Strategies and Considerations for Defending § 1983 Claims Involving the Use of Deadly Force

Dispositive Motions and Expert Testimony



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First Circuit - No Constitutional Violation

Objective Reasonableness in light of the facts and circumstances without regard to intent or motive

- First Circuit applies the *Graham v. O'Connor* factors – examine (1) severity of the crime; (2) whether they pose immediate threat to safety of officers or others; and (3) whether they are actively resisting or evading arrest
- In First Circuit deadly force cases, it often hinges on the second factor. *Compare Conlogue v. Hamilton* (2018) with *McKenney v. Mangino* (2017)
- Imminent danger does not require pointing or brandishing of the weapon. Warning of potential weapon and actions leading one to believe they are reaching for it are sufficient. *Escalero v. United States* (2018)
- *Bannon v. Godin* facts

First Circuit - Qualified Immunity

- Allegedly abridged right must be **clearly established** at the time of the claimed misconduct – defense presumes there is a constitutional violation
  - Two-part test: (1) controlling authority or consensus of persuasive authority sufficient to put officer on notice that the conduct fell short of the constitutional norm; and (2) that an objectively reasonable officer would have known that his conducted violated the law. *Conlogue* (2018)
  - Protects "all but the plainly incompetent or those who knowingly violate the law." "Reasonable mistakes" about the lawfulness of conduct protected under *Rahim*
  - Eight *Rahim* (nonexclusive) factors for reasonableness drawn from established precedent: (1) immediate threat; (2) whether a warning was given and complied with; (3) whether the suspect was armed or officers believed him to be armed; (4) speed with which officers had to respond; (5) whether suspect was advancing; (6) proximity of suspect to officers; (7) whether multiple officers decided to use force simultaneously; and (8) nature of the underlying crime

Tenth Circuit – No Constitutional Violation

- Generally same as First Circuit - Tenth Circuit first applies the *Graham* factors regarding objectively unreasonable use of force*:* (1) severity of the crime; (2) whether they pose immediate threat to safety of officers or public; and (3) whether they are actively resisting or attempting to evade arrest by flight.
- In a departure from other circuits, Tenth Circuit next applies four additional factors known as the *Larsen* factors that are specific to Fourth Amendment deadly force cases: (1) obeying commands to drop weapon, (2) hostile motion toward officers, (3) distance between office3rs and suspect, and (4) manifest intentions of the suspect. *Larsen v. Murr*, 511 F.3d. 1255 (10th Cir. 2008).
- No Monday morning quarterbacking – must be viewed through lens of reasonable officer on scene. *Valverde v. Dodge* (10th Cir. 2020).
- Although the second *Graham* factor is the most important (*Valverde*), the current trend is to focus on reasonableness based on the "totality of the circumstances." *Rifle* (10th Cir. 2023).

Tenth Circuit – Qualified Immunity

- Plaintiff carries “heavy burden” to show that: (1) Officer’s conduct violated a constitutional right and (2) the right was clearly established at time of incident. *Booker* (10th Cir. 2014)
- The contours of the right must be sufficiently clear that a reasonable officer would understand. *Wilson* 10th Cir. 2013)
- Tenth Circuit is not shy about application of QI.
- Current types of issues Plaintiffs are using to defeat immunity: mental health/suicide, escalation, alcohol/drugs, non-lethal weapons, duty to protect/medical attention (standoff equals custody)

Municipal Liability - *Monell*

- There must be an underlying constitutional violation
- Plaintiff must show: (1) an unconstitutional "policy or custom"; that (2) was the "moving force" behind the constitutional violation
- Use of force is subject to a thorough set of BPD rules that pass muster - usually allegations are failure to train/supervise
- Municipality not liable for actions of employees – must be acting per policy. *Bryson* (10th Cir. 2010). Only responsible for its own unconstitutional policies. Policy must be a "moving force" behind the injury. *Barney* (10th Cir. 1998)
- Plaintiff must show that policy was enacted or maintained with "deliberate indifference to an almost inevitable constitutional injury." *Schneider* (10th Cir. 2013)

Municipal Liability - *Monell*

- Official policy or custom can take form of: (1) regulation/policy, (2) informal custom with widespread use, (3) decisions of final policymaking employees, (4) failure to train/supervise. *Bryson*
- Deliberate indifference – notice of a pattern of unconstitutional acts with no action to correct.
  - Use of statistics to show pattern.
  - Other unique evidence.
- Problems with 30(b)(6) depositions
  - Identifying appropriate persons to testify
  - Sworn officers often rotate positions – no institutional knowledge
  - Older cases – problems with using former employees

Expert Witnesses

- In *Bannon*, a police practices expert testified that safer alternatives existed that would have prevented the shooting.
- When should you put an expert into a Rule 56 motion – risk of fact question.
- *Daubert/702* challenges - knock them out early.
  - What is qualified? Is former police officer enough? Command level experience, college education? Other training/certifications?
  - Knowledge of, and compliance with controlling law, is key – not just scientific methodologies.
  - Reasonable officer standard must be used (not expert's perspective)
  - *Ramirez v. Escajeda* (USDC W.D. Tex. 2021)

Trends and Issues

- Impact of widespread use of body cameras – Colorado requires them (SB217)
  - Camera does not always see what officer sees and vice versa.
  - Federal DOJ guidelines used in task forces conflict.
- De-escalation – MA POST Commission standards and mandatory BPD Rule changes on use of force
  - Do loud hails escalate? What about spotlights and SWAT team?
- Mental Health issues – *Bannon*, *Coleman* (unapproved BPD Rule)
  - Implied knowledge (past experience with perpetrator, background info from 911 or computer, perpetrator claims to be suicidal)
  - Mental Health Response Teams
- Opioids and alcohol – recognizing signs (*Cox*)

Trends and Issues

- Internal Investigations/CIRT/Admin Reviews/Citizen Complaints
  - Deliberative process & privilege – what is covered and how to avoid issues.
  - Force Science Research Center (www.forcescience.com) – very good training.
- Less-lethal methods – when to use
- Non-lethal weapons (fake guns, bats, knives from distance)
- PIT maneuvers – *Sabbe* (9th Cir 2023)
  - Permission required v. supervisor monitoring channel, etc.
- Retreat – *City of Rifle* (10th Cir. 2023)

Trends – Changes in the Law

- Colorado Civil Rights Statute (SB217) – applies only to City/County, eliminates QI, forces indemnification, individual officers liable up to $25,000 personally, 1988 equivalent fees mandatory (no Lodestar), statistics/tracking, bodycams mandatory

- Regulatory schemes – Massachusetts Police Officer Standards and Training Commission ("POST") and Boston Office of Police Accountability and Transparency ("OPAT")
  - Mandatory certification and training
  - Discipline – decertification
  - Self-reporting of complaints – departments and officers

- Local ordinances – City of Boston Ordinance regarding crowd control tactics – eliminates QI, provides for automatic treble damages
- Joint Mental Health-Law Enforcement response teams
  - Not always available, can't get to scene in time, not a solution to every problem

Defense Strategies – Rules 12 and 56

- Don’t forget the obvious – statute of limitations. Section 1983 doesn’t have one, look to state tort statute
- Denial of qualified immunity is immediately appealable – *Rahim*
- Rule 12 and discovery issues
  - *Monell* discovery - dismissal of municipality or other local government entity can streamline discovery by eliminating custom and policy or training issues
  - Expert discovery
- John Doe defendants and timeliness of adding officers
- Dismissal (and refiling) of 28 USC 1367 supplemental state claims
  - Subsection (d) tolling. *Artis* (2018)

Defense Strategies – Rules 12 and 56

- Officer testimony is sufficient to support summary judgment in First Circuit – plaintiff needs some affirmative evidence to rebut it – *Velasquez-Garcia* (2018)
- No question of fact if testimony is slightly inconsistent or where contradictory evidence is belied by video
  - How to get video in for a Rule 12
  - How to prevent Plaintiff from demanding discovery as soon as video goes in
- Local rules – some federal courts permit only one Rule 56.
- Negligence is not enough
  - Plaintiffs cannot use police practices experts to argue that safer tactics and decisions existed as a means to defeat summary judgment (First Circuit – *Roy* (1994))
- Rules violations are not enough – BPD more restrictive (First Circuit – *Boveri* (1997))
  - PIT Maneuver example – *Bannon* and *Scott v. Harris* constitutionality