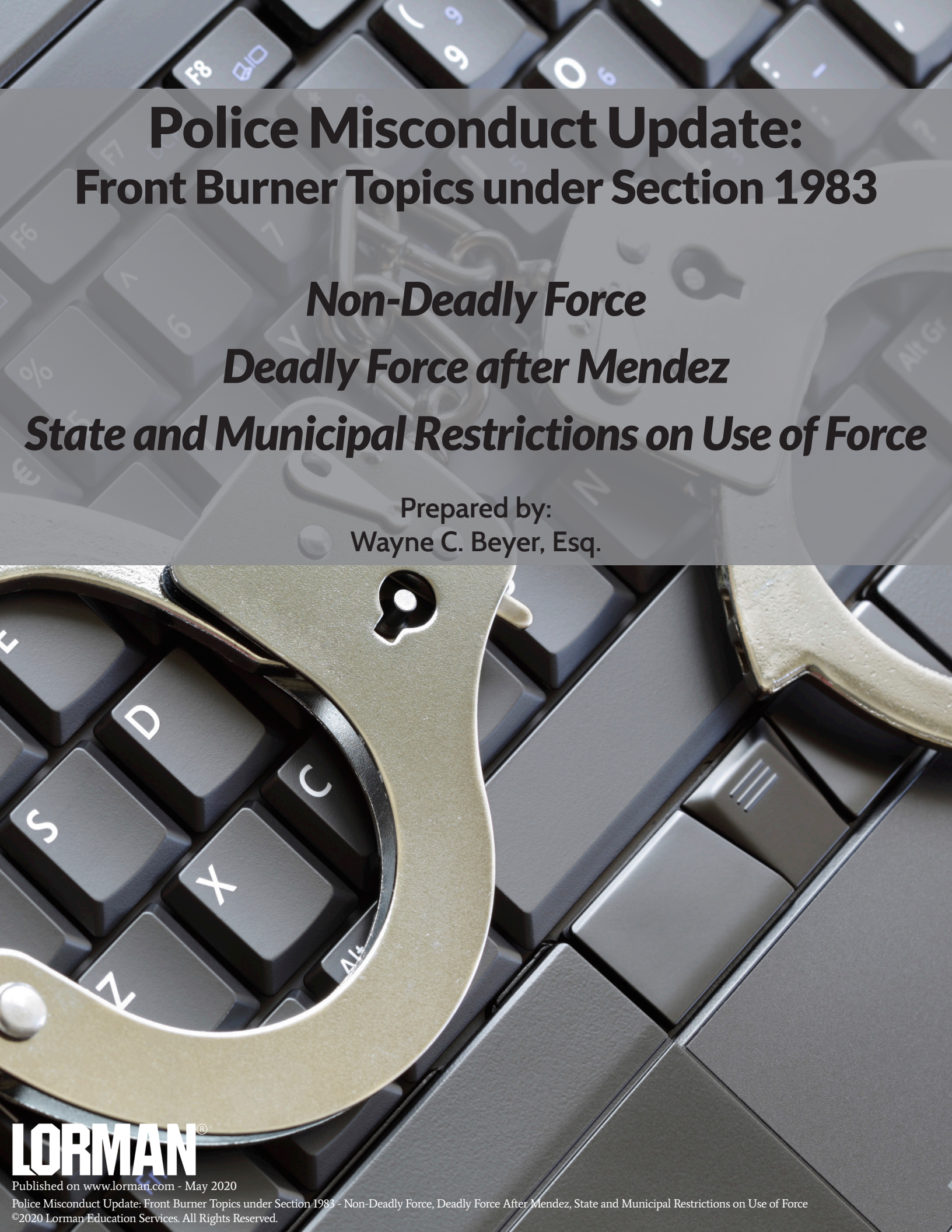

Police Misconduct Update:
Front Burner Topics under Section 1983

Non-Deadly Force
Deadly Force after Mendez
State and Municipal Restrictions on Use of Force

Prepared by:
Wayne C. Beyer, Esq.

LORMAN®
Published on www.lorman.com - May 2020

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 110+ live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 3,800 courses available
- ☑ **Videos** - More than 1,900 available
- ☑ **Slide Decks** - More than 3,000 available
- ☑ **White Papers** - More than 1,900 available
- ☑ **Reports**
- ☑ **Articles**
- ☑ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: **www.lorman.com/pass/?s=special20**

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Police Misconduct Update: Front Burner Topics under Section 1983*

Wayne C. Beyer, Esq.

Non-Deadly Force

Wrap Technologies

This section supplements the treatment of non-deadly force in the "Practitioner's Guide," Chapter 7: Fourth Amendment: Non-Deadly Force, III. Specific Uses of Non-Deadly Force. BolaWrap is the latest less-lethal force tool. The device shoots out a cord that wraps around a subject's lower body, immobilizing them without pain, so that they can effectively be taken into custody. Here is what the company, Wrap Technologies, says about it:

> The BolaWrap™ 100 is a hand-held remote restraint tool that discharges an eight-foot bola style Kevlar® tether to effectively entangle an individual at a range of 5-25 feet. Designed in cooperation with law enforcement, the small but powerful BolaWrap 100 safely offers an additional tool for law enforcement encounters allowing for a better chance of encounter control, reducing the incidence of and need for injurious uses of force. Other non-lethal devices rely on "pain compliance" often escalating encounters (creating "fight or flight" scenarios) with significant potential for injury. BolaWrap 100 provides law enforcement an effective new tool to safely engage individuals at a distance.
>
> The small, light but rugged BolaWrap 100 is designed for weak hand operation to provide effective remote restraint while all other use of force continuum options remain open. The design provides a wide latitude of accuracy to engage and restrain individuals without pain or uncontrolled falls. Quick eject and rapid reload of bola cartridges allows one device to be reused in a single encounter or in multiple encounters. The bola cartridge contains two sockets that discharge two small harmless pellets at a thirty-degree angle. The pellets are linked by the eight-foot Kevlar tether such that the tether first engages an individual's legs then the force of the pellets causes the tether to wrap. Small barbs on each pellet engage clothing to retard the unwinding of the bola tether wrap. The bola cartridge contains a 9 mm fractional charge blank cartridge (as used in prop guns) to discharge the tether.

Once deployed, the BolaWrap impedes the subject's ability to flee or fight, so that they can be approached and safely be taken into custody. The company says: "The BolaWrap 100 is intended as a tool to impede flight by engaging the legs of a subject. This subject engagement can also protect the surrounding public and the officer from injury. Primary use cases fall into the two broad categories often encountered:"

- Remotely retain and limit the mobility of an individual attempting to evade arrest or questioning. Individuals increasingly ignore law enforcement verbal commands.

- Assist in subduing individuals actively resisting arrest by limiting mobility making other engagement options less risky to officers and less injurious to individuals and the public.

REMOTE ENTANGLEMENT RESTRAINT AS A POLICE USE OF FORCE TOOL A Review Study of One Year of Field Statistics - - Police Shooting Deaths, at 6-8 https://www.fostercity.org/sites/default/files/fileattachments/police/page/15971/whitepaper_02022018.pdf

Because it can be deployed up to 25 feet, the BolaWrap would seem to be a good alternative to Tasers of pepper spray on an emotionally disturbed individual armed with a knife, bottle, bat or similar weapon, but obviously not a firearm. Because the eight-foot cord stretches out before it wraps around the subject, it is not effective indoors: "Due to the requirement for the Bola tether to expand outward to effectively engage, use in close enclosed quarters (e.g. homes, narrow hallways, etc.) is not generally effective."

Demonstrations of its use can be seen on the Wrap Technologies website, https://wraptechnologies.com/ and YouTube https://www.youtube.com/channel/UCUAp9jPdZXjpAwcREtsHO8w. The BolaWrap has been

featured across more than 60 networks, including CBS, FOX, NBC and others. According to the website, about 45 police or sheriff's departments have bought or tested the BolaWrap, including: Fort Worth; Los Angeles Police Department; Orlando; 10 Illinois agencies, including northern Chicago suburbs of Buffalo Grove and Des Plaines and western suburbs Westchester, Elgin and Aurora; Daytona Beach; Orlando; Columbia, Missouri.; New York City; Yonkers; Miami; Birmingham, Alabama; Ferguson, Missouri; and Atlanta.

Practice Tip: Additional Resources on use of force: Police Executive Research Forum (PERF 2020), "Refining the Role of Less-Lethal Technology: Critical Thinking, Communications, and Tactics Are Essential in Defusing Critical Incidents," available at https://www.policeforum.org/assets/LessLethal.pdf. U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office), "Law Enforcement Best Practices: Lessons Learned from the Field," available at https://cops.usdoj.gov/RIC/ric.php?page=detail&id=COPS-W0875.

Deadly Force after Mendez

Introduction

An important unresolved Fourth Amendment issue is where should Fourth Amendment scrutiny begin when law enforcement officers caused or contributed to cause their use of deadly force? Many of the cases involve suicidal, mentally disturbed individuals who are not complying with police commands and who have not committed an offense until they raise or point a weapon at an officer. Should the Fourth Amendment review concentrate only on the moment of shooting to the exclusion of events leading up to it? Similarly, where does the reasonableness analysis begin when a search warrant execution goes wrong, or a pursuit that begins with a minor offense ends with a car crash, drawn guns, and an officer standing in the way to avoid the motorist getting away? Is it an unreasonable seizure if an officer's unreasonable conduct creates the circumstances that otherwise authorize the use of deadly force?

As the author has previously noted, the Circuits have had varying and not altogether reconcilable approaches: from considering only the events "immediately preceding and moment of the shooting" to a broader review of the "totality of the circumstances" to a more complicated causation analysis of whether one Fourth Amendment violation "provoked" another. "Practitioner's Guide," Chapter 8: Fourth Amendment: Deadly Force, V. Recurring Fourth Amendment Issues, H. Conduct Preceding Shooting. The First, Third, Seventh (applying qualified immunity), and Eleventh Circuits consider "all the surrounding circumstances" and "actions leading up to" the use of force. The Second, Fourth, Fifth, and Eighth Circuits consider "circumstances immediately prior to and at the moment" the officer made the decision to use deadly force. The Sixth Circuit applies a "segmented" approach, considering each possible violation separately and not as causally related. The Ninth Circuit until the ruling in *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017), discussed below, applied a "provocation" theory. Antecedent events could be considered if an earlier, independent Fourth Amendment violation intentionally or recklessly caused a second Fourth Amendment violation, i.e., the self-defense shooting. Similarly, the Tenth Circuit would consider whether the officer's own reckless or deliberate (but not negligent) conduct immediately before the seizure unreasonably created the need to use deadly force.

This section discusses the Supreme Court's recent rejection of the Ninth Circuit's "provocation" rule in *County of Los Angeles v. Mendez*, surveys the other Circuits' handling of deadly force cases after *Mendez*, and ends with some recommendations for resolution.

Ninth Circuit

Under the Ninth Circuit's "provocation" rule, if

> an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force.

Billington v. Smith, 292 F.3d 1177, 1190-91 (9th Cir. 2002).

In *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015), the Supreme Court addressed but did not reject the "provocation theory." In a footnote, it said, "[o]ur citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. The Ninth Circuit's 'provocation' rule, for instance, has been sharply questioned elsewhere. . . . Whatever their merits, all that matters for our qualified immunity analysis is that they do not clearly establish any right that the officers violated." 135 S.Ct. at 1776 (citations omitted). As discussed in the previous, 2018 supplement, that rejection occurred in *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017).

In *Mendez*, the Supreme Court said that if a shooting was reasonable, it could not be rendered unreasonable by some other unreasonable act; there it was a warrantless entry. The Court reverted to guidelines under *Graham v. Connor*, 490 U.S. 386 (1989), and traditional proximate cause analysis; although the plaintiffs could not recover on their unreasonable seizure claim, the Court said that did not "foreclose recovery for injuries proximately caused *by the warrantless entry*." 137 S.Ct. at 1548 (emphasis in original). Presumably that meant that the plaintiffs could recover for the shooting, not because it was an unreasonable seizure under the Fourth Amendment, but because it was an injury proximately caused by the warrantless entry, an unreasonable search under the Fourth Amendment. In a footnote, the Court addressed an issue the plaintiff briefed, which was whether Fourth Amendment scrutiny should consider "*unreasonable police conduct prior to the use of force that foreseeably created the need to use it.*" The Court responded: "We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. . . . All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation." 137 S.Ct. at 1549 n. * (citations omitted; first emphasis added; second in original). On remand, the Ninth Circuit found that the unlawful entry was the proximate cause of the shooting. *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1076 (9th Cir. 2018) ("[W]e hold that the officer's unlawful entry proximately caused the [plaintiff's] injuries.").

Following rejection of its "provocation theory," the Ninth Circuit has not clearly sided with the circuits that follow the longer view, "totality of the circumstances" test, or the shorter "moment of the shooting" test. For example, in *Estate of Serrano v. Trieu*, No. 16-15744 (9th Cir. 2/23/2018), the decedent wielded an 11-inch steak knife with a six-inch blade in an aggressive manner, pursued as a deputy sheriff retreated approximately 160 feet, and ignored commands to stop until he was within 15 to 20 feet, when the deputy fired a single shot. Noting that that deputy was not required to retreat,

> [t]he deputy is not liable based on events antecedent to the shooting. The Supreme Court rejected this court's provocation doctrine in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1544 (2017). Although a proximate cause theory survives *Mendez*, the plaintiffs have not identified a constitutional violation preceding the shooting. The plaintiffs 'cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.' *Sheehan*, 135 S. Ct. at 1777 (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002))."

See also Isayeva v. Sacramento Sheriff's Department, 872 F.3d 938 (9th Cir. 2017) (officers attempted to take large, mentally ill man possibly on methamphetamines into custody for mental health evaluation, first using taser, chokehold and then deadly force when man pummeled deputy to point he began to pass out; bypassing whether there were Fourth Amendment violations for taser use and shooting, Circuit panel held that deputy was entitled to summary judgment based on qualified immunity);

Johnson v. City of Philadelphia, 837 F.3d 343, 351, 353 (3d Cir. 2016) (holding that Fourth Amendment "does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state." The Supreme Court in *Mendez* left open the possibility that, under the *Graham* test, a court should consider "unreasonable police conduct prior to the use of force that foreseeably created the need to use it[;]" also declining to decide whether *Graham's* "totality of the circumstances" test "should account for whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force") (citation omitted).

Practice Tip: But note that the Supreme Court's notion that an unreasonable search can lead to damages for excessive force is inconsistent with almost all other jurisprudence that treats search and seizure claims separately. If that were so, no force would be justified in a false arrest case.

First Circuit

The First Circuit does not cite *Mendez*. But cases since then affirm that the court will consider events leading up to the seizure in evaluating its constitutionality. In *McKenney v. Mangino*, 873 F.3d 75 (1st Cir. 2017), officers encountered a 66-year-old suicidal man. On review, the Circuit panel had to accept the plaintiff's facts that:

> [D]defendant [officer] had "ample opportunity to observe [decedent's] actions and movements" before pulling the trigger and that the defendant's decision to shoot [decedent] was "unreasonably precipitous." . . . These facts include [decedent's] suicidality, the slowness of his gait, the clear visibility, the fact that six minutes had elapsed since any officer had last ordered [decedent] to drop his weapon, the fact that nobody had warned [decedent] that deadly force would be used if he failed to follow police commands, and the six-minute gap between when [decedent] raised his gun skywards and when the defendant pulled the trigger. . . . To sum up, the precedents make pellucid that the most relevant factors in a lethal force case like this one are the immediacy of the danger posed by the decedent and the feasibility of remedial action.

873 F.3d at 83-84 (citation omitted).

Noting again that "the district court concluded that a rational jury could reasonably infer both that [decedent] did not pose an imminent threat and that viable remedial measures had not been exhausted[,]" the Circuit affirmed denial of qualified immunity and remanded the case to the district court. 873 F.3d at 84.

See also Conlogue v. Hamilton, 17-2210 (1st Cir. 10/11/2018) (fatal shooting of armed civilian by state trooper following prolonged standoff; ruling "an objectively reasonable officer standing in [the officer's] shoes would have thought it appropriate to deploy deadly force against an armed man who, after a nearly three-and-one-half-hour standoff in which he was repeatedly warned to drop his weapon, persisted in pointing a loaded semi-automatic firearm narrowly above the heads of three officers and within easy firing range. . . . Under the *totality of the circumstances*, we conclude that the district court's entry of summary judgment in [the trooper's] favor on the basis of qualified immunity must be [a]ffirmed.") (emphasis added).

Second Circuit

The Second Circuit continues to focus on the moment of the shooting. In *Rose v. City of Utica*, No. 18-1491-cv (2d Cir. 9/25/2019) (summary order), the district court held in relevant part that it was not clearly established at the time of the shooting that a police officer could not lawfully use deadly force against an armed individual who (1) had reportedly been firing a shotgun inside a public park, (2) did not react to an approaching officer's command to drop his weapon, and (3) turned toward the officer while still holding the shotgun in his hands. Under existing caselaw, an officer is entitled to use deadly force when an armed individual fails to comply with an order to put down a weapon and moves in what the officer reasonably perceives to be a threatening manner. The plaintiffs also argued that the officer did not follow the police department's de-escalation policies. "But whether [the officer] followed the policies or not is irrelevant to whether, at the time he fired the shots, [the officer] was acting reasonably under the Constitution." See *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (defendant's "various violations of police procedure . . . leading up to the shooting are irrelevant to the objective reasonableness of his *conduct at the moment he decided to employ deadly force*") (emphasis added)).

See also Marreno v Cote, No. 17-4009-cv (3/1/2019) (summary order) (officer shot as vehicle sped away; dismissing appeal from district court denying qualified immunity based on disputed facts, whether officer "reasonably believed at the *moment* he fired at [decedent] that [decedent] posed a significant threat of death or serious physical harm" to [shooting officer] or the other officers.) (emphasis added);

Callahan v. Wilson, 863 F.3d 144, 146, 149 (2d Cir. 2017) ("We conclude that the use of force instructions here were inconsistent with our prior decision in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013), and we cannot say that the error was harmless. In *Rasanen v. Doe*, decided approximately two years before the trial here, we explained

that the jury charge in a Section 1983 police shooting case alleging excessive use of force by a police officer in circumstances similar to those here must include a specific instruction regarding the legal justification for the use of deadly force. 723 F.3d at 333, 337. Nor does the Supreme Court's recent decision in *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S.Ct. 1539, 198 L.Ed.2d 52 (2017), undermine *Rasanen's* holding as to the requirements for a jury charge in the type of excessive force case presented here.");

Estate of Jaquez v. City of New York, No. 16-1366-cv (9/8/2017) (summary order) (having determined that use of less-lethal force was reasonable before fatal shot was fired, district court did not commit error in asking jury to decide whether subject was pushing himself off floor and holding knife at time of fatal shot).

Third Circuit

The Third Circuit reviews the "totality of the circumstances." *Martin v. City of Newark*, No. 18-1228 (3d Cir. 7/13/2018), involved a fatal shooting after a traffic stop. Viewing disputed facts in the plaintiff's favor, the driver cursed at the officer and initially walked away but then quickly reentered a car that the officer referred to as stolen. The two engaged in a struggle at the open driver's side door, with the driver in the driver's seat and the officer's hands inside of the car. The driver ignored the officer's warning that he would fire his weapon if the driver started the car. Under the defense version, the driver accelerated with some portion of the officer's body inside the car. But accepting the plaintiff's version for purposes of summary judgment, the officer shot the driver as he turned the key in the ignition.

Under the "totality of the circumstances," the shooting was reasonable. The officer "was faced with an erratic and noncompliant driver who disregarded his explicit warning not to start the car, despite [the officer's] proximity to, and presence (of at least his hands) within, the vehicle. [The driver] posed a threat to [the officer's] life: being injured by a moving vehicle." The plaintiff contended that the traffic stop was unlawful. But the Circuit panel, citing *Mendez*, found that an objectively reasonable use of force "may not be found unreasonable by reference to some separate constitutional violation." Alternatively, the officer was entitled to qualified immunity "because it was not clearly established [at the time of the shooting] that an officer uses excessive force when he shoots at a driver who starts a car despite having been warned not to and does so while the officer is positioned between the car and its open driver's side door."

See also Davenport v. Borough of Homestead, 870 F. 3d 273 (3d. Cir. 2017) (officers fired to end flight of vehicle as it entered high pedestrian traffic area, striking passenger who was driver's mother; joining other circuits that held passenger stated Fourth rather than Fourteenth Amendment claim, Circuit panel held under "*totality of circumstances*" review that three of four officers did not violated Fourth Amendment and were entitled to qualified immunity; as to officer who may have fired after final collision, fact dispute prevented resolution on interlocutory appeal) (emphasis added);

Summers v. Ramsey, No. 16-4401 (3d Cir. 11/29/2017) (police were trying to contain naked man thought to be on PCP, when the man turned suddenly and shattered patrol officer's windshield with two strikes of his bare hand; agreeing with district court's assessment that naked man's previous actions coupled with blows to patrol car would lead reasonable officer to fear death or serious bodily injury, justifying fatal shooting);

Thompson v. Howard, No. 15-3338 (3d Cir. 2/17/2017) ("[B]y the time [officer] began shooting, [plaintiff] had already demonstrated a reckless disregard for the safety of others by crashing into [another officer's] police car as [that officer] was getting out of it. [Plaintiff] then compounded that recklessness by blindly fleeing with the gas pedal 'all the way to the floor,' driving over sidewalks and lawns in a residential neighborhood. Thus, regardless of whether [plaintiff] was at that moment driving towards or away from the officers, it was not objectively unreasonable for [shooting officer], when confronted with [plaintiff's] dangerous, chaotic, high-speed flight, to believe that [plaintiff] posed a serious risk to persons who might be in the area and to resort to deadly force to prevent such persons from being injured[;]" granting qualified immunity because it was not clearly established that officer's decision was unlawful).

Fourth Circuit

The Fourth Circuit puts weight on the circumstances immediately preceding the use of force. In *Betton v. Belue*, No. 18-1974 (11/5/2019), a team of plain-clothes law enforcement officers armed with assault style rifles used a battering ram to enter the plaintiff's residence to execute a warrant authorizing a search for marijuana and other illegal substances. The officers did not identify themselves as police or otherwise announce their presence. From the rear of his residence, the plaintiff heard a commotion but did not hear any verbal commands. Responding to the noise, the plaintiff pulled a gun from his waistband and held it down at his hip. Three officers fired a total of 29 shots, striking the plaintiff him nine times and causing him to be permanently paralyzed. "We are required to consider the relevant *circumstances immediately preceding the moment that force was used*." (citing *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) (emphasis added)). The relevant circumstances included that the officers failed to identify themselves or issue verbal commands to a man who was holding a firearm at this side. The court affirmed the district court's order denying one of the officer's motion for summary judgment based on qualified immunity.

See also Harris v. Pittman, No. 17-7308 (4th Cir. 6/18/2019) (officer fired several shots at plaintiff during violent struggle; Fourth Amendment issue was whether threat continued justifying firing additional shots; stating that, "[b]ecause the inquiry into excessiveness turns on the information possessed by the officer at the *moment that force is employed*, force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated[;]" panel majority denied summary judgment for officer) (additional quotation marks omitted; emphasis added);

Hensley on behalf of North Carolina v. Price, 876 F.3d 573, 582-83 (2017) (deputies responding to domestic disturbance did not order man to stop, drop gun, or issue warning as he held gun with its muzzle pointed at ground, descended porch stairs and walked toward officers; "We assess the reasonableness of their conduct based on the totality of the circumstances, *Yates v. Terry*, 817 F.3d 877, 883 (4th Cir. 2016), and based on the information available to the [d]eputies '*immediately prior to and at the very moment they fired the fatal shots*.'" *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (internal quotation marks omitted); holding that shooting man simply because he had possession of firearm violates Fourth Amendment.) (emphasis added).

Fifth Circuit

The Fifth Circuit considers the moment of the threat. Citing *Mendez*, the Fifth Circuit panel in *Hale v. City of Biloxi*, No. 17-60565 (5th Cir. 4/19/2018), rejected the plaintiff's theory that the officers had manufactured the need to use deadly force. Two officers respectively shot and tased the subject during the execution of an arrest warrant for suspected credit card fraud. The plaintiff took his hand out of the line of sight of the officers and placed it in his pocket, despite warnings from armed police officers that his conduct might cause him to be tased and shot. The plaintiff argued, however,

> that we must look to the totality of circumstances and not just at his decision to put his hands in his pocket. In particular, [the plaintiff] argues the officers recklessly created the circumstances leading up to that moment, including by violating the "knock and announce rule" and not telling him he was under arrest. [The plaintiff] argues that he was consequently surprised and confused by the officers' presence and orders and could not be expected to recognize their authority.
>
> It is clear [the plaintiff] cannot "manufacture an excessive force claim where one would not otherwise exist" by pointing to other purported constitutional violations. *See County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). His argument sounds much like the rejected "provocation doctrine" of *Mendez*. Additionally, [the plaintiff's] "totality of the circumstances" argument fails on the facts of this case.
>
> The Supreme Court in *Mendez* expressly declined to address the argument that, in assessing the totality of the circumstances, courts must take into account "unreasonable police conduct prior to the use of force that foreseeably created the need to use it." See 137 S. Ct. at 1547 n.* (declining to address the argument, stating that "[a]ll we hold today is that once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation").

When the plaintiff ignored orders to keep his hands visible, including placing his hand in his pocket where officers could not see what he was reaching for, they could reasonably believe he "had only been pretending to comply and was *at that moment* reaching into his pocket for a weapon." (emphasis added.)

See also Shepherd v. City of Shreveport, 920 F.3d 278, 283 (5th 2019) (man armed with knife disregarded series of instructions, and was moving quickly toward police corporal who continued to move backwards; corporal fatally shot man with shotgun; affirming summary judgment for defendants, Fifth Circuit panel reiterated, "[i]n this circuit, the excessive force inquiry is confined to whether the officer was in danger at the *moment* of the threat that resulted in the officer's shooting. Therefore, *any of the officers' actions leading up to the shooting are not relevant*[.]" (internal quotation marks and citation omitted; emphasis added);

Garza v. Briones, No. 18-40982 (5th Cir. 11/25/2019) ("The reasonableness of deadly force is measured '*at the time of the incident*.' *Bazan ex rel. Bazan v. Hidalgo Cty*., 246 F.3d 481, 490 (5th Cir. 2001) (emphasis added). Even though [decedent] was holding only a BB gun, that wasn't evident to defendants in the moment: The gun's appearance was almost indistinguishable from a handgun. Just before the shooting, [decedent] was behaving erratically, refusing to comply with direct police orders, and waving around what the officers presumed to be a deadly weapon. The video evidence from the dashcams of two patrol vehicles confirms that, just before defendants fired, [decedent] raised the gun above the tabletop, pointed the barrel in [shooting officer's] direction, and lowered his eyeline seemingly to aim the firearm. It was then that [shooting officer] fired his weapon, and the others fired only after they heard a gunshot[;]" granting summary judgment for defendants.);

Sixth Circuit

The Sixth Circuit "segments" different violations. In *Lemmon v. City of Akron*, No. 18-3566 (6th Cir. 4/4/2019), an officer stopped a subject on a bicycle who fit description of possibly armed robber at convenience store. During a tense standoff, the subject refused to show his hands, placing his right hand in his waistband. When he dropped his bike, the subject made a quick movement toward a sergeant, who fatally shot him. Rejecting the plaintiff's theory that the court should consider whether the police had reasonable suspicion for the stop under *Terry v. Ohio*, 392 U.S. 1 (1968), the Sixth Circuit applied its "temporally segmented approach."

> The proper approach under Sixth Circuit precedent is to view excessive force claims in segments. That is, the court should first identify the "seizure" at issue here and then examine "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances." (citing *Livermore v. Lubelan*, 476 F.3d 397, 40607 (6th Cir. 2007)).

Accordingly, "the events leading up to [the subject] being stopped in the parking lot are immaterial to the issue of whether [the sergeant] reasonably utilized deadly force during the standoff." So there was no constitutional violation.

In *Thornton v. City of Columbus*, No. 17-3743 (3/14/2018), officers responded to a call involving a man threatening people with a firearm. At least one person informed the officers that the man had run inside the residence at issue while still having his firearm. Because exigent circumstances justified the entry, there was no violation of a constitutionally protected right, and the officers were entitled to qualified immunity. The Sixth Circuit continues to follow a "segmented" approach under which they do not consider whether an unreasonable search can render an otherwise reasonable use of force unreasonable. Citing *Mendez*, the Circuit panel wrote:

> In this circuit, the court "consider[s] the officer's reasonableness under the circumstances he faced at the time he decided to use force." *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017) (citing *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (discussing the "segmented analysis" this circuit employs to analyze use-of-force claims). Accordingly, "[w]e do not scrutinize whether it was reasonable for the officer to create the circumstances." *Thomas*, 854 F.3d at 365 (internal quotation marks and citation omitted). "[A] different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Los Angeles v. Mendez*, 137 S. Ct. 1539, 1544 (2017).

The non-fatal shooting of the plaintiff did not violate the Fourth Amendment. Because the use of deadly force was reasonable, the officers had qualified immunity.

Seventh Circuit

The Seventh Circuit uses a "totality of the circumstances" approach. *Strand v. Minchuk*, 910 F.3d 909 (7th Cir. 2018), began when an officer issued parking tickets and the trucker tried to take pictures to show the absence of no-parking signs. The officer

> allowed the situation to escalate and boil over by slapping [the trucker's] cell phone to the ground and then tearing [the trucker's] shirt from his body. The fist fight then ensued, with [the trucker] choosing to stop throwing punches and stand up and offer his express surrender, including by raising his hands above his head. It was then—with no direction to [the trucker] to keep his hands in the air, to fall to his knees, or to lay on the ground—that [the officer] drew his gun and fired the shot.

910 F.3d at 916.

The Circuit panel reviewed the controlling law: "The law requires an assessment of the *totality of the facts and circumstances* and a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." But "[e]ven though an officer may in one moment confront circumstances in which he could constitutionally use deadly force, that does not necessarily mean he may still constitutionally use deadly force the next moment." 910 F.3d at 915 (internal quotation marks and citation omitted; emphasis added). Because there was evidence that the trucker had surrendered, the officer was not entitled to summary judgment. "The district court correctly observed that additional fact finding was necessary to determine whether 'the rapidly-evolving nature of the altercation' justified [the officer's] use of deadly force or whether "he had time to recalibrate the degree of force necessary, in light of [the trucker's] statement of surrender.'" 910 F.3d at 916.

Doornbos v. City of Chicago, 868 F.3d 572 (7th Cir. 2017), was not a deadly force case, but it is instructive on the Seventh Circuit's consideration of "the totality of the circumstances," here whether an unreasonable stop caused an unreasonable use of force. Considering the plaintiff's appeal from a defense verdict, the Circuit panel noted that the plaintiff "was leaving a Chicago train station when a plainclothes police officer confronted him, grabbed him, and with the help of two other plainclothes officers, forced him to the ground." The panel said the defendant officer's "own testimony suggests that he initiated an unlawful frisk while policing in plain clothes, and that conduct proximately caused the violent confrontation." That testimony "was relevant for the jury in assessing whether [the officer's] use of force was reasonable under the '*totality of the circumstances*[,]'" 868 F.3d at 583 (citing *Mendez*, 137 S.Ct. at 1546; emphasis added). Noting that "*once* a use of force is deemed reasonable under *Graham* [*v. Connor*, 490 U.S. 386 (1989)], it may not be found unreasonable by reference to some separate constitutional violation." 868 F.3d at 583 (citing *Mendez*, 137 S.Ct. at 1547 .n*) (emphasis in original). But here the Circuit panel addressed the issue *Mendez* left open:

> However, when assessing the "totality of the circumstances" under *Graham*, the *Mendez* Court expressly left open the possibility of "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." And that is our approach here. *When an officer's unreasonable (and unconstitutional) conduct proximately causes the disputed use of force, that conduct is part of the "totality of the circumstances"* that should be considered to determine if the use of force was reasonable, especially since the officers here were not in uniform.

868 F.3d at 583 (citation omitted; emphasis added).

See also Horton v. Pobjecky, 883 F.3d 941, 950 (7th Cir. 2018) (when sixteen-year-old and three other young men attempted to rob pizzeria at gunpoint, off-duty police officer who was waiting for pizza, shot and killed him; "noting that the availability of less severe alternatives does not necessarily render the use of deadly force unconstitutional[,]" and that court "must refuse to view the events through hindsight's distorting lens," reasonableness test requires court to "consider the *totality of the circumstances*, including the pressures of time and

duress, and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances[;]" affirming summary judgment for defendants) (emphasis added).

Eighth Circuit

The Eighth Circuit is one of the circuits that gives most weight to the moment of the shooting. In *Frederick v. Motsinger*, 873 F.3d 641 (8th Cir. 2017), a woman entered a convenience store with a four-inch folding knife and told the store clerk to call 911. A sergeant arrived first and held her at gunpoint as she made quick, impatient movements. An officer with a taser arrived, while she continued to question their authority and refused to drop the knife. She told them she was a "paranoid schizophrenic." The officer with the taser deployed it, but it did not take effect. At that point, she charged the officer with the taser, and a third officer fired three shots. She succumbed to the wounds. Her estate focused on the events preceding the shooting, arguing in line with the Ninth Circuit's previous "provocation rule" that the tasing provoked her violent reaction. Following the Supreme Court's decision in *Mendez*, the estate did not argue that the shooting was objectively unreasonable, but contended that the tasing was a separately compensable Fourth Amendment violation that would entitle it to damages that proximately flowed from it. But the circuit panel applied its precedent ("Numerous cases have upheld use of tasers to control potentially violent, defiant detainees who pose a safety risk to the officers or others, particularly when the officer warns that a taser will be used, as [the officer] did here[]"), and held the officers were entitled to qualified immunity. 873 F.3d at 647.

In affirming the grant of qualified immunity, in *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017), the Circuit panel did not consider events leading up to the shooting of a man in an army uniform walking along the side or a highway, carrying a rifle, and "flipping off" passing cars; or events subsequent to the shooting, e.g., the "rifle" was a pellet gun, and a frame-by-frame review of the deputy's dashboard camera showed that the man was apparently attempting to comply with the shooting deputy's order to drop the gun. "[T]he officers had several minutes to decide how best to approach [the man]. They also had the opportunity to modify their plan after [the man] came into view and a more complete set of circumstances became known to them[,]" but "[t]he circumstances did not become tense, uncertain, or rapidly evolving until [the shooting deputy], in his words, 'began screaming at [the man] to '[d]rop the gun[,]'" so their entitlement to qualified immunity boiled down to the moment of the shooting based on the officer's perception, albeit incorrect, of the danger. "Instantaneously, the subject began to turn toward us and I saw him spin around, raising his rifle and pointing it at me." 856 F.3d at 1182-83.

Tenth Circuit

The Tenth Circuit relies on its pre-*Mendez* rule, that it will consider whether officers' reckless or deliberate conduct created the need to use force. On remand from the Supreme Court, *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam), the Tenth Circuit reconsidered whether a state police officer was entitled to qualified immunity. *Pauly v. White*, No. 14-2035 (10th Cir. 10/31/2017). Three officers had responded to a residence at night to investigate an earlier road rage incident. When one of the three brothers who were occupants pointed a firearm in the direction of an officer who had taken cover behind a wall 50 feet away, the officer fired without first giving a warning, fatally shooting the brother.

The Circuit recited its existing precedent: "The reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force[,]'" citing *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2007) (quoting *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995)). See also *Allen v. City of Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) ("consider[ing] an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force[,]" (quoting *Romero v. Bd. of Cty. Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995))).

Under that standard, "the alleged reckless actions of all three officers were so immediately connected to the . . . brothers arming themselves that such conduct should be included in the reasonableness inquiry. . . . [T]he threat made by the brothers, which would normally justify an officer's use of force, was precipitated by the officers' own actions and [the shooting officer's] use of force was therefore unreasonable." Although the panel majority found

sufficient evidence to raise a fact issue regarding the Fourth Amendment excessive force violation under its methodology, it noted in a footnote that "the concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits." Citing to the Supreme Court's decision in *Mendez*, where the Court declined to address "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it," the Circuit majority observed "at least for now, *Sevier* and *Allen* remain good law in this circuit." However, the entire panel agreed that the shooting officer was entitled to qualified immunity.

See also Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019) (man "acting crazy" or on alcohol, fatally shot as he emerged from garage armed with baseball bat and walking toward officers; denying qualified immunity because prior Tenth Circuit precedent put officer on notice that he could be liable for reckless and deliberate conduct immediately preceding shooting that created need to use deadly force).

Eleventh Circuit

In *Shaw v. City of Selma*, 884 F.3d 1093 (11th Cir. 2018), the Eleventh Circuit panel emphasized the "totality of the circumstances." In deciding whether a man armed with a hatchet presented an imminent threat, the officer did not have to wait for the man to raise a hatchet over his head:

> [The subject] was mentally ill and dangerous. [The officer] had been warned moments before that [the subject] "would fight [him] in a minute." [The subject] was an armed and noncompliant suspect who had ignored more than two dozen orders to drop the hatchet. At the time he was shot, [the subject] was advancing on [the officer] with hatchet in hand. He was close to him — within a few feet — and was getting closer still, yelling at [the officer] to "Shoot it!" [The subject] could have raised the hatchet in another second or two and struck [the officer] with it. Whether the hatchet was at [the subject's] side, behind his back, or above his head doesn't change that fact. Given those circumstances, a reasonable officer could have believed that [the subject] posed a threat of serious physical injury or death at that moment. A reasonable officer could have also concluded, as [the officer] apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense.

884 F.3d 1099-1100.

Additionally, the officer was entitled to qualified immunity: "Even with the benefit of hindsight and without making any special allowance, we would not find that [the officer] violated clearly established Fourth Amendment law." 884 F.3d 1100-1101.

See also Hammett v. Paulding County, 875 F.3d 1036. 1048 (11th Cir. 2017) (police officers executed search warrant intending to seize methamphetamines; confrontation ensued during which each officer fired one shot, killing subject's husband; "[w]hen an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim[,]"citing *Mendez*, 137 S.Ct.at 1547; "The operative question in excessive force cases is 'whether the *totality of the circumstances* justifie[s] a particular sort of search or seizure.'" quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9, (1985)) (emphasis added).

Knight through Kerr v. Miami-Dade County, 856 F.3d 795, 814 (11th Cir. 2017) (officers discharged their firearms at SUV driven in reverse toward them, killing non-party driver, killing one passenger and wounding another; plaintiffs did not argue that officers' alleged violation of department pursuit policy was itself Fourth Amendment violation, but rather that officers' decision to pursue SUV created situation that required use of deadly force; but "trial court carefully considered the temporal separation between any claimed pursuit-policy violation and the moment that shots were fired, and it concluded that the relevant violations were only those that occurred after the cars stopped.").

D.C. Circuit

In *Lane v. District of Columbia*, 887 F.3d 480 (D.C. Cir. 2018), the shooting officer and three others were on patrol as part of the Gun Recovery Unit of the Metropolitan Police Department ("MPD"). The officers encountered the subject in an apartment parking lot. When one of the officers asked the subject if he was carrying

a gun, the subject fled. Two of the officers pursued the subject on foot, while the shooting officer and another officer pursued in a police vehicle. A portion of the chase was captured on an MPD video camera. The shooting officer testified that he saw the subject's right hand moving toward his waistband, causing the shooting officer to fear that he was reaching for a gun. The subject repeatedly looked over his left shoulder, toward the pursuing officers, and turned toward the police vehicle, pointing what appeared to the shooting officer to be a gun. The officer fired two shots. One struck the subject in the back and one in the buttocks. The subject was transported to the hospital where he died as a result of the wounds. The shooter and another officer testified that they saw the subject holding a gun, and a BB gun was recovered from the scene. The jury was shown the video and was able to make their own determination regarding the credibility of the officers' testimony and whether the subject appeared to have in his hand a cell phone, a shadow, or a gun. The district court did not abuse its discretion in denying the estate's motion for a new trial after a defense verdict and the D.C. Circuit affirmed. 887 F.3d at 487.

Practice Tip: Under *Mendez*, a shooting must itself be unreasonable, but under the Supreme Court's invocation of a traditional proximate cause analysis, unreasonable police conduct beforehand can likely be considered, rendering a fatality an unreasonable seizure in violation of the Fourth Amendment. But still considering causation, the practitioner should recall the distinction between cause in fact and proximate cause. A subject is not protected under the Fourth Amendment until he/she is not "free to leave." *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980). So the response to a 911 call; the decision to make a warrantless entry; or the decision to engage in a high speed pursuit is more properly viewed as a cause in fact, and not a legal cause. Fourth Amendment scrutiny logically does not begin there, but rather when an officer is encountering a subject. The Supreme Court has also told the practitioner that the failure to follow best practices do not necessarily render the conduct unreasonable. *Sheehan*, 135 S.Ct. at 1772-74 (plaintiff could not defeat summary judgment by offering expert testimony that "officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless."). And finally, because of the ongoing lack of clarity in this area of the law, officers will continue to enjoy qualified immunity.

State and Municipal Restrictions on Use of Force

Thanks to the efforts of the International Association of Chiefs of Police (IACP) and the Police Executive Research Forum (PERF), police departments in New Jersey are among those putting more emphasis on crisis-intervention for those with mental health problems, de-escalation and exhausting other alternatives to the use of force, and prohibiting firing at vehicles when officers can safely move out of their path. See National Consensus Policy on Use of Force, available at https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf. Police Executive Research Forum (PERF) monographs in "Critical Issues in Policing Series": "Re-Engineering Training on Police Use of Force," available at http://www.policeforum.org/assets/reengineeringtraining1.pdf; "Guiding Principles on Use of Force," available at http://www.policeforum.org/assets/guidingprinciples1.pdf; "Integrating Communications, Assessment, and Tactics (ICAT)" available at http://www.policeforum.org/assets/icattrainingguide.pdf and its guide to ICAT training is available at www.policeforum.org/TrainingGuide

The biggest change in state law this year was in California. Assembly Bill 392 was signed into law by Governor Gavin Newsom on August 19, 2019, and took effect on January 1, 2020. The new law is clearly aimed at codifying best practices, such as those listed in the resources above, but the extent to which it places additional burdens on police or alters existing law has been exaggerated. It's key provisions:

- Respect for the "dignity and sanctity of every human life."
- "As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer." Arguably, requiring force to be "necessary" rather than the constitutional standard "reasonable" sets a higher bar.
- Use of force "consistent with law and agency policies" is consistent with existing practice if "agency policies" are not used to determine whether the conduct was constitutional but rather was subject to disciplinary action.

- Use of force evaluated from "perspective of a reasonable officer in the same situation based on the totality of the circumstances," rather than with "hindsight."
- "[P]physical, mental health, developmental, or intellectual disabilities . . . may affect their ability to understand or comply with commands from peace officers."
- "A peace officer shall not use deadly force against a person based on the danger that person poses to themselves," i.e., to prevent their suicide.
- "A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested." But "retreat does not mean tactical repositioning or other de-escalation tactics."

Practice Tip: Department regulations may set a higher standard than the Constitution requires, e.g., "minimal" rather than "reasonable force," or "exhaust all other alternatives" before using deadly force. Deviations from those standards can be used in disciplinary actions against officers, but not in civil rights trials. The same can be said of state laws or regulations. They cannot alter the federal constitutional standard, but they can be used in litigation of state law claims, e.g., whether the force used was "reasonable" instead of "necessary."