Deadly Force Law & Policy



I. Department of Justice Deadly Force Policy

A. GENERAL PRINCIPLES

- 1. Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a **reasonable belief** that the subject of such force poses an **imminent danger** of **death or serious physical injury** to the officer or to another person.
 - a. Deadly force may *not* be used **solely to prevent the escape** of a fleeing suspect.
 - b. Firearms may *not* be fired solely to disable moving vehicles.
 - c. **If feasible** and if to do so would not increase the danger to the officer or others, a **verbal warning** to submit to the authority of the officer shall be given prior to the use of deadly force.
 - d. Warning shots are <u>not</u> permitted outside of the prison context.
 - e. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

B. APPLICATION OF THE POLICY

1. This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

CAUTION - TFO's: Task Force Officers (TFO's) designated under 21 U.S.C. § 878 to enforce Federal drug laws, agree to follow the prohibitions on shooting contained in the Attorney General's Deadly Force Policy. This outline accurately describes the Attorney General's Policy and relates it to the Federal case law on the use of deadly force. Extraordinary circumstances could occur where a TFO could be permitted by Federal case law and Federal Policy to shoot at a suspect, but be prohibited from taking the shot under State law or State Agency Policy. In these rare circumstances, the power of the Attorney General of the United States to protect a TFO from State criminal prosecution, State civil action or State disciplinary action, is NOT clearly-established by existing case law. Therefore, we caution TFO's to follow the most restrictive rule from the applicable State or Federal laws or policies, with particular care to abide by any specific prohibition contained in those laws or policies. We encourage TFO'S to consult with their home department legal advisors regarding State deadly force law and policy.

- 1. Probable Cause (Reasonable Belief)¹
 - a. Subject **intends**² to attack
 - i. Necessary³ but alone <u>not sufficient</u>⁴





- 2. Probable Cause (Reasonable Belief)⁵
 - a. Has the **power**⁶ to cause
 - i. Death or
 - ii. Serious physical injury
 - (1) Necessary but alone not sufficient⁷





↑ (Necessary But Not Sufficient) ↑



- 3. Probable Cause (R/Belief)⁸
 - a. Danger is **imminent**⁹
 - Probable cause of intent, power, and imminence could happen in a split second (as soon as the

subject reaches for his gun)



↑ Sufficient ↑



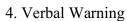
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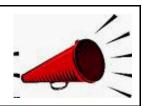
1 Sufficient

- ii. Before you shoot to stop a deadly threat, you should see or hear some objective sign¹⁰ (usually a physical act,¹¹ such as some hand movement) indicating that the subject is about to attack¹²
- iii. Note: It is <u>not required</u> that the subject actually point the gun at you before you may use deadly force in self defense





- a. "Police, stop or I'll shoot"
- b. Only required if safe & feasible





- 5. **Balance risk** of hitting others if:
 - a. You have good cover,
 - b. You are shooting to prevent the escape of a dangerous felon, or
 - c. You are shooting through concealment.

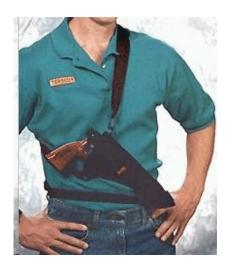


May use deadly force¹³ in self defense or defense of a third party

Power* (The subject's power (ability) to kill or seriously hurt you is an insufficient basis by itself to use deadly force against him)

It is necessary, but not sufficient, that you have:

- Probable Cause (Reasonable Belief)
- He has power to
- Cause death or
- Serious physical injury



↑ (Necessary But Not Sufficient) ↑



Before you are legally justified in using deadly force in self defense,

you must see the person make a move indicating he intends to use his power to kill or seriously injure you or someone else.

↑ (Sufficient) ↑

- 1. A suspect could have the <u>power</u> to cause death or serious physical injury if he is:
 - a. Armed with a weapon¹⁴ capable of causing death or serious physical injury, or
 - b. Superior in strength¹⁵ to you.
- 2. Even if any one suspect is not superior in strength to you, a group 16 could have sufficient power to cause death or serious physical injury to you if they act in concert.
- 3. In any case, the attacker must <u>do something to use his power to kill or seriously injure</u> you before you may used deadly force in self defense.

Death or

Serious Physical Injury¹⁷

The threatened injury must be serious, but need not be deadly nor permanent.

Examples of serious physical injuries:

- ♦ Serious impairment of vision
- ♦ Serious burns
- ♦ Severe pain
- ♦ Serious disfigurement
- **♦** Choking
- ♦ Serious head injuries
- ♦ Testicular injuries
- ♦ Broken Bones
- ♦ Serious wounds
- ♦ Loss of body parts
- ♦ Forced sex¹⁸

The Danger must be Imminent¹⁹

Imminent is broader than immediate.²⁰

All immediate dangers are imminent.

Not all imminent dangers are immediate.

A past danger is not an imminent danger.²¹

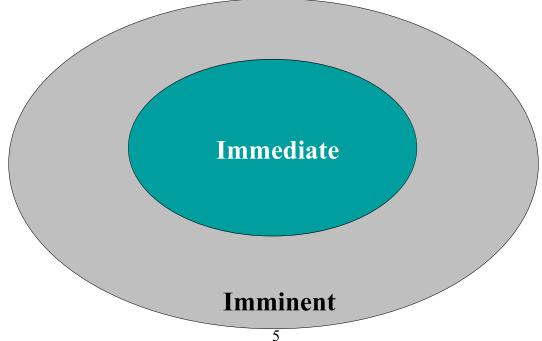
This Danger is both immediate and imminent

An **immediate threat** is one that requires a response *then and* there, if the response is going to be an effective defense against the attack.



↑ Sufficient ↑

A person who has fired a gun at you and now is running in a direction away from you in order to gain a tactical advantage of cover does not pose an immediate danger to you. However, he does pose an imminent danger to you.



Hostile Moves

Before you shoot to stop a deadly threat, you should see or hear some objective sign (usually a physical act, such as some hand movement) indicating that a person who has the power to cause death or serious physical injury is about to attack you or someone else.

Examples:

You approach drug suspect with your gun aimed at him, identify yourself as a DEA Agent, and give him a command to raise his hands.

He violates your command and instead:

- 1. Reaches for a gun;²²
- 2. Reaches for his waist;²³
- 3. Reaches for his lower back;²⁴
- 4. Reaches for a pocket;²⁵
- 5. Reaches into his coat;²⁶
- 6. Reaches for his ankle;²⁷
- 7. Reaches under the seat;²⁸
- 8. Reaches into an area not yet cleared, that could conceal a gun;²⁹



1 Sufficient 1

- 9. Advances toward you with what appears to be a weapon in his hand;³⁰
- 10. Turns toward you with what appears to be a gun in his hand;³¹
- 11. Raises what appears to be a gun in your direction;³²
- 12. Points what appears to be a gun in your direction;³³
- 13. Shoots at you;³⁴
- 14. Lunges for what appears to be a gun;³⁵
- 15. Grabs for your gun;³⁶ or
- 16. Runs for what appears to be a gun nearby.³⁷

Courts have ruled in individual cases that officers faced with any one of the above listed actions were justified in using deadly force to defend themselves, because in each case it was reasonable for the officer to believe that he was in imminent danger of being shot.

It is not enough that the defendant makes a move.³⁸ The move must be the type of move that could reasonably viewed as hostile.

Verbal Warnings



- 1. Merely identifying yourself as an officer is not a warning.
 - a. Not a warning → "Police!"
 - b. While saying "police" is not sufficient alone to constitute a warning before using deadly force, it is **needed to avoid liability** under the circumstances in \P i(1) and i(2) below.
 - i. The suspect is under **no legal obligation** to follow your commands if you do not identify yourself as an officer.
 - (1) Except when there is imminent peril³⁹, always identify yourself as an officer any time you make a **warrantless entry**⁴⁰ or an entry pursuant to **a search warrant**.⁴¹
 - (2) Always identify yourself as an officer any time you approach a suspect with your weapon drawn.⁴²
- 2. A command itself is not a warning.⁴³

Not a warning → "Police, stop!"



"Police, stop!" Insufficient Deadly Force Warning

3. You must warn the suspect that you will shoot him⁴⁴ before doing so in order to **provide him an opportunity to give up**, if it is feasible to give such a warning.

"Police, Stop or I'll shoot!" (give him enough time to heed the warning, before shooting)

Feasible

- 1. You must give a warning that you will shoot the suspect only if it is **feasible** to do so. It is **feasible** to give a warning if you have **time**. 45 You will (usually) have time if he is **running** away to an open area.
- 2. It is generally **not feasible** to give a warning if the suspect is trying to shoot you and you must **shoot immediately** to defend yourself.⁴⁶
- 3. It is generally **not feasible** to give a warning if the suspect is trying to shoot another person and you must **shoot immediately** to defend that person.
- 4. It is generally **not feasible** to give a warning if the suspect is **trying to get to a weapon**, and your taking time to warn him would enable him to do so.
- 5. It is generally **not feasible** to give a warning if the suspect is running to cover and the time it takes to give a warning would allow the suspect to gain a tactical advantage by getting **behind cover**.
- 6. It is generally **not feasible** to give a warning if the time it takes to give a warning would allow the suspect to **reload his weapon**.

Balance Risk to Others



Immediate Danger

If you must shoot **"immediately"** to stop a deadly threat, you are not legally responsible for accidentally hitting others, 47 unless you are shooting recklessly. 48 You are not legally required to give up your life on the chance you may hit a bystander when the threat to you is **"immediate."** 49

Imminent (but not immediate) Danger

When the danger is <u>not immediate</u>, but still imminent, you must balance the need to shoot against the **risk to others**. ⁵⁰

You should engage in this balancing of danger to bystanders if:

- 1. You have good cover, or
- 2. You are shooting to prevent the escape of a fleeing dangerous felon, or
- 3. You are shooting through concealment.



Even if you were initially justified in using deadly force, you must stop shooting if the subject:

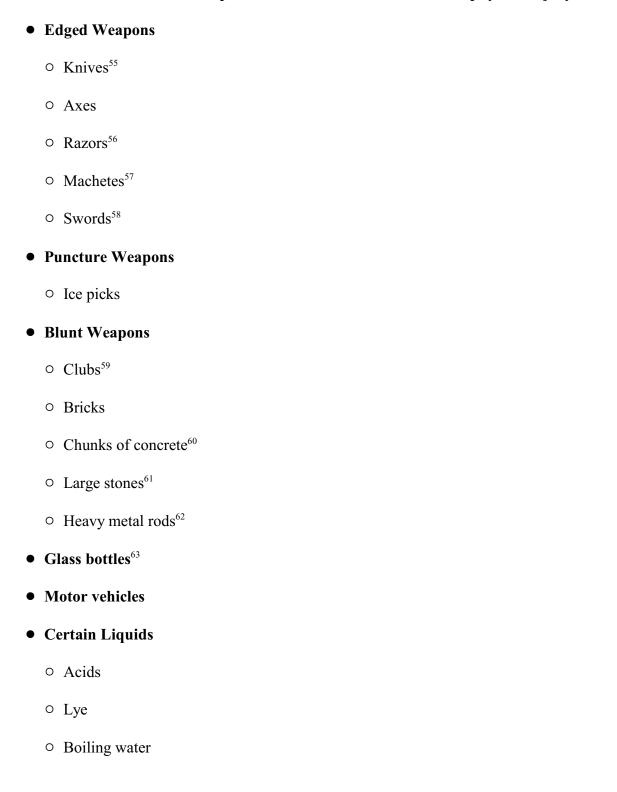
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- ☐ Drops his gun, indicating he has **given up the fight**;⁵¹
- ☐ Puts up his hands to **surrender**;⁵² or
- ☐ Collapses due to being **incapacitated**.⁵³

In most cases, courts have found that the danger to the officer is no longer imminent in the each of the above circumstances. There must be some additional facts that would justify continuing to shoot after any of the above things have happened that would lead a reasonable officer to believe that the subject continued to pose an imminent danger of death or serious physical injury, before such a shooting could be viewed as justified.

Contact Weapons

Below is a list of contact weapons that can cause death or serious physical injury:54



The 21-Foot Rule

If to kill or seriously injure you, an attacker must get close enough to touch you, then his **distance** from you will be an important factor in determining if he is an **imminent danger** to you.⁶⁴

On average, it takes an attacker only 1.5 seconds to rush 21 feet. 65

- On average, it takes <u>over</u> 1/2 second for a person with his gun drawn to react and fire one round (reaction time)⁶⁶
 - Time to perceive the threat (perception time) +
 - Time to decide what to do (decision time⁶⁷) +
 - Time to begin to respond to the threat, by beginning to pull the trigger (response time) +
 - \circ Time to complete act of pulling the trigger⁶⁸ (mechanical time⁶⁹) =
 - Over 1/2 second reaction time⁷⁰
- Perception time + decision time + response time + mechanical time = $\underline{\text{over}}$ 1/2 second total reaction time to fire the first round⁷¹

If a suspect has a knife and he attacks you from 21 feet away, if you are well trained and ready to react, you may be able to shoot the suspect 3 or more times before he can cut you with the knife. The harsh reality, however, is that under stress officers usually miss their target with most of their rounds, even at close range. Furthermore, it is unlikely that the bullets will incapacitate the attacker, and he therefore may still be able to stab or slash you, even though he has been shot. The harsh reality has been shot. The harsh reality has a support to the suspect a stab or slash you, even though he has been shot.

- A suspect with a knife who is within 21 feet of you, would pose an imminent danger of death or serous physical injury to you if he makes a hostile move toward you.⁷⁴
 - For example:
 - suppose a suspect with a knife starts walking toward you from 30 feet away,
 - you draw your gun and point it at him,
 - you warn him to stop or you will shoot him,
 - he keeps coming toward you,
 - you may shoot him when he gets 21 feet from you because he poses an imminent danger of death or serious physical injury.

Please note that if the scenario is changed and the suspect, instead of walking, is running swiftly at you, there is no assurance that even if you shoot the suspect from 21 feet away that the rounds hitting him will disable him before he can kill you with his knife. In such a case, you may legally be able to shoot the attacker before he gets to within 21 feet.

The peril increases if your gun is holstered when the subject attacks. If you are standing within 21 feet of the knife wielding subject with your gun holstered when he begins his attack, assuming you react immediately, you might have just enough time to draw your weapon from its holster and pull the trigger at about the moment that he is plunging the knife into your body.⁷⁵

Empty Handed Attacker

The following five circumstances have been accepted by courts as providing probable cause that an empty handed attacker has the power to cause you death or serious physical injury:

- There is a group of empty handed attackers who **outnumber** you and appear to be working in concert to assault you.⁷⁶
 - You have the choice as to which, if any, of the attackers to shoot first.
- A single empty handed attacker **grabs your gun**,⁷⁷ or gives some objective sign that he intends to grab your gun.
 - It is <u>insufficient justification</u> to shoot if all you have is some <u>generalized fear</u> that he is thinking of grabbing your gun.
- The empty handed attacker has **demonstrated** during the attack that he is your **superior in strength**.
 - In other words, the fight is on and you are losing.⁷⁸
- Prior to attacking you, the empty handed attacker clearly appears to be superior in strength to you.
 - Note that not all courts accept this justification.
- The empty handed attacker is **skilled in martial arts** or other special fighting skill.
 - Note that not all courts accept this justification.

Absent one of the above circumstances, current case law prohibits shooting an empty handed attacker.

Motor Vehicles

• Under the DOJ Deadly Force Policy, firearms may <u>not</u> be fired solely to disable moving vehicles.





• An officer may, however, use deadly force against the **driver** of a motor vehicle if the driver uses the motor vehicle as a weapon⁷⁹ to kill or seriously injure the officer or another.⁸⁰

Alternatives to Deadly Force





The majority rule⁸¹ is that an officer has <u>no duty to consider alternatives</u>⁸² to deadly force, if deadly force is otherwise justified.

An officer who is faced with an imminent danger of death or serious physical injury has **no duty to retreat** before using deadly force in self defense.⁸³



Assailant Shoots at You and With Gun in Hand Turns His Back and Runs



A suspect assaults you with a gun, turns his back to you and starts to run away from you. You yell to him "stop, drop the gun, or I'll shoot." The suspect keeps running away with his back to you.

In this case the suspect no longer poses an immediate threat to you, however, he still poses an **imminent** threat.⁸⁴

- In order to chase him you would have to **leave any cover** you may have. That would put you at a tactical disadvantage in that the suspect could **stop at any time** and fire upon you while you are in the open. 85 He has the advantage of acting first to stop his running, turn, and fire; you have the disadvantage of having to react to his actions.
- Your ability to shoot him is hampered by running, which makes it difficult to shoot accurately.
- He could get access to **cover** and thereby gain a tactical advantage over you. The law permits you to use deadly force to prevent him from gaining that tactical advantage of cover. 86
- Case law permits you to shoot the armed dangerous⁸⁷ assailant in the back to stop the imminent threat, provided that:
 - He has ignored your warnings (or it was not safe and feasible to give warnings⁸⁸), and
 - Shooting him would not create a **significant risk to others**.

Assailant Shoots at You and Drops His Gun Before Running Away



A suspect assaults you with a gun, turns his back to you and starts to run away from you. You yell to him "stop, drop the gun, or I'll shoot." The suspect drops the gun, but he keeps running away with his back to you.

The law permits you to use deadly force to prevent the escape of this dangerous fleeing felon⁸⁹ if:

- You have **high probable cause** to believe he has committed a felony involving the infliction or threatened infliction of **death or serious physical injury**;
- Shooting him is necessary to stop his flight;
- He has ignored your warnings (or it was not safe and feasible to give warnings); and
- Shooting him would not create a significant risk to others.

The DOJ Deadly Force Policy states: "Deadly force may <u>not</u> be used **solely to prevent the escape** of a fleeing suspect." (emphasis added)

In this case the suspect has just committed a deadly assault against a law enforcement officer (you). He knows that he is facing a long prison term if he is caught. He has ignored your commands to stop, which indicates that he is not likely to submit to you or any other officer in his desperate and reckless attempt to get away. He poses a significant danger to anyone he may come across in his desperate attempt to get away.

In this case you have three choices:

- You may let him get away
 - O You are a law enforcement officer and this is the very type of criminal that the citizens expect that you will stop. A person who will shoot at a police officer, who represents the community law and order, will not hesitate to shoot at any other member of that community. It would be unsatisfactory to allow a dangerous criminal to get away to prey on the community.
- You may try to catch him
 - O If you tried to catch him and you succeeded, you would bring yourself and your weapon within reach of this dangerous and desperate felon in the hope that you are his physical superior. You would be at a disadvantage because you would have to accomplish two tasks to survive the encounter, whereas your adversary would only need to do one thing to kill you. Your first task would be to arrest the subject once you catch up with him, and secondly, in the process of arresting him you would have to retain your weapon. The subject, however, has a much easier task to win the fight against you. He would only need to get your gun away from you in order for him to win. Once he gets the gun from you, it is probable that he will use it to shoot you, an inclination he has already demonstrated.
- You may shoot him
 - Under the DOJ policy, you could <u>not</u> shoot him <u>solely</u> to prevent his escape; however, you are permitted to shoot him for the additional purpose of preventing him from killing or seriously injuring someone in his desperate attempt to get away. Under these circumstances, the DOJ Deadly Force Policy permits you to shoot this fleeing dangerous felon in the back, if necessary to prevent his escape, because he poses an imminent danger of death or serious physical injury. Authorization to use deadly force under the policy should not be interpreted as a mandate requiring you to use deadly force.

Post Shooting Statement

1. Prior information

a. Explain the prior information you had about the subject.

2. Mission

a. Explain why you were there (search warrant, arrest warrant, surveillance, conducting an interview).

3. Insignia Displayed

a. Did you display police or DEA insignia for the subject to see?

4. Approach

a. How did you approach the subject?

5. Cover

- a. Were you behind cover?
- b. Was cover available?

6. Subject's Hands

- a. Was there anything in the subject's hands?
- b. What did he do with his hands?

7. Verbal Announcement

- a. What did you say?
- b. Did you identify yourself as an officer?

8. Commands

a. Did you command him to do anything?

9. Warning

- a. Did you warn him that you were going to shoot him?
- b. If you did not warn him, explain why it was not feasible to do so.

10. Hostile Move(s)

a. What did he do?

11. Threat Assessment

a. An example of a legally sufficient conclusory justification for shooting a subject would be: "At that moment I believed that I was in imminent danger of being shot, so I shot him to stop him from shooting me." That statement must be supported by the facts. Your belief that deadly force was necessary must be reasonable.

Endnotes

1. Tennessee v. Garner, 471 U.S. 1 (1985). Garner was a fleeing felon case, in which the U.S. Supreme Court stated that deadly force may not be used unless it is necessary to prevent the escape of the suspect 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." *Id.* at 3.

2. Acers v. United States, 164 U.S. 388 (1896). Acers was a case involving an appeal of a conviction for "assault with intent to kill." The defendant (Acers) claimed self defense (from an alleged attack by Owens), and the U.S. Supreme Court approved of a jury instruction on self defense, which provided:

You look at the act being done, and you from that draw an inference as to whether there was **reasonable ground to believe that there was a design upon the part of Owens**, in this case, to destroy the life of the defendant Acers, or to commit any great violence upon his person at the time he [Owens] was struck by the rock.

Id. at 392-93 (emphasis added). *See also State v. Hendrix*, 244 S.E.2d 503 (S.C. 1978). In *Hendrix*, the Supreme Court of South Carolina overturned the manslaughter conviction of the defendant, who shot the decedent four times with his shotgun. The *Hendrix* court found that the defendant was justified in shooting the decedent because the decedent had earlier threatened the defendant, the decedent was under the influence of alcohol, and the decedent went to his truck, grabbed a shotgun, and pointed it at the defendant. "**His conduct evidenced no intent other than that he intended to do battle.**" *Id.* at 506-07.

3. Roberts v. State, 65 Ga. 430 (Ga. 1880) ("No menace, threat, contemptuous gesture, or presentation of weapons without a manifest intent to use them presently, will justify the killing.").

4. Harris v. Roderick, 126 F.3d 1189, 1202-03 (9th Cir. 1997). In Harris, the court ruled that the rules of engagement were patently unjustified, because they provided that any adult male armed with a weapon in the vicinity of a cabin "could and should" be killed, regardless of whether he was threatening the officers or any other person. The subject had the previous day shot and killed a U.S. Marshal. Even though the subject was armed, and it was likely that he was ready to respond to a confrontation with the FBI by shooting, he made no aggressive move of any kind toward the police or any member of the public when he was shot by the FBI sniper. Therefore, the FBI sniper was not justified in shooting the subject. The fact that the subject allegedly committed a violent crime in the immediate past is an important factor, but without more it is insufficient to justify shooting a subject on sight. See also Harrison v. State, 24 Ala. 67 (Ala. 1854). In Harrison, the Supreme Court of Alabama stated:

It was correctly stated by Ruffin, C.J., in *The State v. William Scott*, that "the belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately." The "situation" spoken of is, not that he has the means at hand for effecting a deadly purpose, but that, by some act or demonstration, he indicates at the time of the killing a present intention to carry out such purpose, thereby inducing a reasonable belief, on the

Id. (citations omitted) (emphasis added). It is not enough that the target has the intent to kill or seriously injure (even if he also has the present means to carry out his intentions), he must do something indicating that he is acting upon his intentions. In *Harrison*, the court affirmed a murder conviction, where the defendant shot the decedent who was standing within a few feet of him with a rifle on his shoulder. The decedent retrieved the rifle in response to a previous assault by the defendant upon his sons, but the decedent made no move to use the gun against the defendant when he was shot. See also Bougess v. Mattingly, 482 F.3d 886 (6th Cir. 2007). In Bougess an officer tried to arrest the suspect for a drug crime. The suspect resisted the arrest attempt and broke free. The suspect was fleeing when the officer shot the suspect in the back. The officer stated that during the altercation the suspect "just had this look in his eyes like, man I'm going to kill you." Id. at 888. The officer argued that he had probable cause to believe the suspect was armed because trained police officers know that drug dealers usually carry guns. The officer also testified that the suspect tried to take his gun from him and that one shot was fired, but the court discounted the officer's testimony because it was rebutted by 4 eye witneses who stated that no shots were fired during the struggle. The court ruled that the officer's hunch that the suspect might be armed because he was a drug dealer was not sufficient to establish probable cause, which requires particularized facts. *Id.* at 891. Furthermore, the court ruled that the look in the subject's eyes was insufficient to justify shooting the subject. *Id.* at 892. Although the subject turned out in fact to be armed, the court denied the officer qualified immunity because there were disputed facts on the issue of whether the officer reasonably believed the suspect was armed and whether the suspect grabbed the officer's gun.

5. Anderson v. Russell, 247 F.3d 125, 130 (4th Cir. 2001), infra in endnote accompanying Hostile Moves section on page 6 (An officer was told by a citizen that a suspect appeared to have a gun under his sweater, and the officer saw a bulge under his clothing near his left waistband. The court ruled that the officer "reasonably perceived" that the suspect was armed with a concealed gun and as a matter of law the officer was justified in shooting the suspect when the suspect suddenly reached toward his back left pocket, immediately after he initially raised his hands in compliance with the officer's command.). Suell v. Derricott, 49 So. 895 (Ala. 1909). In Suell, the Supreme Court of Alabama affirmed a jury verdict in favor of the defendants in a wrongful death civil suit. In Suell, the decedent was caught in the act of committing a burglary of a business. He was told to stop by the defendants, and when the decedent turned toward the defendants he pointed an object that resembled a gun in the direction of the defendants and they shot and killed the decedent. The object turned out later to be an iron crowbar he was using to break into the store. The court stated: "There is also a rule of law that, in cases of self-defense. the party is not required to know the real fact, but he may act upon a reasonable and well-founded appearance and apprehension, and, whenever a man exercises the right of self-defense, he is understood to act on the facts as they reasonably appeared to him, or as they would appear to a reasonable man, similarly situated; and if, without fault or carelessness on his part, he is misled concerning the facts, and defends himself according to what he reasonably supposes the facts to be, he is justifiable, though in truth the facts as they were reasonably supposed did not exist, and in fact he had no occasion for the extreme measure." Id.

6.*Clark v. Ziedonis*, 513 F.2d 79 (7th Cir. 1975) (A thin metal file being held by the victim was of no threat to the officer, who was approximately 45 feet away. Since the file did not resemble a gun, the officer was not justified in shooting the victim from 45 feet away as he turned toward officer with the file in his hand.). In *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993), the Court of

Appeals for the Seventh Circuit reversed the summary judgment order in favor of an officer who shot a fleeing burglar. At present burglary is not viewed as a crime involving the infliction or threatened infliction of death or serious physical injury. Consequently, deadly force may not be used to prevent the escape of a burglar. In *Ellis*, the suspect tossed a mesh bag full of loot weighing approximately five pounds at the officer; the bag struck the officer in the arm and fell harmlessly to the ground. The suspect then backed away and ran. As he ran from the confrontation the officer shot him twice in the back. The court found that the officer could have shot at the moment that the suspect threw the bag at him. However, once the lightweight bag struck him and it was clear that he bore no injury and that the suspect was not attacking him, he was not justified in shooting the suspect. In this case, the court noted that the clothing the suspect was wearing made it difficult to conceal a weapon. The Wynalda court acknowledged that it was possible that the suspect could have been armed, just as it is possible that any felon could be armed. Possibility, however, is not the standard. The standard is probable cause; that is, the officer must articulate sufficient particular facts to establish a fair **probability that the suspect is armed**. *Id.* at 247. The court accepted as true the version of the facts as presented by the suspect, for purposes of making its ruling in the case. The case was remanded to the district court for the jury to resolve the factual issues.

7. Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991) (qualified immunity denied to officers where facts in light most favorable to the plaintiff indicated that the police shot the decedent while a gun was laying at his side but he did not reach for it or point it at the officers). Bennett v. Murphy, 274 F.3d 133 (3rd Cir. 2002), infra in accompanying endnote under the imminent danger section on page 2. The Bennett court disapproved of shooting a subject with a shotgun pointed to his own head during a police standoff, because he did not make a hostile move with the gun. Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996), infra in accompanying endnote under the imminent danger section on page 2. In *Dickerson*, the court ruled that officers were unjustified in shooting the subject as he walked inside his home toward his front door carrying a gun. In *Robinson v. Nolte*, 77 Fed.Appx. 413 (9th Cir. 2003) (unpublished), the court ruled that it was unlawful to shoot a subject sitting on a bed with a gun in his lap with his hands over his head in a surrender position. The jury award of \$1 million against the officer was upheld. The *Nolte* court stated that "[s]imply possessing a gun, without more, is insufficient cause to justify the use of deadly force." But See Sinclair v. City of Des Moines, 268 F.3d 594 (8th Cir. 2001). In Sinclair, officers went to an apartment identified by an injured woman as the place where her two assailants had fled. Two officers announced their presence several times when the door suddenly opened (apparently by the decedent). The officers saw the decedent standing with a long barrel rifle in his hands. The appellate briefs revealed that the gun later turned out to be a non-functional pellet gun, however, the court apparently did not think that fact was germane, since the court made no mention of it in its opinion. The court opinion did not indicate that the rifle was pointed at the officers either. In the appellee's brief, the officers claimed that the gun was pointed at them, however, the appellant disputed whether the decedent even had a gun in his hands. The court, for purposes of addressing the qualified immunity issue, apparently decided to only mention that the decedent had a gun in his hands and not explain where it was pointed. In any event, one of the officers fired four rounds from his handgun, striking the suspect three times, killing him. The court ruled that the officer acted reasonably. Note, that in this case the officers announced their presence before seeing the suspect with the gun in his hands. It would be reasonable for an officer to infer that the suspect armed himself after hearing the announcement that they were the police for the purpose of resisting the police. Arguably, the *Sinclair* decision is authority for the proposition that just as an officer would be justified in shooting a suspect who reached for a gun in his

presence, an officer would also be justified in shooting a suspect after he has reached for and actually gained possession of the weapon, even though the officer did not see the action of reaching.

8.New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18 (1891). In Jopes, a passenger was shot by the train conductor when he approached the conductor with an open knife. The passenger sued and won a money judgment of \$9,500 against the railroad company. The railroad company appealed, alleging error in the instructions given by the trial court to the jury. The trial court refused to give the jury the following instruction requested by the railroad:

[I]f they believed from the evidence that when Carlin shot the plaintiff, he, Carlin, had **reasonable cause to believe** from Jopes' manner and attitude that he, Jopes, was about to assault Carlin with the knife, and that it was necessary to shoot him to prevent great bodily harm from Jopes, then that the jury should find for defendant, **whether Jopes was intending to do Carlin great bodily harm or not.**"

Id. at 19 (emphasis added).

Instead, the trial court gave the following instruction:

[I]f Carlin shot under the **mistaken belief** from Jopes' actions that he was in danger of great bodily harm then about to be done him by Jopes, when in fact Jopes was not designing or intentionally acting so as to indicate such design, the plaintiff should be **entitled to compensatory damages**, and not punitive damages.

Id. (emphasis added)

The U.S. Supreme Court ruled that the trial court erred in its instructions to the jury. The Supreme Court ruled that the issue was the reasonable appearance of the imminent danger of death or serious physical injury to the conductor. It was irrelevant if it turned out later that the conductor was mistaken in his belief. The Supreme Court ruled that the focus should be on the reasonableness of the conductor's belief at the time he was faced with the danger, not the correctness of his belief based upon later determined facts. The court stated:

It will be scarcely doubted that if the conductor was prosecuted criminally, it would be a sufficient defense that he honestly believed he was in imminent danger, and had reasonable ground for such belief. In other words, the law of self-defense justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is that, if one approaches another, pointing a pistol, and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent, facts, and the honesty of belief in danger. . . . And the same rule of immunity extends to civil as to criminal cases. If the injury was done by the defendant in justifiable self-defense, he can neither be punished criminally, nor held responsible for damages in a civil action. Because the act was lawful, he is

Id. at 24.

"[T]he law, as it judges the police, [is placed] in no better position than the police as they judge the suspect." Menuel v. City of Atlanta, 25 F.2d 990, 995 (11th Cir. 1994). "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." Graham v. Connor, 490 U.S. 386, 396-97 (1989). See Milstead v. Kibler, 243 F.3d 157 (4th 2001). In Milstead, the court ruled that the officer acted reasonably when he shot and killed a person who "came crashing through the door" in a run and turned and faced the officer. Although the officer did not see a gun, he believed the runner to be an assailant who had moments earlier shot two people, pointed his gun at officers, and threatened to kill them all. It turned out later that the runner was an unarmed "good guy" who had called the police to the scene. The standard of review of the officers conduct focused on the reasonableness of the officer's belief in the few seconds he had to react, not the correctness of his actions viewed from the calm vantage point of 20/20 hindsight. See also McLenagan v. Karnes, 27 F.3d 1002, 1007-08 (4th Cir. 1994). In McLenagan, an officer was found to have mistakenly (but reasonably) shot an unarmed man. The court stated that "we 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." Id. at 1007. The court further stated: "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 and others. Although it is extremely unfortunate that McLenagan was seriously injured, § 1983 does not purport to redress injuries resulting from reasonable mistakes." Id. at 1007-08.

9. Commonwealth v. Cary, 271 Va. 87, 623 S.E.2d 906 (Va. 2006). In Cary, a the male decedent called the defendant vulgar names and attacked her, grabbing her by the hair and hitting her in the face and sides. The decedent refused to leave the apartment despite the defendant's request that he do so. The decedent went to use the bathroom in the apartment, at which time the defendant retrieved a handgun. When the decedent left the restroom the defendant again told the decedent to leave the apartment. The decedent told the defendant that he was going to "smack" her, "'F' [her] up," and "break [her] up" as he walked toward the defendant. The defendant shot the decedent when he was 11 to 18 feet away. The Supreme Court of Virginia reversed the defendant's conviction for first degree murder because the trial court did not give the jury a requested instruction on self defense. The Supreme Court of Virginia ruled that there was sufficient evidence that the decedent posed an imminent deadly threat to warrant a self defense instruction. The court stated that even though five minutes had passed since the first assault, the decedent had verbally threatened the defendant and was approaching her when he was shot. The court analyzed the imminence of the threat as follows:

Beekman refused this demand and threatened to "smack" her and commit other acts of violence upon her. It was in this context that Cary testified that Beekman was "walking or running" toward her. And that fact must be viewed in the context that Beekman's assault on Cary, which had ended only five minutes before, had been occasioned by the same demand that he leave the home, his refusal, and a vile verbal assault. When so viewed, the trier-of-fact could reasonably conclude that Beekman, although 11 to 18 feet away from Cary at the

time of the shooting, was nonetheless advancing toward her with the intent to resume his physical assault upon her. Such act constituted an overt act of sufficient imminence on the part of Beekman to warrant Cary to respond in her defense. Accordingly, we hold that the Court of Appeals did not err in finding that there was sufficient evidence in the record to warrant the trial court instructing the jury on Cary's claim of self-defense and, thus, that the trial court erred in not giving the proffered self-defense instruction.

Id. at 99. While a past assault that happened five minutes earlier does not constitute an imminent danger warranting the use of deadly force, the *Cary* court pointed out that the subsequent actions of the decedent must be viewed in light of that past assault. When the decedent threatened to strike the defendant as he walked toward her, the defendant could reasonably believe that he meant it, in light of the fact that he had done that very thing only five minutes earlier.

10. Bennett v. Murphy, 274 F.3d 133, 136 (3rd Cir. 2002). The Bennett court ruled that an officer violated the decedent's constitutional right to be free from unreasonable seizure by shooting him from behind at 80 yards away as the decedent stood holding the barrel of a shotgun pointed vertically at his own head during a one hour standoff with police. The court ruled that shooting the decedent was unjustified because at no time during the standoff did the plaintiff point the gun at anyone other than at his own head. The decedent was distraught over not being able to see his girlfriend. At one point the decedent began to walk toward officers within 20-25 yards of him, however, he obeyed their command to stop when they ordered him to halt, he obeyed that command four seconds before being shot. The court stated that assuming the facts alleged by the decedent's representatives were true, the decedent did not pose a threat to anyone but himself, deadly force therefore was objectively excessive. In a later unpublished opinion, a different panel of appellate judges ultimately ruled that the officer was not entitled to summary judgement on grounds of qualified immunity. See Bennett v. Murphy, 120 Fed. Appx. 914 (3rd Cir. 2005) (unpublished opinion). Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985). The Grandstaff court upheld a jury verdict against several police officers because they "poured their gunfire" at the truck of a subject "without awaiting any hostile act or sound." The court ruled that the officers "showed no inclination to avoid inflicting unnecessary harm upon innocent people. They simply saw a target and fired." Id. at 168. In Garczynski v. Bradshaw, 573 F.3d 1158 (11th Cir. 2009), the U.S. Court of Appeals for the Eleventh Circuit took a contrary view. The court in that case found that even if it assumed that the decedent did not point his gun at the officers as they alleged, "the fact that [the decedent] did not comply with the officers's repeated commands to drop his gun justified the use of deadly force under these particular circumstances." Id. at 1168. The Garczynski case involved a roadside standoff with suicidal man who had a gun pointed at his own head.

11. "The 'bare fear' of serious bodily injury, or even death, however well-grounded, will not justify the taking of human life. *Stoneman v. Commonwealth*, 66 Va. 887, 900 (1874). 'There must [also] be some **overt act** indicative of **imminent danger** at the time.' *Vlastaris v. Commonwealth*, 178 S.E. 775, 776 (Va. 1935). . . . In other words, a defendant 'must wait till some **overt act** is done [,] ... till the danger becomes imminent.'" *Commonwealth v. Cary*, 623 S.E.2d 906, 912 (Va. 2006). *Acers v. United States*, 164 U.S. 388 (1896). The danger justifying the use of deadly force must be "apparent." "[T]here must be some overt act being done by the party which, from its character, from its nature, would give a reasonable man, situated as was the defendant, the ground to believe that there was danger to his life, or deadly violence to his person, and unless that condition existed, then there is no ground upon which this proposition can

stand; there is nothing to which the doctrine of apparent danger could apply." *Id.* at 392 (emphasis added). The Acers Court further approved a jury instruction on self defense that provided in part that the defendant cannot use deadly force in self defense "where there is a bare conception of fear, but that there must exist that which is either really or apparently an act of violence, and from that the inference may reasonably be drawn that there was deadly danger hanging over Acers [the defendant claiming self defense], in this case, at that time." *Id.* at 393 (emphasis added). Palmer v. Hall. 517 F.2d 705 (5th Cir. 1975) (unjustified shooting of a fleeing misdemeanant carrying a rifle (later determined to be a BB gun), where the facts supported a finding that the subject made no hostile move toward the officer). See Roberts v. State, 65 Ga. 430 (1880). In *Roberts*, it was alleged that the decedent drew his weapon and simply carried it while walking with the defendant. The Supreme Court of Georgia ruled that the defendant was not justified in shooting the decedent, because the decedent made no move to raise the weapon or otherwise try to use it to assault the defendant. "The mere show of a deadly weapon, without more, would not produce an exigency to justify homicide." Id. See also Dickerson v.McClellan, 101 F.3d 1151 (6th Cir. 1996). In *Dickerson*, officers arrived at the scene where a subject had minutes earlier shot his gun 9 times inside his home. The Dickerson court did not grant qualified immunity to the officers who shot the subject as he walked inside his home toward his front door carrying a gun, because there was a factual dispute whether the subject pointed his gun at the officers and whether it was feasible for the officers to warn the subject before they shot him. Id. at 1164. The court's ruling means that if the facts support a finding that the subject did not make a hostile move by pointing his gun at the officers, the officers were not justified in shooting him.

12. Harrison v. State, 24 Ala. 67 (1854). In Harrison, the Supreme Court of Alabama affirmed a murder conviction. The court ruled that the instruction given by the trial court on self defense was actually more favorable to the defendant than the law allowed. The Alabama Supreme Court ruled that the facts on the record did not make out a case for self defense. The decedent retrieved a rifle from his home in response to an assault upon the decedent's sons by the defendant. The decedent approached the defendant, stopped within a few feet of him, was standing with his gun on his shoulder, and began to speak with his wife at the moment the defendant shot him. The Supreme Court stated that the defendant cannot claim he acted in self defense where the decedent made no overt attempt or demonstration toward the defendant indicating he was in the act of assaulting the defendant with his gun. Therefore, the defendant's claim that he shot the decedent in self defense had no merit.

13. There are variations in the definition of deadly force in statutes, court decisions, model policies, and model codes. Some authorities limit the result to death while the more common definition allows for both death or serious physical injury, great bodily harm, grave injury or similar language. Some authorities require that death in fact occur, while the more common requirement is only that death or serious physical injury be likely to occur. The likelihood of death or serious injury is described in a variety of ways: strong probability, substantial risk, readily capable, reasonably likely, etc. Some authorities require that the person intend to produce death or serious injury while other authorities do not require a state of mind at all. The Model Penal Code is a popular standard for deadly force in the federal courts. Several federal courts in civil cases have borrowed language from the Model Penal Code and defined deadly force as force that creates a substantial risk of causing death or serious bodily injury. The Model Penal Code is a standard for criminal cases. Some federal courts, with that in mind, have modified the Model Penal Code definition and applied only part of it to civil cases. Those courts have excised the *mens rea* standard from the Model Penal Code definition, since the Fourth Amendment is an objective standard whereby the intent of the officer is irrelevant. *E.g., Smith v. City of Hemet*,

394 F.3d 689 (9th Cir. 2005) (en banc) ("We simply look to the objective part of the [Model Penal Code § 3.11] test: whether the force employed 'creates a substantial risk of death or serious bodily injury." *Id.* at 706); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (the court held that the definition of deadly force as that force that carries with it a substantial risk of causing death or serious bodily harm was clearly established in the Fifth Circuit); Estate of Phillips v. City of Milwaukee, 123 F.3d 586 (7th Cir. 1997) ("For a particular application of force to be classified as deadly, it must at least carry with it a substantial risk of causing death or serious bodily harm." Id. at 593.); Mattis v. Schnarr, 547 F.2d 1007, 1009 n.2 (8th Cir.1976) (en banc) (vacated on other grounds by Ashcroft v. Mattis, 431 U.S. 171 (1977)) (The court adopted the full Model Penal Code deadly force definition in a civil claim under 42 U.S.C. 1983. "We use the term in this opinion as it is used in the Model Penal Code § 3.11(2) (1962): 'deadly force' means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force."), vacated as most sub nom., Ashcroft v. Mattis, 431 U.S. 171 (1977). Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988) (same). But see Ford v. Childers, 855 F.2d 1271, 1275 (7th Cir. 1988) (en banc) (An Illinois statute defined deadly force as "force likely to cause death or great bodily harm." The *Childers* court without passing in the issue noted that the statute seems to have passed constitutional muster by the U.S. Supreme Court in *Tennessee v. Garner*. 471 U.S. 1, 17 n. 18 (1985)). The U.S. Supreme Court in Scott v. Harris, 550 U.S. 372, 382-83 (2007), quoted the deadly force definition proposed by the appellant: "any use of force which creates a substantial likelihood of causing death or serious bodily injury." However, the Scott Court expressly refused to apply that definition. The Court instead ruled that the definition of deadly force was irrelevant. The Court stated: "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' Garner was simply an application of the Fourth Amendment's 'reasonableness' test, . . . to the use of a particular type of force . . . we must still slosh our way through the factbound morass of 'reasonableness.' Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable." (citation omitted).

14. Elliot v. Leavitt, 99 F.3d 640 (4th Cir. 1996). In Elliot, the court of appeals reversed the district court's denial of the police officers' motion for summary judgment. The officers had performed a cursory pat down search of the intoxicated suspect before cuffing his hands behind his back and placing him in the police cruiser. The suspect, who was slender and wiry, as able to release the seat belt and grab a gun that was on his person but was not detected during the frisk. He had the gun in his hands, which were still cuffed behind his back. The officers ordered him to drop the gun, when he refused to comply the officers fired a total of 22 rounds, killing the suspect. The court found the shooting to be reasonable. The court further stated that the number of rounds that the officers shot does not suggest that they shot mindlessly, but rather indicates that they sought to ensure the elimination of a deadly threat. The court rejected the argument of the plaintiff that because the suspect was intoxicated he somehow was less of a threat. The court stated:

No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life. . . . Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. 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.

Id. at 644. In a concurring opinion to a later order denying *en banc* review of the *Elliot* decision, Chief Judge J. Harvie Wilkinson III, the author of the original Fourth Circuit panel decision, stated:

As we sit in comfort in our chambers, we should pause to ponder what the dissenters have decreed for the streets: a rule that would question every action, second-guess every judgment, and scrutinize every move made by a policeman in an instant of personal peril. It is no violation of clearly established law for an officer to act to save his own life. I should have thought that the Court in *Garner/Graham* made one thing clear--that those in robes should not strip those in uniform even of the right to self protection.

Elliot v. Leavitt, 105 F.3d 174, 178 (4th Cir. 1997) (Wilkinson, C.J., concurring in order denying en banc review) (emphasis added).

15. Tom v. Voida, 963 F.2d 952 (7th Cir. 1992). In Voida, the Court of Appeals for the Seventh Circuit affirmed the district court summary judgment in favor of the officer who shot an unarmed subject who was attacking her with his bare hands. The officer initially went up to check on the suspect who was laying on the ground. As the officer approached him he got up, grabbed his bicycle, and walked off. The officer did not suspect him of any criminal activity at that time. When the officer said: "Hey, wait a minute," he threw down his bike and ran away. The bike was fairly nice and the neighborhood was a high property crime area. The officer believed, and the Circuit Court later agreed, that there was probable cause to arrest the suspect at that time for possession of a stolen bike. The officer pursued him and finally caught him. The suspect struggled with the officer and repeatedly struck the officer's head on the concrete before breaking free. The officer caught the subject again and tried to handcuff him. The subject continued to struggle and gained an advantage over the officer. The officer pushed him away, drew her weapon, and said three times "please, don't make me shoot you." The suspect moved toward the officer who fired an errant shot. The suspect stepped back and then lunged at the officer with his arms outstretched. The officer then fired a second shot, striking the suspect in the chest and killing him.

16. Smith v. Hill, 741 F. Supp. 647 (E.D. Mich. 1990). In Hill, DEA Special Agent Marc Hill and his partner were using a pay telephone in downtown Detroit when 4 subjects drove up in a Blazer and approached the Agents. One of the subjects had a baseball bat. Another of the subjects (Smith) showed an activated pager to the agents and told them that he was a "dope dealer," and ordered them off the phone. S/A Hill drew his weapon and identified himself as a police officer. The subjects returned to the car and S/A Hill finished his phone call. Smith then made a quick phone call. He and two of the other subjects, one of whom again had possession of the baseball bat, approached the Agents. They knocked S/A Hill to the ground. He got up and both Agents retreated down the street, with the subjects pursuing. Hill drew his weapon and told the subjects to back off. Smith told S/A Hill he thought the gun was only a toy. S/A Hill then fired two warning shots into the ground, but Smith continued to advance, stating that he thought the Agent had only fired blanks. S/A Hill gave a final verbal warning, but Smith continued to advance. S/A Hill then fatally shot Smith three times in the torso. The Agents were sued by the mother of the decedent, alleging that Hill unreasonably used deadly force. The court granted summary judgment in favor of S/A Hill, ruling that the shooting was reasonable under all of the

circumstances as a matter of law.

17. Serious physical injury is typically defined as an injury that involves a substantial risk of death, serious permanent disfigurement, protracted and obvious disfigurement, or permanent or protracted loss or impairment of the function of a bodily member, organ or mental faculty. E.g., 21 U.S.C. § 802 (25) (federal drug statute defining "serious bodily injury"); Mckee v. Nix, 995 F.2d 833, 836 (8th Cir. 1993) (habeas corpus review of an Iowa rape statute which defines "serious injury"). "Serious physical injury" is defined by Missouri statute as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body." State v. Westfall, 75 S.W.3d 278 (Mo. 2002) (citing V.A.M.S. § 556.061(28)). Lum v. State, 281 Ark. 495, 665 S.W.2d 265 (Ark. 1984). In Lum, the Supreme Court of Arkansas affirmed the felony assault conviction of a 6'3", 200 pound defendant who struck a woman in the face three times with his closed fist. The victim bled from her nose, mouth, eye, and ear. In addition, she "had suffered fractures in three areas of her face-the area surrounding the right eye socket, the sinus wall and the cheekbone. Holes were drilled in the boney area near the eye socket and nasal passages to allow for the wiring together of the cheekbone area. She had impaired vision for approximately two weeks, two months of pain, six weeks of medical supervision and continues to lack some feeling in the right side of her face." Id at 497. The defendant argued that he should have been granted a directed verdict on the issue of whether he caused serious physical injury. In Arkansas, "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ." Id. (citing Ark. Stat. § 41-115(19)). The jury found that the victim suffered serious physical injuries from the attack. The Lum court ruled that the trial court correctly refused to grant the defendant's motion for directed verdict.

18. State v. Burkhart, 565 S.E.2d 298 (S.C. 2002) (murder convictions overturned because the trial judge did not properly instruct the jury on self defense where the defendant claimed he killed the decedents in self defense against an attack by the decedents who intended on homosexually raping and killing him). People v. Heflin, 456 N.W.2d 10 (Mich. 1990). "Only an archaic system of justice would suggest that a woman cannot use deadly force to defend herself against common-law rape. Therefore, it necessarily follows that a woman who fears being raped, also fears the threat of serious bodily harm." *Id.* at 22. The *Heflin* court, however, was concerned that the criminal sexual conduct statutes in Michigan created gradations of sexual assault, some of which would not involve the imminent threat of death or serious physical injury, as would be the case in a common law rape assault. With that in mind, the *Heflin* court held that "a person may use deadly force in self-defense to repel a criminal sexual assault when confronted with force that the person reasonably believes could result in imminent death or serious bodily harm." *Id.* at 23. Not all courts require that the threat of rape include a requirement that the rape could result in imminent death or serious physical injury, before a person may used deadly force to defend against the rape. See People v. Garcia, 28 P.3d 340 (Colo. 2001). See also State v. Havican, 569 A.2d 1089 (Conn. 1990). The court stated that "at common law, a person could justifiably use deadly force in self-defense of sodomy and rape." Id. at 1092. In Havican, the Supreme Court of Connecticut reversed the murder conviction of the defendant. The court ruled that the trial court erred by defining "great bodily harm" only in terms of "serious physical injury." The court stated that the threat of great bodily harm and the threat of serious physical injury are two separate grounds that justify the use of deadly force in self defense. The court ruled that the threat of forcible sodomy constituted the threat of great bodily harm, which justified the used of deadly force in self defense, even without a threat of serious physical injury. The court noted that the

Model Penal Code lists the threat of forcible sexual intercourse and the threat of serious bodily injury as two separate and distinct justifications for the use of deadly force in self defense. *But see State v. Dodis*, 314 N.W.2d 233 (Minn. 1982). In *Dodis*, the Supreme Court of Minnesota ruled that the trial court correctly refused to give the self defense instruction requested by the defendant. The instruction requested by the defendant stated in pertinent part: "The jury is instructed that forcing a person to perform oral sex upon them is a serious felony and the use of deadly force is authorized to prevent the commission of this crime upon defendant if all the other requirements of self defense are met." *Id.* at 237. The *Dodis* court ruled: "The requested instruction approving the use of deadly force to prevent a felony which is not life-threatening is improper." *Id.*

19. Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987). In Ryder, a theft by fraud suspect (who later turned out to be an unarmed 14 year old girl) was about to run around a building into a darkened residential area. The officer shot her from a distance of over 50 feet. Id. at 1416. The officer testified that he did not know the name, age, or sex of the suspect and that she had her hands in her pockets when he shot and he had prior information that the suspect would be armed with a weapon. *Id.* at 1421-22. The girl was rendered a quadriplegic and sued the officer and the city. The Ryder court found deadly force was not justified to prevent the suspect's escape. because she was not fleeing after having committed a dangerous felony involving the infliction or threatened infliction of death or serious physical injury. However, the court found that deadly force was justified for another reason; because the subject posed a present threat of death or serious physical injury. The court found that it was reasonable for the officer to believe that the suspect was armed and therefore posed a threat of ambush if she had rounded the corner of the building. Id. at 1421-22. Caution, Ryder is arguably sui generis, because there was no classic hostile move in that case, which ordinarily would be needed to justify the use of deadly force. Blanford v. Sacramento County, 406 F.3d 1110, 1113 (9th Cir. 2005). In Blanford, the court found that the subject posed an imminent danger of death or serious physical injury to the occupants of a home and backyard he was trying to enter carrying a 2 ½ foot sword. The suspect did not pose an immediate threat to the officers or anyone else; the officers kept a "safe" 20 to 25 foot distance from the subject and the officers did not see anyone in danger or even know if anyone was in the house or backyard. Nonetheless, the court found that the officers were justified in shooting the suspect as he rounded the corner of the house into the backyard. See State v. Hendrix, 244 S.E.2d 503 (S.C. 1978), infra in endnote under Hostile Moves section on page 6, where the Supreme Court of South Carolina found that the appellant was justified in shooting a person in self defense and therefore the trial court erred when it did not direct a verdict of acquittal. The decedent (who had earlier threatened the appellant and was presently drunk) had gone to his truck and obtained a shotgun and walked up to the appellant. The appellant and decedent were standing with shotguns pointed at each other, when the decedent turned his head to look in the direction from which someone was yelling his name. At that point, the appellant shot the decedent with four successive rounds from his shotgun. The *Hendrix* court stated that "an actual, **imminent danger** confronted the appellant a danger which, unless met with an immediate response, held the promise of death for the appellant." Id. at 506 (emphasis added).

20.State v. White, 161 P.3d 208, 221 (Kan. 2007) (quoting State v. Hernandez, 861 P.2d 814 (Kan. 1993)). "Although the term imminent describes a broader time frame than immediate, the term imminent is not without limit. The danger must be near at hand." *Id.* at 221. In *Hernandez*, the court ruled that the decedent's recent threats and assaults on his wife and the wife's presence in the adjoining factory did not amount to an imminent threat to the wife justifying the wife's

brother in killing the decedent.

- 21. Acers v. United States, 164 U.S. 388 (1896), supra in endnote accompanying intent section on page 2 (A "real danger" justifying the use of deadly force in self defense "could not be a past danger, or a danger of a future injury, but a present danger, and a danger of a great injury to the person injured, that would maim him, or that would be permanent in its character, or that might cause death." *Id.* at 391-92.).
- 22. *Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995) (officer lawfully shot a drug suspect who reached for a gun upon seeing the officer approach his car to detain him during the execution of a search warrant).
- 23. Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001). In Thompson, a suspected armed robber was running from an officer. After the suspect jumped over a fence he looked over his shoulder and reached for his waist area. The officer responded by shooting the suspect, who later died. The subject turned out to be unarmed. The U.S. Court of Appeals for the Eighth Circuit ruled that the officer acted reasonably and affirmed the district court's granting of summary judgement for the officer. The court stated: "An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun." See also Guerra Morales v. United States, 416 F.3d 458 (6th Cir. 2005) (The plaintiff's glance at the agent as he ran away, the movement of his hand in front of his body, and the proximity of a building corner gave rise to a reasonable belief that the subject posed an imminent danger to the agent justifying the agent in shooting the subject.).
- 24. Anderson v. Russell, 247 F.3d 125, 130 (4th Cir. 2001), supra in endnote accompanying Reasonable Belief section on page 2. In Anderson, an officer was told by a citizen that a suspect appeared to have a gun under his sweater. The officer watched the suspect for 20 minutes and saw a bulge under his clothing near his left waistband that was consistent with a concealed handgun. The court ruled that the officer had probable cause to believe the suspect was armed with a concealed gun and as a matter of law the officer was justified in shooting the suspect when the suspect suddenly reached toward his back left pocket, immediately after he initially raised his hands in compliance with the officer's command. The court determined that the officer reasonably believed the subject was reaching for a weapon. It turned out that the suspect was unarmed and was reaching into his left rear pocket to turn off his Walkman radio. The bulge turned out to be a shoe polish tin inside an eyeglass case. The court ruled that it was irrelevant that the waistband bulge was not in fact a gun.
- 25. Allison v. United States, 16 S. Ct. 252 (1895). In Allison, the U.S. Supreme Court having federal jurisdiction over Indian reservations, reversed the murder conviction of a defendant on Indian territory because of erroneous instructions given by the federal trial court. The defendant shot and killed his father, a particularly odious fellow, who had a violent character and in the recent past threatened to kill the defendant and his family. The evidence was that the deceased father had just been released from prison for shooting at one of his sons and his son-in-law. He arrived at the home of his former wife, where an argument ensued resulting in the decedent threatening the defendant (his son) by stating: "God damn you! I will go off and get a gun and kill the last damned one of you." *Id.* at 253. The decedent followed up this threat when on another occasion he told his son-in-law to tell his son (the defendant) that he would blow his brains out the first time he saw him, and that he would kill his mother and the entire family. The evidence was that the decedent was in the habit of carrying a pistol in his hip pocket. Some days

later the defendant was confronted by the decedent near a barn at a neighbor's home. The decedent came toward the defendant and stated "you have got it have you?" Whereupon the decedent threw his hand back as if he were drawing a pistol. The defendant responded by drawing his gun and firing three rounds at the decedent, mortally wounding him. It turned out later that the decedent was unarmed. The trial court turned the threats made by the decedent against the defendant by instructing the jury that the threats by the decedent should be considered as evidence that the defendant hunted down the decedent and killed him because of the threats. On the contrary, the U.S. Supreme Court viewed that premise as based upon speculation and unsupported by the evidence. The U.S. Supreme Court ruled that the recent threats by the decedent were relevant in establishing the defendant's claim of self defense, and the jury was not but should have been told that. See also Thompson v. United States, 155 U.S. 271 (1894). The threats gave meaning to the decedent's sudden movement, which suggested that he was going to act upon the previous threats by pulling a gun. The recent threats by the decedent constituted relevant evidence indicating that the defendant was justified in acting immediately upon the hostile movement of the decedent. The Allison Court stated: "What is an overt demonstration or violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of the reasonable apprehension of danger; under other circumstances this would not be so." Id. at 257.

26. Cunningham v. Neagle, 135 U.S. 1, 52-53 (1890). In Neagle, one Terry was angry with a U.S. Supreme Court Justice over a prior court ruling by the Justice and had threatened to horsewhip, slap, and if he resisted, kill the Justice. As a result, a Deputy U.S. Marshal was assigned to protect the Justice. Terry came up to the Justice while he was in the dining area of a train stop and twice slapped him in the head, he was winding up to punch the Justice when the deputy marshal intervened to protect the Justice. Terry then turned his aggression toward the marshal, as he did so Terry thrust his hand into his coat in what appeared to be an attempt to grab a bowie-knife he was known to carry. The marshal shot Terry, who later turned out to be unarmed. The U.S. Supreme Court, in granting immunity from criminal prosecution to the deputy, stated:

The marshal of United States, charged with the duty of protecting and guarding the judge of United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty – a duty which he had no liberty to refuse to perform – to take the steps which resulted in Terry's death.

Id. at 69. See also Sherrod v. Berry, 856 F. 2d 802 (7th Cir. 1988) (en banc). In Sherrod, the entire bench of the U.S. Court of Appeals for the Seventh Circuit reversed a jury verdict against a police officer who shot and killed an armed robbery suspect. The officer had ordered the suspect three times to raise his hands, he finally did so after some delay. The suspect then suddenly made a quick movement of his hand into his coat as though he was reaching for a weapon and the officer shot and killed him. The circuit court ruled that the trial court erred when it allowed evidence that after the shooting it was determined that the suspect was unarmed. The court stated:

When a jury measures the objective reasonableness of an officer's action, it must stand in his shoes and judge the reasonableness of his action based upon the information he possessed and the judgment he exercised in responding to that situation. Knowledge of facts and circumstances gained after the fact (that the suspect was unarmed) has no place in the trial court's or jury's proper post-hoc

Id. at 804-05.

27. Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984), reversed on other grounds, 471 U.S. 808 (1985). In Tuttle, an officer responded to an armed robbery call at a bar. When he arrived at the bar he was informed that no robbery had taken place. He confronted a suspect matching the description of the robber, one Tuttle, who apparently made the call and described himself as the robber with a gun. The officer attempted to stop Mr. Tuttle from leaving the bar. Mr. Tuttle broke away from the grip of the officer, got down on one knee and appeared to be reaching into his boot. The officer shot Tuttle. A toy gun was later found inside Tuttle's boot. The officer was sued under 42 U.S.C. § 1983 by Tuttle's wife. The trial judge denied a motion for directed verdict brought by the plaintiff, and the jury returned a verdict in favor of the officer. The plaintiff appealed, arguing that the trial court should have granted the motion for directed verdict and not have submitted the issue of the good faith of the officer to the jury. The U.S. Court of Appeals for the Tenth Circuit affirmed the decision of the trial court. The Tenth Circuit stated: "There was some evidence that he [the officer] reasonably believed that his life was threatened and his actions were justified. Accordingly, we affirm the jury's finding that Officer Rotramel acted in good faith and thus deny the contention of Mrs. Tuttle." Id. at 459.

28. Harrell v. Decatur County, 41 F.3d 1494 (11th Cir. 1995) (per curiam), adopting by reference 22 F.3d at 1577 (11th Cir. 1994) (Dubina, J., dissenting). In Harrell, a suspect beat an officer senseless and threatened to kill the officer. The suspect then reached for something under the passenger seat of his car when the officer shot him. The officer testified that he did not actually see a weapon and no weapon was found after the shooting. The court ruled that the officer acted reasonably in shooting the suspect, because the suspect posed an imminent danger of death or serious physical injury. Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985). In Killeen, the court of appeals reversed the district court judgment against an officer on a Fourth Amendment claim, where the officer shot a drug suspect who disregarded an order by the officer to exit his vehicle. The suspect instead reached down to the seat or floorboards of his car. The officer believed that the suspect was reaching for a gun and shot and killed him. The court of appeals, however, affirmed the district court's award of damages in the common law wrongful death claim. That wrongful death award was based upon a claim that negligent police procedures caused the shooting. Negligence is not sufficient to support a claim under the Fourth Amendment, however, it is sufficient to support a common law tort claim for wrongful death.

29. Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991). In Reese, an officer shot a robbery suspect after a vehicle pursuit when the suspect reached down after the officer repeatedly commanded him to keep his hands raised. Following the shooting it was determined the suspect was actually unarmed. The court ruled that

[W]e must conclude that Anderson's [the officer] shooting of Crawford [the suspect] was reasonable and not excessive. . . . [T]he vehicle had just come to an abrupt stop after a high speed chase during which apparently stolen objects had been tossed from the car. Anderson had his gun drawn . . . and ordered the vehicle's occupants to raise their hands . . . the vehicle occupants clearly understood Anderson's commands and initially complied. Then Crawford repeatedly reached down in defiance of Anderson's orders. . . . Under these circumstances, a reasonable officer could well fear for his safety and that of others

nearby. The fact that the vehicle was 'totally surrounded' by police does not change matters...also irrelevant is the fact that Crawford was actually unarmed.

Id. at 500-01.

30.*Mclenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994). In *Mclenagan*, an officer shot an unarmed handcuffed subject who was running toward him because another officer yelled "the man has a gun." The officer was not yelling in reference to the subject who was shot, but to another subject who had ducked into an office. The officer said that he could not see whether the suspect was armed until after he had shot him and the subject fell to the ground. The court of appeals affirmed the district court's summary judgment ruling in favor of the officer. The court held that the officer, who had just turned in response to the warning, had no opportunity to himself give warnings to the subject because the subject was in full stride within 5 to 10 feet of him and closing fast. The court held that an officer is not required to actually see a weapon in the subject's hands before shooting.

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 and others. . . . At the moment of truth [the officer] acted well within the range of behavior expected of a police officer."

Id. at 1007-08.

31. Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991). In Rizzo, the police assigned to a narcotics enforcement team were conducting a reverse sting in an open air drug market known for violence. When the arrest signal was given an officer drove up, identified himself, and ordered a subject twice to raise his hands. The subject failed to raise his hands and instead turned his head slowly and looked at the officer, he then turned back and looked away from the officer. The subject had something in his hand that the officer could not see. The officer ordered the subject again to raise his hands. The subject then turned his entire body in the direction of the officer. The officer immediately shot the suspect twice in the face. It turned out later that the suspect was holding a beer bottle. The subject sued the officer alleging an unreasonable use of force under the Fourth Amendment. The district court initially denied the summary judgment motion brought by the officer. The Court of Appeals for the Fourth Circuit reversed the district court decision and remanded the case for the issuance of a summary judgment order in favor of the officer. The court held that "... a reasonable officer could have had probable cause to believe that the suspect posed a deadly threat and therefore would be authorized to use deadly force." *Id.* at 216. In Billingsley v. City of Omaha, 277 F.3d 990 (8th Cir. 2002), the U.S. Court of Appeals for the Eighth Circuit affirmed the finding of the jury on behalf of a police officer. The court found that the district court properly denied the plaintiff's motion for summary judgement because the evidence supported a finding that the officer had probable cause to believe he was faced with an immediate threat of death or serious physical injury from a fleeing burglar when the officer shot the burglar. The burglar jumped down 15 feet to the ground from the back deck of a house he was burglarizing and "landed in a crouched position and then rotated his left shoulder" when the officer shot him. The officer at no time saw a weapon and the burglar was unarmed. However, the court ruled that it was not necessary that the officer actually see a gun; under the circumstances, it was reasonable for the officer to believe that the burglar was armed and was about to shoot the officer. Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991). The Ansley court

affirmed a jury verdict finding that although officers were comparatively 20% negligent per officer, they did not violate the subject's Fourth Amendment rights when they shot a subject carrying a gun in his hand as he turned toward the officers. The jury found that the subject was 50% negligent. The findings of no constitutional violation and of negligence were based upon disputed facts whether the officers identified themselves, whether they told the subject to freeze before firing, and whether the subject raised the gun toward the officers.

32. Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995), overruled on other grounds by Saucier v. Katz, 533 U.S. 194 (2001) (The court ruled that an officer lawfully shot a suspect, who in an act of drunken recklessness raised and pointed an empty pistol at the officer. The court stated that "it is hard to imagine that pointing a .357 magnum in any direction would not cause a reasonable police officer to fear for someone's life-if not his own, then the life of a bystander or the gunman himself." Id. at 1554.). Hebah v. United States, 456 F.2d 696 (Ct. Cl. 1972) (an officer was justified in using deadly force against a drunk suspect who had shot at officers minutes earlier and had turned in the direction of the officers while raising a rifle he was carrying). State v. Murphy, 145 S.E. 275 (W. Va. 1928). The Murphy court ruled that evidence was insufficient to support a verdict of manslaughter against a police officer. The decedent was being arrested by the officer for having committed a misdemeanor when the decedent drew a gun and threatened to shoot the officer if he followed him. The officer pursued decedent, came upon him, and commanded him to raise his hands. The decedent, who was carrying his gun in his hand at his side, raised his gun to shoot, at which time the officer shot the subject in self defense. The court determined that the previous threat by the decedent if it had been given due weight by the jury should have rendered the evidence insufficient to support the guilty verdict.

33. Neuburger v. Thompson, 305 F. Supp. 2d 521 (W.D. Pa. 2004), aff'd, 124 Fed. Appx. 703 (3rd Cir. 2005) (unpublished). Medina v. Cram, 252 F.3d 1124 (10th Cir. 2001). The court of appeals in Medina ruled that the trial court should have granted the officer qualified immunity. In Medina, the subject told officers he had a gun before he exited his home. However, instead of a firearm he had a staple gun concealed beneath a towel wrapped around his hand.

Mr. Medina subsequently dropped to the ground and exposed the staple gun, which officers at the scene believed to be a gun. As he did so, he turned to the left, causing Officer Cram to conclude he and other officers were in the line of fire. From a distance of approximately eight to ten feet, Officer Cram then fired a three-round burst from his automatic weapon, hitting Mr. Medina in the stomach. In addition, Officer Bruning fired two shots at the center of Mr. Medina's body from a distance of approximately ten to twelve feet.

Id. at 1127. State v. Hendrix, 244 S.E.2d 503 (S.C. 1978), supra in endnote under Danger Must be Imminent section on page 5. In Hendrix, the appellant and decedent (who was viewed by the court as the aggressor) were standing with shotguns pointed at each other, when the decedent turned his head to look in the direction from which someone was yelling his name, the appellant shot the decedent four times. The Hendrix court stated that the appellant was justified at that point in shooting the decedent because "an actual, imminent danger confronted the appellant a danger which, unless met with an immediate response, held the promise of death for the appellant." Id. at 506. "Once the appellant's right to fire in self-defense arose, he was not required to wait until his adversary was on equal terms or until he fired or aimed his weapon." Id. at 507. Cox v. County of Prince William, 249 F.3d 295 (4th Cir. 2001) (officers were justified in shooting a subject who woke from a drunken slumber and pointed a rifle at the officers).

Stroik v. Ponseti, 35 F.3d 155 (5th Cir. 1994). The Stroik court overturned a jury verdict against an officer and ruled that the trial court erred by not granting summary judgement for the officer who shot what turned out later to be a hostage. The court ruled that the irrefutable evidence was that the fleeing armed robbery suspect who appeared to be a companion of the plaintiff (but who in fact was her kidnapper) pointed a gun at the officer. The court ruled that the officer was reasonable in shooting the assailant and the plaintiff. Boyd v. Baeppler, 215 F.3d 594 (6th Cir. 2000) (because the suspect pointed a gun at officers, the officers were justified in shooting him).

34. Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994) (officers acted reasonably under the Fourth Amendment when they returned fire and killed a deranged subject who shot a pistol at them). Maravilla v. United States, 60 F.3d 1230 (7th Cir. 1995). In Maravilla, officers executing an arrest warrant knocked on the door and announced, "Police with a warrant." After receiving no response, the police forced open the door and entered the house. As they proceeded through the second floor, they heard gunshots. Upon reaching the doorway to the bedroom from which they heard the shots, the officers observed a man firing a gun out the window, apparently at the perimeter team. The officers ordered him to drop the weapon, but he continued firing out the window. The officers fatally shot the subject. The court ruled that the shooting of the subject by the police was reasonable as a matter of law. Garcia v. City of Boston, 253 F.3d 147 (1st Cir. 2001) (officer was justified in shooting a deranged prisoner who grabbed another officer's gun and shot that officer and another prisoner before dropping the gun because he was shot in the arm). Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992). In Carter, the suspect conspired to murder his wife. The police devised a ruse to arrest him on the highway, away from known sources of firearms at his residence and place of employment. The ruse failed, and the subject drew a gun and shot two officers, killing one of them, before the subject himself was fatally shot by an officer. The subject's wife (the target of the murder conspiracy) sued the officers, alleging in the suit that the plan devised to arrest her husband "provoked a situation whereby unreasonable deadly force was used in an attempt to seize his person." Id. at 1329. The court held:

Contrary to the plaintiff's contention, *Garner* and *Brower* do not suggest that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to effect a legal arrest. The Fourth Amendment prohibits unreasonable *seizures* not unreasonable, unjustified, or outrageous conduct in general. . . . Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny. [The officer] unquestionably seized [the subject] by shooting him in the chest. Prior to that, however, no 'seizure' occurred Even if the defendants concocted a dubious scheme to bring about [the subject's] arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment.

Id. at 1332-33 (emphasis in original). But see Deering v. Reich, 183 F.3d 645 (7th Cir. 1999). The Deering court affirmed a jury verdict for officers in a case where one of two officers shot an elderly subject who shot at the officer's police partner and was facing toward the officer with his shotgun at his shoulder. However, in the course of affirming the jury verdict the Deering court seemed to backtrack from its previous Seventh Circuit ruling in Carter v. Buscher, supra. The Deering court ruled that "totality of the circumstances" requires a consideration of pre-seizure facts such as the reason for the arrest warrant and the time and manner of the execution of the warrant that was the cause for the police arriving at the home at the time of the shooting. The Deering court stated that the pre-seizure facts are important in part to establish what the officer knew about the decedent so that the trier of fact can assess the reasonableness of his

determination that he and the other officers were in mortal danger by the actions of the decedent. The court made the statement that if the only thing that was considered was the fact that the decedent fired a shotgun at the officers, "we would hardly need a trial." *Id.* at 650. *Kesinger v. Herrington*, 381 F.3d 1243 (11th Cir. 2004) (court ruled that the officer acted reasonably when shooting a deranged suspect (who later turned out to be unarmed), who the officer thought was shooting at him when the suspect broke the window to the officer's car). *Mettler v. Whitledge*, 165 F.3d 1197 (8th Cir. 1999) (summary judgment affirmed for officers who were within 20 feet of the decedent when they shot and killed him immediately upon the decedent shooting a police canine).

35. Gereenridge v. Ruffin, 927 F.2d 789, 791-92 (4th Cir. 1991). The Greenridge court affirmed a jury verdict for an officer who shot a subject who violated the officer's commands to put his hands in view and instead reached behind his car seat for a long cylindrical object that the officer thought was a shotgun, but later turned out to be a wooden nightstick. The court of appeals ruled that the trial court did not abuse its discretion by excluding evidence of the actions of the officer leading up to the time immediately prior to the shooting, because under Graham v. Conner, 490 U.S. 386, 396 (1989), the reasonableness standard focuses on the split second decision an officer makes at the moment when the officer uses force.

36.Monroe v. City of Phoenix, 248 F.3d 851 (9th Cir. 2001) (overruled on other grounds in Acosta v. Hill, 504 F.3d 1323, 1324 (9th Cir.2007)) (The court upheld a jury verdict for an officer who shot a burglar at the conclusion of a physical struggle that the officer was losing. During the struggle the officer felt tugging on his gunbelt and thought that the suspect may be going for his gun.). See Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002), discussed, infra, in section on Bare Handed Attackers, and accompanying endnotes. In Billington, an officer was kicked and punched by an unarmed drunk suspect who also tried to grab the officer's weapon. The officer shot the suspect at close range. The suspect died, and his family sued. The court ruled that the use of deadly force by the officer was reasonable under the Fourth Amendment. New York v. Tanella, 374 F.3d 141 (2nd Cir. 2004) (criminal charges dismissed against DEA Agent who shot a suspect, because the court found that it was reasonable for the agent to believe the subject was trying to grab the agent's gun). See also Nelson v. County of Wright, 162 F.3d 986 (8th Cir. 1998). In Nelson, the U.S. Court of Appeals for the Eighth Circuit ruled that an officer was entitled to qualified immunity after being sued for shooting a suspect after he tried to grab the officer's gun when resisting the officer's attempt to take him into custody.

37. Colston v. Barnhart, 130 F.3d 96 (5th Cir. 1997). In Colston, an state trooper shot an unarmed suspect after the suspect had battered him and a deputy sheriff. A Texas State Trooper arrested the driver of a vehicle after determining that the driver had an outstanding traffic warrant. A county sheriff's deputy arrived at the scene. The passenger of the vehicle became belligerent. The passenger was 6 ft. 1 inches tall and weighed 225 pounds; the trooper was approximately 5 ft. 6 inches tall and weighed 160 pounds. An altercation took place during which the passenger violently resisted and knocked the deputy to the ground with a single hard blow. The passenger then struck the trooper in the face, braking his glasses, dazing him, and knocking him to the ground. The sheriff's deputy got up and was again knocked to the ground by the passenger. As the trooper was laying on the ground in a prone position he drew his gun. He fired the gun at the passenger, but the round missed. The passenger turned, stepped over the trooper's outstretched legs, and took two steps from the trooper and in the direction of the trooper's patrol car which contained a shotgun. At that moment the trooper fired twice striking the passenger in the back of his right arm and his buttocks. The passenger sued the trooper,

alleging an unreasonable seizure under the Fourth Amendment. The federal district court denied the trooper's motion for summary judgment and the trooper appealed to the U.S. Court of Appeals for the Fifth Circuit. The court of appeals reversed the district court and ruled that the trooper was entitled to summary judgment because his actions were reasonable when he shot the passenger. The passenger asserted that he was only attempting to flee, but the court of appeals stated that the trooper had no way to know whether he intended to flee or inflict further injury or death on the officers. At the time he was shot he had knocked both officers to the ground and was moving in the direction of the trooper's patrol car, which contained a shotgun.

38. Baker v. Putnal, 75 F.3d 190, 197 (5th Cir. 1996) (dismissal of the civil complaint by the trial court against an officer was not proper where the facts taken in the light most favorable to the plaintiff indicate that the subject merely turned to face the officer before the officer shot him).

39. See Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996), discussed in an endnote to the section discussing overt acts on page 2, supra. In Dickerson, the court ruled that officers were not legally required to announce their presence when they surreptitiously entered the home of a drunk suspect who had minutes earlier fired 9 rounds inside his house. The court ruled that the officers were not required to announce their presence because there was an emergency situation where "the officers had a justified belief that someone in the residence was in imminent peril of bodily harm." Id. at 1160. Note that the court made a distinction between the legal obligation of the officers to identify themselves when entering the home and the legal obligation to warn the subject before they shot him. The *Dickerson* court did not grant qualified immunity to the officers regarding their liability for having shot the subject, because there was a factual dispute whether the subject pointed his gun at the officers and whether it was feasible for the officers to warn the subject before they shot him. Id. at 1164. The legal obligation of an officer to identify himself is separate and distinct from the obligation to warn a subject when feasible before shooting him. Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). In Clifton, Special Agent Lloyd Clifton was indicted for second degree murder by the State of California for shooting an unarmed subject who was fleeing from a house. Clifton had been earlier informed that the subject might be armed and dangerous. Clifton's partner had exited a helicopter along with Clifton, but fell to the ground as he ran to the house to execute a search warrant. When Agent Clifton saw his partner fall to the ground and heard what sounded like a gunshot, he thought that his partner had been shot by the subject inside the house. Without regard for his own safety, Clifton immediately ran to the house kicked in the door and entered. Clifton did not knock. identify himself, nor announce his authority and purpose before kicking in the front door. When he saw the subject running away toward the woods he fired his gun at the subject, killing him. The federal district court ordered the case removed from state court to federal court and dismissed the murder charges. The respondent pointed out that a district court in a related criminal case against a co-defendant of the decedent ruled that Agent Clifton violated the knock and announce statute, and therefore he should not be granted sovereign immunity for the shooting. The federal court of appeals nonetheless affirmed the dismissal of the charges. The court of appeals ruled that propriety of the of the manner of the execution of the search warrant was a question of law which the district court properly decided in favor of Agent Clifton.

40. Yates v. City of Cleveland, 941 F.2d 444 (6th Cir. 1991). In Yates, the U.S. Court of Appeals for the Sixth Circuit denied qualified immunity to an officer who shot a subject while making a warrantless entry after responding to a radio dispatch of a public distrubance. The court denied qualified immunity in large part because the court determined that it was clearly established law that it was "objectively unreasonable" for the officer entering a dark hallway of a house not to

identify himself as a police officer, not to wear his police hat, and not to shine a flashlight.

41. Wilson v. Arkansas, 514 U.S. 927 (1985). In Wilson, the U.S. Supreme Court stated held that the common law knock and announce rule was part and parcel of the reasonableness inquiry under the Fourth Amendment. "Our own cases have acknowledged that the common law principle of announcement is embedded in Anglo-American law, but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." Id. at 934. Suppose, however, that the issue is not whether the officer is legally obligated to knock and announce prior to entering a building pursuant to a search warrant, but whether immediately after making a no knock entry the officer is constitutionally obligated to identify himself as a police officer. In State v. Richards, 941 P.2d 710 (Wash. App. 1997), plain clothes detectives with a search warrant yelled the name of the suspect through a sliding screen door, and when the suspect turned to look at the officers, the officers opened the screen door and announced that they were the police with a search warrant. The court ruled that the officers's entry did not violate the knock and announce requirement. "If police enter before the occupants are advised of their identity and purpose, the occupants will be surprised, may believe themselves to be under attack, and may react with force. But when police announce both their identity and purpose to the occupants, it is more likely than otherwise that the occupants will, as was true in this case, peacefully submit to their authority." *Id.* at 292. In *Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996), the plaintiff reacted just what the court in *Richards* predicted a person would to an unannounced entry by police. In *Sledd*, the plaintiff averred that he was about to take a shower when he heard loud banging on the door. He started down the stairs wearing only a towel and witnessed unknown intruders breaking through his front door. The plaintiff quickly retreated upstairs and grabbed a .22 caliber rifle. He turned to see a person standing with a gun. The unknown intruder was wearing blue jeans, a blue jacket, and white tennis shoes. The intruder, upon seeing the plaintiff with a gun turned and ran, saying "he's got a gun, let's get the fuck out of here." Id. at 286. The plaintiff followed, holding his rifle across his chest, with the barrel pointing up toward the ceiling. He was immediately met by a "storm of gunfire" from the unidentified man. The intruder turned out to be member of a seven man team executing a search warrant on the premises. The plaintiff sued four of the seven officers. The court denied qualified immunity to the four officers because there was a factual dispute whether the officers identified themselves as police officers when entering the premises. The court stated that assuming the plaintiff's version of events were true, the officers behaved in an objectively unreasonable manner by breaking into the home without announcing their identity or purpose. The court made the point that "where a person has no reason to know that someone is a police officer, and the officer's identity is concealed, the normal rules governing use of deadly force and right to resist are modified." Id. at 288.

42. *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir. 2000). In *Jackson*, the U.S. Court of Appeals for the Eleventh Circuit ruled that the district court erred in denying the defendant-officers' motion for summary judgment on the plaintiffs' deadly force claim. The officers shot two people, killing one, after a third person began shooting at the officers. The court ruled that the officers acted lawfully in using deadly force in self defense. However, the court of appeals also ruled that the district court properly denied the defendant-officers' motion for summary judgment on a claim

that the officers illegally stopped the plaintiffs in violation of the Fourth Amendment. The court found that the officers lacked reasonable suspicion for the stop. One of the key aspects of that unlawful stop claim was that the three plain clothes officers approached the plaintiffs with their guns drawn and had no visible display of a badge or other police markings. The plaintiffs further claimed that the plain clothes officers did not verbally identify themselves as officers. When a mechanic saw the three plain clothes officers approach with their guns pointed at the repair shop customers and then heard the officers curse at the customers, order them back into the shop, and order them to lie down on the ground, the mechanic believed that the plain clothes officers were armed robbers. The mechanic drew his lawfully licensed firearm and shot one of the officers, which led that officer and another officer to return fire, killing one bystander and wounding another bystander. The court ruled that if a jury believed the account of the plaintiffs, the officers would be liable for the damages caused, even thought the shooting was not initiated by them, and the officers were justified in shooting in self defense. The court of appeals ruled that it was foreseeable that a person would respond to their approach in plain clothes and with guns drawn by shooting at them. *Id.* at 1168-69. The court further ruled that the fact that the third plain clothes officer did not fire his weapon did not relieve him of liability. The court ruled that a jury could reasonably find that it was the concerted effort of the three defendant-officers that caused the death and injuries. Id. at 1169 n.17 (citing Gutierrez-Rodriguez v. Cartagena, infra). The court made the point that the defendant-officers' claim that they should be granted qualified immunity on the illegal stop claim would have merit if only they had identified themselves as police officers when they approached the shop. The court pointed out that although the officers lacked reasonable suspicion for the stop, they would not be liable for damages caused by their shooting if only they had identified themselves as police officers. That is because it would not be reasonably foreseeable that a business employee would shoot at them, if he had known that they were police officers. Id. at 1169. If the business employee did shoot after they identified themselves as police officers, the officers would not be liable for the resulting injuries because the injuries would be caused by their reaction in lawful self defense to the employee's initial assault. The assault by the employee upon known officers would be considered an intervening independent cause for the injuries, for which the officers would not be liable. However, the alleged failure of the officers to identify themselves would be the proximate cause of the mechanic's reaction in shooting the officers and the resulting injuries when the officers returned fire. The conclusion is that the officers' alleged failure to identify themselves as police officers spelled the difference between potential liability for damages and summary judgment on behalf of the officers. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989). In Gutierrez-Rodriguez, four officers in an unmarked police car saw a car parked on the side of the road. The officers in plain clothes exited their vehicle with their guns drawn and approached the car. The driver of the vehicle, upon seeing four unidentified men brandishing firearms approaching his car, hastily started his engine and began to drive away. The officers opened fire on the vehicle as it drove off. One bullet struck the plaintiff in the back, causing him to lose control of the vehicle. The vehicle went off the road and landed on its side in a ditch. The plaintiff was rendered a paraplegic. A jury awarded compensatory damages in the amount of \$4,500,000 and \$600,000 in punitive damages. The U.S. Court of Appeals reviewed the case and determined that the evidence was sufficient to support the verdict. The court stated that the acts of the officers in exiting their vehicle with guns drawn and approached the plaintiff's vehicle without identifying themselves as police officers were among the salient facts that supported a finding that the officers violated the plaintiff's due process rights. Two of the officers claimed that the evidence was insufficient to support a verdict against them, because they did not shoot the plaintiff. The court ruled that their conduct in approaching the car with a group of plain clothes officers, with guns drawn, and without identifying themselves as police, was the

proximate cause of the injury to the plaintiff. "It was eminently foreseeable that an encounter with a civilian by four policemen with weapons drawn and ready to fire might result in a discharge of the firearms and an injury to the civilian. No matter whose bullet ultimately inflicted plaintiff's injury, the deprivation of Gutierrez' constitutional rights was the result of a team effort." Id. at 561. See Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995). In Hilaire, the U.S. Court of Appeals for the First Circuit ruled that prior to Wilson v. Arkansas, supra, it was not a clearly established constitutional rule that required a plain clothes officer approaching a suspect with his gun drawn to identify himself as a police officer. In *Hilaire*, the suspect responded by drawing a gun to defend himself and the officer in turn shot the suspect. Arguably, the same court would come to a different conclusion now that Wilson has clearly established a notice requirement. Cf. United States v. Amuny, 767 F.2d 1113 (5th Cir. 1985). In Amuny, the court found that "six unmarked vehicles carrying approximately twelve plainclothes law enforcement officers converged, in unison, upon the site of the aircraft. None of the vehicles had sirens blaring or lights flashing, and the officers did not announce either their purpose or identity in any other way. Some of the officers apparently had their weapons drawn. Flight under these circumstances was as much reasonable as it was suspicious. It added nothing to the officers' determination of probable cause. We therefore reject the government's claim that the appellants' flight from the area of the plane supported their determination of probable cause. The search of the aircraft cannot be sustained upon this basis." Id. at 1124-25. But See Catlin v. City of Wheaton, 574 F.3d 361 (7th Cir. 2009). In Catlin, the U.S. Court of Appeals for the Seventh Circuit granted qualified immunity to several plain clothes officers who without identifying themselves as officers grabbed a suspect from his stopped motorcycle and engaged in a physical struggle to arrest him. The officers mistakenly (but reasonably) believed that the suspect was an armed and dangerous drug kingpin because he matched the physical description, was riding the distinctive type of motorcycle ("crotch rocket" sport motorcycle) the target was known to ride, and was coming from an area the target was expected to be found. The court ruled that the officers had probable cause to arrest and probable cause to believe that the plaintiff was the drug kingpin. The court also ruled that it was not clearly established law that it was required for officers to identify themselves as police when approaching a suspect without their guns drawn and physically subdue him.

43. Plummer v. State, 34 N.E. 968, 969 (Ind. 1893). Plummer illustrates that a command to drop a gun is not the same as informing a person he is under arrest and commanding him to submit to that arrest. By the same token, such a command would not be sufficient as a warning that an officer will use deadly force. In *Plummer*, the Supreme Court of Indiana ruled that it was material to its decision to overturn a murder conviction against the defendant who shot a town marshal, that the marshal did not inform that defendant that he was under arrest and did not order him to submit to his authority. The defendant had threatened several people with a pistol and was carrying the pistol in his hand. The marshal ordered the defendant to "put up" his gun, the defendant refused to comply with the marshal's command and kept walking away. Shortly thereafter, the marshal "tiptoed" behind the defendant (who was still carrying the pistol in his hand) and struck the defendant in the head with his billy club and shot at him, after which the defendant responded by returning fire, killing the marshal. The court stated: "We are constrained to hold that [Marshal] Dorn, if he even had the right to make the arrest without a warrant, abused that authority by striking Plummer over the head with his policeman's club. Had he informed Plummer that he intended to arrest him, and requested him to submit to such arrest, and then Plummer had refused to submit, and resisted, or threatened to resist, arrest, with any demonstration of force, a very different question would have been presented. In such a case the officer, as we have seen, having authority to arrest, would have been justified in using force

sufficient and necessary to overcome such resistance, even to the taking of the life of the person he was attempting to arrest." *Id.* at 970. In *Pullins v. State*, 256 N.E.2d 553 (Ind. 1970), the Supreme Court of Indiana explained the *Plummer* decision: "The obvious purpose of informing a suspect he is under arrest is not to make the arrest legal but to indicate to the person being arrested that his detention is legal, so he will not resist." *Id.* at 556. Similar reasoning would apply to a deadly force warning. The deadly force warning gives the person an opportunity to comply, so that deadly force will not have to be used.

44. Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001). In Deorle, the U.S. Court of Appeals for the Ninth Circuit ruled that an officer unreasonably seized a subject in violation of the Fourth Amendment by shooting him in the face with a "bean bag round" (a cloth bag filled with lead shot). The court stated: "Our conclusion is strongly supported by Rutherford's failure to give Deorle any warning that he would be shot if he approached any closer, or any order to drop the can or bottle or stop where he was: Deorle certainly could not have been expected to comply with instructions that were never given to him." Id. at 1283. The Deorle court determined that shooting someone in the face with a bean bag round was reasonably likely to cause serious injury, but it was not deadly force because it was not likely to cause death. That part of the decision is no longer the law in the Ninth Circuit. The Deorle court relied upon Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1997) for its position that force that is likely to only cause serious physical injury is not deadly force. That decision, however, was subsequently overruled by Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2004) (en banc). In Smith, the entire bench of the U.S. Court of Appeals for the Ninth Circuit accepted the Model Penal Code definition of deadly force. The court stated that deadly force is "that force which is creates a substantial risk of death or serious bodily injury." Id. at 706. The Smith court stated that the same definition should be used to define deadly force whether the force is applied by an officer or a civilian. If the force creates a substantial risk of serious physical injury, it is considered deadly force, even though it is unlikely to cause death. That does not change the still valid point made by the *Deorle* court that if it is feasible to do so, before using force that is likely to cause serious physical injury, the subject should be given a warning that he will be shot if he does not stop. "[W]e simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test." *Deorle* at 1284. *See also* Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005). In Blanford, the court upheld the granting of qualified immunity for officers, where the officers shot a mentally ill suspect (rendering him a paraplegic) who tried to enter a house after they repeatedly commanded him to drop a 2 ½ foot sword and warned him that they would shoot him if he did not drop it. Unknown to the officers at the time, the subject was trying to get into his own house. Also unknown to the officers, the subject was wearing earphones under a hat with an attached Discman turned to maximum volume; consequently he did not hear the warnings.

45. Young v. City of Providence ex rel. Napolitano, 404 F.3d 4 (1st Cir. 2005). In Young, the court upheld an excessive force jury verdict against one of two officers who shot a plain clothes off duty officer, where there was evidence that the off duty officer's "gun was pointed downwards, and not at . . . anyone else, and that the officers shot him extraordinarily quickly, almost immediately after he left the restaurant, and without giving him adequate warning." *Id.* at 22.

46. Guerra Morales v. United States, 416 F.3d 458, 463 (6th Cir. 2005) (it was not safe and feasible for the agent to give a warning before shooting the plaintiff who was running away,

because the plaintiff "might have drawn a weapon and fired in the time it took Agent Ohanian to announce her identity."). See section explaining the danger posed by a fleeing deadly felon and accompanying endnotes, infra, wherein Guerra is discussed further. Wilson v. Meeks, 52 F.3d 1547, 1554 (10th Cir. 1995), overruled on other grounds by Saucier v. Katz, 533 U.S. 194 (2001) (it was not feasible for the officer to give a warning before shooting when the plaintiff in an act of drunken recklessness raised and pointed a pistol (later determined to have been empty) at the officer). See also McLenagan v. Karnes, 27 F.3d 1002, 1007-08 (4th Cir. 1994). In McLenagan the court reasoned that the officer did not have the luxury of time to give a warning: "When [the officer] turned and drew his weapon, McLenagan, in full flight, was virtually upon him. For all [officer] Karnes knew, the hesitation involved in giving a warning could readily cause such a warning to be his last. We decline, therefore, to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing-particularly where, as here, such a warning might easily have cost the officer his life." Id. at 1007.

47. Jackson v. Sauls, 206 F.3d 1156 (11th Cir. 2000). See Verbal Warnings section and accompanying endnotes, supra, wherein the Sauls decision is further discussed. In Sauls, the U.S. Court of Appeals for the Eleventh Circuit ruled that the district court erred in denying the defendant-officer's motion for summary judgment on the plaintiffs' deadly force claim. The officers shot two bystanders, killing one, after a third person began shooting at the officers. The court ruled that the officers acted lawfully in using deadly force in self defense. The Jackson court stated: "We begin with Officer Sauls's use of deadly force. Under Plaintiffs' version of the events, Officer Sauls was standing in the doorway of the Shop and was struck in the abdomen by Stearns's two bullets. Stearns then crouched down inside the Shop, but Sauls fired back in an effort to save his own life. The fact that Sauls hit Plaintiff Wimbish, lying on the floor in the Shop, and not Stearns, the man with the gun firing at Officer Sauls, does not negate the reasonableness of Officer Sauls's response to this clearly life-threatening situation." Id. at 1172-73. The principle is best summarized by the U.S. Supreme court in New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18 (1891), which is discussed in further detail in an endnote under the probable cause (reasonable belief) section on page 2, supra. The Jopes Court stated:

The case of *Morris v. Platt*, 32 Conn. 75, fully illustrates the extent to which immunity goes. In that case it appeared that the defendant when assaulted had fired in self-defense, and, missing the assailant, had wounded an innocent by-stander, and the court held that the party thus assailed was free from both civil and criminal liability. The act which he had done was lawful, and without negligence, and no one, not even a third party, not an assailant, but an innocent by-stander, could make him answer in damages for the injury occasioned thereby.

Id. at 24.

48. "Though a defendant may forcibly repel and inflict injury to repel an aggressor under certain circumstances, the State may still advance the claim that a defendant was reckless with respect to bystanders." *State v. Zumwalt*, 973 S.W.2d 504, 508 (Mo. App. 1998), *Id.* at 508 (citing *State v. Fielder*, 330 Mo. 747, 50 S.W.2d 1031, 1034 (1932)). "A person acts 'recklessly' when he or she 'consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." *Zumwalt*, at 509. For example, in *State v. Isreal*, 872 S.W.2d 647 (Mo. App. 1994), the defendant was convicted of second-degree murder and his conviction was overturned on appeal because the jury was not instructed on the

crime of involuntary manslaughter. In *Israel*, the defendant shot an innocent bystander after he covered his eyes and fired all of the rounds from his gun in self-defense against a knife attack. It was not murder, however, it was not completely excusable where the shooter shoots recklessly. In *Scott v. State*, 86 S.W. 1004 (Ark. 1905), the defendant shot four or five times and killed an innocent bystander in an attempt to shoot an assailant who was trying to get a gun from another to shoot at the defendant. The defendant was convicted of involuntary manslaughter and the court in upholding his conviction approved of the following jury instruction: "If you find from the evidence that the defendant was justified in shooting at Bailey [the assailant], and that he shot at Bailey in a careless, reckless manner, and not with that caution that he should have done under the circumstances, you will convict him of involuntary manslaughter." *Id.* at 1005.

49. The general rule is that if a person, without legal excuse or justification, shoots at one individual and inadvertently kills another, he is guilty of the same degree of unlawful homicide as if he had killed the person he intended. *People v. Hill*, 735 N.E.2d 191, 197-98 (Ill. App. 2000). However if the subject was acting in self-defense and accidentally kills another, he is not guilty of any crime. Id. In Commonwealth v. Fowlin, 710 A.2d 1130 (Pa. 1998), a subject was blinded by pepper spray by one of three gun toting assailants. One of the three assailants pulled a handgun. "Fearing that he was about to be killed. Fowlin drew his own handgun and fired repeatedly in the direction of the attackers. Although he was nearly blinded by the pepper spray, he killed the assailant who had drawn the gun and wounded one of the others. He also wounded a bystander. At the time of the shooting, approximately 200 people were present in the nightclub." *Id.* at 1131. The *Fowlin* court ruled that the subject committed no crime, since the innocent bystander was shot while the subject had a right to use deadly force to defend himself. The Fowlin court reasoned that "the law of Pennsylvania does not require one to stand by helplessly while he is injured or killed by an assailant. And as Judge Cirillo aptly points out, when one is the victim of an attack, the assailant, not the victim, picks the time, the place, the manner, and the circumstances of the attack. Leisurely assessment of the circumstances and the danger to others is almost never a feature of such an assault, and most often, the best the victim can do is to mount a defense which hopefully will preserve his life. In many cases, the victim has only seconds to act in order to avoid injury or death. . . . Any victim of crime who justifiably exercises his right of self-preservation may inadvertently injure a bystander. Admittedly, this court could fashion a rule of law which holds the defender criminally liable, but in doing so, we would have furthered no policy of the criminal law. Instead, we would have punished a person who was acting within his instinct for self-preservation and, in an appropriate case, within the boundaries of our law." Id. at 134-35. In State v. Green, 206 S.E.2d 923 (W. Va. 1974), the court quoted 40 Am. Jur. 2d, Homicide § 144 in ruling that "If the circumstances are such that they would excuse the killing of an assailant in self-defense, the emergency will be held to excuse the person assailed from culpability, if in attempting to defend himself he unintentionally kills or injures a third person." Id. at 926. In People v. Adams, 291 N.E.2d 54 (Ill. App. 1972), the defendant was shot at night at close range by the driver of a vehicle, the defendant immediately returned fire and killed his assailant and an innocent bystander seated in the car. The court ruled that the defendant had committed no crime. "There were other persons present in the car with defendant's assailant, but it was dark and defendant was being fired on at close range. He had very little time to think or assess the situation. He had to act immediately to protect himself from a man who had been drinking all day and who was not just threatening him but was shooting at him. Even under such circumstances defendant did not shoot wildly or carelessly. From the record it can be inferred that he hit his assailant with every shot and that the innocent victim was killed only as a result of a bullet passing through the body of the assailant. We conclude that under the circumstances of this case the killing of Mary Davis constituted no crime." *Id.* at 64.

- 50.In *Ringer v. State*, 85 S.W. 410 (Ark. 1905), the court ruled that when a subject shoots through a door and does so because he feels that there is facing a deadly threat, he must be careful that there is not an innocent bystander that could be hit by the bullet. *See Generally* 18 A.L.R. 917.
- 51. Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999). In Napier, the court affirmed summary judgment for the police officer, ruling that a second burst of three rounds fired at the plaintiff was justified, because the subject "did not fall to the ground, drop his gun, or otherwise indicate that the risk no longer existed." *Id.* at 187. "After what had already occurred, Napier need not have specifically pointed his gun at Ronald for Ronald to believe that the danger still existed and now also encompassed him." *Id.* at 187-88.
- 52. Drury v. Lewis, 200 U.S. 1 (1906) (The U.S. Supreme Court affirmed ruling refusing sovereign immunity to army soldiers who were charged with murder in state court for shooting a subject because there was a factual issue as to whether the decedent had raised his hands and verbally stated he would surrender when he was shot. The Court ruled that if the subject had raised his hands and told the soldiers that he was surrendering when the officer decided to shoot, then the shooting would not be justified.). Gray-Hopkins v. Prince George's County, Maryland, 309 F.3d 224 (4th Cir. 2002). In *Gray-Hopkins*, the court refused to overturn a trial court ruling denying an officer qualified immunity. The officer shot a suspect allegedly because he was grabbing the officer's gun. Evidence developed that there was DNA from the decedent's hands found on the officer's gun, which indicated that the decedent had grabbed the gun. However, the evidence was also presented that the decedent grabbed the gun several times before he exited his vehicle. The plaintiff alleged that once the decedent exited his vehicle he "was standing still with his hands raised over his head at the time of the fatal shot, he was not resisting arrest, and he was not posing a threat to the safety of the officers or others." *Id.* at 231. The appellate court was bound to accept those facts as true in ruling on the summary judgement issue. The court ruled that if those facts were true then a reasonable officer in that position could not have believed he was acting lawfully. Assuming those facts were true, the danger had passed and there was no legal justification to use deadly force, even though the officer would have been justified in using deadly force earlier when the decedent was grabbing at the officer's gun.
- 53. State v. Hendrix, 244 S.E.2d 503 (S.C. 1978). In Hendrix, the Supreme Court of South Carolina overturned the manslaughter conviction of the defendant, who shot the decedent four times with his shotgun. The state argued that even if the defendant initially shot in proper self defense, he was not permitted to continue to shoot once the decedent was disabled by the first shot. The court stated the common law rule that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *Id.* at 507. The *Hendrix* court found that the defendant did not use excessive force when he shot in self defense, because he shot four shots from his shotgun in quick succession and finished shooting before the decedent hit the ground.
- 54.*Lamb v. State*, 462 N.E.2d 1025 (Ind. 1984). The Supreme Court of Indiana in *Lamb* cited with approval the Indiana statute that defined a deadly weapon as "a weapon, device, equipment, chemical substance, or other material that in the manner it is used ... is readily capable of causing serious bodily injury." *Id.* at 1028 (citing Ind. Code § 35-41-1-8). The *Lamb* court held that whether an object is a deadly weapon in a given circumstance depends on the way it is used. The court affirmed the rape conviction of the defendant and ruled that a "steel screw-driver type thing" held to the neck of the victim was a deadly weapon because of the way in which it was

used. The court stated that the defendant could have poked out the eye of the victim or stabbed her.

- 55. Sigman v. Town of Chapel Hill, 161 F.2d 782 (4th Cir. 1998) (officer acted reasonably when he shot from 15 feet away an approaching, drunk, enraged man carrying a Chef's knife with a broken tip). Roy v. City of Lewiston, 42 F.3d 691 (1st Cir. 1994) (affirming summary judgment in favor of officers who shot a drunk as he was flailing ineffectually at the officers, while he held a steak knife in each hand). Lewis v. Mazurkiewicz, 915 F.2d 106 (3rd Cir. 1990). "Under Pennsylvania law, Lewis's use of a knife to inflict head or neck wounds almost certainly constituted 'deadly force,' i.e., 'force which, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury." Id. at 113.
- 56. The revised criminal code of the State of Washington lists a straight razor as being a deadly weapon. The code section states that "deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any **razor with an unguarded blade**, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas." RCW § 9.94A.602.
- 57. Rhodes v. McDaniel, 945 F.2d 117 (6th Cir. 1991) (officer was justified in shooting an advancing subject from 4 to 6 feet away, who had an upraised machete in his hand and ignored warnings to drop it).
- 58. Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005).
- 59. Plummer v. State, 34 N.E. 968 (Ind. 1893). See Verbal Warning section and accompanying endnotes, supra, wherein the Plummer court's analysis of the verbal warning requirement is explained. In Plummer, the Supreme Court of Indiana overturned a murder conviction against the defendant who shot a town marshal. The defendant had threatened several people with a pistol and was carrying the pistol in his hand, when the marshal walked up behind the defendant and without warning struck the defendant in the head with his billy club and shot at him, after which the defendant instantly responded by returning fire, killing the marshal. The court ruled that the defendant was reasonable in believing "that he was in danger of receiving great bodily harm" when the marshal struck him on the head with the billy club, and was justified in instantly beginning to defend himself, although he did not ultimately shoot until after the marshal fired first. Id. at 970.
- 60.*Pena v. Leombuni*, 200 F.3d 1031 (7th Cir. 1999). In *Pena*, the court of appeals affirmed a jury verdict on behalf of officer who shot a person high on cocaine and acting "crazy" as he advanced toward officer with a chunk of concrete. The fact that the assailant was acting "crazy" was not relevant to the reasonableness of the officers response to the deadly threat. "Whatever Pena's mental problems (apparently he was high on cocaine), they were not such as to prevent him from beating Leombruni's brains out with a chunk of concrete. Leoumbruni was entitled to defend himself." *Id.* at 1034.
- 61. Acers v. United States, 164 U.S. 388 (1896). In Acers, the defendant was convicted of assault with intent to kill for having struck the victim in the side of the head (fracturing his skull) with a stone that was 3 inches by 9 inches by 2 inches in size. The defendant, among other things,

appealed his conviction, claiming that the jury instructions that defined a deadly weapon were in error. The U.S. Supreme Court approved of the jury instruction given by the trial court that it was proper for the trial court to instruct that a deadly weapon is anything, no matter what it is, by which death may be easily and readily produced. The Supreme Court further indicated that it was proper for the trial court to instruct the jury that it could consider the manner in which the stone was used and the part of the body that was struck in determining if the stone was a deadly weapon.

62. Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994). In Plakas, the arrestee (Plakas) began to make his escape from the back seat of a police cruiser as it was traveling down the road. Ultimately. Plakas was able to escape from police even though he was handcuffed behind his back. He ran to a nearby house, and after working his legs through the circle of his hands he grabbed a fireplace poker; he then assaulted and injured a sheriff's deputy before running from the house. The ordeal resulted in a standoff between the officers and Plakas in a nearby clearing. Plakas made the prophetic statement that "[e]ither you 're going to die here or I'm going to die here" before he charged with the poker at one of the officers and was fatally shot, when he reached two arms lengths from the officer. Id. at 1146. The court ruled that officer Drinski "was faced with a man who had, minutes before, attacked a police officer with a dangerous weapon, had refused several entreaties to disarm, had told the officer that one of the two would die that night, and then had moved toward the officer while raising his weapon to strike. Shooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self-defense even if, as Plakas's expert maintains, the man is attempting 'suicide by police." Id. The court ruled that the officer was not required to consider any alternatives to deadly force once he determined that deadly force was justified. There was an issue raised whether the officer tried to retreat, but was unable to do so because of an obstruction. However, that should not have been an issue at all. While in some jurisdictions a private citizen has a duty to retreat before he is justified in using deadly force, an officer has no legal duty to retreat, before he may used deadly force. In Reed v. Hov, 909 F.2d 324, 330-31 (9th Cir. 1989) (overruled on other grounds in Virginia v. Moore, 553 U.S. 164 (2008)), the plaintiff appealed the district court's refusal to give an instruction to the jury that the officer had a duty to first retreat before using deadly force. The Ninth Circuit Court of Appeals affirmed the decision of the district court and stated that, while in some circumstances an ordinary citizen may be required to first retreat before using deadly force, the plaintiff did not cite any authority which imposes such a duty on a police officer. "In our view, such a duty may be inconsistent with police officers' duty to the public to pursue investigations of criminal activity." Id. at 331. Police Have No Legal Duty to Retreat Before Using Deadly Force. If an officer elects to retreat, it should be for tactical reasons and not legal reasons.

63. People v. Villalobos, 53 Ill. App. 3d 234, 368 N.E.2d 556 (Ill. App. 1977). In Villalobos, the court reversed the murder conviction of the defendant who stabbed and killed the decedent who had attacked him with a broken bottle. The court stated: "A broken bottle is legally classified as a dangerous or deadly weapon." The court stated that there was insufficient evidence to overcome the defendant's claim of self defense because the attacker was taller and heavier than the defendant and he was drunk, enraged and attacking him with a broken bottle. The court added in dicta that: "Considered under these circumstances, even an unbroken bottle, in this situation, should be classified as a deadly weapon." In Sleeting v. Supreme Tribe of Ben Hur, 161 Ill. App. 449 (Ill. App. 1911), the court reversed a civil judgement against a police officer who shot and killed a subject who was attacking him with a bottle. The attacker broke the bottle over the officer's head and continued to attack the officer with the broken bottle, when the officer shot

him. The court stated: "From the evidence it clearly appears that Sleeting was the aggressor, and at the time and immediately before his being shot he was engaged in a murderous assault upon the officer, who was justified in shooting him. The large bottle used by Sleeting in making the assault upon O'Neill was a deadly weapon within the meaning of the law making an assault with a deadly weapon a criminal offense." *Id.* In *People v. Singh*, 119 Cal. App. 4th 905, 14 Cal. Rptr. 3d 769 (Cal. App. 2004), the court affirmed the conviction for assaulting an officer with a deadly weapon where the facts indicated that as the deputy sheriff "was holding defendant from behind, defendant grabbed the 40-ounce beer bottle off the table and threw it over his left shoulder at Deputy Jaquith's head. The bottle came 'probably within an inch, maybe a little bit less' of hitting her in the head." Id. at 909. In support of its ruling the court cited the California statute defining a deadly weapon as "any weapon, instrument or object that is capable of being used to inflict death or great bodily injury." CA CALJIC 12.42. In State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380 (N.C. App. 2003), the court affirmed a conviction for assault with a deadly weapon inflicting serious injury where the victim's testimony was that the defendant blind-sided him by hitting him in head with a wine bottle, which upon impact broke. Thereafter, the defendant continued to hit the victim, resulting in cuts on the victim's forehead and the top of his head. In Ferrel v. State, 55 S.W.3d 586 (Tex. Crim. App. 2001), the court affirmed the defendant's conviction for aggravate assault. The court ruled that the defendant caused serious bodily injury to the decedent when he struck the victim in the mouth with a full beer bottle, causing the victim to fall straight back, hitting his head on the floor, which resulted in his death. The court found it unnecessary to decide if the full beer bottle was a deadly weapon. However, the case is important in illustrating that a full beer bottle is capable not only causing serious physical injury, but also death.

64. See Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255 (10th Cir. 2008). "The undisputed facts here show that Larsen ignored at least four police commands to drop his weapon and then turned and stepped toward the officer [from 7 to 12 feet away] with a large knife raised in a provocative motion. Under these circumstances, Murr reasonably concluded Larsen posed an immediate threat to his safety. For all these reasons, we agree with the district court that the use of deadly force in these circumstances was objectively reasonable." Id. at 1263. See also Campbell v. City of Leavenworth, 13 P.3d 917 (Kan. App. 2000). In Campbell, the court affirmed summary judgement in favor of the officers on grounds of qualified immunity because "[t]he uncontroverted facts of this case show that at the time he was shot, the decedent was charging at Officer Bledsoe with a large metal object held over his head. The decedent was allowed to get within 8 feet of Officer Bledsoe before he was shot, and there is no question in our mind that the officer properly acted in self-defense and did not use excessive force in firing at the decedent." Id. at 922.

65.Dennis Tueller, *How Close is Too Close*, Police Policy Studies Council, *at* http://www.theppsc.org/Staff Views/Tueller/How.Close.htm (last visited on November 7, 2007). Dennis Tueller is a former Salt Lake City Police Lieutenant and an internationally recognized and respected law enforcement instructor. Tueller was one of the first to write about the reaction time gap. In his *How Close is Too Close* article, which was first published in 1983, Tueller stated:

How long does it take for you to draw your handgun and place two center hits on a man-size target at seven yards? Those of us who have learned and practiced proper pistolcraft techniques would say that a time of about one and one-half seconds is acceptable for that drill. . . . We have done some testing along those lines recently and have found that an average healthy adult male can cover the

traditional seven yard distance in a time of (you guessed it) about one and one-half seconds. It would be safe to say then that an armed attacker at 21 feet is well within your Danger Zone.

Id. See also Charles Remsberg, *Telling the Truth About Police Shootings*, The Police Marksman, http://ordnancecorner.wordpress.com/2007/11/30/telling-the-truth-about-police-shootings/(Nov/Dec 2004) (the average time for an officer to draw and fire a gun was 1.5 seconds).

66.Chris Wisecarver and Melvin Tucker, *The Force Science Reactionary Gap*, LAW AND ORDER, September 2007, at 10, *also at*

http://www.hendonpub.com/resources/articlearchive/details.aspx?ID=4105. "[A]n officer with his firearm at the low ready position (arms extended at 45 degrees, two-handed grip) takes .83 seconds to raise the firearm, get a sight picture and fire." *Id.* at 14.

67. UREY PATRICK & JOHN HALL, IN DEFENSE OF SELF AND OTHERS 106 (2004). The mean decision time (time between perception of the stimulus and the decision to respond) in a controlled study was calculated to be 0.211 seconds for a simple scenario involving a suspect stepping out of a doorway with a shotgun pointed at the officers who had their finger on the trigger and 0.895 seconds for a more complex scenario presented to officers with their fingers on the trigger involving an assassination in a courtyard with bystanders present. The decision time was arrived at by subtracting the mean time it takes an officer with his finger on the trigger to simply fire the weapon in response to an audible signal (0.365 seconds) from the mean reaction time for the scenarios (0.576 seconds reaction time for the simple scenario and 1.260 seconds reaction time for the complex scenario). The increased total reaction time from the simple scenario to the more complex scenario was determined to be taken up in the decision time, which increased from 0.211 seconds (0.576 - 0.365 = 0.211) for the simple scenario to 0.895 seconds (1.260 - 0.365 = 0.895) for the more complex scenario. Dr. Bill Lewinski and Dr. Bill Hudson confirmed the reaction time in an experiment involving 102 police officers from the Tempe Arizona Police Department. The officers were called upon to shoot only when a three light sequence appeared as a series of three rows with each having three lights. The officers were distracted with flashes of one and two lights and were instructed to only fire their guns when they saw all three lights in a row illuminated. The average reaction time was found to be 0.564 seconds. Jeffrey B. Bumgarner & William J. Lewinski, *The Impact of Visual Complexity*. Decision Making and Anticipation, The Tempe Study, Experiments 3 & 5, The Police Marksman, November/December 2003, available at http://www.forcescience.org/articles/tempestudy2.pdf. The 0.564-second reaction time arrived at in the Tempe study is very close to the 0.576-second reaction time that was found in the study by Tobin and Fackler (cited in PATRICK & HALL, supra).

68.Ernest Tobin & Martin Fackler M.D., *Officer Reaction-Response Times in Firing a Handgun*, Wound Ballistics Review, Vol. 3, No. 1 (1997). Dr. Martin Fackler, a wound ballistics expert, and Ernest Tobin, the Firearms Training Coordinator at the Georgia Public Safety Training Center (GPSTC), conducted a controlled experiment involving forty six police officers from the training courses at the Firearms Training Unit of the GPSTC. The officers stood with their handguns drawn and pointed forward. They were instructed to react as soon as they heard an audible signal. Each officer was tested three times with his finger on the trigger (138 measurements) and three times with his finger off the trigger (138 measurements). The average reaction time was determined to be 0.365 seconds (ranging from 0.18 seconds to 0.89 seconds, with a standard deviation of ±0.146) for those starting with their fingers on the trigger and 0.677

seconds (ranging from 0.24 seconds to 1.24 seconds, with a standard deviation of \pm 0.238) for those starting with their fingers off the trigger. This experiment did not call on the officers to decide whether to shoot or not shoot. They were simply instructed to fire their guns as quickly as possible, and so the officers did not have to take the time normally needed to decide whether to shoot. Only three of the four factors considered in determining reaction time were measured (perception time, response time, and mechanical time). By having the officers fire their guns upon the stimulus, there was no lag due to the time necessary to make a decision whether to shoot (decision time was eliminated). With training, the reaction time can be reduced even further. Noted speed shooting pistol expert William Bill Jordan was able to draw his gun from a standard side hip holster and hit a target in 0.027 seconds. He did not begin to draw the gun until a light flashed which started the timer. The timer did not stop until a wax bullet hit the target, which was 10 feet away. Note that the Jordan time only included perception time, response time, and mechanical time. Jordan was not faced with a decision whether or not to shoot. Decision time was removed from the equation. WILLIAM JORDAN, NO SECOND PLACE WINNER 47 (1965).

69. The mechanical time is the shortest time span in the sequence. A study involving 102 police officers from the Tempe Arizona Police Department showed that the average mechanical time for pulling the trigger on a gun is 6/100 (.06) of a second. Bill Lewinski & Bill Hudson, *Reaction Times in Lethal Force Encounters, Time to Start Shooting? Time to Stop Shooting? The Temple Study*, The Police Marksman, September/October 2003, at 27, *available at* http://www.forcescience.org/articles/tempestudy.pdf. Lewinski and Hudson concluded that once an officer starts pulling the trigger with the intent to fire the gun (as distinguished from simply pulling the slack out of the trigger) it is impossible for the officer to stop the mechanical process of pulling the trigger if he perceives a change in the circumstances. *Id*.

70. The delay in firing a gun after being presented with a deadly threat is similar in nature to the delay in time it takes for the driver of a motor vehicle to apply the brakes upon seeing a hazard in the road. See also UREY PATRICK & JOHN HALL, IN DEFENSE OF SELF AND OTHERS 103 (2004) (citing U.S. Dept. Of Transportation, Federal Aviation Administration, Civil AEROMEDICAL INSTITUTE PSYCHOLOGICAL OPERATIONS, PHYSIOLOGY TRAINING - HIGH SPEED FLIGHT 24 (January 1972)). "In aviation, the Federal Aviation Administration presupposes a minimum reaction time of 0.6 to 1.0 seconds in it operational analysis. In collision avoidance maneuvers, it is not uncommon to see up to five seconds elapse before an aircraft begins evasive action." Id. Research has shown that it takes drivers approximately one (1) second to apply breaks after seeing a road hazard. Fu-Kwun Hwang, Reaction Time Measurement, NTNUJAVA Virtual Physics Laboratory, at http://www.phy.ntnu.edu.tw/ntnujava/index.php?topic=137 (last visited May 14, 2008). Fu-Kwun Hwang, a physicist at the National Taiwan Normal University, has found that the reaction time for average drivers of automobiles to be approximately 1 second, with the fastest measured reaction time being approximately .60 of a second. The findings of Hwang seem to be implicitly validated by the FAA, which presupposes a minimum reaction time of 0.6 to 1.0 seconds in its operational analysis of collision avoidance. See PATRICK & HALL, supra. See also Reaction Time Java Applet, at

http://www.phys.hawaii.edu/~teb/java/ntnujava/Reaction/reactionTime.html (last visited on May 14, 2008). Just as a driver of a vehicle does not apply the breaks instantaneously as the hazard ahead of him appears, so also the officer does not shoot instantaneously when faced with a deadly attack. The typical reaction time tests have a subject respond to a given stimulus (usually a visual light or an audible beep), and the test measures the time it takes to shoot a gun. Bill Lewinski, *Biomechanics of Lethal Encounters - Officer Movements*, The Police Marksman, November/December 2002, *available at* http://www.forcescience.org/articles/biomechanics.pdf.

Such tests do not take into account the decision time delay.

71.PATRICK & HALL, supra at 106. In a controlled study, the mean reaction time from the start of the stimulus to the firing of the gun (the officers started with their fingers on the trigger) for a simple scenario involving a suspect stepping out of a doorway with a shotgun pointed at the officers was 0.576 seconds. For a more complex scenario involving an assassination in a courtyard with bystanders present, the mean reaction time increased to 1.260 seconds. The increased time was determined to be taken up in the decision time, which increased from 0.211 for a simple scenario to 0.895 for the more complex scenario. A court, that is uninformed about this time lag would not know to consider it in deciding a case. For example, in *Palmer v. Hall*, 517 F.2d 705, 707 (5th Cir. 1975), the court ruled against a police officer on the issue of whether the suspect was turned toward him when he was shot running away with a rifle in his hands. The court did not discuss reaction time in its opinion. The court's opinion indicates that the court only factored in the time it would take the round to strike the subject in the back part of his body from 120 feet away (less than 1/10 of a second). The court determined that the suspect could not have turned back forward in 1/10 of a second. The court did not account for the reaction time of the officer. If reaction time were factored into the equation the court's decision may have been different, because studies have shown that a person can on average turn his torso 90 degrees in 0.310 seconds and 180 degrees in 0.677 seconds. Tobin & Fackler, supra. In New York v. Tanella, 374 F.3d 141 (2nd Cir. 2004), the court seemed implicitly to apply the reaction time lag to its assessment of the facts in that case. In Tanella, a DEA Agent was charged under state law with manslaughter. The U.S. Court of Appeals for the Second Circuit assumed the truth of the factual allegations in the indictment and looked at the facts in the light most favorable to the prosecution. In doing so the court ruled that the DEA Special Agent was entitled to sovereign immunity. The court assumed, as alleged by the state, that the suspect pushed the agent and turned and took two or more steps away from the agent when he was shot. Assuming those facts as true, the court ruled that the agent honestly and reasonably believed that the suspect's sudden movement of pushing the agent was an attempt to reach for the agent's gun. The court concluded that "under these tense and perilous circumstances, Tanella's perception that Dewgard was reaching for his (Tanella's) gun was objectively reasonable as a matter of law." The court stated that it was not necessary for it to determine whether the agent was correct in evaluating the circumstances. It was only necessary to decide whether the agent believed that the suspect was trying to get the agent's gun, and whether the agent's belief was reasonable. "Immunity does not require an officer to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be." Id. at 152. Agent Tanella's delay in shooting was due to the aggregate total of the perception time + decision time + response time + mechanical time. All of those separate delays created a total time delay of over ½ second for the agent to fire the first round. PATRICK & HALL, supra at 106. The Tanella court's determination that Agent Tanella was reasonable in shooting the suspect after he had turned and taken two steps away from the agent, suggests that the court implicitly realized that there was a time gap between the decision by the agent to shoot and the time it took to actually fire the gun. That conclusion by the court is supported by the research. Dr. Bill Lewinski studied over 600 police shootings and concluded that "once the brain decides its time to shoot, it is virtually impossible to interrupt the completion of that action." Bill Lewinski & Dave Grossi, The Suspect is Shot in the Back, is Your Shooting Clean? Understanding the Limits of Survival Psychology, The Police Marksman, September/October 1999, at 23, available at

http://www.forcescience.org/articles/isyourshootingclean.pdf. In fact, Dr. Lewinski "has encountered only three officers who, once they had made the mental commitment to shoot, were capable of interrupting that action the instant they wanted to. One of these did so in a Minnesota

city by jerking his gun off his assailant; he still reflexively continued his trigger pull and sent a bullet flying into nearby rush-hour traffic!" Charles Remsberg, *Telling the Truth About Police Shootings*, The Police Marksman, Nov/Dec 2004, *available at*http://www.forcescience.org/articles/tellingthetruth.pdf. Charles Remsberg, *Telling the Truth About Police Shootings*, The Police Marksman, Nov/Dec 2004, *available at*http://www.forcescience.org/articles/tellingthetruth.pdf (going from a threatening, frontal stance to a running, square back presented to the officer can take as little as .14 seconds, according to experiments conducted by Dr. Bill Lewinski, who is a specialist in law enforcement behavioral psychology). "[Dr. Lewinski] discovered that . . . a person can turn and move as much as 13ft (4m) in one second. So an officer facing an attacker may decide to shoot - and later swear they were facing them - when in reality their victim has turned to run and been shot in the back. In the US, an astonishing 70% of victims of police shootings are shot in the back or the side." Tom Tanner, *What Happens When Police Kill?*, BBC,

http://news.bbc.co.uk/1/hi/magazine/6047218.stm (October 13, 2006). See also Bill Lewinski, Why is the Suspect Shot in the Back?, The Police Marksman, November/December 2000, available at http://www.forcescience.org/articles/shotinback.pdf. Not only is there a reaction delay, but in addition there is a cessation delay. "In studies with the Tempe Police Department, [Dr. Bill Lewinski, a specialist in law enforcement behavioral psychology and founder of the nonprofit Force Science Research Center at Minnesota State University Mankatol established that once the average officer in the midst of a 'committed, intense effort to save his life' perceives a stimulus to stop shooting, it takes him 'an absolute minimum' of .3 to .6 seconds to process that information and 'back off.' That means he's likely to unavoidably make an additional two to three trigger pulls, firing 'extra' bullets after he determines that the shooting should stop." Remsberg, Supra. In a study of reaction times involving over 1,400 officers, it was found that "it took an average of 0.73 seconds for police officers to react to a visual stimulus by raising their already drawn pistols from a ready position (arms partially extended with firearm above waist level but below eye level) to a firing position and then firing one shot. Further, it took officers an average of 1.82 seconds to draw their weapons from their holster, bring it to eve level, and fire one shot. It took an average of 2.84 seconds for officers to draw and fire two rounds at a target from 7 yards away." Jeffrey B. Bumgarner, William J. Lewinski, William Hudson, and Craig Sapp, An Examination of Police Officer Mental Chronometry: "I Swear...I Don't Know How I Shot Him in the Back", The Scene, Journal of The Association for Crime Scene Reconstruction, available at http://www.forcescience.org/articles/mentalchronometry.pdf (citing G. Smith, Evaluation of Law Enforcement Officer Combat Handgun Skills. Smith and Wesson Academy Newsletter, November 1990, 7-8).

72.Al Baker, *A Hail of Bullets, a Heap of Uncertainty*, N.Y. TIMES, Dec. 9, 2007, at 4. The New York Police Department Firearms Discharge Report revealed that in 2006 out of a total of 540 bullets fired in all situations that year (including against animals and other circumstances), New York Police Department officers only hit their targets 182 times. That is a hit rate of only 34 %. Even at very close range the officers were more likely to miss their target than hit it. Officers fired a total of 252 rounds at targets that were 6 feet or closer and hit their targets only 107 times. That is a hit rate of only 43 % when the target was 6 feet away or closer. The hit rate dropped to 23 % for rounds fired between distances of 6 to 21 feet (22 hits out of 95 bullets fired). Interestingly, the hit rate increased to 40 % for rounds fired between 21 and 45 feet (16 hits out of 40 shots fired). The hit rate dropped back down to 14 % for shots fired between 45 and 75 feet away (1 hit out of 7 shots fired) and 7 % for shots fired at distances of greater than 75 feet away (2 hits out of 30 shots fired). In Los Angeles, where there are far fewer shootings, a similar review of 2006 shootings showed that out of a total of 67 rounds fired, the officers only

hit their target 27 times, for a 40 % hit rate. In the 2006 New York Police Department review, when they considered only those circumstances where the officers were shooting at a person (factoring out dog and other shootings), it was found that the hit rate for all rounds fired from all distances at persons was 28.3 % (103 hits out of 364 total rounds fired at persons). A similar 2005 New York Police Department review of shootings at persons found that the hit rate for all rounds fired from all distances was only 17.4 % (82 hits out of 472 total rounds fired at persons). John C. Cerar, a retired commander of the New York Police Department's Firearms Training Section, uses a humorous anthropomorphism to explain the low hit rates. "You take Olympic Shooters, and they practice all the time, and they can hit a fly of a cow's nose from 100 yards. But if you put a gun in that cow's hand, you will get a different reaction from the Olympic shooter." *Id*.

73. PATRICK & HALL, supra. In training exercises conducted at the FBI Firearms Training Unit, it was determined that "[i]nside 21 feet, most of the agents could still fire a shot by the time the attacker reached them with the knife, as the attacker concurrently was able to stab or slash the agent. The harsh reality in such circumstance is that unless the shot happens to hit the attacker in the central nervous system, the attack will succeed." *Id.* at 109. The only way to immediately stop a determined knife attacker is to disrupt the brain or upper spinal cord by shooting the suspect in the head or neck. Id. at 62. The only other means of stopping a determined knife attacker would be to shoot the suspect causing him to lose enough blood to lose consciousness. Total incapacitation by blood loss does not begin to occur until the attacker loses approximately 20%-25% of his blood. Such blood loss in an average healthy adult would take approximately 5 seconds assuming the largest artery in the human body (thoracic artery) were severed. Even in a case where a gun shot strikes the heart causing it to stop immediately, there is enough residual oxygen in the blood to allow a person with a stopped heart to continue to function for 10 to 15 seconds before incapacitation. From this it can be concluded that, on average, physical incapacitation from blood loss alone will take at minimum 10-15 seconds. *Id.* at 62-64 (citing Wound Ballistic Workshop: 9mm vs. .45 Auto, FBI Academy, Quantico, VA, September 1987). In a study of gunshot and knife victims who eventually died of their wounds in Dade County. Florida, it was found that 64% of those suffering gunshot wounds to the chest and 36 % of those shot in the head and neck survived for 5 minutes or more after being shot. A number of anecdotal cases were presented in which the victims of the gunshots, including those shot through the heart, continued to engage in strenuous physical activity before they finally died. PATRICK & HALL at 64 (citing Levy, V., et al., Survival Time in Gunshot and Stab Wound Victims, The American Journal of Forensic Medicine and Pathology 1988; 9(3)). Washington v. Starke, 855 F.2d 346 (6th Cir. 1988) (after being shot in the back of the head by an officer with a .38 caliber handgun, the subject ran for a distance of 298 feet, before collapsing and dving from the wound); Jones v. Wittenberg University, 534 F.2d 1203 (6th Cir. 1976) (after being shot in the chest by a security guard, the subject kept running for a distance of 30 to 40 yards, before he collapsed and died); Amato v. United States, 549 F. Supp. 863 (D.N.J. 1982), aff'd, 729 F.2d 1445 (3d Cir. 1984) (A perimeter was set up in order to arrest the robbers as they exited the bank. As the robbers ran from the bank one of the bank robbers fired on the agents who were converging on them. The chain reaction caused by that shot was described by the court as equivalent to the splitting of an atom. Eleven agents fired 39 rounds which included 281 bullets and buckshot pellets. The bank robber who fired on the agents was killed. However, it is notable that the other bank robber survived the shooting, even though he suffered 65 bullet wounds); Goold v. Saunders, 194 N.W. 227 (Iowa 1923) (plaintiff survives after being shot with 125 bullets). In the April 11, 1986, FBI Miami Shootout, bank robbers William Matix and Michael Platt were each wounded with several rounds, but were able to continue to shoot at FBI

Agents for over 4 minutes killing two FBI Agents and wounding an additional five agents before Matix and Platt were finally killed. Matix was shot 6 times and Platt was shot 12 times during the shootout. Greg Solano, *Knife verses Gun*, *Police Shootings*, Sheriff Greg Solano Blog, http://sheriffgregsolano.blogspot.com/2006/09/knife-verses-gun-police-shootings.html (September 06, 2006). Dr. W. French Anderson analyzed the FBI Miami Shootout in detail. His analysis revealed that the first wound suffered by Michael Platt to his right upper arm and chest was unsurvivable and was the primary injury responsible for Platt's death. However, *after* receiving that fatal wound, Platt continued to engage the FBI Agents in the gun battle and suffered 5 more gunshot wounds in the minutes *before* he shot and killed two FBI Agents and seriously wounded at least one other agent. At the beginning of the gun battle, William Matix was shot in his arm and head and fell unconscious. After several minutes, he regained consciousness and rejoined the gun battle, firing his gun at the FBI Agents and local police officers who arrived at the scene before he was finally shot and killed by an FBI Agent. W. French Anderson, M.D., *Forensic Analysis of the April 11, 1986, FBI Firefight*, Firearms Tactical Institute, http://www.firearmstactical.com/briefs7.htm (July 1998).

74. Sigman v. Town of Chapel Hill, 161 F.2d 782 (4th Cir. 1998). In Sigman, the court found that an officer acted reasonably when he shot an approaching, drunk, enraged man carrying a Chef's knife with a broken tip after the attacker got within 15 feet of the officer. *Id.* at 788. The court further found that there was no evidence presented by the plaintiff that the department training rule was unreasonable. The department training rule provided that an officer may use deadly force to stop a threatening individual armed with an edged weapon when he that individual comes within 21 feet of the officer. *Id. See Rhodes v. McDaniel*, 945 F.2d 117 (6th Cir. 1991) (officer was justified in shooting an advancing subject from 4 to 6 feet away, who had an upraised machete in his hand and ignored warnings to drop it).

75. Wisecarver, *supra* at 12. "[A]n officer with his firearm securely holstered requires an average of 1.71 seconds to draw the firearm, get on target and fire. Even with the holster unsnapped, the officer requires an average time of 1.61 seconds." *Id. See* Tueller, *supra*, wherein the author found that an "acceptable" time for drawing a gun from a holster and firing "two" accurate rounds (presumably at close range) would be approximately 1.5 seconds.

76. See Smith v. Hill, 741 F. Supp. 647 (E.D. Mich. 1990), discussed above under the section on "Power."

77. See Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002), in section on Hostile Moves and accompanying endnotes, supra. See also Merzon v. County of Suffolk, 767 F. Supp. 432 (E.D.N.Y. 1991), two officers were surrounded by a hostile group, some of whom tried to thwart their efforts to arrest a suspect. The crowd began to assault the officers. One of the officers, who was carrying two guns, pulled one of his guns from his holster and pointed it at one of the subjects. Another subject was choking the officer when the subject who was facing the officer lunged at the officer in an effort to get his other gun. The officer shot the subject. The forensic evidence presented by the medical examiner supported the officer's contention that the decedent was reaching for the officer's gun. The court found that the officer acted reasonably and dismissed the complaint against the officer.

78. Tom v. Voida, 963 F.2d 952 (7th Cir. 1992), discussed above in an endnote under the section on "Power." See also Billington v. Smith, in section on Hostile Moves and accompanying endnotes, supra. In Billington, an officer was kicked and punched by an unarmed drunk suspect who also tried to grab the officer's weapon. The officer shot the suspect at close range. The

suspect died, and his family sued. The court ruled that the use of deadly force by the officer was reasonable under the Fourth Amendment. The court stated that aside from the suspect's attempt to grab the officer's gun, the bare handed attack by the decedent was itself enough to justify the use of deadly force. "[The suspect] was trying to get the detective's gun and was getting the upper hand. [The suspect] posed an imminent threat of injury or death; indeed, the threat of injury had already been realized by [the suspect's] blows and kicks. . . . Under the circumstances, a reasonable officer would perceive a substantial risk that [the suspect] would seriously injure or kill him, either by beating and kicking him, or by taking his gun and shooting him with it. Indeed, once [the suspect] grabbed the barrel of Detective Smith's gun and tried to pry it from his hand, a reasonable officer would infer a substantial possibility that he was fighting for his life." *Id*.

79. "A gun is an instrument designed for the destruction of life or the infliction of injury, and death or injury will result if a person is struck by a bullet. While an automobile is capable of lethality, it is not designed to kill or injure; and even when automobiles strike each other, death and injury may well not result. . . . " Adams v. St. Lucie County Sheriff's Office, 998 F. 2d 923 (11th Cir. 1993) (en banc, per curiam) (modified on other grounds by *Brower v. County of Invo*, 489 U.S. 593 (1989)), adopting by reference 962 F. 2d 1573, 1577 (Edmondson, J., dissenting) (emphasis in original). In *United States v. Sanchez*, 914 F.2d 1355, 1358 (9th Cir. 1990), cert. denied, 499 U.S. 978 (1991), the court held that an automobile is a dangerous weapon when used to endanger the life of or inflict great bodily harm upon another. Sanchez is a case involving an assault on a federal officer in violation of 18 U.S.C. § 111. See also Scott v. Harris, 127 S. Ct. 1769 (2007). In Scott, a driver posed a danger to the public and officers by his reckles driving in an attempt to elude police who tried to pull him over for a speeding violation. The U.S. Supreme Court ruled that it was reasonable for an officer in pursuit of the driver to use his bumper to ram the rear of the suspect's vehicle as he was traveling at high speed, thus causing the driver to crash. In Scott, the U.S. Supreme Court addressed the issue of using another car to push a fleeing high speed vehicle from behind causing it to crash. The Scott Court made the point that while such conduct by the officer posed a "high likelihood of serious injury or death," it was not the "near certainty of death" posed by shooting a suspect in the head as was the case in Garner. Id. at 1778. While the *Scott* Court discussed *Garner*, it did not seem to rely on *Garner* as precedent for its ruling. However, language in *Garner* supports the *Scott* holding. As pointed out in another officer caused vehicle crash case of a fleeing misdemeanant, the en banc court in Adams v. St. Lucie County Sheriff's Office, supra, stated: "Even the Court in Garner recognized that, when a fleeing suspect poses a threat of danger to others, a higher degree of force is permissible." *Id.* at 1578. The *Adams* court cited to the page in the *Garner* opinion where the Court stated: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. See also Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) (officer acted reasonably when he shot and killed an unarmed driver of an automobile as he attempted to flee during a high speed chase); Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000) (an officer was justified in shooting 9 rounds from his gun at a suspect who had accelerated his car at a police vehicle that was approaching the suspect's vehicle). See also Long v. Slaton, 508 F.3d 576 (11th Cir. 2007). In Long, the court ruled that an officer acted reasonably when he shot a mentally unstable subject who tried to drive away in the officer's fully marked cruiser, even though at the point of the shooting the subject had not vet used the police cruiser as a deadly weapon. The court ruled that it was reasonable because the subject's unstable frame of mind, energetic evasion of the deputy, stealing the cruiser, and starting to drive away after being warned he would be shot gave the deputy reason to believe that the subject was

dangerous.).

80. Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992). In Fraire, the Court of Appeals for the Fifth Circuit affirmed the district court's summary judgment in favor of an officer who shot the driver of a vehicle that was accelerating directly at him. The suspect fled in his vehicle after being stopped for suspected drunk driving by a plain clothes officer in an unmarked police car. The officer had displayed his badge and identified himself to the suspect as a police officer. The suspect ended up driving down a cul-de-sac. The officer followed him to that point and exited his vehicle. The officer was standing toward the middle of the street and testified that the suspect could have driven around him, but instead drove at him. Id. at 1271. The Circuit Court found that the driver "might cause death or serious bodily injury to himself or others based on the facts that (1) in attempting to flee, [the suspect] drove recklessly and at a high speed into and around a residential neighborhood on a Sunday afternoon, and (2) attempted to run [the officer] down." Id. at 1277. In Scott v. Edinburg, 364 F.3d 752 (7th Cir. 2003), the court ruled that it was not unreasonable for an officer to shoot a person stealing his car, because the suspect had seconds earlier placed the officer in danger by backing up toward him and he posed a danger to between 12 and 14 people in a gas station parking lot through which the decedent was driving as he sped away. The court ruled that "the threatened individuals need not have been placed in the direct path of the threat. Deadly force may be exercised if the suspect's actions place the officer, 'his partner, or those in the *immediate vicinity* in imminent danger of death or serious bodily injury." Id, at 759 (emphasis added by Scott court to quote from Muhammed v. City of Chicago, 316 F.3d 680 (7th Cir. 2002), also citing Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988) (en banc)).

81.A minority of courts, on the other hand, will look to whether the officer had available a less intrusive means when reviewing a deadly force claim. For example, in *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992), the court reversed the district court decision granting summary judgement in favor of a police officer, the chief of police, and the city in a 42 U.S.C. § 1983 deadly force action. Among the factors the court considered in deciding the case were the alternative less restrictive courses of action available to the officer. See also Brower v. County of Invo, 884 F.2d 1316, 1318 (9th Cir. 1989), where the court of appeals, on remand from the U.S. Supreme Court, in turn remanded the case to the district court to determine the reasonableness of the use of deadly force, by having the trier of fact examine whether a reasonable non-deadly alternative existed. In Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994), cert. denied, 513 U.S. 1148 (1995), the Court of Appeals for the Ninth Circuit remanded the case to the district court to explore whether the police had alternatives available to sending a police dog into a scrapyard to bite and hold a suspect. The suspect had an outstanding unspecified felony warrant and had fled on foot to the yard after a stop for a traffic violation. The court felt that the police were not faced with an unfolding crisis requiring a split second decision because the suspect was trapped and had no place else to flee. Chew seems to be contrary to the clear precedent of the U.S. Supreme Court. Hopkins, Brower, and Chew, supra, which are all Ninth Circuit opinions, are in conflict with other Ninth Circuit opinions (E.g., Forrester v. City of San Diego, 25 F.3d 804, 807-08 (9th Cir. 1994); Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)) and contrary to the clear precedent of the U.S. Supreme Court on this issue (see Illinois v. Laffayette, 462 U.S. 640, 647 (1983); United States v. Sokolow, 490 U.S. 1 (1989)). In Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007), the court ruled that "in this circuit . . . a Fourth Amendment seizure must be effectuated with the least intrusive means reasonably available." The Griffith court cited to two previous Sixth Circuit rulings in support of its ruling, however, the *Griffith* court overlooked the contrary Sixth Circuit precedent established by Collins v. Nagle, 892 F.2d 489, 493 (6th Cir. 1989). The Nagle court held that "the fourth amendment reasonableness standard does not turn

on the availability of less intrusive alternatives." *Id.* at 493. Just five months before *Griffith* was decided the district court for the Eastern District of Tennessee in an unreported decision cited *Nagle* in support of its ruling that the plaintiff's position that "deadly force is justified only after all other options have proven futile has no basis in the law and is frivolous." *Williams v. Holt*, 2006 WL 2290471 (E.D. Tenn. 2006) (unreported). The *Holt* court also cited *Deering v. Reich*, 183 F.3d 645, 652-53 (7th Cir. 1999) and quoted *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) (overruled on other grounds by *Chroma Lighting v. GTE Products Corp.*, 127 F.3d 1136 (9th Cir.1997)): "The fourth amendment reasonableness standard does not turn on the availability of less intrusive alternatives." The very rule that the *Griffith* court announced as the law in the Sixth Circuit had been characterized by the *Holt* district court only five months earlier as "frivolous" and having "no basis in law" because the precedent (*Nagle*) in the Sixth Circuit did not support that rule. *Nagle* was not overruled (in fact, it was not even cited) by the *Griffith* court. It appears that there is a split within the Sixth Circuit on whether it is necessary to consider the least intrusive means.

82."[T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment requires such steps. . . . The reasonableness of any particular governmental activity does not necessarily turn on the existence of alternative 'less intrusive' means." Illinois v. Laffayette, 462 U.S. 640, 647 (1983). See also United States v. Sokolow, 490 U.S. 1 (1989). "The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment. . . . For clarity, the reasonableness inquiry in cases . . . where deadly force is used is simply whether 'the officer [using the force] has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others.'" Schulz v. Long, 44 F.3d 643, 649 (8th Cir. 1995) (quoting Tennessee v Garner, 471 U.S. 1, 3 (1985)) (emphasis added). See also Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989); Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996). It increases the risk of death or serious physical injury to an officer to require him to first consider less than deadly force options and calculate their effectiveness before he could use deadly force in a situation where deadly force is otherwise justified. "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgement. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing that requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment." Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (emphasis in the original). Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994). In Plakas, the court ruled that the officer was not required to consider any alternatives to deadly force once he determined that deadly force was justified. "[I]t is clear that the Constitution does not enact a police administrator's equipment list." Id. at 1150.

83. Reed v. Hoy, 909 F.2d 324, 330-31 (9th Cir. 1989). In Reed, the plaintiff appealed the district court's refusal to give an instruction to the jury that the officer had a duty to first retreat before using deadly force. The Ninth Circuit Court of Appeals affirmed the decision of the district court and stated that, while in some circumstances an ordinary citizen may be required to first retreat before using deadly force, the plaintiff did not cite any authority which imposes such a duty on a

police officer. "In our view, such a duty may be inconsistent with police officers' duty to the public to pursue investigations of criminal activity." *Id.* at 331. **Police Have No Legal Duty to Retreat Before Using Deadly Force.** If an officer elects to retreat, it should be for tactical reasons and not legal reasons.

84. Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987). In Ryder, the court found that deadly force was not justified to prevent the suspect's escape, because she was not fleeing after having committed a dangerous felony involving the infliction or threatened infliction of death or serious physical injury. Nonetheless, the court found that deadly force was justified because it was reasonable for the officer to believe that the fleeing suspect was armed and therefore posed a threat of ambush if she had rounded the corner of the building. Id. at 1421-22. Caution, Ryder is arguably sui generis, because there was no classic hostile move in that case, which ordinarily would be needed to justify the use of deadly force. Ford v. Childers, 855 F.2d 1271, 1275-76 (7th Cir. 1988) (en banc). In Childers, the entire bench of the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the district court to grant a directed verdict in favor of an officer and police department in a lawsuit alleging a violation of the Fourth Amendment. The officer shot a fleeing bank robber after twice ordering him to halt. The officer did not actually see the suspect with a gun because his view was partially obstructed by a post. The officer, however, had probable cause to believe that the suspect was armed because he had earlier seen the suspect's arm extended toward several people who had their arms raised.

85. Montoute v. Carr, 114 F.3d 181 (11th Cir. 1997). In Montoute, an officer was called to the scene of a disturbance with a large crowd. Upon the officer's arrival he heard gun shots fired and the officer shot a subject after he refused to drop a pistol grip sawed off shotgun upon command, but instead continued to run past the officer. The U.S. Court of Appeals for the Eleventh Circuit reversed the district court's denial of qualified immunity to the officer. The court ruled that the officer's belief that the subject posed a deadly threat to the officer was reasonable even though the officer never saw the subject at any time point the gun at anyone and the subject never even turned to face the officer after he ran by him. The court reasoned that the subject posed a risk of death or serious physical injury to the officer or others as he fled. The court stated that the subject could have in a split second turned and fired upon the officer. The court further stated: "At least where orders to drop the weapon have gone unheeded, an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force." Id. at 185. Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) (discussed further in an endnote under the Verbal Warnings section, *supra*). In the *Clifton* case, Special Agent Lloyd Clifton shot an unarmed subject who was fleeing from a house because he mistakenly thought the fleeing suspect has shot Clifton's partner. Clifton was indicted for murder. The federal district court removed that case and dismissed the murder charges. The federal court of appeals affirmed the dismissal of the charges. The court of appeals quoted with approval from the district court opinion: "In view of these facts, undisputed on the record, and in view of the earlier discussed belief by petitioner that the occupants of the cabin were potentially armed and dangerous, this court concludes the petitioner's belief that Dickenson had shot Agent Filben was both honest and reasonable." Id. at 729. The court of appeals further stated: "The [district] court also concluded that petitioner's belief that Dickenson's escape into the woods would pose a danger to the lives of the pursuing officers was honest and reasonable. We cannot on the basis of the overall record conclude that these findings are clearly erroneous." Id.

86. Guerra Morales v. United States, 416 F.3d 458 (6th Cir. 2005). Guerra was a review of a ruling in favor of a the federal government in an FTCA action under Michigan law for assault and battery. The plaintiff was shot by a DEA agent during a drug transaction, rendering the plaintiff a paraplegic. Michigan law requires that the agent reasonably believe that the subject poses an imminent threat of death or serious physical bodily harm before an officer may use deadly force. In Guerra, the subject was running away after the agent had shot a coconspirator who tried to pull a gun in an attempt to rob the agent. The plaintiff's glance at the agent as he ran away, the movement of his hand in front of his body, and the proximity of a building corner gave rise to a reasonable belief that the subject posed an imminent danger to the agent justifying the agent in shooting the subject. The fact that the suspect did not in fact have a weapon did not affect the court's view that the agent acted reasonably, because the agent did not know the subject was unarmed and reasonably believed he was armed because a coconspirator seconds earlier pulled a gun and tried to rob her.

87.*Hamm v. Powell*, 874 F.2d 766 (11th Cir. 1989). In *Powell*, officers shot two fleeing drug suspects as they tried to drive away, because the officers mistakenly thought the suspects had shot at them. The officers were sued, but were granted qualified immunity on the Fourth Amendment claim by the district court. However, the district court did not grant qualified immunity on the Fifth and Fourteenth Amendment Due Process claims. The jury awarded damages to the plaintiffs. The court of appeals reversed the judgment against the officers and granted qualified immunity to them on the due process claims. *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975) (unjustified shooting of a non-dangerous fleeing misdemeanant carrying a rifle (later determined to a be a BB gun), where the facts supported a finding that the subject made no hostile move toward the officer).

88. See Verbal Warnings section and accompanying endnotes, supra.

89. Harrell v. Decatur County, 41 F.3d 1494 (11th Cir. 1995) (per curiam), adopting by reference 22 F.3d at 1577 (11th Cir. 1994) (Dubina, J., dissenting). In Harrell, a suspect was arrested for drunk driving. After the officer put a cuff on one wrist, the suspect began to fight with the officer. The suspect ultimately was able to wrest away the officer's flashlight, whereupon he used it to beat the officer. The suspect searched the officer for his gun but could not locate it, as it was hidden in the small of the officer's back. As the suspect began to walk back toward his car the officer tried to follow him, but the suspect kicked the officer and threatened to kill him. As the suspect reached his car, the officer shot the suspect, killing him. The district court granted summary judgment for the officer. The circuit court initially reversed the district court decision in Harrell v. Decatur County, 22 F.3d 1570 (11th Cir. 1994). The circuit court in its initial ruling felt that there were factual issues whether the suspect was reaching for a weapon as he returned to his car. Furthermore, the court thought *Tennessee v. Garner* "unequivocally prohibits the use of deadly force to apprehend a fleeing felon." The circuit court, however, vacated its opinion on rehearing and adopted by reference the dissenting opinion of Judge Dubina, thus affirming the district court summary judgment order. Harrell, 41 F.3d 1494, adopting by reference 22 F.3d at 1577 (11th Cir. 1994) (Dubina, J., dissenting). Judge Dubina stated that the majority in their first opinion had misapplied *Tennessee v. Garner*. Judge Dubina viewed the suspect as a dangerous fleeing felon who had just assaulted the officer with a weapon and was trying to get away. The Supreme Court expressly authorized the use of deadly force to prevent escape under just such circumstances. Id. at 1579 (Dubina, J., dissenting). In addition, Judge Dubina stated that there was no factual issue regarding whether the suspect was reaching for something under the passenger seat of his car. Judge Dubina viewed the suspect as posing an imminent threat by his

reaching for something under the passenger seat of his car as though for a weapon. See also Forrett v. Richardson, 112 F. 3d 416 (9th Cir. 1997), overruled on other grounds, Chroma Lighting v. GTE Products Corp., 127 F.3d 1136 (9th Cir.1997). In Forrett, the U.S. Circuit Court of Appeals for the Ninth Circuit ruled that it was lawful for the police to shoot an unarmed fleeing burglar in the back. The suspect had shot one person point blank in the neck, shot at another person, and tied up three others, all during the burglary. The police were informed that the suspect had fled the scene with several firearms and 250 rounds of ammunition. He refused to stop when commanded to do so by police as they chased him. The court cited the Garner standard and held that . . . "it is not necessary that the suspect be armed or threaten the officer with a weapon. Whenever there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, if some warning has been given, where feasible." Id. at 420.

90. This is more restrictive than the federal legal standard. The U.S. Supreme Court in *Tennessee* v. Garner, 471 U.S. 1 (1985), ruled that deadly force could be used solely to stop a fleeing dangerous felon. The Garner Court seemed to presume that a fleeing felon who had committed a crime involving the infliction of death or serious physical injury was presumptively a deadly threat and therefore deadly force could be used to prevent their escape without having to articulate any basis to believe that the perpetrator poses a deadly threat other than that the person committed a dangerous felony. The DOJ policy, however, requires that there be an articulable basis that the fleeing suspect poses an imminent deadly threat before deadly force may be use to stop his escape. In Garner, officers were dispatched to a "prowler inside call." Upon arrival at the scene a witness told the officers that she heard glass breaking and believed that someone was breaking in next door. One of the officers went around the back of the house and heard a door slam. He next saw a subject run across the backyard and attempt to climb a six foot chain link fence. By using his flashlight the officer could see the face and hands of the suspect and saw that he had no weapon and though not certain was "reasonably sure" and "figured" that he was unarmed. The officer told the suspect to halt, but the suspect attempted to climb the fence. Based on the authority of a Tennessee statute authorizing the use of deadly force to prevent the escape of a fleeing felon, the officer shot the suspect, killing him. 471 U.S. 1, 3. The suspect turned out to be 15 years old. The father of the decedent sued the officer, the City of Memphis, and the police department. The U.S. Supreme Court ruled that the Tennessee statute violated the Fourth Amendment. The common law rule was that a fleeing felon was presumed dangerous. and therefore deadly force could be used to prevent his escape. The Garner Court retained that presumption but required that there be probable cause to believe that the suspect committed the type of felony that involves the infliction or threatened infliction of death or serious physical injury, or that the suspect threaten an officer with a weapon before an officer could lawfully use deadly force to prevent the felon's escape. The Garner Court ruled that deadly force may not be used to apprehend an apparently unarmed suspect . . . "unless it is necessary to prevent 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." 471 U.S. at 3. "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm. deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Id. at 11. The Court further stated, however, that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at 11. The Court determined that a nighttime burglary is not a crime involving the infliction or threatened infliction of death or serious physical injury.