

Use of Force Analysis – What is Justified and In What Situations



By **MATTHEW LAVALLEE**
Daley, Koster & LaVallee, LLC

County officials are advised to keep abreast of changes in federal law governing use of force by law enforcement officers in their jurisdiction. Legal standards required to present a federal excessive force claim depend on the status of the plaintiff at the time of the incident and the various circumstances confronting the officer.

It's a cold winter morning. The moon is still visible in the sky as Officer Johnson checks on his family one last time before getting into his patrol car to start his 6 a.m. shift. His shift is not even an hour old when he gets a call from dispatch that there is a domestic dispute in his area. Johnson drives to the residence, and the first thing he sees is a man exiting the rear of the home in a frantic state.

The officer quickly exits his car and starts running after the suspect. The suspect appears to be holding a gun in his right hand. Officer Johnson draws his weapon and instructs the suspect to stop and put his hands up. All of his commands are ignored, and the chase continues. The alley they are running down suddenly comes to a dead end. Having nowhere left to run, the suspect turns around and charges Officer Johnson, who fires two shots at the suspect. The suspect drops to the

ground and dies from a fatal shot to his chest. As it turns out, the suspect was unarmed.

This scenario is just one example of the many life or death situations confronted by law enforcement officers. Besides having to fend for their lives, law enforcement officers who respond forcibly to such confrontations face the additional trauma of potential criminal and civil liability, as county elected officials well know.

This article analyzes the specific constitutional provisions and controlling case law governing the use of force by law enforcement officers in this jurisdiction. *42 U.S.C. § 1983*

Pursuant to *42 U.S.C. § 1983*: "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law..."

A plaintiff filing suit pursuant to § 1983 must show more than negligence to prevail. The § 1983 plaintiff must establish the officer exhibited deliberate indifference towards his constitutional rights when the action or omission leading to the alleged violation was carried out. *Taylor v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987).

Furthermore, § 1983 "is not itself a source of substitutive rights, but merely provides a method for vindicating Federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266 (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979)). Accordingly, "in addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989). Which amendment applies depends on the status of the plaintiff at the time of the incident, whether he is a free citizen, convicted prisoner, or something in between.

Pre-Arrest and Arrest Scenario

The Fourth Amendment shields citizens from the unreasonable search and seizure of their person by law enforcement. *U.S. Const. Amend. IV*. If a plaintiff was a free person at the time of the incident in question and the use of force occurred during the course of an arrest or other seizure, the plaintiff's claim falls under the Fourth Amendment and its reasonableness standard. See *Graham*, 490 U.S. at 394 (1989). Although it is not always easy to identify when minimal police interference with a person

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becomes a seizure, courts have held that whenever an officer restrains the freedom of a person to walk away,ⁱ or uses deadly force on a subject, a seizure has taken place.ⁱⁱ

The standard for determining the propriety of a law enforcement officer's use of force in the pre-arrest or arrest context under the Fourth Amendment is one of objective-reasonableness. Factors needed to be considered in determining the objective reasonableness of use of force in a pre-arrest and arrest scenario include:

1. The severity of the crime at issue;
2. The threat the suspect poses to the safety of the officers or others;
3. Whether the suspect is actively resisting arrest or attempting flight. *Id. at 396*.

Whether use of force under the Fourth Amendment is proper is "judged on a case by case basis from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993). (Internal citation omitted). The

salient question is "whether the officer's conduct is objectively reasonable in light of the facts confronting the officer." *Id.*

Notably, an officer's duty to make an arrest or investigatory stop "necessarily carries with it the right to some degree of physical coercion or threat thereof to affect it." *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002) (Internal citation omitted). As such, the objective reasonableness standard contains a built in measure of deference to the officer's on the spot judgment about the level of force necessary in light of the circumstances he is under. See *Graham*, 490 U.S. at 395.

Uses of force may ultimately be deemed "unnecessary" or "unreasonable" under the Fourth Amendment, but nonetheless fail to impugn liability against the officer if the amount of force resulted in minimal injuries. For example, in *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997), police officers slammed the plaintiff — an individual mistakenly suspected of harassing a young woman—against a wall, kicked his legs apart, required him to raise his arms above, and pulled his wallet from his pants. The Eleventh Circuit held that while the use of force against the plaintiff was unnecessary, the actual force used and the resulting injuries were minor in nature so that the officer's use of force did not violate the Fourth Amendment.

Other times, an officer's use of force can be held proper and inappropriate during the same use of force continuum. The case of *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002) provides such an example. In *Vinyard*, the plaintiff was arrested at a house party. During the

course of her arrest, an officer allegedly grabbed her arm, jerked her out of her chair, handcuffed her behind her back, and placed her in the back seat of his patrol car. *Id.* at 1343. On the way to the county jail, plaintiff and the arresting officer engaged in a heated conversation, prompting the officer to stop the patrol car, grab the plaintiff forcibly enough to bruise her arm and breast, and apply pepper spray upon the plaintiff. *Id.* at 1343-44.

The Eleventh Circuit noted the officer's use of force prior to handcuffing plaintiff at the arrest scene was "*de minimis* and not excessive."ⁱⁱⁱ However, the court held the force used by the officer during the transport to the jail "was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate". *Id.* at 1349 (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

Pretrial Detention Scenario

The Supreme Court has defined "pretrial detainees" as those persons "who have been charged with a crime but have not yet been tried on the charge." *Bell v. Wolfish*, 441 U.S. 520 (1979). Use of force on a pretrial detainee is judged under the Fourteenth Amendment's due process clause, which forbids the government to deprive persons of life, liberty, or property without due process of law. *U.S. Const. Amend. XIV*. In applying these "substitutive due process" rights, the Supreme Court has held that the threshold question is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Rochin v. California*, 342 U.S. 165, 169 (1952).

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As the phrase "shocking to the conscience" sets forth on its face, an excessive force plaintiff has a higher hurdle to surpass in establishing liability against an officer under the Fourteenth Amendment than under the objective reasonableness standard of the Fourth Amendment. Again, the seminal issue in the "shocks the conscience" test is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may be fairly said to shock the contemporary conscience." *County of Sacramento v. Lewis* 523 U.S. 833, 848 n.8 (1998.) However, if use of force on a pretrial detainee is rationally related to a legitimate, non-punitive governmental purpose and is not excessive in relation to that purpose, then the use of force is not tantamount to punishment and does not support an excessive force claim under the Fourteenth Amendment. *Bell*, 441 U.S. at 537.

The Eleventh Circuit applies the following factors to assess whether an officer's use of force upon a pre-trial detainee

"shocks the conscience": See, e.g., *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993); *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1500-01 (11th Cir. 1985) (en banc).

The Johnson factors require a Court to look at:

1. the need for force;
2. the relationship between the need for force and the amount of force used;
3. the extent of injury inflicted; and
4. whether the force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm. *Gilmer*, 774 F.2d at 1501 quoting *Johnson*, 481 F.2d at 1033.

Post-arrest, Pre-charge of Custody

As the foregoing discussion establishes, excessive force claims arising out of actions taken *prior* to a criminal conviction are analyzed under either the Fourth or Fourteenth Amendment, depending on the timing of the alleged constitutional violation. The Eleventh Circuit, however, has not clearly established whether the Fourth or Fourteenth Amendment applies to claims of excessive force *following* arrest, but *before* the start of pretrial detention. See *Vinyard*, 1990 F.2d 1211; *Wright v. Whiddon*, 951 F.2d 297, 300-01 (11th Cir. 1992). Therefore, the district courts have struggled with the issue of exactly when the process of arrest ends and some other form of custody begins. Courts in other jurisdictions have in fact recognized the period of custody that lies between the end of the arrest process and the start of pretrial detention. Under this "continuing seizure" theory, a seizure of an arrestee lasts until the individual has

made his first judicial appearance. Until the arrestee, or pre-charge *detainee*, makes his first judicial appearance, the Fourth Amendment protects him against use of excessive force by law enforcement officers. After the first judicial appearance has taken place, the post-arrest, pre-charge detainee then becomes a *pretrial detainee*, and is protected against use of force that would “shock the conscience” under the Fourteenth Amendment.^{iv}

At least one district court in the Eleventh Circuit has applied the “continuing seizure” rule to an excessive force claim. In *Albritten v. Dougherty County* the plaintiff brought a claim of excessive force against defendant police officers after they allegedly manhandled him while he was in custody at the station following his arrest on drunk driving charges. 973 F. Supp. at 1456-57 (M.P.G. 1997). The court ultimately ruled the arrestee’s claims required analysis under the objective reasonableness standard of the Fourth Amendment rather than the shocks the conscience standard of the Fourteenth Amendment because the alleged abuse occurred during a continuing search incident to the arrest, and not during pretrial detention. *Id.* at 1463. The court reasoned the officer’s use of force occurred in the course of an arrest due to the:

1. proximity in time of defendant’s use of force to the plaintiff’s initial arrest;
2. the officer’s presence and apparent custody of the plaintiff at the time of the use of force;
3. the stated purpose of the use of force being to affect a secondary search incident to arrest; and
4. the apparent purpose of the incarceration as something

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other than a pretrial detention. *Id.* at 1461.

Conviction

Excessive force claims for convicted individuals unequivocally implicate the “cruel and unusual punishment” clause of the Eighth Amendment. *U.S. Const. Amend. VIII.* However, use of force post conviction does not amount to a constitutional violation if the force was “applied in a good faith effort to restore discipline and order and not ‘maliciously and sadistically for the very purpose of causing harm.’” *Vinyard*, 311 F.3d at 1349 n.15 (*Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)).

Similar to the factors used to analyze use of force claims under the Fourteenth Amendment, *supra*, “to determine if an application of force [under the Eighth Amendment] was applied maliciously and sadistically to cause harm, a

variety of factors are considered including: ‘the need for the application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response.’” *Skrnich v. Thornton*, 280 F.3d 1295, 1300 (11th Cir. 2002) (quoting *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992)).

“From consideration of such factors, ‘inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occurred.’” *Skrnich*, 280 F.3d at 1300-01 (quoting *Whitley*, 475 U.S. at 321).

In judging the constitutionality of a use of force under the Eighth Amendment, courts afford prison administrators “wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Hudson*, 503 U.S. at 7.

In considering whether prison officials are entitled to judgment as a matter of law: “Courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness and infliction of pain under the standard we have discussed, the case should not go to the jury.” *Campbell v.*

Sikes, 169 F.3d 1353, 1375 (11th Cir. 1999) (quoting *Whitley*, 475 U.S. at 322).

As Eleventh Circuit uses similar factors to judge whether an officer's use of force was applied "maliciously and sadistically" to cause harm rather than "in a good faith effort to maintain or restore discipline" is similar to the factors used to judge the propriety of excessive force under the Fourteenth Amendment, decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees. *Cottrell*, 85 F.3d at 1490, citing *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985).

Conclusion

As discussed, the level of force a law enforcement officer may legally exert under federal law is not cut and dry. It is

certain, however, that in virtually every officer's line of duty there will come a time when they will need to respond forcibly to a situation. Keeping this in mind, county officials must ensure that their law enforcement officers are equipped with proper training. The bad publicity and monetary pitfalls that can result from civil liability for an officer's excessive use of force cannot be ignored, but may be prevented if appropriate training is provided.

County officials are advised to keep abreast of changes in the federal law governing use of force by law enforcement officers in their jurisdiction. The legal standards required to present a cognizable federal excessive force claim depends on the status of the plaintiff at the time of the incident and the various circumstances confronting the officer.

Understanding the nuances of each type of federal excessive force claim will enable a county official to be able to immediately assess potential liability. □

REFERENCES

1 See *California v. Hodari D.*, 499 U.S. 621, 625 (1991).

ⁱ See *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

ⁱⁱ Minor uses of force where there is little injury are often held to be de minimis and not rising to a constitutional violation. See *Nolin v. Isbell*, 207 F.3d 1253, 1255 (11th Cir. 2000) (Officer grabbed plaintiff and shoved him a few feet inside the vehicle, pushed a knee into the back of his head, and handcuffed him); *Gold v. City of Miami*, 121 F.3d 1442, 1444 (11th Cir. 1997).

ⁱⁱⁱ The second, third, sixth, eighth, ninth, and tenth circuits follow the continuing seizure approach.

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