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Law Enforcement Use of Force: The Objective Reasonableness Standards under North Carolina and Federal Law

J. Michael McGuinness

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LAW ENFORCEMENT USE OF FORCE:
THE OBJECTIVE REASONABLENESS STANDARDS
UNDER NORTH CAROLINA AND FEDERAL LAW

J. MICHAEL MCGUINNESS*

The police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. [T]he officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest.

[W]e must avoid our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone

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*B.A. Cum Laude, North Carolina; J.D., North Carolina Central; post-graduate study, National Law Center, George Washington University. Mr. McGuinness practices law enforcement liability and civil rights litigation from his offices in Elizabethtown, North Carolina and Washington, D.C. Mr. McGuinness has served as counsel in numerous use of force and other law enforcement cases. c 2002 J. Michael McGuinness. jmichael@mcguinnesslaw.com. 910-862-7087

This article is dedicated to Officer Reuben Hassell and Deputy Frank Hicks, who were prosecuted by the State of North Carolina and completely exonerated of criminal excessive force charges. Deputy Hicks' manslaughter charge was dismissed at the close of the State's evidence. Officer Hassell's felonious assault charges were resolved by a jury verdict. Multiple renowned use of force experts and many others were dismayed that Deputy Hicks and Officer Hassell were not awarded badges of honor, as opposed to being indicted by the State. Fundamental misunderstandings as to what constitutes excessive force led to these flawed criminal excessive force cases.


facing a possible assailant than to someone analyzing the question at leisure.³

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I. INTRODUCTION

Law enforcement use of force is among the most controversial public interest topics throughout the country.⁴ The Supreme Court

³ Smith v. Freeland, 954 F.2d 343, 347 (6th Cir. 1992).
has observed that there is often a "hazy border between excessive and acceptable force."\textsuperscript{5} Federal and North Carolina courts regularly struggle with these often difficult cases. Many of the headline-grabbing cases invoke strong emotion, often pitting interest groups against officers even when there is no evidence of improper motivations.\textsuperscript{6}

High profile cases in North Carolina have focused concern on the underlying legal standards in alleged police misconduct cases.\textsuperscript{7} The most common form of alleged police misconduct is excessive force.\textsuperscript{8} The central issue in most use of force cases is typically \textit{whether an objectively reasonable officer could have reasonably believed that the force employed was appropriate under the circumstances}.\textsuperscript{9}

In a split second, officers are required to evaluate and employ force against criminal suspects to thwart apparent dangers to citizens and themselves.\textsuperscript{10} The officer is often alone in this nightmare, like a "pedestrian in Hell."\textsuperscript{11} The officer's environment in use of force deci-


\textsuperscript{6} See Brown v. Gilmore, 278 F.3d 362, 370 (4th Cir. 2002); Schwartz, 2002 WL 312501; Volpe, 224 F.3d 72.

\textsuperscript{7} One of the three primary United States Supreme Court cases arose from North Carolina. See Graham v. Connor, 490 U.S. 386 (1989). In North Carolina, even investigations into alleged excessive force have generated high profile litigation. See In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (2001), where an unprecedented ex parte procedure was used by the State Bureau of Investigation, but ultimately declared improper, to obtain confidential personnel and internal affairs files of officers without a warrant and without notice to the officers and opportunity to be heard.


\textsuperscript{10} See Saucier, 533 U.S. 194; Park v. Shiflett, 250 F.3d 843, 853 (4th Cir. 2001); Anderson v. Russell, 247 F.3d 125, 129 (4th Cir. 2001); McLenagan v. Karness, 27 F.3d 1002, 1007 (4th Cir. 1994). "[A]n officer oftentimes only has a split second to make the critical judgment of whether to use his weapon." Ford v. Childers, 855 F.2d 1271, 1276 (7th Cir. 1988).


"A police officer's life is always at risk, no matter how routine the assignment might seem." National Law Enforcement Officers Memorial Fund, Inc., Police Deaths Mount Nationwide, <http://www.nleomf.com>, at 1. "On average, one police officer dies within the line of duty nationwide every 54 hours." Id. "There are more than
sion-making is particularly unique because of the time pressures to act immediately without "armchair reflection"\(^{12}\) and because the lives of officers and bystanders are often at immediate risk.

Many of these split second decisions by officers to employ force are correct, while some are mistaken. Under what circumstances does a mistaken belief that deadly force is necessary subject an officer to civil, criminal or civil rights liability? Generally, if the officer's mistaken belief is objectively reasonable under the circumstances, then the officer is not subject to any liability. The perceived danger must only be apparent, not actual, in order to justify the use of deadly force. North Carolina and federal law provide that where officers make reasonable mistakes, there is generally no liability.

Professor Rubin of the Institute of Government at the University of North Carolina has observed that "despite its place in North Carolina jurisprudence, however, the excessive force element has been difficult to apply. The principle difficulty has been with distinguishing the requirement that the Defendant's force not be excessive, or unreasonable, from the reasonable belief requirement embodied" in the law.\(^{13}\) Recent cases have clarified these issues, especially *Saucier v. Katz*,\(^{14}\) where the Supreme Court reaffirmed recognition of the doctrine of mistaken beliefs in use of force cases.

This article analyzes use of force law under North Carolina and federal standards. This article emphasizes methodology and leading Supreme Court, Fourth Circuit and North Carolina cases. Statutory and common law use of force standards under North Carolina law including self defense and apparent dangers are explored. The article analyzes the prevailing federal liability standards which are employed in determining whether use of force is excessive, particularly in "mistaken belief" cases. Finally, the nature of expert testimony typically admissible in use of force litigation is reviewed.

64,000 criminal assaults against our law officers each year resulting in more than 22,000 injuries." *Id.* Over fourteen thousand law enforcement officers have been killed. *The Officers* at 1. The most common source of death of officers occurs from murders committed by criminal suspects in the process of arrest. See *Kenneth Peak, Policing America: Methods Issues and Challenges* 359 (Prentice Hall 2d ed. 1993).


II. THE POLICE ENVIRONMENT AND USE OF FORCE LIABILITY

Law enforcement involves protecting citizens from harm, investigating alleged or suspected crimes, apprehending and taking suspects into custody, and countless other challenging related duties. Law enforcement officers are required to respond to citizen requests for assistance and to protect citizens and themselves.15 "Police officers have a duty to apprehend lawbreakers..." The foremost mission of an investigating law enforcement officer is to protect all citizens from physical and other harm and to apprehend criminal suspects. "[P]olice must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time." As Judge Fox of the Eastern District of North Carolina explained:

It is the duty of a law enforcement officer who is assaulted to stand his ground, carry through on the performance of his duties, and meet force with force, so long as he acts in good faith and uses no more force than reasonably appears necessary to effectuate his duties and save himself from harm.18

Thus, use of force necessarily goes with the law enforcement turf.

A number of factors have contributed to the environment necessitating police use of force in response to apparent dangers. Civil rights advocates have challenged police for the failure to protect citizens from better armed criminals. This phenomenon has been particularly prevalent in the alleged domestic violence context.19 Law-abiding citizens rightfully demand instantaneous and decisive law enforcement responses to their legitimate needs. Citizens are quick to complain when criminal offenders are not apprehended. Courts have generally recognized that law enforcement officers are vulnerable to unfounded claims of abuse.20

Like most jurisdictions, North Carolina courts have become a common forum for various types of alleged excessive force cases

15. Failure to properly act can result in malfeasance in office and other charges against law enforcement officers. See N.C. Gen. Stat. § 14-230.
17. Menuel v. City of Atlanta, 25 F.3d 990, 996 (11th Cir. 1994).
19. Section 1983 and other cases are developing liability theories against law enforcement officers and agencies for failing to properly respond to domestic violence. See Watson v. City of Kansas City, 857 F.2d 690 (10th Cir. 1988).
20. See Brooks v. Scheib, 813 F.2d 1191, 1194 (11th Cir. 1987) (holding that officers working in high crime areas are likely subject to higher numbers of complaints).
against law enforcement officers. North Carolina has begun to indict officers for alleged excessive force related crimes with greater frequency. alleged excessive force may give rise to civil, criminal, civil rights and administrative charges under North Carolina law. Although "the amount of deadly force since the early 1970s has dropped 50% in the major cities," alleged excessive force cases against law enforcement officers continue to explode. Alleged police misconduct claims encompass a wide variety of potential tort-related claims. Law enforcement officers are subject to civil, civil

21. State v. Hicks (Hoke County Super. Ct., No. 98 CRS 10492, Nov. 3, 1998; State v. Hassell (Beaufort County Super. Ct.; 98 CRS 5709). In State v. Hicks, the Honorable Jack Thompson, Superior Court Judge, issued an order dismissing an alleged voluntary manslaughter charge against Hoke County Deputy Hicks at the close of the State's evidence. There, the criminal suspect led Deputy Hicks on a high speed chase and temporarily lost Deputy Hicks. Later, Deputy Hicks found the suspect near his van, whereby the suspect jumped in his van and attempted to drive off. Deputy Hicks observed the suspect reach down to the floor of the van as if he was retrieving a gun. The suspect was driving the van towards Deputy Hicks and four citizens. Deputy Hicks consequently shot at the suspect eleven times, striking and killing him. There was no weapon in the suspect's van. However, the suspect's gesture implied such a weapon. Judge Thompson dismissed the case at the close of the State's case. His announced decision appeared to rely heavily upon N.C. Gen. Stat. § 15A-401.

22. See Hicks (Hoke County Super. Ct., No. 98 CRS 10492); Hassell (Beaufort County Super. Ct., 98 CRS 5709). See generally Nichols, Pursuit Leads To Felony Indictment, American Police Beat, Mar. 2002. In North Carolina, officers have been subjected to unlawful investigative tactics including warrantless seizures of confidential records in attempts to indict officers. See In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (2000).


25. See id., which summarizes the broad range of prospective civil and civil rights claims against police officers: negligence claims, claims based on arrest and detention involving warrantless arrests, arrests under unconstitutional statutes and ordinances, malicious prosecution, abuse of process, retaliatory prosecution, illegal searches and seizures, deprivations through improper use of informants and undercover agents, deprivation of First Amendment rights based on retaliatory actions, illegal interrogations, denial of medical attention, denial of counsel, defamation, verbal abuse and harassment, failure to provide police protection in various contexts including domestic violence, conspiracies to violate civil rights, interference with family relationships, police pursuits, failure to disclose or act upon exculpatory evidence, negligence or deliberate indifference in the establishment or maintenance of road blocks, misuse of weapons, defamation and invasion of privacy, discrimination
rights\textsuperscript{27} and criminal liability\textsuperscript{28} for excessive force.\textsuperscript{29} Similar legal


Most police officers are public officials and are therefore subject to the doctrine of public official immunity that immunizes them from common law tort claims where there is no malice or corruption. It is well settled that in North Carolina a public officer engaged in the performance of a governmental function involving the exercise of judgment and discretion may not be held liable for common law torts unless the action is corrupt, malicious or beyond the scope of authority. Smith v. Herner, 235 N.C. 1, 68 S.E.2d 783 (1952); Wiggins v. Monroe, 73 N.C. App. 44, 326 S.E.2d 39 (1985); Piggot v. Wilmington, 50 N.C. App. 401, 273 S.E.2d 752 (1981); Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); Barnett v. Karpinos, 119 N.C.App. 719, 460 S.E.2d 208 (1995). Police officers are public officials and are immune from liability from state tort claims.

27. Among the most common civil rights actions for alleged excessive force are Fourth Amendment claims brought under 42 U.S.C. § 1983. See Graham, 490 U.S. 386; Garner, 471 U.S. 1; Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987).

Individual capacity actions against officers under 42 U.S.C. § 1983 are subject to the doctrine of qualified immunity. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

In deciding whether a defendant is entitled to qualified immunity, the court initially examines whether the plaintiff has properly alleged a violation of a clearly established right, and then, if so, it is to decide whether the defendant's actions were objectively reasonable. Siegert v. Gilley, 500 U.S. 226, 231-35 (1991). "Clearly established" means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). See Sigman v. Town of Chapel Hill, 161 F.3d 782, 787 (4th Cir. 1998), where the Fourth Circuit affirmed Judge Beatty's grant of summary judgment to police officers who shot and killed a suspect whom the officers perceived was holding a knife and began walking towards the officers.

Law enforcement officers "are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992). Where there is a legitimate question as to whether the officer's conduct would objectively violate the Plaintiff's rights, qualified immunity "gives police officers the necessary latitude to pursue their [duties] without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law." Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987), abrogated by Horton v. California, 496 U.S. 128 (1990).
The purpose of qualified immunity is to "remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury." Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991). Furthermore, granting qualified immunity to law enforcement officers "ensures that [they] can perform their duties free from the specter of endless and debilitating lawsuits." Torchinsky v. Siwinski, 942 F.2d at 257, 260 (4th Cir. 1991). See Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987) ("certainly we cannot expect police officers to carry . . . . . . a Decennial Digest on patrol; they cannot be held to . . . . . . a legal scholar's expertise in constitutional law."). Finally, "permitting damages suits against governmental officials can entail substantial costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

28. Homicide and felonious assault charges under North Carolina law apply to law enforcement use of force allegations.

Federal statutes also preclude excessive force. 18 U.S.C. § 241 generally prohibits conspiracies to violate civil rights and 18 U.S.C. § 242 generally prohibits excessive force and other conduct that deprives one of a federal constitutional or statutory right. 18 U.S.C. § 242 "imposes a criminal penalty on anyone who, under color of state law, willfully subjects any person to the deprivation of rights secured by the Constitution or laws of the United States." United States v. Colbert, 172 F.3d 594, 596 (8th Cir. 1999).

The most recent interpretation of 18 U.S.C. § 242 by the Supreme Court appears in United States v. Lanier, 520 U.S. 259 (1997). There, a Tennessee State Judge was convicted for violating 18 U.S.C. § 242 for having sexually assaulted judicial employees and litigants. There, the Supreme Court held that 18 U.S.C. § 242 makes it "criminal to act (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." United States v. Colbert, 172 F.3d 594, 596 (8th Cir. 1999).

Excessive force is actionable under 18 U.S.C. § 242. See United States v. Dean, 722 F.2d 92, 94 (5th Cir. 1983), where the Fifth Circuit concluded that "excessive force can be the basis of a conviction under 18 U.S.C. Section 242." Many other recent cases have confirmed the reach and breadth of 18 U.S.C. § 242. See United States v. Daniels, 2002 WL 87573 (5th Cir. 2002); United States v. Baden, 912 F.2d 780 (5th Cir. 1990); United States v. Tines, 70 F.3d 891 (6th Cir. 1995); United States v. Golden, 671 F.2d 369 (10th Cir. 1982).


29. Law enforcement officers are under increasing legal challenge from multiple sources: their own agencies, the U.S. Attorney General, the U.S. Justice Department and its specialized Law Enforcement Prosecutions Unit, U.S. Attorneys, the North Carolina Attorney General and the Special Prosecutions Unit, local prosecutors, internal affairs units, Law Enforcement Training & Standards Commissions, special interest groups, the media, politicians, criminals, other government agencies, and others. Thus, it is not unusual for officers to have to defend themselves in overlapping federal, state and local forums which include criminal, civil, civil rights and administrative charges.
standards apply to most of these charges: the *objective reasonableness standard*.\(^{30}\)

Typical police encounters often pit officers against dangerous suspects at traffic stops, at domestic calls and in many other routine police operations. Routine police encounters often become confrontational. Suspects and citizens often physically overreact, thus requiring force to prevent violence and apprehend suspects. The physical risks to officers in such encounters present deadly threats.

The streets of North Carolina and America are increasingly loaded with criminals wielding sophisticated high tech illegal weaponry, bulletproof vests and special ammunition designed to kill officers on the front line.\(^{31}\) The streets are so full of illegal guns that they have been described as a "domestic Vietnam."\(^{32}\) Law enforcement officers are usually the prime targets of these illegal guns. "A police officer's life is always at risk, no matter how routine the assignment might seem."\(^{33}\)

III. **THE NORTH CAROLINA STATUTORY STANDARD:**


N.C. Gen. Stat. § 15A-401(d)(2) provides one of the applicable standards governing the use of force in North Carolina in connection with the apprehension of criminal suspects. This statute codifies the rights, duties and privileges of officers to employ force in the defense of others and self defense.\(^{34}\) It provides in pertinent part:

[A] law enforcement officer is justified in using deadly physical force upon another person . . . when it is or appears to be reasonably necessary thereby: a. [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; b. [t]o effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates

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31. See Peak, supra note 11, at 357 - 58.


33. See Floyd, supra note 11, at 1 ("On average, one police officer dies within the line of duty nationwide every fifty four hours." "There are more than sixty four thousand criminal assaults against our law officers each year resulting in more than twenty two thousand injuries."). Over fourteen thousand law enforcement officers have been killed. *Id.*

34. "A police officer making an otherwise valid arrest is legally privileged to use reasonably necessary force to affect a custody." ISIDORE SILVER, POLICE CIVIL LIABILITY, Section 6.03[2] at 6-12 (Matthew Bender, 2001).
that he presents an imminent threat of death or serious physical injury
to others unless apprehended without delay . . . .

This statutory provision recognizes three essential concepts: 1) what "appears" to the officer can justify the force used; 2) the concept of "reasonable" necessity for force; and 3) that the officer's perspective is the predicate for analysis.

North Carolina law recognizes the presumption that "an officer is presumed to be acting lawfully while in the exercise of his official duties." This also recognizes a "privilege to intervene in the context of a supposed felonious assault . . . ."37

N.C. Gen. Stat. § 15A-401 provides both a statutory standard and a privilege38 for law enforcement officers which is consistent with common law as well as contemporary decisions by the United States Supreme Court regarding the use of force.39 Several cases have demon-

37. Id. at 323, 253 S.E. 2d at 52.
39. In Hassell, the Honorable Richard Allsbrook, Superior Court Judge presiding, instructed the jury as follows in pertinent part on use of force issues and the criminal cases against Officer Hassell:

Since the Defendant, Reuben Hassell, Jr., was acting in his capacity as a police officer in the Washington Police Department at the time of this incident on March 24, 1998, and since he then was attempting to affect a lawful arrest, there are some special instructions that you need to consider as you deliberate upon your verdict in this case.

Police officers have a duty to apprehend lawbreakers, and society has a strong interest in allowing the police to carry out that duty without fear of being subjected to criminal liability just because someone is injured. North Carolina General Statute 15A-401 entitled "arrest by law enforcement officers" provides in part as follows:

An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence. A law enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest of a person who he reasonably believes has committed a criminal offense. And a law enforcement officer is justified in using deadly physical force upon another person only when it is or appears to be reasonably necessary thereby to defend himself from what he reasonably believes to be the use or imminent use of deadly physical force. Nothing in this subdivision shall be construed to excuse or justify the use of an unreasonable or excessive force.

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. But in reasonable limits, the officer is properly left with the discretion to
determined that N.C. Gen. Stat. § 15A-401(d)(2) "was designed solely to
codify and clarify those situations in which a police officer may use
deadly force without fear of incurring criminal or civil liability." 40

If the offender put the life of an officer in jeopardy, the latter in self-
defense may slay him. But he must be careful not to use any greater force
than is reasonable and apparently necessary under the circumstances, for
necessity, real or apparent, is the ground upon which the law permits such
action. However, where officers of the law engaged in making arrests or
acting in good faith and force is required to be used, their conduct should not
be weighed in golden scales. Stated somewhat differently, every arrest
officers make involves either a threatened or active use of force. Essentially
the officers themselves decide how much force is necessary under the
circumstances to bring the arrestees within their custody and control.
However, they are entitled to use only as much force as is reasonably
necessary to secure the arrestee, overcome resistance, prevent escape, or
protect themselves from bodily injury. They may never use more force than
is necessary to accomplish this purpose. In determining the amount of force
required, an officer may consider all of the circumstances surrounding the
arrest, such as the type of offense, the arrestee's reputation for violence, the
arrestee's words or actions, and whether the arrestee is armed or is
apparently armed. The amount of force must not be excessive considering
the circumstances."

Judge Allsbrook later gave specific instructions regarding self-defense and apparent
danger.

Pruett, 143 N.C. App. 612, 620, 550 S.E.2d 166, 171-72 (2001); Perry v. Gibson, 247
N.C. 212, 100 S.E.2d 341 (1957); Cf. Sossamon v. Cruse, 133 N.C. 470, 45 S.E. 757
(1903).

In his criminal procedure treatise, Professor Irving Joyner has outlined the
principles of "Use of Deadly Force by Police Officers" as follows:

A police officer is justified in using deadly force when it is or appears to be
reasonably necessary: 1. To defend himself or a third person from what he
reasonably believes to be the use or imminent use of deadly physical
force . . .

IRVING JOYNER, CRIMINAL PROCEDURE IN NORTH CAROLINA § 3.4 (Michie 1989).
Professor Joyner observed that even a fleeing misdemeanant may be subjected to
deadly force. "[I]f the misdemeanant poses a threat of death or serious bodily injury
A number of North Carolina cases have construed N.C. Gen. Stat. § 15A-401. In *State v. Anderson*, the North Carolina Court of Appeals provided instructive analysis:

An officer of the law has the right to use *such force as he may reasonably believe necessary* in the proper discharge of his duties to effect an arrest . . . *[t]he officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest.*

In use of force cases, officers have considerable discretion in determining whether force is necessary, and if so, the extent of the force needed. In *Todd v. Creech*, the North Carolina Court of Appeals reaffirmed the principle that an officer "has discretion to determine the amount of force required under the circumstances as they appear to him at the time he acted." The amount of force that an officer may utilize is that which appears "necessary from the viewpoint of the officer." This "officer viewpoint" standard is a critically important principle because it eliminates the possibility of after-the-fact second-guessing by judges and jurors not confronting the split-second environment and often life-threatening environment of the officer's actual decision.

In *Hinton v. City of Raleigh*, the North Carolina Court of Appeals held that the officer was entitled to shoot the suspect when the suspect failed to submit when ordered to do so by the officers. The decedent was under a "duty" to "submit when ordered to do so by the officers." The officer had a "right to self defense" provided by N.C. Gen. Stat. §15A-401(d)(2). The decedent's "crouching" and movement "raising his arm" justified the officers to employ deadly force.

In *State v. Burton*, the North Carolina Court of Appeals held that if an officer is attempting a lawful arrest, the officer has the right to employ commensurate force to subdue the arrestee and the arrestee


46. 46 N.C. App. 305, 264 S.E. 2d 777 (1980).

47. *Id.* at 308, 264 S.E. 2d at 779.

has no right to resist. In State v. Fain, the North Carolina Supreme Court articulated an excellent summary of the basic principles of the use of force and self-defense in the law enforcement criminal context:

An officer, where he acts in self-defense may, if necessary, kill an offender who endangers his life or safety, while attempting an arrest. If the officer is assaulted, he is not bound to fly to the wall, but if necessary to save his own life, or to guard his person from great bodily harm, he may even kill the offender; this rule applies, although the arrest is being made for a misdemeanor.

It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged. [H]e may use the force necessary to overcome resistance and to the extent of taking life.

A. Apparent Dangers Warrant The Use of Force

If there is apparent danger to the officer or to any citizens, a law enforcement officer is required to stop the threat to the officer or citizen. Law enforcement officers are required to react to apparent dangers and apparent weapons because typical conditions and lag time do not allow for an officer to wait to ascertain a precise weapon with certainty. Typical conditions in routine police encounters present the likelihood of mistakes. The North Carolina Supreme Court has long recognized the balance that law enforcement officers must employ:

The police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made “in haste, under pressure, and frequently without the luxury of a second chance.”

In State v. Marsh, the North Carolina Supreme Court explained:

The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently neces-

49. 229 N.C. 644, 646, 50 S.E. 2d 904, 905 (1948) (emphasis added)
sary to save himself from death or great bodily harm in the exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.

Courts have recognized that a police officer is not required to "await the glint of steel" before he or she can act to preserve his or her own safety. Once the "glint of steel" appears, it is often too late to take safety precautions. 53

In *Davis v. Freels*, a leading police shooting case, the Seventh Circuit explained:

[i]t is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self-defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken. 54

Law enforcement officers are trained to evaluate human behavior as a part of their basic functions. Attempts to evade the officer, as well as furtive glances, sudden turns and ignoring requests to bring one's hands into view are common indicia of behavior which demonstrates reasonable suspicion and prospective danger. 55 Police encounters often occur at night, which substantially limits vision and enhances risk to everyone. Criminals often flee and take cover in uncertain terrain, thus putting officers at a further disadvantage.

The most common gesture that fuels the need for the use of force is the reach towards a pocket or the waistband area. 56 In *People v. Benjamin*, the court explained:

It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband. It is equally apparent that law-abiding persons do not normally step back while reaching to the rear of the waistband, with both hands, to where such a weapon might be carried. Although such action may be consistent with innocuous or innocent behavior, it would be unrealistic to require [the police] . . . to assume the risk that the defendant's conduct was in fact innocuous or innocent . . . . Indeed, it would be absurd to suggest that a police officer has to await

54. 583 F.2d 337, 341 (7th Cir. 1978).
the glint of steel before he can act to preserve his safety. These cases recognize the fundamental tenet of law enforcement decisionmaking in split-second environments: there is not time for "armchair reflection" and reflective analysis.

The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists. An officer is not required to shoot to wound. An officer is not required to use a minimum of force to apprehend a violent dangerous suspect.

IV. SPECIAL SELF-DEFENSE PRINCIPLES IN LAW ENFORCEMENT CASES

Leading North Carolina cases demonstrate the application of the doctrine of self-defense in the law enforcement use of force context:

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest . . . the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest.

An officer "has discretion to determine the amount of force required under the circumstances as they appear to him at the time he acted." An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life if necessary.

The danger necessary for self-defense must only be apparent danger, such that would cause a reasonable person to believe that he was in danger of death or great bodily harm. Actual danger is not the

59. Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996); Cox v. County of Prince William's, 249 F.3d 295, 301 (4th Cir. 2001).
60. Clark v. Evans, 840 F.2d 876 (11th Cir. 1988).
65. State v. Hand, 170 N.C. 703, 86 S.E. 1006 (1915); State v. Goode, 249 N.C. 632, 107 S.E.2d 70 (1959). "The burden is upon the State to prove beyond a reasonable doubt that the Defendant did not act in self defense when there is some evidence in the case that he did." State v. Herbin, 298 N.C. 441, 445, 259 S.E.2d 263,
issue; rather, apparent danger as it reasonably appears to the defendant is sufficient to establish self-defense.⁶⁶

The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.⁶⁷

An officer "acting in self-defense is presumed to have acted in good faith."⁶⁸

In Holloway v. Moser,⁶⁹ the North Carolina Supreme Court explained that "an officer . . . may meet force with force, sufficient to overcome it, even to the taking of life if necessary." In State v. Brannon,⁷⁰ the North Carolina Supreme Court addressed a homicide case involving an officer who was attacked with a pool cue. The court in Brannon explained that "if the offender put the life of the officer in jeopardy, the latter may se defendendo slay him . . . ."⁷¹ "As against those who defy its decrees and threaten violence to its officers, the law commands that its mandates be executed, peaceably, if they can, forcibly if they must."⁷²

A. Defense Of Others

Numerous cases recognize the right to come to the defense of a third party.⁷³ State v. Foster involved a manslaughter charge against an officer arising out of a shooting at the suspect's car. The officer was acquitted. The court reasoned that "a person can come to the defense

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²⁶⁷ (1979). The State must disprove self defense beyond a reasonable doubt. Id.; Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981); Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980).


⁷¹. Id. at 480, 67 S.E.2d at 638.

⁷². Id. at 479, 67 S.E.2d at 637.

⁷³. See State v. Church, 229 N.C. 718, 721, 51 S.E.2d 345, 347 (1949) (defendant has right to defend another against threat of death or great bodily harm); State v. Anderson, 40 N.C. App. 318, 324, 253 S.E.2d 48, 52 (1979).
of another person and even kill an assailant in the necessary defense of
the other person."\textsuperscript{74}

A person may intervene and use force against another when it appears reasonably necessary in order to protect a third person from harm.\textsuperscript{75} When one has a reasonable belief that a felonious assault is about to be committed, one has the right and the duty to intervene and prevent it.\textsuperscript{76} In \textit{State v. Robinson},\textsuperscript{77} the North Carolina Supreme Court held that the jury may be instructed on both self-defense and crime prevention aspects of the defense of others.

V. STATE LAW USE OF FORCE STANDARDS IN OTHER JURISDICTIONS

Various state appellate courts have similarly recognized the appropriateness of deferential objective reasonableness standards in alleged law enforcement use of force cases. The difficulties and inherent dangers in law enforcement must be factored in the use of force inquiry. For example, in \textit{Johnson v. Ray},\textsuperscript{78} the Supreme Court of Wisconsin affirmed that police officers, in the course of making an arrest, are privileged to use whatever force is reasonably necessary. The court held that the test of reasonableness focused upon the particular belief of the officer involved. In \textit{State v. Thompson},\textsuperscript{79} the court held that the use of force is justifiable when the officer is making or assisting in making an arrest and the officer believes that such force is necessary.

In \textit{State v. Foster}, the defendant was a law enforcement officer charged with voluntary manslaughter arising out of a shooting.

Officer Foster, armed with a Smith and Wesson, Model 10, .38 caliber revolver, discharged five rounds of the six available rounds as the car proceeded toward and past him. Two of the rounds discharged, struck the front of Thorne’s automobile. . . . After the first two shots, [the criminal suspect] was observed bending down toward the passenger’s side. As the [suspect’s] vehicle continued toward Officer Foster, Officer Foster kept from being struck by the vehicle by moving to the east side of Dublin Road where he continued to fire three more shots.\textsuperscript{80}

\textsuperscript{74} 396 N.E.2d 246, 257 (Ohio 1979).
\textsuperscript{75} See \textit{State v. Hornbuckle}, 265 N.C. 312, 144 S.E.2d 12 (1965); North Carolina Pattern Jury Instruction—Criminal, 308.60 and 308.65 (killing in lawful defense of a third person—defense to homicide).
\textsuperscript{76} \textit{Hornbuckle}, 265 N.C. 312, 144 S.E.2d 12 (1965); State v. Moses, 17 N.C. App. 115, 193 S.E.2d 288 (1965).
\textsuperscript{77} 213 N.C. 273, 195 S.E.824 (1938).
\textsuperscript{78} 299 N.W.2d. 849 (Wis. 1981).
\textsuperscript{79} 505 N.W. 2d. 673, 680 (Neb. 1993).
\textsuperscript{80} 396 N.E.2d. 246, 251 (Ohio 1979).
The court analyzed the state of law regarding the use of force by police officers. In Foster, the Court addressed the issue of whether the use of deadly force, in order to be privileged, must be "actually necessary" or "apparently necessary." The court held that "the majority view today requires only 'apparent necessity.'" The court in Foster stated that "the courts will ordinarily afford [police officers] the utmost protection."82

VI. ANALYTICAL METHODOLOGY IN USE OF FORCE CASES

Courts have structured a contextual test for the analysis of law enforcement use of force claims. This methodology is grounded upon the "reasonableness of the moment" standard.83 This standard requires an assessment of force at the precise moment of its use, rather than before or after-the-fact considerations. The Supreme Court has long recognized the "practical difficulties of attempting to assess the suspect's dangerousness."84 "To evaluate excessive force, we view the facts from the perspective of the officer."85

Through a settled line of cases, courts have fleshed out this "reasonableness of the moment" concept of use of force law. Police conduct that "may later seem unnecessary in the peace of a judge's chambers" is not made illegal through the "20/20 vision of hindsight."86 Cases make clear that "only" the situation present "at the precise moment" of the use of force is to be factored into the "reasonableness inquiry."87 "[W]e scrutinize only the seizure itself, not the events leading up to the seizure, for reasonableness."88 A literal

81. Id. at 256.
82. 396 N.E.2d at 258.
86. Graham, 490 U.S. at 396-97.
87. Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995).
88. Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993); Schulz, 44 F.3d at 648; Carter v. Busher, 973 F.2d 1328, 1332 (7th Cir. 1992) (preseizure conduct by the officer is not subject to use of force scrutiny); Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991) ("the officer's liability [is to] be determined exclusively upon an examination and weighing of the information [the officer] possessed immediately prior to and at the very moment [he] fired the fatal shot."); Frazier v. Arlington, 957 F.2d 1268, 1275-76 (5th Cir. 1992) (rejecting as irrelevant evidence that police officer manufactured the circumstances which gave rise to the force). When examining the "reasonableness of the moment," the Court will observe the facts at the time that the
application of this principle may strain logic and the "totality of the circumstances" framework because the course of events leading up to the use of force may further support or negate the need for the force. 89

Use of force law also does not allow admission of evidence that may suggest that the officer had less drastic or less intrusive alternatives available. 90 In Plakas v. Drinski, 91 the court held that police officers are not required "to use the least intrusive or even less intrusive alternatives . . . The only test is whether what the police officers actually did was reasonable." As Schulz v. Long explained: "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." 92

A. The "Could Have Believed" Standard

Courts now routinely apply the "could have believed" standard in use of force litigation. In Hunter v. Bryant, the Supreme Court adopted the "could have believed" standard, which absolves the officer of liability "if a reasonable officer could have believed [the conduct in issue] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." 93 The Fourth Circuit is in accord. 94 In Prior v. Pruett, the North Carolina Court of Appeals recognized the "could have believed" standard under federal law. 95

In Wyche v. City of Franklinton, 96 it was alleged that a police officer used excessive force in shooting the decedent after a confrontation. The decedent had been acting in a bizarre manner, thus causing a convenience store clerk to summons police. Officer Caldwell responded and the decedent appeared unarmed. The officer observed

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89. Cf. Tennessee v. Garner, 471 U.S. 1, 8-9 (1985), where the Court relied upon the "totality of the circumstances."

90. Illinois v. LaFayette, 462 U.S. 640, 647 (1983) (reasonableness of governmental activity does not turn on existence of alternative "less intrusive" means); Schulz v. Long, 44 F.3d 643, 649 (8th Cir. 1995) (Officers are not required to "pursue the most prudent course of conduct as judged by 20/20 hindsight.").

91. 19 F.3d 1143, 1149 (7th Cir. 1994).
92. 44 F.3d 643, 64 (8th Cir. 1995).
94. Park v. Shifflet, 250 F.3d 843, 853 (4th Cir. 2001); Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994).
the decedent reach behind him. Fearing a weapon, the officer shot the decedent in the leg. As the decedent continued to advance, the officer shot him a second time, killing him. The court explained: "Caldwell is entitled to qualified immunity if he can establish that, in light of the clearly established principles governing the use of force to effect an arrest, he could, as a matter of law, reasonably have believed that his use of deadly force was lawful."97

In *Pittman v. Nelms*98 the Fourth Circuit held as a matter of law that a police officer did not use excessive force in shooting a fleeing suspect from the rear. In *Pittman*, two officers, Banks and Nelms, pulled over a car belonging to a suspected drug dealer. After approaching the car, Banks leaned inside to speak to the driver, Hudson. Hudson took off with Banks' arm still stuck inside the window.99 After Banks was thrown clear of the car, and the officer knew his partner was no longer in danger, Nelms fired his gun hitting Pittman, a passenger, in the back. The court explained that "[i]n light of *Graham* . . . we cannot conclude that the force Nelms used was excessive under clearly established law . . . [A]n objectively reasonable officer certainly could have believed that his decision to fire was legally justified."100

In *Klein v. Ryan,*101 the Seventh Circuit held that a reasonable officer in the position of the defendant officers could have believed that the use of deadly force was justified. The officers had been investigating the burglary of a laundromat. Using surveillance photos, the officers identified a suspect, Klein. One night while surveying the area around the laundromat, they spotted Klein in a car a few feet away from the laundromat. Klein entered the laundromat and proceeded to open the machines and remove the money. After obtaining backup, several officers took strategic positions outside the laundromat. As Klein exited, one of the officers told him to halt. Klein did not heed the warning and ran for his car. Klein was between two officers, one to the east and one to the west.

After he got to the car, Klein started the engine and began backing up as though he were going to hit one of the officers. The officer then jumped out of the way, and after regaining his position, fired two shots at Klein as Klein left the scene. He was later captured after checking into the hospital to be treated for gunshot wounds.102 The court deter-

97. *Id.* at 141-42.
98. 87 F.3d 116, 120 (4th Cir. 1996).
99. *Id.* at 118.
100. *Id.* at 120.
101. 847 F.2d 368, 375 (7th Cir. 1988).
102. *Id.* at 369-71.
mined that the actions taken by the defendants in attempting to stop the fleeing suspect were reasonable as a matter of law. In *Klein*, the court explained that:

> [p]olice officers tell a person, who they reasonably suspect of having committed a forcible felony, to halt. They reasonably believe that the suspect heard them, but the suspect continues to flee. The suspect gets in his car and begins to drive away, with no resistance from any other officer. In this situation, a police officer could reasonably believe that deadly force was necessary to prevent the arrest from being defeated by resistance or escape.

**VII. GRAHAM, GARNER AND SAUCIER PROVIDE THE FEDERAL EXCESSIVE FORCE TESTS**

**A. Graham v. Connor**

The controlling federal use of force standards are virtually identical to the North Carolina standards. In *Graham v. Connor*, the Supreme Court clarified the parameters of use of force law. In *Graham*, the Court explained that:

> [t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hind sight . . . . 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. . . . [T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

In *Graham*, the Court was confronted with the issue of what constitutional standard governs an excessive force claim against a law enforcement officer in the course of making an arrest, investigatory stop, or other “seizure” of the person. There, the plaintiff sought

103. Id. at 375.
104. Id. at 373.
106. 490 U.S. at 386.
damages for alleged injuries when officers used physical force against him in the course of an investigatory stop. 107

Plaintiff Dethorne Graham, a diabetic, had a friend drive him to a convenience store to obtain orange juice in order to counteract an oncoming insulin reaction. 108 Graham entered the store but hurried out after becoming concerned about delay when he observed a number of people ahead of him in line. 109 A Charlotte police officer observed Graham hastily enter and leave the store. 110 The officer became suspicious, followed the car in which Graham was traveling, and made an investigatory stop. 111 Graham's friend informed the officer that Graham was suffering from a "sugar reaction." 112 The officer ordered Graham and his driver to wait until he determined what happened at the convenience store. 113 When the officer called for assistance, Graham got out of the car, ran around it twice, sat on the curb, and briefly passed out. 114

Other officers arrived on the scene and handcuffed Graham. 115 One of the officers observed that he thought Graham was drunk. 116 Several officers then lifted Graham and placed him face down on the hood of his friend's car. 117 Graham regained consciousness and asked the officers to check his wallet for his diabetic seal. 118 An officer instructed him to be quiet and forced his face down against the hood of the car. 119 The officers then put Graham into the police car. 120 A friend brought Graham some orange juice but the officers allegedly refused to let him have it. 121 After the officers determined that Graham had done nothing wrong at the store, they drove him home and released him. 122 During the encounter, Graham allegedly suffered a

107. See Graham, 490 U.S. 386.
108. Id. at 388-89.
109. Id. at 389.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id. at 389.
120. Id.
121. Id.
122. Id.
broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and a loud ringing in his ear. 123

Graham's complaint alleged excessive force in making the investigatory stop. 124 The district court directed a verdict for the officers, finding that the use of force was appropriate under the circumstances. 125 The district court employed the four-factor Glick test. 126 A divided panel of the Fourth Circuit affirmed. 127 Over a vigorous dissent by Judge Butzner, the majority endorsed the four-factor test applied by the district court as generally applicable to all claims of constitutionally excessive force. 128

The Supreme Court's analysis in Graham v. Connor began with a treatment of Johnson v. Glick. 129 Speaking through Chief Justice Rehnquist, the Court observed that after Glick, the vast majority of lower federal courts have applied Glick's four-prong substantive due process test indiscriminately to all excessive force claims. 130 The Court rejected the argument that all excessive force claims "are governed by a single generic standard." 131 Previous lower court cases assumed that there was such a generic right to be free of excessive force not grounded in any particular constitutional provision. 132

In rejecting the generic type of excessive force analysis, Graham instructed that "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." 133 The Court noted that "[i]n most instances," the specific constitutional rights involved in excessive force claims will be the Fourth and Eighth Amendments. 134 The Court made clear that the validity of an excessive force claim must be "judged by reference to the specific constitutional standard which governs that right . . . ." 135 The Court observed that where the excessive force claim arose in the context of an

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123. Id. at 390.
124. Id.
126. Id. (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973)).
128. See id.
130. 490 U.S. at 392-93.
131. 490 U.S. at 393.
132. See Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987) (en banc).
133. 490 U.S. at 394.
134. Id.
135. Id.
arrest or investigatory stop, "it is most properly characterized as one invoking the protections of the Fourth Amendment."\textsuperscript{136}

The Court made its holding very specific: "all claims that law enforcement officers have used excessive force—deadly or not— in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."\textsuperscript{137} The Court reasoned that the Fourth Amendment provides an "explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct . . . ."\textsuperscript{138}

The Court enunciated a balancing test to be applied on a case-by-case basis to determine if a particular seizure is unreasonable because of constitutionally excessive force.\textsuperscript{139} A court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."\textsuperscript{140} The Court set forth the standard as being at the "reasonableness at the moment" of the seizure.\textsuperscript{141}

The Court emphasized the objective nature of this reasonableness test: [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.\textsuperscript{142} Thus, under this reasonableness test, considerations of concepts such as malice have no formal place in the objective reasonableness inquiry.\textsuperscript{143}

\textsuperscript{136} Id.
\textsuperscript{137} 490 U.S. at 395.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 396.
\textsuperscript{141} Id.
\textsuperscript{142} Id., see Martin v. Gentile, 849 F.2d 863, 869 (4th Cir. 1988); Scott v. United States, 436 U.S. 128, 137 (1978) (citing Terry v. Ohio, 392 U.S. 1 (1968)). Just before the Court decided Graham, in Wilkins v. May, 872 F.2d 190 (7th Cir. 1989), the Seventh Circuit held that the use of excessive force in interrogating a suspect who has been arrested but not yet charged does not contravene the Fourth Amendment but may violate substantive due process. Wilkins alleged that officers held a pistol pointed at his head while being interrogated thus causing mental distress. Judge Posner's opinion reasoned that since Wilkins was seized when he was arrested, there was no seizure through pointing the gun. The "continuing seizure" theory was rejected. Judge Posner went on to enunciate a shock the conscience test.
\textsuperscript{143} Miller v. Lovett, 879 F.2d 1066, 1070 (2d Cir. 1989).
LAW ENFORCEMENT USE OF FORCE

The Court's holding in *Graham* is quite narrow. It does not purport to apply beyond law enforcement excessive force where the Fourth Amendment is not properly invoked.\(^{144}\)

The concurring opinion of Justice Blackmun, joined by Justices Brennan and Marshall, provides helpful guidance and raises additional concerns.\(^{145}\) Justice Blackmun's concurrence primarily addressed the issue of whether substantive due process might serve as an alternative basis for recovery.\(^{146}\) The majority's narrow holding seems to eliminate the substantive due process framework in the specific law enforcement context, but did not address whether this now precludes a plaintiff from proceeding under both theories independently.\(^{147}\) However, any plaintiff with an excessive force claim that could establish liability under the more difficult substantive due process standard would almost necessarily also be able to establish liability under the Fourth Amendment standard. As Justice Blackmun observed: "the use of force that is not demonstrably unreasonable under the Fourth Amendment will only rarely raise substantive due process concerns."\(^{148}\)

B. *Saucier v. Katz*

In *Saucier v. Katz*,\(^{149}\) the Supreme Court decided the issue of whether the legal tests for qualified immunity and underlying substantive use of force are identical in a law enforcement use of force case. The Ninth Circuit Court of Appeals had held that the two inquiries merged into a single question.\(^{150}\)

In *Saucier*, an Army base in San Francisco was the location of an event to celebrate conversion of the base to a national park. Vice President Gore was a scheduled speaker. Elliot Katz was concerned that the Army's hospital on the base would be used for conducting experiments on animals. In order to voice opposition to the possibility that the hospital might be used for such animal experiments, Katz brought with him a cloth banner for display.

145. Id. at 399.
146. Id.
147. Id. at 397.
148. Id. at 400. In County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Court enunciated a "shocks the conscience" test for vehicular police pursuits. This test is grounded in Fourteenth Amendment substantive due process. See Michael Douglas Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force To Stop Dangerous Pursuits*, 52 Mercer L. Rev. 1599 (2001).
150. Katz v. United States, 194 F.3d 962 (9th Cir. 1999).
While waiting for Gore to speak, Katz sat in the front row of the seating area. When Gore began speaking, Katz removed the banner, started to unfold it, and walk toward the speaker's platform. Saucier, a military police officer, was on duty that day. Saucier had been warned by his superiors of the possibility of demonstrations, and Katz had been identified as a potential protestor. Saucier and a sergeant recognized Katz and moved to intercept him as he walked toward the speaker's platform. As Katz began placing the banner, the officers grabbed Katz from behind, took the banner and ushered him out of the area. Katz alleged that the officers used excessive force in arresting him. The trial court concluded that Saucier was not entitled to summary judgment. Saucier initiated an interlocutory appeal from the denial of qualified immunity and the Ninth Circuit affirmed.\(^{151}\)

The Supreme Court held that a qualified immunity decision requires an analysis which is not susceptible of fusion with the substantive question on the merits of whether unreasonable force was used. The Court concluded that "\([\text{t}]\)he inquiries for qualified immunity and excessive force remain distinct . . . ."\(^{152}\) The Court explained that because:

> 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, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene.\(^{153}\)

The Court observed that the factors set forth in Graham determine the merits of an alleged excessive force claim, which require "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."\(^{154}\)

In Saucier, the Court reaffirmed the doctrine of mistaken beliefs, which provides: "[i]f an officer reasonably, but mistakenly, believed that the suspect was likely to fight back, for instance, the officer would

151. See id.
152. 533 U.S. at 204.
154. 533 U.S. at 205. Graham, 490 U.S. at 396.
be justified in using more force than in fact was needed." The Court explained that the qualified immunity inquiry includes a further dimension:

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

The doctrine of qualified immunity protects law enforcement officers from individual liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." If the law is not clearly established, the officer is entitled to qualified immunity from suit. However, even if the law is clearly established, the officer is still entitled to qualified immunity where a reasonable officer could have believed that his or her conduct was lawful.

Saucier held that qualified immunity and the underlying substantive standards for use of force claims are distinct issues even though they both involve determinations of reasonableness from the officer's perspective. Saucier emphasized the application of qualified immunity for officers even where there has been a mistake that has resulted in injury. Saucier held that officers are entitled to qualified immunity from liability where their mistakes are reasonable.

Saucier has been interpreted by at least one Fourth Circuit case. In Brown v. Gilmore, the Fourth Circuit reversed a decision denying an officer's motion for summary judgment based on qualified immunity. Brown arose out of a situation involving an alleged false arrest and use of excessive force during an arrest for violation of the City of Myrtle Beach's disorderly conduct ordinance. Plaintiff Brown had been in a minor traffic accident during a holiday weekend when there was an extremely large crowd of individuals who were visiting Myrtle

155. 533 U.S. at 205. See Roberts v. McSwain, 126 N.C. App. 12, 487 S.E.2d 760 (1999) (Qualified immunity protects conduct which was reasonable although mistaken).

156. 533 U.S. at 205.


158. 278 F.3d 362 (4th Cir. 2002).
Beach in connection with a biker festival.\textsuperscript{159} Once officers arrived following the minor accident, Officer Gilmore asked Ms. Brown to move her car. After the first two instructions to move the car were ignored, Officer Gilmore asked Brown again and she continued to ignore him. Brown became verbally abusive and again refused to move the car. Officer Gilmore then asked Officer Pena to arrest Brown for disorderly conduct.\textsuperscript{160} Officer Pena then escorted Brown to his patrol cruiser, handcuffed her and asked her to get in the cruiser at which time she refused and put up such a scuffle that she kicked off one of her sandals.

The Fourth Circuit observed that there was factual dispute between the officers and Brown as to what occurred. Brown claims that she did not understand what the officer was saying and was not aware that he directed her to move her car.\textsuperscript{161} The Fourth Circuit posed the issue as whether a reasonable officer would be justified in the belief that a citizen heard his request under those circumstances.\textsuperscript{162}

The Fourth Circuit observed that Brown admitted that she was standing very close to Officer Gilmore, even to the extent that he was allegedly invading her personal space. It was undisputed that the other driver involved in the accident had no difficulty hearing the request and moved her car. There was no allegation by Brown that Officer Gilmore never told her to move her car. The Fourth Circuit explained that giving Brown the benefit of the doubt as to whether she heard the officer’s request does not strip the officers of an objectively reasonable belief that she heard the request. “In fact, a reasonable officer in this situation would have been warranted in the belief that Brown knew full well that she had been asked to move her automobile.”\textsuperscript{163}

The Fourth Circuit concluded that the circumstances justified the minimal level of force applied by Officer Pena. The Fourth Circuit explained how Brown claimed that she was not resisting arrest and that she kicked her sandal off only because it became tangled. Officer Pena however believed Brown was angry, attempting to resist and that the sandal came off in a struggle. The Fourth Circuit observed how the Supreme Court had made clear that this subjective clash of beliefs is not one that the court need resolve. “If an officer reasonably, but

\begin{itemize}
\item \textsuperscript{159} 278 F.3d at 365.
\item \textsuperscript{160} \textit{id.} at 365.
\item \textsuperscript{161} \textit{id.} at 366.
\item \textsuperscript{162} \textit{id.} at 368.
\item \textsuperscript{163} 278 F.3d at 368.
\end{itemize}
mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed. 164

Brown is a very instructive case to illustrate the critical point that alleged excessive force encounters will often develop some factual inconsistencies in the views of arrestees and the officers involved. However, factual discrepancies do not necessarily create genuine issues of material fact, especially where the facts demonstrate that officers had a reasonable belief that their action taken was necessary, even if their belief was mistaken.

C. Escapes And The Fleeing Felon Rule

In Tennessee v. Garner, the Supreme Court explained: "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape . . . ." 165 In Garner, the Court addressed the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. In Garner, officers were dispatched to answer a "prowler inside call." 166 Upon arrival, the officers observed someone on her porch and gesturing toward the adjacent house. This person informed the officers that she had heard glass breaking and that "they" or "someone" were breaking into the adjacent home. 167 The officers heard a door slam and observed someone run across the backyard. These events occurred at approximately 10:45 p.m. at night. With the aid of a flashlight, one of the officers was able to generally observe the fleeing suspect's face and hands. He did not appear to see a weapon. The officer verbally commanded the suspect to halt as the suspect was fleeing. 168 The suspect attempted to climb over a fence. The officer was concerned that the suspect would escape, consequently the suspect was shot.

In Garner, the Court reaffirmed application of the constitutional balancing test in determining the constitutionality of a seizure. 169 The Court explained: "to determine the constitutionality of a seizure, we

164. Id. at 369 (quoting Saucier, 533 U.S. at 205).
166. 471 U.S. at 3.
167. Id.
168. Id. at 4.
169. Id. at 7-8.
must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."\textsuperscript{170} After reviewing a long line of seizure cases, the Court observed that the question "was whether the totality of the circumstances justified a particular sort of search or seizure."\textsuperscript{171}

In \textit{Garner}, the Court enunciated a number of fundamental rules. The Court concluded that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."\textsuperscript{172} However,

where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to present escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threaten infliction of serious physical harm, deadly force may be used if necessary to prevent escape . . . .\textsuperscript{173}

Finally, the essential principle from Garner is that "such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."\textsuperscript{174} Thus, in situations involving fleeing suspected felons, the Court recognized a "probable cause" standard. \textit{Garner} makes clear that where officers have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others, officers may justifiably shoot a fleeing suspect.

In \textit{Garner}, the determinative facts exposing the officers to constitutional tort liability appear to be the lack of threat of harm to the officers or others from the fleeing suspect. Generally, mere flight alone without more is not sufficient to warrant deadly force. Without some implied threat of harm to officers or others, fleeing suspects cannot be shot. However, the constitutional interest balancing test applied by the court in \textit{Garner} allows consideration of the "totality of circumstances" which warrants an officer to consider a vast array of facts, circumstances and inferences which may give rise to an officer's reasonable belief that the suspect poses a risk to officers and citizens.

\textsuperscript{170} \textit{Id.} at 8.
\textsuperscript{171} \textit{Id.} at 8-9.
\textsuperscript{172} \textit{Id.} at 11.
\textsuperscript{173} \textit{Id}
\textsuperscript{174} \textit{Id.} at 3
In *Ford v. Childers*,\(^{175}\) the Seventh Circuit held "that Childers' actions were objectively reasonable under the circumstances leading to his decision to fire his revolver at Ford." The officer was held to act reasonably in shooting at a fleeing suspect even though the officer could not be certain as to whether the suspect was armed. Officer Childers was called to the scene of a bank robbery in progress. He could see the hands of the bank patrons in the air from outside, however, he could not see the suspect or any weapon that the suspect may have been wielding. The suspect exited the bank carrying only a bag. Officer Childers and his partner pursued the suspect and warned him to stop. When he did not stop running, both officers fired shots at the fleeing suspect. Thereafter, the suspect was captured and the officers found that he was shot in the back. The court explained that "[a]s we recognized in another . . . police shooting [case], a reasonable belief that danger exists may be formed by reliance on appearances."\(^{176}\) The court reasoned:

In view of the totality of the information Officer Childers possessed when he fired at Ford, we hold that a reasonable jury could only conclude that Officer Childers had probable cause to believe that Ford posed a threat of serious physical harm to himself and/or to others. Thus, Childers' actions under the circumstances were objectively reasonable as a matter of law.\(^{177}\)

In *Forrett v. Richardson*,\(^{178}\) a suspect who supposedly tied up three people, murdering one of them and assaulting another, was shot while trying to escape. The Ninth Circuit held that "the only reasonable conclusion that could be drawn from the evidence when construed in the light most favorable to plaintiff was that the officers did not violate plaintiff's Fourth Amendment rights."\(^{179}\)

Forrett committed a residential burglary, tying up the three people, shooting one of them and assaulting another. Once he left the house, one of the victims was able to notify the police. The suspect fled in a stolen truck. The police responded to the call and were able to locate the truck within the hour, but there was no sign of the suspect or the firearm. The police canvassed the area and located the suspect, Forrett, in a residential neighborhood. He ran and the police gave chase. The chase continued as Forrett eluded the police by vaulting

\(^{175}\) 855 F.2d 1271, 1275 (7th Cir. 1988) (en banc).

\(^{176}\) Id. at 1275 (citing Davis v. Freels, 583 F.2d 337, 341 (7th Cir. 1978)).

\(^{177}\) Id. at 1276.

\(^{178}\) 112 F.3d 416 (9th Cir. 1997), *superceded by* Chroma Lighting v. GTE Products Corp., 127 F.3d 1136 (9th Cir. 1997).

\(^{179}\) Id. at 421.
fences, hiding in a shed, taking off a layer of clothing to change his appearance, and running. Finally, the officers trapped him in a yard that had a six-foot fence. The officers warned Forrett to stop but, as Forrett hesitated, the officers fired at him. Forrett attempted to jump the fence and, as he reached the other side, the bullets penetrated through the fence and hit him in the back.

The court reasoned that "the only objectively reasonable conclusion to be drawn from this evidence is that if the defendants had not shot him, he would have continued taking whatever measures were necessary to avoid capture." The court observed that "[t]he use of deadly force was objectively reasonable under these circumstances," and held that the plaintiff's rights were not violated as a matter of law.

VIII. LEADING CIRCUIT CASES DEMONSTRATE APPLICATION OF USE OF FORCE TESTS

In Smith v. Freeland, the Sixth Circuit explained:

[Under Graham, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

In Smith, Officer Schulcz saw a car run a stop sign and tried to pull the car over. Instead of pulling over, the car led Officer Schulcz on a high-speed chase for several miles before turning down a dead-end residential street. During the pursuit, the driver, Mr. Smith, eluded several police cars, swerving towards several of them, and went around one roadblock. Once on the dead-end street, Smith turned his car around on a lawn and faced Officer Schulcz's car. Schulcz thought the car was stuck in the lawn and began to close in on the car, in order to prevent Smith's escape. Once the cars were sufficiently close, Officer Schulcz got out of his car and began to approach Smith's car in order to arrest Smith.

Just as Schulcz approached, Smith backed up and drove forward, ramming Schulcz's car and then backed up again to go around it. When Smith drove by, Schulcz shot into the passenger side of the car,

180. 112 F.3d at 421.
181. Id. at 421.
182. 954 F.2d 343 (6th Cir. 1992).
183. Id. at 347.
which went through the seat from behind and into Smith's right side, killing him. The court held that the seizure was not unreasonable. The court reasoned that:

"After a dramatic chase, Officer Schulcz appeared to have trapped his man at the end of a dark street. Suddenly Mr. Smith freed his car and began speeding down the street. In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably." The court further explained that:

"Had [Smith] proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the roadblock. Even unarmed, he was not harmless; a car can be a deadly weapon. Finally, rather than confronting the roadblock, [Smith] could have stopped his car and entered one of the neighboring houses, hoping to take hostages. Mr. Smith had proven he would do almost anything to avoid capture; Officer Schulcz could certainly assume he would not stop at threatening others.

In *Smith*, the Sixth Circuit noted that "a car can be a deadly weapon" and since Smith had already assaulted an officer, it was reasonable to assume that he would not stop at threatening others. A "reasonable officer in those circumstances would certainly believe that if Mr. Smith continued this escape attempt, he posed a significant threat of physical injury to numerous others." In *Milstead v. Kibler*, the Fourth Circuit addressed Fourth Amendment constitutional tort claims arising out of a clearly mistaken shooting death. An emergency call by Mark Milstead to a 911 operator sought police help as a result of an alleged physical attack by an intruder, Ramey, his fiancé's former boyfriend. The 911 operator reported Milstead's call to Officers Kibler, Proctor and others, informing them that a man had been shot in the neck and a woman stabbed. The officers received the call shortly after midnight and immediately responded. Upon arrival at the scene, the officers observed a van parked in front of the house, with the door open and fresh blood on the van and on the steps leading to the house.

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185. *Id.* at 344.
186. *Id.* at 347.
188. *Id.* at 346.
189. 243 F.3d 157 (4th Cir. 2001).
190. 243 F.3d at 160.
191. *Id.*
officers also heard calls for help from inside the house. One of the officers kicked open the door and yelled "police." Officers observed two figures resting on the floor, one of whom withdrew from the altercation and warned the officers that the other had a gun. 192 The person with the gun pointed it at Officer Proctor, who began to back up and fired four shots from his pistol. While backing up, Proctor fell backwards onto the deck outside the door. Officer Kibler, believing that Proctor had been shot, retreated to the outside corner of the house and assumed a defensive position. 193 Kibler then heard one of the people inside the house, presumably Ramey, say that he was going to "kill all of you." 194 About 15 seconds after Officer Kibler's retreat, someone came crashing through the door "in a run" and turned toward where Officer Kibler was positioned. Kibler fired two shots. Officer Kibler explained later that he fired his weapon because he believed the target had to be the assailant Ramey because Milstead had been shot in the neck and therefore could not have been running. Officer Kibler also explained that Ramey had a gun and that shortly before the person believed to be Ramey came out of the house, someone said he was going to "kill you all." 195 The person whom Officer Kibler had shot informed him that "he is still inside." Officer Kibler then realized that he had shot Milstead and not Ramey. After talking with Milstead, Kibler went to the other side of the house and told Officer Proctor that he had shot "the good guy." Milstead was transported to the hospital, where he later died. Ramey killed himself with a shot to the head and Milstead's fiancée also died.

The Fourth Circuit concluded that all claims whereby law enforcement officers have allegedly used excessive force, whether deadly or not, in the course of an arrest, investigatory stop or other seizure must be analyzed under the Fourth Amendment and its reasonableness standard. 196 After recounting all of the pertinent circumstances, the Fourth Circuit concluded that the mistaken impressions by the officer were completely reasonable and justifiable under the circumstances. 197

The Fourth Circuit explained how mistakes of this nature generally involve one of two forms. One is typified by an officer who shoots with justification at a suspect but misses and accidentally hits a

192. Id.
193. Id.
194. Id.
195. Id.
196. 243 F.3d at 162.
197. 243 F.3d at 163.
bystander. The second form is typified by the officer who shoots with justification at a person he believes to be the suspect and hits the intended target but the target was misidentified which turns out to be an innocent victim. Under the first type of mistake, no Fourth Amendment seizure occurs at all. 198 However, the second form of mistake and the one applicable in Milstead, is seizure of an innocent victim which implicates the Fourth Amendment but is not necessarily unreasonable and consequently would not violate the Fourth Amendment. 199 The Fourth Circuit concluded that Officer Kibler's mistaken understanding did not render his use of force unreasonable. 200 The Fourth Circuit explained that "this mistake does not negate the justification for the use of deadly force where Officer Kibler had an objectively reasonable belief that Milstead was Ramey." 201 The Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." 202 The Fourth Circuit explained that "[c]ourts cannot second guess the split-second judgments of a police officer to use deadly force in the context of rapidly evolving circumstances, when inaction could threaten the safety of the officers or others." 203

In Anderson v. Russell, 204 the Fourth Circuit addressed an alleged excessive force complaint following a jury verdict in plaintiff's favor. The trial court granted Officer Russell's motion for judgment as a matter of law with respect to Russell's qualified immunity defense, but denied his motion with respect to the jury's finding of excessive force. The Fourth Circuit concluded that Officer Russell acted reasonably in using deadly force to protect himself against a perceived immediate and deadly threat posed by Anderson. 205 Thus, the verdict was set aside in its entirety.

Russell, a law enforcement officer, was providing part-time security services at a mall. Anderson, who had been drinking wine during the day purchased another bottle of wine at a store in the mall, which he drank while walking around the mall. Anderson was wearing a jacket, and underneath he wore three shirts and a sweater. Inside one of the shirts, Anderson had tucked a shoe polish container inside an

198. 243 F.3d at 164.
199. Id.
200. 243 F.3d at 165.
201. Id.
202. Id. (quoting Brower, 489 U.S. at 596).
203. 243 F.3d at 165 (citing Graham, 490 U.S. at 396-97).
204. 247 F.3d 125 (4th Cir. 2001).
205. Id. at 127.
eyeglass case on the left side of his belt. Anderson was also carrying a portable walkman radio in his back pocket and was listening to the radio with the earphones which were covered by a hat.\textsuperscript{206}

A mall patron approached Officer Russell and informed him that a man appeared to have a gun under his sweater, pointing to Anderson. Officer Russell spent the next 20 minutes observing Anderson and saw a bulge under Anderson’s clothing on his left side near his waistband that Russell believed to be consistent with a handgun, therefore corroborating the citizen’s report.\textsuperscript{207} Russell decided to confront Anderson to attempt to discern whether Anderson was armed and if so what his intentions were. When Anderson exited the mall, Officer Russell and Officer Pearson followed him, approached him with their guns drawn and instructed him to raise his hands and get down on his knees. Although Anderson initially complied with the order to raise his hands, he later lowered them without explanation to the officers in an attempt to reach into his back left pocket to turn off his walkman radio. Believing Anderson was reaching for the purported weapon, Russell shot Anderson three times thereby causing permanent injuries to his left arm, left thigh and leg. A subsequent search of Anderson revealed his radio and that he was unarmed.\textsuperscript{208}

The Fourth Circuit held that Russell’s use of force did not violate the Fourth Amendment and consequently the alleged excessive force claim should not have been submitted to the jury.\textsuperscript{209} The Fourth Circuit applied the objective reasonableness standard from \textit{Graham v. Conner} and concluded that “the evidence conclusively establishes that Russell reasonably perceived Anderson to be armed with a gun.”\textsuperscript{210} The Fourth Circuit explained that “[t]his Circuit has consistently held that an officer does not have to wait until a gun is pointed at the officer before the officer is entitled to take action.”\textsuperscript{211} Despite the mistake and the injury to Anderson, because the officer’s conduct was reasonable, the alleged excessive claim should have been dismissed. “Section 1983 does not purport to redress injuries resulting from reasonable mistakes.”\textsuperscript{212}

\textsuperscript{206} \textit{Id.} at 127-28.
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.} at 129.
\textsuperscript{210} \textit{Id.} at 130.
\textsuperscript{211} \textit{Id.} at 131.
\textsuperscript{212} \textit{Id.} at 132 (quoting McLenagan v. Karnes, 27 F.3d 1002, 1008 (4th Cir. 1994)).
In *Elliott v. Leavitt*, the Fourth Circuit reversed the District Court's denial of qualified immunity in an alleged excessive force case. Officer Leavitt stopped motorist Elliott and smelled alcohol. Elliott failed several sobriety tests and Leavitt called for backup. Leavitt conducted a brief search of Elliott at least just to the backside of Elliott's body but did not recall whether he checked the front. Leavitt placed Elliott in the front passenger's seat of the police car with the seatbelt fastened, the door closed and the window rolled up. The officers were talking at the passenger's side of the car when Leavitt noticed a movement and observed Elliott with his finger on the trigger of a small handgun pointed at Leavitt and the other officer. The officers ordered Elliott to drop the gun but when Elliott did not respond he was shot and killed.

The plaintiff's argument focused upon a number of considerations not relevant to the objective reasonableness inquiry. For example, the plaintiff suggested that the officers might have responded differently by moving further away rather than shooting. The District Court observed that the number of shots fired was excessive. However, the Fourth Circuit explained that "the number of shots by itself cannot be determinative as to whether the force used was reasonable." The evidence demonstrated that both officers fired simultaneously, neither officer fired all of the available shots from their weapons and that the shooting occurred within a matter of seconds. As to plaintiff's argument and the trial court's suggestion that officers could have moved away from the car, the Fourth Circuit explained that sort of suggestion was more reflective of something from the "peace of a judge's chambers" than of a dangerous and threatening situation on the street.

The Fourth Circuit explained that:

> [the] Fourth Amendment does not require omniscience. Officers need not be absolutely sure, however, of the nature of the threat or the suspect's intent to cause them harm—the Constitution does not require that certitude precede the act of self-protection. The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.

In *Slattery v. Rizzo*, an officer was found not liable when he shot the criminal suspect because it was objectively reasonable for the

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213. 99 F.3d 640 (4th Cir. 1996).
214. Id. at 643.
215. Id. at 643 (citing *Graham*, 490 U.S. at 396).
216. Id. at 644.
217. 939 F.2d. 213 (4th Cir. 1991).
officer to have believed the suspect was reaching for a gun, when in fact the object in the suspect's hands was actually a beer bottle.

In *McLenagan v. Karnes*, an officer was found not liable when the officer shot an unarmed suspect who appeared to be chasing another officer. Although the suspect was unarmed and handcuffed in front, the officer could not confirm there was no weapon. In *McLenagan*, the Fourth Circuit explained:

A suspect's failure to raise his hands in compliance with a police officer's command to do so may support the existence of probable cause to believe that the suspect is armed . . . . [W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him . . . . We will not second guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer or others . . . . section 1983 does not purport to redress injuries resulting from reasonable mistakes.

In *Sigman v. Town of Chapel Hill*, the Fourth Circuit affirmed the trial court's grant of summary judgment to police officers who shot and killed a suspect whom the officers perceived was holding a knife and began walking towards the officers. “[A] police officer need not, in all circumstances, 'actually detect the presence of an object in a suspect's hands before firing on him.'” The court rejected the plaintiff's argument that a factual dispute as to whether the suspect actually had a knife was material to whether the officer was protected by qualified immunity. Thus, an officer may justifiably fire if he or she reasonably perceives that a suspect may have a weapon.

In *Krueger v. Fuhr*, the Eighth Circuit decided that an officer's shooting of a fleeing suspect was objectively reasonable. Officer Fuhr responded to a call identifying the area in which a suspect was allegedly spotted. Fuhr believed that the suspect had just committed an assault at a laundry and was possibly an escapee from a halfway house. While canvassing the area, Officer Fuhr spotted the suspect, Krueger, and approached him with his service revolver drawn. He then told Krueger to freeze. Krueger, instead, ran and Fuhr pursued him. Fuhr yelled for Krueger to stop; however, Krueger continued and, as he ran, tried to pull something from his waistband. As Fuhr wit-

218. 27 F.3d 1002 (4th Cir. 1994).
219. Id. at 1007-08.
220. 161 F.3d 782 (4th Cir. 1998).
221. Id. at 788.
222. 991 F.2d 435, 440 (8th Cir. 1993).
nessed this attempt, he slowed his pursuit and fired four shots at the suspect. Two of the shots hit Krueger in the back and one hit him in the base of the skull, killing him. The "fact that Leroy Krueger was shot in the back" was insufficient to negate "the reasonableness of Officer's Fuhr's actions." 223

The court held that "[i]t was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband." 224 Police officers are not required to "forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect." 225

A. Bullet Trajectory Does Not Determine Justification

At first glance, cases involving "back shots" or shootings from a rear position may suggest that the shooting was unnecessary because the danger was leaving. However, ballistics studies reveal that a person can turn around in less time than it takes to fire even a drawn weapon. 226 This recognized "lag time" phenomenon justifies many cases with bullet trajectory from the rear as being objectively reasonable.

The number of shots fired is not a determinative factor in the use of force inquiry. 227 An officer is required to shoot until the threat is stopped, whether it takes one shot or forty-one shots. Modern police firearms will typically fire up to fifteen rounds in a matter of three or four seconds. Thus, it is common to have an extensive number of shots in a given encounter. Because of the lag time phenomenon, it is not unusual for shots to enter a suspect in the side or in the back. In the time it takes to unholster, prepare and fire a weapon, often the position of the suspect has materially changed. After the first shot or warning, it is not unusual for a suspect to turn his or her back to the officer out of fear. These scenarios often justify back shootings, which on the surface may appear suspicious.

223. Id. at 439.
224. Id.
225. Id. at 440.
Many of the foregoing cases demonstrate arguably difficult fact patterns but no resulting liability. At first glance, cases involving "back shots" or shootings from a rear position may suggest that the shooting was unnecessary because the danger was leaving. However, the objective reasonableness standard considers the totality of the circumstances including the fact that dangers are not necessarily reduced because a suspect is in some flight.

IX. THE USE OF EXPERT TESTIMONY IN USE OF FORCE LITIGATION

Use of force cases often necessitate expert testimony on a range of issues. Many law enforcement disputes require specialized or technical knowledge beyond that usually understood by lay jurors. A number of cases demonstrate the admission of expert testimony in civil, criminal and administrative litigation involving use of force.

228. Rule 702 of the North Carolina Rules of Evidence provides as follows:

"If the scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion."

Expert testimony is properly admissible when such testimony may assist the jury to draw inferences from facts because the expert is better qualified on the issues than are lay persons. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984). The test for admissibility of expert testimony is whether the jury can receive help from the expert witness. State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985). The leading North Carolina evidence treatise provides that: "Under Rule 702, once expertise is demonstrated, the test of admissibility is helpfulness. A witness who is better qualified than the jury to form a particular opinion may satisfy the rule...."


To qualify, an expert need not have had experience in the subject at issue; it is sufficient that "through study or experience," the expert is better qualified than the jury to render an opinion regarding the particular subject. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985).

229. In State v. Hassell, the Superior Court allowed expert testimony regarding the propriety of Officer Hassell's use of force. In United States v. Zapata, 916 F.2d 795, 805 (2d Cir. 1990), the Court held that it was proper to admit testimony from an expert witness testifying as to police surveillance and record keeping procedures. In United States v. Young, 745 F.2d 733 (2d Cir. 1984), the Court allowed government agents to testify that in their opinion, an incident involving a defendant was a narcotics transaction because the agents were experts whose testimony might have aided the jury in understanding the events.

In United States v. Alonso, 48 F.3d 1536, 1541 (9th Cir. 1995), the Court held that there was no error in permitting undercover agents conducting a sting to characterize a defendant's counter-surveillance behavior as consistent with someone being involved in a criminal activity. A law enforcement expert may testify as to "techniques and methods" used. Id. In United States v. Williams, 980 F.2d 1463
and related law enforcement issues. Law enforcement experts have testified in state and federal courts in North Carolina on a variety of law enforcement cases. The conduct of law enforcement officers has been the subject of testimony in various types of cases, including

(D.C. Cir. 1992), an expert in a drug case was allowed to testify that more than 100 zip lock bags concerning small amounts of drugs "were meant to be distributed at street level."

In United States v. Gastiaburo, 16 F.3d 582, 587-89 (4th Cir. 1994), the court held that there was no error in admitting testimony about methods of drug dealers. The court explained how expert testimony as to the "modus operandi" is "commonly admitted . . . ." Id. at 589. In United States v. Phillips, 593 F.2d 553, 558 (4th Cir. 1978), the Court held that there was no error in admitting testimony in a narcotics case interpreting code language in intercepted telephone conversations. In United States v. Lawson, 780 F.2d 535 (6th Cir. 1985), the Court upheld the admission of police officers testimony concerning the meaning of certain terms used in drug trafficking.

In United States v. Scavo, 593 F.2d 837, 844 (8th Cir. 1979), the Court affirmed admission of expert testimony about the nature of gambling operations, gambling terminology, and his opinion of the defendant's role in a bookmaking scheme. See also United States v. Hankey, 203 F.3d 1160, 1169-70 (9th Cir. 2000) (allowing expert testimony about gang behavior); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (testimony admissible showing that a particular defendant was susceptible to interrogation techniques that would lead him to make unreliable statements); United States v. McCollum, 802 F.2d 553, 558 (4th Cir. 1986) (upholding admission of expert testimony regarding the typical structure of mail fraud schemes).


231. See Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E. 2d 277 (1992) (propriety of officer conduct testimony admitted); Spell v. McDaniel, 824 F.2d 1384 (4th Cir. 1987) (use of force opinion testimony admitted); State v. Hassell. See supra note 227 and accompanying text. In order to qualify, the expert need not be a specialist, have a particular license or have had any experience with the exact type of subject matter involved. See Brandis & Broun, supra note 227, at 643, citing dozens of cases. The minimum prerequisite is that "through knowledge . . . the testimony can assist the trier of the fact." Id. at 643-44. In State v. Saunders, 317 N.C. 308, 345 S.E. 2d 212 (1986), a pathologist was allowed to offer expert testimony to assist the jury in understanding the nature of the decedent's wound and in determining whether the defendant acted in self-defense when he shot the decedent even though self-defense was an ultimate issue in the case.
employment cases where the appropriateness of the officer's behavior is in issue. 232

In *Kopf v. Skyrm*, 233 the Fourth Circuit addressed expert evidentiary standards in law enforcement use of force cases. The Fourth Circuit held that the proper training of a police dog is a proper subject of expert testimony. The court also held that a law enforcement expert should be permitted to testify as to the prevailing standard of conduct with respect to use of a police slapjack. Further, the expert testimony involved testimony from a former chief of police and a police trainer as to "accepted police practices." In *McEwen v. City of Norman*, 234 expert law enforcement testimony was permitted on the issue of reasonableness of force. There, a professor testified as to the propriety of the police pursuit, the review procedures of the police chief, roadblocks, method of arrest, and the overall handling of the incident.

In *Zuchel v. City of Denver*, 235 a law enforcement expert was properly permitted to testify that the officer's use of deadly force was inappropriate. In *Zuchel*, the criminal justice professor was permitted to give expert opinion testimony of "police tactics, the use of force, administration, supervision, and training." 236 The expert properly testified about police training, tactics and options available to police in situations where bodily injury is threatened. In *Zuchel*, the court held that expert testimony is admissible on whether the practices followed fell below acceptable standards. 237 An area of admitted expert testimony involved "generally accepted police custom and practice at the time." 238 The professor was an expert in: "police training, tactics, and the use of deadly force. Courts generally allow experts in this area to state an opinion on whether the conduct in issue fell below accepted standards in the field of law enforcement." 239 The professor also testified as to causation. 240 In *Lawson v. Trowbridge*, 241 the Seventh Circuit held that admission of expert testimony regarding dangerousness of

232. See Webb v. City of Chester, 813 F.2d 824, 832 (7th Cir. 1987), where a law enforcement professor testified "as to the appropriateness of plaintiff's actions in each of the six incidents . . . ."

233. 993 F.2d 374 (4th Cir. 1993).

234. 826 F.2d 1593 (10th Cir. 1991).

235. 997 F.2d 730 (10th Cir. 1993).

236. 997 F.2d at 738.

237. *Id.* at 739.

238. *Id.*

239. *Id.* at 742.

240. See Samples v. City of Atlanta, 916 F.2d 1548, 1551-52 (11th Cir. 1990).

241. 153 F.3d 368 (7th Cir. 1998).
carrying knives and how to arrest individuals carrying concealed weapons was proper.

In *Samples v. City of Atlanta*, the Court held that there was no error in permitting an expert on the use of force to testify as to whether it was reasonable for the officer to discharge his firearm when the victim charged him with a knife. The expert was allowed to testify as to whether the shooting "was justified." In *Slakan v. Porter*, the Fourth Circuit affirmed a decision involving an inmate’s excessive force claim against prison guards. The court found no error in the admission of expert testimony concerning the punitive nature of North Carolina’s practice of using water hoses on inmates. In *Parker v. Williams*, the Eleventh Circuit held that it was permissible for the plaintiff’s law enforcement expert to testify that the law enforcement agency was grossly negligent in hiring the jailer. In *Vineyard v. County of Murray*, the inadequacy of law enforcement training was the subject of expert testimony. A professor of criminal justice who qualified as an expert in "police operations" was permitted to testify that the practice of not logging complaints which can alert a law enforcement agency that an officer may have a history of the use of excessive force, as well as the lack of follow-up on such complaints, constitutes a ratification of wrongs that the agency knows have been committed. The expert was also permitted to testify on the issue of causation.

These cases provide a fundamental evidentiary framework for the admission of expert testimony to address an array of issues in routine use of force cases.

X. Conclusion

Alleged excessive force cases typically arise from instantaneous judgment calls made by law enforcement officers under the most difficult circumstances. Because of the proliferation of illegal gun use by criminals and the necessity of quick police action, some innocent citizens will inevitably be injured or killed by law enforcement officers,

242. 916 F.2d 1548 (11th Cir. 1990).
243. *Id.* at 1552. See *Wade v. Haynes*, 663 F.2d 778, 783-84 (11th Cir. 1981) (expert in prison policy allowed to give opinion on whether conduct was prudent administration), *aff’d sub. nom.*, *Smith v. Wade*, 461 U.S. 30 (1983); *United States v. Myers*, 972 F.2d 1566, 1577-78 (11th Cir. 1992) (lay witness allowed to testify as to whether use of force was reasonable or justified).
244. 737 F.2d 368 (4th Cir. 1984).
245. 855 F.2d 763 (11th Cir. 1988), *vacated on other grounds*, 862 F.2d 1471 (11th Cir. 1989).
246. 990 F.2d 1207, 1212-13 (11th Cir. 1993).
247. *Id.*
especially when those citizens make gestures inferring that weapons are being retrieved. Most everyone has an after-the-fact opinion about how they may have responded somewhat differently. However, use of force law expressly prohibits such Monday morning quarterbacking.

The *Saucier*, *Graham* and *Garner* standards strike an appropriate balance affording remedies for objectively unreasonable police conduct while protecting officers who act consistent with reasonable beliefs even when mistaken. Fourth Circuit and North Carolina cases strictly adhere to the Supreme Court’s continuing mandate that officers are not liable for mistaken beliefs or reasonable mistakes under standards of objective reasonableness. A synthesis of federal and North Carolina law has enunciated a workable standard that affords considerable discretion to officers whose lives are often at immediate risk.