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POLICE SHOOTINGS UNDER THE FOURTH AMENDMENT

Wayne C. Beyer\*

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## I. INTRODUCTION

The Fourth Amendment of the Constitution protects “[t]he right of the people to be secure in their persons ... against unreasonable ... seizures.”<sup>1</sup> An intentional shooting of a free citizen is a “seizure” governed by the objective reasonableness standard of the Fourth Amendment. The Fourth Amendment permits police to use deadly force when there is an imminent threat of serious bodily harm or death to themselves or others.

Although the governing standard is well established in a general way, its application to particular facts and circumstances may not be clear to officers on the street. Unless a reasonable police officer would have understood that his/her decision to shoot was clearly constitutionally prohibited, the officer may be entitled to qualified immunity, a decision that the court can make on summary judgment before trial. Discussed first are shootings that are not subject to Fourth Amendment review: shots that do not seize a subject because they miss or are accidental; and shootings of those already in confinement, who are protected by the higher “intent to harm” and “malicious and sadistic” standards of the Due Process Clause<sup>2</sup> and the Eighth Amendment.<sup>3</sup> Discussed next are the most common fact patterns involving police shootings: a subject armed with a gun, armed with an edged weapon (e.g., knife), using a motor vehicle as a weapon, apparently reaching for a weapon, engaged in a violent struggle, or fleeing.

Discussed last are recurring Fourth Amendment issues, namely: whether pointing without shooting is excessive force; when an off-duty officer is operating under the strictures of the Fourth Amendment; if an officer can be relieved from the requirement that he/she give a warning before shooting; when firing multiple times constitutes excessive force; and whether written police policies and procedures, the existence of less-than-lethal alternatives, and events leading up to the shooting are pertinent to the Fourth Amendment reasonableness inquiry. The issue of when Fourth Amendment scrutiny attaches in an intentional, self-defense police shooting case is an important and unsettled area of federal law.

These questions help frame the discussion:

- (1) Was the Fourth Amendment involved? For a shooting to be a seizure, it must have seized its intended target, a subject police are trying to arrest or detain.

<sup>1</sup> U.S. CONST. amend. IV. The civil enforcement mechanism for state actors’ violations of the Fourth Amendment is 42 U.S.C. § 1983, which reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

To state a cause of action under § 1983, a plaintiff must allege that a person deprived him/her of a federally protected right, and that the person who caused the deprivation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

<sup>2</sup> U.S. CONST. amend. XIV, § 1 (“... nor shall any State deprive any person of life, liberty, or property, without due process of law”).

<sup>3</sup> U.S. CONST. amend. XVIII (“... nor cruel and unusual punishments inflicted”).

Accidental shootings, the shooting of unintended third parties, and the shooting of escapees from pretrial detention or convicted prisoners do not implicate the Fourth Amendment.

- (2) Was the shooting objectively reasonable? A police officer may use deadly force (i.e., shoot) if he/she reasonably fears imminent serious bodily harm or death. Serious bodily harm includes severe tissue damage, broken bones, major disfigurement, or permanent paralysis or impairment.
- (3) Did the officer stop shooting when the threat was over? Whether or not the force was excessive does not depend on the number of shots fired, but whether they were fired while the threat was imminent.
- (4) Did the defense raise qualified immunity for individual officers? Even an officer whose conduct violated the “objective reasonableness” standard of the Fourth Amendment may avail himself/herself of the defense. Unless the law clearly established that deadly force could not be used under the same or similar circumstances, the shooter may be entitled to summary judgment. Many of the cases discuss qualified immunity before trial on summary judgment, but it should be noted that the defense remains viable through trial.
- (5) Did the plaintiff rely on state law and police department directives to show the unreasonableness of the shooting? These can be more restrictive than the Constitution. A violation of a regulation may bear on common law negligence and subject the officer to discipline, but it does not establish a constitutional violation.
- (6) Did the plaintiff’s theory depend on what might have been done differently prior to the shooting to prevent it? Case law emphasizes the moment of the shooting itself. At the point the threat is imminent officers are justified in shooting. Officers do not have to disengage or retreat. They, at least, may be entitled to judgment in their favor.
- (7) Even though the shooting officer was entitled to qualified immunity, there may still have been an underlying Fourth Amendment violation. Did the plaintiff raise mistakes in planning or poor direction in the field as a basis for holding supervisors liable for the incident? Something more than mere negligence, “deliberate indifference” or more, is required to establish supervisory liability.
- (8) Did the plaintiff seek to impose liability on the municipality?<sup>4</sup> Most often the municipal claim in a shooting case will be premised on inadequate training. If the municipality was aware of the risk that the type of shooting at issue was reasonably likely to occur and provided training in preparation for it, the plaintiff probably could not establish the requisite “deliberate indifference.”<sup>5</sup> Police departments may require firearms training that includes simulated police-citizen deadly force (“shoot/don’t shoot”) scenarios.

<sup>4</sup> *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978). To hold the municipality liable, the plaintiff must show that a municipal policy or custom caused the constitutional violation. *Id.* at 694.

<sup>5</sup> *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 407 (1997) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). To establish fault for inadequate training (or recruitment, supervision, or discipline), the plaintiff must prove that municipal policymakers engaged in a policy of consciously disregarding known risks that police officers would violate the rights of citizens with whom they had contact. *Harris*, 489 U.S. at 388.

### 1. Supreme Court Standards

As the following discussion illustrates, a shooting is a “seizure” subject to the reasonableness standard of the Fourth Amendment. To justify the use of deadly force, there must be an imminent threat of serious bodily harm or death to the shooting officer or others. If the shooting is objectively reasonable, the Fourth Amendment is not violated. Further, individual police officers may invoke the defense of qualified immunity if, under the fact-specific setting of the incident, the shooting did not violate clearly established law.

#### A. Seizure

The Supreme Court has defined “seizure” under the Fourth Amendment. A “seizure” triggering the Fourth Amendment’s protections occurs when government actors have, “by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.”<sup>6</sup> In *United States v. Mendenhall*,<sup>7</sup> the Court stated: “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>8</sup> In *Brower v. County of Inyo*,<sup>9</sup> the Court said a seizure occurs “only when there is a governmental termination of freedom of movement *through means intentionally applied*.”<sup>10</sup> The Court subsequently held that “[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.”<sup>11</sup>

#### B. Objectively Reasonable Force

In *Tennessee v. Garner*,<sup>12</sup> the Court articulated the Fourth Amendment test for the use of deadly force. A youth was shot to prevent his escape from the scene of a burglary, even though he did not appear to be armed.<sup>13</sup> The Court held that fleeing felons could not be shot unless they presented an imminent threat.<sup>14</sup> The Court noted that “[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”<sup>15</sup> The Court also noted, however that

[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious

<sup>6</sup> *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

<sup>7</sup> 446 U.S. 544 (1980).

<sup>8</sup> *Id.* at 554.

<sup>9</sup> 489 U.S. 593 (1989).

<sup>10</sup> *Id.* at 597 (emphasis in original).

<sup>11</sup> *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis in original).

<sup>12</sup> 471 U.S. 1 (1985).

<sup>13</sup> *Id.* at 3-4.

<sup>14</sup> *See id.* at 11.

<sup>15</sup> *Id.* at 7.

physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>16</sup>

Subsequently, in *Graham v. Connor*,<sup>17</sup> the Court held that excessive force in the course of arrest claims are governed by an objective reasonableness standard under the Fourth Amendment.<sup>18</sup> During an investigative stop, the plaintiff allegedly was tightly handcuffed, shoved face first against the hood of a car, and thrown head first into a police car.<sup>19</sup>

[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard . . . .

Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests” at stake. . . . [T]he right to make an arrest or investigatory stop carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” however, its proper application requires careful attention to the facts and circumstances of each particular case including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he or she is actively resisting arrest or attempting to evade arrest by flight.

The “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. . . . “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment. 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.<sup>20</sup>

### C. Qualified Immunity

Officers whose conduct violates the objective reasonableness requirement of the Fourth Amendment may nevertheless be relieved from personal liability under the doctrine of qualified immunity. Under the classic statement of the defense, “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their

<sup>16</sup> *Id.* at 11-12.

<sup>17</sup> 490 U.S. 386 (1989).

<sup>18</sup> *Id.* at 392.

<sup>19</sup> *Id.* at 389.

<sup>20</sup> *Id.* at 395-97 (citations omitted).

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>21</sup>

In *Malley v. Briggs*,<sup>22</sup> a state police officer whose request for warrants allegedly caused unconstitutional arrests was granted qualified immunity. The defense was held to protect

all but the plainly incompetent or those who knowingly violate the law. . . . Defendants will not be immune if, on an objective basis, it is obvious that *no* reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.<sup>23</sup>

*Anderson v. Creighton*<sup>24</sup> involved the warrantless search of the plaintiffs’ home for a bank robber. The Court stated

that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.<sup>25</sup>

The pertinent question is not whether the officer should have believed his or her conduct to be lawful, but whether the officer *could* have believed it to be.<sup>26</sup> “The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer *could* have believed [the defendant’s] warrantless search to be lawful, in the light of clearly established law and the information the searching officers possessed.”<sup>27</sup> The dissent in *Anderson* criticized the Court for fashioning this “double standard” for Fourth Amendment analysis, one for merits consideration and the other for qualified immunity.<sup>28</sup> In sum, in the Fourth Amendment areas that the Supreme Court has previously addressed, the Court indicated that, notwithstanding a constitutional violation, an individual police officer could be entitled to qualified immunity.<sup>29</sup>

*Saucier v. Katz*<sup>30</sup> specifically extended the qualified immunity defense to Fourth Amendment cases where the officer used objectively excessive force. The plaintiff was an animal rights protester who attended the Vice President’s speech.<sup>31</sup> As the Vice President began

<sup>21</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (involving a *Bivens* action following *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (allowing an action for damages as a remedy for a constitutional violation committed by federal agents)).

<sup>22</sup> 475 U.S. 335 (1986).

<sup>23</sup> *Id.* at 341 (emphasis added).

<sup>24</sup> 483 U.S. 635 (1987) (allowing for a *Bivens* action).

<sup>25</sup> *Id.* at 641.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 641 (emphasis added); *see also* *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (“Secret Service Agents . . . are entitled to immunity if a reasonable officer *could* have believed that probable cause existed to arrest [plaintiff]”) (emphasis added).

<sup>28</sup> *Anderson*, 483 U.S. at 659 (Stevens, J., dissenting).

<sup>29</sup> *Id.* at 638.

<sup>30</sup> 533 U.S. 194 (2001).

<sup>31</sup> *Id.* at 197.

speaking, the protester unfolded a banner he had concealed under his jacket, walked toward a fence that separated the public seating area from the speaker's platform, and began to put the banner on the other side of the fence.<sup>32</sup> Military police officers intercepted the protester, grabbed him from behind, took the banner, and with one officer on each arm half-walked, half-dragged him out of the area.<sup>33</sup> He claimed the officers then shoved or threw him inside a military van, where he fell to the floor.<sup>34</sup> He was uninjured.<sup>35</sup>

The Court found the defendant military police officer was entitled to qualified immunity.<sup>36</sup> The Court harmonized *Graham v. Connor*<sup>37</sup> (which established the general rule that excessive force violates the objective reasonableness standard of the Fourth Amendment) with *Anderson v. Creighton*<sup>38</sup> (which required that the right be clearly established with enough factual specificity for a reasonable officer to know whether his conduct violated that right).<sup>39</sup> The question of whether an officer is entitled to qualified immunity is distinct from whether he used unreasonable force.<sup>40</sup> The Court therefore described two separate inquiries. First, "[t]aken in the light most favorable to the party asserting the injury [i.e., the plaintiff], do the facts alleged show the officer's conduct violated a constitutional right?"<sup>41</sup> If on the plaintiff's facts there was no constitutional violation, the inquiry stops, and the defendant is entitled to judgment.<sup>42</sup>

On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry ... must be undertaken in light of the specific context of the case, not as a broad general proposition....

... The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. . . .

... If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.<sup>43</sup>

The Court first assumed that the protester's factual allegations would have established a violation of the general rule against excessive force, but then proceeded to the second level of inquiry: whether this prohibition was clearly established in the particular circumstances the officer faced.<sup>44</sup> A reasonable police officer could have believed that the protester posed a threat to the safety and security of the Vice President, and that it was necessary to hurry him away from

<sup>32</sup> *Id.* at 197-98.

<sup>33</sup> *Id.* at 198.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 209.

<sup>37</sup> 490 U.S. 386 (1989).

<sup>38</sup> 483 U.S. 635 (1987).

<sup>39</sup> *Saucier*, 533 U.S. at 201-02.

<sup>40</sup> *Id.* at 204.

<sup>41</sup> *Id.* at 201.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 201-02.

<sup>44</sup> *Id.* at 207-08.



the scene.<sup>45</sup> Not every push or shove violates the Fourth Amendment, no known case prohibited the officer's conduct, and the protester was not injured.<sup>46</sup> On these facts, therefore, the military police officer was entitled to qualified immunity.<sup>47</sup>

The Supreme Court cases suggest the analytical framework. First, the Fourth Amendment must be implicated. Was there a seizure subject to scrutiny under the Fourth Amendment?<sup>48</sup> If there was no seizure, the Fourth Amendment is not at issue.<sup>49</sup> Next, was the seizure objectively reasonable and, therefore, consistent with the Fourth Amendment?<sup>50</sup> If there was no Fourth Amendment violation, the next step of review, qualified immunity, does not have to be reached.<sup>51</sup> Third, if there was an underlying Fourth Amendment violation, are the individual police officers/defendants entitled to qualified immunity? This hinges on whether, under the specific circumstances the defendant officers confronted and the information they possessed, they could reasonably have believed the shooting did not violate clearly established Fourth Amendment law.<sup>52</sup> Many reported cases involve early disposition on a motion for summary judgment on the basis of the undisputed material facts or, if material facts are disputed, accepting the plaintiff's version for the purposes of the motion. Even if qualified immunity is denied on summary judgment, however, it can be preserved as an issue for trial.

## II. NOT SEIZURES UNDER THE FOURTH AMENDMENT

To trigger Fourth Amendment protection, there must be a "seizure."<sup>53</sup> If there is no seizure, the question of whether it was reasonable is obviously not reached. For a seizure to occur, "there [must be] a governmental termination of freedom of movement *through means intentionally applied*."<sup>54</sup> Attempted, but failed, seizures are beyond the scope of the Fourth Amendment.<sup>55</sup> In at least three situations, there is no seizure; hence no reason to analyze them for Fourth Amendment reasonableness: (1) when the officer shoots and misses his intended target;<sup>56</sup> (2) when the officer does not intend to shoot, but his weapon discharges accidentally;<sup>57</sup> and (3) when he/she shoots at a subject and hits someone else.<sup>58</sup> In all of those situations, but most particularly the latter, substantive Due Process may be implicated, but only if the officer's conduct is "conscience shocking."<sup>59</sup>

<sup>45</sup> *Id.* at 208.

<sup>46</sup> *Id.* at 208-09.

<sup>47</sup> *Id.* at 209.

<sup>48</sup> *Terry*, 392 U.S. at 16.

<sup>49</sup> *Mendenhall*, 446 U.S. at 553.

<sup>50</sup> *Garner*, 471 U.S. at 7-8.

<sup>51</sup> *Saucier*, 533 U.S. at 201.

<sup>52</sup> *Id.* at 202.

<sup>53</sup> *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

<sup>54</sup> *Id.* at 597 (emphasis in original).

<sup>55</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

<sup>56</sup> *Cameron v. City of Pontiac*, 813 F.2d 782, 785 (6th Cir. 1987).

<sup>57</sup> *See Brower*, 489 U.S. at 596.

<sup>58</sup> *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990).

<sup>59</sup> *Lewis*, 523 U.S. at 847.

In a high-speed pursuit case, *County of Sacramento v. Lewis*,<sup>60</sup> the decedent was a passenger on a motorcycle that tipped over and was struck by a deputy sheriff.<sup>61</sup> The Court noted that the “deliberate or reckless indifference” Due Process standard was appropriate to situations allowing for deliberation, but that where decisions had to be made “in haste, under pressure, and frequently without the luxury of a second chance,”<sup>62</sup> only an intent to harm unrelated to the legitimate object of arrest would satisfy the “shocks the conscience” standard.<sup>63</sup> There is a strong argument that the intent to harm standard applies to police shootings that are not governed by the reasonableness standard of the Fourth Amendment.

Although the Fourth Amendment protects free citizens, the Due Process Clause of the Fourteenth Amendment<sup>64</sup> and the Cruel and Unusual Punishments Clause of the Eighth Amendment<sup>65</sup> respectively protect pre-trial detainees and convicted prisoners. Those plaintiffs have a higher burden than showing that the shooting was unreasonable; they must prove it was “conscience shocking,” or malicious and sadistic, and for the purpose of inflicting harm and punishing and not preventing escape.

### *1. Shooting, Missing*

If an officer shoots, but misses his intended target or otherwise fails to stop the subject’s freedom of movement and effect his/her custody, there has been no seizure.<sup>66</sup> Accordingly, the court need not reach the question of whether the seizure was reasonable under the Fourth Amendment.<sup>67</sup> For example, the officer’s firing at an automobile to stop the suspect did not hit him or impair his ability to leave the scene.<sup>68</sup> Because there was no seizure, it was unnecessary to discuss the reasonableness of the officer’s conduct under the Fourth Amendment.<sup>69</sup>

A woman commandeered a helicopter to land at a state penitentiary to aid the escape of several inmates.<sup>70</sup> After landing in a park, an inmate held a gun to the pilot’s head and ordered him to take off, while a U.S. Customs Service Officer fired shots from the ground.<sup>71</sup> Another Customs Service officer flew the agency’s helicopter dangerously near the hijacked helicopter, trying to force it to land.<sup>72</sup> The hostage sued.<sup>73</sup> The Tenth Circuit ruled that, while the shots constituted a show of authority, they did not cause the helicopter to submit.<sup>74</sup> The pilot’s complaint failed to state a Fourth Amendment unreasonable seizure claim.<sup>75</sup>

<sup>60</sup> 523 U.S. 833 (1998).

<sup>61</sup> *Id.* at 844.

<sup>62</sup> *Id.* at 853 (internal citations omitted).

<sup>63</sup> *Id.* at 836.

<sup>64</sup> U.S. CONST. amend. XIV, § 1.

<sup>65</sup> U.S. CONST. amend. VIII.

<sup>66</sup> *Cameron*, 813 F.2d at 785.

<sup>67</sup> *Id.*

<sup>68</sup> *Adams v. City of Auburn Hills*, 336 F.3d 515, 520 (6th Cir. 2003).

<sup>69</sup> *Id.*

<sup>70</sup> *Bella v. Chamberlain*, 24 F.3d 1251, 1253 (10th Cir. 1994).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1256.

<sup>75</sup> *Id.*

Where there is no seizure, substantive due process may provide protection.<sup>76</sup> Suspects threw rocks at police hiding in bushes to do surveillance of a house where they thought drugs were sold.<sup>77</sup> After believing that they heard the chambering of rounds and that they saw a suspect pointing a gun at one of the officers, the police fired.<sup>78</sup> A suspect who was hit was “seized.”<sup>79</sup> But where a suspect is fired on in the officer’s self-defense but not hit, the conduct is not “conscience shocking” under the Due Process Clause.<sup>80</sup>

## 2. *Shooting Accidentally*

An accidental or negligent discharge of a firearm is not a Fourth Amendment violation.<sup>81</sup> There is no seizure when an officer lacks the intent to “seize” the subject by firing his/her gun.<sup>82</sup> An accidental or negligent discharge of the firearm may occur when an officer tries to do two things at once, such as grab a suspect with one hand while holding a firearm with the other. Instead of the Fourth Amendment, the courts may look to the Fourteenth Amendment as a source of protection, finding a Due Process Clause violation only if the shooting “shocks the conscience.”<sup>83</sup>

In a district court case, a township police detective fatally shot an arrestee in the back when a shotgun that he was carrying accidentally discharged.<sup>84</sup> The arrestee had ignored orders to get down on the floor.<sup>85</sup> The detective took his left hand from the shotgun to stop the arrestee from getting up; when the arrestee’s back hit the muzzle, the gun discharged accidentally.<sup>86</sup> The court held that there was no seizure, and, therefore, no Fourth Amendment violation, because the officer lacked the intent to seize the decedent by firing the gun.<sup>87</sup> Approaching the arrestee to within arm’s length to secure him and prevent him from becoming a danger to the officers was not objectively unreasonable.<sup>88</sup> Moreover, the shooting did not “shock the conscience” in violation of the Fourteenth Amendment’s Due Process Clause.<sup>89</sup>

In another district court decision,<sup>90</sup> an intoxicated car thief was ordered out of a car at gunpoint and told to lie on the ground.<sup>91</sup> With his pistol drawn, the officer searched the car thief, placed him in handcuffs, and attempted to re-holster his pistol, when it fired and hit the car thief

<sup>76</sup> Carr. v. Tatangelo, 338 F.3d 1259, 1270-71 (11th Cir. 2003).

<sup>77</sup> *Id.* at 1263.

<sup>78</sup> *Id.* at 1263-64.

<sup>79</sup> *Id.* at 1268.

<sup>80</sup> *Id.* at 1273.

<sup>81</sup> Clark v. Buchko, 936 F. Supp. 212 (D. N.J. 1996).

<sup>82</sup> *Id.* at 219-20.

<sup>83</sup> *Id.* at 220.

<sup>84</sup> *Id.* at 216.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 219.

<sup>88</sup> *Id.* at 220.

<sup>89</sup> *Id.* at 220-21.

<sup>90</sup> Troublefield v. City of Harrisburg, 789 F. Supp. 160 (M.D. Pa. 1992).

<sup>91</sup> *Id.* at 162.

in the leg.<sup>92</sup> The case was dismissed: the accidental discharge was not a “seizure” because it was not intended to bring the car thief under the officer’s control.<sup>93</sup>

### 3. *Shooting Unintended Bystander*

Hostages, passengers, bystanders, and other unintended victims of police officers’ shots are not protected under the Fourth Amendment, since they are not the objects of the attempted seizure.<sup>94</sup> They are protected under the higher standard of the Due Process Clause. While some cases discuss the state of mind requirement as “deliberate or reckless indifference,” after *County of Sacramento v. Lewis*,<sup>95</sup> it is likely that the plaintiff would have to demonstrate arbitrary state action and the more culpable state of mind of “malicious and sadistic intent” to harm the victim to establish “conscience shocking” conduct.<sup>96</sup> Illustrative circuit cases follow.

A robber took the plaintiff, the night manager of a fast-food restaurant, hostage.<sup>97</sup> The robber tried to drive away with the plaintiff on his lap.<sup>98</sup> Officers fired at the robber but hit the hostage.<sup>99</sup> Because the officers were not trying to restrain the liberty of the hostage, the Fourth Amendment was not implicated.<sup>100</sup> Nor did the officers violate substantive due process, since they did not act with reckless or callous indifference to the hostage’s rights; at most, their conduct was negligent, which was insufficient to prove a constitutional violation.<sup>101</sup>

A suspect boarded a school van and took the driver and two teenagers hostage.<sup>102</sup> A trooper shot, killing the suspect.<sup>103</sup> One of the bullets also passed through a rear seat, deflected, and then passed through a front seat, hitting one of the hostages.<sup>104</sup> The Second Circuit concluded that the hostage was not seized, so the Fourth Amendment claim failed.<sup>105</sup> The trooper’s deliberate decision to stop the suspect’s flight was not a willful detention of the hostage.<sup>106</sup> The trooper did not violate the hostage’s Fourteenth Amendment rights.<sup>107</sup> The trooper’s actions, in a tense situation, did not “shock the conscience.”<sup>108</sup>

Officers shot at a stolen car suspect, but instead killed a bystander motorist who had been warned to leave the scene.<sup>109</sup> The ruling was for the defendants: the bystander was not the

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 166.

<sup>94</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989)).

<sup>95</sup> 523 U.S. 833 (1998).

<sup>96</sup> *Id.* at 852-54.

<sup>97</sup> *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 791-92 (1st Cir. 1990).

<sup>98</sup> *Id.* at 792.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 796.

<sup>101</sup> *Id.* at 796-97.

<sup>102</sup> *Medeiros v. O’Connell*, 150 F.3d 164, 166 (2d Cir. 1998).

<sup>103</sup> *Id.* at 167.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 168.

<sup>106</sup> *Id.* at 169.

<sup>107</sup> *Id.* at 170.

<sup>108</sup> *Id.* at 170.

<sup>109</sup> *Rucker v. Harford County, Md.*, 946 F.2d 278, 280 (4th Cir. 1991).

intended object of the shooting, and so was not subject to Fourth Amendment protection for “unreasonable seizures.”<sup>110</sup> The substantive provisions of the Due Process Clause could provide protection, but only where the officer’s actions were a “brutal and inhumane abuse of official power literally shocking to the conscience.”<sup>111</sup>

Undercover officers engaged in a firefight with a man with a shotgun, hitting an unknown passenger in the car.<sup>112</sup> The unreasonableness test of the Fourth Amendment applies only to individuals the police are trying to seize.<sup>113</sup> If the police injure an individual they are not trying to seize, such as the passenger, their conduct violates constitutional rights only if it is malicious, sadistic, and for the purpose of causing harm.<sup>114</sup> The passenger was injured only accidentally.<sup>115</sup>

Likewise, the subject of a motor vehicle pursuit lost control and hit a guardrail.<sup>116</sup> As a deputy approached with his weapon drawn, the subject accelerated, requiring the deputy to leap out of the way.<sup>117</sup> The subject drove toward the deputy’s car.<sup>118</sup> The deputy fired at the subject and at the car’s tires, striking a passenger he was unaware of in the car.<sup>119</sup> The Sixth Circuit found the deputy justifiably fired at the car to seize the driver, and did not violate the passenger’s Fourth Amendment rights, since he was unaware of her presence.<sup>120</sup>

On the other hand, a few cases treat the vehicle as the subject of the seizure, rather than just the people in it. In that way, the unintended shooting of a passenger may be reviewed under the Fourth Amendment. Intending to disable a stolen truck, a deputy fired and a bullet punctured the spine of a passenger, instantly paralyzing him.<sup>121</sup> The Eleventh Circuit decided that although the passenger was “seized” because he was hit by a bullet meant to stop him and the driver,<sup>122</sup> the deputy was entitled to qualified immunity on the Fourth Amendment claim.<sup>123</sup>

The officer’s bullet went through the window and hit the passenger.<sup>124</sup> The Sixth Circuit denied qualified immunity.<sup>125</sup> When the officer fired at the driver, he intended to stop the car, seizing everything inside including the passenger.<sup>126</sup> A jury determined that the seizure was unreasonable.

<sup>110</sup> *Id.* at 281.

<sup>111</sup> *Id.* (quoting *Temkin v. Fredrick County Comm’rs*, 945 F. 2d 716, 720 (4th Cir. 1991).

<sup>112</sup> *Claybrook v. Birchwell*, 199 F.3d 350, 354-55 (6th Cir. 2000).

<sup>113</sup> *Id.* at 359.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 360-61.

<sup>116</sup> *Scott v. Clay County, Tenn.*, 205 F.3d 867, 872 (6th Cir. 2000).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 872-73.

<sup>120</sup> *Id.* at 878.

<sup>121</sup> *Vaughan v. Cox*, 264 F.3d 1027, 1032 (11th Cir. 2001).

<sup>122</sup> *Id.* at 1033.

<sup>123</sup> *Id.* at 1037.

<sup>124</sup> *Fisher v. City of Memphis*, 234 F.3d 312, 315 (6th Cir. 2000).

<sup>125</sup> *Id.* at 317.

<sup>126</sup> *Id.* at 319-20.

#### 4. Shooting Escaping Prisoner

The reasonableness standard of the Fourth Amendment does not afford protection to pretrial detainees, who are protected by the Due Process Clause, or convicted prisoners, who are protected by the Eighth Amendment's prohibition on cruel and unusual punishments. Accordingly, the plaintiff must show that the shooting was conscience shocking or malicious and sadistic.

The decedent was arrested for auto theft and there were outstanding warrants on other charges.<sup>127</sup> After transport to the county jail, he fled from sheriff's deputies.<sup>128</sup> They shouted for him to stop, and, when he did not, they fired twelve shots.<sup>129</sup> Sheriff's department policy was in accord with a state statute that authorized deadly force to prevent escape from jail, irrespective of whether the prisoner was dangerous.<sup>130</sup> The Fifth Circuit held the decedent was a pretrial detainee.<sup>131</sup> Once an arrestee has been placed into police custody and transferred to a jail cell, he becomes a pretrial detainee.<sup>132</sup> As such, the Due Process Clause protected him against excessive force.<sup>133</sup> The prevention of escape was not unconstitutional.<sup>134</sup> "The deputies did not act maliciously or sadistically or in an attempt to inflict punishment, but rather followed a constitutional policy that permits deadly force only when necessary to prevent an immediate escape."<sup>135</sup>

A prisoner escaped while working a farm detail.<sup>136</sup> He was located at a friend's house and shot in the back while trying to escape.<sup>137</sup> Only the Eighth Amendment's protection against cruel and unusual punishments protects convicts.<sup>138</sup> The Sixth Circuit ruled that the officer did not fire at the escaped convict maliciously and sadistically for the purpose of inflicting harm, but to prevent his escape.<sup>139</sup> It granted qualified immunity.<sup>140</sup> A state regulation that authorized corrections officers to use deadly force only when it was the "least force necessary"<sup>141</sup> to recapture an escaped prisoner did not create a right under which the plaintiff could sue.<sup>142</sup> Instead, it merely provided a guideline for corrections officers.<sup>143</sup>

<sup>127</sup> *Brothers v. Klevenhagen*, 28 F.3d 452, 454 (5th Cir. 1994).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 457.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 454.

<sup>135</sup> *Id.* at 457.

<sup>136</sup> *Gravelly v. Madden*, 142 F.3d 345, 347 (6th Cir. 1998).

<sup>137</sup> *Id.*

<sup>138</sup> U.S. CONST. amend. VIII.

<sup>139</sup> *Gravelly*, 142 F.3d at 349.

<sup>140</sup> *Id.* at 346.

<sup>141</sup> OHIO ADMIN. CODE §5120-9-01(F)(5)(1984); *see also Gravelly*, 142 F.3d at 349 (citing §5120-9-01(F)(5)).

<sup>142</sup> *Gravelly*, 142 F.3d at 349.

<sup>143</sup> *Id.* at 349.

### III. RECURRING FOURTH AMENDMENT SITUATIONS

The most common fact patterns involving police shootings are:

- (1) The subject is armed with a gun that he refuses to put down.
- (2) The subject is a mentally disturbed person armed with knives who is about to attack.
- (3) The subject is using a motor vehicle as a deadly weapon to drag or run the officer down.
- (4) The subject is reaching for something and the surrounding facts and circumstances lead the officer to believe it is a weapon.
- (5) The subject engages the officer in a violent struggle that threatens him/her with death or serious bodily harm.
- (6) The subject is fleeing and has committed a crime involving the infliction or threatened infliction of serious bodily harm.

#### 1. *Subject Armed with Gun*

For a shooting to be justified under the objective reasonableness test of the Fourth Amendment, a subject need not have actually shot or aimed a gun at police. Cases have ruled the shooting in compliance with the rigors of the Fourth Amendment when the subject was facing away, had a firearm within reach, or was pointing it at himself/herself and threatening suicide. The core issue is the imminence of the threat of serious bodily harm or death. In assessing an officer's entitlement to qualified immunity, the information the officer possessed at the time and the reasonableness of his/her perceptions are significant. Although it may later be disclosed that the "gun" is a toy or is unloaded, or officers mistook the identify of the person they shot, that is irrelevant to the calculus, so long as the officer's perception of an imminent threat to himself/herself was reasonable.

The following decisions are favorable to the defendants. In the Fourth Circuit,<sup>144</sup> police were investigating a suspected burglary, but the "burglar" was a resident who had been locked out of the house after a fight with his wife, broke a rear window to get in, and then went to bed, intoxicated.<sup>145</sup> While an officer was ordering him to get his hands up, the resident brought a rifle up from under the covers, pointed it at the officer, and yelled.<sup>146</sup> Both officers then drew their weapons and fired.<sup>147</sup> The court affirmed summary judgment for them.<sup>148</sup>

Two officers observed a man holding a gun and running toward them.<sup>149</sup> He matched the description of a perpetrator who had shot his gun off and threatened three people at gunpoint.<sup>150</sup> The officers exited their marked patrol car, with weapons (including a shotgun) displayed.<sup>151</sup>

<sup>144</sup> Cox v. County of Prince William, 249 F.3d 295 (4th Cir. 2001).

<sup>145</sup> *Id.* at 297.

<sup>146</sup> *Id.* at 298.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 301.

<sup>149</sup> Boyd v. Baepler, 215 F.3d 594, 598 (6th Cir. 2000).

<sup>150</sup> *Id.* at 597.

<sup>151</sup> *Id.* at 598.

They identified themselves and ordered the perpetrator to stop and drop his gun.<sup>152</sup> He did not.<sup>153</sup> Instead, he aimed his weapon at them.<sup>154</sup> They pursued on foot, with one officer firing his pistol three or four times.<sup>155</sup> When the perpetrator turned and aimed again, the officer with the shotgun fired once, knocking him down.<sup>156</sup> The perpetrator pushed himself up and aimed at the officers again, at which point the first officer fired seven more rounds, killing him.<sup>157</sup> The Sixth Circuit held that the officers shot in self-defense; hence, they were entitled to qualified immunity.<sup>158</sup>

Officers observed a man fitting the description of a bank robber and decided to question him.<sup>159</sup> They identified themselves and ordered him to stop, but the robbery suspect pointed a gun at one of the officers, who “ducked behind his car door.”<sup>160</sup> The second officer fired two shots, hitting the robbery suspect, who then fell to the ground.<sup>161</sup> When the officer identified himself a second time, the robbery suspect allegedly aimed his gun at him.<sup>162</sup> The officer fired two more shots, which killed the robbery suspect.<sup>163</sup> Affirming summary judgment for the defendants, the Seventh Circuit said it was irrelevant whether the suspect had actually robbed the bank.<sup>164</sup> The issue the court found determinative was whether the shooting was justified.<sup>165</sup> The court rejected plaintiff estate’s argument that the second set of shots was excessive; the estate failed to establish that the first shots incapacitated him or that he did not point his gun at the officer after the first shots.<sup>166</sup>

Similarly, officers responding to a report of a fight encountered an injured young woman who informed them that two males who had assaulted her had fled to a top floor apartment.<sup>167</sup> The officers announced their presence, but covered the peephole for their safety.<sup>168</sup> The door opened and when police saw a man holding a long rifle, the officer standing nearest him fired four times.<sup>169</sup> The Eighth Circuit decided: “[N]o constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon,” and the officers could reasonably believe that the subject posed a significant threat of death or serious physical injury to them or others.<sup>170</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 601.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 604.

<sup>159</sup> *Muhammed v. City of Chicago*, 316 F.3d 680, 682 (7th Cir. 2002).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 683.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Sinclair v. City of Des Moines*, 268 F.3d 594, 595 (8th Cir. 2001).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 596.

<sup>170</sup> *Id.*



A storeowner carrying cash and his brother carrying a gun left a store via the rear door.<sup>171</sup> A police officer at the wrong address mistook them for robbers.<sup>172</sup> When the police officer ordered the brother to drop the gun, he shot the officer, sparking a gun battle in which the brother was fatally shot.<sup>173</sup> The Ninth Circuit upheld a verdict for the officer.<sup>174</sup>

Calls reported fights and gunfire outside of a bar.<sup>175</sup> Police officers responded, heard a gunshot, and observed a man running towards them with a sawed-off shotgun.<sup>176</sup> He claimed he had just taken the gun “from the guy.”<sup>177</sup> Two officers ordered him to drop the gun, but he did not comply, and ran past the officers.<sup>178</sup> One officer fired two shots, one of which struck the man in the buttock.<sup>179</sup> The Eleventh Circuit granted qualified immunity:

At least where orders to drop the weapon have gone unheeded, an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force. . . . In view of all of the facts, we cannot say that an officer in those volatile circumstances could not reasonably have believed that [the subject] might wheel around and fire his shotgun again, or might take cover behind a parked automobile or the side of a building and shoot at the officers or others.<sup>180</sup>

In another Eleventh Circuit case,<sup>181</sup> police responded to a call regarding an emotionally troubled woman. During their initial approach, the woman suddenly opened the door and, swinging a knife, lunged at the two officers, forcing them to leave the porch.<sup>182</sup> After she retreated to a bedroom, police entered the residence.<sup>183</sup> She fired a handgun at four officers, and three returned fire, killing her.<sup>184</sup> The court held the shooting was not objectively unreasonable or offensive to the Fourth Amendment.<sup>185</sup> The district court decisions cited in the footnote are also favorable to the defendants.<sup>186</sup>

<sup>171</sup> *Saman v. Robbins*, 173 F.3d 1150, 1153 (9th Cir. 1999).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1154.

<sup>174</sup> *Id.* at 1158.

<sup>175</sup> *Montoute v. Carr*, 114 F.3d 181, 182 (11th Cir. 1997).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 183.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 185.

<sup>181</sup> *Manuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994).

<sup>182</sup> *Id.* at 992.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 993.

<sup>185</sup> *Id.* at 997.

<sup>186</sup> For district court decisions favorable to the defendants, see the following cases:

*Cunningham v. Hamilton*, 259 F. Supp. 2d 457 (E.D. Va. 2003). Officers responding to reports of shots in a high-crime area encountered a subject who did not obey an order to drop his handgun. Whether or not the subject was pointing the weapon at the officers when he was shot, they were entitled to qualified immunity on summary judgment. *Id.*

*Leong v. City of Detroit*, 151 F. Supp. 2d 858 (E.D. Mich. 2001). A suspect allegedly pointed a shotgun out of his truck window and fired two shots toward a car that two young women occupied. Unaware of the incident that had just occurred, two police officers observed the suspect squeal his tires and turn the corner at an intersection

In contrast, the following decisions are favorable to the plaintiffs. Police were in a standoff in a field with an apparently suicidal individual, who was pointing the barrel of a single shot shotgun at his head.<sup>187</sup> He allegedly became agitated and began moving toward the officers, but stopped about four seconds before being fatally shot.<sup>188</sup> Applying *Saucier v. Katz*,<sup>189</sup> the

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at a high rate of speed. A chase ensued down several streets and alleys. When blocked in, the suspect fired his shotgun into the roof of his truck and exited his vehicle carrying the weapon. The district court ruled that the police officers were entitled to qualified immunity for shooting and killing the suspect following the chase, regardless of whether he was shot from the side or from the back. "Under the particular circumstances presented here, this Court does not share [p]laintiff's view as to the significance of the question whether [the suspect] was facing the officers or had turned away at the moment he was shot. Initially, the Court notes that none of the cases cited by [p]laintiff establishes such a bright-line rule. . . . These cases, then, merely affirm the principle that a police officer's use of deadly force must rest upon a reasonable belief that [the suspect] posed a significant threat of death or serious physical injury to the officer or others. None of these decisions establishes the further proposition that a suspect, though armed, poses no such threat so long as he is facing away from the officer." *Id.* at 864-65 (internal quotations and citations omitted).

*Natal v. City of New Bedford*, 37 F. Supp. 2d 74 (D. Mass. 1999). An undercover officer purchased beer from a man inside an apartment through a chained, partially open door. At that point, he identified himself as a police officer and ordered the man to open up. A second officer saw through the space in the door that the man was holding a shotgun. The first officer told the man to drop the gun, kicked the door in, drew his gun, and, not sure where the man was pointing the shotgun, shot him in the stomach as he turned away. Less than a minute elapsed. Under the undisputed facts, it was objectively reasonable for the officer to shoot. A report of one of the plaintiff's experts suggesting that the officer could have taken cover did not create a fact dispute that would allow the fact finder to second-guess the officer's decision. Another plaintiff's expert reported that the man was turning away when shot, but that meant he must have faced the officers beforehand. *Id.*

*Chandie v. Whelan*, 21 F. Supp. 2d 170 (E.D. N.Y. 1998). Two armed robbers took an off duty, out-of-uniform police officer working as security in a convenience store and three store employees hostage. The officer pulled his pistol from a shoulder holster under his shirt and killed both robbers. The fact that he used hollow point bullets did not alter the reasonableness of the shooting. *Id.*

*Frane v. Kijowski*, 992 F. Supp. 985 (N. D. Ill. 1998). Officers looked through a kitchen window, and saw the intruder-husband pointing what looked like a gun at his wife's head. The court concluded that a reasonable officer was justified in thinking that the wife's life was in danger, and therefore shooting, even though the intruder-husband was actually holding only a dart or BB gun. *Id.* at 991.

*Costoso v. United States*, 884 F. Supp. 52 (D. Puerto Rico 1995). Two FBI agents saw a man rob two taxi cab passengers at gunpoint and run off with a purse. The agents confronted the robber and identified themselves as law enforcement officers. He responded by turning on them with what appeared to be a semi-automatic pistol, at which time an agent shot and the robber fell. The pistol was a plastic gun replica. Even if the autopsy report showed the robber was shot in the back, the bullet's entrance would not determine whether deadly force was unreasonable. The shooting was consistent with Fourth Amendment guarantees. *Id.*

*Malignaggi v. County of Gloucester*, 855 F. Supp. 74 (D.N.J. 1994). Two women were taken hostage in a restaurant. When the SWAT team confronted the hostage-taker, he pointed a rifle at them, and they shot. The rifle was unloaded. Although plaintiff's expert contended sending in the SWAT team was premature, the court ruled that "no objectively reasonable police officer would believe that such decision would violate the hostage-taker's civil rights. . . . Indeed, [the hostage-taker] was not shot until he pointed his rifle at police." *Id.* at 80.

*Linder v. Richmond County, Ga.*, 844 F. Supp. 764 (S.D. Ga. 1994). A woman called police, saying a prowler entered the garage, setting off an alarm. Her 88-year-old husband, who was hard of hearing, went out to the backyard with a loaded pistol. When a deputy sheriff arrived, he came upon the husband and, thinking he was the prowler, told him to drop the gun. The husband allegedly turned toward the deputy sheriff and fired. The deputy fired back, with one bullet taking effect on the husband and the other going through the garage and striking the prowler. Even if the husband shot first and then turned toward the deputy, the deputy was entitled to summary judgment. *Id.*

<sup>187</sup> *Bennett v. Murphy*, 274 F.3d 133, 136 n.2 (3d Cir. 2001).

<sup>188</sup> *Id.* at 135, n.6.

<sup>189</sup> 533 U.S. 194 (2001).

Third Circuit considered whether the facts, taken in the light most favorable to the plaintiff, showed a constitutional violation. Here they did: if the individual “had stopped advancing and did not pose a threat to anyone but himself, the force used against him, i.e., deadly force, was objectively excessive.”<sup>190</sup> The plaintiff having adduced evidence of a constitutional violation, the court next considered whether the constitutional right was clearly established, “[t]hat is, in the factual scenario established by the plaintiff, would a reasonable officer have understood that his actions were prohibited?”<sup>191</sup> The court remanded the case to the district court for application of the test.<sup>192</sup>

A woman called police for help with her 58-year-old husband, who suffered from dementia, depression, and physical problems.<sup>193</sup> He was disabled with pepper spray, then shot, as he supposedly charged or stomped toward an officer.<sup>194</sup> Applying the two-part test of *Saucier v. Katz*,<sup>195</sup> the Fourth Circuit said the plaintiff stated a Fourth Amendment violation for excessive force: “[V]iewed in the light most favorable to [the plaintiff], the evidence is that [the officer] shot a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone.”<sup>196</sup> Secondly, the law was clearly established:

Well before 1998 [the date of the incident] it was clearly established that a police officer could not lawfully shoot a citizen perceived to be unarmed and nondangerous, neither suspected of any crime nor fleeing a crime scene. The decision to use deadly force in these circumstances simply does not lie near the hazy border between excessive and acceptable force, and any mistaken belief to the contrary would not have been reasonable.<sup>197</sup>

Accordingly, the officer was not entitled to qualified immunity before trial.<sup>198</sup>

Likewise, a police officer pursued two occupants of a car into a swamp after they exited the vehicle following a high-speed chase.<sup>199</sup> The officer shot one of the subjects in the back, paralyzing him.<sup>200</sup> The officer asserted that he saw the subject wielding a small pistol, but the subject claimed that he was unarmed and stuck in the mud when he was shot.<sup>201</sup> No gun was recovered.<sup>202</sup> The jury found that the officer had violated the plaintiff’s Fourth Amendment rights through excessive force, but they also determined that qualified immunity protected him from liability.<sup>203</sup> The Supreme Court granted review to determine “whether a jury finding that a

<sup>190</sup> *Bennett*, 274 F.3d at 136.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Clem v. Corbeau*, 284 F.3d 543, 545-46 (4th Cir. 2002).

<sup>194</sup> *Id.* at 546.

<sup>195</sup> 533 U.S. 194 (2001).

<sup>196</sup> *Clem*, 284 F.3d at 552.

<sup>197</sup> *Id.* at 554 (internal quotation and citation omitted).

<sup>198</sup> *Id.*

<sup>199</sup> *Snyder v. Trepagnier*, 142 F.3d 791, 794 (5th Cir. 1998).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

constitutional violation incurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable[.]”<sup>204</sup> However, the Court later dismissed certiorari (because the case settled).<sup>205</sup> *Saucier v. Katz* subsequently resolved the question on which the Court had granted review.<sup>206</sup>

An informant told police where a suspect could be found and claimed that the suspect, while armed, would not use his weapon on police.<sup>207</sup> The officer testified that the suspect pointed a shotgun at him and he fired.<sup>208</sup> The suspect testified that his gun was in his lap and that he was lying back on his bed with his arms raised in a “classic surrender position” when the officer shot.<sup>209</sup> The physical evidence supported his version, because there was no blood or tissue on the gun, which was likely if the gun had been in his hands when he was shot.<sup>210</sup> The Ninth Circuit affirmed a jury verdict of \$1 million for the suspect.<sup>211</sup>

Finally, a siege occurred after federal marshals came onto Randall Weaver’s property in Ruby Ridge, Idaho.<sup>212</sup> Weaver’s dog, son and wife were fatally shot, and a family friend was wounded while retreating to the cabin.<sup>213</sup> That individual’s lawsuit challenged the “Special Rules of Engagement” under which federal agents could “kill any armed adult” male “observed near the Weaver residence, irrespective of whether the armed adult presented an immediate threat of harm to the agent or to another person.”<sup>214</sup> The Ninth Circuit found that “so extreme an order is patently unjustified,”<sup>215</sup> and confirmed the constitutional standard that “[l]aw enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons.”<sup>216</sup> Accordingly, the FBI agent who shot the plaintiff was not entitled to qualified immunity.<sup>217</sup>

## 2. *Subject Armed with Edged Weapon*

Many police shootings involve intoxicated, mentally or emotionally disturbed, or suicidal individuals with knives or other edged weapons. The plaintiff’s theory of the case will usually be that there were less than lethal alternatives: calming the plaintiff down, using an intermediate weapon like pepper spray, increasing the gap between the subject and the officers, and the like. On the defense side, generally accepted police procedures allow the officer to shoot if the subject with an edged weapon closes the reactionary gap, usually described as twenty-one feet or less. Twenty-one feet (about 7 paces) is the distance a subject with an edged weapon can travel in the

<sup>204</sup> *Snyder v. Trepagnier*, 525 U.S. 1098 (1999).

<sup>205</sup> *Snyder v. Trepagnier*, 526 U.S. 1083 (1999).

<sup>206</sup> *See* 533 U.S. 194, 197 (2001).

<sup>207</sup> *Robinson v. Nolte*, No. 02-55094 (9th Cir. 2003).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Harris v. Roderick*, 126 F.3d 1189, 1193 (9th Cir. 1997).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1200.

<sup>215</sup> *Id.* at 1202.

<sup>216</sup> *Id.* at 1201.

<sup>217</sup> *Id.* at 1205.

time period before an officer can draw, aim and shoot his weapon. The justification for the shooting should be based upon the moment of the shooting and not preceding events.

In the first group of cases, the courts decided in favor of the defendants. In a First Circuit case, officers responded to a call for domestic violence and tried to serve a summons.<sup>218</sup> The intoxicated subject was armed with steak knives.<sup>219</sup> Officers ordered the subject to drop the knives.<sup>220</sup> They tried to distract him, but he advanced, flailing, kicking and lunging, whereupon one officer shot.<sup>221</sup> The First Circuit held that the officers were entitled to qualified immunity.<sup>222</sup> Although the shooting may have been avoided, if, for example, the officers had pepper spray, it did not violate the subject's constitutional rights.<sup>223</sup> Police officers are entitled to discretion in making split-second decisions.<sup>224</sup>

In a Fourth Circuit case, a woman told the police supervisor that her boyfriend had been drinking, cut himself, and was destroying things inside the house.<sup>225</sup> The supervisor tried to talk to the boyfriend and calm him down, then attempted to use pepper spray on him and finally called the emergency response team.<sup>226</sup> The boyfriend left the house, holding a chef's knife.<sup>227</sup> Officers yelled to drop the knife and stop approaching.<sup>228</sup> He said he wanted to die.<sup>229</sup> When he was about ten to fifteen feet away, the supervisor shot twice, killing him.<sup>230</sup> The Fourth Circuit affirmed judgment for the defense and awarded qualified immunity for the officers.<sup>231</sup>

Before the emergency response team could arrive, [the decedent] stepped out of the house, and, according to all of the police officers, he held a knife in his right hand. . . . Officers . . . yelled for [the decedent] to drop the knife . . . [The decedent] continued to walk toward [an officer], holding his knife in a threatening manner. By this time, [the officers] had drawn their guns. As [the decedent] continued to approach and was 10 to 15 feet away from [an officer], [the officer] shot [the decedent] twice in rapid succession, mortally wounding him. [The officer] states that, at the time of the shooting, he believed that [the decedent] presented a danger to his life and safety and to the life and safety of others. . . .

... According to the officers, the . . . police department trains them in dealing with persons armed with knives. As [an officer] stated, "We are trained—twenty-one feet is the closest you let some-one get with an edged weapon because they can cut you or kill you before you can even fire." This policy is confirmed by a police

<sup>218</sup> Roy v. Inhabitants of Lewiston, 42 F.3d 691, 693 (1st Cir. 1994).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 697.

<sup>223</sup> *Id.* at 696.

<sup>224</sup> *Id.* at 695.

<sup>225</sup> Sigman v. Town of Chapel Hill, 161 F.3d 782, 784 (4th Cir. 1998).

<sup>226</sup> *Id.* at 784-85.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 785.

<sup>231</sup> *Id.* at 789.

expert, who stated that the 21-foot standard “is based on studies which have shown that an armed individual within twenty-one feet of an officer still has time to get to the officer and stab and fatally wound the officer even if the officer has his weapon brandished and is prepared to or has fired a shot.”<sup>232</sup>

. . . Where an officer is faced with a split-second decision in the context of a volatile atmosphere about how to restrain a suspect who is dangerous, who has been recently – and potentially still is – armed, and who is coming towards the officer despite officers’ commands to halt, we conclude that the officer’s decision to fire is not unreasonable.<sup>233</sup>

The Fourth Circuit also found no municipal liability:

The only municipal policy that the plaintiffs have identified is the department’s training rule that an officer may use deadly force to stop a threatening individual armed with an edged weapon when that individual comes within 21 feet. As the basis for this rule, the department identified studies which have shown that an assailant with an edged weapon within 21 feet of an armed police officer can kill the officer before the officer can get off a disabling shot.

. . . [T]he plaintiffs have not produced a shred of evidence that the policy is unreasonable. They have not called an expert, adduced any testimony, or in any way contested or brought into dispute the department’s reasons for the policy. Without such evidence, no factual dispute is created.<sup>234</sup>

In a Fifth Circuit case,<sup>235</sup> officers found the subject of a disturbance call inside a mobile home with the door open, yelling, cursing, brandishing an eighteen to twenty inch sword and breaking windows. . . . The officers, with weapons drawn, told [the subject] to drop the sword. . . . [The chief of police] arrived on the scene and attempted to calm [the subject]. . . . [The chief] told [the subject] to drop the sword and not to advance on the officers. . . . During this time [the subject] was between eight and ten away from the officers. When [the subject] turned, and raised the sword toward the officers, [the chief] shot [the subject]. . . .<sup>236</sup>

Ruling on qualified immunity, the court said, “Although, in retrospect, there may have been alternative courses of action for [the chief] to take, we will not use ‘the 20-20 vision of hindsight’ to judge the reasonableness of [the chief’s] use of force. . . . [The chief’s] use of force against [the subject] was not objectively unreasonable.”<sup>237</sup>

<sup>232</sup> *Id.* at 785.

<sup>233</sup> *Id.* at 788.

<sup>234</sup> *Id.* at 788.

<sup>235</sup> *Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003).

<sup>236</sup> *Id.* at 622-23.

<sup>237</sup> *Id.* at 625.

In a Sixth Circuit case, a woman called police to complain that a man with a machete was chasing her around the residence.<sup>238</sup> Police ordered him to drop the machete, but he refused.<sup>239</sup> When the man closed the gap to four to six feet with the machete raised, he was fatally shot.<sup>240</sup> The Sixth Circuit affirmed a decision for the defense.<sup>241</sup> The use of deadly force was justified when the decedent ignored warnings and continued to advance with a raised machete.<sup>242</sup>

In another case, a schizophrenic got a double-bladed ax and walked toward an officer with its handle cocked.<sup>243</sup> After warning that he would shoot if the plaintiff did not drop the ax, the officer fired multiple times.<sup>244</sup> The fourth shot, fired from within five feet, disabled the plaintiff.<sup>245</sup> The trial court excluded evidence that the officers created the situation that required them to use deadly force and they should have responded differently, by waiting for a supervisor, calling the SWAT team, or using less than lethal force.<sup>246</sup> The Eighth Circuit held that the evidence was properly excluded.<sup>247</sup> Evidence that the defendant officer should have done things differently was irrelevant, the question being whether he acted reasonably.<sup>248</sup>

In a similar case, a man with a knife had committed an assault and was high on drugs.<sup>249</sup> The officer chased him on foot, ordering him to freeze.<sup>250</sup> When the gap closed to three or four yards, the officer believed he saw the suspect pull a knife from his waistband.<sup>251</sup> Thinking he was going to attack, the officer slowed down and shot four times, killing him.<sup>252</sup> Even though the man may actually not have had the knife in his possession at the time, the officer's belief that the man was armed and dangerous was reasonable.<sup>253</sup>

In a Tenth Circuit case, a motorist "denied that he was intoxicated and refused to submit to any tests."<sup>254</sup> He punched the officer in the nose and ran a knife across the officer's stomach.<sup>255</sup> The officer retreated, drew his gun, and, when the man ignored repeated requests to drop the knife and continued to advance in an attack position, the officer shot.<sup>256</sup> The Tenth Circuit held that the fact that the officer failed to handcuff and arrest the drunk driver as required

<sup>238</sup> Rhodes v. McDaniel, 945 F.2d 117, 118 (6th Cir. 1991).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 121.

<sup>242</sup> *Id.* at 120.

<sup>243</sup> Schulz v. Long, 44 F.3d 643, 646 (8th Cir. 1995).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 648.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 649-50.

<sup>249</sup> Krueger v. Fuhr, 991 F.2d 435, 436-37 (8th Cir. 1993).

<sup>250</sup> *Id.* at 437.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 439.

<sup>254</sup> Romero v. Bd. of County Comm'rs, 60 F.3d 702, 703 (10th Cir. 1995).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

under state law and procedures was irrelevant.<sup>257</sup> The use of force was objectively reasonable and the officer was entitled to qualified immunity.<sup>258</sup>

In an Eleventh Circuit case, the

Plaintiff obtained a number of objects from the kitchen and threw them at [two officers]. She threw a glass at [one officer], striking him in the shoulder; and then she picked up a knife in the kitchen and threw it at [the other officer's] back in an attempt to kill him. She immediately thereafter raised her hands to her head and, at that time, was shot four times by each of the [o]fficer [d]efendants. The shots were fired within a split-second of her assault on [the officer she threw the glass at] and of her attempt to kill [the officer she struck with the knife], but while she was unarmed. She was also standing in the doorway to the kitchen where she had obtained the bottles and knife she had already thrown at the officers.<sup>259</sup>

On remand from the Supreme Court, the Eleventh Circuit affirmed its grant of qualified immunity:

[W]e have considered again whether, in the light of general constitutional rules on deadly force that had already been identified in the decisional law, this use of deadly force would have been seen as plainly unlawful by all objectively reasonable officers; and the answer is “no” given the circumstances, including that the shooting occurred within a split second of an attempted murder on a fellow officer.<sup>260</sup>

In another Eleventh Circuit case, officers responded to a call involving a drug abuser who had threatened suicide.<sup>261</sup> He had cut his arms, refused to drop a box cutter he was holding to his neck, and yelled obscenities.<sup>262</sup> He was sitting on a dresser, but slid off from six to eight feet from the police, after which an officer shot him in the chest.<sup>263</sup> The shooting officers were entitled to qualified immunity.<sup>264</sup> Representative district and state courts have also decided in favor of officers.<sup>265</sup>

<sup>257</sup> *Id.* at 705.

<sup>258</sup> *Id.* at 704-05.

<sup>259</sup> *Willingham v. Loughnan*, 321 F.3d 1299, 1301 (quoting *Willingham v. Loughnan*, 261 F.3d 1178, 1185-86 (11th Cir. 2001)).

<sup>260</sup> *Willingham*, 321 F.3d at 1304.

<sup>261</sup> *Wood v. City of Lakeland, Fl.*, 203 F.3d 1288, 1289 (11th Cir. 2000).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1293.

<sup>265</sup> See the following cases for decisions in favor of officers:

*Easley v. Kirmsee*, 235 F. Supp. 2d 945 (E.D. Wis. 2002). The defendant officers were dispatched to search for a 6 foot tall, 180 pound 18-year-old, who had left his home in a rage, inebriated, spattered with blood from self-inflicted cuts, and armed with a knife. As officers closed in on him, he refused to give up the knife, and began to charge an officer. Fearing for his life, the officer shot and killed the 18-year-old. The officer did not use spray or his baton or any lesser form of force because of the immediate threat to his life. Given the undisputed facts, the force was reasonable and the officers were entitled to qualified immunity on summary judgment. *Id.* at 965.



Some cases, however, have been decided against police officers.<sup>266</sup> For example, in a Tenth Circuit case, a teenager told a police officer that the decedent was armed with a knife.<sup>267</sup> The officer came up from behind the decedent, whose hands were in the air.<sup>268</sup> The decedent turned, started to walk toward the officer, and was shot when he approached to about ten feet.<sup>269</sup> The Tenth Circuit held that the use of deadly force was not objectively reasonable.<sup>270</sup> On the issue of municipal liability, it noted that six encounters involving deadly force in six weeks showed that such encounters were usual and recurring, and thus required training.<sup>271</sup> The firearms training was defective, because it had a lecture and movie, but no live “shoot–don’t shoot” on a range.<sup>272</sup>

### 3. *Subject Using Motor Vehicle as Weapon*

A motor vehicle can be a deadly weapon if driven toward or used to drag an officer. Plaintiff’s usual theory is that the officer’s violation of good police procedures in the manner of his/her approach to the vehicle improperly created the circumstances that then required the use of lethal force. On the defense side, the Constitution, not police procedures, governs. If the officer or a civilian was in danger at the time of the shooting, it does not matter what the circumstances were that got him/her to that point.

The defendants succeeded in representative holdings. In one case an officer leaned into the car window to speak to the driver, who began to drive away.<sup>273</sup> The officer’s arm got caught inside the window, which caused him to be carried 25 to 30 feet before the car swerved and released his arm.<sup>274</sup> A second officer fired at the car, and the bullet struck a passenger in the back

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Huong v. City of Port Arthur, 961 F. Supp. 1003 (E.D. Tex. 1997). During two hours, officers and family members attempted to have a mental subject relinquish a knife and leave. Eventually, when the shooting officer was backed up against a door with the subject in front of him and the subject drew a bowl of hot grease that he held in the other hand back as if he were going to throw it, the officer fired one shot. The officer “was in a situation where he had every reason to believe that he might be hurt or killed by either the knife or the pot of hot grease that [the subject] held in his hands. Considering the circumstances existing at the exact moment when [the officer] decided to shoot [the subject] establishes that [the officer’s] use of force was objectively reasonable.” *Id.* at 1007.

McRae v. Tena, 914 F. Supp. 363 (D. Ariz. 1996). The plaintiff, who had mental problems, said the officer could leave, but that he intended to kill the officer by throwing a metal bar at him on the count of three. At the count of two, the plaintiff’s arm was back, and he was ready to throw. Held: The law did not require the officer to retreat when threatened with the use of force, or to ascertain and choose the least intrusive alternative. *Id.* at 367.

Yellowback v. City of Sioux Falls, 600 N.W.2d 554 (S.D. 1999). Police located a man sitting in a closet. He had stabbed his brother and was drunk and holding a knife to his throat. The suspect emerged, still with the knife at his throat and advanced toward the officers, as they shouted to drop the knife. Discussion: The State Supreme Court noted that, “[The stabber] had made a sudden aggressive movement, that he had advanced to a point at which he could easily have lunged and stabbed [the shooter], and that he was moving still closer. . . . Since the officer acted reasonably [in shooting], there was no Fourth Amendment violation.” *Id.* at 558-59.

<sup>266</sup> See, e.g., case cited *infra* note 569 and accompanying text.

<sup>267</sup> Zuchel v. City and County of Denver, 997 F.2d 730, 735 (10th Cir. 1993).

<sup>268</sup> *Id.* at 736.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 737.

<sup>271</sup> *Id.* at 737-38.

<sup>272</sup> *Id.* at 738-39.

<sup>273</sup> Pittman v. Nelms, 87 F.3d 116, 118 (4th Cir. 1996).

<sup>274</sup> *Id.*

seat.<sup>275</sup> The Fourth Circuit granted qualified immunity on the ground that “an objectively reasonable police officer certainly could have believed his decision to fire was legally justified.”<sup>276</sup>

In another case, an off-duty officer working security responded to a complaint about reckless driving.<sup>277</sup> He observed the plaintiff collide into a parked car and start to drive away.<sup>278</sup> He ran toward the car with his revolver drawn, yelling, “Police officer, stop!”<sup>279</sup> The car accelerated, struck him and threw him onto the hood, where he shot into the windshield.<sup>280</sup> A second shot was fired accidentally as the officer fell off the hood.<sup>281</sup> The Fourth Circuit decided that the officer was entitled to qualified immunity.<sup>282</sup> The “failure of [the officer] to display his badge when announcing himself as a police officer” and demanding that the driver stop, even if it was a violation of state law, was “irrelevant to the issue of whether at the moment of the shooting” the officer had probable cause to shoot.<sup>283</sup>

In a Fifth Circuit case, a plainclothes officer patrolling in an unmarked car tried to stop the decedent on suspicion of drunk driving.<sup>284</sup> The decedent stepped on the accelerator and tried to run the officer over as he approached the vehicle on foot.<sup>285</sup> The officer fired once, killing the driver.<sup>286</sup> The Fifth Circuit affirmed summary judgment for the defense holding that the officer was entitled to qualified immunity.<sup>287</sup> “[E]ven a negligent departure from established police procedure does not necessarily signal violation of constitutional protections.”<sup>288</sup> The fact that the city amended its deadly force policy after the incident to prohibit an officer from intentionally or recklessly placing himself or herself in front of an oncoming vehicle when the use of force is a likely outcome was not determinative.<sup>289</sup> The new policy was not constitutionally mandated.<sup>290</sup> That the city made the policy more restrictive did not establish that the prior policies were unconstitutional.<sup>291</sup>

In a case decided by the Sixth Circuit, officers shot at the tires of a bank robbery suspect as he sped away.<sup>292</sup> Another officer, who heard the shots, observed the robbery suspect drive

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 120.

<sup>277</sup> *Drewitt v. Pratt*, 999 F.2d 774, 776 (4th Cir. 1993).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 780.

<sup>283</sup> *Id.*

<sup>284</sup> *Fraire v. City of Arlington*, 957 F.2d 1268, 1270 (5th Cir. 1992) (quotations omitted).

<sup>285</sup> *Id.* at 1271.

<sup>286</sup> *Id.* at 1271-72.

<sup>287</sup> *Id.* at 1276.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 1280-81.

<sup>290</sup> *Id.* at 1281.

<sup>291</sup> *Id.*

<sup>292</sup> *Dudley v. Eden*, 260 F.3d 722, 724 (6th Cir. 2001).

recklessly.<sup>293</sup> According to him, the suspect rammed his police cruiser, at which point the officer fired three rounds.<sup>294</sup> The court held that there was no Fourth Amendment violation.<sup>295</sup> It noted,

[g]iven [the suspect's] bank robbery, his refusal to comply with the commands of armed policemen, his attempt to evade arrest, and his reckless driving, it was reasonable for [the officer] to conclude that [the suspect] posed a serious threat to himself and others.<sup>296</sup>

In a similar case, the decedent fled at speeds of over ninety miles per hour to evade capture.<sup>297</sup> In a field and later a dead end street, he crashed into police vehicles and drove around others.<sup>298</sup> As the decedent again attempted to drive off, an officer fired one shot, which killed him.<sup>299</sup> The Sixth Circuit affirmed summary judgment for the defendants, and rejected the plaintiff's claim that the officer should be liable for violating a city policy that forbids officers to fire at moving vehicles in order to apprehend a misdemeanor suspect.<sup>300</sup> The issue was whether the officer violated the Constitution, "not whether he should be disciplined by the local police force. A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability."<sup>301</sup>

In another case, the decedent motorist, a suspected drunk driver, led police on a high-speed chase involving officers from two states.<sup>302</sup> At the end of the chase, the decedent reversed direction and ran head on into the sheriff's stopped patrol car.<sup>303</sup> Outside the patrol car, fearing that the motorist next intended to run him over, the chief of police fired four shotgun blasts, killing the motorist.<sup>304</sup> The Eighth Circuit concluded that even if the shots were fired after the head-on collision with the sheriff's patrol car, the decedent posed an imminent threat that justified the shooting and summary judgment for the chief.<sup>305</sup>

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 727.

<sup>296</sup> *Id.*

<sup>297</sup> *Smith v. Freland*, 954 F.2d 343, 344 (6th Cir. 1992).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 345-46.

<sup>301</sup> *Id.* at 347.

<sup>302</sup> *Hernandez v. Jarman*, 340 F.3d 617, 624 (8th Cir. 2003); *see also Ridgeway v. City of Woolwich Township Police Department*, 924 F. Supp. 653 (D. N.J. 1996). The plaintiff sprayed a chemical in a woman's face, robbed her of her purse, and dragged her through a parking lot before taking off in a car. During the chase, he made a U-turn and rammed a police vehicle, disabling it. Ten minutes later, a second officer observed the car and gave chase, and again the plaintiff did a U-turn and rammed the police car. After running a stop sign and entering a parking lot, the plaintiff rammed the police car again, flipping it on its side. The plaintiff leaned toward the floor before getting out and appeared to point something at the officer. The evidence was disputed about whether the officer warned him to stop or he would shoot. The officer fired 10 to 20 rounds at the plaintiff as he ran. The officer reasonably believed he had to use deadly force to apprehend the plaintiff and to prevent his escape. *Id.*

<sup>303</sup> *Hernandez*, 340 F.3d at 621.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 624.

However, the plaintiffs succeeded in other representative circuit holdings. In one case a plaintiff, after murdering a police officer, fled in a chase.<sup>306</sup> The chase ended in a collision.<sup>307</sup> A state trooper responded to the lookout for a “tall black male.”<sup>308</sup> When he observed a black male at the scene dressed in dark clothing and carrying a gun, the trooper mistook a port authority police officer for the perpetrator and shot him.<sup>309</sup> According to the port authority officer’s version, the trooper should have observed that the perpetrator was in the car already dead from a self-inflicted gunshot wound, he (the port authority officer) did not hear the trooper scream to drop the gun, he did not point the gun at the trooper, and he was mistaken for the perpetrator because he was also black.<sup>310</sup> Applying *Saucier v. Katz*,<sup>311</sup> the Third Circuit found that on the plaintiff’s version of the facts, there was an unreasonable seizure, and a jury on remand would have to resolve disputed facts before the court could determine whether it would have been clear to a reasonable officer in the trooper’s position that his conduct was unlawful.<sup>312</sup>

In a separate case, a shoplifting suspect entered his car and drove in reverse toward an off-duty officer working security, ignoring her demands to stop.<sup>313</sup> A factual dispute precluded summary judgment on qualified immunity.<sup>314</sup> The decedent’s estate argued that the officer was not standing in the path of the backing car, but along side of it, safely out of the way, when she fired.<sup>315</sup> On the Fourth Amendment’s reasonableness standard, “[T]he ultimate question is not whether [the security officer] really was in danger as a matter of fact, but is instead whether it was objectively reasonable for her to believe that she was” at the time she fired.<sup>316</sup>

Another case from the Sixth Circuit involved two women and an officer who saw a vehicle coming toward them.<sup>317</sup> The women jumped on the curb.<sup>318</sup> The officer fired at the car.<sup>319</sup> The bullet went through the window and hit the passenger.<sup>320</sup> The Sixth Circuit denied qualified immunity.<sup>321</sup> When the officer fired at the driver, he intended to stop the car, seizing everything inside including the passenger.<sup>322</sup> A jury considered that the seizure was unreasonable.<sup>323</sup>

In the Seventh Circuit, an officer ordered the decedent out of the cab that he stole.<sup>324</sup> Instead, he locked the doors, rammed the cab into the officer’s car, drove recklessly around the

<sup>306</sup> *Curley v. Klem*, 298 F.3d 271, 273-74 (3d Cir. 2002).

<sup>307</sup> *Id.* at 274.

<sup>308</sup> *Id.* at 273-74.

<sup>309</sup> *Id.* at 274.

<sup>310</sup> *Id.* at 276-77.

<sup>311</sup> 533 U.S. 194 (2001).

<sup>312</sup> *Curley*, 298 F.3d at 283.

<sup>313</sup> *Abraham v. Raso*, 183 F.3d 279, 283 (3d Cir. 1999).

<sup>314</sup> *Id.* at 282.

<sup>315</sup> *Id.* at 284.

<sup>316</sup> *Id.* at 294.

<sup>317</sup> *Fisher v. City of Memphis*, 234 F.3d 312, 315 (6th Cir. 2000).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 317.

<sup>322</sup> *Id.* at 318-19.

<sup>323</sup> *Id.* at 315.

<sup>324</sup> *Estate of Starks v. Enyart*, 5 F.3d 230, 232 (7th Cir. 1993).

parking lot and tried to escape.<sup>325</sup> He sped toward a telephone pole where the officer had taken cover.<sup>326</sup> When the officer stepped out, he and two other officers fired.<sup>327</sup> The court held that, because there was a factual dispute about whether the decedent was intentionally trying to hit the officer, the case could not be disposed of on summary judgment.<sup>328</sup> If, as the plaintiff contended, the officer unreasonably moved in front of the cab giving the driver no time to stop, then the decedent did not cause the danger, and the use of deadly force was unjustified.<sup>329</sup> If the driver could see the officer before he accelerated, the shooting was justified.<sup>330</sup>

In another case, an off-duty officer heard a woman scream and saw two young men with a purse enter a waiting car.<sup>331</sup> The officer fired two shots into the car, killing the driver, who was not one of two young men he had seen.<sup>332</sup> The Ninth Circuit held that the shooter was not entitled to qualified immunity.<sup>333</sup> A “reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead center of the car, would have recognized that he could avoid being injured when the car moved slowly, by simply stepping to the side . . . a reasonable police officer in [the shooter’s] position would not have perceived himself to be in danger of serious bodily harm.”<sup>334</sup>

In another Ninth Circuit case, a federal customs agent who was undercover approached a parked car at a pier and observed a subject with his pants down on top of a woman.<sup>335</sup> The woman screamed for help.<sup>336</sup> Before an agent could apply handcuffs, the subject broke free, jumped back in the car, put it in reverse and raced backwards, with the agent holding on to the door with one hand and his weapon with the other.<sup>337</sup> The agent claimed he feared for his life and held onto the car while he fired three shots, at least two of which hit and killed the subject.<sup>338</sup> The subject’s estate claimed the agent jumped clear of the car after the first shot and was safely out of harm’s way before he fired the second and third.<sup>339</sup> The Ninth Circuit held that a disputed issue of fact concerning the agent’s location when he fired and whether he reasonably believed his life was in danger precluded summary judgment.<sup>340</sup>

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 232-33.

<sup>329</sup> *Id.* at 233-34.

<sup>330</sup> *Id.*

<sup>331</sup> *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1144 (9th Cir. 1996).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 1148.

<sup>334</sup> *Id.* at 1146-47.

<sup>335</sup> *Pellegrino v. United States*, 73 F.3d 934, 935 (9th Cir. 1996); *see also* *Javid v. Scott*, 913 F. Supp. 223, 228 (S.D.N.Y. 1996) (holding that the reasonableness of the use of deadly force did not depend upon whether the officer thought the decedent had a gun, but what he saw the decedent do).

<sup>336</sup> *Pellegrino*, 73 F.3d at 935.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 936.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 937.

#### 4. *Subject Reaching for Something*

Some subjects are shot when they make a furtive gesture, grab for their waistband, reach for something out of sight, try to gain control of the officer's firearm, or hold an object that the defendant mistakenly believes could be a deadly weapon. These cases turn on the reasonableness of the officer's perceptions that the subject presented an immediate threat under the particular facts and circumstances.

On the defense side, several cases illustrate the standard of a "reasonably perceived threat." A mall patron said the plaintiff appeared to have a gun under his sweater.<sup>341</sup> Noting the bulge under the plaintiff's clothing near his waistband, officers ordered the plaintiff to raise his hands and to get down on his knees.<sup>342</sup> The plaintiff initially complied, but later put his hands down to reach into his pocket to turn off his personal stereo.<sup>343</sup> Believing the plaintiff was reaching for a weapon, the officer shot.<sup>344</sup> The Fourth Circuit decided that the officer was entitled to qualified immunity, because he reasonably believed the plaintiff was armed with a gun.<sup>345</sup>

In another case, an undercover officer sold drugs to the driver of the car in which the plaintiff was a passenger.<sup>346</sup> The arresting officer blocked the car, identified himself, and with his gun drawn ordered the plaintiff to raise his hands.<sup>347</sup> The plaintiff had an unidentified object in his hand.<sup>348</sup> Instead of putting up his hands, the plaintiff began to turn his upper body toward the officer.<sup>349</sup> Believing the plaintiff was about to use a weapon, the officer shot him once in the face.<sup>350</sup> The object turned out to be a beer bottle.<sup>351</sup> The Fourth Circuit ruled that the officer was entitled to qualified immunity.<sup>352</sup> He reasonably could have believed the plaintiff presented a deadly threat.<sup>353</sup>

In another Fourth Circuit case, a vice officer saw a woman she thought was a prostitute enter a vehicle with a man.<sup>354</sup> Believing she observed an illegal sex act occurring, the vice officer opened the car door, identified herself, and ordered the occupants to place their hands where she could see them.<sup>355</sup> The man reached for a long cylindrical object behind the seat.<sup>356</sup>

<sup>341</sup> Anderson v. Russell, 247 F.3d 125, 129 (4th Cir. 2001).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 132.

<sup>346</sup> Slattery v. Rizzo, 939 F.2d 213, 215 (4th Cir. 1991).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 217.

<sup>353</sup> *Id.* at 216-17.

<sup>354</sup> Greenidge v. Ruffin, 927 F.2d 789, 790 (4th Cir. 1991).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

Expecting it to be a shotgun, the vice officer shot.<sup>357</sup> The item was a wooden nightstick.<sup>358</sup> The jury verdict for the vice officer was affirmed.<sup>359</sup>

In the Fifth Circuit, the police spotted a suspected convenience store robbery getaway car and gave chase.<sup>360</sup> A passenger discarded portions of the cash register as they fled.<sup>361</sup> After the vehicle spun out of control, police drew their weapons and surrounded it.<sup>362</sup> In defiance of orders to raise his hands, a passenger repeatedly reached down below the line of sight.<sup>363</sup> When the passenger tipped his shoulder and reached further down, the officer shot.<sup>364</sup> The court issued a ruling granting summary judgment for the defense.<sup>365</sup>

In a similar case, an off-duty officer observed an intruder attempting to enter residences.<sup>366</sup> Inside a home, the officer told the intruder to halt and put his hands up.<sup>367</sup> Instead, the intruder fled, with a purse in one hand and the other out of sight, and jumped over a deck railing to the ground 15 feet below.<sup>368</sup> The officer repeated his warning, but the intruder, from a crouched position, rotated his shoulder and the officer shot.<sup>369</sup> The Eighth Circuit upheld a verdict for the officer.<sup>370</sup>

In another Eighth Circuit case, after a report of shots fired, a robbery suspect climbed over a short fence, looked over his shoulder at the officer, and moved his arms as though reaching for a weapon at waist level.<sup>371</sup> The suspect's back remained turned toward the officer and his hands were obscured from view.<sup>372</sup> The officer yelled, "stop," and when the suspect continued to move, he fired into his back.<sup>373</sup> The Eighth Circuit granted summary judgment for the defense, noting that "An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."<sup>374</sup>

In another case, as numerous officers, including the named defendants, began arriving at the scene, the plaintiff "refused to leave the house and began using cocaine and drinking rum."<sup>375</sup> The plaintiff told an officer that he had a gun.<sup>376</sup> The plaintiff "finally emerged from the house

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 793.

<sup>360</sup> *Reese v. Anderson*, 926 F.2d 494, 495 (5th Cir. 1991).

<sup>361</sup> *Id.* at 495-96.

<sup>362</sup> *Id.* at 496.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 501.

<sup>366</sup> *Billingsley v. City of Omaha*, 277 F.3d 990, 992 (8th Cir. 2002).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 995.

<sup>371</sup> *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001).

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 899.

<sup>375</sup> *Medina v. Cram*, 252 F.3d 1124, 1126 (10th Cir. 2001).

<sup>376</sup> *Id.* at 1127.

with his ... hand wrapped in a towel concealing a staple gun, which [the plaintiff] intended as a representation of a weapon.”<sup>377</sup> Although the officers ordered the plaintiff to stop, he continued to walk toward and into the street.<sup>378</sup> The officers used non-lethal beanbag rounds, then an attack dog, to stop the plaintiff.<sup>379</sup> The plaintiff “subsequently dropped to the ground and exposed the staple gun, which officers ... believed to be a gun.”<sup>380</sup> As he turned to the left, causing an officer to conclude he and other officers were in the line of fire, two officers opened fire from distances between eight to twelve feet.<sup>381</sup> The plaintiff survived his injuries.<sup>382</sup> The Tenth Circuit remanded the case with instructions that the district court enter judgment in favor of the defendant officers, making three important points: (1) Fourth Amendment scrutiny applies to conduct that is immediately connected to the seizure; (2) violations of state law and police procedure do not necessarily violate the Constitution; and (3) officers do not have to choose what in hindsight was the least intrusive alternative.<sup>383</sup> A few district court cases are representative.<sup>384</sup>

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<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 1132-33.

<sup>384</sup> For representative decisions, see the following district court cases:

*Medeiros v. Town of Dracut*, 21 F. Supp. 2d 82 (D. Mass. 1998). Two officers encountered two male motorists who acted suspiciously. When the first officer attempted to pat the first suspect down for weapons, the suspect drew a semi-automatic weapon and pointed it in the officer’s face. The second officer, believing he saw the first suspect squeeze or jerk something on the weapon, fired at the suspect. The second suspect then ran and dove behind the open door of their pickup truck as if to go into the cab for a weapon. The second officer fired at the door of the pickup, striking the suspect in the arms and leg. He was unarmed. “There are at least two reasonable explanations for plaintiff’s conduct. On the one hand, diving for cover is a perfectly reasonable reaction on the part of an innocent person caught in a firefight. On the other hand, a culpable individual might dive for a weapon to prevent capture, or, worse, to take the offensive against the police. Confronted with two possible explanations, and the need to make a split-second decision that, either way, would have potentially life-threatening consequences.” *Id.* at 88. The officer was entitled to qualified immunity “unless no reasonable police officer could have believed that plaintiff posed a threat.” *Id.* at 89.

*Ridgeway v. City of Woolwich Twnshp Police Dep’t*, 924 F. Supp. 653 (D.N.J. 1996). After running a stop sign and entering a parking lot, the plaintiff rammed the police car, flipping it on its side. The plaintiff leaned toward the floor before getting out and appeared to point something at the officer. The evidence was disputed about whether the officer warned him to stop or he would shoot. The officer fired 10 to 20 rounds at the plaintiff as he ran. The officer reasonably believed he had to use deadly force to apprehend the plaintiff and to prevent his escape.

*St. Hilaire v. City of Laconia*, 885 F. Supp. 349 (D.N.H. 1995), *aff’d on other grounds*, 71 F.3d 20 (1st. Cir. 1995). A search warrant execution team came around the plaintiff’s car from the rear, shouting “Police.” A plainclothes officer in the lead and on the passenger side observed the plaintiff reach for a gun, at which time the officer shot. Qualified immunity granted on summary judgment: Although the officers may have created a dangerous situation by approaching from the rear with guns drawn and a plainclothes officer in the lead, using deadly force under the circumstances did not violate clearly established law. *Id.* at 358.

*Colon v. Rivera*, 846 F. Supp. 156 (D.P.R. 1993). Officers responding to a breaking and entering incident saw the plaintiff running down the stairs. The defendant officer chased the plaintiff through yards and over a fence. The plaintiff reached into his pocket, pulled out something shiny, and approached the defendant officer, who fired, hitting him in the leg. Outcome: The officer was entitled to qualified immunity. *Id.* at 161.

*Wyche v. City of Franklinton*, 837 F. Supp. 137 (E.D.N.C. 1993). An officer received a call about a mentally disturbed person. The officer observed a man with blood on his arms roaming the aisles of a convenience store. The officer called for backup. When the person saw the officer out in the parking lot, he started chasing him, threatened to kill him, and started to grab him. The officer told him to stop or he would shoot. Nevertheless, he continued to advance to three to five feet, reached behind his back and lunged forward. The officer shot him in the



On the plaintiffs' side, some cases illustrate the lack of a reasonable threat. In one case, the plaintiff robbed a pharmacy and took off running, with a jacket in one hand and a mesh bag with stolen cash and drugs in the other.<sup>385</sup> When the officer ordered him to stop, the thief turned and unexpectedly threw the jacket and bag at the officer.<sup>386</sup> After the bag hit the officer in the shoulder, he again ordered the thief to stop and shot him in the back.<sup>387</sup> The Seventh Circuit reversed the trial court's grant of qualified immunity to the officer.<sup>388</sup> Throwing the jacket and bag was not like the threat of a weapon.<sup>389</sup> After the thief threw the bag and jacket and started to run, there was no immediate threat.<sup>390</sup>

In another case, a radio call said a motorist involved in an accident was assaulting a female passenger.<sup>391</sup> Officers observed a suspect running on a bridge, engaged in a foot pursuit with their weapons drawn, and chased the suspect into a field.<sup>392</sup> He ignored commands to show his hands, turned, and uttered obscenities, whereupon the officer shot him.<sup>393</sup> The Eighth Circuit said the case against each officer should be analyzed separately.<sup>394</sup> Contradictions in the testimony, physical evidence, and testimony from a police procedures expert precluded summary judgment on qualified immunity.<sup>395</sup>

Finally, in another Eighth Circuit case, troopers were involved in a high-speed chase.<sup>396</sup> The pursued vehicle hit a chain link fence at the end of a vacant lot and came to a stop.<sup>397</sup> The troopers surrounded the vehicle.<sup>398</sup> The defendant trooper approached the passenger side with his gun drawn and used his flashlight to break the passenger-side window.<sup>399</sup> The plaintiff's decedent raised his hands and made eye contact with the defendant trooper.<sup>400</sup> The plaintiff's decedent shifted his eyes to his left, dropped his hands, twisted his body to his left, and reached to the floor in the area between his legs and the console in the middle of the vehicle.<sup>401</sup> The Eighth Circuit denied summary judgment based upon qualified immunity.<sup>402</sup> A question of fact existed regarding whether the decedent was turning reflexively down and away from the

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leg, the person continued to approach, and the officer then fired a fatal shot. The court granted summary judgment on qualified immunity: A reasonable officer could have believed the use of deadly force was necessary and lawful. *Id.* at 143.

<sup>385</sup> *Ellis v. Wynalda*, 999 F.2d 243, 245 (7th Cir. 1993).

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 246-47.

<sup>389</sup> *Id.* at 247.

<sup>390</sup> *Id.*

<sup>391</sup> *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 449 (8th Cir. 2002).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 454.

<sup>395</sup> *Id.*

<sup>396</sup> *Ribbey v. Cox*, 222 F.3d 1040, 1041 (8th Cir. 2000).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 1043.

breaking window or the trooper had probable cause to believe that the decedent was reaching for a weapon, and thus posed a significant threat of death or serious physical harm.<sup>403</sup>

### 5. *Subject Engaged in Violent Struggle*

Where a subject engages the officer in a violent struggle that threatens him or her with death or serious bodily harm, the shooting is ordinarily justified. Cases ruling in the defendant's favor have some of these features:

- (1) Although unarmed, the subject has clearly achieved the upper hand and is inflicting serious bodily harm;
- (2) the officer is in immediate danger of losing consciousness;
- (3) the subject is using the officer's baton or other equipment against him; or
- (4) the subject is about to gain control of the officer's weapon.

In an illustrative case from the Fifth Circuit, the suspect did not answer questions truthfully, disobeyed orders to get on the ground, and violently resisted two troopers' attempts to control him.<sup>404</sup> The suspect, who was larger, knocked a trooper to the ground, where the trooper was dazed and experienced blurry vision.<sup>405</sup> The suspect moved toward the patrol car, which had the trooper's shotgun.<sup>406</sup> The court held that the failure to give a warning before firing was not objectively unreasonable, as the trooper did not know if the suspect was going to escape or kill or seriously injure him.<sup>407</sup>

In another case, the plaintiff left a treatment center for mental illness and chemical dependency.<sup>408</sup> During a struggle to take him into custody, a deputy hit the plaintiff with his baton.<sup>409</sup> The plaintiff reached for the deputy's gun, hit him, kicked him in the chest, knocked him down twice and pushed him onto the floor.<sup>410</sup> The court held the shooting was justified.<sup>411</sup> The encounter lasted less than three minutes, but rapidly escalated.<sup>412</sup> The deputy could reasonably have believed that his life was in danger.<sup>413</sup>

<sup>403</sup> *Id.* See also *Javid v. Scott*, 913 F. Supp. 223 (S.D.N.Y. 1996). The suspect looked at the officer, turned quickly to his right, and turned back facing the officer. The pick-up came directly towards the officer's vehicle. Believing that the robbery suspect was reaching for a gun, the officer fired a bullet that broke the driver's side window and struck the robbery suspect in the side. Dispositive motion denied: Fact issues had to be tried. The reasonableness of the use of deadly force did not depend upon whether the officer thought the decedent had a gun, but what he saw the decedent do. *Id.* at 228.

<sup>404</sup> *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997).

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 100.

<sup>408</sup> *Nelson v. County of Wright*, 162 F.3d 986, 988 (8th Cir. 1998).

<sup>409</sup> *Id.* at 988.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 991.

<sup>412</sup> *Id.* at 989.

<sup>413</sup> *Id.* at 991.

In another case, a police detective in an unmarked car with his wife and daughter pursued a car that almost caused a head-on collision.<sup>414</sup> The pursued car struck a curb and the detective walked up to the vehicle with his gun in one hand and a long metal flashlight in the other.<sup>415</sup> The very intoxicated motorist did not respond to the detective's request to put his hands on the steering wheel and instead tried to escape.<sup>416</sup> The detective reached inside to turn off the ignition, but the motorist grabbed the detective's flashlight.<sup>417</sup> When the detective tried to handcuff him, the motorist came out of the vehicle swinging.<sup>418</sup> The detective hit the motorist with his flashlight, the motorist kicked the detective in the stomach and groin, and the two fought for control of the detective's gun.<sup>419</sup> The detective shot, killing him.<sup>420</sup> The Ninth Circuit held that there was no Fourth Amendment violation.<sup>421</sup>

## 6. Subject Fleeing

In the final category of common fact patterns, the subject has committed a violent crime and is fleeing. Under *Tennessee v. Garner*, lethal force is justified to prevent escape if no alternative means of apprehension are available.<sup>422</sup>

For instance, in one case, a burglar tied up three victims and shot two others with a gun found in the house, took firearms and ammunition, and fled the scene.<sup>423</sup> Officers located him on foot in the neighborhood.<sup>424</sup> After ordering him to surrender, they fired shots as he climbed a fence.<sup>425</sup> Two shots fired through the fence hit him in the hip and the back.<sup>426</sup> The court held that use of deadly force was justified.<sup>427</sup> The burglar had committed a crime involving infliction of serious bodily harm, was still a threat, was trying to escape, and was warned before the officers shot.<sup>428</sup> Although he might have been captured later by less drastic means, the Fourth Amendment did not require that.<sup>429</sup>

<sup>414</sup> *Billington v. Smith*, 292 F.3d 1177, 1180 (9th Cir. 2001).

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 1181.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 1190-91.

<sup>422</sup> *Tennessee v. Garner*, 471 U.S. 1, 20 (1985).

<sup>423</sup> *Forrett v. Richardson*, 112 F.3d 416, 418 (9th Cir. 1997); *see also* *Ridgeway v. City of Woolwich Township Police Dep't*, 924 F. Supp. 653 (D.N.J. 1996). After running a stop sign and entering a parking lot, the plaintiff rammed the police car, flipping it on its side. The plaintiff leaned toward the floor before getting out and appeared to point something at the officer. The evidence was disputed about whether the officer warned him to stop or he would shoot. The officer fired 10 to 20 rounds at the plaintiff as he ran. The officer reasonably believed he had to use deadly force to apprehend the plaintiff and to prevent his escape. *Id.* at 655-56.

<sup>424</sup> *Forrett*, 112 F.3d at 418.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 421.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

In contrast, in a Sixth Circuit case, a male robbery victim told police that one of the two robbers had a gun.<sup>430</sup> The police then saw the two robbers attempt a second armed robbery against a woman.<sup>431</sup> One of the suspected robbers, a passenger in a car, pointed a gun at an officer and the officer fired back.<sup>432</sup> The driver fled on foot, was shot trying to escape, and died later.<sup>433</sup> The only weapon recovered was the passenger's rifle.<sup>434</sup> There was a factual dispute over whether an objectively reasonable police officer would have thought the driver was armed and an immediate threat, and, therefore, the Sixth Circuit could not award summary judgment based on qualified immunity.<sup>435</sup>

#### IV. RECURRING FOURTH AMENDMENT ISSUES

Regardless of the fact pattern, there are recurring issues that stake out the bounds of the Fourth Amendment. These are discussed in the following sections:

- (1) Pointing a gun without shooting may implicate the Fourth Amendment if it is done in connection with detaining someone or taking them into custody; and it may be objectively reasonable when the officer's safety and security are threatened.
- (2) Off-duty police officers engaging in purely private disputes and not performing a core police function like making an arrest are not acting under color of law, and, therefore, cannot be charged with a Fourth Amendment violation enforceable through section 1983. However, the analysis becomes more complicated if their department rules require officers to be "always armed/always on duty."
- (3) Although the Supreme Court has said that a pre-shooting warning should be given if feasible, it did not define the limits of feasibility. Numerous lower federal court decisions have found that the threat of harm was so imminent that a warning was not feasible, and, therefore, not constitutionally required.
- (4) The Fourth Amendment does not limit the number of shots that can be fired if a shooting is justified, but it does require that none be fired after the threat is eliminated.
- (5) At least one court has said that the reasonableness inquiry is limited to the person who is actually shot. That bystanders may have been at risk does not render an otherwise reasonable shooting unreasonable.
- (6) Compliance with state law and department protocols may bear on the objective reasonableness of an officer's actions, but ultimately does not determine whether the actions are in compliance with the Fourth Amendment.
- (7) The Fourth Amendment does not require an officer to choose the least intrusive or the best among alternatives, only one that is objectively reasonable.

<sup>430</sup> *Washington v. Newsom*, 977 F.2d 991, 992 (6th Cir. 1992).

<sup>431</sup> *Id.* at 993.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at 995-96.

(8) The Supreme Court has yet to determine if a Fourth Amendment reasonableness review should include the entire sequence of events leading up to a shooting where the police claim self defense, or just those events immediately before and the shooting itself. Most lower federal court decisions do not consider whether the shooting police officer created or could have avoided the circumstances that later required the use of deadly force, but only whether the officer's shooting was justified considering only the threat at that instant. With some courts, the result may be different. They may break the incident up into segments and scrutinize each one under the reasonableness standard. Or they may impose liability if a Fourth Amendment violation earlier in the sequence provoked, i.e., can be causally linked to, the shooting itself.

### 1. *Pointing Gun Without Shooting*

Police officers draw their weapons in the normal course of their duties for their own safety and security, e.g., conducting high-risk motor vehicle stops, investigating robberies and burglaries in progress, and executing high-risk search and arrest warrants. While this conduct is gauged by the objective reasonableness standard of the Fourth Amendment, it generally does not violate it. In some instances, e.g., where an officer draws his gun and the subject is not under detention or the officer is trying to detain him/her and the subject does not respond to the show of force, there is no seizure, and the issue of whether the use of force was unreasonable under the Fourth Amendment is not ripe. In a few examples, an officer points a weapon at an unarmed subject who poses no threat to the officer's safety or security. In such cases, it can properly be said that excessive force was used in violation of the Fourth Amendment.

Several examples make the point for the defense. For example, in one case, based on radio reports, sheriff's deputies suspected that the occupants of a car they stopped had been involved in the shooting of a security guard or police officer in a tavern parking lot fight.<sup>436</sup> Officer safety justified ordering the occupants out a gunpoint, handcuffing them, and detaining them in the back of a police vehicle while the deputies investigated the shooting.<sup>437</sup>

In another case, police pursued a suspect on foot on suspicion that he stole a van.<sup>438</sup> An officer pointed his gun at the suspect and re-holstered it when the suspect started to run.<sup>439</sup> Pointing the gun did not cause the suspect to submit to authority, and was, therefore, not a seizure.<sup>440</sup> Moreover, because the officer had reason to believe the suspect committed a felony, fled, and hid to avoid capture, his conduct was objectively reasonable.<sup>441</sup>

In a Ninth Circuit case, police responded to a radio dispatch regarding a man who had just shot two dogs and was in middle of the street yelling.<sup>442</sup> According to the plaintiff, an

<sup>436</sup> *Houston v. Clark County Sheriff Deputy John Does*, 174 F.3d 809, 813 (6th Cir. 1999).

<sup>437</sup> *Id.* at 815.

<sup>438</sup> *Edwards v. Giles*, 51 F.3d 155, 156 (8th Cir. 1995).

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 157.

<sup>441</sup> *Id.*

<sup>442</sup> *Robinson v. Solano County*, 278 F.3d 1007, 1010 (9th Cir. 2002).

officer took out his gun and pointed it at him.<sup>443</sup> The other officer told the plaintiff to put his hands over his head.<sup>444</sup> As the plaintiff was putting his hands up, the other officer commanded him to step forward and thrust his gun three or four feet from the plaintiff's head.<sup>445</sup> As a retired police officer, the plaintiff "was aware of the immediate physical danger posed by a gun pointed at his head from point blank range; he testified that he feared for his life."<sup>446</sup> The court's analysis was that the retired officer's "earlier use of a weapon, that he clearly no longer carried, is insufficient to justify the intrusion on [his] personal security."<sup>447</sup> He, therefore, alleged a claim of excessive force in violation of the Fourth Amendment's standard of "objective reasonableness."<sup>448</sup> However, because the law regarding pointing a gun to the head of an unarmed suspect during a detention or arrest was not clearly established, the officers were entitled to qualified immunity.<sup>449</sup>

In another case, a police officer allegedly pointed a gun at a family member and made a "profane remark."<sup>450</sup> Because the plaintiff was not arrested or his liberty restrained, there was no seizure, and, therefore, no unreasonable seizure through excessive force.<sup>451</sup>

However, compare those outcomes with a Seventh Circuit decision.<sup>452</sup> The complaint alleged that, during a residential search, a boy posed no threat to the officer's safety.<sup>453</sup> He was not actively resisting arrest, attempting to flee, assaulting anyone, or suspected of committing a crime.<sup>454</sup> Even if there was no "precisely analogous case," it "should have been obvious" to the officer that the threat of deadly force was objectively unreasonable.<sup>455</sup> Qualified immunity was denied.<sup>456</sup>

## 2. *Off-Duty Conduct*

Many police departments require their officers to carry their firearms at all times and to take police action when they are off-duty. Off-duty officers put themselves at risk to protect lives and property. But since no reputable municipality would have a police department with no uniforms, radios, vehicles, or use of force options between a bare hand and a hand gun, the "always on duty/always armed" policy puts both officers and the public at risk without specialized officer guidance and training. For instance, off-duty officers typically are cautioned against making motor vehicle stops, or taking action where confusion over their identity as police officers could cause a danger to themselves or others. Instead, the appropriate police response may be to call for on-duty, uniformed officers.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 1014.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 1016.

<sup>450</sup> *Fuller v. Vines*, 36 F.3d 65, 67-68 (9th Cir. 1994).

<sup>451</sup> *Id.* at 68.

<sup>452</sup> *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992).

<sup>453</sup> *Id.* at 292-93.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 295.

<sup>456</sup> *Id.*

In a significant Tenth Circuit ruling, a motorist running errands became involved in a traffic dispute with another driver who was a police officer.<sup>457</sup> The police officer “was not on regular shift, was driving his own car, and was not in uniform.”<sup>458</sup> According to the motorist, on the two occasions when the two cars were stopped, the off-duty officer got out of his car, walked up to the motorist’s car, and drew his service revolver out of his jacket.<sup>459</sup> He then shouted that he was a police officer without displaying a badge or other identification, and pointed the gun at the motorist’s face.<sup>460</sup> The second time the motorist put the car in gear and started to drive away.<sup>461</sup> The off-duty officer fired several shots into the car, hitting the motorist approximately three times.<sup>462</sup> The shooting caused the motorist a collapsed lung, shattered ribs, and extensive nerve and muscle damage in his neck, chest, and arm.<sup>463</sup>

The off-duty officer claimed that, “after the traffic dispute, the motorist brandished a weapon at *him*, committing the crime of felony menacing. He therefore attempted to arrest [the motorist] pursuant to [the city’s police department] policy.”<sup>464</sup> The second time he approached the motorist’s vehicle he ordered the motorist to keep his hands visible.<sup>465</sup> Instead, the motorist reached down to his right, brought his hand up, and began driving away.<sup>466</sup> He fired because he feared the motorist was both reaching for a weapon and attempting to flee.<sup>467</sup>

After settling with the off-duty officer, the motorist proceeded to trial on the § 1983 municipal liability claim based on a “failure to train” theory.<sup>468</sup> Specifically, the motorist claimed the city and county failed to train its officers adequately with respect to implementing the following department policies:

#### Rule and Regulation 107 – Always on Duty

Officers are held to be always on duty, although periodically relieved from their routine performance of it. . . . The fact that they may be technically off-duty shall not relieve them from the responsibility of taking proper police action in any matter coming to their attention. When there is no urgent or immediate need for police action, they may request the dispatcher to turn the matter over to officers on duty in the district, but they shall take such police action as may be required prior to the arrival of the dispatched officers.<sup>469</sup>

#### Rule and Regulation 85 – Equipment Carried on Person

<sup>457</sup> *Brown v. Gray*, 227 F.3d 1278, 1284 (10th Cir. 2000).

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* at 1284.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 1284-85.

<sup>469</sup> *Id.* at 1285-86.

Officers shall . . . be armed at all times . . .<sup>470</sup>

These policies were referred to collectively in the opinion as the “always armed/always on duty” policy.<sup>471</sup>

With regards to municipal liability, the motorist’s failure to train theory was, police officers were not instructed how to take “police action” when they were off-shift and without their uniforms, police vehicles, radios, and other accouterments of law enforcement. He contended that despite the different circumstances presented when an officer is off-shift, the officer training program purposefully did not distinguish between on-shift and off-shift scenarios. Officers were instead told to respond as though they were on-shift in all situations. Consequently, [the off-duty officer] believed he was required to take police action after he thought he saw [the motorist] brandish a gun. However, he could not properly pull [the motorist] over because he was not in his patrol car, failed to adequately identify himself as a police officer because he was not in uniform, and inappropriately escalated the violence level of the encounter because he was unable to call for back-up.<sup>472</sup>

In support of his theory, the plaintiff called a twenty-nine year veteran of the department and former commander of the police academy, and an expert witness with an extensive background in police policies, procedures, and training practices.<sup>473</sup> The Tenth Circuit held that there was sufficient evidence of deliberate indifference to training on how to handle off-shift incidents and a direct causal link to the incident to sustain the verdict against the city.<sup>474</sup>

Occasionally, off-duty officers abuse their police powers and equipment in the course of private disputes. If they are not performing a police function, they are not acting under color of state law, and § 1983 does not afford a Fourth Amendment remedy. For example, what began as an argument inside a bar turned into a fatal shooting outside between a patron and an off duty officer who displayed his police identification and service revolver under an “always armed/always on duty” policy.<sup>475</sup> The First Circuit held that the fact that the officer agreed to go outside to settle his differences in a brawl “dominate[d] any characterization of the events.”<sup>476</sup> Because he was not acting under color of law, defendants could not be held liable on a deprivation of civil rights theory.<sup>477</sup>

In the Ninth Circuit case, an intoxicated, off-duty sheriff’s deputy fatally shot a man in a barroom brawl.<sup>478</sup> The county had an always armed/always on duty policy and another against

<sup>470</sup> *Id.*

<sup>471</sup> *Id.* at 1286.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at 1289.

<sup>474</sup> *Id.* at 1291.

<sup>475</sup> *Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 450 (1st Cir. 1997).

<sup>476</sup> *Id.*

<sup>477</sup> *Id.* at 446.

<sup>478</sup> *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1056 (9th Cir. 1998).



being drunk and disorderly.<sup>479</sup> The decedent's representatives argued that the county was liable because the sheriff's department failed to warn deputies about the danger of carrying a gun while intoxicated.<sup>480</sup> Evidence was introduced that fifteen of sixty-three off-duty shootings and seventeen off-duty brandishings of guns involved alcohol.<sup>481</sup> There was no municipal liability because the county could not have foreseen that a deputy would become drunk and disorderly and shoot someone.<sup>482</sup>

### 3. Feasibility of Warning

*Tennessee v. Garner* permits deadly force, "if, where feasible, some warning has been given."<sup>483</sup> Cases discuss whether the officer has issued a warning ("Drop the gun or I'll shoot"), or an immobilization command ("Police, freeze"); or, in a variation, visually or audibly identified himself or herself as a police officer.

In a First Circuit case, a police officer obtained a search warrant for the decedent's person and his business premises.<sup>484</sup> As a plainclothes detective approached the decedent, who was sitting in his vehicle, the decedent reached for a firearm.<sup>485</sup> Under the plaintiff's version, before identifying himself or his purpose, the officer fired.<sup>486</sup> The First Circuit awarded qualified immunity for the detective. The law was not clearly established that he had to announce his identity and purpose before executing the warrant.<sup>487</sup>

In a Fifth Circuit case, the suspect did not answer questions truthfully, disobeyed orders to get on the ground, and violently resisted two troopers' attempts to control him.<sup>488</sup> The suspect, who was larger, knocked a trooper to the ground, where the trooper was dazed and experienced blurry vision.<sup>489</sup> The suspect moved toward the patrol car, which had the trooper's shotgun.<sup>490</sup> The court held the failure to give a warning before firing was not objectively unreasonable.<sup>491</sup> The trooper did not know if the suspect was going to escape or kill or seriously injure him.<sup>492</sup>

In another case, an officer chased on foot a man reported to have a knife, and ordered him to freeze.<sup>493</sup> When the gap closed to three or four yards, the officer believed he saw the suspect

<sup>479</sup> *Id.* at 1060.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

<sup>484</sup> *St. Hilaire v. City of Laconia*, 71 F.3d 20, 22 (1st Cir. 1995).

<sup>485</sup> *Id.* at 23.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 28; *see also* *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (holding that the "failure of [the officer] to display his badge when announcing himself as a police officer" and demanding that the driver stop, even if it was a violation of state law, was "irrelevant to the issue of whether at the moment of the shooting [the officer] had probable cause" to shoot).

<sup>488</sup> *Colston v. Barnhart*, 130 F.3d 96, 98 (5th Cir. 1997).

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> *Id.* at 100.

<sup>493</sup> *Krueger v. Fuhr*, 991 F.2d 435, 437 (8th Cir. 1993).

pull a knife from his waistband.<sup>494</sup> Thinking the man was going to attack, the officer slowed down and shot four times, killing him.<sup>495</sup> The officer ordered the suspect to freeze when he first encountered him, “[h]owever...under the urgent circumstances facing [the officer], the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable.”<sup>496</sup>

In an Eleventh Circuit case, a stolen truck rammed the back of a deputy’s vehicle, and sped off at high speed.<sup>497</sup> Intending to disable the truck, the deputy fired three rounds without warning the occupants.<sup>498</sup> A bullet punctured the spine of a passenger, instantly paralyzing him.<sup>499</sup> The court decided that the passenger was “seized” because he was hit by a bullet meant to stop him and the driver.<sup>500</sup> A jury could conclude that the seizure was unreasonable and it was feasible for the deputy to warn the truck’s occupants before opening fire.<sup>501</sup> However, qualified immunity was afforded the deputy because the *Garner* Court did not define factual situations when a warning was necessary.<sup>502</sup> To the same effect are district court decisions.<sup>503</sup>

Compare the following district court case, which deals with officer identification.<sup>504</sup> Officers wearing police caps and bullet-proof vests with police identification knocked and announced that they were police with a search warrant.<sup>505</sup> When there was no response, they broke the door open with a battering ram.<sup>506</sup> Inside, they continued to announce, “[P]olice officers, we have a search warrant.”<sup>507</sup> Observing the broken door, and not hearing that the

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

<sup>496</sup> *Id.* at 440.

<sup>497</sup> *Vaughan v. Cox*, 264 F.3d 1027, 1031 (11th Cir. 2001).

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* at 1032.

<sup>500</sup> *Id.* at 1033.

<sup>501</sup> *Id.*

<sup>502</sup> *Id.* at 1036-37.

<sup>503</sup> For similar district court decisions, see the following cases:

*Frane v. Kijowski*, 992 F. Supp. 985, 991 (N.D. Ill. 1998). Officers looked through a kitchen window, and saw the intruder-husband pointing what looked like a gun at his wife’s head. The court concluded that a reasonable officer was justified in thinking that the wife’s life was in danger. Exigent circumstances justified the failure to knock and announce. It was not feasible for the officers to give a warning before shooting through the window. *Id.*

*Ridgeway v. City of Woolwich Township Police Dep’t.*, 924 F. Supp. 653, 660 (D.N.J. 1996). The plaintiff rammed a police car, flipping it on its side. The plaintiff leaned toward the floor before getting out and appeared to point something at the officer. The evidence was disputed about whether the officer warned him to stop or he would shoot. The officer fired 10 to 20 rounds at the plaintiff as he ran. The officer reasonably believed he had to use deadly force to apprehend the plaintiff and to prevent his escape. It was not feasible to issue a warning, since the plaintiff knew he was being pursued and had given no indication he would submit to police authority. Based on the belief that the plaintiff was armed, the officer could have reasonably concluded that a “warning would cause the plaintiff to turn and use his weapon . . .” *Id.*

*Maravilla v. United States*, 867 F. Supp. 1363, 1378-79 (N.D. Ind. 1994). ATF agents were executing an arrest warrant for a gang leader at his home. Agents saw the gang leader’s father fire a gun from a second floor bedroom window at agents outside. The agents fatally shot him. Summary judgment for the defendants: Even if the agents did not shout a warning before they shot the gang leader’s father as they claimed, they acted reasonably given the immediate and serious threat. *Id.*

<sup>504</sup> *Sledd v. Lindsay*, 864 F. Supp. 819 (N.D. Ill. 1994).

<sup>505</sup> *Id.* at 823.

<sup>506</sup> *Id.* at 824.

<sup>507</sup> *Id.*

intruders were police, the plaintiff got a rifle.<sup>508</sup> An officer identified himself and told the plaintiff to drop the rifle, but he stepped into the stairway with the gun pointed at the officer, whereupon the other officers shot.<sup>509</sup> The district court granted summary judgment for the officers.<sup>510</sup> Although officers could not use deadly force in situations where they created the dangerous encounter, here they did not because “there existed no clear standard of law that an officer must obtain confirmation that the threatening suspect knows that he is confronting a peace officer prior to using deadly force.”<sup>511</sup>

#### 4. *Multiple Shots*

The Constitution does not prescribe the number of shots that can be fired or the number of officers who can fire them. It is improper to conclude that excessive force was used because multiple shots were fired so long as the shots were fired in a very few seconds and the officers ceased firing the instant they perceived that the subject was no longer a threat. However, it is constitutionally unreasonable for officers to continue to fire after the threat is over.

Summary judgment was granted for the defense in a Fourth Circuit case.<sup>512</sup> A handcuffed arrestee sitting in the front seat of a police vehicle released the seatbelt and was able to position his arms to aim a small handgun at the officer.<sup>513</sup> When the arrestee did not respond to an order to drop the gun, officers fired twenty-two shots, killing him.<sup>514</sup> The court said the officer’s actions were reasonable.<sup>515</sup> Officers “confronted an intoxicated individual pointing a gun at them from only a few feet away with his finger on the trigger.”<sup>516</sup> On the issue of multiple shots, the Court held that “multiple shots were fired does not suggest the officers shot mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat.”<sup>517</sup>

More often, opinions treat the issue of multiple shots as creating a factual dispute requiring jury resolution. In the Sixth Circuit,<sup>518</sup> a 37-year-old paranoid schizophrenic man with knives in each hand refused to return to a psychiatric institute.<sup>519</sup> An officer forced open his apartment door.<sup>520</sup> An officer fired two Tazer darts, but the psychiatric patient overcame the effects and rushed toward an officer, with the knives pointed at him.<sup>521</sup> Two officers shot, and he fell downstairs to a landing, but still held a knife.<sup>522</sup> They told him to drop the knife.<sup>523</sup> The psychiatric patient got up, was hit with two additional Taser darts, and charged upstairs at the

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

<sup>510</sup> *Id.* at 831.

<sup>511</sup> *Id.* at 830.

<sup>512</sup> *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996).

<sup>513</sup> *Id.* at 642.

<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 641.

<sup>516</sup> *Id.* at 642.

<sup>517</sup> *Id.* at 643.

<sup>518</sup> *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992).

<sup>519</sup> *Id.* at 1039-40.

<sup>520</sup> *Id.* at 1040.

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

officers, still holding a knife.<sup>524</sup> In the course of these events, they fired several more times.<sup>525</sup> Reversing summary judgment for the officers, the court said,

[The psychiatric patient] was shot a total of twenty-two times . . . even though he was armed only with knives. In addition, plaintiffs raise a genuine issue of fact as to whether, in the second and third round of discharges of the officers' revolvers, the officers may have shot [the psychiatric patient] even though he posed no serious threat of physical harm. Finally, the record suggests that some ten to twelve minutes elapsed between the second and third series of shots, during which time [the plaintiff claimed the psychiatric patient] dropped his knife. Given the current state of the record, we believe that a reasonable jury might conclude that the officers' repeated use of their revolvers violated this court's clearly established precedent on the use of deadly force.<sup>526</sup>

The court also found an issue of fact concerning municipal liability:

[T]he fact that the [c]ity offered a seven-hour course entitled "Disturbed-Distress[ed] Persons" [was] insufficient in and of itself to shield the [c]ity from liability. . . .

... we disagree that the mere fact that the [c]ity had a policy of dealing with barricaded persons constitutes conclusive a proof that it was not deliberately indifferent to the rights of individuals in [the decedent's] position.<sup>527</sup>

Similarly, a suspect gained control of an officer's baton, caused him to fall backwards and hit his head, and then struck the officer with his baton a disputed number of times.<sup>528</sup> After a warning to stop attacking, the officer fired six shots.<sup>529</sup> Both the officer and suspect got up, at which time the officer shot four more times.<sup>530</sup> The Ninth Circuit overturned summary judgment for the defense.<sup>531</sup> There was a jury question on whether the second use of deadly force was justified.<sup>532</sup> The suspect had been wounded, no longer had the baton, and the officer had non-deadly use of force options.<sup>533</sup>

<sup>524</sup> *Id.* at 1041.

<sup>525</sup> *Id.*

<sup>526</sup> *Id.* at 1045.

<sup>527</sup> *Id.*

<sup>528</sup> *Hopkins v. Andaya*, 958 F.2d 881, 883 (9th Cir. 1992).

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.* at 886-87.

<sup>533</sup> *Id.* at 887; *see also* *District of Columbia v. Jackson*, 810 A.2d 388 (D.C. 2002). A man held his mother hostage at knifepoint. Emergency Response Team (ERT) officers told the perpetrator to drop the knife. Instead, he raised it as if to stab her in the chest. An officer fired and struck him in the face and then fired again as he was spinning to the ground. As the man still held the knife or was reaching toward it on the ground as he was trying to regain his footing, three other officers shot. Of 21 shots fired, seven struck him in the back. The jury found that the three officers used excessive force in continuing to shoot after the threat had been eliminated. The court of appeals reduced an award of \$2,149,998 in compensatory damages to \$180,000 and eliminated \$3,999,000 in punitive damages. *Id.* at 390-91.

### 5. Risk to Third Persons

At least one court has said that a jury should not consider the possible risk to members of the public from officers' use of deadly force against an intended subject, who later becomes the plaintiff or the plaintiff's decedent.

In a case from the Fourth Circuit, a mentally disabled man walked into a barbershop, wearing only a cap and sunglasses and carrying a knife.<sup>534</sup> Police officers arrived on the scene.<sup>535</sup> One of the people leaving the barbershop told the officers that a naked man with the knife was inside.<sup>536</sup> The naked man with the knife began to approach another man standing just outside the barbershop.<sup>537</sup> "Perceiving that [the naked man with the knife] was attempting to attack [the other man], and after unsuccessfully trying to subdue him with mace, the officers shot and killed [him]."<sup>538</sup> The decedent's mother filed suit.<sup>539</sup> The trial court instructed that the jury was "not to consider in reaching [its] determination the public safety of other individuals. The only suit here is the determination of whether excessive force was used against the deceased."<sup>540</sup> On appeal from a verdict for the defendants, the court upheld the instruction because "the question is not whether the officer acted reasonably vis-à-vis the world at large. Rather, the question is whether the officer acted reasonably *as against the plaintiff*. . . . That inquiry is not dependent at all on whether the officer did or did not subject third parties to risk."<sup>541</sup>

### 6. State Law, Department Regulations

Under the common law, a violation of a regulation or statute may constitute negligence per se. In contrast, the present violation of a departmental order or internal operating procedure may subject an officer to discipline within the department, but it does not establish a duty of conduct toward the public, absent supporting evidence that the directive conforms with a generally accepted, meaning national, standard of conduct.<sup>542</sup>

In section 1983 litigation, the adherence to a department directive does not render the conduct constitutional, and conversely the failure to follow a department protocol does not

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Kessler v. Barowsky, 931 P.2d 641, 651 (Idaho 1997). The state police crisis response team (CRT) was called to assist a sheriff in the arrest of a reserve deputy. After being pepper sprayed, the reserve deputy drew his gun and pointed it down the hall. Bullets from CRT officers' weapons struck him in the shoulder, he rolled to his left, and they fired additional, fatal rounds. Decision: contested facts should have precluded summary judgment on qualified immunity. "[A]lthough it may not have been excessive to use deadly force after [the reserve deputy] pulled out his gun, there is a genuine issue of material fact whether it was excessive to begin a second volley of shots after [he] was hit and lying on the floor." *Id.* at 657.

<sup>534</sup> Howerton v. Fletcher, 213 F.3d 171, 172 (4th Cir. 2000).

<sup>535</sup> *Id.* at 172.

<sup>536</sup> *Id.*

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 173 (emphasis added).

<sup>542</sup> See, e.g., Scott v. District of Columbia, 101 F.3d 748, 757 n.7 (D.C. Cir. 1996); Abney v. District of Columbia, 580 A.2d 1036, 1041 (D.C. 1990).

establish a constitutional violation.<sup>543</sup> The issue usually arises in connection with department regulations that require officers to use minimal (as distinct from reasonable) force and to exhaust every other alternative before resorting to deadly force. Courts often exclude evidence of more restrictive department rules, or instruct the jury that they do not establish the constitutional standard.

There are numerous examples. The “failure of” the officer “to display his badge when announcing himself as a police officer” and demanding that the driver stop, even if it was a violation of state law, was “irrelevant to the issue of whether at the moment of the shooting” the officer had probable cause to shoot.<sup>544</sup>

The Sixth Circuit held that “even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections.”<sup>545</sup> The fact that the city amended its deadly force policy after the incident to prohibit an officer from intentionally or recklessly placing himself/herself in front of an oncoming vehicle when the use of force is a likely outcome was not determinative.<sup>546</sup> The new policy was not constitutionally mandated because the city made the policy more restrictive did not establish that the prior policies were unconstitutional.<sup>547</sup>

The Sixth Circuit rejected the plaintiff’s claim that an officer should be liable for violating a city policy that forbids officers to fire at moving vehicles in order to apprehend a misdemeanor suspect.<sup>548</sup> The issue was whether the officer “violated the Constitution, not whether he should be disciplined by the local police force. A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability under § 1983.”<sup>549</sup>

The next case involved the shooting death of a suspect after a high-speed chase.<sup>550</sup> The International Association of Chiefs of Police (IACP) Model Policy on off-duty officers engaging in traffic stops under circumstances where they are personally involved was ruled inadmissible,

whether it is wise public policy to allow off-duty police officers to chase late night traffic violators is beside the point; the action is not unconstitutional and, more to the point, it has nothing to do with the key issue of whether the force used after a suspect is collared is excessive under the circumstances.<sup>551</sup>

<sup>543</sup> Cf. *Davis v. Scherer*, 468 U.S. 183, 194 (1984) (involving a member of the highway patrol who alleged that his discharge violated due process. “Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some [state] statutory or administrative provision.”); *Edwards v. Baer*, 863 F.2d 606 (8th Cir. 1988). An officer’s arrest on an invalid warrant violated a special order; but “police department guidelines do not create a constitutional right.” *Id.* at 608.

<sup>544</sup> *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993).

<sup>545</sup> *Freire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992).

<sup>546</sup> *Id.* at 1280.

<sup>547</sup> *Id.* at 1281.

<sup>548</sup> *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

<sup>549</sup> *Id.*

<sup>550</sup> *Soller v. Moore*, 84 F.3d 964, 966-67 (7th Cir. 1996).

<sup>551</sup> *Id.* at 969.

In another case, police pursued an upset, intoxicated man who cocked a poker over his head and charged an officer.<sup>552</sup> The officer tried to retreat, but he tripped.<sup>553</sup> From two arm lengths away, he shot.<sup>554</sup> The plaintiff contended police should have used less-than-lethal alternatives like chemical spray or a dog, but the Seventh Circuit held

We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police force). . . . [W]e think it is clear that the Constitution does not enact a police administrator's equipment list. We decline to use this case to impose constitutional equipment requirements on the police.<sup>555</sup>

In an Eighth Circuit case, the facts were:

[The decedent], carrying a pump-action, "sawed-off" shotgun, was hiding in the garage, either crouched down or prone near the nose of [an automobile]. When [the police dog] growled, [the decedent] fired one shot from his shotgun. This shot struck and killed [the police dog]. Deputies . . . then instantly fired their semiautomatic duty pistols. They fired thirty-two shots, emptying the pistols' magazines. Approximately fourteen of the shots struck [the decedent], and one bullet—the sequence of shots is unknown—killed him.<sup>556</sup>

The court noted that:

No federal court has held that the Constitution forbids police officers, after being fired upon by a suspect, from returning fire. . . .

....

[The plaintiff] . . . argues that the deputies should be held liable because they failed to follow [s]heriff's [d]epartment guidelines, and that their actions might have helped precipitate the confrontation. In particular, [the plaintiff] and her expert witnesses claim the two deputies should have waited for additional backup, barricaded [the decedent] in the garage stall with a patrol car, or engaged in other protective actions. Most of the guidelines cited are for the protection of the sheriff's deputies, not of armed suspects, and in any event the breach of such guidelines is not dispositive to our determination of whether the deputies violated a clearly established constitutional right.<sup>557</sup>

<sup>552</sup> *Plakas v. Drinski*, 19 F.3d 1143, 1144-45 (7th Cir. 1994).

<sup>553</sup> *Id.* at 1146.

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 1150-51.

<sup>556</sup> *Mettler v. Whitledge*, 165 F.3d 1197, 1201 (8th Cir. 1999).

<sup>557</sup> *Id.* at 1203.

In a Ninth Circuit case, *Scott v. Henrich*,<sup>558</sup> police responded to reports of a man who was acting “crazy” and firing a gun.<sup>559</sup> Officers banged and kicked on the door, yelling, “Police, . . . open up.”<sup>560</sup> As the door opened, police said the decedent stood in the doorway and pointed a gun at them.<sup>561</sup> An officer fired but missed.<sup>562</sup> Believing the shot came from the decedent, another officer fired four more.<sup>563</sup> The plaintiff argued “the police officers’ conduct violated police department guidelines for dealing with barricaded suspects,”<sup>564</sup> however,

Assuming internal police guidelines are relevant to determining whether use of force is objectively reasonable, they are relevant only when one of their purposes is to protect the individual against whom force is used. . . . Both the guidelines at issue here and the context in which they appear in the police manual show they were meant to safeguard the police and other innocent parties, not the suspect.<sup>565</sup>

In a Tenth Circuit case, in response to the defendants’ assertion of a qualified immunity defense, the plaintiff submitted an affidavit of an expert, which he argued supported his contention that genuine issues of material fact existed.<sup>566</sup> The court observed that “[t]he expert’s affidavit does not, however, highlight a disputed issue of fact; rather, it simply contains the ultimate conclusion that the officers’ use of force did not conform with accepted police guidelines and practices and was, therefore, excessive.”<sup>567</sup> The Court continued “[w]e have, of course, recognized that claims based on violations of state law and police procedure are not actionable under § 1983.”<sup>568</sup>

However, when department operating procedures establish a standard of conduct, they may be probative of the constitutional reasonableness of officers’ actions. An officer tried to stop a homeless, emotionally disturbed man who had a knife by hitting him with the officer’s squad car.<sup>569</sup> Officers formed a semi-circle and ordered the homeless man to drop the knife.<sup>570</sup> An officer “maced” him, whereupon he ran toward a street.<sup>571</sup> Without yelling a warning, the officer who hit the man with his squad car shot at him twice.<sup>572</sup> Another officer fired a shotgun.<sup>573</sup> The Eighth Circuit reversed the district court’s decision granting qualified immunity.<sup>574</sup> Although

<sup>558</sup> 39 F.3d 912 (9th Cir. 1994).

<sup>559</sup> *Id.* at 914.

<sup>560</sup> *Id.*

<sup>561</sup> *Id.*

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> *Id.* at 915.

<sup>565</sup> *Id.* at 915-16 (citations omitted).

<sup>566</sup> *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001).

<sup>567</sup> *Id.* at 1133.

<sup>568</sup> *Id.*

<sup>569</sup> *Ludwig v. Anderson*, 54 F.3d 465, 468 (8th Cir. 1995).

<sup>570</sup> *Id.*

<sup>571</sup> *Id.* at 469.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

<sup>574</sup> *Id.* at 474.



“police department guidelines [on dealing with emotionally disturbed persons] do not create a constitutional right, they are relevant to the analysis of constitutionally excessive force.”<sup>575</sup>

### 7. *More Prudent Alternatives*

The Fourth Amendment does not mandate that officers choose what in hindsight was the best or least intrusive alternative.<sup>576</sup> Officers must only act within a range of objective reasonableness.<sup>577</sup> Courts may exclude expert or other testimony of what the officers could have done better or differently, or inform the jury that the constitutional touchstone is the objective reasonableness of what the officers did do.

When police tried to serve a warrant at night on a 69-year-old man for a minor charge, he came to his back door with a shotgun.<sup>578</sup> A deputy shined a flashlight on the man and told him to drop the gun.<sup>579</sup> Instead, the man fired the gun in the direction of one of the deputies.<sup>580</sup> Another deputy fired eleven rounds, two of them hitting the man in the back.<sup>581</sup> The Seventh Circuit upheld a jury verdict for the shooting deputy.<sup>582</sup> Although relevant circumstances were not limited to the precise moment of the shooting (and included the fact that the elderly man was to be arrested for a minor charge), it was not improper for the trial court to instruct the jury that the deputies did not need to use “all feasible alternatives” to avoid the situation in which deadly force was used.<sup>583</sup>

The Seventh Circuit held similarly in another case:

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. . . . [W]e rejected the proposition that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to effect a legal arrest of a suspect. . . .

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.<sup>584</sup>

<sup>575</sup> *Id.* at 472. (quoting *Cole v. Borne*, 993 F.2d 1328, 1334 (8th Cir. 1993)).

<sup>576</sup> *Plaskas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994); *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

<sup>577</sup> *Plaskas*, 19 F.3d at 1149; *see also* *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>578</sup> *Deering v. Reich*, 183 F.3d 645, 647-48 (7th Cir. 1999).

<sup>579</sup> *Id.* at 648.

<sup>580</sup> *Id.*

<sup>581</sup> *Id.*

<sup>582</sup> *Id.* at 648, 654.

<sup>583</sup> *Id.* at 652-53.

<sup>584</sup> *Plakas v. Drinsky*, 19 F.3d 1143, 1148-49 (7th Cir. 1994) (internal quotations and citations omitted).

What began as an investigatory stop of a teenager riding a possibly stolen bicycle progressed to a violent beating of the officer, then her shooting the teenager.<sup>585</sup> Regardless of preceding events, less intrusive means were not available at the time of the shooting.<sup>586</sup>

State law enforcement officers were confronted with a man who refused to drop his weapon, despite repeated orders, and who instead fired the first shot, followed by several more.<sup>587</sup> “[A]ll of the troopers at the scene were aware that [a trooper] had been wounded, and that his assailant was still armed and unwilling to surrender.”<sup>588</sup> The officer giving the authorization to shoot, and the trooper who shot the decedent “could reasonably have believed that this was a situation in which there was a significant threat of death or serious physical injury.”<sup>589</sup> The Eighth Circuit would not ask “whether the course of action chosen was the most prudent or the wisest one,” but only “whether the decision to use deadly force was objectively reasonable, and we hold that it was as a matter of law.”<sup>590</sup>

In one case, the trial court excluded evidence that the officer should have responded differently, by waiting for a supervisor, calling the SWAT team, or using less than lethal force.<sup>591</sup> The Eighth Circuit held that the evidence was properly excluded.<sup>592</sup> Evidence that the defendant officer should have done things differently was irrelevant, the question being whether he acted reasonably.<sup>593</sup> “[T]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment.”<sup>594</sup>

In the case of *Scott v. Henrich*,<sup>595</sup> the Ninth Circuit found that:

Plaintiff argues that the officers should have used alternative measures before approaching and knocking on the door where [decedent] was located. But, as 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. Requiring officers to find and choose the least intrusive alternative would ‘induce tentativeness[,] . . . deter police from protecting the public . . . [and] entangle the courts in endless second guessing of police decisions . . . .’<sup>596</sup>

The reasonableness standard:

<sup>585</sup> Tom v. Volda, 963 F.2d 952, 955 (7th Cir. 1992).

<sup>586</sup> *Id.* at 962.

<sup>587</sup> Tauke v. Stine, 120 F.3d 1363, 1364-65 (8th Cir. 1997).

<sup>588</sup> *Id.* at 1366.

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

<sup>591</sup> Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995).

<sup>592</sup> *Id.* at 649.

<sup>593</sup> *Id.* at 648.

<sup>594</sup> *Id.* (quoting Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993)).

<sup>595</sup> See *supra* text accompanying notes 558-65.

<sup>596</sup> *Scott*, 39 F.3d at 915.

does not require that officers use alternative less intrusive means. . . . If we were to . . . consider the expert's assertions regarding the failure to use pepper spray and other tactical measures, we would be evaluating the officers' conduct from the 20/20 perspective of hindsight rather than from the perspective of an officer making split-second judgments on the scene."<sup>597</sup>

District court and state court decisions make the same point.<sup>598</sup>

#### 8. *Conduct Preceding Shooting*

Plaintiffs may argue that the defendants violated the Fourth Amendment because they unreasonably manufactured the danger that required the use of deadly force. The defense response, adopted by most decisions, is that the shooting is the seizure, and that Fourth Amendment scrutiny is limited to the events immediately preceding the shooting. There is thus a basis for the exclusion of pre-seizure evidence, or, as is more appropriate, an instruction that the jury should base their decision on the reasonableness of the shooting itself.

A minority of cases will break the incident into segments if separate constitutional violations are claimed. A few distinguish between negligent and reckless conduct and will find liability if an earlier Fourth Amendment violation provoked, i.e., caused, the shooting. Regardless, the shooting officers should be entitled to qualified immunity. Even if they committed a Fourth Amendment violation, the law does not clearly establish that their prior mistakes – constitutional or not – can be considered in whether they justifiably shot in self-defense at the time of the shooting.

The first cases considered limit the reasonableness inquiry to events immediately before the shooting. In the Fourth Circuit, the court held that the “failure of [the officer] to display his badge when announcing himself as a police officer” and demanding that the driver stop, even if it was a violation of state law, was “irrelevant to the issue of whether at the moment of the shooting” the officer had probable cause to shoot.<sup>599</sup> The officer's use of deadly force should be evaluated with respect to circumstances existing immediately prior to and at the moment force was used because the evidence of what occurred before was not relevant or admissible.<sup>600</sup>

The Fifth Circuit recognized in a similar case that “regardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at least at

<sup>597</sup> *Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001) (quotations and citations omitted).

<sup>598</sup> See the following district and state court decisions for the same point:

*McRae v. Tena*, 914 F. Supp. 363, 357 (D. Arizona 1996) (holding the law did not require the officer to retreat when threatened with the use of force, or to ascertain and choose the least intrusive alternative);

*Estate of Saldana v. Weitzel*, 912 F. Supp. 413, 416 (D. Wisc. 1996) (“By closing to fifteen feet, [the officer] . . . created the situation in which the use of deadly force was necessary. Even if the plaintiff's expert is correct and closing to fifteen feet was poor policing, poor policing, however, is not a constitutional violation. Logically, [the officer] did not violate [the decedent's] rights because [the decedent] was not seized until [the officer] shot.”);

*Yellowback v. City of Sioux Falls*, 600 N.W.2d 554, 560 (S.D. 1999) (“[T]hat the officer might have pursued other methods before that probable cause [to shoot] arose—is simply irrelevant.”).

<sup>599</sup> *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993).

<sup>600</sup> *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

that moment, that there was a threat of physical harm.”<sup>601</sup> The contention that the officer approaching an apparent drug transaction between two men in a car and a pedestrian created the situation where a fatal error was more likely possible was a basis for a state negligence action, but not a Fourth Amendment claim.<sup>602</sup>

In a decision from the Tenth Circuit, the plaintiff specifically claimed that the officers acted unreasonably in creating the need to use force.<sup>603</sup> In addition to considering whether the officers reasonably believed they were in danger at the time they used force, the court considered:

whether [the officers’] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force. An officer’s conduct before the suspect threatens force is therefore relevant provided it is immediately connected to the seizure and the threat of force. This approach is simply a specific application of the totality of the circumstances approach inherent in the Fourth Amendment’s reasonableness standard. We emphasize, however, that, in order to constitute excessive force, the conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence. The primary focus of our inquiry, therefore, remains on whether the officer was in danger at the exact moment of the threat of force.<sup>604</sup>

According to the plaintiff, the officers’ actions after he left the house and began walking toward the street “constituted reckless and deliberate conduct giving rise to the threat of force.”<sup>605</sup>

Specifically, he argues the officers should have remained under cover rather than following him in an attempt to knock him to the ground. He apparently argues that their failure to take cover was particularly reckless in light of the attack dog’s release, which increased the risk of force. We have, however, suggested that an officer’s failure to take cover is at issue only insofar as it [bears] upon whether the officer’s life [is] truly in danger. Moreover, even if we were to consider whether an officer’s failure to take cover contributed to the need for force, [the plaintiff] has clearly failed to establish that the officers’ actions in this case rise to the level of reckless or deliberate conduct. In this case, [the plaintiff] communicated he had a gun, emerged from the house covering what could reasonably be interpreted as a weapon, and began walking away from the house into the street. The officers’ response in attempting to stop [the plaintiff] was reasonable under the circumstances. [The plaintiff] has, therefore, failed to establish that the defendants violated his Fourth Amendment rights.<sup>606</sup>

<sup>601</sup> *Freire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992).

<sup>602</sup> *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985).

<sup>603</sup> *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001).

<sup>604</sup> *Id.* (citations and quotations omitted).

<sup>605</sup> *Id.*

<sup>606</sup> *Id.*

In another Tenth Circuit case, a motorist punched the officer in the nose, ran a knife across the officer's stomach, ignored repeated requests to drop the knife and continued to advance in an attack position.<sup>607</sup> In a prior case, the court had "refuse[ed] to consider whether an officer who used deadly force in self-defense had caused the suspect to behave in a threatening manner;" instead, the court "followed other circuits that have confined the reasonableness inquiry in excessive force cases 'to whether the officer was in danger at the moment of the threat.'"<sup>608</sup> The majority of district and state courts adhere to a similar analysis.<sup>609</sup>

The next cases considered expand the scope of the reasonableness inquiry under the circumstances noted. In a case from the Sixth Circuit, undercover officers were engaged in

<sup>607</sup> *Romero v. Bd. of County Comm'rs*, 60 F.3d 702, 703 (10th Cir. 1995).

<sup>608</sup> *Id.* at 704-05 (citing *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995)).

<sup>609</sup> See the following cases adhering to the same analysis:

*Estate of Saldana v. Weitzel*, 912 F. Supp. 413 (E.D. Wisc. 1996). The decedent was holding a knife and shouting. He was drunk and threatening people. An officer shot from about fifteen feet. The plaintiff argued that, "[b]y closing to fifteen feet, [the officer] . . . created the situation in which the use of deadly force was necessary. Even if the plaintiff's expert is correct and closing to fifteen feet was poor policing, poor policing, however, is not a constitutional violation. Logically, [the officer] did not violate [the decedent's] rights because [the decedent] was not seized until [the officer] shot . . .". *Id.* at 415-16.

*St. Hilaire v. City of Laconia*, 885 F. Supp. 349 (D. N.H. 1995), *aff'd on other grounds*, 71 F.3d 20 (1st Cir. 1995). In a shooting, the issue is not whether the agency negligently created the risk that deadly force would have to be used, but whether, at the time of the seizure itself, i.e., the shooting, the use of lethal force was permissible. *Id.* at 356.

*James v. City of Chester*, 852 F. Supp. 1288 (D. S.C. 1994). The court rejected the theory that the police unreasonably increased risk by their earlier actions. The court would "focus only upon the reasonableness of the conduct at the moment [the officer] made the decision to use deadly force." "[The subject] was waving a baseball bat over his head while threatening to kill the officer. The officer, dressed in a police uniform, made repeated requests that [the subject] drop the bat, retreated as far as he could, and then made the decision to use deadly force. Under the circumstances, [the officer] had probable cause to believe that [the subject] posed a significant threat of serious bodily injury to [the officer]." *Id.* at 1295;

*Linder v. Richmond County, Ga.*, 844 F. Supp. 764 (S.D. Ga. 1994). A woman called police saying a prowler entered the garage, setting off an alarm. Her 88-year-old husband, who was hard of hearing, went out to the backyard with a loaded pistol. When the deputy sheriff arrived, he came upon the husband and, thinking he was the prowler, told him to drop the gun. The husband allegedly turned toward the deputy sheriff and fired. The deputy fired back, with one bullet taking effect on the husband and the other going through the garage and striking the prowler. Even if the husband shot first and then turned toward the deputy, the deputy was entitled to summary judgment. "Much of [p]laintiffs' evidence and legal analysis focus on the alleged unreasonableness of [the deputy] prior to shooting [the husband]. Plaintiffs specifically argue that [the deputy] was unreasonable in beginning his approach towards the garage before a backup officer arrived, in failing to utilize a position of cover in confronting [the husband], and in failing to use the word 'police' in his command to [the husband] to drop the gun. However unreasonable these actions may have been, they have no bearing on the reasonableness of [the deputy's] actions *at the time he was forced to make the decision* whether to shoot [the husband]" (emphasis in original). *Id.* at 764-65, 767;

*Yellowback v. City of Sioux Falls*, 600 N.W.2d 554, 560 (S.D. 1999). A suspect who had stabbed his brother had a knife at his own throat and advanced toward the officers, as they shouted to drop the knife. When he got within eighteen to twenty-four inches from an officer's gun muzzle, the officer shot. The trial court excluded expert testimony that the officers had not pursued certain strategies in dealing with the suspect, portions of the police department policies and procedures manual concerning use of force and mental cases, and an equipment list showing that batons were issued to the officers. Discussion: "We limit our scrutiny of the seizure in this case to this question: at the moment of the shooting did [the shooter] have probable cause to believe that [the suspect] posed a significant threat of death or serious physical injury to himself or others? . . . . The answer to that question is clearly 'yes' . . . . Consequently, the exclusion of this evidence could not provide grounds for a new trial." *Id.* at 556-57, 560.

anticrime surveillance from an unmarked squad vehicle in a high crime neighborhood, when they observed a man in the dimly-lit parking lot of a market displaying a long gun at port-arms.<sup>610</sup> Actually, the gunman was acting as a security guard for his daughter-in-law, who was responsible for depositing illegal betting proceeds and was seated inside her car.<sup>611</sup> After an undercover officer told the man to drop his weapon, a firefight ensued.<sup>612</sup> The suspect circled behind the market and reappeared with his shotgun aimed at the officers, who shot in self-defense.<sup>613</sup> The court's analysis segmented the incident into the approach, the initial firefight in front of the market, and the final shot.<sup>614</sup> Although the officers' approach violated that department's policy for undercover officers, any unreasonableness of their actions was not a consideration in the use of excessive force.<sup>615</sup> But because the man's family contested "all use of deadly force" against him, the court had to scrutinize the second segment, the firefight in front of the market, and not just the last segment in which the officers fired in self-defense.<sup>616</sup> As to the middle segment, there was a factual dispute as to whether the man was fired upon by unidentified, non-uniformed officers whom he took to be robbers, and as a consequence whether their use of deadly force was reasonable.<sup>617</sup> On the basis of disputed facts, the court had to remand the case for trial.<sup>618</sup>

Another case involved the use of a cab during a shooting.<sup>619</sup> If, as the plaintiff contended, the officer unreasonably moved in front of the cab giving the driver no time to stop, the decedent did not cause the danger, and the use of deadly force was unjustified.<sup>620</sup> If the driver could see the officer before he accelerated, the shooting was justified.<sup>621</sup>

The Ninth Circuit will review antecedent events if an earlier, independent Fourth Amendment violation intentionally or recklessly causes a second Fourth Amendment violation: the self-defense shooting.<sup>622</sup> Following a pursuit, the motorist and off-duty detective engaged in a struggle over possession of the detective's gun and the detective shot, killing him.<sup>623</sup> The plaintiff's theory was that the detective made tactical errors and "shouldn't have gotten himself into the situation, so he couldn't constitutionally shoot his way out of it."<sup>624</sup> After surveying relevant caselaw, the court noted that a plaintiff could not avoid summary judgment "by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless."<sup>625</sup> However,

<sup>610</sup> Claybrook v. Birchwell, 274 F.3d 1098, 1100 (6th Cir. 2001).

<sup>611</sup> *Id.* at 1100-01.

<sup>612</sup> *Id.* at 1101.

<sup>613</sup> *Id.*

<sup>614</sup> *Id.* at 1105.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* (emphasis in original).

<sup>617</sup> *Id.*

<sup>618</sup> *Id.*

<sup>619</sup> Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993).

<sup>620</sup> *Id.* at 235.

<sup>621</sup> *Id.*

<sup>622</sup> Billington v. Smith, 292 F.3d 1177 (9th Cir. 2001).

<sup>623</sup> *Id.* at 1181.

<sup>624</sup> *Id.* at 1185-86.

<sup>625</sup> *Id.* at 1189.

where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.

. . . if an officer's provocative actions are objectively unreasonable under the Fourth Amendment, . . . liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused. .

..

... our precedents do not forbid *any* consideration of events leading up to a shooting. But neither do they permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided. . . .

... the fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself. The Fourth Amendment's "reasonableness" standard is not the same as the standard of "reasonable care" under tort law, and negligent acts do not incur constitutional liability. An officer may fail to exercise "reasonable care" as a matter of tort law yet still be a constitutionally "reasonable" officer. Thus, even if an officer negligently *provokes* a violent response, that negligent act will not transform otherwise reasonable subsequent use of force into a Fourth Amendment violation.

But if . . . an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force.<sup>626</sup>

Applying the rule to the facts, the court found no Fourth Amendment violation, and did not reach the issue of qualified immunity.<sup>627</sup>

In the case at bar, [the motorist's] estate has not established that [the detective] provoked [the motorist's] attack, much less committed an independent Fourth Amendment violation that provoked it. . . . But even if we were to assume for the sake of argument that a jury could conclude that [the detective] should have sat in his car until backup arrived, or donned all of his equipment before approaching [the motorist], or have taken precautions against [the motorist] grabbing him by his throat and pulling himself out of the car window to attack the detective, or that [the detective] should have dropped off his wife and daughter somewhere before dealing with [the motorist], none of [the detective's] supposed errors could be deemed intentional or reckless, much less unconstitutional, provocations that caused [the motorist] to attack him.

<sup>626</sup> *Id.* at 1189-91 (some internal quotations and citations omitted).

<sup>627</sup> *Id.* at 1191.

... one hundred fifty seconds filled with hot pursuit followed by hand-to-hand combat is not a comfortably ample period in which to consider and evaluate the prudence of alternative tactics.<sup>628</sup>

In another case, a man armed with guns and ammunition parked in front of his sister's house.<sup>629</sup> A lieutenant on the scene told him to drop the gun and reached into the car to grab it, while a second officer held the decedent's arm, and a third officer tried to open the passenger side door.<sup>630</sup> The decedent pointed his gun at the officer on the passenger side, then moved the gun toward the lieutenant and other officer on the other side, who then fired twelve rounds, taking effect on the decedent.<sup>631</sup> The Tenth Circuit held that disputed facts precluded summary judgment.<sup>632</sup> The whole incident lasted only 90 seconds.<sup>633</sup> The preceding actions of the officers were so "immediately connected" to the decedent's threat of force that they had to be scrutinized for reasonableness under the Fourth Amendment.<sup>634</sup> A reasonable jury could conclude, in finding the facts, that the officers' behavior was reckless and caused the need to use lethal force.<sup>635</sup>

Under the current state of the law, in lethal force scenarios leading ultimately to a seizure (i.e., shooting), Fourth Amendment reasonableness scrutiny is generally applied to the seizure itself, and not to whether antecedent events were objectively unreasonable, i.e., involved poor decisions or violations of standard operating procedures or whether better, less dangerous alternatives were available. Police officers whose decision to shoot in self-defense is objectively reasonable do not violate the Fourth Amendment. They also have the defense of qualified immunity. In deciding whether to shoot, they are not required to consider whether their pre-seizure conduct was unreasonable. Accordingly, since the point at which Fourth Amendment review attaches is not clearly established, officers who deviate from professional norms or unreasonably create the risk that deadly force will have to be used (e.g., "shoot their way out" of a bad situation) are entitled to qualified immunity. The court should afford immunity unless no reasonable police officer could have believed his/her conduct complied with the Constitution. To do less, it can be argued, makes for timorous, ineffective police officers.

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<sup>628</sup> *Id.*

<sup>629</sup> *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

<sup>630</sup> *Id.*

<sup>631</sup> *Id.*

<sup>632</sup> *Id.* at 844.

<sup>633</sup> *Id.* at 839.

<sup>634</sup> *Id.* at 841.

<sup>635</sup> *Id.*; see also *Kessler v. Barowsky*, 931 P.2d 641 (Idaho 1997). The state police crisis response team (CRT) was called to assist a sheriff in the arrest of a reserve deputy, who was charged with sexually assaulting his daughter. The reserve deputy had martial arts experience and served in a special forces unit in the military. Since he would be armed when arrested at work, the plan called for him to be pepper sprayed to subdue him. After being pepper sprayed, the reserve deputy drew his gun and pointed it down the hall. Bullets from CRT officers' weapons struck him in the shoulder, he rolled to his left, and they fired additional, fatal rounds. Decision: contested facts should have precluded summary judgment on qualified immunity. "A reasonable person could . . . conclude that [the reserve deputy] pulled his gun in self-defense after being confronted by camouflaged men holding a submachine gun at his chest and spraying him with Cap-stun in a locked hallway. Therefore, there is a genuine issue of material fact concerning whether the use of the Cap-stun caused [the reserve deputy's] reaction and unnecessarily escalated the situation, leading to [his] death." *Id.* at 651-52, 657.



On the other hand, under existing law, there are a number of ways in which an entire incident can be subjected to reasonableness analysis. One is to break the incident up into segments, each of which has a Fourth Amendment issue, e.g., obtaining a search warrant, making a no-knock entry of a residence, resulting in a fight inside, and then ending in a shooting. Each segment is separately reviewed for Fourth Amendment reasonableness and the plaintiff could potentially be compensated for each violation. Similarly, the plaintiff could try to show the interconnection of each segment; one Fourth Amendment violation led to another, culminating in the shooting, e.g., a tumultuous, unannounced entry led to violence.

It is appropriate to expand the reasonableness review where supervisors or the municipality are defendants because the plaintiff has alleged that they created a risk that ultimately caused the constitutional harm. For example, if supervisory “deliberate indifference” as to the manner in which the raid was planned or a defective training policy or custom on obtaining and executing warrants was affirmatively linked to the unnecessary use of deadly force against the subject, then the raid supervisors or the municipality could be held liable for the Fourth Amendment violation. Liability is forced upstream at supervisors and the municipality. In that case, qualified immunity may relieve individual officers of personal liability for simply having been positioned in the wrong place at the wrong time: a conduit for the constitutional deprivation but not themselves a cause.

Finally, the plaintiff might have a common law negligence claim for deviations from generally accepted police practices, in which event evidence of pre-seizure activities would be relevant to the state law claim.

#### IV. CONCLUSION

The crucial points are as follows:

- (1) Only an intentional shooting of a free citizen is governed by the objective reasonableness standard of the Fourth Amendment. The general rule on the use of lethal force can be written in a classroom: Police officers can use deadly force only if the threat of serious bodily harm or death is imminent.
- (2) To comply with the Fourth Amendment, the use of force must be objectively reasonable. But the application of that standard to the rough and tumble topography of the streets creates some uncertainty. Police officers are often required to make split second decisions in life-threatening situations involving subjects with firearms, knives, and motor vehicles they are using as weapons. In qualified immunity, the Supreme Court tipped the margin of error in favor of the police. So there are two steps in the analysis. First, did the shooting violate the Fourth Amendment right to be free from unreasonable force? Second, under the specific circumstances the defendant officers confronted and the information they possessed, could they have reasonably believed that the shooting complied with clearly established Fourth Amendment law? In laypersons’ terms, could reasonable officers differ on whether the shooting was justified? Although many of the cases discussed in this article dealt with

qualified immunity before trial on summary judgment, the reader is reminded that the defense can continue to be raised through trial.

- (3) Besides recurring Fourth Amendment situations (e.g., subjects with guns, knives and cars), this article addressed recurring Fourth Amendment issues (e.g., if a warning is required, if multiple shots are excessive force). A significant issue requiring Supreme Court clarification is when Fourth Amendment reasonableness scrutiny begins in a self-defense police shooting case. The plaintiff's theory of the case, developed through expert witnesses and other evidence, is likely to emphasize the existence of generally accepted police practices and procedures that could have prevented the shooting. The defense, on the other hand, will focus on the instant of the shooting itself, when the police officers had to decide in the blink of an eye to shoot or be shot. Since the law on the question is not clearly established, the shooting officers should be granted qualified immunity.