DEADLY FORCE IN THE TENTH CIRCUIT

Joshua M. Minner*

I. INTRODUCTION

Police officers have used deadly force since at least the mid-1800s when they started carrying firearms.[1] However, police use of deadly force has not been a significant social issue until more recent decades. The Supreme Court did not even address the subject until 1985 in *Tennessee v. Garner*.[2] Nothing is more telling of the evolution of this issue than the process that follows a police officer using deadly force.

Some of my senior colleagues on the Oklahoma City Police Department tell me of a time when they can remember an officer might shoot someone early in their shift and take a routine burglary call a couple hours later. As late as the 1980's, some states still authorized officers to shoot a fleeing felon in the back regardless of the nature of the felony.[3] There was minimal scrutiny that followed shootings and little concern of criminal or civil liability. Times have rapidly changed.

If an officer uses deadly force now, an army of investigators and command staff will converge upon the scene, the officer will be placed on administrative leave, a criminal investigation will initiate, and the officer will be interrogated and subject to prosecution. Even if the officer is not prosecuted, the officer's agency will then conduct a thorough and sometimes lengthy administrative investigation; and the officer may be

* Joshua M. Minner graduated from Oklahoma City University School of Law in 2008. He is a member of the Oklahoma Bar, an adjunct professor of law at Oklahoma City University School of Law, and Executive Officer to the Chief of Police at the Oklahoma City Police Department.

1. *See* Jeffrey S. Adler, *Shoot to Kill: The Use of Deadly Force by the Chicago Police, 1875–1920*, 38 J. INTERDISC. HIST. 233, 233 (2007); Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 241 (1994).

2. 471 U.S. 1 (1985).

3. *See id.* at 11–15.

issued discipline for violating any of hundreds of pages of agency policies. The officer will then get to spend the next year or two waiting to be sued. The statute of limitations runs out for the lucky ones. The others get the pleasure of getting dragged through years of litigation wondering how they will manage to survive if they lose all their assets.

At the same time, officers get to experience the wrath of the media. Regardless of whether an officer's actions are ultimately justified, the media will obsess over the incident. They will be on scene before investigators even arrive. They will pass judgment and comment on the incident based on what little they know. They will seek out anyone willing to talk about the incident on camera. Unfortunately for the officer, he or she will not get the opportunity to explain their version of the incident to the media. The officer will either be prohibited by agency policy or advised by counsel not to speak about the incident. Neither will the agency release any significant details or opinions on the matter. Detectives have not even had time to piece together all the facts. Instead, officers get to watch the media air interviews with witnesses, who are under no obligation to tell the truth or may have not seen the whole incident unfold, and family or friends of the suspect who were not even there but tell the world how the suspect was a decent, church-going person and that the officer's actions were unjustified.

Determining exactly why deadly force has recently become a significant social issue is complicated and is beyond the scope of this Article. What is certain is that use of deadly force is a topic almost every American has an opinion about, and for some it provokes strong emotions. However, very few see (or care to see) it through the lens of the Constitution.

This Article will open that lens. Part II will briefly look into what constitutional standards may apply when a person dies as a result of police action. Although the Fourth Amendment is the most common constitutional standard deadly force is judged by, it is not the only one. Therefore, it is important to understand when the Fourth Amendment even applies to the use of deadly force. Part III examines police use of deadly force specifically under the Fourth Amendment by reviewing the growing body of Supreme Court deadly force jurisprudence. This Part includes a review of cases where the Court established and applied the constitutional standard and where the Court determined whether officers were entitled to qualified immunity. This Part will go on to explore the treatment of police uses of deadly force in the Tenth Circuit. Since it has decided more deadly

force cases than the Supreme Court, the Tenth Circuit has developed a much greater body of deadly force law.

II. DETERMINING THE APPROPRIATE CONSTITUTIONAL USE-OF-FORCE STANDARD

The first step in determining whether any use of force, including deadly force, is lawful is to "identify[] the specific constitutional right allegedly infringed," so as to apply the appropriate constitutional standard.[4] In most situations where state and local police officers use force that results in death, the objective-reasonableness test of the Fourth Amendment is applicable. In its most basic form, this standard provides that an officer violates the Fourth Amendment where the officer's actions or force are objectively unreasonable.[5] This standard applies where an officer uses force that seizes a free citizen.[6]

A seizure only occurs when an officer intentionally terminates a person's freedom of movement.[7] The officers must actually succeed in restraining the person or causing the person to submit to their authority.[8] For example, when a suspect charges at an officer with a knife, the officer shoots the suspect, and the suspect falls and is apprehended,[9] or when an officer points his gun at a suspect, orders the suspect to the ground, and the suspect complies,[10] there is a seizure. But when an officer unintentionally runs over a suspect while in pursuit;[11] intentionally rams a fleeing vehicle, but the vehicle continues on;[12] intentionally shoots at a suspect but misses, and the suspect continues to flee;[13] or actually shoots a suspect, but the suspect gets away and evades officers for several days,[14] there is no seizure within the meaning of the Fourth Amendment.

When an officer's actions or force result in unintentional injury or when a suspect continues to flee despite an officer's efforts at restraint, the

4. Graham v. Connor, 490 U.S. 386, 394 (1989).
5. *See, e.g.*, Estate of Larsen v. Murr, 511 F.3d 1255, 1259 (10th Cir. 2008).
6. *Graham*, 490 U.S. at 395.
7. Cty. of Sacramento v. Lewis, 523 U.S. 833, 844 (1998) (citing Brower v. Cty. of Inyo, 489 U.S. 593, 596–97 (1989)).
8. *See* Latta v. Keryte, 118 F.3d 693, 698 (10th Cir. 1997).
9. *Estate of Larsen*, 511 F.3d at 1259–61.
10. Holland v. Harrington, 268 F.3d 1179, 1184, 1187–88 (10th Cir. 2001).
11. *See Lewis*, 523 U.S. at 844.
12. *Latta*, 118 F.3d at 696, 699–700.
13. Bella v. Chamberlain, 24 F.3d 1251, 1255–56 (10th Cir. 1994).
14. Brooks v. Gaenzle, 614 F.3d 1213, 1217 (10th Cir. 2010).

officer's actions or force will be judged by the shocks-the-conscience test of the Fourteenth Amendment's Due Process Clause.[15] The Supreme Court held a police officer's actions or use of force violates the Fourteenth Amendment's Due Process Clause only when his or her behavior shocks the conscience or was arbitrary in the constitutional sense.[16] The shocks-the-conscience test requires either proof an officer actually intended to the cause the harm; or, at a minimum, an officer acted with deliberate indifference, recklessness, or gross negligence after being given extended opportunities to avoid the harm.[17] Mere negligence is insufficient.[18] "[O]nly the most egregious official conduct can be said to" shock the conscience.[19] When officers find themselves in unforeseen circumstances that demand instant judgment, only intent to cause injury unrelated to the arrest can rise to the level of a due process violation.[20] Proving a violation of this standard is more difficult than proving a violation of the Fourth Amendment objective-reasonableness test. The shock-the-conscience test generally requires proof of actual intent to cause the harm (a tough threshold to surpass), whereas determining whether a particular use of force is reasonable under the objective-reasonableness test of the Fourth Amendment will turn on a judge or jury's opinion of reasonableness.[21]

In the context of use of force, courts will apply the Fourth Amendment only if the person seized is a free citizen.[22] In the Tenth Circuit, free citizens are those persons arrested on a warrant that have not yet been placed in the booking area in jail[23] or those persons arrested without a warrant that have not yet received a judicial probable-cause determination.[24] This means the Fourth Amendment may continue to

15. *See Lewis*, 523 U.S. at 843–49; Childress v. City of Arapaho, 210 F.3d 1154, 1157–58 (10th Cir. 2000).

16. *See Lewis*, 523 U.S. at 846–47 (citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)).

17. *See id.* at 853.

18. *See id.* at 849.

19. *Id.* at 846 (citing *Collins*, 503 U.S. at 129).

20. *See id.* at 853–54.

21. Any would-be criminals out there should take note that if you successfully flee from the police, any force they use on you will be less likely to be found excessive under the more officer-friendly shocks-the-conscience test.

22. *See* Graham v. Connor, 490 U.S. 386, 394–95 (1989).

23. Estate of Booker v. Gomez, 745 F.3d 405, 419–21 (10th Cir. 2014) (An arrestee was brought into a booking area as pre-trial detainee, and the Fourth Amendment no longer applied.).

24. *Id.* at 420 (citing Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991)).

apply even at the jail—a "continuing seizure" as the Tenth Circuit has labeled it.[25]

However, once someone arrested on a warrant is booked in jail or someone arrested without a warrant has received their judicial probable-cause determination, the Fourth Amendment is no longer applicable. These persons become pre-trial detainees, and any intentional force used against them will be judged by the Due Process Clause of the Fourteenth Amendment.[26] Historically, the Tenth Circuit applied the subjective shock-the-conscience test to pre-trial detainees—a violation that requires proof an officer acted with malice.[27] However, recently the Supreme Court changed the standard to an objective one, much like the Fourth Amendment's objective-reasonableness test.[28] While detention officers use force against pre-trial detainees most often, it remains possible that before a police officer leaves a jail facility, he or she might become involved in a use of force judged, not by the Fourth Amendment, but by the Fourteenth Amendment. This was a significant distinction. However, the significance is likely diminished now that the Supreme Court has announced an objective standard.[29]

While a state and local police officer's use of force may fall under any of three separate constitutional standards, the objective-reasonableness test of the Fourth Amendment is by far the most common. The following parts provide a review of Supreme Court deadly force jurisprudence and its development in the Tenth Circuit.

III. DEADLY FORCE UNDER THE FOURTH AMENDMENT

A. Supreme Court Jurisprudence

Deadly force is a relatively recent phenomenon for the Supreme Court. This is so because the Supreme Court did not address the application of deadly force under the Fourth Amendment until 1985.[30] Since then, the Court has issued ten significant opinions, most of them within the past decade. Some of the cases dealt with the constitutional analysis of whether

25. *See id.*
26. *See id.* at 419.
27. *See* Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010).
28. *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).
29. *See* Perry v. Durborow, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) (The Tenth Circuit acknowledged, but did not have an occasion to apply, the new standard.).
30. *See* Tennessee v. Garner, 471 U.S. 1, 3 (1985).

a particular application of deadly force was excessive in violation of the Fourth Amendment. Other cases have focused on whether officers that used deadly force were entitled to qualified immunity. Together, these cases have shaped a growing body of Supreme Court deadly force caselaw.

B. Constitutional Jurisprudence

The Supreme Court first tackled the subject of deadly force in *Garner*. *Garner* was significant for a couple of reasons. First, it sounded the death knell for those states that still authorized deadly force to apprehend any fleeing felon. The Court found a Tennessee statute that authorized an officer to use any means necessary to effect an arrest of a fleeing or forcibly resisting suspect after notice of the arrest was given to be unconstitutional to the extent it authorized an officer to shoot a young, unarmed-burglary suspect in the back of the head while he was running away on foot.[31] The Court provided that

> [w]here [a] suspect poses no immediate threat to [an] officer and no threat to others, the harm resulting from failing to apprehend [the suspect] does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.[32]

Second, even though the Court limited its holding,[33] it went on to provide some guidance in dicta as to when application of deadly force would be reasonable:

> Where 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 physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been

31. *See id.* at 4, 11.
32. *Id.* at 11.
33. *Id.* at 22.

given.[34]

Four years later, the Supreme Court decided *Graham v. Connor*.[35] The facts that led to the decision did not involve deadly force at all. However, the Court established the base rules for determining whether force—deadly or not—was reasonable under the Fourth Amendment, and *Graham's* principles are broadly applied by the federal circuits.[36]

In *Graham*, a robbery suspect sustained injuries after officers shoved his face on the hood of their car and threw him headfirst into the backseat.[37] The issue before the Court was what standard should be used to judge the use of force.[38] Graham had brought suit under § 1983 claiming excessive force in violation of his rights secured under the Fourteenth Amendment.[39] Without identifying the specific constitutional provision under which the claim arose, the lower federal courts who heard the case applied what was commonly referred to as the *Glick* test.[40] Until *Graham*, the vast majority of federal courts used this generic test to decide all excessive-force claims, regardless of whether a more particular constitutional provision applied.[41] The test analyzes:

> [1.] [T]he need for the application of force,
> [2.] [T]he relationship between [that] need and the amount of force that was used,
> [3.] [T]he extent of the injury inflicted, and
> [4.] [W]hether [the] force was applied in a good faith effort to maintain [and] restore discipline or maliciously and sadistically for the very purpose of causing harm.[42]

In *Graham*, the Supreme Court rejected this test holding where an excessive-force claim arises concerning a seizure of a free citizen, the force must be analyzed under the Fourth Amendment's reasonableness

34. *Id.* at 11–12.
35. 490 U.S. 386 (1989).
36. *Id.* at 388.
37. *Id.* at 389.
38. *Id.* at 388.
39. *Id.* at 390.
40. *Id.* at 390–93 (citing Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973)).
41. *Id.* at 393.
42. *Glick*, 481 F.2d at 1033.

standard.[43] This portion of the decision was significant because it eliminated any inquiry into an officer's intent or state of mind under these circumstances.

Most importantly, the Court laid out rules to determine if the use of force is reasonable.[44] The Court noted the determination is a balancing test "not capable of precise definition or mechanical application," which requires careful attention to the facts of each case.[45] The Court offered three factors: 1) "the severity of the crime at issue," 2) "whether the [person] poses an immediate threat to the safety of the officers or others, and" 3) "whether [the person] is actively resisting arrest or attempting to evade arrest by flight."[46]

The Court continued by saying

> [t]he *reasonableness* of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . 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.[47]

And the Court stated the test is an objective one:

> [T]he question is whether the officers' actions are *objectively reasonable* in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.[48]

After *Garner* and *Graham*, the Supreme Court left the subject alone for a considerable period of time. But *Scott v. Harris* came along in 2007,

43. *Graham*, 490 U.S. at 395.
44. *Id.* at 396.
45. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
46. *Id.*
47. *Id.* at 396–97 (emphasis added) (internal quotations omitted).
48. *Id.* at 397 (emphasis added) (internal quotations omitted).

and the Court significantly clarified its deadly force analysis.[49] In *Scott*, an officer terminated a high-speed pursuit by applying his "push bumper to the rear of" the suspect's fleeing vehicle, causing it to crash and leaving the suspect a quadriplegic.[50] The suspect brought suit under § 1983 alleging excessive force in violation of the Fourth Amendment.[51] After the officer was denied qualified immunity, the Supreme Court granted certiorari to determine whether the officer's use of force violated the Fourth Amendment.[52] The suspect argued deadly force can only be reasonable if the preconditions or elements established in *Garner* are satisfied: "(1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning."[53]

The Court applauded the suspect's effort to create a simple, easy-to-apply Fourth Amendment test but then rejected his arguments; again the Court stated the so-called *Garner* elements are only factors and interpreted *Garner* as merely one application of the Fourth Amendment's reasonableness test.[54] The Court articulated that it does not matter if an officer's actions could be categorized as deadly force; all that matters is whether the officer's actions were reasonable.[55] The Court further held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death"; ultimately, it found the officer's actions were reasonable as a matter of law.[56]

Similarly in *Plumhoff v. Rickard*, the Supreme Court discussed a specific application of deadly force.[57] *Plumhoff* is significant for a couple of reasons. Like *Scott*, the Court ruled on the constitutionality of a particular use of deadly force as a matter of law, thereby promoting the development of constitutional deadly force precedent, a subject that is

49. *See* Scott v. Harris, 550 U.S. 372, 382–84 (2007).
50. *Id.* at 375.
51. *Id.* at 375–76.
52. *Id.* at 376–78.
53. *Id.* at 382.
54. *Id.* at 382–83.
55. *Id.* at 383.
56. *Id.* at 386.
57. Plumhoff v. Rickard, 134 S. Ct. 2012, 2020–21 (2014).

often considered in cases where a qualified-immunity defense is asserted.[58] And *Plumhoff* also involved a high-speed pursuit.[59] In *Plumhoff*, officers fired three shots into a car that fled from them at over one-hundred miles per hour on an occupied street and was actively colliding into multiple police cars.[60] The officers fired twelve more shots at the vehicle after it managed to drive off again.[61] The Court applied the objective-reasonableness test, citing *Graham* for the rules requiring balancing of interests, analysis of the totality of the circumstances, and consideration that officers operate in tense circumstances.[62] After comparing this case to the circumstances in *Scott*, the Court held the officers' use of deadly force was reasonable as a matter of law.[63]

The Court also addressed the issue of how long an officer is authorized to use deadly force once it is initially justified. The Court held that when officers are justified in using deadly force, they need not stop using the deadly force until the threat is resolved.[64] This means that once it is objectively reasonable for an officer to use deadly force, the officer need not shoot only once or attempt to shoot a suspect in the foot to see if that will be sufficient to stop the threat. Once an officer is justified in using deadly force, he or she may continue using it for as long as the circumstances justifying the initial use of force persist—or for as long as a severe threat exists.[65]

In *County of Los Angeles v. Mendez*, the Supreme Court placed some limitations on evaluating conduct leading up to an application of deadly force.[66] The Court rejected the Ninth Circuit's so-called provocation rule—which renders an otherwise lawful use of force unreasonable if the "officer[s] violate[] the Fourth Amendment in some other way in the course of events leading up to [a] seizure" (if the other Fourth Amendment violation somehow provoked the otherwise reasonable use of force).[67] The Court found the rule to be fundamentally flawed and incompatible with excessive-force jurisprudence, and it mistakenly conflated distinct Fourth

58. *Id.*
59. *Id.* at 2016–17.
60. *Id.* at 2017–18.
61. *Id.*
62. *Id.* at 2020 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).
63. *Id.* at 2022.
64. *Id.*
65. *Id.*
66. Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 (2017).
67. *Id.* at 1546.

Amendment claims.[68] The Court held "[a] different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."[69] "*[O]nce* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation."[70]

C. Clearly Established Law Jurisprudence

The Supreme Court has only spent half its time on the subject of deadly force developing constitutional law. It has spent the other half focusing on whether officers using deadly force are entitled to qualified immunity.[71] These cases are different because the Court did not decide whether an officer's actions violated the Fourth Amendment. Instead, these cases focus on whether a reasonable officer would have known or had fair notice that his or her conduct would violate the Fourth Amendment (i.e. whether the law was clearly established).[72] "If the law at [the] time [of the force] did not clearly establish that [an] officer's conduct would violate the" Fourth Amendment, the officer is entitled to qualified immunity.[73]

The defense of qualified immunity shields officers from liability, even

---

68. *Id.* at 1546–47.

> The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.
>
> . . . .
>
> . . . [T]he rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. . . .
>
> This approach mistakenly conflates distinct Fourth Amendment claims. . . .
>
> By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms. . . . To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.

Id.

69. *Id.* at 1544.

70. *Id.* at 1547 n.2 (emphasis in original).

71. Qualified immunity is a common-law defense against claims of civil-rights violations.

72. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

73. *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) ("If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.").

if they have violated the Fourth Amendment, as long as their "conduct does not violate clearly established . . . constitutional rights of which a reasonable officer would have known."[74] "A clearly established right is one that is 'sufficiently clear that every reasonable [officer] would have understood that what he [or she] is doing violates that right.'"[75] The Supreme Court does not necessarily "require a case directly on point."[76] However, recently the Court stated that "existing precedent must have placed the [excessive force] question *beyond debate*"[77] and that "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[78] "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[79]

On numerous occasions within the past fifteen years, the Court addressed whether the law was clearly established in deadly force cases. In all but one of these cases[80] the Court granted the officers qualified immunity.

For example, during 2004 in *Brosseau v. Haugen*, the Supreme Court granted an officer qualified immunity when she shot a fleeing suspect out of fear that the suspect was a danger to "other officers on foot who [she] believed were in the immediate area, . . . the occupied vehicles in [his] path[,] and . . . any other citizens who might be in the area."[81] The Court noted that the law was very "hazy" as to when deadly force may be used to apprehend fleeing drivers citing various circuit cases that went both ways.[82]

Similarly, during 2015 in *Mullenix v. Luna*, the Supreme Court

74. *Kisela*, 138 S. Ct. at 1152 (quoting White v. Pauly (*Pauly II*), 137 S. Ct. 548, 551 (2017)). *See also Mullenix*, 136 S. Ct. at 308 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)); *Brosseau*, 543 U.S. at 198.

75. *Mullenix*, 136 S. Ct. at 308 (quoting Reichle v. Howards, 566 U.S. 658, 659 (2012)).

76. *Id.* (quoting Ashcroft v. al–Kidd, 563 U.S. 731, 741 (2011)).

77. *Id.* (emphasis added) (quoting Ashcroft, 563 U.S. at 741). See *also Kisela*, 138 S. Ct. at 1152 (quoting *Pauly II*, 137 S. Ct. at 551).

78. *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 309).

79. *Mullenix*, 136 S. Ct. at 308 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). *See also Kisela*, 138 S. Ct. at 1152 (quoting *Pauly II*, 137 S. Ct. at 551).

80. *See* Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (ruling the lower courts failed to view the facts in the light most favorable to the non-moving party).

81. Brosseau v. Haugen, 543 U.S. 194, 197 (2004) (quoting Haugen v. Brosseau, 339 F.3d 857, 865 (9th Cir. 2003)).

82. *Id.* at 201 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

granted an officer qualified immunity when he fired his rifle at an armed and possibly intoxicated fugitive fleeing arrest in a vehicle at speeds over one-hundred miles per hour, threatening to kill any officer he saw if the police did not abandon their pursuit, and racing towards another officer's position, even though the officer was on an overpass and spike strips were set up just ahead of the vehicle.[83] The Court rejected the Fifth Circuit's rule: "a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'"[84] The Court determined it was in direct contravention with its own ruling in *Brosseau* and that it was an insufficient basis to deny qualified immunity.[85] Trying to make a point, the Court also noted that it has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."[86]

During the same year, in *City & County of San Francisco v. Sheehan*, the Supreme Court reversed the Ninth Circuit's denial of qualified immunity to officers when they used deadly force on a mentally ill suspect.[87] In *Sheehan*, officers responded to a call from a social worker who wanted assistance transporting Sheehan, a mentally ill individual living at a home for the mentally ill, to a secure facility after she threatened to kill the worker.[88] Upon arrival, officers entered Sheehan's room, Sheehan grabbed a knife and threatened to kill them, and the officers retreated and closed the door.[89] Concerned about what Sheehan might do behind closed doors, and without considering if they could accommodate her disability, the officers reentered her room.[90] Sheehan, still holding the knife, advanced on the officers.[91] The officers pepper sprayed Sheehan, but she did not drop the knife.[92] And when she "was only a few feet away," the officers shot Sheehan multiple times.[93] The Ninth Circuit held that the initial entry, secondary entry, and use of deadly force were lawful in

83. *Mullenix*, 136 S. Ct. at 306–307, 312 (2015).
84. *Id.* at 308–09. (quoting Luna v. Mullenix, 773 F.3d 712, 725 (5th Cir. 2014)).
85. *Id.* at 308–12.
86. *Id.* at 310.
87. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769 (2015).
88. *Id.* at 1769–70.
89. *Id.* at 1770.
90. *Id.* at 1771.
91. *Id.*
92. *Id.*
93. *Id.*

isolation but then denied qualified immunity to the officers after finding "it was clearly established that an officer cannot 'forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry'" and that the officers could have provoked Sheehan by needlessly forcing the second confrontation.[94] The Supreme Court agreed with the Ninth Circuit's conclusion that both entries and the use of deadly force were lawful but then concluded the officers were also entitled to qualified immunity.[95] The Court granted the officers qualified immunity after finding "no precedent clearly established that there was not an objective need for immediate entry."[96] The Court cited circuit precedent that permits officers to make entry into homes to provide emergency assistance where failure to do so might endanger someone's life,[97] even where the occupant is mentally ill.[98] The Court explained that

> [the officers] knew that Sheehan had a weapon and had threatened to use it to kill three people. They also knew that delay could make the situation more dangerous. The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay "would gravely endanger their lives or the lives of others."[99]

Two years later in *White v. Pauly* (*Pauly II*), the Supreme Court granted an officer qualified immunity when the officer shot a suspect through the window of his house without warning after arriving to the scene of a road-rage investigation where two other officers had already attempted to make contact with the suspects, heard one of the suspects say "we have guns," took cover behind a stone wall, heard the discharge of a shotgun, and saw the suspect inside the residence pointing a handgun in his direction.[100] The Court found the Tenth Circuit failed to identify a case

94. *Id.* at 1772 (quoting Sheehan v. City & Cty. of San Francisco, 743 F.3d 1211, 1229 (9th Cir. 2014)).

95. *Id.* at 1774–75.

96. *Id.* at 1777 (emphasis omitted) (internal quotations omitted).

97. *Id.* at 1774–75 (first citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006); then Kentucky v. King, 563 U.S. 452, 460 (2011)).

98. *Id.* at 1778 (first citing Bates v. Chesterfield Cty., 216 F.3d 367, 372 (4th Cir. 2000); then Sanders v. City of Minneapolis, 474 F.3d 523, 527 (8th Cir. 2007); and then Menuel v. City of Atlanta, 25 F.3d 990, 995 (11th Cir. 1994)).

99. *Id.* at 1775 (quoting Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 299 (1967)).

100. *Pauly II*, 137 S. Ct. 548, 549–50 (2017).

where an officer acting under similar circumstances violated the Fourth Amendment and misinterpreted the general principles from *Garner* and *Graham*, which paved the way for the Tenth Circuit to deny the officers qualified immunity.[101] The Court clarified the general deadly force rules set out in *Garner* and *Graham* are cast at a high level of generality and "do not by themselves create clearly established law," except in an obvious case.[102] The Court ruled this was not an obvious case.[103]

Most recently, in *Kisela v. Hughes*, the Supreme Court granted an officer qualified immunity where the officer shot a woman that "was holding a large kitchen knife," moved towards another person standing nearby, disregarded multiple commands to drop the knife, and was seen hacking a tree with the knife.[104] Once again, the Court corrected a circuit court for failing to implement the qualified-immunity standard in a correct way.[105] The Court determined this was not an obvious case.[106] It distinguished every single case the Ninth Circuit relied on for denying qualified immunity and pointed out that one case was actually decided after the incident in question—making it impossible for the officer to have known about it.[107]

The Supreme Court's record in these deadly force qualified-immunity cases is telling. Within the last three years, the Court corrected federal circuit courts four times for defining clearly established law at too high a level of generality. It is clear the Court is frustrated with qualified-immunity analysis in the deadly force arena. It has underscored that qualified immunity is important to society as a whole.[108] The Court has also emphasized how difficult it is for officers to determine how excessive force law will apply in the ever-changing situations they face.[109] For good reason, the Court considered the border between reasonable and excessive

101. *Id.* at 552.
102. *Id.*
103. *Id.*
104. Kisela v. Hughes, 138 S. Ct. 1148, 1150–52 (2018).
105. *Id.* at 1153.
106. *Id.*
107. *Id.* at 1154.
108. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"). *See also* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n. 3 (2015); *Pauly II*, 137 S. Ct. 548, 551 (2017).
109. *See* Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

force hazy.[110] And the Court has held that qualified immunity protects applications of deadly force that fall in that *hazy border*.[111]

Moving forward, courts will not likely deny qualified immunity to officers based on general deadly force principles (like those established in *Garner* and *Graham*). Courts cannot simply cite these cases, rule that a particular use of deadly force was unreasonable, and deny the officer qualified immunity.[112] Qualified immunity "must be undertaken in light of the specific context of the case, not as a broad[,] general proposition."[113]

On the other hand, when officers utilize deadly force in circumstances analogous or quite similar to those found unconstitutional in one of the previous cases, courts are far more likely to deny qualified immunity. The closer the facts and the more deadly force cases that are decided on constitutional grounds, the more likely courts will clearly establish the law for officers.

IV. TENTH CIRCUIT JURISPRUDENCE

The Tenth Circuit significantly expanded upon the Supreme Court's Fourth Amendment deadly force caselaw. Like the Supreme Court, it recognized "[t]here is no easy-to-apply legal test for [determining the reasonableness] of deadly force."[114] The inquiry requires careful "balanc[ing] [of] the nature and quality of the intrusion on the [person's] Fourth Amendment interests against the [countervailing] governmental interests";[115] and the ultimate question is whether the officer's force was reasonable based on the totality of the circumstances, without regard to the

110. *See* Saucier v. Katz, 533 U.S. 194, 206 (2001).

111. *Id.* at 204, 209.

112. *See Kisela*, 138 S. Ct. at 1153.

113. *Mullenix*, 136 S. Ct. at 308 (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004)); *Saucier*, 533 U.S. at 201.

114. Cordova v. Aragon, 569 F.3d 1183, 1188 (10th Cir. 2009) (quoting Scott v. Harris, 550 U.S. 372, 383 (2007)). *See also* Pauly v. White (*Pauly I*), 814 F.3d 1060, 1077 (10th Cir. 2016) (quoting *Cordova*, 569 F.3d at 1188).

115. Clark v. Bowcutt, 675 F. App'x. 799, 806–07 (10th Cir. 2017) (quoting *Scott*, 550 U.S. at 383). *See also* Estate of Ronquillo v. City & Cty. of Denver, 720 F. App'x. 434, 438 (10th Cir. 2017) (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)) ; *Pauly I*, 814 F.3d at 1070 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)); *Cordova*, 569 F.3d at 1188 (quoting *Scott*, 550 U.S. at 383); Hastings v. Barnes, 252 F. App'x. 197, 202 (10th Cir. 2007) (quoting *Graham*, 490 U.S. at 396); Walker v. City of Orem, 451 F.3d 1139, 1159 (10th Cir. 2006) (quoting *Graham*, 490 U.S. at 396).

officer's underlying intent.[116] Likewise, the Tenth Circuit adopted the Supreme Court's rules established in *Graham* that requires courts to judge the reasonableness of the force used from the perspective of a reasonable officer on the scene without the benefit of hindsight where officers are forced to make split-second judgments in tense circumstances.[117]

The Tenth Circuit has acknowledged that application of deadly force is not a unitary concept and that the outcome of the reasonableness determination may depend on the type of deadly force used.[118] Deadly force may include

> a range of applications of force, some more certain to cause death than others. It includes force that is *likely* to cause serious injury or death, such as ramming, and also includes force that is nearly certain to cause death, such as a shot to the head. . . . [J]ust because a situation justifies ramming does not mean it will justify shooting a suspect in the head.[119]

When determining whether a particular use of deadly force is objectively reasonable, the Tenth Circuit often starts by analyzing what are commonly referred to as the *Graham* factors.[120] The *Graham* factors include: 1) "the severity of the crime at issue," 2) "whether the [person] poses an immediate threat to the safety of the officers or others, and" 3)

---

116. *See, e.g.*, *Clark*, 675 F. App'x. at 805; Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015); Zia Trust Co. v. Montoya, 597 F.3d 1150, 1154 (10th Cir. 2010); *Cordova*, 569 F.3d at 1188; Thomson v. Salt Lake Cty., 584 F.3d 1304, 1313 (10th Cir. 2009); Estate of Larsen v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008); Beckett-Crabtree v. Hair, 298 F. App'x. 718, 721–22 (10th Cir. 2008); Phillips v. James, 422 F.3d 1075, 1083 (10th Cir. 2005); Jiron v. City of Lakewood, 392 F.3d 410, 414 (10th Cir. 2004); Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995).

117. *See, e.g.*, *Clark*, 675 F. App'x. at 805; *Estate of Ronquillo*, 720 F. App'x. at 438–39; *Pauly I*, 814 F.3d at 1070; *Tenorio*, 802 F.3d at 1164; Thomas v. Durastanti, 607 F.3d 655, 664 (10th Cir. 2010); *Cordova*, 569 F.3d at 1188; *Thomson*, 584 F.3d at 1314; *Estate of Larsen*, 511 F.3d at 1259–60; *Beckett-Crabtree*, 298 F. App'x. at 721; *Hastings*, 252 F. App'x. at 202; *Walker*, 451 F.3d at 1159; Blossom v. Yarbrough, 429 F.3d 963, 967 (10th Cir. 2005); Medina v. Cram, 252 F.3d 1124, 1131 (10th Cir. 2001); Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997).

118. *See, e.g.*, *Cordova*, 569 F.3d at 1189; *Thomson*, 584 F.3d at 1315.

119. *Cordova*, 569 F.3d at 1189 (emphasis added) (internal quotations omitted).

120. *See, e.g.*, *Clark*, 675 F. App'x. at 805; *Estate of Ronquillo*, 720 F. App'x. at 438; *Pauly I*, 814 F.3d at 1077; *Cordova*, 569 F.3d at 1188; *Thomson*, 584 F.3d at 1314–15; *Durastanti*, 607 F.3d at 664; *Hastings*, 252 F. App'x. at 202; *Walker*, 451 F.3d at 1159; *Jiron*, 392 F.3d at 414–15; *Medina*, 252 F.3d at 1131.

"whether [the person] is actively resisting arrest or attempting to evade arrest by flight."[121]

The Tenth Circuit emphasizes the second factor and essentially treats it as dispositive. Citing *Garner* and *Graham*, the Tenth Circuit generally provides that deadly force is reasonable where an officer has probable cause to believe there is a threat of serious physical harm to the officer or others.[122] On several occasions, in its statement of Fourth Amendment rules, it even noted that deadly force is reasonable *only* under those circumstances.[123]

The Tenth Circuit generally goes beyond the *Graham* factors in deadly force cases. It has developed more extensive rules and factors for evaluating use of deadly force and has addressed more deadly force issues than the Supreme Court. The following sections provide a review of additional issues the Tenth Circuit has addressed in deadly force cases.

A. What is Deadly Force?

The Supreme Court has held the objective-reasonableness standard established in *Graham* is the standard to be applied whether the force complained of was deadly or not.[124] Up until now, the Supreme Court has not indicated it is interested in determining whether a particular application of force is deadly force or not—all that matters is whether the force was objectively reasonable.[125] Nonetheless, the Tenth Circuit at times addressed the issue of whether a particular force is deadly or not. It did so because on occasion it ruled that deadly force is *only* reasonable if the officer "had probable cause 'to believe that there was a threat of serious physical harm to [officers] or others.'"[126] In effect, this rule places a greater restriction on officers applying deadly force than those applying

121. Graham v. Connor, 490 U.S. 386, 396 (1989).

122. *See, e.g.*, *Clark*, 675 F. App'x. at 806–10; Samuel v. City of Broken Arrow, 506 F. App'x. 751, 753–54 (10th Cir. 2012); *Durastanti*, 607 F.3d at 664–65; *Zia Trust Co.*, 597 F.3d at 1154–55; *Beckett-Crabtree*, 298 F. App'x. at 721; *Estate of Larsen*, 511 F.3d at 1260–61; Weigel v. Broad, 544 F.3d 1143, 1152–55 (10th Cir. 2008); *Hastings*, 252 F. App'x. at 202–03; *Walker*, 451 F.3d at 1159–60; *Blossom*, 429 F.3d at 967–68; *Jiron*, 392 F.3d at 415–18; *Phillips*, 422 F.3d at 1083–84; *Sevier*, 60 F.3d at 699.

123. *See, e.g.*, *Pauly I*, 814 F.3d at 1070; *Tenorio*, 802 F.3d at 1164; *Cordova*, 569 F.3d at 1192; *Thomson*, 584 F.3d at 1313.

124. *See Graham*, 490 U.S. at 395.

125. *See* Scott v. Harris, 550 U.S. 372, 383 (2007).

126. *Pauly I*, 814 F.3d at 1070 (quoting *Thomson*, 584 F.3d at 1313); *Tenorio*, 802 F.3d at 1164 (quoting *Estate of Larsen*, 511 F.3d at 1260); *Cordova*, 569 F.3d at 1192.

non-deadly force.[127] Consequently, the type of force an officer applied may be relevant.

The Tenth Circuit defines *deadly force* as force used by an officer for the purpose of causing or the officer knowing will likely cause "a substantial risk of . . . death or serious bodily harm."[128] The Tenth Circuit also recognizes that

> the term [*deadly force*] encompasses a range of applications of force, some more certain to cause death than others. It includes force that is *likely* to cause serious injury or death, such as ramming, and also includes force that is nearly certain to cause death, such as a shot to the head.[129]

Determining whether a particular force is deadly does not depend on whether a suspect actually dies.[130] Nor does the mere fact that a law-enforcement tool is dangerous (that it has the potential to cause serious harm) "suffice as proof that the tool is an instrument of deadly force."[131] Whether deadly force was used to seize a suspect must be determined in the context of each case.[132] Obviously, intentionally firing a firearm at a person constitutes deadly force,[133] so is purposefully firing a firearm at a vehicle where an individual is located.[134] The tougher issue is whether the application of force other than firearms, such as the use of a police canine, a Taser, or a particular restraint technique to apprehend a person constitutes deadly force.

In *Thomson v. Salt Lake County*, the Tenth Circuit held that the release of a properly trained police dog to apprehend a suspect did not constitute deadly force but left open the question whether under other circumstances,

---

127. In the non-deadly force context, the Tenth Circuit has never limited the analysis to the presence of a threat of serious physical harm. The court has always left open the possibility of discussion of other factors. Yet the court has limited the analysis to the presence of a threat of serious physical harm on some occasions in the deadly force context.

128. *Thomson*, 584 F.3d at 1313–14 (quoting Jiron v. City of Lakewood, 392 F.3d 410, 415 n.2 (10th Cir. 2004)).

129. *Cordova*, 569 F.3d at 1189 (emphasis added) (internal quotations omitted).

130. *See* Ryder v. City of Topeka, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987).

131. *See Thomson*, 584 F.3d at 1316 (quoting Robinette v. Barnes, 854 F.2d 909, 913 (6th Cir. 1988)).

132. *See id.* at 1315–17 (considering all the circumstances of the release of a police dog).

133. *See Jiron*, 392 F.3d at 415 n.2.

134. *See Ryder*, 814 F.2d at 1416 n.11.

such as where a dog was improperly trained, the use of a police dog might be considered deadly force.[135] Similarly, the Tenth Circuit has acknowledged that the use of a Taser by itself does not constitute deadly force,[136] but under certain circumstances it may be. Might it be deadly force to use a Taser on a person that has doused themselves with gasoline or on a person known to have a heart condition or exhibiting symptoms of excited delirium? In *Weigel v. Broad*, the Tenth Circuit found that officers utilized deadly force where they placed pressure on a vulnerable person's upper torso for a significant period of time while the person was fully restrained on his stomach and no longer posed any danger.[137] In *Cruz v. City of Laramie*, the Tenth Circuit cited the Fifth Circuit for the proposition that hog-tying a person of diminished capacity could constitute deadly force.[138] Of course, just because a particular application of force may be considered deadly, does not necessarily mean it is excessive or unreasonable. However, in the Tenth Circuit, it may mean that there must be a threat of serious physical harm to officers or others to be considered reasonable.

B. Least Intrusive Force Not Required

It is very convenient to argue, and often plaintiffs do in deadly force cases, that a police officer could have used a lesser degree of force: a Taser instead of a firearm, the hands instead of a baton, or a punch instead of a kick. However, the Tenth Circuit made clear that officers are not required to use the least or less intrusive force.[139] They are only required to use objectively reasonable force. The inquiry is whether the force *actually* used was objectively reasonable, regardless of the availability of less intrusive alternatives.[140] The Tenth Circuit recognized that questioning

135. *Thomson*, 584 F.3d at 1316.

136. *See* Cavanaugh v. Woods Cross City, 625 F.3d 661, 665 (10th Cir. 2010).

137. Weigel v. Broad, 544 F.3d 1143, 1154 (10th Cir. 2008) ("A reasonable officer would know these actions present a substantial and totally unnecessary risk of death to the person.").

138. Cruz v. City of Laramie, 239 F.3d 1183, 1188 (10th Cir. 2001) (citing Gutierrez v. San Antonio, 139 F.3d 441 (5th Cir. 1998)).

139. *See* Blossom v. Yarbrough, 429 F.3d 963, 968 (10th Cir. 2005); Marquez v. City of Albuquerque, 399 F.3d 1216, 1222 (10th Cir. 2005); Jiron v. City of Lakewood, 392 F.3d 410, 414 (10th Cir. 2004) (citing Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir. 2001)).

140. *See* Thomas v. Durastanti, 607 F.3d 655, 665 (10th Cir. 2010); Cortez v. McCauley, 478 F.3d 1108, 1146 (10th Cir. 2007); *Blossom*, 429 F.3d at 968 (failing to attempt to

whether an officer could have used a lesser degree of force when determining reasonableness would violate the principles laid out in *Graham*, which requires courts to allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolve and not judge the force used with the 20/20 vision of hindsight.[141]

C. Mistaken Beliefs

Police officers are human, so they are entitled to make reasonable mistakes.[142] Consequently, an officer's mistaken belief is not determinative in the reasonableness analysis. An officer's belief that the use of deadly force was justified need not necessarily turn out to be correct as long as it was objectively reasonable given the circumstances.[143] For example, officers may reasonably mistake that an object is a gun,[144] that they are in the path of a fleeing vehicle,[145] or that another officer was run over by a vehicle.[146]

However, not all mistakes will be reasonable. The Tenth Circuit is inclined to deny qualified immunity where a mistake may be unreasonable. For example, in *King v. Hill*, an officer was denied qualified immunity when he wrongly believed a subject was armed with a gun.[147] In *Walker v. City of Orem*, the Tenth Circuit denied qualified immunity to an officer who believed a suspect was pointing a gun, but the suspect was actually holding a small knife to his wrist.[148]

---

utilize baton or OC spray before applying deadly force was not reckless); *Marquez*, 399 F.3d at 1222; *Jiron*, 392 F.3d at 414; *Medina*, 252 F.3d at 1133 (citing Illinois v. Lafayette, 462 U.S. 640, 647–48 (1983)); Ryder v. City of Topeka, 814 F.2d 1412, 1422–23 (10th Cir. 1987) (Plaintiff alleged the officer could have continued to try to catch the suspect on foot instead of using deadly force, but the court held a reasonable jury could have found deadly force was necessary to prevent escape.).

141. *See Medina*, 252 F.3d at 1133.

142. Clark v. Bowcutt, 675 F. App'x. 799, 808 (10th Cir. 2017); Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015); *Durastanti*, 607 F.3d at 666; Thomson v. Salt Lake Cty., 584 F.3d 1304, 1313, 1319 (10th Cir. 2009); Estate of Larsen v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008); *Jiron*, 392 F.3d at 415.

143. *See* King v. Hill, 615 F. App'x. 470, 474 (10th Cir. 2015); *Tenorio*, 802 F.3d at 1164; *Estate of Larsen*, 511 F.3d at 1260.

144. *See Medina*, 252 F.3d at 1132.

145. *See Durastanti*, 607 F.3d at 666.

146. *See* Johnson v. Peay, 704 F. App'x. 738, 744 (10th Cir. 2017).

147. King v. Hill, 615 F. App'x. 470, 475 (10th Cir. 2015).

148. Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006).

D. Determining the Degree of Threat

The primary focus in deadly force cases is generally whether there was a threat of death or serious physical harm to officers or others. The Tenth Circuit may examine various factors when making this determination.

It has utilized what it is referred to as the *Estate of Larsen* Test.[149] This test requires an analysis of four factors:

> (1) [W]hether the officers ordered the suspect to drop his [or her] weapon, and the suspect's compliance with police commands;
> (2) [W]hether any hostile motions were made with the weapon towards the officers;
> (3) [T]he distance separating the officers and the suspect; and
> (4) [T]he manifest intentions of the suspect. [150]

However, just like the *Graham* factors, these factors only aid the court in making its final decision.[151] They are also not exclusive.[152]

The Tenth Circuit also routinely asks "whether the officers were in danger *at the precise moment* that they used deadly force."[153] The more imminent the threat, the more likely the use of deadly force will be reasonable. The Tenth Circuit considers the imminence of a threat to be a critical factor,[154] and it is often the primary focus of a deadly force analysis.[155] Nonetheless, the imminence of a threat is still a factor in the totality of the circumstances—not an absolute requirement.[156] In other

149. *See, e.g.*, Clark v. Bowcutt, 675 F. App'x. 799, 806 (10th Cir. 2017); Pauly v. White (*Pauly III*), 874 F.3d 1197, 1216–19 (10th Cir. 2017); *Pauly I*, 814 F.3d 1060, 1070 (10th Cir. 2016); Zia Trust Co. v. Montoya, 597 F.3d 1150, 1154 (10th Cir. 2010); Thomson v. Salt Lake Cty., 584 F.3d 1304, 1314–15 (10th Cir. 2009); Beckett-Crabtree v. Hair, 298 F. App'x. 718, 721 (10th Cir. 2008).

150. Estate of Larsen v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008).

151. *See* Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015).

152. *See Pauly I*, 814 F.3d at 1070; *Estate of Larsen*, 511 F.3d at 1260.

153. *Clark*, 675 F. App'x. at 806 (quoting Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995) (emphasis in original)). *See also Pauly I*, 814 F.3d at 1071, 1076; *Tenorio*, 802 F.3d at 1164; *Thomson*, 584 F.3d at 1315; Phillips v. James, 422 F.3d 1075, 1083 (10th Cir. 2005); *Jiron*, 392 F.3d at 415; *Medina*, 252 F.3d at 1132; *Allen*, 119 F.3d at 840.

154. *See Phillips*, 422 F.3d at 1083.

155. *See Pauly I*, 814 F.3d at 1071, 1076; *Medina*, 252 F.3d at 1132.

156. *See Phillips*, 422 F.3d at 1083. *See also* Cordova v. Aragon, 569 F.3d 1183, 1190 (10th Cir. 2009) ("We do not . . . suggest that the risk to others must always be imminent in order to justify the use of deadly force . . . ."); *Thomson*, 584 F.3d at 1318 (citing *Phillips*, 422 F.3d at 1083) ("'Strict reliance' on the 'precise moment' factor is inappropriate when

words, all instances of deadly force must be reasonable, but not all threats must be imminent. So what types of threats pose a risk of death or serious physical harm sufficient to justify deadly force?

1. Firearms

Use of deadly force is obviously reasonable where a suspect is actively firing a gun at officers or others. Clearly shooting a gun at officers or others presents an imminent threat of death or serious physical harm. However, deadly force is not only authorized when a suspect is firing a gun. Deadly force may be lawful where a suspect is pointing a gun at officers or others.[157] For example, in *Thomson v. Salt Lake County*, the Tenth Circuit held it was objectively reasonable for an officer to use deadly force on a suspect moving a gun around in the direction of officers after threatening his wife and refusing to comply with orders to drop the gun.[158]

Deadly force may also be lawful when a suspect is merely holding a gun without directly pointing it at anyone. In *Malone v. Board of County Commissioners*, officers were attempting to serve an arrest warrant on a suspect for choking, punching, and pointing a revolver at his wife.[159] The Tenth Circuit granted qualified immunity to the officer that shot the suspect who jumped over a chain-link fence, backed away holding a lowered revolver in his hand, and refused several commands to drop the weapon.[160]

Moreover, deadly force may even be lawful when a suspect held a gun but no longer had it when officers used deadly force. For example, in *Phillips v. James*, the Tenth Circuit held a SWAT sniper acted reasonably when he shot an unarmed suicidal subject inside his residence from an outside tree after the subject had exited his residence with a handgun, disobeyed orders to drop the weapon, retreated back inside, and propped

---

the totality must be considered."). *But see Pauly I*, 814 F.3d at 1084 (indicating it is clearly established that a police officer is not entitled to use deadly force unless he or she was in danger at the exact moment deadly force was used) (overturned by *Pauly II*, 137 S. Ct. 548 (2017) for relying on principles that were too general).

157. *See, e.g.*, Wilson v. Meeks, 52 F.3d 1547, 1554 (10th Cir. 1995) (holding that the officer acted reasonably in shooting the suspect who was pointing a gun in the officer's direction), *abrogated by* Saucier v. Katz, 533 U.S. 194, 205 (2001).

158. Thomson v. Salt Lake Cty., 584 F.3d 1304, 1317–18 (10th Cir. 2009).

159. Malone v. Board of Cty. Comm'rs, 707 F. App'x. 552, 553–57 (10th Cir. 2017).

160. *Id.* at 554, 557.

open a window while threatening to shoot officers.[161] The court found the officers had no reason to wait to be shot at or see if the suspect would raise a gun and point it at them before they shot him.[162]

2. Knives

Moreover, the Tenth Circuit also found deadly force to be objectively reasonable when a suspect makes hostile motions towards officers with a knife.[163] For example, in *Estate of Larsen v. Murr*, the court found deadly force to be objectively reasonable as a matter of law where an agitated and suicidal suspect raised a knife in a provocative motion and took a step towards officers after refusing orders to drop the knife.[164]

On the other hand, the Tenth Circuit established that it is unreasonable for an officer to use deadly force against "a suspect [who is] only holding a knife, not a gun, and the suspect [is] not charging and . . . [making] no slicing or stabbing motions toward[s]" the officer or others.[165] In *Tenorio v. Pitzer*, the Tenth Circuit denied qualified immunity to an officer who used deadly force on an intoxicated suspect holding a three and a half inch kitchen knife to his own throat; officers entered the suspect's home, and the suspect took a few steps towards officers while holding the knife loosely by his side but had not made any threatening gestures towards officers.[166]

Distance is often a relevant, though non-determinative, factor when knives are involved. Unlike firearms, which present a threat at great distances,[167] knives generally only become a threat to officers or others as

---

161. Phillips v. James, 422 F.3d at 1078–79.

162. *Id.* at 1084.

163. *See, e.g.*, Clark v. Colbert, 895 F.3d 1258, 1263–64 (10th Cir. 2018) (holding the officers acted reasonably in shooting a mentally ill suspect who charged them with a knife); Jiron v. City of Lakewood, 392 F.3d 410, 417–18 (10th Cir. 2004) (holding the officer acted reasonably in shooting a felony suspect who advanced towards the officer while hacking a knife); Romero v. Bd. of Cty. Comm'rs, 60 F.3d 702, 703–04 (10th Cir. 1995) (holding that an officer acted reasonably in shooting a suspect coming at him with a knife in an attack position).

164. Estate of Larsen v. Murr, 511 F.3d 1255, 1263 (10th Cir. 2008).

165. *See* Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006) (citing Zuchel v. City & Cty. of Denver, 997 F.2d 730, 735–36 (10th Cir. 1993)).

166. Tenorio v. Pitzer, 802 F.3d 1160, 1164–66 (10th Cir. 2015).

167. However, in *Pauly I*, 814 F.3d 1060, 1077–78 (10th Cir. 2016), the Tenth Circuit found a distance of fifty feet weighed against an officer even though the suspect was firing a gun and denied the officer qualified immunity. Apparently, in this case, the court forgot bullets travel further than fifty feet. At any rate, the court's judgment denying the officer

the handler gets closer. The Tenth Circuit has refused to establish any per se rule regarding the distance from which deadly force may be applied.[168] Instead, distance must be considered in the totality of the circumstances.[169] At the same time, the Tenth Circuit understands that officers "need not await the 'glint of steel' before taking self-protective action."[170] But how close can officers allow a person attacking with a knife to get to them or to others before utilizing deadly force?

Many police officers are trained on the twenty-one-foot rule, which generally provides that a suspect with a knife within twenty-one feet of an officer can attack the officer before the officer can react and fire his or her weapon.[171] Because in some cases the Tenth Circuit has found deadly force reasonable where a knife-wielding suspect was within twenty-one feet of an officer, police officers often make this argument when they use deadly force. For example, in *Estate of Larsen*, deadly force was deemed reasonable when an agitated, suicidal suspect raised a knife in a provocative manner and took a step towards officers within seven to twelve feet of them.[172] In other cases, the Tenth Circuit has denied qualified immunity where the distance was greater than twenty-one feet. In *Walker v. City of Orem*, the court denied qualified immunity to an officer that shot a suspect holding a two-inch blade when a suspect was farther away than twenty-one feet.[173]

Although the twenty-one-foot rule may be an easy training rule, it is not a legal rule. Just because a suspect with a knife is within twenty-one feet of an officer does not mean the use of deadly force will be reasonable. For example, in *Zuchel v. Spinharney*, the Tenth Circuit denied qualified immunity to an officer that used deadly force on a suspect that was only

---

qualified immunity was later vacated by the Supreme Court. *See Pauly II*, 137 S. Ct. 548, 553 (2017).

168. *See, e.g.*, Samuel v. City of Broken Arrow, 506 F. App'x. 751, 754 (10th Cir. 2012); Beckett-Crabtree v. Hair, 298 F. App'x. 718, 721 (10th Cir. 2008); Estate of Larsen v. Murr, 511 F.3d 1255, 1262 (10th Cir. 2008).

169. *See, e.g.*, *Beckett-Crabtree*, 298 F. App'x. at 721 (distance of twenty-one feet was not determinative and no constitutional violation found); *Estate of Larsen*, 511 F.3d at 1261–62; *Walker*, 451 F.3d at 1159.

170. *Estate of Larsen*, 511 F.3d at 1260 (quoting People v. Morales, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)).

171. Ron Martinelli, *Revisiting the "21-Foot Rule,"* POLICE: LAW ENFORCEMENT MAG. (September 18, 2014), https://www.policemag.com/341203/revisiting-the-21-foot-rule [https://perma.cc/T4WK-2LFP].

172. *Estate of Larsen*, 511 F.3d at 1258, 1263.

173. *Walker*, 451 F.3d at 1160.

three and a half to twelve feet away because the court questioned whether the officer could reasonably think the suspect was armed when he in fact was holding fingernail clippers.[174] Also, just because a suspect with a knife is farther than twenty-one feet away does not mean the use of deadly force will be unreasonable. For example, in *Samuel v. City of Broken Arrow*, the Tenth Circuit granted an officer qualified immunity where the knife-wielding suspect was twenty-seven feet away.[175]

In the end, distance was not a determining factor in any of these cases. It was merely one factor that was considered in the totality of the circumstances. Regardless, it is fair to say that the closer a threat is to officers or others, the more imminent the threat and the more likely deadly force will be reasonable.

3. Unarmed Suspects

Although it is difficult for some to accept, a suspect does not need to be armed in order for an officer's use of deadly force to be reasonable. Whether a suspect is armed is not determinative in the analysis under certain circumstances because even an unarmed suspect may be a sufficient threat to justify deadly force.[176] The Tenth Circuit found deadly force to be objectively reasonable when unarmed suspects attempted to take an officer's firearm.[177] For example, in *Blossom v. Yarbrough*, the Tenth Circuit held that the use of deadly force was objectively reasonable when a large, unarmed, and intoxicated suspect threatened to take a smaller officer's gun. The suspect ignored the officer's multiple orders to get on the ground; and after the suspect reached the officer's gun, the officer, while backing up, shot the suspect.[178] Additionally, in *Beckett-Crabtree v. Hair*, the Tenth Circuit found deadly force to be objectively reasonable when a drug suspect attempted to flee from an officer, grabbed the officer's gun, and then struck the officer in the head with his own flashlight, nearly rendering the officer unconscious.[179]

And of course, an unarmed suspect must present, to some degree, an

174. Zuchel v. Spinharney, 890 F.2d 273, 274–75 (10th Cir. 1989).

175. *See* Samuel v. City of Broken Arrow, 506 F. App'x. 751, 754 (10th Cir. 2012).

176. *See, e.g.*, Blossom v. Yarbrough, 429 F.3d 963, 968 (10th Cir. 2005); Ryder v. City of Topeka, 814 F.2d 1412, 1419 n.16 (10th Cir. 1987).

177. *See, e.g.*, Beckett-Crabtree v. Hair, 298 F. App'x. 718, 721 (10th Cir. 2008); *Blossom*, 429 F.3d at 968.

178. *Blossom*, 429 F.3d at 967–68.

179. *Beckett-Crabtree*, 298 F. App'x. at 721.

actual threat before deadly force may be found reasonable. As highlighted in *King v. Hill*, the Tenth Circuit denied qualified immunity to an officer who used deadly force on an unarmed, mentally ill subject who refused to drop a jacket draped over his arm where the officer received a call to assist the subject because he was off his meds; the calling party advised there were no firearms in the residence, and the subject had not made any threatening gestures towards the officer who was standing at least twenty-five yards away.[180] The court ruled it was clearly established that an officer cannot "shoot an unarmed man who did not pose any actual threat to the officer or to others."[181]

4. Fake Weapons

Whether a suspect's weapon turns out to be fake (and did not actually present a threat) is not determinative either. For example, in *Medina v. Cram*, the Tenth Circuit held that use of deadly force was reasonable as a matter of law when a suspect told officers he had a gun, started walking down the street covering what reasonably appeared to be a gun, and refused to comply with officer's commands to drop the weapon; it turned out the object was a staple gun—not a real gun.[182]

But this mistaken belief (a suspect having a weapon) must be reasonable. When officers have insufficient evidence that a person is holding a weapon (or presents some other type of threat of death or serious physical harm), the application of deadly force is more likely to be unlawful. For example, in *King v. Hill*, an officer shot an unarmed, mentally ill subject claiming he might have been holding a long gun underneath a jacket draped over his arm, which he refused to remove.[183] However, the Tenth Circuit held the force was unreasonable because the officer only responded to provide assistance to the subject who was off his meds (or at most investigate a non-serious crime), and the officer was advised there were no firearms in the residence, there was evidence that a long gun could not possibly have been completely covered by the subject's jacket, and both the subject's hands were visible at the time of the shooting.[184]

---

180. King v. Hill, 615 F. App'x. 470, 471–72, 479 (10th Cir. 2015).

181. *Id.* at 749.

182. Medina v. Cram, 252 F.3d 1124, 1132.

183. *King*, 615 F. App'x. at 471–73.

184. *Id.* at 474–76, 479. Furthermore, there was evidence at a previous review board the officer had stated that he was only afraid for other officers, that he was not even sure the

5. Vehicles as a Threat

Vehicles may also present a threat sufficient to justify use of deadly force. The Tenth Circuit has given officers considerable latitude when using deadly force against the driver or occupants of a vehicle. This is likely the effect of the Supreme Court finding deadly force to be reasonable as a matter of law or granting officers qualified immunity every time it has decided a case involving officers using deadly force against the driver of a vehicle.[185]

Deadly force against a driver is likely to be lawful where the driver strikes or charges at officers. For example, in *Thomas v. Durastanti*, the court held that it was reasonable for the officer to fire shots at the driver and rear of a vehicle where officers attempted to stop the driver at a gas station and the driver struck one officer and attempted to flee by driving directly towards an officer and continuing on after it struck the officer.[186] In *Estate of Ronquillo v. City & County of Denver*, the Tenth Circuit found that it was reasonable for officers to shoot the driver of a vehicle when the officers converged on the driver (who had felony warrants) and the driver backed up over a median and then accelerated towards the officers.[187]

Moreover, the Tenth Circuit also found deadly force against the driver of a vehicle to be reasonable when the officer attempted to block a suspect's vehicle on a dead-end road. For example, in *Clark v. Bowcutt*, the court held that an officer acted reasonably when he shot the driver of a vehicle after the driver fled from a lawful traffic stop, turned down a dead-end road, and then drove his vehicle towards the officer who had partially blocked the road and exited his vehicle ordering the driver to stop.[188]

Recently, in *Johnson v. Peay*, the Tenth Circuit granted an officer qualified immunity for shooting at a driver after the driver led officers on a lengthy, high-speed chase; came to a stop; and intentionally rammed into police vehicles and the officer was unsure if other officers had been struck

---

subject saw him, and that the other officers, who were much closer to the subject with their guns drawn, asked why the officer had shot the subject. *Id.* at 473.

185. *See* Mullenix v. Luna, 136 S. Ct. 305, 310 (2015); Plumhoff v. Rickard, 134 S. Ct. 2012, 2024 (2014); Scott v. Harris, 550 U.S. 372, 386 (2007); Brosseau v. Haugen, 543 U.S. 194, 201 (2004).

186. Thomas v. Durastanti, 607 F.3d 655, 660–61, 674 (10th Cir. 2010).

187. Estate of Ronquillo v. City & Cty. of Denver, 720 F. App'x. 434, 436–37, 440–41 (10th Cir. 2017).

188. Clark v. Bowcutt, 675 F. App'x. 799, 800–01, 810 (10th Cir. 2017).

by the truck.[189]

Although the Tenth Circuit has given officers latitude when utilizing deadly force against vehicles, it has not granted officers a free-for-all. This much is clear from *Cordova v. Aragon*.[190] In *Cordova*, the Tenth Circuit considered whether it was reasonable for an officer to shoot a fleeing suspect in the back of the head after the suspect ran red lights, attempted to ram police cars, drove down the wrong side of the highway, and approached the officer who was deploying stop sticks but there was no evidence of other motorists or bystanders in the vicinity.[191] The court pointed out that deadly force "encompasses a range of applications of force, some more certain to cause death than others. It includes force that is *likely* to cause serious injury or death, such as ramming, and also includes force that is nearly certain to cause death, such as a shot to the head."[192] But just because one type of deadly force may be justified does not mean all types will be.[193]

Next, the court established that the general threat of reckless driving does not by itself justify shooting a fleeing driver:

> We do not believe it would be reasonable for an officer to shoot any motorist who ran a red light or swerved through lanes, simply because reckless driving poses some threat of physical harm to a bystander who might be down the road. Car chases inherently risk injury to persons who might happen along their course, and if that risk alone could justify shooting the suspect, every chase would end much more quickly with a swiftly-fired bullet. We do not mean to minimize that risk, or suggest that the risk to others must always be imminent in order to justify the use of deadly force, but the Court's decision in *Scott* did not declare open season on suspects fleeing in motor vehicles. When an officer employs such a level of force that death is nearly certain, he must do so based on more than the general dangers posed by reckless driving.
>
> . . . . The threat must have been more than a mere possibility.[194]

Looking to the case at hand, the Tenth Circuit recognized the fleeing

189. Johnson v. Peay, 704 F. App'x. 738, 741–44 (10th Cir. 2017).
190. 569 F.3d 1183, 1195 (10th Cir. 2009).
191. *Id.* at 1186–87.
192. *Id.* at 1189 (emphasis added) (internal quotations omitted).
193. *Id.*
194. *Id.* at 1190 (citations omitted) (internal quotations omitted).

suspect posed a substantial threat to any potential motorists or bystanders but weighed the absence of other motorists or bystanders against the choice to use a firearm to stop the suspect.[195] The court held that the district court's conclusion that the officer did not use excessive force was in error and that a reasonable jury could find the officer used excessive force.[196] Nevertheless, in the end, the court found that the law was not clearly established and granted the officer qualified immunity:[197]

> The law in our circuit and elsewhere has been vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death. Given that our precedent does authorize the use of deadly force when a fleeing suspect poses a threat of serious harm to others, [the officer] was not unreasonable in believing that a potential threat to third parties would justify such a level of force.[198]

E. Using Deadly Force to Prevent Escape

Deadly force is not limited to those situations where a suspect is actively in the process of killing or seriously injuring someone.[199] It may also be used to prevent the escape of a suspect under limited circumstances.[200] The Tenth Circuit cited *Garner* for the propositions that officers may not use deadly force on a fleeing suspect that poses no immediate threat to the officers or others, but deadly force would be reasonable to apprehend a fleeing suspect where the officer has probable cause to believe the suspect poses a threat of serious physical harm.[201] The Tenth Circuit also recognized that deadly force is reasonable (1) where it is applied to a suspect that "threatens [an] officer with a weapon or [where] there is probable cause to believe that [a suspect] committed a crime involving the infliction or threatened infliction of serious physical harm," (2) where it is "necessary to prevent escape, and" (3) where "some warning

195. *Id.* 1188–90.

196. *Id.* at 1190. The court also clarified that it was not saying the use of force was unreasonable as a matter of law. *Id.* at 1192.

197. *Id.* at 1192–93.

198. *Id.* at 1193.

199. *See* Ryder v. City of Topeka, 814 F.2d 1412, 1419 (10th Cir. 1987).

200. *See id.* at 1417–18 (citing Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

201. *See id.* at 1418 (citing *Garner*, 471 U.S. at 11).

has been given," if feasible.[202] Although the Supreme Court has made clear these are not elements to be rigidly applied in all deadly force cases,[203] they are nonetheless very relevant in cases that have a fact pattern similar to those in *Garner*—where an officer is attempting to apprehend a suspect fleeing on foot.

The Tenth Circuit acknowledged there are two "situations that would justify an officer's belief that a fleeing suspect poses a threat of serious physical harm: (1) where the suspect has placed the officer in a dangerous, life threatening situation; or (2) where the suspect is fleeing from the commission of an inherently violent crime."[204] The first situation is not unique. It is essentially an application of the Tenth Circuit's rule that deadly force is reasonable where an officer has probable cause to believe there is a threat of serious physical harm to the officer or others. It does not matter whether a suspect is fleeing or not; if the suspect is threatening serious, physical harm to officers or others, an officer may utilize deadly force.

On the other hand, the second situation is unique. "This . . . situation does not require that the officer's life actually be threatened by the suspect. Rather, the officer is allowed to infer that the suspect is inherently dangerous by the violent nature of the crime."[205] Although the Tenth Circuit has recognized an officer may infer a suspect is inherently dangerous by having committed a violent crime, it has not addressed this precise issue on very many occasions. Most deadly force cases are decided on the grounds of an active or on-going threat. Nonetheless, the few cases decided on the basis of the crime involved do shed some light on when a crime is inherently dangerous enough to justify deadly force to prevent escape and when it is not.

For example, in *Hicks v. Woodruff*, the Tenth Circuit held that an officer was entitled to qualified immunity when the officer was escorting a forgery suspect to a back room in a grocery store, the suspect punched the officer, took his gun, pointed the gun at the officer, dropped the gun, and then attempted to flee the store; the officer shot the unarmed suspect with the firearm as the suspect fled the store.[206] The court explained that the officer reasonably inferred that the suspect was inherently dangerous

202. *See id.* at 1418.
203. *See* Scott v. Harris, 550 U.S. 372, 382–83 (2007).
204. *Ryder*, 814 F.2d at 1419.
205. *Id.*
206. Hicks v. Woodruff, 216 F.3d 1087, *1 (10th Cir. 2000).

based on the crime he had just committed against the officer.[207]

On the other hand, in *Ryder v. City of Topeka*, the Tenth Circuit held that a staged robbery where an officer knew before responding to the scene that an insider employee was going to consensually hand over the money to the other involved "robbery" suspects did not constitute an inherently violent crime such that deadly force could be used to apprehend a suspect fleeing from this crime based only on the fact they had just committed the crime.[208] The fact that officers were told the suspects would be armed in advance did not change that conclusion.[209] The court made clear that just because an officer has probable cause to assume a suspect might be armed does not necessarily mean the crime actually committed involved the infliction or threatened infliction of serious bodily injury.[210] However, the court went on to hold there was sufficient evidence to support a jury verdict that the use of deadly force was reasonable to apprehend a fleeing suspect based on the officer being placed in a dangerous, life-threatening situation.[211] The officer was told that the participants in the staged robbery would be armed, one of the suspects he was chasing was about to turn into a darkened alley in a residential area, and he believed that he was in an ambush situation where his life was in danger.[212]

Just because a suspect may have committed a violent crime, does not mean an officer may use deadly force to apprehend the suspect. The use of deadly force must also be *necessary* to prevent escape.[213] When a subject is fleeing, non-compliant, appears to be on the verge of escaping, and officers have no other reasonable alternatives, the necessity element will likely be met. As stated previously in *Ryder v. City of Topeka*, the

207. *Id.* at *3 (The officer "could have reasonably feared for his safety or those in plaintiff's path as he fled. . . . [P]laintiff's conduct as captured on the store videotape would justify [the officer's] inference that plaintiff was inherently dangerous.").

208. *Ryder*, 814 F.2d at 1420.

209. *Id.*

210. *Id.*

211. *Id.* at 1420–22.

212. *Id.* at 1415–16, 1422.

213. *See* Weigel v. Broad, 544 F.3d 1143, 1155 (10th Cir. 2008) ("It is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself [or herself]."). *See also* Zia Trust Co. v. Montoya, 597 F.3d 1150, 1155 (10th Cir. 2010) (denied qualified immunity to an officer after finding the officer's use of deadly force "totally unnecessary" to restrain the suspect) (citing *Weigel*, 544 F.3d at 1154); Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006) (found police did not need to use deadly force to prevent a suspect from fleeing).

Tenth Circuit found that the officer's use of deadly force was necessary because the suspect was fleeing, the officer did not know where other officers were, and the suspect was about to turn into a darkened alley.[214] Similarly, in *Barboa v. Baird*, the Tenth Circuit affirmed a judgment finding that deadly force was necessary to prevent the escape of a suspect that fled in a vehicle, struck a utility pole, slid into a ditch, climbed out, stole a truck, drove faster when an officer tried to grab onto the truck, saw the officer fall off the back of the truck, and accelerated hitting another officer.[215]

However, where a subject is not making any real attempts to flee or would not pose a significant risk of harm to others if he or she did flee, the use of deadly force to prevent escape will likely be found unreasonable. For example, in *Walker v. City of Orem*, the Tenth Circuit found it unnecessary to use deadly force to prevent a mentally ill suspect from fleeing where the suspect was standing in place holding a small knife to his own wrist.[216] Likewise, in *Zia Trust Co. v. Montoya*, the Tenth Circuit cited *Garner* for the proposition that "[w]here [a] suspect poses no immediate threat to [an] officer and no threat to others, the harm resulting from failing to apprehend [the suspect] does not justify the use of deadly force to do so" and then held it was unreasonable to use deadly force where a mentally ill subject revved the engine in a van that was stuck on a retaining wall on his own property, the van jumped forward less than a foot, if at all, in the officers direction, and the officer may have been standing up to fifteen feet away at the time of the shooting.[217]

F. Warning

In *Garner*, the Supreme Court held that officers must give a warning prior to using deadly force where feasible.[218] Although *Garner* was decided in the context of apprehending a fleeing suspect, the Tenth Circuit adopted this rule and applied it to all deadly force cases whether the suspect is fleeing or not.[219] The Tenth Circuit also integrated the warning

214. *Ryder*, 814 F.2d at 1423.

215. Barboa v. Baird, 81 F. App'x. 301, 303–04 (10th Cir. 2003).

216. *Walker*, 451 F.3d at 1160.

217. *Zia Trust Co.*, 597 F.3d at 1155 (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

218. *Garner*, 471 U.S. at 11–12.

219. *See* Cordova v. City of Albuquerque, 816 F.3d 645, 660 (10th Cir. 2016) ("Where feasible, an officer is required to warn a suspect that he is going to shoot before doing so.");

rule into one of the factors in the *Estate of Larsen* test—the test the court sometimes uses to analyze the degree of a threat: "whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands."[220]

Although the Supreme Court stated it requires "some warning" where feasible in *Garner*,[221] the Court did not go into detail about what type of actions or warnings are sufficient. The Tenth Circuit has found sufficient warning where officers:

1. Ordered a suspect to drop the weapon;[222]
2. Ordered a suspect to put a knife down;[223]
3. Ordered a suspect to get on the ground;[224]
4. Ordered a fleeing suspect to halt;[225] and
5. Fired a warning shot while chasing a suspect on foot.[226]

The Tenth Circuit has recognized that police officers are "not invariably required" to give a warning prior to using deadly force.[227] However, a failure to warn has worked against officers in some cases. On a few occasions the Tenth Circuit has denied officers qualified immunity where at least some witnesses stated an officer did not warn a suspect before firing his firearm.[228] Recently, in *Pauly v. White* (*Pauly III*), the Tenth Circuit found that a lack of warning contributed to finding that an officer's use of deadly force was excessive and unreasonable as a matter of law.[229] The court held it was unreasonable to shoot a prior road-rage

---

Pauly I, 814 F.3d 1060, 1084 (10th Cir. 2016) (failure to give warning contributed to finding of unreasonable force and denial of qualified immunity), *vacated*, *Pauly II*, 137 S. Ct. 548 (2017).

220. Estate of Larsen v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008).

221. *Garner*, 471 U.S. at 11–12.

222. *Cordova*, 816 F.3d at 661 (command to "drop the weapon" before using deadly force was sufficient); Samuel v. City of Broken Arrow, 506 F. App'x. 751, 754 (10th Cir. 2012); *See also* Thomson v. Salt Lake Cty., 584 F.3d 1304, 1318 (10th Cir. 2009); Allen v. Muskogee, 119 F.3d 837, 841 (10th Cir. 1997).

223. *See* Tenorio v. Pitzer, 802 F.3d 1160, 1163–65 (10th Cir. 2015).

224. *See* Blossom v. Yarbrough, 429 F.3d 963, 967 (10th Cir. 2005).

225. *See* Ryder v. City of Topeka, 814 F.2d 1412, 1418 n.15 (10th Cir. 1987).

226. *See id.*

227. *See Thomson*, 584 F.3d at 1321.

228. *See, e.g.*, Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006); Zuchel v. Spinharney, 890 F.2d 273, 275 (10th Cir. 1989).

229. *Pauly III*, 874 F.3d 1197, 1216, 1219 (10th Cir. 2017).

suspect through a window of his own home even though the suspect pointed a handgun in the direction of the officer, the officer did not identify himself or order the suspect the drop his weapon when the officer was fifty feet away and kneeling behind a rock, and five seconds later the officer shot the suspect.[230] The court pointed out the officer in *Tenorio v. Pitzer* had given a warning where only two to three seconds had transpired.[231] Nevertheless, after Supreme Court intervention, the Tenth Circuit ultimately went on to hold the law was not clearly established at the time and the officer was entitled to qualified immunity.[232]

G. Creating Need for Force

When determining whether deadly force is reasonable, the Tenth Circuit will often consider whether an officer's own conduct prior to a seizure unreasonably created the need for the deadly force applied.[233] The Tenth Circuit considers this issue part of applying the totality of the circumstances inherent in the Fourth Amendment's reasonableness standard.[234] This inquiry is unique. First, it does not look at the officer's decision to apply deadly force but instead looks at what the officer did before he or she made that decision. It considers whether the officer's

230. *Id.* at 1215–22.

231. *Id.* at 1216 n.6 (citing Tenorio v. Pitzer, 802 F.3d 1160, 1163 (10th Cir. 2015). No mention was made of the difference in threat those officers were faced with: a knife in the hands of a suicidal subject in *Tenorio* and a gun in the hands of a criminal suspect in *Pauly III*. Nor did the court specifically address how the concern with the lack of warning within five seconds of having a gun pointed at the officer was in line with *Graham's* rule that the analysis must account for the fact officers are forced to make split-second judgments in tense circumstances.

232. The court came to this conclusion only after the Supreme Court rejected its initial assessment that the law was clear and the officer was not entitled to qualified immunity. *See Pauly I*, 814 F.3d 1060, 1091 (10th Cir. 2016) *vacated*, 137 S. Ct. 548 (2017).

233. *See, e.g.*, Jiron v. City of Lakewood, 392 F.3d 410, 415 (10th Cir. 2004); Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997); Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995); Clark v. Bowcutt, 675 F. App'x. 799, 805 (10th Cir. 2017); *Pauly I*, 814 F.3d at 1071; Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015)); Thomas v. Durastanti, 607 F.3d 655, 667 (10th Cir. 2010); Thomson v. Salt Lake Cty., 584 F.3d 1304, 1320–22 (10th Cir. 2009); Beckett-Crabtree v. Hair, 298 F. App'x. 718, 722 (10th Cir. 2008); Hastings v. Barnes, 252 F. App'x. 197, 203 (10th Cir. 2007); Blossom v. Yarbrough, 429 F.3d 963, 968 (10th Cir. 2005); Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001).

234. *See Durastanti*, 607 F.3d at 667; *Medina*, 252 F.3d at 1132; *Jiron*, 392 F.3d at 415; Bella v. Chamberlain, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.").

conduct prior to applying deadly force somehow unnecessarily caused the circumstances that led to the officer using otherwise lawful deadly force. Moreover, the inquiry presents a unique cross-section between the objective-reasonableness test of the Fourth Amendment (which does not analyze the officer's state of mind at all) and § 1983 litigation (which does place state of mind limitations on liability).

Beginning with *Sevier v. City of Lawrence*, decided in 1995, the Tenth Circuit provided (as part of its deadly force reasonableness rules) that an officer's own reckless or deliberate conduct immediately connected to the seizure that unreasonably creates the need to use deadly force may render unreasonable, in violation of the Fourth Amendment, an otherwise reasonable use of deadly force.[235] The Tenth Circuit has clarified that any negligent conduct or actions taken with less culpability than recklessness that might have precipitated deadly force are not actionable[236]—only conduct immediately connected with the actual seizure will be considered.[237] The Tenth Circuit has also considered officer conduct within seconds and minutes of using deadly force to be immediately connected with the actual seizure.[238] On one occasion, the Tenth Circuit stated that conduct occurring an hour before the seizure was too remote to be considered.[239]

The Tenth Circuit has never held that an officer violated the Fourth Amendment as a matter of law because he or she recklessly created the need to use otherwise lawful deadly force. Although the Tenth Circuit has often addressed this issue, the court has found in favor of officers in most cases. For example, the Tenth Circuit has refused to find an officer unreasonably created the need for deadly force either because the officer's conduct did not reach the level of recklessness or because the conduct was not immediately connected to the seizure where:

1. An officer shot a suspect coming at him with a knife after the officer

235. *See, e.g.*, *Sevier*, 60 F.3d at 699.

236. *See Pauly I*, 814 F.3d at 1071; *Thomson*, 584 F.3d at 1320 ("[T]he officers' conduct is only actionable if it rises to the level of recklessness."); *Hastings*, 252 F. App'x. at 203; *Jiron*, 392 F.3d at 415; *Sevier*, 60 F.3d at 699 & n.7 ("Mere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983.").

237. *See Hastings*, 252 F. App'x. at 203; *Medina*, 252 F.3d at 1132; *Allen*, 119 F.3d at 840; *Bella*, 24 F.3d at 1256 n.7.

238. *See, e.g.*, *Clark*, 675 F. App'x. 799; *Hastings*, 252 F. App'x. at 203; *Medina*, 252 F.3d at 1132–33; *Allen*, 119 F.3d at 839–40.

239. *See Bella*, 24 F.3d at 1256.

failed to arrest and handcuff the suspect;[240]

2. An officer in plain clothes shot a suspect driving a vehicle after the officer failed to identify himself as he approached the vehicle with his gun drawn, but there was a police car with emergency lights activated parked behind the vehicle;[241]

3. Officers shot the driver of a vehicle after they had parked their vehicles in front of the driver's vehicle in order to block him in, attempted to remove the driver from his vehicle, and the driver accelerated towards them;[242]

4. An officer shot a felony suspect who approached the officer while hacking a knife after the officer cornered the armed suspect in a bedroom and then ordered the suspect to exit;[243]

5. An officer shot the driver of a vehicle after the driver fled a lawful traffic stop, turned down a dead-end road, turned around, and then drove towards the officer who had partially blocked the road and was ordering the driver to stop;[244]

6. An officer shot a suspect who communicated he had a gun and was covering an object that reasonably appeared to be a gun after the officer chose to approach the suspect instead of taking cover;[245]

7. An officer shot a suspect that had tried to take his gun and hit him in the head with his flashlight after initiating a foot pursuit without waiting for backup;[246]

8. An officer used deadly force on an unarmed suspect that attempted to take the officer's firearm after not waiting for backup and not first using

240. *See* Romero v. Brd. of Cty. Comm'rs, 60 F.3d 702, 705 (10th Cir. 1995).

241. *See* Thomas v. Durastanti, 607 F.3d 655, 667–69 (10th Cir. 2010).

242. *See* Estate of Ronquillo v. City & Cty. of Denver, 720 F. App'x. 434, 436–37, 439 (10th Cir. 2017).

243. *See* Jiron v. City of Lakewood, 392 F.3d 410, 418 (10th Cir. 2004).

244. See Clark v. Bowcott, 675 F. App'x 799, 809–10 (10th Cir. 2017). The court rejected the lower court's conclusion that a jury could have found the officer acted recklessly by not stepping out of the way of the vehicle declaring that "[t]his is tantamount to the proposition that a citizen has a Fourth Amendment right to be free of police actions contributing to the use of deadly force by the citizen." *Id.* at 809 (quoting Wilson v. Meeks, 52 F.3d 1547, 1554 (10th Cir. 1995) (italics removed)). The court articulated that the officer was under no obligation to take cover to discourage the suspect from using his vehicle as a weapon. *Id.*

245. *See* Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) (finding failure to take cover is only relevant as to whether the officer was truly in danger not as to whether the officer created the need to use deadly force and that the officer's conduct was not reckless anyways).

246. *See* Beckett-Crabtree v. Hair, 298 F. App'x. 718, 722 (10th Cir. 2008).

a less-lethal weapon;[247] and

9. An officer shot a suspect holding a gun after having released a police dog without warning in response to receiving a report the suspect had aimed a gun at his wife and was now somewhere in a residential neighborhood with a gun.[248]

However, occasionally the Tenth Circuit has denied qualified immunity on such grounds. Interestingly, these occasions all involved mentally ill or suicidal subjects. For example, in *Allen v. Muskogee*, the Tenth Circuit denied qualified immunity to officers after finding a reasonable jury could conclude the officers were reckless and their actions precipitated the need to use deadly force where they approached an armed, suicidal subject in a vehicle while yelling commands to drop the gun, grabbed the subject's arm in an attempt to restrain him, and shot the subject after he pointed his gun at one of the officers.[249] In *Hastings v. Barnes*, the Tenth Circuit denied qualified immunity to officers who shot a mentally ill suspect advancing on them with a samurai sword.[250] The officers were called only to conduct a welfare check on the suicidal suspect; but then the officers entered the suspect's home, cornered him in a bedroom, issued loud and forceful commands at him, and then used pepper spray after the suspect refused to drop the sword.[251]

The future of the Tenth Circuit's create-the-need doctrine is unclear. Not all federal circuit courts necessarily agree that pre-seizure conduct of officers is relevant to the analysis.[252] Moreover, recently the Supreme Court held that a prior "Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."[253] However, the Supreme Court has not specifically addressed whether or to what extent any officer conduct (other than an independent Fourth Amendment

247. *See* Blossom v. Yarbrough, 429 F.3d 963, 968 (10th Cir. 2005).

248. *See* Thomson v. Salt Lake Cty., 584 F.3d 1304, 1320 (10th Cir. 2009).

249. Allen v. Muskogee, 119 F.3d 837, 839–41 (10th Cir. 1997).

250. Hastings v. Barnes, 252 F. App'x. 197, 203, 207 (10th Cir. 2007).

251. *Id.*

252. *See, e.g.*, Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995) ("[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment."); Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("*Garner* and *Brower* do not suggest that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to effect a legal arrest of a suspect. The Fourth Amendment prohibits unreasonable seizures not unreasonable, unjustified or outrageous conduct in general. Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny.") (emphasis omitted) (citations omitted).

253. *See* Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1544 (2017).

violation) prior to an application of deadly force that foreseeably created the need to use it may render otherwise reasonable force unreasonable under the Fourth Amendment. The Supreme Court side-stepped this issue in *City & County of San Francisco v. Sheehan*[254] and *County of Los Angeles v. Mendez*[255] but will undoubtedly have more opportunities to address it. Recently, the Court was given an opportunity from the Tenth Circuit. In January 2018, the plaintiff in *Pauly III* petitioned the Supreme Court to grant certiorari to consider: (1) whether the totality of the circumstances under *Graham* includes unreasonable police conduct prior to the use of force that foreseeably created the need to use it; and (2) whether officers that did not use deadly force but caused another officer to use deadly force may be liable for a Fourth Amendment violation in a § 1983 action, even though the officer that used deadly force already received qualified immunity.[256] However, on June 18, 2018, the Supreme Court denied the petition.[257] For now, plaintiffs will undoubtedly continue making arguments about conduct unreasonably causing an officer to use otherwise reasonable deadly force and the Tenth Circuit will likely continue to consider such conduct *immediately connected to the seizure.*

H. Excessive Shots

Generally, when officers fire multiple shots at someone they do so very rapidly, and all the shots are treated as one application of deadly force. However, the Tenth Circuit has recognized that circumstances justifying deadly force may change within seconds, and under some circumstances, it is appropriate to analyze individual shots or groups of shots. For example, in *Fancher v. Barrientos*, an officer fired one shot at a suspect who assaulted him, attempted to take his gun, got in the driver's seat of his police vehicle where he had additional firearms, and managed to shift the vehicle into reverse.[258] After the first shot, the officer saw the suspect slump; backed away from the car, which started to move in reverse; and then fired six additional shots.[259] The Tenth Circuit analyzed the first shot separately from the following six, granting the officer

254. 135 S. Ct. 1765, 1775 (2015).
255. 137 S. Ct. 1539, 1547 n.2 (2017).
256. Reply Brief of Petitioner at 9–11, Pauly v. White, 137 S. Ct. 548 (2017) (No. 17-1078), 2018 WL 2684548.
257. Pauly v. White, 138 S. Ct. 2650 (2018).
258. Fancher v. Barrientos, 723 F.3d 1191, 1195–96 (10th Cir. 2013).
259. *Id.* at 1196–97.

qualified immunity for the first but denying it for the last six.[260]

I. Mental Illness

When determining the reasonableness of deadly force, an officer's consideration of a subject's mental illness is a factor.[261] The Tenth Circuit has acknowledged the government has a legitimate interest in protecting mentally disturbed individuals from harming themselves.[262] "When an individual poses a more severe and immediate threat to himself, a higher level of force may be reasonable in order to seize him for protective custody purposes."[263] However, the Tenth Circuit has also recognized the choice to apply severe force, or force at all, in a particular manner may be counterintuitive of that government interest and therefore weigh against the reasonableness of an officer's actions.[264]

When mentally ill individuals have not committed a crime and only pose a threat to themselves, using deadly force on them may weigh against its reasonableness.[265] For example, in *Walker v. City of Orem*, the Tenth Circuit denied officers qualified immunity who used deadly force on a suicidal subject who was holding a small knife to his own wrist while standing at least twenty-one feet away from officers.[266] Similarly, in *Hastings v. Barnes*, the Tenth Circuit denied qualified immunity to officers and held that a jury could find the officers could have unreasonably escalated the situation (thereby rendering their deadly force unreasonable) where they responded to a suicidal subject who advised dispatch he was going to run a hose into his home from his truck; attempted

---

260. *Id.* at 1201.

261. *See, e.g.*, Aldaba v. Pickens, 777 F.3d 1148, 1155 (10th Cir. 2015) (citing Giannetti v. City of Stillwater, 216 F. App'x. 756, 764 (10th Cir. 2007)); Waters v. Coleman, 632 F. App'x. 431, 436–37 (10th Cir. 2015).

262. Pino v. Higgs, 75 F.3d 1461, 1468 (10th Cir. 1996).

263. *Aldaba*, 777 F.3d at 1155.

264. *See id.* at 1155–56.

265. *See id.* at 1156.

> This factor will weigh against the use of force most strongly where the mentally disturbed individual has committed no crime and poses a threat only to himself, since a seizure by force may well undermine the sole governmental interest supporting the seizure in such a case—the interest in protecting the mentally disturbed individual from harming himself.

Id.

266. Walker v. City of Orem, 451 F.3d 1139, 1144, 1160 (10th Cir. 2006).

to slam the door on officers after they confirmed he had threatened suicide; and the officers entered the residence, observed the subject retrieve a Samurai sword, ordered the suspect to drop the sword, sprayed the subject with pepper spray when he failed to drop the sword, and fatally shot the subject when he began to move towards them.[267]

Likewise, where officers "aggressively confront[] an armed and suicidal/emotionally disturbed individual without gaining additional information or by approaching [the individual] in a threatening manner[, such as by] running and screaming at [the individual]," the use of deadly force is more likely to be found unreasonable.[268] For example, in *Allen v. Muskogee*, the Tenth Circuit held a triable claim for excessive force existed where officers responded to a suicidal individual, saw the individual sitting in his car with a gun in his hand, chose to run toward the car screaming, reached inside to try to grab the individual's hands, and then deliberately shot the individual as he began to struggle, even though officers knew the individual threatened his family and had an outstanding warrant for his arrest.[269]

However, the Tenth Circuit has upheld the actions of officers in approaching and attempting to seize a mentally ill or suicidal suspect in many cases.[270] In *Medina v. Cram*, the Tenth Circuit held the officers used reasonable force where they shot a suicidal suspect to prevent him from escaping after the suspect exited his residence while carrying an object that appeared to be a gun.[271] Moreover, in *In re Estate of Bleck v. City of Alamosa*, Judge Gorsuch, for the Tenth Circuit, held police officers did not use excessive force where they were contacted by a counselor seeking help for a suicidal, intoxicated, and possibly armed person and entered the hotel room where the person was believed to be with their guns drawn, which resulted in the person being shot in the hip.[272]

Officer awareness of a person's mental illness proves to be a significant—albeit non-determinative—factor in deadly force analysis in

267. Hastings v. Barnes, 252 F. App'x. 197, 198–200 (10th Cir. 2007).

268. *See id.* at 206 (first citing Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997); then Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995)).

269. *Allen*, 119 F.3d at 839–40, 845 (10th Cir. 1997).

270. *See, e.g.*, Weigel v. Broad, 544 F.3d 1143, 1148, 1155 (10th Cir. 2008); Phillips v. James, 422 F.3d 1075, 1078–81 (10th Cir. 2005); Giannetti v. City of Stillwater, 216 F. App'x. 756, 762–66 (10th Cir. 2007).

271. Medina v. Cram, 252 F.3d 1124, 1126–27, 1132 (10th Cir. 2001).

272. In re Estate of Bleck v. City of Alamosa, 643 F. App'x. 754, 755–57 (10th Cir. 2016).

the Tenth Circuit. On one occasion it outweighed an application of deadly force in the face of possibly getting stabbed by a samurai sword.[273] Nonetheless, on numerous occasions the Tenth Circuit has upheld applications of force and deadly force against known mentally ill persons.[274] The significance of the factor remains to be seen in the Tenth Circuit, particularly in light of the Supreme Court's recent decision in *Sheehan*, where the Court held it was not clearly established law that officers could not enter the home of an armed, mentally ill subject who had been acting irrationally and threatened everyone who entered her home.[275] Regardless of the weight given to this factor, an officer's consideration of an individual's mental illness will continue to be considered in the totality of the circumstances in the Tenth Circuit.

J. Excited Delirium Syndrome

Another health condition that may be a factor in a deadly force analysis is excited delirium syndrome, sometimes referred to as sudden-custody-death syndrome.[276] Excited delirium is a somewhat mysterious medical condition.[277] It has gained attention over the past twenty to thirty years as medical examiners began to utilize the term to describe the cause of death of persons that physically struggled with police and there was insufficient evidence of trauma or natural disease to explain the death.[278] The syndrome is best explained as a physical response to a psychological problem resulting in a person's autonomic system producing too much adrenaline and causes a heart attack or respiratory failure.[279] Experts believe the presence of drugs in a person's system (most commonly cocaine) combined with physical struggle or exertion triggers the syndrome.[280] Symptoms of excited delirium often include elevated temperature, fast heart rate, rapid breathing, elevated blood pressure,

273. *See* Hastings v. Barnes, 252 F. App'x. 197, 198, 201–03 (10th Cir. 2007).

274. *See, e.g.*, *In re Estate of Bleck*, 643 F. App'x. at 755–57; *Giannetti*, 216 F. App'x. at 762, 766; *Weigel*, 544 F.3d at 1148, 1155; *Phillips*, 422 F.3d at 1081, 1083; *Medina*, 252 F.3d at 1126–27, 1132.

275. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774–75 (2015).

276. Michael L. Storey, *Explaining the Unexplainable: Excited Delirium Syndrome and Its Impact on the Objective Reasonableness Standard for Allegations of Excessive Force*, 56 ST. LOUIS U. L.J. 633, 636–37 (2012).

277. *Id.* at 636.

278. *Id.* at 636–37.

279. *Id.* at 637.

280. *Id.*

sweaty skin, violent or bizarre behavior, hallucinations, paranoia, fear, profound levels of strength, and resistance to painful stimuli.[281]

Knowledge of this syndrome creates a predicament for police officers who are trying to deal with a suspect experiencing excited delirium: officers are charged with the responsibility of apprehending an agitated, violent subject likely to have already committed a crime and continuing to pose a threat to themselves, officers, and others nearby. But the use of even the slightest degree of force will almost certainly lead to resistance and a struggle that may unintentionally result in the death of the suspect. What are officers to do?

As with the presence of mental illness, the presence of excited delirium does not mean officers cannot use force to arrest a person or prevent a person from causing harm to themselves or others. For example, in *Waters v. Coleman*, the Tenth Circuit granted an officer qualified immunity when the officer grabbed an assault suspect's arms after he attempted to elude apprehension, tackled him to the ground after he forcibly resisted, punched the suspect in the stomach, and deployed his Taser, even though the officer was aware the suspect was probably experiencing excited delirium.[282] The court pointed out that there was "no Supreme Court or Tenth Circuit decision existing [at that time] . . . that required officers to refrain from a minimal use of force when dealing with an impaired individual, particularly one who reportedly has committed a crime against another person."[283] To the contrary, the court recognized a number of decisions where it had upheld the use of physical force to seize an actively resisting, impaired subject.[284]

Regardless, whether officers knew or should have known a person was more susceptible to harm from a particular type of force is a factor to be considered.[285] Application of force that presents a substantial risk of death to a person in light of their physical condition will not be reasonable if the

281. Brian Roach et al., *Excited Delirium and the Dual Response: Preventing In-Custody Deaths*, FBI LAW ENFORCEMENT BULLETIN (July 8, 2014), https://leb.fbi.gov/articles/featured-articles/excited-delirium-and-the-dual-response-preventing-in-custody-deaths?utm_campaign=email-Immediate&utm_content=334353 [https://perma.cc/D4SD-W8AP].

282. Waters v. Coleman, 632 F. App'x. 431, 436–39 (10th Cir. 2015).

283. *Id.* at 437.

284. *Id.* at 436–38 (first citing Phillips v. James, 422 F.3d 1075, 1084 (10th Cir. 2005); then citing Giannetti v. City of Stillwater, 216 F. App'x. 756, 765–66 (10th Cir. 2007); and then citing Weigel v. Broad, 544 F.3d 1143, 1148, 1155 (10th Cir. 2008)).

285. *See* Aldaba v. Pickens, 777 F.3d 1148, 1156 (10th Cir. 2015).

person is not or is no longer posing a threat of death or serious bodily injury to officers or others. The Tenth Circuit considered such a scenario in *Weigel v. Broad*.[286]

In *Weigel*, a suspected drunk driver, acting "bizarre" and "strange," intentionally walked into oncoming traffic on a highway, got struck by a vehicle, and continued across the highway.[287] Officers followed the driver and attempted to take him into custody.[288] After the driver vigorously resisted apprehension and repeatedly attempted to take the officers' guns, one of the officers put the driver in a chokehold.[289] However, the driver continued to resist, and "the [officers] solicited assistance from bystanders."[290] Even after the driver was handcuffed, he continued to resist; so one bystander laid across the back of the driver's legs and another bound the driver's feet.[291] At this point, the driver was handcuffed in a facedown prone position; one officer was continuously applying weight to the driver's upper torso, one bystander continued to apply pressure on top of the driver's legs, and the other officer went back to his vehicle believing the driver to be sufficiently restrained and no longer posing a safety threat.[292] Three minutes later, the driver went into cardiac arrest.[293]

The Tenth Circuit acknowledged that the force the officers used up until the driver's hands and feet were bound (which included the chokehold) was reasonable—they "were protecting themselves and the public from [the driver] and [the driver] from himself."[294] However, the court held the force the officers applied after the driver's hands and feet were bound was unreasonable and denied the officers qualified immunity.[295] The court arrived at this conclusion after finding it clearly established that continuing to apply pressure on a vulnerable person's upper torso while in a facedown position presents a substantial risk of death to a person[296] and "that deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public,

286. 544 F.3d 1143 (10th Cir. 2008).
287. *Id.* at 1148.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 1152.
293. *Id.* at 1153 & n.4.
294. *Id.* at 1155.
295. *Id.* at 1153, 1155.
296. *Id.* at 1154.

or the suspect himself."[297] Because the officers continued to use what amounted to deadly force after the driver was already restrained and no longer posing any threat, it was unnecessary and therefore unreasonable.[298]

Moreover, where officers are attempting to provide medical assistance or take a person into custody solely for his or her own wellbeing (as opposed to arresting a person for a crime) and the person is exhibiting symptoms of excited delirium or an otherwise diminished capacity, officers must be extra sensitive to the likelihood that a particular application of force may do more harm than good.[299] For example, in *Aldaba v. Pickens*, the Tenth Circuit determined officers could have used excessive force while restraining a "disturbed" hospital patient suffering from pneumonia.[300] Hospital personnel sought the assistance of the officers after one of their patients had become confused, anxious, uncooperative, and aggressive; pulled his intravenous tube from his arm; and began claiming he was god and superman.[301] Upon arrival, the officers observed the patient "standing in [a] hall, visibly agitated and upset."[302] Hospital personnel advised the officers that if the patient were allowed to escape, he could die from his medical problems.[303] Officers ordered the patient to calm down, return to his room, and then get on his knees.[304] When the patient did not comply, officers attempted to deploy a Taser; but the deployment was not successful, and a struggle ensued.[305] As the patient continued to physically resist restraint, the officers grabbed each of the patient's arms, pushed him against a wall, and then took him to the floor in a facedown position.[306] While holding the patient in this position, hospital personnel administered an injection of Haldol and Ativan.[307] The patient then "went limp, made a grunting sound, and vomited."[308] Hospital personnel began CPR, but the patient was pronounced dead shortly after.[309] The medical examiner determined the patient's cause of death was

297. *Id.* at 1155.
298. *Id.* at 1152–53.
299. *See* Aldaba v. Pickens, 777 F.3d 1148, 1156 (10th Cir. 2015).
300. *Id.* at 1152–53, 1161.
301. *Id.* at 1152.
302. *Id.*
303. *Id.*
304. *Id.* at 1152–53.
305. *Id.* at 1153.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*

respiratory insufficiency secondary to pneumonia, the use of a Taser could have increased the patient's need for oxygen, and the physical struggle with officers exacerbated his underlying pneumonia.[310]

The Tenth Circuit recognized that the threat the patient posed to himself was a factor to be considered and that some force was justified to alleviate this threat.[311] However, the court went on to find that awareness a person is highly susceptible to harm if a particular type of force is applied is also a factor to be considered, and it is a particularly pertinent factor when the reason for seizing the person is only to ensure he or she receives medical treatment.[312] In light of this factor, the court found the decision to apply the Taser and wrestle the patient to the ground while he was delusional, mentally disturbed, and physically compromised weighed against the reasonableness of their force and concluded that the initial decision to deploy the Taser against the patient demonstrated an excessive force violation.[313] The court explained that

> [t]he situation the police officers faced in this case called for conflict resolution and de-escalation, not confrontation and [T]asers.
>
> . . . . A use of force that might be reasonable against an apparently healthy individual may be unreasonable when employed against an individual whose diminished capacity should be apparent to a reasonable police officer.[314]

Originally, the Tenth Circuit also found the law was clearly established and denied the officers qualified immunity.[315] However, after intervention by the Supreme Court,[316] the Tenth Circuit ultimately went on to distinguish prior precedent[317] and hold the officers were entitled to qualified immunity.[318] Although the Tenth Circuit's original qualified-

310. *Id.*
311. *Id.* at 1157.
312. *Id.* at 1156.
313. *Id.* at 1157.
314. *Id.*
315. *Id.* at 1159–61.
316. *See* Pickens v. Aldaba, 136 S. Ct. 479 (2015).
317. Aldaba v. Pickens, 844 F.3d 870, 876 (10th Cir. 2016) ("[No prior] cases remotely involved a situation as here: three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment.").
318. *Id.* at 871. "We certainly cannot say that every reasonable officer would know that

immunity analysis was corrected, the original constitutional analysis was untouched. Federal district courts have been citing portions of the constitutional analysis and utilizing its factors ever since.

In summary, officers are not prohibited from apprehending persons merely because they are exhibiting symptoms of excited delirium or a diminished capacity. However, the court has emphasized that officers must be highly sensitive to the type and degree of force they use against such persons. The court has already found that applying pressure to the upper torso of a vulnerable, facedown person after they are already restrained and no longer pose a threat to others constitutes excessive force. Similarly, the court has found that applying a Taser to a vulnerable person where the only reason for apprehension was for the person's own welfare constitutes excessive force. Officers must consider that such force, although typically non-lethal, is significantly likely to become lethal due to the person's vulnerable condition and may be treated as deadly force for purposes of analysis. Further, as soon as persons exhibiting these symptoms are restrained or no longer pose a threat to others, officers must cease utilizing any unnecessary force and constantly monitor the person's condition.

K. Positional Asphyxiation and Restraint

Positional asphyxiation is a form of asphyxia that occurs when someone's position prevents them from breathing adequately.[319] It may occur during a physical struggle with police officers or while being restrained in a particular position or manner.[320] While anyone, even healthy adults, could fall victim to positional asphyxiation, certain individuals with diminished capacity, especially those experiencing excited delirium, are more susceptible.[321]

Cruz v. City of Laramie is the principal case in the Tenth Circuit

---

the Fourth Amendment condemned using a Taser to avoid a full-out physical confrontation with a patient whose life depended on immediate treatment. No case renders a Fourth Amendment violation *beyond debate*." *Id.* at 879. (emphasis added) (internal quotations omitted).

319. National Institute of Justice, *Positional Asphyxia—Sudden Death*, NAT'L L. ENFORCEMENT TECH. CTR. BULL. 2 (June 1995), https://www.ncjrs.gov/pdffiles/posasph.pdf [https://perma.cc/S3NT-LMP4].

320. *Id.*

321. *Id.*

addressing positional asphyxiation.[322] In *Cruz*, police responded to a report that a man was running around naked, yelling, and kicking his legs.[323] After the man attempted to walk past the officers, they wrestled him facedown to the ground where he continued to yell, kick, and flail about.[324] Officers then handcuffed the man, secured a nylon restraint around his ankles, and hog-tied him (defined by the court as "the binding of the ankles to the wrists, behind the back, with [twelve] inches or less of separation").[325] Once hog-tied, the man markedly calmed.[326] Afterward, officers noticed the man's face had blanched, removed the restraints, and began CPR.[327] The man was pronounced dead upon arrival at a hospital.[328] His autopsy revealed "a large amount of cocaine in his system."[329]

The Tenth Circuit first held officers may not hog-tie a person if his or her diminished capacity is apparent.[330]

> This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint.[331]

The court specifically limited its holding to hog-tying with less than twelve inches between a person's ankles and wrists and to individuals of diminished capacity.[332] The court left open the questions whether it may nonetheless be reasonable to (1) hog-tie a person of diminished capacity with greater than twelve inches between their ankles and wrists or (2) to hog-tie a healthy adult not exhibiting a diminished capacity with less than twelve inches between their ankles and wrists.[333] Regardless, the court

322. *See* Cruz v. City of Laramie, 239 F.3d 1183, 1186 (10th Cir. 2001).
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at 1186, 1188.
327. *Id.* at 1186.
328. *Id.*
329. *Id.*
330. *Id.* at 1188.
331. *Id.*
332. *Id.*
333. *See id.* at 1188–90.

provided a stark warning: "[O]fficers should use much caution in applying the hog-tie restraint. In those instances in which it may be appropriate, such restraint should be used with great care and continual observation of the well being [sic] of the subject."[334] Ultimately, turning to the case at hand, the court held the particular hog-tie restraint used on the man was unreasonable but granted the officers qualified immunity because the law was not clearly established at the time.[335]

V. DEADLY FORCE LOOKING FORWARD

Treatment of deadly force in the American legal system has changed significantly in the past thirty-five years. During this time, police officers have adapted to tightening legal restraints over the use of deadly force. It seems likely the next thirty-five years promise just as much change.

Police officers will likely remain highly visible. More than seventy-five percent of Americans own smartphones,[336] and for some reason people are obsessed with filming everything they experience, particularly if it involves trauma or violence.[337] Not only will officers likely continue to be recorded by the public, law-enforcement agencies have now armed their officers with body-worn cameras. Video and images are free flowing through the news and social media.

Americans will likely remain litigious. Americans spend more on tort litigation per citizen than any other nation.[338] There are over 1.3 million lawyers in America,[339] and Americans often turn to them when they feel they have been wronged at the hands of police. Ask any government attorney.

---

334. *Id.* at 1189.

335. *Id.* at 1189–90.

336. *Mobile Fact Sheet*, PEW RES. CTR. (February 5, 2018), https://www.pewinternet.org/fact-sheet/mobile/ [http://perma.cc/5S3M-LW27].

337. Radhika Sanghani, *Fight, Flight, Freeze - or Film? Why We Reach for Our Smartphones During Terror Attacks*, THE TELEGRAPH (December 7, 2015), https://www.telegraph.co.uk/women/life/fight-flight-freeze---or-film-why-we-reach-for-our-smartphones-d/ [http://perma.cc/8T6Q-GHD8].

338. Paul H. Rubin, *More Money Into Bad Suits*, N.Y. TIMES (November 16, 2010), https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits [https://perma.cc/4VU5-DTNR].

339. *ABA National Lawyer Population Survey: Historical Trend in Total National Lawyer Population 1878–2018*, AM. B. ASS'N 1 (2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.pdf [http://perma.cc/JYR2-ACUE].

America will also likely remain violent. Sure violent crime ebbs and flows. However, Americans resort to violence, particularly gun violence, to solve their problems more than most developed nations.[340] Some of this violence is even directed specifically at police.[341] There are now more guns in America than people.[342] It seems inevitable that police will continue to find themselves in situations where their lives or someone else's are in danger.

The ingredients for further evolution of deadly force law are there.

340. *A Nation of Survivors: The Toll of Gun Violence in America*, EVERYTOWN FOR GUN SAFETY (February 1, 2019), https://everytownresearch.org/reports/nationofsurvivors/#foot_note_anchor_1 [http://perma.cc/5Z6V-Z8TJ].

341. *Law Enforcement Officers Killed and Assaulted*, FED. BUREAU OF INVESTIGATION (May 7, 2019), https://www.fbi.gov/services/cjis/ucr/leoka [http://perma.cc/97Y7-9HHP].

342. Christopher Ingraham, *There Are More Guns Than People in the United States*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/?noredirect=on&utm_term=.007e08a694ed [http://perma.cc/674C-9NCY].