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## FEATURE:

### 6th Circuit Holds Officer Liable for Use of Lethal Force Against Mentally Ill Man Showing No Signs of Aggression, but Walking Toward Officer

***Driscoll v. Montgomery Cnty. Bd. of Comm'rs,* No. 24-4060 (6th Cir. April 23, 2026)**

While in a park in Montgomery County, Ohio, Cory Driscoll was praying, speaking in tongues, and making "rolling his R's" noises while experiencing symptoms associated with schizoaffective and bipolar disorders. Park visitors, concerned but not reporting weapons or danger, called the non-emergency line. Dispatch relayed that Driscoll was making strange noises, had a big water jug, had earlier rested his head on his steering wheel, and might have a lighter in his car, but did not indicate he was armed, dangerous, or had gasoline.

Deputy Jennifer Smiley arrived as Driscoll returned from the lake with a gallon jug, continued speaking in tongues, and initially did not comply with the command to drop the jug, but eventually dropped it a few seconds after the first command. As he discarded the jug, Smiley pointed her gun and radioed, "he's pouring gasoline," although no witness, dispatch, or recording mentioned gasoline, no one reported smelling gasoline, and Driscoll showed no reaction to drinking the liquid. Smiley later claimed an onlooker had mentioned gasoline, but that was unsupported in the record. Smiley ordered Driscoll to stop and get on the ground. He stopped, backed up with hands visible and empty, continued speaking in tongues, and described experiencing a panic-induced manic episode. Driscoll picked the jug back up and took more swigs while Smiley radioed that he was drinking gasoline; a witness believed he had poured the contents to show it was water. Smiley threatened to shoot; Driscoll said, "Shoot me," repeated, "I'm drinking gasoline?" with what the court described as an inquisitive tone, and continued noncompliance without physical threats.

Over the next minute, Smiley continued unlawful commands, Driscoll questioned why he must get on the ground, repeated "the blood of Jesus," took swigs, and then advanced with empty hands; when he closed to at least a few paces, Smiley shot him once in the abdomen. Driscoll survived but lost a kidney, suffered significant internal injuries requiring multiple surgeries, was hospitalized for a month, and is permanently disabled with PTSD. An investigation confirmed that the jug did not

contain gasoline. Driscoll sued Smiley and county entities under § 1983 and state law; at summary judgment, the district court dismissed all claims except the Fourth Amendment excessive-force claim and state-law claims against Smiley individually for battery, IIED, and false arrest, and denied qualified and statutory immunity.

**Legal Question(s):**

1. Whether the use of deadly force was objectively reasonable under the Fourth Amendment given the facts available to the officer at the time of the shooting.
2. Whether the right at issue was clearly established so as to defeat qualified immunity.

**Holdings:**

The court affirmed the district court's denial of Deputy Smiley's motion for summary judgment on federal qualified immunity and Ohio state statutory immunity. The panel held that, viewing the evidence in the light most favorable to Driscoll, a reasonable jury could find that Smiley used objectively unreasonable deadly force against an unarmed, non-dangerous individual, and that the right was clearly established; therefore, Smiley is not entitled to qualified immunity or overlapping state statutory immunity at this stage.

**Analysis:**

Viewing evidence in Driscoll's favor, the court held Smiley used unreasonable deadly force under the Fourth Amendment. The court began by applying the *Palma* factors, but also discussed *Garner* and the *Graham* factors, and affirmed the denial of qualified immunity. For those unfamiliar the *Palma* factors are (1) why the officer was called to the scene; (2) whether the officer knew or reasonably believed that the person was armed; (3) whether the person verbally or physically threatened the officer or disobeyed the officer; (4) how far the officer was from the person; (5) the duration of the entire encounter; (6) whether the officer knew of any ongoing mental or physical health conditions that may have affected the person's response to the officer; and (7) whether the officer could have diffused the situation with less forceful tactics. The *Palma* factors are an enhanced version of the *Graham* factors that offer supplemental considerations for use of force cases involving someone going through a mental health episode.

The first factor weighed against reasonableness because Smiley was effectively conducting a welfare check from a non-emergency call with no reported crime, weapons, or danger. The "armed" factor weighed against reasonableness because Smiley had no objective basis to believe Driscoll was armed; at most there was a possible lighter in the car, his hands were visible and empty when shot, and even the gasoline belief lacked objective indicia. Noncompliance did not equal active resistance or threats, and refusal to obey unlawful orders cannot justify force, so this factor also weighed against Smiley. Distance favored Smiley to a limited extent because the separation was relatively short and required quick decisions, but it did not justify the use of deadly force absent an imminent threat. Driscoll's approach with open, empty hands did not amount to a threatening charge, distinguishing *Mitchell v. Schlabach,* 864 F.3d 416, 423 (6th Cir. 2017), so his advance did not justify lethal force. The brief duration did not favor Smiley because she rapidly escalated without adequate justification, and reasonableness is an objective inquiry. Driscoll's evident diminished capacity required de-escalation; his incoherence, strange noises, and drinking from a dirty jug presented more than fragmentary evidence, and cases allowing deadly force with mentally ill individuals involved actual weapons or imminent threats, unlike here.

The court held that less forceful tactics were available, and Smiley had no reason to draw her gun initially; having drawn it did not justify using it, and *Mitchell's* car-chase context was not applicable. On balance, the court concluded Smiley confronted a noncompliant but non-dangerous, unarmed

individual, not breaking any laws, and her escalation and use of deadly force were unreasonable under *Barnes's* totality instruction rejecting a moment-of-threat rule. The court rejected Smiley's gasoline justification on interlocutory review because it depended on disputed facts and lacked objective support, such as Driscoll's "I'm drinking gasoline" question, which was inquisitory. The court held the right was clearly established, both as an "obvious case" under *Garner's* rule that officers may not shoot unarmed, nondangerous persons, and under analogous Sixth Circuit precedent requiring de-escalation and forbidding force in response to noncompliance and nondangerous conduct, including *Martin*, *Kent*, *Palma*, and *Goodwin*. The panel affirmed the district court's denial of qualified immunity and state-law immunity. The dissent argued the law was not clearly established under the specific fast-evolving circumstances, that *Mitchell* was analogous, and that the district court improperly treated dangerousness as a factual question.

***Driscoll v. Montgomery Cnty. Bd. of Comm'rs***

## SHORT SUMMARIES:

### 11th Circuit – 1st Amendment - Signs

In 2015, following *Reed v. Town of Gilbert*, the City of Atlanta amended its sign code by repealing a section of the 1982 code to reflect the new Supreme Court decision and allowed nonconforming signs to remain if they were lawfully erected before the adoption of the 2015 code. Plaintiffs operated two signs adjacent to Interstate 85 that were permitted in 1993 under the previous code, installed in compliance with those permits, and renewed between 2002 and 2008. In 2018, Atlanta issued permits to upgrade the signs' changing technology; after private-party challenges, the Fulton County Superior Court reversed the Board of Zoning Adjustment and held the original 1993 permits were unlawful at inception under subsection (7) of the code's restrictions on off-site signs, rendering the signs not lawfully nonconforming under the 2015 code. Atlanta then ordered the removal of the signs, staying enforcement pending litigation. Plaintiffs sued for declaratory and injunctive relief, asserting that the 1982 code is unconstitutional; the district court ultimately granted summary judgment in their favor, holding the 1982 code content-based and enjoining its enforcement.

On appeal, the Eleventh Circuit held that plaintiffs had standing only to challenge the restriction on off-site signs, vacated the district court's facial invalidation of the entire 1982 code, and concluded that subsection (7)'s on-/off-premises distinction is content-neutral under *City of Austin*, both facially and as applied. The court rejected plaintiffs' arguments that the arrest citations and permitting provisions prevented isolating subsection (7), explaining the citations referenced unlawful nonconforming signs per the Superior Court ruling and subsection (7) applies regardless of permit status. Because the district court did not apply intermediate scrutiny to the content-neutral provision, the Eleventh Circuit vacated the summary judgment and injunction and remanded for the district court to determine whether subsection (7) passed intermediate scrutiny. A very procedurally confusing case that I recommend you read yourself.

***Anderson v. City of Atlanta***

### 5th Circuit – 1st Amendment - Religion

Texas enacted S.B. 10 in June 2025, requiring every public school classroom to display a conspicuous, durable Ten Commandments poster with specified text, size, and formatting, permitting private donations and optional district purchases. Parents and clergy of diverse faiths sued multiple

Texas school districts, asserting facial Establishment and Free Exercise Clause violations and obtained a preliminary injunction from the district court; defendants appealed, and the Fifth Circuit took the case en banc alongside a similar Louisiana matter later dismissed as unripe.

The majority reversed, holding that S.B. 10 violates neither clause. The court rejected *Stone v. Graham,* concluding it relied too heavily on *Lemon*, which the Supreme Court overturned. The current Establishment analysis asks whether a law bears hallmarks of founding-era establishments, such as compelled worship, doctrinal control, religious taxes, or civil functions vested in churches. S.B. 10 lacks those features, imposes no penalties, financial support, doctrinal control, or required religious exercise, and thus does not resemble a historical establishment. It also held that alleged coercion from passive classroom displays does not equal historic compulsion to worship, and the presence of religious language alone is insufficient. The court also rejected "denominational discrimination," noting *Van Orden's* acceptance of identical text and warning against courts adjudicating theological disputes.

For Free Exercise, the court distinguished *Mahmoud*, finding no curriculum, instruction, proselytizing, or reprimand of dissenting beliefs, and thus no substantial burden on students' or parents' religious exercise. The court emphasized that *Mahmoud* was concerned with active, coercive pedagogy, whereas S.B. 10 mandates only a poster, and the plaintiffs' remedy would improperly micromanage school walls. It should be noted that multiple dissents argued *Stone* should still be controlling for reasons other than its reliance on *Lemon*. This was a sharply split decision.

**Note**: While the statute does require that the poster be 16 inches wide and 20 inches tall and that it must use an easily readable typeface, it does not specify which language the 10 commandments have to be in. As a result, Chaz Stevens, who many of you may remember from his webinar last December, has reached out to inform me that he and his fellow activists will be sending posters in Arabic, Klingon, and a number of other languages to schools across Texas and are fully prepared and waiting for a lawsuit should they not comply given that Sec.A1.0041.(d)(1) requires public schools to accept private donations if they do not already have a compliant poster in each classroom. I have a feeling this will not be the last we will see of these types of cases.

***Nathan v. Alamo Heights ISD***

## 10th Circuit - Jails - Damages - Deliberate Indifference

A fellow turns himself into the jail on an outstanding warrant. He begins to complain about his health. The jail staff and the nurse believe his complaints lack merit. Over time, he complains more, and the staff's responses reflect their general belief that he's faking or malingering. Long story short, he dies. The case goes to trial with a host of stipulations, a few witnesses, and some video. The panel recounts in great detail the interactions between the inmate and the staff. They report on the policies at the jail and discuss the trial proceedings. The jury awarded the estate $33 million in compensatory damages. Much argument and analysis focused on the emotions displayed by Plaintiff's attorney and on how the damage award could serve as a deterrent. The panel affirmed, but two of the judges in concurring made clear that the Plaintiff improperly argued deterrence to the jury and attempted to make clear that judges in the Circuit should not allow Plaintiffs to walk down that path.

***Bond vs. Ottawa County, OK***

## 10th Circuit - Color of Law

A police officer is placed on administrative leave for an on-duty shooting. The officer's terms of leave prohibit the officer from exercising any police authority, wearing a uniform, or enforcing the law. The officer, however, retained his badge. About a week later, as he and his wife were pulling into their apartment parking lot, the officer spotted a woman walking her dog and, as he pulled in near her, became enraged when she did not move out of his way. He shoots the car toward her and ultimately pins her between the car and the parking garage. He gets out of his car and begins berating her, which leads her to tell him she would call the police. Naturally, he responds by claiming to be the police and gives her his badge number. She tells him she has pepper spray and warns that she will use it. He responds by grabbing her, throwing her down, and beating her. He's arrested. She sues. The city, also sued, defends by asserting that the fellow was not acting under "color of law' as he was on leave and not acting on behalf of the city. The lower court doesn't agree. On appeal, the panel buys the city's argument that *Lindke v. Freed*, 601 U.S. 187 (2024), conclusively decided that a person must have actual authority to be found to act under color of law. Reversed and remanded. Great work by Hollie R. Birkholz (Julia A. Bannon, with her on the briefs), Office of the Aurora City Attorney, Aurora, Colorado.

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***Martinez vs. City of Aurora***

We wanted to end this edition of eNews by giving a shoutout to our $5,000 scholarship award winner, Chase Howard, who is currently attending law school at the University of North Carolina. Each of our scholarship winners wrote a paper discussing a legal topic that interested them and Chase wrote a very interesting article discussing universal basic income. His article is included below.

**View the Paper Here**