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The Confluence of Fourth Amendment Claims and the ADA

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I. In law-enforcement-related cases brought pursuant to the Fourth Amendment, an evolving, alternative plaintiffs' strategy has been to assert claims under the ADA.

A. Within the past few years, practitioners in the area of police civil rights defense litigation share increased concern regarding an uptick in plaintiffs' claims asserting that law enforcement officers are required to provide accommodations to arrestees/suspects who they might reasonably believe to be mentally or cognitively impaired.

B. Traditionally, cases involving Fourth Amendment claims stemming from arrest situations, like excessive use of force, have been brought under 42 USC § 1983. In those cases, the focus for review is whether the law enforcement officer's actions were objectively reasonable. *Graham v. Connor*, 490 U.S. 386 (1989); *Kisela v. Hughes*, 584 U.S. _____ (2018) (per curiam) (slip op. pp. 3-4).

C. The qualified immunity defense has been an effective tool in defending law enforcement officers against such Fourth Amendment claims. *See Mullenix v. Luna*, 577 U.S. _____ (2015) (per curiam); *White v. Pauly*, 580 U.S. _____ (2017) (per curiam); *District of Columbia v. Wesby* _____ U.S. _____ (2018) (Thomas, J.); *Kisela v. Hughes* (*Id.*)

D. However, in cases involving plaintiffs/subjects who allege that they suffered from a mental or cognitive impairment at the time of the underlying event, an evolving and alternative strategy has been to allege that their disability had not been accommodated, consistent with the Americans With Disabilities Act (ADA) 42 U.S.C. § 12131, and that therefore their civil rights were violated.

E. The ADA is a federal civil rights law which provides equal opportunity for individuals with disabilities, with regard to state and local government services, public accommodations, employment, transportation, and telecommunications. An individual is "disabled" if s/he 1) has a physical or mental impairment that substantially limits one or more major life activities, like working, walking, seeing, or hearing; 2) has a record of having such an impairment; or 3) is regarded as having such an impairment. See 42 U.S.C. § 12131.

II. The United States Supreme Court, in *City and County of San Francisco v. Sheehan*, 575 U.S. ____, 135 S. Ct. 1765 (2015) (Alito, J.), provided limited insight into resolving the issue of whether a disabled person may raise claims under the ADA, in cases stemming from law-enforcement-related activities, like arrest and use of force.

A. **Summary of facts**: Teresa Sheehan was living in a San Francisco group home for individuals with mental illness. She began behaving erratically, and threatened to kill her social worker. Ultimately, police officers were dispatched to her location. Officers Reynolds and Holder were sent to help escort Ms. Sheehan to a mental health facility for evaluation and potential treatment. The officers entered her room, using a key provided to them by an employee of the group

home. When the officers first entered, Ms. Sheehan grabbed a knife and threatened to kill them. The officers then retreated and closed the door. However, the officers were concerned about what Ms. Sheehan might do to herself in that room, and admitted that, without considering if they could accommodate her disability, the officers reentered her room. Ms. Sheehan again confronted the officers with a knife, and after pepper spray proved ineffective, the officers shot her multiple times. Ms. Sheehan survived, and filed suit against the officers and the City and County of San Francisco, asserting that her rights under both the Americans with Disability Act and 42 U.S.C. § 1983 were violated.

The District Court granted summary judgment, concluding that the officers were not required to determine whether their actions complied with the ADA, before protecting themselves and others, and also holding that the officers did not violate 42 U.S.C. § 1983 by both their entry into Ms. Sheehan's room and their use of force. Vacating the District Court decision in part, the Ninth Circuit held that the ADA applied, and that a jury must decide whether the officers should have accommodated Ms. Sheehan's disability. The Ninth Circuit also held that Officers Reynolds and Holder were not entitled to qualified immunity, because it was clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person, who has been acting irrationally and has threatened anyone who enters.

B. **Supreme Court Review**: This case was decided by the United States Supreme Court on May 18, 2015. The Supreme Court dismissed the ADA-related question, because it determined that certiorari was improvidently granted on that claim. The related question presented in the writ asked whether the ADA requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing that suspect into custody. In its reply brief at the certiorari stage, San Francisco explained that resolving this question did "not require a fact-intensive 'reasonable accommodation' inquiry' since 'the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA.'" (135 S.Ct. 1765 at 1772). However, in its brief before the Supreme Court, San Francisco argued that "'a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA'" (Id. at 1773) San Francisco contended that Ms. Sheehan "clearly posed a 'direct threat,'" and concluded "that she was therefore not 'qualified' for an accommodation." Id. The Supreme Court concluded that this argument did not appear in San Francisco's certiorari petition, and that San Francisco was advancing a proposition that "the ADA governs the manner in which a qualified individual with a disability is arrested." (Id.) The Court held that the statutory language of the ADA, regarding whether an arrest is an activity in which the arrestee participates, or from which the arrestee benefits, or whether the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes discrimination, are important questions "that would benefit from an adversary briefing." (Id.) The Court held that "[n]o one argues the contrary view. As a result, we do not think that it would be

prudent to decide the question in this case." (Id.) The Court further noted that its "decision to not decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers." (Id.) The Court stated that it had never decided "whether a public entity can be held vicariously liable for the purposeful or deliberately indifferent conduct of its employees," and it declined to do so in this case, absent "adversarial briefing." (Id. at 1773-1774) The Court therefore dismissed the ADA-related question as "improvidently granted." (Id.) The Supreme Court went on to hold that the officers did not violate the Constitution when they opened Ms. Sheehan's door the first time, and that their use of force was reasonable. As to the question of whether or not they violated the Constitution when they entered her room the second time, the Court determined that such a Fourth Amendment right was not clearly established, and that therefore, the officers were entitled to qualified immunity from suit on that claim.

C. Significant aspects of decision:

1. The Supreme Court reiterated its prior holdings that any alleged constitutional right must be clearly established at the time of the challenged conduct, and that an officer cannot violate a clearly established right unless the right's contours were sufficiently definite such that **any** reasonable official would have understood that he was violating it. (135 S. Ct. at 1774) (emphasis added)

2. The Supreme Court agreed that there is no doubt that the officers did not violate any federal right when they opened Ms. Sheehan's door the first time. (Id. at 1774-1775)

3. The Court reaffirmed its previous ruling that "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." (135 S. Ct. at 1775)

4. The Supreme Court also noted that there was no doubt "that had Sheehan not been disabled, the officers could have opened her door the second time without violating any constitutional rights." (Id.)

5. The Supreme Court also agreed with the Ninth Circuit that after the officers opened Ms. Sheehan's door the second time, their use of force was reasonable. (Id. at 1775)

6. However, the Court noted that "[t]he real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder,

devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. See *id*., at 239, 129 S.Ct. 808. Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not." (135 S.C. at 1775)

7. The Court found that "[u]nder Ninth Circuit law, an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. 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.' . .. Courts must not judge officers with 'the 20/20 vision of hindsight.'" (135 S. Ct. at 1776-1777) (citations omitted).

8. The Court concluded that no robust consensus of cases of persuasive authority existed, to guide the officers involved with this case. (135 S. Ct. at 1778)

9. The Court reasoned that because "the qualified immunity analysis is straight forward, we need not decide whether the constitution was violated by the officers' failure to accommodate Sheehan's illness." (135 S. Ct. at 1778)

D. Constitutional right under the ADA clarified?

The Supreme Court reaffirmed its previous ruling that officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. However, the Court did not provide guidance as to whether, under the ADA, an officer must accommodate the special needs of a mentally ill subject in such a situation. Rather, the Court concluded that the law was not clearly established on this point at the time of the subject incident in August, 2008, thus confirming that qualified immunity applied.

Since its 2015 decision in the Sheehan case, the Supreme Court has not reviewed a case involving the confluence of law enforcement-related claims, like unlawful arrest or excessive use of force, and the ADA. However, we can look to two

decisions of the Circuit Courts of Appeal issued since 2015 to obtain perspective as to what practitioners might anticipate in future litigation of this nature.

III. Two decisions issued by the Circuit Courts of Appeal since *Sheehan* was decided in 2015 provide guidance as to how to defend against ADA claims raised in the context of Fourth Amendment cases.

A. H*aberle v. Troxell*, 885 F.3d 170 (3rd Cir. 2018) (decided March 20, 2018)

1. Summary of facts: Timothy Nixon experienced a serious mental health episode on May 20, 2013. He called his partner, Nicole Haberle, and told her that he was suicidal. He later broke into a friend's home and stole his handgun. Mr. Nixon told Ms. Haberle that he was going to commit suicide. Ms. Haberle subsequently contacted law enforcement officers from the Borough of Nazareth, Pennsylvania. Mr. Nixon went to his cousin's apartment, and police officers responded to that location. Officer Daniel Troxell obtained a warrant for Mr. Nixon's arrest. The 3rd Circuit reported that

> [u]pon arriving at the apartment, some of the officers suggested setting up a perimeter and asking the Pennsylvania State Police to send crisis negotiators. Others suggested asking Haberle to help communicate with Nixon. Troxell rebuffed those suggestions, calling the other officers 'a bunch of f[---]ing pussies.' (App. At 7.) He declared his intention to immediately go to the apartment, because '[t]his is how we do things in Nazareth.' (App. At 7.) He did as he said, knocked on the door of the apartment, and identified himself as a police officer. Nixon then promptly went into one of the bedrooms of the apartment and turned the stolen gun on himself." (885 F.3d at 174)

Subsequent to Mr. Nixon's suicide, Ms. Haberle sued on her own behalf, and also as the administrator of Mr. Nixon's estate, claiming that Officer Troxell, other officers, and the Borough violated the Constitution, as well as a variety of federal and state statutes. All of her claims were dismissed by the District Court. Her primary claim on appeal to the 3rd Circuit Court of Appeals was that Officer Troxell unconstitutionally seized Mr. Nixon, and that Mr. Nixon's suicide was the foreseeable result of a danger created by Officer Troxell. She also argued that the Borough violated the ADA, "…by, among other things, failing to modify Borough policies, practices, and procedures to ensure that disabled individuals would have their needs met during interactions with the police." (*Id.*)

2. **3rd Circuit Review:** On appeal, the 3rd Circuit Court of Appeals concluded that Ms. Haberle should have been given an opportunity to amend her complaint with respect to her ADA claim, and remanded the case for further proceedings. However, the 3rd Circuit held that the District Court correctly concluded that Officer Troxell's actions did not constitute an actionable seizure under the Fourth Amendment. (*Id.* at 176) The 3rd Circuit also opined that

> "[a]s a general principal, the government has no obligation under the Due Process Clause of the Fourteenth Amendment to protect citizens against injuries caused by private actors. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189,197 (1989). That includes a self-inflicted injury. *Sanford v. Stiles*, 456 F.3d 298, 303-04 (3d Cir. 2006). There is, however, an obligation to protect individuals against dangers that the government itself creates. *Bright v. Westmoreland Cty.*, 443 F.3d 276, 281 (3d Cir. 2006). We have identified four elements for a claim under the "state-crated danger" doctrine:
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> > (1) [T]he harm ultimately caused was foreseeable and fairly direct;
> > (2) a state actor acted with a degree of culpability that shocks the conscience;
> > (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's action, as opposed to a member of the public in general; and
> > (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger that had the state not acted at all.
>
> *Id.* (citations, footnotes, and internal quotation marks omitted). The District Court here considered the second element in particular and determined that Officer Troxell's conduct lacked "a degree of culpability that shocks the conscience." *Id.* We agree with that assessment."

The 3rd Circuit also concluded that

> "[s]plit-second decisions taking place in a 'hyperpressurized environment,' usually do not shock the conscience unless they are done with 'an intent to cause harm.' *Sanford*, 456 F.3d at 309. At the other end of the continuum, actions taken after time for 'unhurried judgments' and careful deliberation may shock the conscience if done with deliberate indifference. *Id*. (quoting *Lewis*, 523 U.S. at 853). In the middle are actions taken under 'hurried deliberation.' *Id*. at 310. Such situations involve decisions that need to be made 'in a matter of hours or minutes.' *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 65 (3d Cir. 2002). If that standard applies, then an officer's actions may shock the conscience if they reveal a conscious disregard of 'a great risk of serious harm rather than a substantial risk." *Sanford*, 456 F.3d at 310."

With regard to the ADA claim, the 3rd Circuit noted that

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> [Ms. Haberle] argues that she is entitled to money damages because the Borough 'fail[ed] to make reasonable modifications to [its] policies, practices and procedures to ensure that [Nixon's] needs as an individual with a disability would be met.' (App. At 87.) While we agree that, in general, the ADA applies to arrest situations, Haberle fails to state a claim for damages under that statute because she does not allege facts showing that any inaction of the Borough reflects deliberate indifference.

Note that the 3rd Circuit "agreed" that the ADA applies to arrest situations, but provided no citation to precedent or other authority to support that conclusion.

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The Court reminded that

> [t]o successfully state a claim under Title II of the ADA, a person "must demonstrate: (1) he is a qualified individual; (2) with a disability; (3) [who] was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or

> was subjected to discrimination by any such entity; (4) by reason of his disability." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 553 n.32 (3d Cir. 2007) (*Id*., at 178-179.)
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The Court held

> "[a]s a threshold matter, we consider whether the ADA applies when police officers make an arrest. Although the question is debatable, we think the answer is generally yes." (*Id*.)

Again, the Court offered no citation to any Supreme Court decision, or a consensus of Courts of Appeal decisions, which supported this "thought." The Court later qualified this "thought" by asserting that although arrestees can be qualified as individuals with a disability under the ADA, that does not mean "that they necessarily will qualify." (*Id*. at Footnote 9.)

The Court went on to note that the second question to be answered under an ADA analysis is whether arrestees may have disabilities covered by the ADA. The court held that arrestees may have disabilities covered by the ADA, but failed to support this assertion with citation to authority. (Id. at 179) The 3rd Circuit then went on to conclude that Mr. Nixon had such a disability. (*Id*. at 179) Jumping to the fourth prong of the ADA analysis, the Court concluded that if the arrestee's disability was a "but for" cause of the deprivation or harm he suffered, then the fourth element of an ADA claim has been met. (*Id*.)

The 3rd Circuit then returned to the third prong of the ADA analysis, and concluded that it was required to consider whether the ADA applies when police officers are making arrests. The Court concluded that the "text of the ADA is deliberately broad and police departments, 'fall[] squarely within the statutory definition of a 'public entity,'" and that "persuasive precedent indicates that the ADA's references to the services, programs, and activities of a public entity' should likewise be interpreted broadly to 'encompass[] virtually everything that a public entity does.'" (*Id*.) Again, no support was provided for these assertions.

However, the 3rd Circuit recognized that "courts across the country are divided on whether police field work and arrests can rightly be called 'services, programs, or activities of a public entity . . . .'" (*Id*., p.179) The 3rd Circuit went on to state that "[f]ortunately, we do not need to resolve that issue in this case, because § 12132 is framed in the alternative and we can look instead to the second phrase, namely, to whether the arrestee was 'subjected to discrimination' by the police." (*Id*. p. 180) The Court added that "the 'subjected to discrimination' phrase in Title II is a 'catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.'" (*Id*. at 180) The Court concluded that it "follows, then, that police officers may violate the

ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee's disability, thus subjecting him to discrimination. Given that catch-all, we believe that the ADA can indeed apply to police conduct during an arrest." (*Id*. at p. 180) The 3rd Circuit clarified this point by noting that "[e]ven though there is some disagreement concerning the point during a law enforcement encounter at which the ADA applies to police conduct, no court of appeals has held that the ADA does not apply at all. (*Id*. p.181) The 3rd Circuit concluded that even though "the ADA generally applies in the arrest context, Haberle's claim for money damages against the Borough fails as a matter of law because she has not adequately pled that the Borough acted with deliberate indifference to the risk of an ADA violation. She seeks compensatory damages from the Borough under the ADA, but that remedy is not available absent proof of 'intentional discrimination.'" (Id. at p. 181) The Court instructed that "[t]o prove intentional discrimination, an ADA claimant must prove at least deliberate indifference . . . and to plead deliberate indifference, a claimant must allege '(1) knowledge that a federally protected right is substantially likely to be violated, . . . and (2) failure to act despite that knowledge.'" (*Id*. at 181) In Footnote 11, the Court noted that it has

> "no occasion now to consider the analytical approach to an ADA claim arising from an arrest because we conclude that Haberle's ADA claim for money damages fails due to her failure to plead deliberate indifference. Nevertheless, in the future, we may need to consider whether and under what circumstances it is reasonable to require police officers to make accommodations during an arrest when they face an exigent threat."

The Court concluded that with respect to her pleading, Ms. Haberle should have been given an opportunity to amend her complaint, to salvage her ADA claim against the Borough, since that failure in her complaint was not one to which the Court could "say definitively that amendment would be futile." (Id. at p.182)

B. *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018) (decided June 11, 2018)

1. Summary of facts: On May 29, 2014 officers of the City of Newport Beach California Police Department responded to a situation occurring at a local 7-Eleven convenience store. Someone at the store called 9-1-1, because Gerritt Vos was running around the store shouting things like "kill me already, dog," and also because he was holding a pair of scissors, while other people were inside the store, and at one point, Mr. Vos grabbed and immediately released a 7-Eleven employee, yelling "I got a hostage." At another point, Mr. Vos cut an employee's hand while the employee was trying to disarm Mr. Vos of his scissors, resulting in a half-inch laceration. Officers were presented with this information prior to and upon arrival.

At about 8: 25 p.m. Officer Kresge was the first officer to arrive at the scene. Officer Kresge also saw Mr. Vos simulating that he had a gun behind his back, and asking to be shot. Officer Kresge saw Mr. Vos go into a back room at the 7-Eleven, and shut the door. Officer Kresge called for back-up, and specifically asked for a 40mm less-lethal projectile launcher. Other officers arrived on scene, and were briefed regarding the above. Officers Richard Henry and Nathan Farris armed themselves with AR-15 rifles, while Officer Kresge held a handgun. Officer Shawn Preasmyer set up a public address system, to communicate with Mr. Vos. The Court found that all officers present "knew that Vos had been simulating having a gun and that he was agitated, appeared angry, and was potentially mentally unstable or under the influence of drugs. They also heard Vos yell 'shoot me' and other similar cries. The police on site talked about using non-lethal force to subdue Vos both over the radio and amongst themselves at the scene." (892 F.3d 1024 at 1029)

At about 8:43 p.m., Mr. Vos opened the door of the back room, and as he did so, officers shouted "doors opening." Mr. Vos then ran around the front check-out counter and toward the open door, and as he ran, he held an object over his head. The distance between Mr. Vos and the officers at the point he started running was approximately 30 feet. One officer shouted that Mr. Vos had scissors, and over the public address system, Officer Preasmyer twice told Mr. Vos to "drop the weapon." Mr. Vos did not drop the object, and instead, he kept charging toward the officers, Officer Preasmyer then shouted "shoot him." Officer Shen then fired the less-lethal weaponry, and within seconds, Officers Henry and Farris fired their AR-15 rifles. The Court reported that Mr. Vos continued to run as he was struck by the bullets, but that he collapsed on the sidewalk in front of the officers, and he died from his wounds. The Court noted that "[a]bout eight seconds lapsed from the time Vos came out of the back room to when he was killed." (*Id.* at p. 1029) The Court also noted that approximately 20 minutes had passed from when the officers first arrived until Mr. Vos ran at them, and that during that timeframe, the officers did not communicate with Mr. Vos. (*Id.*)

Mr. Vos' parents brought suit as his lawful heirs and successors-in-interest against the City of Newport Beach, Officer Henry, Officer Farris and Officer Kresge. Included amongst the 12 causes of action were a claim of excessive force, in violation of the Fourth Amendment and 42 U.S.C. § 1983, and a violation of Title II of the Americans with Disability Act, 42 U.S. C. § 12131. The District Court granted the defendants' motion for summary judgment as to all of the parents' claims, and the parents appealed that judgment.

2. **9th Circuit Review:** The 9th Circuit Court of Appeals held that a reasonable jury could conclude that Mr. Vos did not pose an immediate

threat, such that the use of deadly force was warranted. (*Id.* p. 1032) The Court conducted a review of the facts, applying the parameters established *by Graham v. Connor*, 490 U.S. 386 (1989), and noted that the most important factor to consider in evaluating the reasonableness of the use of deadly force was whether Mr. Vos posed an immediate threat to the safety of officers or others. (*Id.* pp. 1031-1032)

The 9th Circuit added that

> the *Graham* factors are not exclusive. Other relevant factors include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force used was mentally disturbed. *See Bryan*, 630 F.3d at 831; *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (Id. at 1033-1034.)

The Court also noted that

> it is undisputed that the officers had less intrusive force options available to them. *See Bryan*, 630 F.3d at 831. Whether the officers warned Vos that they would use deadly force is more complicated. On one hand, '[e]verything happened within eight seconds,' giving officers little to no time to warn Vos that they would use deadly force. On the other hand, the officers had upwards of 15 minutes to create a perimeter, assemble less-lethal means, coordinate a plan for their use of force, establish cover, and arguably, try to communicate with Vos. While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,' *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002); *see also City & County of S.F. v. Sheehan (Sheehan II)*, _____ U.S. _____, 135 S.Ct. 1765, 1777, 191 L.Ed.2d 856 (2015), the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis, *see Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017); *see also Bryan*, 630 F.3d at 831. (*Id.* at 1034)

The Court concluded that it was

> undisputed that Vos was mentally unstable, acting out, and at times invited officers to use deadly force on him.

> These indications of mental illness create a genuine issue of material fact about whether the government's interest in using deadly force was diminished. *See Longoria*, 873 F.3d at 708. (*Id.*)

Thus, the 9th Circuit concluded that there were significant questions of fact regarding the reasonableness of the officers' use of deadly force, and they accordingly reversed the decision of the District Court in that regard.

However, while conducting its qualified immunity analysis, the 9th Circuit noted that

> [h]ere, officers confronted a reportedly erratic individual that took refuge in a 7-Eleven, cut someone with scissors, asked officers to shoot him, simulated having a firearm, and ultimately charged at officers with something in his upraised hand. The relevant inquiry is whether existing precedent placed the conclusion that officers acted unreasonably in these circumstances 'beyond debate.'" *Mullenix*, 136 S.Ct. at 309. It did not. *See Kisela*, 138

Accordingly, the 9th Circuit determined that the defendant officers were entitled to qualified immunity on the Section 1983 claims.

The 9th Circuit also analyzed the parents' claims raised under the ADA, by first reviewing the procedural history of the *Sheehan* case. (see *Id*., at p. 1036) The Court asserted that its first decision in the *Sheehan* case controlled, as to whether Title II of the ADA applied. The Court quoted from its earlier decision, wherein it held that

> [t]o state a claim under Title II of the ADA, a plaintiff generally must show: (1) []he is an individual with a disability; (2) []he is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) []he was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of h[is] disability. (*Id*. at 1036)

The 9th Circuit concluded that

> [s]imilar to the situation in *Sheehan I*, the officers here had the time and the opportunity to assess the situation and potentially employ the accommodations identified by the Parents including de-escalation, communication, or specialized help. While the defendants rely on the officers' pre-shooting conduct to argue they accommodated Vos to the extent required by the law, those facts arguably show further accommodation was possible. (*Id.*)

Thus, the 9th Circuit concluded that the defendants were not entitled to summary judgment regarding the parents' ADA claims, and accordingly reversed that aspect of the District Court's opinion. It is worthy to note that Judge Bea dissented. He asserted that

> [b]efore Vos charged at Newport Beach police officers, the officers had been informed by a store employee that Vos had wielded scissors to stab a store employee, and saw that Vos had refused to drop his weapon when ordered by bullhorn to do so. Instead of dropping the weapon as police ordered, Vos raised the metal weapon above his head, and from approximately forty feet away charged full speed at the officers. An officer bullhorned an order "shoot him." Two of the officers shot him. Because deadly force in such a circumstance is reasonable, I respectfully dissent in part. (Id. at 1038)

Also, Judge Bea argued that

> [w]hile the majority opinion recites the factors in *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1890), it misapplies them. As the majority notes, *Graham* instructs us to consider three primary factors when evaluating the reasonableness of a police officer's use of force: (1) 'the severity of the crime at issue,' (2) 'whether the suspect poses an immediate threat to the safety of the officers or others,' and (3) 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.' Id. In addition, but not noted by the majority, *is Graham's* instruction that '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly

> evolving – about the amount of force that is necessary in a particular situation.' (*Id*. at 1040)

Judge Bea also pointed out that

> [w]hat the majority ignores is the following undisputed fact: the police were presented with a mere two seconds in which to decide to deploy deadly force. Vos had secreted himself into a back room. The officers had just set up a means of communication when Vos suddenly reappeared and charged. In the mere seconds which passed, the officers warned Vos, and ordered him to drop his weapon. Instead, he ran at them at full speed with a weapon 'uplifted.' *Brown*, 256 U.S. at 343, 41 S.Ct. 501. As we see on the video, he charged full speed, directly at the officers. There is no factual dispute. (*Id*. at 1041)
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> It is possible that other means could have brought down Vos without this tragic loss of life. But a reasonable officer could have believed that the alternate means would not have done the job without the risk that Vos stab one of them. The officers had two seconds to make these calculations before deciding to deploy force to stop the charging man.
>
> Neither should this case turn on Vos's mental illness. While we may consider whether a person is emotionally disturbed in determining what level of force is reasonable, we have never ruled that police are obligated to put themselves in danger so long as the person threatening them is mentally ill. Such a conclusion would be illogical – especially given the admonition in *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010), quoted by the majority, that we will not "create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals."
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> But that is exactly what the majority does here. (Id. at 1042)

Judge Bea concluded that

> the majority instead creates a *per s*e rule that in *all* circumstances the governmental interest in deadly force is diminished where the subject is mentally ill. While in *some* circumstances that may be true, in circumstances such as our case – where a mentally ill person charged at officers while wielding a metal weapon above his head – it is not.
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>
> Because I think the officers reacted reasonably to the threat they faced, I respectfully dissent in part and would affirm the decision of the district court. (Id. at 1043)

IV. There is no clear answer to the question of whether arrest situations involving subjects with disabilities, like mental illness, are subject to claims raised pursuant to the ADA. Until the related issues are resolved by the United States Supreme Court, and/or a consensus of the Circuit Courts of Appeal, defense counsel should

A. consult with law enforcement clients to make sure that they are providing/receiving training on related issues, consistent with the minimum training mandated by their state law enforcement boards and/or national standards;

B. advise that all law enforcement officers called to respond to subjects who might reasonably be considered to suffer from a disability thoroughly document their response(s) and their related decision-making processes;

C. advise that any recordings of those interactions, like body camera or security camera footage, be preserved, at least for the duration of the statute of limitations for civil rights litigation; and

D. advise that units/departments which respond jointly to high-risk situations that might involve disabled individuals train together, communicate, and establish good working relationships.

V. Suggested resources for developing policy and/or training recommendations, which could assist law enforcement clients in insuring a positive outcome for interactions involving disabled individuals, and also potential litigation which might stem from those interactions:

A. Crisis Intervention Team (CIT) training program developed by Major Sam Cochran of the Memphis, TN Police Department – cit.memphis.edu/pdf/CoreElements.pdf

B. National Alliance on Mental Illness (NAMI) – www.nami.org

C. National Tactical Officer Association (NTOA) – www.ntoa.org

D. National Council of Negotiation Associations (NCNA) – www.ncna.us

E. United States Department of Justice
Toll-Free ADA Information Line
800-514-0301 (voice) or 800-514-0383 (TTY)

F. ADA website = www.ada.gov

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