiff carrying a large kitchen knife and walking toward a second woman, who was the plaintiff's roommate. Officers commanded the plaintiff to drop the knife, but she did not heed their commands. The officers were separated from the plaintiff by a large chain link fence, which obstructed their ability to physically approach the plaintiff. An officer shot the plaintiff multiple times as she approached the second woman. After the shooting, the plaintiff's roommate told investigators that the plaintiff suffered from bipolar disorder and that she had managed the plaintiff's behavior in the past. According to the roommate, the officers could have allowed her to disarm the plaintiff; she believed that the plaintiff would have dropped the knife if she had been given the opportunity to talk with the plaintiff.

The district court granted the officer's summary judgment motion, finding that the officer was entitled to qualified immunity. The Ninth Circuit Court of Appeals reversed and remanded the case for trial, finding that a reasonable jury could determine that the plaintiff was not a threat to her roommate, and that the officer acted unreasonably in deploying deadly force. The Court's decision was based upon several similar Ninth Circuit cases, including *Glenn v. Washington Cty.*, 673 F.3d 864 (9th Cir. 2011) and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001).