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Standard for Federal Motions for Summary Judgment in OIS/Fatal cases

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I. 9th Cir.'s Rule That Summary Judgment Must Be Granted Sparingly In Deadly Force Cases Has De Facto Created A Higher Standard.

"[D]efendants can still win on summary judgment if the district court concludes … that the officer's use of force was objectively reasonable under the circumstances." Scott v. Henrich (9th Cir. 1944) 39 F3d 912, 915. But this statement does not resolve the fundamental issue: "how willing should district courts be to find a use of force objectively reasonable assuming a given set of undisputed facts?" Abraham v. Raso (3rd Cir. 1999) 183 F3d 279, 290.

In inviting a jury to speculate, long after the fact, about what an Officer should have done before shooting a suspect, the 9th Cir. en banc majority invoked and reaffirmed the 9th Cir.'s rule that **police motions for summary judgment in deadly force cases are subject to heightened scrutiny by the courts**. Specifically, that summary judgment must be granted "sparingly in excessive force cases" and that the "principle applies with particular force where the only witness other than the officers was killed during the encounter." Gonzalez v. City of Anaheim (9th Cir. 2014, en banc) 747 F3d 789, 795 citing Glenn v. Washington County (9th Cir. 2011) 673 F3d 864, 871.

The genesis of this rule was Judge Kozinski's practical interpretation of the basic rules governing summary judgment, namely, that **in a deadly force case where the motion is based solely on the testimony of surviving officers, a court cannot simply accept their testimony at face value**. Rather, the court must review the testimony in light of all of the evidence, including circumstantial evidence, that might create a material issue of fact. Scott v. Henrich (9th Cir. 1994) 39 F3d 912, 915. In Smith v. City of Hemet (9th Cir. 2005, en banc) 394 F3d 689, the principle that summary judgment must be granted "sparingly" in excessive force cases was explained as a function of the nature of such cases, which are generally subject to numerous factual disputes about what actually happened. Id. at 701 ("the reasonableness of force used is ordinarily a question of fact for the jury.").

However, as the en banc decision in Gonzalez illustrates, the principle is being applied to deny summary judgment to a police officer where it is not so much a question of conflicting facts, but rather the legal significance of such facts. As the 4 dissenting judges noted, under the governing law, the officer's use of force was reasonable. In contrast, the en banc majority, citing the principle that summary judgment must be granted "sparingly" in excessive force cases because the ultimate issue is generally one of fact for the jury, concludes it is up to the jury to determine whether use of deadly force constitutes excessive force. Thus, the principle is being employed as an end run around the US Supreme Court's express admonition in Scott v. Harris that where the basic facts underlying the use of force are undisputed, the reasonableness of the force under the 4th Amendment is an issue of law for the court, and courts cannot abdicate this responsibility by simply declaring that the use of force in a given instance must ultimately be evaluated by a jury using some ex post facto view of the facts and general notions of "reasonableness." Scott v. Harris (2007) 550 US 372, 381 n.8 ("once we have determined the relevant set of facts … the reasonableness of [the officer's] actions … is a pure question of law.").

Moreover, FRCP 56 contains no heightened standard for summary judgment in deadly force cases and indeed the US Supreme Court has expressly held that §1983 claims are not subject to heightened standards under the federal rules. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit (1993) 507 US 163, 168. As the 3rd Cir. recognized in Lamont v. New Jersey (3rd Cir. 2011) 637 F3d 177, 182, **while courts must carefully scrutinize evidence in deadly force cases, "[t]his is not to say that the summary judgment standard should be applied with extra rigor in deadly-force cases. Rule 56 contains no separate provision governing summary judgment in such cases**." See also Gordon v. United Airlines, Inc. (7th Cir. 2001) 246 F3d 878, 896 (Easterbrook, J., dissenting) ("[Rule 56 prescribes] a universally applicable standard; there is no room for a thumb on the scale against summary judgment in any class of cases.").

Illustrative is Scott v. Harris (2007) 550 US 372, 127 S.Ct. 1769, where the Supreme Court reviewed the district court's denial of summary judgment in an excessive force case. The Harris Court reiterated: "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts. As we have emphasized, '[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts…. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Id. at 380; Reynolds v. County of San Diego (9th Cir. 1996) 84 F3d 1162, 1169-1170 (holding that a party's pointing out a minor inconsistency was insufficient to create a triable issue of material fact).

Moreover, in cases involving deadly force, the search for genuine disputes of material fact becomes even more complicated, especially where non-police officer witnesses are unavailable to provide the decedent's version. Indeed, the Third Circuit has recognized this challenge: "Just as in a run-of-the-mill civil action, the party opposing summary judgment in a deadly-force case must point to evidence—whether direct or circumstantial—that creates a genuine issue of material fact, and may not rely simply on the assertion that a reasonable jury could discredit the opponent's account." Lamont v. New Jersey (3rd Cir. 2011) 637 F3d 177, 181-182.

"Accordingly, to satisfy the mandate from the Supreme Court and the Third Circuit, **Plaintiff may not rely on a general challenge to the credibility of the officers' account. Instead, Plaintiff must** point to contradictions in the testimony of eye witnesses, or between or among the various officers on the scene, or incompatibility of the testimony of the witnesses with the physical or forensic evidence at the scene, or any other direct or circumstantial evidence that raises a genuine dispute of material fact or casts doubt on the veracity of the officers' testimony." Grant v. Winik (ED Pa. 2013) 948 FS2d 480, 491-492.

Scott v. Henrich stated that the court should examine "any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts." Scott v. Henrich (9th Cir. 1994) 39 F3d 912, 915. But, "[t]he fact that an expert disagrees with an officer's actions does not render the officer's actions unreasonable." Reynolds v. County of San Diego (9th Cir. 1996) 84 F3d 1162, 1170. The inquiry is not "whether another reasonable or more reasonable interpretation of events can be constructed ... after the fact." Id. at

1170. Reynolds also held, “The fact that [the expert] disagrees with the steps [taken by the officer] is not enough to create a genuine issue of material fact regarding the reasonableness of [the officer's] conduct.” Id.; Tennessee v. Garner (1985) 471 US 1, 20, 105 S.Ct. 1694 (warning against “inappropriate second-guessing of police officers' split-second decisions”); George v. Morris (9th Cir. 2013) 736 F3d 829, 855.

The 9th Cir.'s special rule for deadly force cases spawns the very sort of “flyspecking” of evidence displayed in the Gonzalez en banc opinion declaring a fact to be a “material” fact that is ultimately not material at all, i.e., the availability of lesser means of force or finding a “discrepancy” in the officer's deposition testimony (estimates of speed and distance).

In reversing summary judgment for the officer, the Gonzalez en banc majority invoked the well-established principle in the 9th Cir. that summary judgment must be granted sparingly in deadly force cases, particularly cases involving use of deadly force where the victim does not survive and the court is left with only an officer's account of what transpired (no witnesses). As noted above, this rule started as an outgrowth of the ordinary principles governing summary judgment, specifically that a court is required to draw all inferences in favor of the opposing party, even if such inferences are based upon circumstantial evidence. However, as Gonzalez illustrates, the principle is now invoked by the 9th Cir. in almost talismanic fashion to justify denial of summary judgment based not upon the need of the jury to resolve disputed issues of fact, but on the notion that it is up to the jury to determine whether given a particular set of facts the use of deadly force was justified, most specifically in light of what Plaintiffs and the en banc majority contend are less intrusive alternatives.

Several circuit cases (see summary below) have echoed the 9th Cir.'s observation that because deadly force cases often involve conflicting facts, with testimony coming only from the officers, that summary judgment motions must be scrutinized carefully and granted “sparingly.” Yet, as the 3rd Cir. held in Lamont v. New Jersey (3rd Cir. 2011) 637 F3d 177, 182, “[t]his is not to say that the summary judgment standard should be applied with extra rigor in deadly-force cases. Rule 56 contains no separate provision governing summary judgment in such cases.” Nor do the other circuit cases ultimately suggest otherwise. It is the 9th Cir., and the 9th Cir. alone that reviews summary judgment motions in deadly force cases through such a narrow prism, which, as the Gonzalez case underscores, serves as a springboard to delegate what the US Supreme Court has held to be a clear question of law-assessment of the reasonable use of force against a given set of relevant facts-to the freewheeling after-the-fact second guessing by a jury. The Gonzalez en banc decision is now setting poor precedent that the 9th Cir. followed in Cruz v. City of Anaheim (9th Cir. 2014) 765 F3d 1076, 1079 ("[decedent] didn't have a gun on him, so why would he have reached for his waistband?"); C.V. by & through Villegas v. City of Anaheim (9th Cir. 2016) 823 F3d 1252, 1256 (Villegas was ordered to put his hands up, and as he was complying, the officers ordered him to drop his [shot]gun; … without providing a warning or sufficient time to comply, or observing Villegas pointing the long gun toward the officers or making any move toward the trigger, Bennallack resorted to deadly force…. [which] was not objectively reasonable…. Our court has rejected summary judgment in cases involving similar degrees of apparent danger, and we must do the same here.").

The question of whether or not an officer's actions were objectively reasonable under the 4th Amendment is a “pure question of law,” not a question of fact reserved for a jury. Scott v. Harris, supra, 550 US at 381 n. 8; Gonzalez v. City of Anaheim (9th Cir. 2014) 747 F3d 789, 801 (J. Trott, Kozinski, Tallman, and Bea, dissenting). The Supreme Court has made clear that, at the summary judgment stage, once a court has determined the relevant set of facts the reasonableness of an officer's actions remains a question of law for the court to decide. Scott v. Harris, supra, 550 U.S. at 381 n. 8. Police officers are not required to face a brandished weapon before they can reasonably ascertain a threat to their safety. Gonzalez, supra, 747 F3d at 800 (“The word ‘threat’ denotes an indication of impending danger or harm. The law does not require an officer who immediately faces physical harm to wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury.”); Pennsylvania v. Mimms (1977) 434 US 106, 110, 98 S.Ct. 330 (“it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties”); Anderson v. Russell (4th Cir. 2001) 247 F3d 125, 131 ("This Circuit has consistently held that an officer does not have to wait until a gun is pointed at the officer before the officer is entitled to take action.").

If the court has, “carefully examine[d] all the evidence in the record ... [and] determined … the officer's story is internally consistent and consistent with other known facts,” Gonzalez, supra, 747 F3d at 794-795, it should rule as a matter of law. "To decide [a] case [one] would have to answer just one simple question: Did the police see [decedent] reach for [a gun]? If they did, they were entitled to shoot." Cruz v. City of Anaheim (9th Cir. 2014)765 F3d 1076, 1079. The court should be mindful that it “must be wary of self-serving accounts by police officers when the only non-police eyewitness is dead.” Long v. City & Cnty. of Honolulu (9th Cir. 2007) 511 F3d 901, 906. But after carefully examining all the evidence in the record, if the Court finds nothing that would tend to discredit the officers' testimony, it can rule as a matter of law when the officers' testimony is “internally consistent and consistent with other known facts.” Villegas v. City of Anaheim (CD CA 2014) 998 FS2d 903, 908, fn. 7, reversed in C.V. by & through Villegas v. City of Anaheim (9th Cir. 2106) 823 F3d 1252, 1253 ("Because triable issues of fact remain … reverse in part, and remand.").

In Flythe v. District of Columbia (DC Cir. 2015) 791 F.3d 13, the D.C. Circuit held that an officer who shot and killed a suspect based on contradicted assertions that the suspect charged the officer with a knife was not entitled to summary judgment. Citing the egregious circumstances of the incident in Flythe, the D.C. Circuit relied in part on the fact that “every circuit to have confronted [the] question” of “where the police officer killed the only other witness to the incident” has found a need to engage in “a fairly critical assessment of the forensic evidence ... to decide whether the officer's testimony could reasonably be rejected at a trial.” Flythe, 791 F3d at 19 (quoting Plakas v. Drinski (7th Cir. 1994) 19 F3d 1143, 1147). The D.C. Circuit found multiple contradictory witness reports, as well as evidence that the officer who fired the fatal shots tested positive for meth just “four days after the killing” and that the police dept. “fired him after concluding that he lied about using illegal methamphetamines,” sufficient to raise material factual disputes about the reliability of the officer's testimony such that the case should proceed to a jury. Id. at 21. But given the unique factual scenario in Flythe, the D.C. Circuit's holding in that case is of limited relevance to the issue.

Many times officers have to make a split-second decision whether a suspect is attempting to shoot them and their fellow police officers. When an officer makes the decision that the suspect poses an immediate threat so he shoots to protect himself and his fellow officers the court should not judge the reasonableness of the officer's actions with the 20/20 vision of hindsight. "[The] Officer … did what he reasonably believed he had to do at the time. The Fourth Amendment requires nothing more." Villegas v. City of Anaheim, supra, 998 FS2d at 908, reversed in C.V. by & through Villegas v. City of Anaheim (9th Cir. 2106) 823 F3d 1252.

Judge Trott dissented in Gonzalez: "Instead of cooperating with the police, Gonzalez stomped on his van's accelerator and fled from a traffic stop, igniting a dangerous chase. What makes this chase unusual is that Officer Wyatt was trapped in Gonzalez's van. After yelling at Gonzalez to stop and unsuccessfully trying to disable the vehicle, Officer Wyatt ended Gonzalez's violent attempt to escape by shooting him. As much as one might have wished for a different outcome, I conclude that Officer Wyatt's act in self-defense was objectively reasonable. Thus, I would affirm the district court." Gonzalez, supra 747 F3d at 798. But Chief Judge Kozinski's dissent in Gonzalez said it all: "It's undisputed that, at the time he fired the fatal shot, [the] Officer … was trapped inside a moving vehicle driven by a man who had resisted the verbal commands, physical restraints, lethal threats and bodily force of two uniformed officers. How fast the van was moving and how far it had traveled are beside the point. What matters is that [the] Officer … was prisoner in a vehicle controlled by someone who had already committed several dangerous felonies. No sane officer in [his] situation would have acted any differently, and no reasonable jury will hold him liable." Gonzalez, supra, 747 F3d at 814.

II. 9th Cir.'s Requirement That The Availability Of Less Intrusive Levels Of Force Must Be Factored Into The *Graham* Inquiry Effectively Precludes Summary Judgment.

The Gonzalez en banc majority held that it is ultimately up to a jury to determine whether the purported availability of less intrusive means to halt a suspect rendered the officer's use of force unreasonable. Gonzalez, 747 F3d at 794, citing Smith v. City of Hemet (9th Cir. 2005) 394 F3d 689, 703 (en banc). As Judge Trott noted, the majority, consistent with Ninth Circuit precedent, pays lip service to this Court's repeated admonition that the **Fourth Amendment does not require officers to use the least intrusive means to accomplish a particular task, so long as their actions are ultimately reasonable**. Gonzalez, supra, 747 F3d at 811-812. However, by holding that the availability of less intrusive means must be considered in evaluating whether the underlying use of force was reasonable, the Ninth Circuit has effectively nullified that principle and particularly in the context of use of deadly force, virtually guaranteeing that every case must go to a jury.

The Ninth Circuit's rule that the availability of less intrusive alternatives must be included as one of the *Graham* factors in evaluating the use of force, stems from Judge Reinhardt's opinion in Chew v. Gates (9th Cir. 1994) 27 F.3d 1432 where he seized upon the US Supreme Court's statement in *Graham* that use of force must be evaluated under a totality of circumstances, and that the specific *Graham* factors were not exclusive. Noting that other circuits had included other factors in the *Graham* analysis, he opined that it was proper to include the availability of less intrusive means of force in determining whether the officer's use of a particular type of force was reasonable under the circumstances. Id. at 1440, n.5.

The Ninth Circuit has embraced what is effectively a tautology concerning the availability of less intrusive levels of force in evaluating use of force under the Fourth Amendment. Namely, that while the 4th Amendment does not require an officer to use less intrusive alternatives, nonetheless the availability of lesser levels of force must be evaluated in determining whether the officer acted reasonably. Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 701 (en banc) ("In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider"); Glenn v. Washington County (9th Cir. 2011) 673 F3d 864, 876 ("Officers 'need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.' … However, 'police are 'required to consider [w]hat other tactics if any were available,'' and if there were 'clear, reasonable and less intrusive alternatives' to the force employed, that 'militate[s] against finding [the] use of force reasonable'"); Bryan v. MacPherson (9th Cir. 2010) 630 F3d 805, 831 n.15 ("We do not challenge the settled principle that police officers need not employ the 'least intrusive' degree of force possible. We merely recognize the equally settled principle that officers must *consider* less intrusive methods of affecting the arrest and that the presence of feasible alternatives is a *factor* to include in our analysis").

The mischief lies in the fact that it makes no sense to state that an officer is not required to use the less intrusive means of force, while at the same time evaluating the reasonableness of the force employed in light of the availability of less intrusive alternatives. Requiring consideration of less intrusive means necessarily implies that such lesser means should have been employed.

The 7th and 8th Circuits have rejected consideration of less intrusive means in evaluating the reasonableness of force under the 4th Amendment. In Plakas v. Drinski (7th Cir. 1994) 19 F3d 1143, the court noted: "The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable." Id. at 1149 (citing Illinois v. Lafayette (1983) 462 US 640, 647; US v. Martinez-Fuerte (1976) 428 US 543, 556-557 n.12. It rejected the contention that prior case law suggested that the availability of less intrusive levels of force had to be factored into the reasonableness inquiry: "[D]id we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives? The answer is no." 19 F3d at 1149.

Judge Trott in his Gonzalez dissent quoted from Plakas: "There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first. Plakas, supra, 19 F3d at 1148." Gonzalez v. City of Anaheim, supra, 747 F3d at 812. Those cases include Judge Kozinski's opinion in Scott v. Henrich: "[A]s the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." Scott v. Henrich (9th Cir. 1994) 39 F3d 912, 915.

In Schulz v. Long (8th Cir. 1995) 44 F3d 643, the 8th Circuit similarly held that less intrusive alternatives were irrelevant to the use of force inquiry: "The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other

alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry." Id. at 649.

"Accepting [plaintiff]'s argument would require us to undertake the type of 'Monday morning quarterbacking' that is prohibited under the Fourth Amendment. See Schulz v. Long, 44 F.3d 643, 649 (8th Cir.1995). The Fourth Amendment does not require officers to use the least intrusive or less intrusive means to effectuate a [seizure] but instead permits a range of objectively reasonable conduct. See id. If the officers' conduct falls within that permissible range of reasonableness, it is not our role to hinder or interfere with the difficult tasks and emotionally-charged situations that officers face in their daily job." Shade v. City of Farmington (8th Cir. 2002) 309 F3d 1054, 1061.

"[Plaintiff]s also cite Hopkins, supra, 958 F.2d 881, for the proposition that the failure to use less forceful alternatives might make a police shooting unreasonable. In finding the police officer's second shooting unreasonable, the Hopkins court did say the officer should have considered alternative means before shooting a man who was still some distance away and had already been wounded by gunfire. (Id. at p. 887.) That language from Hopkins has been rejected as requiring officers to use less deadly alternatives even when deadly force is reasonable and justified. (Schulz v. Long (8th Cir.1995) 44 F.3d 643, 649, fn. 5.) Moreover, it has been implicitly overruled by the Ninth Circuit in Scott, supra, 39 F.3d at page 915." Martinez v. County of Los Angeles (1996) 47 CA4th 334, 348, fn. 6, 54 CR2d 772, 779, fn. 6

The Ninth Circuit's rule has a particularly pernicious impact in deadly force cases because in such cases there will virtually always be some lesser type of force available to the officer. The Gonzalez case is a prime example, with the en banc majority speculating that a jury could somehow properly find that within the close quarters of the front seat of the fleeing vehicle the officer could have, and in the ultimate second guess, should have, possibly drawn and swung his baton, pepper sprayed Gonzalez (notwithstanding his own close proximity to the spray), or drawn his Taser and contemplated whether pressing it against Gonzalez in touch mode might subdue him, or if he could pull back far enough to deploy the Taser in dart mode. Even more preposterously, a jury should be allowed to speculate whether the officer should have tried to merely wound Gonzalez by shooting him in the leg, arm or foot, and hope that stopped the struggle for control of the vehicle. Gonzalez, supra, 747 F3d at 797.

Plaintiffs will claim a court abuses its discretion by not instructing juries to consider the potential availability of other methods of subduing him as factor 6 in **9th Cir. Jury Instruction 9.22**: "[6. The availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff]." As the notes to Instruction 9.22 explain, however, “it is not error for a trial court to decline to instruct explicitly on the availability of ‘alternative courses of action’” if the whole of the jury instruction fairly and accurately covers the legal issues presented. Brewer v. City of Napa (9th Cir. 2000) 210 F3d 1093, 1097. The court usually instructs the jury to “consider all of the circumstances known to the [officers] on the scene,” in assessing what was “objectively reasonable.” This “general reasonableness/‘totality of the circumstances' instruction[ ]” is appropriate “in an excessive force case, despite the plaintiff's request for more detailed

instructions addressing the specific factors to be considered in the reasonableness calculus." Id. at 1097; Fikes v. Cleghorn (9th Cir. 1995) 47 F3d 1011, 1013-1014. Nor does the court's decision to include 5 specific considerations in 9.22 adapted from Graham v. Connor (1989) 490 US 386, 396-397, 109 S.Ct. 1865, render the instruction infirm. Plaintiff's argument that the jury likely limited itself to those factors founders on the principle that "juries are presumed to follow the court's instructions." Brown v. Ornoski (9th Cir. 2007) 503 F3d 1006, 1018. Not only does the instruction reference all the circumstances, but the list of the 5 factors is prefaced with the word "including." Miramontes v. Klevos (9th Cir. 2013) 517 F.App'x 574, 574-575.

"[P]laintiff challenges an instruction given that stated officers are not required to 'use the least intrusive force' but only that 'reasonable under the totality of the circumstances. The appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them.' He claims it was an incorrect statement of the law because the possibility lesser force would be effective is a factor that should be considered. It is well established that 'the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. [Citations.]' (Scott v. Henrich (9th Cir.1994) 39 F.3d 912, 915; see Martinez v. County of Los Angeles (1996) 47 Cal.App.4th 334, 348 & fn. 6.) Smith v. City of Hemet (9th Cir.2005) 394 F.3d 689, on which plaintiff relies, states only that alternative force "may be a factor to consider." (Id. at p. 701.) The language of the jury instruction given tracks the rule of law." Momeni v. County of Orange (4th Dist., Div. 3, 2011) 2011 WL 1620967, at *7.

Thus, the Ninth Circuit's requirement that the availability of less intrusive means of force must be factored into the *Graham* inquiry, is contrary to the decisions of the US Supreme Court, conflicts with the decisions of the 7th and 8th Circuits and improperly forecloses summary judgment in deadly force cases.

The Ninth Circuit acknowledges that under US Supreme Court's decisions officers need not employ the least intrusive means when employing force under the 4th Amendment, so long as the force used is reasonable in light of the facts of the particular case. However, while paying lip service to this principle, the Ninth Circuit has smuggled in a less intrusive means test via Judge Reinhardt's opinion in Chew v. Gates (9th Cir. 1994) 27 F3d 1432, 1440 n.5, holding that while officers need not employ the least intrusive means, nonetheless the existence of less intrusive alternatives must be considered by a jury in determining whether the force was reasonable under Graham v. Connor (1989) 490 US 386.

The net result is a tautology - officers are not required to use the least intrusive means to affect a seizure, yet a jury is free to second-guess their decision-making based upon the existence of less intrusive means. As noted above, consideration of less intrusive means necessarily carries with it the implication that such lesser means should be used.

The Gonzalez case is a prime example of the mischief wrought by the Ninth Circuit's incorporation of a less intrusive means standard into the Graham factors. The en banc majority holds that it is for a jury, and not a court, to determine whether or not the officer could reasonably use deadly force because a jury is entitled to evaluate whether the officer could have used less intrusive alternatives - everything from attempting to pull his baton, using pepper

spray, deploying his taser, or chancing a shot at Gonzalez's hand, leg, or foot and "hope for the best." Gonzalez, supra, 747 F3d at 797.

No other circuit follows the Ninth Circuit's practice of injecting a less intrusive means test into the Graham factors. In Plakas v. Drinski (7th Cir. 1994) 19 F3d 1143, the 7th Circuit expressly rejecting the proposition that there was "a constitutional duty to use (or at least consider) the use of all alternatives…." 19 F3d at 1149.

In Schulz v. Long (8th Cir. 1995) 44 F3d 643, the 8th Circuit also expressly rejected the proposition that the availability of less intrusive alternatives was relevant to the use of force inquiry, observing that the "inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available" and that "[a]lternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent)," are "simply not relevant to the reasonableness inquiry." 44 F3d at 649.

In the passage citing the Ninth Circuit's decision in Hopkins v. Andaya (9th Cir. 1992) 958 F2d 881, the 8th Circuit made it clear that it rejected the proposition that a court should consider the availability of less intrusive means in evaluating use of force under Graham.

Hopkins involved 2 separate shooting incidents involving a single officer and a single suspect. The 2nd shooting occurred after the suspect had been seriously wounded, taken to the station, and then attempted to flee. 958 F2d at 886-887. The officer shot the suspect several more times, although it was undisputed that he was unarmed, not attacking the officer, and already seriously wounded. The Ninth Circuit found a genuine issue of fact on whether the force was reasonable given the absence of any evidence that the suspect posed a danger to the officer or to the public. Id. at 887. In Schulz, the 8th Circuit had no quarrel with the Ninth Circuit's resolution of Hopkins on the merits, but expressly declined to embrace the less intrusive means test as part of the Graham inquiry: "At the time of the second shooting, it was far from clear that Andaya reasonably feared for his life." Id. Thus, given the court's focus on the reasonableness of the seizure according to the circumstances existing at the time of the seizure, we read Hopkins to be consistent with our holding in this case. To the extent it is inconsistent with our law, we decline to follow it." 44 F3d at 649 n.5.

Thus, the 9th Cir's injection of a less intrusive alternative inquiry into the Graham factors can't be reconciled with the decisions of the US Supreme Court, nor the decisions of the 7th & 8th Circuits and the California court of appeal.

The 9th Cir. en banc majority also listed as another factor: A jury can also consider whether an officer failed to give a warning before he shoots a suspect. The absence of a warning does not necessarily mean that an officer's use of deadly force was unreasonable. Scott, 550 US at 383. But a jury may find, however, that a warning was practicable and the failure to give one might weigh against reasonableness, citing Deorle v. Rutherford (9th Cir. 2001) 272 F3d 1272, 1283-1284. Gonzalez, 747 F3d at 797.

Lastly, in "Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." Scott v. Henrich (9th Cir. 1994)

39 F3d 912, 914-915; O'Bert ex rel. Estate of O'Bert v. Vargo (2nd Cir. 2003) 331 F3d 29, 37. In other words, if an officer's use of force was not objectively reasonable and thus constitutes a 4th Amendment violation, a "reasonable officer" in his position would necessarily conclude that the use of force was unlawful, and thus qualified immunity is not available. If, on the other hand, the use of force was reasonable and thus did not violate the 4th Amendment, there is no need for qualified immunity. "[T]he summary judgment threshold issue under either approach—which we call 'prong one' in judicial short form—is the same, i.e., whether … the facts alleged show the officer's conduct violated a constitutional right? …. If not, the question of immunity becomes moot…. In some cases … the relevant facts do not make out a constitutional violation at all." Gonzalez, 747 F3d at 798. More recently the 9th Cir. has held: "'We do not require a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate." Id.; see also Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (explaining that the qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition" (quoting Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001))." C.V. by & through Villegas v. City of Anaheim (9th Cir. 2016) 823 F3d 1252, 1257.

Summary of Other Circuit Cases:

Second Circuit:

1. "[G]iven the difficult problem posed by a suit for the use of deadly force, in which 'the witness most likely to contradict [the police officer's] story—the person shot dead—is unable to testify[,]' .... the court must … consider 'circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' [citing Scott v. Henrich, 39 F3d at 915]; see, e.g., Maravilla v. United States, 60 F.3d 1230, 1233–34 (7th Cir.1995) (where 'the witness most likely to contradict the officers' testimony is dead,' the court should 'examine all the evidence to determine whether the officers' story is consistent with other known facts'); Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir.) ('in deadly force cases[,] ... where the officer defendant is the only witness left alive to testify[,] .... a court must undertake a fairly critical assessment of,' inter alia, 'the officer's original reports or statements ... to decide whether the officer's testimony could reasonably be rejected at a trial'), cert. denied, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 34 (1994)." O'Bert ex rel. Estate of O'Bert v. Vargo (2nd Cir. 2003) 331 F3d 29, 37.

Third Circuit:

2. "Because 'the victim of deadly force is unable to testify,' Abraham v. Raso, 183 F.3d 279, 294 (3d Cir.1999), we have recognized that a court ruling on summary judgment in a deadly-force case 'should be cautious ... to 'ensure that the officer[s are] not taking advantage of the fact that the witness most likely to contradict [their] story—the person shot dead—is unable to testify,'' id…. Thus, a court should avoid simply accepting ''what may be a self-serving account by the officer[s]. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer[s'] story, and consider whether this evidence could convince a rational fact finder that the officer[s] acted unreasonably.'' Id…. **¶This is not to say that the summary judgment standard should be applied with extra rigor in deadly-force cases**. Rule 56

contains no separate provision governing summary judgment in such cases…. Just as in a run-of-the-mill civil action, the party opposing summary judgment in a deadly-force case must point to evidence—whether direct or circumstantial—that creates a genuine issue of material fact, 'and may not rely simply on the assertion that a reasonable jury could discredit the opponent[s'] account.' Estate of Smith v. Marasco, 318 F.3d 497, 514 (3d Cir.2003); see Thompson v. Hubbard, 257 F.3d 896, 899–900 (8th Cir.2001); Elliott v. Leavitt, 99 F.3d 640, 644 (4th Cir.1996); Williams v. Borough of W. Chester, 891 F.2d 458, 460–61 (3d Cir.1989). Our conclusion on this score is reinforced by decisions refusing to ratchet up the summary judgment standard for other types of cases. See Anderson, 477 U.S. at 256–57, 106 S.Ct. 2505 (defamation cases requiring a showing of malice); … see also Gordon v. United Airlines, Inc., 246 F.3d 878, 896 (7th Cir.2001) (Easterbrook, J., dissenting) ('[Rule 56 prescribes] a universally applicable standard; there is no room for a thumb on the scale against summary judgment in any class of cases.')." Lamont v. New Jersey (3rd Cir. 2011) 637 F3d 177, 181-182.

3. "[S]ince the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.' Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994). '[T]he court may not simply accept what may be a self-serving account by the officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably.' Id. See also Hopkins v. Andaya, 958 F.2d 881, 885 (9th Cir.1992)." Abraham v. Raso (3rd Cir. 1999) 183 F3d 279, 294.

Fourth Circuit:

4. Plaintiff, "of course, has no way to directly contradict the officers' statements. Because this is a deadly force case, 'the witness most likely to contradict [the officers'] story—the person shot dead—is unable to testify.' Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994). ¶In such circumstances, 'a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.' Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir.1994). When there is contrary evidence, a 'court may not simply accept what may be a self-serving account by the police officer.' Scott, 39 F.3d at 915. Cf. Elliott v. Leavitt, 99 F.3d 640, 644–45 (4th Cir.1996) (noting officers' account in lethal force case was consistent with the physical evidence). Indeed, several courts have vacated the entry of summary judgment when the physical evidence undermined the officers' assertions that they feared for their safety before deploying lethal force, even when there was no other witness to the shooting. See, e.g., Abraham v. Raso, 183 F.3d 279, 293–94 (3d Cir.1999) (ballistic and videotape evidence contradicted security guards' assertions); Hopkins v. Andaya, 958 F.2d 881, 885 (9th Cir.1992) ('[T]he medical evidence in the record undermines [the officer]'s story in numerous ways.'); Ting v. United States, 927 F.2d 1504, 1510 (9th Cir.1991) (ballistic evidence undermined claim that decedent was advancing threateningly toward officer)." Ingle ex rel. Estate of Ingle v. Yelton (4th Cir. 2006) 439 F3d 191, 195-196.

Fifth Circuit:

5. "[T]he evidence … comes for the most part, if not exclusively, from an interested witness—[the officer]. Cf. Abraham v. Raso, 183 F.3d 279, 287 (3d Cir.1999) ('Cases that turn crucially on the credibility of witnesses' testimony in particular should *not* be resolved on summary judgment.')…. ¶Plaintiffs do not dispute [most of the] material fact issues…. [But] an opinion by the Seventh Circuit, Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir.) (two officers witnessed use of deadly force), cert. denied, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 34 (1994) [holds]: 'The award of summary judgment to the defense in deadly force cases may be made only with *particular care where the officer defendant is the only witness left alive to testify*. In any self-defense case, a defendant knows that *the only person likely to contradict him or her is beyond reach*. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.'" Bazan ex rel. Bazan v. Hidalgo Cty. (5th Cir. 2001) 246 F3d 481, 492.

Sixth Circuit:

6. "Though we are hesitant to doubt [the] Officer['s] testimony …, 'the court may not simply accept what may be a self-serving account by the police officer. It must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story....' Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994)…. At this stage, it is not our place to resolve these factual disputes." Jefferson v. Lewis (6th Cir. 2010) 594 F3d 454, 462.

Seventh Circuit:

7. "[W]e are mindful of the practical problems a plaintiff alleging deadly force may face in resisting summary judgment. As in the case before us the witness most likely to contradict the officers' testimony is dead. In these situations we think it wise to examine all the evidence to determine whether the officers' story is consistent with other known facts. See Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994), cert. denied, 515 U.S. 1159, 115 S.Ct. 2612, 132 L.Ed.2d 855 (1995). Here several … officers positioned on the ground testified that they saw and heard [suspect] firing a gun…. What's more, the summary judgment record also contains the report of a detective who stated that bullet holes were found in a house across from the [plaintiff's] residence in the line of fire … which [suspect] fired his gun. This additional evidence corroborates the defendant officers' story that [suspect] was actually firing a weapon … and posed a threat to others, and therefore convinces us that this case was properly resolved by summary judgment." Maravilla v. United States, 60 F.3d 1230, 1233-34 (7th Cir. 1995).

8. "The award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify. In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial. This guiding principle does not fit well here.

There is a witness who corroborates the defendant officer's version. And there is no reason to discount the testimony of [the officer]." Plakas v. Drinski (7th Cir. 1994) 19 F3d 1143, 1147.

Eight Circuit:

9. "Deadly force cases pose a unique evidentiary problem because the police officer defendants and their colleagues are often the only surviving eyewitnesses, while the person most likely to contradict their story is dead. See Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994). This is just such a case." Ludwig v. Anderson (8th Cir. 1995) 54 F3d 465, 470, fn. 3.

Tenth Circuit:

10. "'[B]ased on the physical evidence, a jury could reasonably decide to reject [the Officer's] testimony.' Abraham v. Raso, 183 F.3d 279, 294 (3d Cir.1999) (holding fact issue precluded summary judgment on excessive force claim against officer). Indeed, '[c]onsidering the physical evidence together with the inconsistencies in the officer's testimony, a jury will have to make credibility judgments, and credibility determinations should not be made on summary judgment.' Id. Moreover, 'since the victim of deadly force is unable to testify, courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'' Id.… As the Ninth Circuit noted in Scott, 39 F.3d at 915, 'the court may not simply accept what may be a self-serving account by the police officer.' Rather, '[i]t must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' Id." Pauly v. White (10th Cir. 2016) 2016 WL 502830, at *16.

DC Circuit:

11. "[H]istory is usually written by those who survive to tell the tale, and in this case the only survivor is [the] Officer…. [Plaintiff] is dead and, although several witnesses observed the two men face each other, none can testify as to exactly what happened between them. Under these circumstances, where 'the witness most likely to contradict [the officer's] story—the person [he] shot dead—is unable to testify,' courts, as the Ninth Circuit has explained, 'may not simply accept what may be a self-serving account by the police officer.' Scott v. Henrich, 39 F.3d 912, 915 (9th Cir.1994). Instead, courts must 'carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts.' Id. Courts 'must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' Id.

"Every circuit to have confronted this situation—where the police officer killed the only other witness to the incident—follows this approach. For example, the Seventh Circuit has explained that '[t]he award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify.' Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir.1994). Accordingly, 'a court must undertake a fairly critical assessment of the forensic evidence ... to decide whether the officer's testimony could reasonably

be rejected at a trial.' Id.; see also Jefferson v. Lewis, 594 F.3d 454, 462 (6th Cir.2010); Ingle ex rel. Estate of Ingle v. Yelton, 439 F.3d 191, 195 (4th Cir.2006); O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29, 37 (2d Cir.2003); Abraham v. Raso, 183 F.3d 279, 294 (3d Cir.1999); Ludwig v. Anderson, 54 F.3d 465, 470 n. 3 (8th Cir.1995); Hegarty v. Somerset County, 53 F.3d 1367, 1376 n. 6 (1st Cir.1995)." Flythe v. D.C. (DC Cir. 2015) 791 F3d 13, 19.

*[Tim Coates of Greines, Martin, Stein & Richland LLP, co-authored the City's Cert. Petition and Reply in Wyatt v. Gonzalez, 135 S.Ct. 676, on which this paper is based. Cert. was denied].