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"SHOW ME YOUR HANDS!" Analyzing a Critical Element in Qualified Immunity

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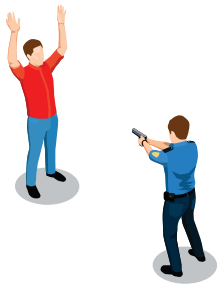
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"Show Me Your Hands!"-Analyzing A Critical Element In Qualified Immunity

By ROBERT HIGGASON,
Senior Assistant Attorney, Houston, Texas



Officers frequently face unknown threats when encountering a suspect. For their own safety and for the safety of other persons nearby—indeed, for the safety of the suspect as well—officers must be ready to respond appropriately if the suspect begins to act violently. Police departments sometimes refer to the lawful and proper use of force as "response to resistance." That presupposes that the suspect is resisting a lawful command from the officer.

Some high-risk encounters happen so quickly that the officer has no time to give a command before responding to the suspect's threatening act, such as pointing a gun at the officer or charging at the officer with a knife. More typically, the officer has time—even if only a few seconds—to command the suspect to do something or to stop doing something. This is to expose unknown threats, if any, and to reduce apparent threats.

The possibility of a threat remains unknown for as long as the suspect's hands are out of sight. Public complaints that officers don't do enough to de-escalate high-risk encounters often overlook the need for a suspect's hands to be completely exposed and empty. How does an officer get the suspect to show his hands? And why is it so important?

An officer's view of a suspect's empty hands is critical to deciding whether the decision to use deadly force was objectively reasonable. Where the suspect's hands are not visible, the unknown possible threat weighs in favor of objective reasonableness. If the officer's use of deadly force is objectively reasonable, he is protected by qualified immunity even if the suspect is later found to have been unarmed. When the officer cannot see the suspect's hands (which could well be empty), he must view that unknown in light of other surrounding clues, such as the facts that gave rise to the encounter, the suspect's verbal statements of intent, the suspect's actions immediately before the question of force arises, and the suspects bodily movements, bodily tension, and even facial expressions.

This article focuses on the need for an officer to have a clear view of the suspect's hands (and for those hands to be visibly empty) and seeks to illustrate how qualified immunity applies to such situations.

Reviewing the Standard

The Supreme Court held in *Graham v. Connor*[1] that a claim for a Fourth Amendment violation by excessive force—deadly or not—is to be analyzed under the "objective reasonableness" standard rather than under substantive due process.[2] There, the Court explicitly held what was implicit in *Tennessee v. Garner*.[3] In *Garner*, the Court had observed that the question regarding use of force is "whether the totality of the circumstances justifies a particular sort of seizure."[4] The phrase "totality of the circumstances" is central to analyzing the objective reasonableness of the officer's decision. Moreover, the Court also held in *Graham* that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[5]

Thus, three phrases from *Garner* and *Graham* combine for a succinct statement of the standard for evaluating the use of deadly force (or lesser force): whether the officer's use of force was objectively reasonable in light of the totality of circumstances known to a reasonable officer on the scene. But it does not stop there. Still in *Graham*, the Court added that evaluating reasonableness from the perspective of the officer must encompass the speed at which events may unfold and the accompanying mental and physical effects on the officer:

> "The calculus of reasonableness must embody allowance for the fact

> that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[6]

But neither *Graham* nor *Garner* was about qualified immunity; that connection comes from other Supreme Court cases, notably from *Malley v. Briggs*,[7] where an officer claimed absolute immunity in applying for a warrant based on an affidavit that failed to establish probable cause. The Supreme Court disagreed and held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[8]

The Court put it another way in *Mullenix v. Luna*: "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[9] This describes two prongs: (1) whether plaintiff has alleged facts that state a constitutional violation; and (2)whether the law was clearly established at the time.[10] Courts are free to consider either prong first.[11] As police defense counsel, we cannot afford to become complacent with familiar citations and overlook the impact of this standard. We must firmly assert how each aspect of this analysis comes to bear on the officer's entitlement to qualified immunity.

How does this apply to the visibility of a suspect's hands in a high-risk encounter?

The Danger of Hidden Hands

It is obvious that a suspect can be holding a gun or a knife in a hand that is out of the officer's view. But there are also other weapons, some of which are unusual, that are smaller and harder for an officer to detect. This is especially so in low-light conditions. Many uses of force occur after dark, which increases the unknown threat to an officer. Whether day or night, hidden hands present a heightened risk.

The FBI's Law Enforcement Bulletin has published lists and photos of numerous unusual weapons of various sizes, many of which are small enough to conceal easily. Some of those include: a coin key chain that houses a knife,[12] a working lighter that conceals an automatic knife,[13] a money clip knife,[14] a necklace knife,[15] an object that appears to be a house key but conceals a blade,[16] a knife gun,[17] a folding knife the size of a credit card,[18] a six-inch long flashlight gun,[19] a six-inch long pen gun,[20] and a nine-inch long bolt gun.[21] Courts have recognized many things that are atypical deadly weapons, many of which are small and easy to conceal, while others might appear innocuous. These include: a loose handcuff;[22] a lighter, by using it to start a fire;[23] a belt buckle, by placing in the hand and striking at the officer;[24] a pencil;[25] and a lock inside a sock.[26]

A suspect can be in a variety of postures with one or both hands out of view. If the suspect is inside a vehicle, as in *Manis v. Lawson*,[27] or walking away from the officer, as in *Salazar-Limon v. City of Houston*,[28] it would be easy for the hands to be hidden from view, and a weapon could easily be within reach. Where a suspect is lying in a prone position, some might interpret that as either compliant or controlled and non-threatening. But the visibility of the hands is paramount. If the hands are underneath the suspect's body, then the prone position actually favors a suspect who wishes to do harm. The Force Science Institute has studied reaction times based on varied positions and has found that "Some suspects lying flat with hands hidden under chest or waist can produce and fire a gun at an approaching officer faster than any human being on earth can react to defend himself[.]"[29]

Action beats Reaction

Studies of reaction times during stress, such as those from Force Science Institute, have established that an action beats a reaction every time. For that reason, an officer cannot wait until a suspect points a gun at him. The officer must act according to an objectively reasonable belief about what is in the suspect's hands, evaluating the clues that suggest a suspect's next act. If the officer waits until the gun is pointed at him, the officer will not be able to react in time to stop that threat.

But aren't we talking about hands? What if the hands are not holding a weapon? Why can't the officer at least wait until he sees a weapon? Again, it's because action beats reaction. Review the above noted finding from Force Science about a prone suspect with hidden hands. No one knows what, if anything, might be in the suspect's hands. But the FSI study showed that the prone suspect could change his position and produce and fire a gun at an approaching officer before the officer could react to stop the threat. So the officer has to act when he is facing what is still the unknown possible threat in the hidden hands. When the suspect makes a move that reasonably suggests an imminent harm, the officer cannot afford to wait to see if it actually happens.

Salazar-Limon v. City of Houston

The unknown possibility of a weapon in hidden hands was central to the officer's qualified immunity in *Salazar-Limon v. City of Houston*.[30] And as the case indicates, the significance of hidden hands also depends on what else is happening—i.e., the totality of the circumstances.

Around midnight, Officer Chris Thompson of the Houston Police

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Department observed a truck speeding and weaving in and out of lanes on Houston's Southwest Freeway. Officer Thompson pulled the truck over onto the shoulder on an overpass, and Thompson parked his vehicle a few feet behind the truck.[31] The truck driver, Ricardo Salazar-Limon, produced a Mexican driver's license. Salazar had drunk at least four or five beers in the previous two hours, and he had the rest of a 12-pack in the truck with him. Three other men were also in the truck.[32]

Officer Thompson was on the scene solo, and he had not yet had an opportunity to search all four men and the truck's cab for weapons. As a safety measure, he asked Salazar to get out and come to the rear of the truck, and Salazar did so. Thompson and Salazar were then standing on the overpass shoulder between the rear of the truck and the front of Thompson's patrol car.[33] The Fifth Circuit succinctly described the rest of the encounter to the point at which Thompson used deadly force against Salazar:

> Officer Thompson and Salazar dispute certain details of what happened next, but it is undisputed that: 1) **Officer Thompson tried to handcuff Salazar;** 2) **Salazar resisted;** 3) **a brief struggle ensued** (in which neither party was injured); and 4) after the brief struggle, **Salazar pulled away, turned his back to Officer Thompson, and walked away along the retaining wall** and the passenger side of his truck.
> At this point, **Officer Thompson pulled out his handgun and ordered Salazar to stop**. Salazar did not immediately comply and took "one or two" more steps. **Officer Thompson testified he then saw Salazar turn left and reach toward his waistband, which was covered by an untucked shirt that hung below his waist.** Further, Officer Thompson testified that **he perceived the combination of Salazar's actions to be consistent with a suspect retrieving a weapon from his waistband**. Officer Thompson **fired a single shot, hitting Salazar in the right lower back.**
> Upon inspection, Officer Thompson determined that **Salazar was not armed.** Salazar survived, but the gunshot wound left him partially paralyzed.[34]

As Salazar walked away, his hands were hidden from view. That alone would not have been enough to justify Officer Thompson using deadly force. But in the totality of the circumstances as described above, Salazar's reach toward his waistband was enough for Thompson to reasonably believe that Salazar was reaching for a weapon. Had that belief turned out to be true, Salazar could have turned and fired before Thompson could have reacted. On the other hand, had Salazar's hands both been visible, empty, and not reaching, the calculus of objective reasonableness might have led to a different result. As it was, the Fifth Circuit held that Thompson did not violate Salazar's constitutional rights, and it affirmed summary judgment for Thompson on grounds of qualified immunity.[35] The court concluded:

> Thus, based on our precedent and the undisputed facts, considering the **totality of the circumstances—**which include Salazar's **resistance, intoxication,** his **disregard** for Officer Thompson's orders, the threat he and the other three men in his truck posed while unrestrained, and Salazar's actions leading up to the shooting (including suddenly ***reaching towards his waistband***)—it seems clear that it was not unreasonable for an officer in Officer Thompson's position to **perceive Salazar's actions to be an *immediate threat to his safety***. And, it follows that it was not "clearly excessive" or "unreasonable" for Officer Thompson to use deadly force in the manner he did to protect himself in such circumstances.[36]

One takeaway from *Salazar-Limon* reflecting the "action beats reaction" finding of the FSI study is captured in this line: "[W]e have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety."[37]

Manis v. Lawson

The movement of a suspect's hands out of an officer's sight was again central to qualified immunity for the officer's use of deadly force in *Manis v. Lawson*.[38] In October 2005 in Gretna, Louisiana, Officer Douglass Zemlik and Sergeant Scott Vinson responded to a call around 3:00am reporting that an occupied vehicle was sitting on a railroad track with its engine idling.[39] Vinson observed Michael Manis in the driver's seat either sleeping or passed out. Vinson approached Manis's car on the passenger side, and Zemlik approached on the driver's side. Both officers identified themselves as policemen and "verbally and physically tried to wake Manis."[40] The court described what then transpired:

> The parties dispute what happened after Manis was roused. According to Zemlik and Vinson, Manis immediately began shouting obscenities and flailing his arms aggressively at them. After Zemlik opened the driver's side door and attempted to calm Manis, Vinson turned the ignition off and walked around the front of the vehicle to join Zemlik. **Manis**, still seat-belted, then **began to repeatedly reach underneath the front seat.** The **officers drew their weapons and ordered Manis several times to show his hands.** He **ignored them.** When **Manis appeared to retrieve some object and began to straighten up**, Zemlik **fired four rounds**, killing Manis.[41]

The court continues with the claims from decedent's family:

> The Appellees contend that Manis did not curse the officers and only moved his arms out of drunken confusion, not combativeness. They state that Manis, oblivious to his fastened seat belt, tried

unsuccessfully to get out of the Jeep at Zemlik's instruction. **Manis then leaned forward over the front seat in a stupor, leading the officers to order him to show his hands**. According to the Appellees, Zemlik shot Manis as he was attempting to straighten up and raise his hands in a display of submission. **No weapon was recovered.** An autopsy showed that Manis was drunk and under the influence of cocaine and barbiturates at the time of his death.[42]

As with Salazar, Manis was unarmed. But in neither case could the officers make that determination.[43] In each case, the officer was protected by qualified immunity because he did not violate a constitutional right that was clearly established at the time, and it was objectively reasonable for the officer to believe that the suspect was reaching for a weapon. As in *Salazar-Limon*, if that belief had been true, the officer would have faced an imminent threat of harm; since action beats reaction, the officer would have been unable to neutralize that threat. The Fifth Circuit reversed the district court's denial of summary judgment and held that Zemlik was entitled to qualified immunity.

Estate of Valverde by and through Padilla v. Dodge

Officers from Denver Police Department, including a SWAT team, set up an undercover drug transaction with cocaine dealer Joseph Valverde.[44] DPD Sergeant Justin Dodge was assigned as SWAT team supervisor for this incident. When the drug deal was consummated, the SWAT team moved to arrest Valverde. The Tenth Circuit describes the use of deadly force here:

> As Dodge exited [the SWAT van], one or more of the other **officers ordered Valverde,** who was facing the van, **to raise his hands. Valverde did not immediately comply;** he **appeared to flinch or jump slightly backward** in reaction to the flash bang.
> * * *
> **Although officers surrounded Valverde and yelled at him to put his hands up and get down, he moved slightly forward and then slid to his left,** in front of the right front tire of the parked sedan. * * * **Dodge said that he saw Valverde keep grabbing for something in his pocket or waistband area.** The two-man team also observed **Valverde reaching for something in his shorts**. Valverde then **pulled out a gun** with his right hand, at waist level. Directly facing Valverde from across the hood of the sedan, **Dodge saw the muzzle of a gun.**
> * * *
> **Less than a second after Valverde pulled out this gun, Dodge fired his carbine at Valverde five times in rapid succession.** Three of the five shots struck Valverde—one in his right chest, one in the back of his right elbow, and one in his right back.
> * * *
> About four seconds elapsed from the time Dodge stepped out of the van to the time Valverde went to the ground.
>
> There is no dispute that Valverde drew a gun, and that Dodge saw Valverde take the gun out before using deadly force.
> * * *
> Valverde died from his wounds.[45]

Unlike in *Salazar-Limon* and *Manis*, the suspect here had a gun, which multiple officers saw. Officers yelled at Valverde to put his hands up; rather than immediately complying with that order, Valverde moved in a way that might have been a reaction to the flash bang device. But Sergeant Dodge did not fire then. A moment later, however, Valverde brought his gun up, and Sergeant Dodge fired multiple rounds, killing Valverde.[46]

The district court denied Dodge's motion for summary judgment on qualified immunity grounds. That court concluded that "evidence could support a finding that Valverde was not shot until after he had disposed of his gun and was raising his hands in surrender."[47] The Tenth Circuit, however, noted that the district court had "overlooked two fundamentals of the necessary analysis."[48] The two fundamentals the court notes reflect the principles discussed in this article. The first of these has to do with the speed at which high-risk encounters can develop: "First, the district court failed to consider that allowance needs to be made for the fact that the **officer must make a split-second decision**. The Constitution **permits officers to make reasonable mistakes**. Officers cannot be mind readers and **must resolve ambiguities immediately**."[49]

The second fundamental has to do with perspective: "The district court's second error was that it failed to appreciate that **the facts must be viewed from the perspective of the officer**."[50] Seeing the unfolding events as the officer saw them is a necessary component of the objective reasonableness analysis. The Tenth Circuit reversed the district court's ruling and held that Dodge was entitled to qualified immunity.[51]

Oakes v. Anderson

Oakes v. Anderson is another case where a hidden hand was the catalyst for an officer using deadly force. DeKalb County, Georgia, police officers were dispatched to a shopping center in response to a 911 call regarding possible trouble between some people in the parking lot.[52] First to respond was Officer Daniels, who met Karen Maxwell, the girlfriend of Carter Oakes, the person of interest here. Also present was Ben Wheeler, whom Maxwell had called for help in dealing with Oakes.[53] Maxell told Officer Daniels that Oakes had been drinking for three days and had threatened suicide. She also showed him an empty gun case she had removed from his car. Maxwell and Wheeler, along with Officer Daniels, believed that Oakes had a gun in his vehicle.[54]

Oakes was leaning against his car in the parking lot when Daniels arrived, and then he moved into the driver's seat. Daniels talked with him and offered to take him somewhere to get

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19. *Id*. at 1068.
20. Bennett v. Pippin, 74 F.3d 578, at 583-84 (5th Cir. 1996).
21. *Id*. at 585–86.
22. *Whitson*, *supra* note 18, at 1074.
23. Monell v. Dep't of Soc. Svcs, 436 U.S. 658, 691 (1978).
24. In re National Prescription Opiate Litigation, no. 17-MD-2804 (N.D. Ohio Aug. 22, 2022) "*Track Three*": County of Lake v. Purdue Pharma, L.P. no. 18-op-45032 (N.D. Ohio); County of Trumbull v. Purdue Pharma, L.P. No. 18-op-45079 (N.D. Ohio).
25. 4 Restatement of the Law 2d, Torts, § 821B(1), 87 (1979).
26. Ohio Rev. Code § 2307.71(B).
27. *Id.*
28. *Id*. at § 2307.72(A)–(C).
29. Trumbull County; Lake County; Plaintiff's Executive Committee v. Purdue Pharma, L.P., nos. 22-3750/3751/3753/3841/3843/3844 (6th Cir. Sept. 11, 2023).
30. In re Natl. Prescription Opiate Litigation, Slip Op. No. 2024-Ohio-5744 (Dec. 10, 2024).
31. City of Huntington v. Amerisource Bergin Corp., no. 22-1819 (4th Cir. Mar. 18, 2024).
32. State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2022).
33. Chris Dickerson, *4th Circuit wants state Supreme Court to answer nuisance question in Huntington, Cabell opioid case*, West Virginia Record, Mar. 18, 2024 (https://wvrecord.com/stories/656783579-4th-circuit-wants-state-supreme-court-to-answer-nuisance-question-in-huntington-cabell-opioid-case).
34. *Id*.
35. Lech v. Jackson, 791 Fed. Appx. 711 (10th Cir. 2019); Baker v. City of McKinney, 84 F.4th 378 (5th Cir. 2023); Slaybaugh v. Rutherford County, no. 23-5765 (6th Cir. 2024).
36. Armstrong v. United States, 364 U.S. 40, 49 (1960).
37. Baker v. City of McKinney, no. 23-2363 (denial of certiorari, U.S. Nov. 25, 2024).
38. *Id.*

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help.[55] Daniels, believing that Oakes had a gun in the car, calmly asked him to leave the car, but Oakes refused.[56] Officer Wernecke then arrived as backup for Daniels, and both officers talked with Oakes, who still refused to leave the car and refused to let them search it. After several more minutes, feeling they were at an impasse, Daniels radioed for a supervisor.[57]

Sergeant Anderson then arrived, and "he was told that Oakes likely had access to a gun, was depressed and suicidal."[58] Anderson asked Oakes "if the officers could get him help."[59] He also asked Oakes if he was on medication, to which Oakes admitted that he had stopped taking his prescribed medication for depression.[60] Anderson repeatedly asked Oakes to allow them to search the vehicle for a weapon, and Oakes continued to refuse. When Anderson said they would take him out of the car, "Oakes still refused and stated that the officers 'better unsnap.'"[61] Officers Daniels and Wernecke reached for Oakes's arms to bring him out of the car, and "Oakes flailed his hands and repelled the officers' hands."[62] The Eleventh Circuit then describes Oakes's hidden hand movement in a way that is somewhat similar to *Manis* and, later, to *Salazar-Limon*:

> Oakes then reached into the area between the driver's seat and the center console. Oakes's right hand was not within the officers' view. Fearful that Oakes was reaching for his gun, Anderson shouted "gun, gun, gun" to alert the other officers. Anderson did not actually see any gun. He quickly moved to the outside of the open driver's side door and drew his weapon. Daniels and Wernecke also drew their weapons.
>
> **For about thirty seconds**, the officers can be heard on the audio recording repeatedly shouting "**show your hands!**," "**hands up!**," "**one more time, sir hands up!**," and "**let me see your hands now!**" Anderson said he could **see Oakes wiggling his right arm, as if his hand was searching for something** between the seat and console.
>
> At that point, Anderson **saw Oakes jerk his right hand out of the space** between the seat and the console and start to move his arm across his body. From this movement, Anderson thought Oakes had grabbed a gun and was pulling it out. Believing Oakes was "fixing to fire," Anderson shot twice and fatally wounded Oakes. Anderson had not actually seen a gun.[63]

Although Anderson had not seen a gun, it was objectively reasonable in the totality of the circumstances for him to have believed that Oakes had a gun and was reaching for it. Oakes didn't have the gun in his hand when Anderson fired. The gun was found, however, in the place where Oakes had been reaching his hand.[64] The district court granted summary judgment on qualified immunity grounds and the Eleventh Circuit affirmed.[65]

CONCLUSION:

The *Oakes v. Anderson* opinion's concluding paragraph contains an acknowledgment that we who defend officers should never forget: "The events of that day were undoubtedly tragic. One life ended, and many other lives will never be the same."[66] The work of those we defend is very serious, and qualified immunity can protect them from the distractions and pressures of going through a lawsuit. But qualified immunity cannot protect them from the impact of the decision to use deadly force. Officers protect and serve our communities. And we protect and serve our officers. The cases sampled here are just a few of the many that explore the interplay of qualified immunity and visible or hidden hands. The better we understand that interplay, the better we can help to protect those who protect us. ML

Show Your Hands *cont'd from page 33*

1. 490 U.S. 386 (1989).
2. *Id*. at 388, 395-97.
3. 471 U.S. 1 (1985).
4. 471 U.S. at 8-9 (cleaned up).
5. 490 U.S. at 396.
6. *Id*. at 396-97.
7. 475 U.S. 335 (1986).
8. *Id*. at 341.
9. 577 U.S. 7, 11 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)) (cleaned up).
10. *See*, *e.g*., Buehler v. Dear, 27 F.4th 969, 982 (5 th Cir. 2022).
11. *Id*.
12. https://leb.fbi.gov/bulletin-highlights/unusual-weapons
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. https://leb.fbi.gov/bulletin-highlights/unusual-weapons/unusual-weapons-flashlight-gun-pen-gun-and-bolt-gun
20. *Id*.
21. *Id*.
22. Carroll v. Ellington, 800 F.3d 154, 165 (5th Cir. 2015).
23. Lozano v. State, 860 S.W.2d 152 (Tex. App.—Austin 1993, pet. ref'd).
24. Garza v. State, 695 S.W.2d 726 (Tex. App.—Dallas 1985), aff'd, 725 S.W.2d 256 (Tex. Crim. App. 1987).
25. Clay v. Wilkinson, No. 07-CV-0730, 2007 WL 5147091 at * 4 (W. D. La. Dec. 10, 2007).
26. *Id*.
27. 585 F.3d 839, 842 (5th Cir. 2009).
28. 826 F.3d 272, 275 (5th Cir. 2016).
29. Chuck Remsberg, *New Force Science Study Results: Prone Suspects With Hidden Hands More Dangerous Than Imagined*, Force Science News, Dec 3, 2010. https://www.forcescience.com/2010/12/new-force-science-study-results-prone-suspects-with-hidden-hands-more-dangerous-than-imagined/ 826 F.3d 272 (5th Cir. 2016).
31. *Id*. at 275.
32. *Id*.
33. *Id*.
34. *Id*. (internal footnotes omitted; bold print added).
35. *Id*. at 279-80.
36. 826 F.3d at 279 (internal footnotes omitted; bold print added).
37. *Id*. at n. 6 (citing *Manis*, 585 F.3d at 844).
38. 585 F.3d 839 (5th Cir. 2009).
39. *Id*. at 841-42.
40. *Id*.
41. *Id*. at 842 (bold print added).
42. *Id*. (bold print added).
43. What it means to say that a suspect is armed or unarmed, and the legal significance of that evaluation, is a fitting topic for another article.
44. 967 F.3d 1049, 1054 (10th Cir. 2020).
45. *Id*. at 1056-57 (bold print added).
46. *Id*.
47. *Id*. at 1062.
48. *Id*.
49. *Id*. (bold print added).
50. *Id*. (bold print added).
51. *Id*. at 1068.
52. 494 Fed. App'x 35, 36-37 (11th Cir. 2012).
53. *Id*.
54. *Id*. at 36.
55. *Id*.
56. *Id*.
57. *Id*. at 36-37.
58. *Id*. at 37.
59. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*. at 37-38 (internal footnote omitted; bold print added).
65. *Id*. at 38..
66. *Id*. at 40.



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