"It's the Officer's Fault!"

Consideration of Police Officers' Pre-seizure Conduct in Use-Of-Force Cases

By Randall Wood and Jeffrey C. Hendrickson

This article will explore the complexities arising from claims that a use of force could have been avoided.

On a warm summer evening in Tahlequah, Oklahoma, Joy Rollice anxiously called police and reported that her ex-husband was in her garage, was drunk, would not leave and that it was "going to get ugly real quick." When officers arrived at the residence, they encountered the intoxicated Dominic Rollice at a side entrance to the garage. Rollice was fidgeting with something in his hands. He refused to leave the garage and refused to come out to be patted down for weapons. Instead, Rollice retreated into the garage followed by the officers. One officer ordered Rollice to stop and turn around, after which Rollice grabbed a hammer and stood facing the officers with the hammer held in both hands at shoulder level. Alarmed, the officers backed up, drew their weapons and repeatedly told Rollice to drop the hammer, explaining that they just wanted to talk to him. Rollice refused.

At this point, Rollice was less than ten feet away from the officers in the small garage. He pulled the hammer back behind his head, which the officers took as preparation to either throw the hammer or charge at the officers. Rollice shouted "One of us going to f—ing die tonight." The officers reacted by firing multiple shots, killing Rollice.

Mr. Rollice's family sued, claiming that the officers provoked the situation by entering the garage and confronting Rollice. See *Bond v. City of Tahlequah, Oklahoma*, 981 F.3d 808, 816 (10th Cir. 2020), *cert. granted, judgment rev'd*, 142 S. Ct. 9 (2021). As will be discussed below, ultimately the Supreme Court granted qualified immunity to the officers. *Bond* illustrates the many issues that arise in officer shooting cases. Did the officers engage in reckless or deliberate conduct that unreasonably created the need for the use of force? If so, can blame for the shooting be shifted to the officers even assuming the deceased posed a mortal threat to the officers at the precise moment of the shooting? Moreover, should the Court consider the actions of the officers in the minutes or hours leading up to the shooting? Or should the Court only consider the moments immediately preceding the officer's decision to shoot? In sum, can an apparently justifiable officer shooting be transformed into an excessive use of force by questioning the actions of the officers leading up to the shooting? As we will discuss, courts have wrestled with these issues for many years resulting in complex and divergent paths of thought.

This article will explore the complexities arising from claims that a use of force could have been avoided. The purpose of this article is not to advocate for any particular view, but instead to provide insights and suggestions when facing claims that officers allegedly provoked or mishandled the situation, failed to deescalate, engaged in bad tactics, or otherwise "should have done something different." For informative com-

Randall Wood is a partner at Pierce Couch Hendrickson Baysinger & Green in Oklahoma City, Oklahoma, and is a long-time member of DRI and the Oklahoma Association of Defense Counsel. He represents governmental and corporate entities, elected officials, deputies and police officers throughout Oklahoma, defending against civil rights claims. Randall also represents government and corporate entities in numerous labor and employment issues, including wage claims, discrimination claims, and claims under the ADA and FMLA. **Jeffrey C. Hendrickson** is a partner in the Oklahoma City office of the firm of Pierce Couch Hendrickson Baysinger & Green, L.L.P. He practices primarily in the areas of government liability defense, medical malpractice defense and labor/employment defense, and writes frequently about issues in constitutional law and federal and state statutory interpretation.

mentary on this issue, see Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?*, in Critical Issues in Policing 572-74 (Dunham & Alpert eds. 2015); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rights L. Rev. 261 (2003); Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 Wm. & Mary Bill of Rights J. 651 (2004); Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. Tol. L. Rev. 1 (2018); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Preseizure Conduct, and Imperfect Self-defense*, 2018 U. Ill. L. Rev. 629 (2018); Ryan Hartzell, C. Balisacan, Note, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda*, 54 Harv. C.R.-C.L. L. Rev. 327 (2019); Leonard J. Feldman, *"Make My Day!" The Relevance of Pre-Seizure Conduct in Excessive Force Cases*, 4 How. Hum. & C.R.L. Rev. 27, 29 (2020).

Notwithstanding scholarly input, the courts will determine how these issues are resolved. Certain Supreme Court decisions, discussed below, provide important guideposts for the future in this evolving area of the law. Meanwhile, within the Circuit Courts, three schools of thought have emerged: the narrow approach, the broad approach, and the "segmented" approach. Each will be considered and compared to existing Supreme Court jurisprudence.

Supreme Court Guideposts

The three seminal cases which govern claims that officers unreasonably provoked the use of force are *Tennessee v. Garner,* 471 U.S. 1 (1985), *Graham v. Connor*, 490 U.S. 386 (1989), and *California v. Hodari*, 499 U.S. 621 (1991). In *Garner*, the Supreme Court held that the Fourth Amendment allows an officer to use deadly force if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." 471 U.S. 1, 11. The use of force must be judged under the "totality of the circumstances." 471 U.S., at 8–9. Shortly after in *Graham v. Connor,* the Supreme Court ruled that the reasonableness of a use of force also requires "careful attention to the facts and circumstances of each particular case …" 490 U.S. at 396. The Supreme Court also emphasized that the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. The Supreme Court also cautioned that 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." *Id*. at 396 – 97.

In *Hodari*, the Supreme Court held that no seizure occurred under the Fourth Amendment until either the suspect submitted to an assertion of authority by the officer or a physical apprehension of the suspect occurred with the intent to restrain. A Fourth Amendment seizure does not occur when officers order a suspect to stop but the suspect continues to flee. 499 U.S. at 626-627. <u>See also</u> *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021).

Circuit courts have drawn very different conclusions from these Supreme Court cases. Some, such as the First, Third, Ninth, and Tenth Circuits, have focused on the "totality of the circumstances" analysis. These courts believe that the actions of the officers leading up to the use of force also require examination. Other courts, such as the Second, Fourth, Fifth, Eighth, and Eleventh Circuits, emphasize that the actions of the officer must not be judged with 20/20 hindsight but rather must account for stressful, split-second judgments that officers must make in tense and rapidly evolving confrontations with armed suspects. These courts have focused on the circumstances that existed at the precise moment of the shooting and ignored the actions of the officers that led up to the shooting. The Sixth and Seventh Circuits have charted a third path, using a segmented approach that attempts to divide uses of force into discrete events and then judge the actions of the officers in each segment.

Other more recent Supreme Court cases must also be considered. Notably, the Court has scrutinized the "circumstances at the moment when the shots were fired." <u>See</u> *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014); <u>see also</u> *Scott v. Harris*, 550 U.S. 372, 385-86 (2007). This focus continued in the *Sheehan* case. In *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1216 (9th Cir. 2014), officers entered the room of Ms. Sheehan who was experiencing a mental health crisis. Sheehan responded by grabbing a large knife and threatening to kill the officers. The officers retreated from the room and called for backup. Moments later, the officers chose to reenter the room. Sheehan was pepper sprayed but would not drop the knife and was only a few feet away when the officers fired multiple shots, wounding her.

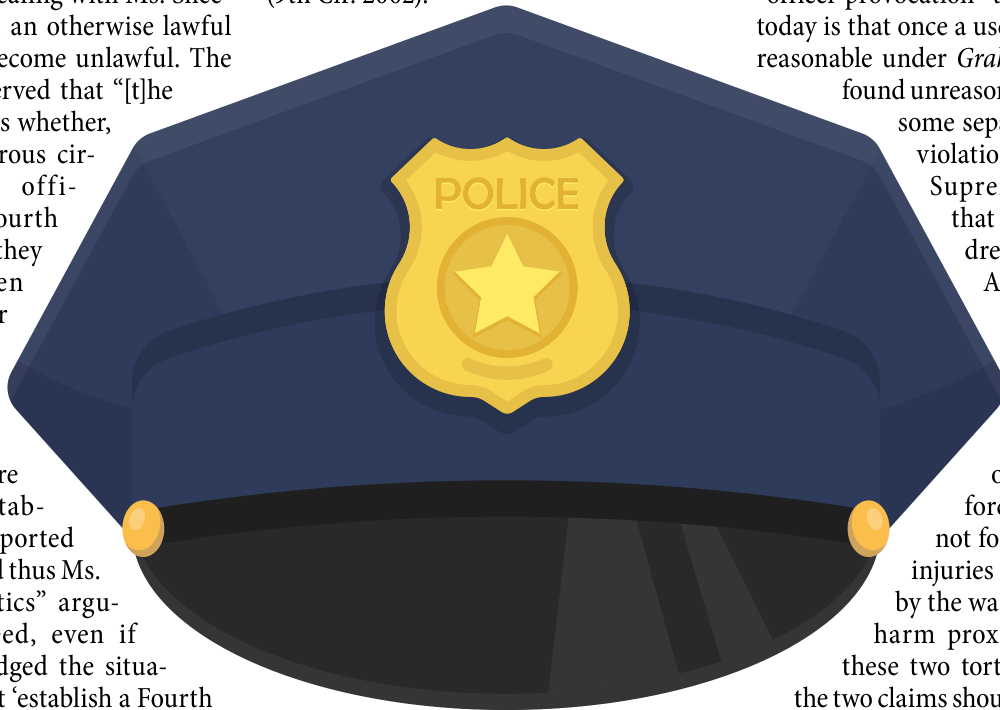
The Ninth Circuit ruled that it was clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." The Ninth Circuit also ruled a jury could find that the officers "provoked" Sheehan by needlessly forcing a confrontation with her. *Id*., at 1216, 1229.

However, the Supreme Court rejected the Ninth Circuit's analysis and ruled that the officers could not be held personally liable for the injuries that Sheehan suffered. *City and County of San Francisco, California v. Sheehan*, 575 U.S. 600 (2015). The Supreme Court concurred with the Ninth Circuit on three points in its ruling. First, they agreed that the officers had the right to enter Ms. Sheehan's room the first time. Second, they further agreed that had Ms. Sheehan not been suffering from a mental disability, the officers could have lawfully entered her room a second time. The Supreme Court noted that police officers must move quickly to protect others. "This is true even when, judged with the benefit of hindsight, the officers may have made 'some mistakes.' [citation omitted] The Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments." *Id*. at 612, *citing Plumhoff v. Rickard*, 572 U.S. 765, 775. Third, and most importantly, the Supreme Court and the Ninth Circuit agreed that when the officers opened the door a second

time, "their use of force was reasonable." *Id*. at 612. "Nothing in the Fourth Amendment barred [the officers] from protecting themselves, even though it meant firing multiple rounds." *Id*.

At this juncture the Supreme Court parted ways with the Ninth Circuit. As noted previously, the Ninth Circuit had ruled that because the officers did not use different tactics in dealing with Ms. Sheehan's mental illness, an otherwise lawful use of force could become unlawful. The Supreme Court observed that "[t]he real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability." *Id*. at 613. The Supreme Court ruled that there was no clearly established law that supported the Ninth Circuit and thus Ms. Sheehan's "bad tactics" argument failed. "Indeed, even if [the officers] misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" *Id*. at 615, *citing Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002). The Court then reaffirmed the principle established in *Graham v. Connor* that "[c]ourts must not judge officers with "the 20/20 vision of hindsight.'" *Sheehan*, 575 U.S. at 615.

When evaluating the role of an officer's pre-seizure conduct, courts and interested practitioners must also consider *County of Los Angeles. v. Mendez*, 581 U.S. 420, 137 S. Ct. 1539 (2017). In *Mendez*, officers searched a residence to locate a parolee. While searching the backyard, two deputies opened the door to a shack and found two men napping. Mendez rose from the bed holding a BB gun. One of the deputies shouted "gun!", and the officers then shot the two men multiple times. The Ninth Circuit held that even if the officers' use of force was reasonable under *Graham v. Connor*, they could still be liable under the Ninth Circuit's provocation rule, which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation." *Mendez v. County. of Los Angeles*, 815 F.3d 1178, 1184 (9th Cir. 2016); *see also Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002).



This "provocation rule" was rejected by the Supreme Court, which observed that this provocation rule had been "sharply questioned" outside the Ninth Circuit. *County of Los Angeles. v. Mendez*, 581 U.S. 420, 427, *citing Sheehan* at 135 S.Ct. 1765, 1776, n. 4. The Supreme Court concluded that the Ninth Circuit's provocation rule was "fundamentally flawed" because it used one constitutional violation "to manufacture an excessive force claim where one would not otherwise exist." 581 U.S. at 427. The Supreme Court concluded that "[i]f there is no excessive force claim under *Graham*, there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately." *Id*., at 429.

However, *Mendez* may not have been a rejection of all claims based upon allegations of unreasonable provocations of the officers. Those arguing for consideration of an officer's pre-seizure conduct emphasize two points from *Mendez*. First, the respondents argued that the actions of the officers should be assessed under the "totality of the circumstances" which, the respondents urged, "means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Id*., see footnote at 429. The Supreme Court rejected this broader "officer provocation" theory: "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." *Id*. Second, the Supreme Court noted that "there is no need to dress up every Fourth Amendment claim as an excessive force claim. For example, if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused by the warrantless entry. The harm proximately caused by these two torts may overlap, but the two claims should not be confused." *Id*. at 431.

The Narrow View: Courts Limiting Consideration of Officer Conduct Leading Up to a Use of Force

Many Courts have rejected claims that the actions of the officer leading up to the ultimate use of force should be considered in the use of force analysis. The Second, Fourth, Fifth, Eighth, and Eleventh Circuits have adopted this view.

For example, in *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996), an officer locked his service revolver and radio in the trunk of his car, leaving the officer with only his personal.22 caliber handgun in his pocket. The officer chased a juvenile and ended up in a struggle on the ground, surrounded by other juveniles who joined in assaulting the officer. During the struggle, the officer shot the juvenile. The family claimed that the officer violated a several department policies that "created a situation in

which the use of deadly force became necessary." *Id*. at 92.

The Second Circuit rejected this argument, reasoning that "[the officer's] actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." *Id*. *See also Terebesi v. Torreso*, 764 F.3d 217, 235 (2d Cir. 2014) ("In cases [where the officer's prior conduct may have contributed to later need to use force], courts in this Circuit and others have discarded evidence of prior negligence or procedural violations, focusing instead on 'the split-second decision to employ deadly force.'"); *Cox v. Vill. of Pleasantville*, 271 F. Supp.3d 591, 617 (S.D.N.Y. 2017) (district court considered the 1.3 seconds just prior to officer's first shot.)

The Fourth Circuit has a robust body of cases that limit the use of force analysis to the moments immediately preceding the use of force. A leading case is *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir.1991). The plaintiff in that case argued that the officer had violated proper police procedures when the officer approached the suspect's car without using a flashlight and proper backup. The plaintiff argued that the officer had thus "recklessly created a dangerous situation during the arrest" which led to the officer's use of deadly force. *Id*., at 791. Relying on *Graham's* reference to "split second judgments" and Seventh Circuit decisions, the Fourth Circuit ruled that events leading up to the officer's decision to use force were "not relevant and are inadmissible." *Id*. at 792. Other Fourth Circuit cases following this same rule are *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir.1996); *Waterman v. Batton*, 393 F.3d 471, 476–77 (4th Cir. 2005); *Ray v. Roane*, 948 F.3d 222, 225 (4th Cir. 2020), *and Drewitt v. Pratt,* 999 F.2d 774, 778–80 (4th Cir.1993) (rejecting a claim that an officer unreasonably provoked a shooting by failing to properly identify himself as a police officer).

The Fifth Circuit has likewise recognized that second-guessing the actions of an officer leading up to an otherwise proper use of force could allow common law negligence standards to seep into the use of force analysis. In *Young v. City of Killeen, Tex*., 775 F.2d 1349, 1353 (5th Cir. 1985), the Fifth Circuit noted that the "constitutional right to be free from unreasonable seizure has never been equated by the [Supreme Court] with the right to be free from a negligently executed stop or arrest." The Fifth Circuit exercised this principle in *Fraire v. City of Arlington*, 957 F.2d 1268, 1275–76 (5th Cir. 1992), where the plaintiff asserted that the officer did not follow "established police procedures" and presumably "manufactured the circumstances that gave rise to the fatal shooting." *Id*. at 1275. The Fifth Circuit rejected this argument, relying on Young and re-emphasizing that "even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections." *Id*., at 1276. *See also Bazan v. Hidalgo Cnty*., 246 F.3d 481, 493 (5th Cir. 2001) ("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 use of deadly force]." Emphasis in original.); *Rockwell v. Brown*, 664 F.3d 985, 992–93 (5th Cir. 2011); *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *Hover v. Brenner*, 2000 WL 1239118, at *1 (5th Cir. Aug. 7, 2000) (per curiam) (noting that, "[i]n this circuit, § 1983 liability cannot be premised on the fact that an officer 'creates the need' to use excessive force by failing to follow police procedure").

The Eighth Circuit subscribes to this view as well. In *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995), the court emphasized that the Supreme Court's "use of the phrases 'at the moment' and 'split-second judgment' [in *Graham v. Connor*] are strong indicia that the reasonableness inquiry extends only to those facts known to the officer at the precise moment the officers effectuate the seizure." *Schulz* also rejected the argument that the officer may be liable for not using different tactics. "Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry." *Id*. at 649. *See also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir.1993) (reviewing "only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment" because the "Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general."); *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995); and *Sok Kong Tr. for Map Kong v. City of Burnsville*, 960 F.3d 985, 993 (8th Cir. 2020).

The Eleventh Circuit follows this same path. *Menuel v. City of Atlanta*, 25 F.3d 990, 996–97 (11th Cir. 1994); *Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir. 2003), as amended (Sept. 29, 2003).

The Broad View: Courts Examining Pre-seizure Conduct as Part of the Use of Force Analysis

The First, Third, Ninth, and Tenth Circuits adopt a broader view that studies the officer's actions leading up to a use of force in evaluating the reasonableness of the officer's actions. In *Abraham v. Raso,* 183 F.3d 279 (3d Cir. 1999), the Third Circuit rejected the reasoning of other Circuits and concluded that "all of the events transpiring during the officers' pursuit of [the suspect] can be considered in evaluating the reasonableness of [the officers'] shooting." *Id*., 292. See also *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 n. 4 (1st Cir.1995).

The Tenth Circuit has one of the more complex bodies of case law analyzing an officer's pre-seizure conduct leading up to a use of force. Initially, the Tenth Circuit limited the analysis to the seizure itself—not the events leading up to the seizure. For instance, in *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994), the court observed: "'Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment.'" *Id*. at 1256, *quoting Cole v. Bone,* 993 F.2d 1328, 1333 (8th Cir.1993). Oddly, however, the *Bella* court also included a footnote observing, "Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable." 24 F.3d at 1256, n. 7. In subsequent cases, the Tenth Circuit moved toward the rationale advanced in this footnote and has declared that the "reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such

force." *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995) (dicta). This approach was followed in *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997). There, the officers approached Mr. Allen who was known to be possibly suicidal and sitting in a car with a gun. Witnesses accused the officers of quickly running up and "screaming" at Allen. Allen pointed his gun at the officers. Shots were exchanged, killing Allen. The Tenth Circuit concluded that this witness testimony could support a claim that the "officers' actions were reckless and precipitated the need to use deadly force." *Id.* at 841. See also *Medina v. Cram,* 252 F.3d 1124, 1132 (10th Cir. 2001); and *Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019).*

To make matters even more complicated in the Tenth Circuit, that court has also differentiated cases based on whether the officer is dealing with a mentally ill or disturbed suspect.

In spite of decisions considering more than the time when force is actually used, the Tenth Circuit has repeatedly emphasized that when evaluating whether the officer provoked the subsequent use of force, "only reckless and deliberate conduct that is 'immediately connected to the seizure will be considered.' Mere negligence or conduct attenuated by time or intervening events is not to be considered." *Ceballos* at 1214, quoting *Hastings v. Barnes*, 252 F. App'x 197, 203 (10th Cir. 2007); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 & n. 7 (10th Cir.1995) ("Mere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983."). Additionally, "[t]he conduct of the officers before a suspect threatens force is relevant only if it is 'immediately connected' to the threat of force." *Thomson v. Salt Lake County*, 584 F.3d 1304, 1320 (10th Cir. 2009).

To make matters even more complicated in the Tenth Circuit, that court has also differentiated cases based on whether the officer is dealing with a mentally ill or disturbed suspect. *Giannetti v. City of Stillwater*, 216 Fed. Appx. 756, 764 (10th Cir. 2007) (observing the detainee's known mental health must be taken into account when considering use of force). For example, when a mentally ill suspect hit with pepperballs charged at the officers with a raised knife, the officers could use deadly force. *Clark v. Colbert,* 895 F.3d 1258 (10th Cir. 2018) (rejecting claims that the officers provoked the situation). Nonetheless, these decisions open the door to arguments that law enforcement did not properly consider a patient's or detainee's mental health before the need for deadly force arose.

In *Est. of Valverde v. Dodge*, 967 F.3d 1049, 1067–68 (10th Cir. 2020), the Tenth Circuit noted that in prior cases, officer actions that were considered possibly "reckless" consisted of a "police onslaught at the victim." *Id*. Additionally, in those prior cases the officers were dealing with "an impaired, emotionally distraught person." *Id*. However, the "calculus is very different when seeking to apprehend someone believed to be involved in high-violence crimes." *Id*. And, in a similar vein, the Tenth Circuit has recognized that tension may exist between the Supreme Court's decision in *Mendez* and the Tenth Circuit's "officer provocation" approach. *See Pauly v. White*, 874 F.3d 1197, 1220 (10th Cir. 2017) (noting that *Mendez* did not definitely rule on this issue and stating "[t]hus, at least for now, *Sevier and Allen* remain good law in this circuit.")

Critics of this "officer provocation" rule argue that, in effect, the Tenth Circuit and other Circuits use the actions of an officer to find an unreasonable use of force "even when an officer uses deadly force in response to a clear threat of such force being employed against him …" *Bond v. City of Tahlequah*, 981 F.3d 808, 816 (10th Cir. 2020). In fact, that was the Tenth Circuit's concluding observation when reviewing the deadly force used against Mr. Rollice at the start of this article.

In *Bond*, the Tenth Circuit ruled that under the broad view, an officer could be held liable for shooting a suspect even if "'viewed in isolation, the shooting was objectively reasonable under the Fourth Amendment.'" *Id*. at 818 (quoting *Hastings v. Barnes*, 252 F. App'x 197, 203 (10th Cir. 2007)). The Tenth Circuit concluded that a "jury could find that the officers recklessly created a lethal situation by driving [Rollice] into the garage and cornering him with his tools in reach. When [Rollice] grabbed the hammer, the officers drew firearms and began shouting. A reasonable jury could find that the officers' reckless conduct unreasonably created the situation that ended [Rollice's] life." *Bond v. City of Tahlequah*, Oklahoma, 981 F.3d 808, 824 (10th Cir. 2020). In the Tenth Circuit's view, such a jury finding could transform an otherwise justifiable use of force into a violation of the Fourth Amendment.

The story does not end there, though. The officers sought and were granted certiorari review from the Supreme Court. They argued the Tenth Circuit's broad approach mirrored the Ninth Circuit's "provocation rule" that was struck down in *Mendez*. The officers also argued that this broad approach conflicted with *Sheehan's* ruling that a plaintiff "cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" 575 U.S. at 615. They thus asked the Supreme Court to resolve the conflict among the Circuits discussed in this article.

Although the Supreme Court decided in the officers' favor, it bypassed the issue at the center of this article. *City of Tahlequah, Oklahoma v. Bond*,142 S. Ct. 9, 11 (2021). After a relatively brief presentation of the facts, the Court held the law was not clearly established that the actions of the officers were unlawful. It easily dispatched the Tenth Circuit's reasoning in a few sentences. *Id*., at 12. As to the Circuit conflict and the issue of broader concern, the *per curiam* opinion stated: "We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law." *Id*., at 11. Thus,

the officers were granted qualified immunity, even though the larger question about the proper analysis of pre-seizure conduct remains.

The Segmented View: Courts Separating an Entire Incident Into Portions and Considering the Fourth Amendment Implications at Each Step

The Sixth Circuit and the Seventh Circuit have carved out a middle ground between a broad and narrow view of officer pre-seizure conduct. An important case in this area is *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994). In *Plakas*, the plaintiff argued that the officers should have used a variety of different methods in their protracted standoff with a suspect armed with a fire poker that he swung at the officers repeatedly. The Seventh Circuit ably articulated the unique position of officers as "troublemakers" in such tense and dangerous situations:

> Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

19 F.3d at 1150. The Seventh Circuit divided the incident up into discrete segments to determine whether the actions of the officers were reasonable at each stage. *Id*. However, it can be difficult to see practical differences between this "segmented" approach and the "narrow approach" discussed previously. In *Plakas*, the court refused to second-guess the pre-seizure conduct of the officers: "We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct." *Id.*

Generally, cases from the Seventh Circuit counsel against using pre-seizure conduct to challenge the propriety of a use of force that otherwise would be reasonable at the moment that force was used. *See Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("pre-seizure conduct is not subject to Fourth Amendment scrutiny."); *Marion v. City of Corydon, Ind.*, 559 F.3d 700, 705 (7th Cir. 2009)("[p]re-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment."); *see also Gysan v. Francisko*, 965 F.3d 567, 570 (7th Cir. 2020) (citing *Mendez* for the proposition that "officers who make errors that lead to a dangerous situation retain the ability to defend themselves."). Despite this general approach, other Seventh Circuit cases seem receptive to a broader approach. In *Deering v. Reich,* 183 F.3d 645 (7th Cir. 1999), the Seventh Circuit noted the approach announced in *Plakas* was to "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." *Id*., at 652, quoting *Plakas*, 19 F.3d at 1150. However, *Deering* concluded that "all of the events that occurred around the time of the shooting are relevant. In other words, the totality of the circumstances is what must be evaluated." *Id*., at 652. The Seventh Circuit has acknowledged that the law in this area is unclear. See *Williams v. Ind. State Police Dep't*, 797 F.3d 468, 482-83 (7th Cir. 2015) ("Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a Fourth Amendment claim.").

The Sixth Circuit has followed the Seventh Circuit in the segmented approach. *See Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996); *Claybrook v. Birchwell*, 274 F.3d 1098, 1103 (6th Cir. 2001), and *Greathouse v. Couch*, 433 F.Appx. 370, 372-373 (6th Cir. 2011). However, this Circuit has also rejected arguments that an officer's pre-seizure conduct is part of the analysis of subsequent use of force. *See Thomas v. City of Columbus, Ohio,* 854 F.3d 361, 365 (6th Cir. 2017) ("In this circuit, we consider the officer's reasonableness under the circumstances he faced at the time he decided to use force.... We do not scrutinize whether it was reasonable for the officer "to create the circumstances."); *Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 406–07 (6th Cir. 2007), quoting *Carter v. Buscher,* 973 F.2d 1328, 1332 (7th Cir.1992)) ("[T]he 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.'").

The Future of Pre-seizure Conduct Assessments

Pre-seizure conduct assessments continue to be a serious concern. In fact, this area of Fourth Amendment law is among the most encountered issues in any use-of-force analysis and will continue to be so. Practitioners must be aware of the relevant Circuit-Court law to best identify lines of inquiry for written discovery and deposition discovery, as well as to assess their client's exposure. A robust knowledge of the applicable law will likewise help in framing legal arguments for dismissal, summary-judgment, or post-trial relief. As things stand, officers in several of the jurisdictions discussed above could make a valid argument that any "law" barring certain pre-seizure conduct was not clearly established on the date of the incident.

While the legal waters on this issue are indisputably murky, it is these authors' hope that the Supreme Court resolves the circuit-split in the near future. Given the number of decisions interpreting the Fourth Amendment, it is difficult to conceive how this fundamental issue—when to begin analyzing the reasonableness of an officer's conduct—has evaded an answer. As the Seventh Circuit aptly pointed out, this question is present in every use of force case. *See Plakas*, 19 F.3d at 1150. For now, officers and practitioners are left to know the law's particulars in their jurisdiction, and argue accordingly.