

NON-CONTACT EXCESSIVE FORCE BY POLICE: IS THAT REALLY A THING?

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INTRODUCTION

When people hear the words “police” and “excessive force,” they usually associate those words with an unjustified assault and battery, or lethal force made against suspects by law enforcement officers during an arrest or investigation. When such acts occur, the victim of the excessive force has the right to pursue a civil action against the police officer pursuant to 42 U.S.C. § 1983 if committed by state or local police, or a *Bivens*¹ action if committed by federal agents.

But can a police officer be sued for excessive force without making any physical contact with the plaintiff? The answer to that question is yes. The context of such alleged excessive force is usually a detention of someone by police at gunpoint. A plaintiff may claim that the pointing of the gun is unreasonable and in violation of the plaintiff’s rights. However, the federal circuits are not uniform on this issue, and the United States Supreme Court has yet to squarely address such a claim.

This article’s purpose is to survey the law in the federal circuits to assist practitioners and courts in understanding the factors used by the federal circuits in analyzing whether a plaintiff has a colorable claim when no *physical* contact or injury results.

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1. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

I. EXCESSIVE FORCE AND CIVIL RIGHTS ACTIONS GENERALLY

The United States Supreme Court has established that in “addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.”² The Court opined, “In most instances, that will be either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments”³ This article will focus on claims made under a Fourth Amendment search and seizure analysis.

The claim must “be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized ‘excessive force’ standard.”⁴ Fourth Amendment protections clearly apply where “the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen”⁵

The Fourth Amendment’s reasonableness standard “requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”⁶ Even if law enforcement has the right to make a search or seizure, such a seizure must be executed in a reasonable manner.⁷ The “when” and “how” of otherwise legitimate law enforcement actions may always render such actions unreasonable.⁸

The Supreme Court has noted “that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”⁹ Determining whether an officer’s actions meet the Fourth Amendment’s reasonableness standard is a fact-specific question.¹⁰ The

2. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (“The first inquiry in any § 1983 suit is to isolate the precise constitutional violation with which [the defendant] is charged.” (quoting *Baker v. McCollan*, 443 U.S. 137, 140 (1979))).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

7. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 559–60 (1978) (noting that possession of a warrant and probable cause does not immunize searches from review for Fourth Amendment reasonableness).

8. *See id.*

9. *See Graham*, 490 U.S. at 396.

10. *Id.* (opining that the lack of a precise definition of the reasonableness standard requires a careful analysis of the facts, including the crime’s severity, the suspect’s threat,

officer's actions must be "objectively reasonable" to satisfy the Fourth Amendment.¹¹

Thus, under Supreme Court jurisprudence, claims that police actions were excessive due to the display or brandishing of firearms are to be judged under an objective reasonableness standard.

II. FEDERAL CIRCUITS EXPRESSLY ALLOWING CLAIMS OF EXCESSIVE FORCE BASED ON UNREASONABLE SEIZURE AT GUNPOINT (THIRD, SIXTH, SEVENTH, NINTH, TENTH, AND FIRST CIRCUITS)

A. *Third Circuit*

The Third Circuit was among the first of the federal circuits to find that pointing a gun at a person without firing the weapon could amount to a constitutional violation. In *Black v. Stephens*, the Third Circuit affirmed a jury verdict finding that a Pennsylvania police detective, who was in plain clothes and did not identify himself to motorists with whom he had a dispute on the highway, committed excessive force when he pointed his revolver at the motorists and threatened to shoot.¹²

However, the court in *Black* did not analyze the constitutional violation under the Fourth Amendment. Rather, the court examined the case under a due process analysis, finding that the police detective's actions were conduct that "shocks the conscience."¹³ Later, however, *Graham* eliminated the use of this "shocks the conscience" test under due process and now requires all claims of excessive force during the course of a pretrial arrest or seizure to be analyzed under the Fourth Amendment objective reasonableness standard.¹⁴

Later, the Third Circuit in *Baker v. Monroe Township* held that detention of a home's occupants, who were handcuffed and detained at gunpoint during a drug raid, stated a triable excessive force claim under the Fourth Amendment.¹⁵ The court noted that

and whether he is resisting or evading arrest).

11. *Id.* 397.

12. *See Black v. Stephens*, 662 F.2d 181, 184–85 (3d Cir. 1981).

13. *Id.* at 188 (quoting *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979)).

14. *See Graham*, 490 U.S. at 394.

15. *Baker v. Monroe Township*, 50 F.3d 1186, 1195 (3d Cir. 1995).

“the use of guns and handcuffs and, indeed, the length of the detention, shows a very substantial invasion of the [plaintiffs’] personal security.”¹⁶

B. *Sixth Circuit*

The Sixth Circuit in *Binay v. Bettendorf* held that it was a question of fact for the jury to determine if police used excessive force in detaining and questioning individuals at gunpoint during a residential search where the detainees were cooperative and compliant.¹⁷

In *Binay*, police obtained a warrant to search the plaintiffs’ apartment based on suspicion of illegal narcotics possession. While executing the search, six masked police officers stormed the apartment while brandishing weapons and forced the plaintiffs to the floor.¹⁸ The officers pointed their guns at the plaintiffs and handcuffed them.¹⁹ The police secured the house within moments and a drug sniffing dog went through the house. The dog did not find any narcotics and was out of the apartment within fifteen minutes.²⁰ The police officers then ransacked each room but found nothing. The officers then interrogated the plaintiffs, who were still handcuffed and held at gunpoint. The plaintiffs were completely cooperative and the police left after an hour without finding any narcotics.²¹

The court reasoned that “Plaintiffs had no criminal record, cooperated throughout the ordeal, posed no immediate threat to the officers, and did not resist arrest or attempt to flee.”²² The court opined that these were all factors weighing against the police officers’ argument that they acted reasonably and led to questions for the jury to resolve.²³

16. *Id.* at 1193.

17. *See Binay v. Bettendorf*, 601 F.3d 640, 653–54 (6th Cir. 2010).

18. *Id.* at 644.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 650.

23. *Id.*

C. *Seventh Circuit*

The Seventh Circuit has upheld excessive force violations, in the context of a § 1983 action, for merely pointing firearms at individuals when it was unreasonable to do so.²⁴ In *Baird v. Renbarger*, the court upheld the denial of a police officer's motion for summary judgment concerning a claim of excessive force in violation of the Fourth Amendment.²⁵

In *Baird*, the officer used a submachine gun to round up persons located in one of the plaintiff's shops and detained them until the search was completed.²⁶ The decision does not indicate whether the officer ever fired the weapon or made threats of using the gun, only that the officer used it to detain the individuals. The court concluded that "a reasonable jury could find that [the officer] violated the plaintiffs' clearly established right to be free from excessive force when he seized and held them by pointing his firearm at them when there was no hint of danger."²⁷ Other Seventh Circuit decisions have held the same.²⁸

D. *Ninth Circuit*

The Ninth Circuit held that pointing a gun at an unarmed suspect who poses no current danger constitutes excessive force in *Robinson v. Solano County*.²⁹ In that case, the court relied on the following factors: "the crime under investigation was at most a misdemeanor; the suspect was apparently unarmed and approaching the officers in a peaceful way; [t]here were no dangerous or exigent circumstances apparent at the time of the detention; and the officers outnumbered the plaintiff."³⁰ The Ninth Circuit has also held that holding an infant at gunpoint constitutes excessive force.³¹

24. *E.g.*, *Baird v. Renbarger*, 576 F.3d 340, 342 (7th Cir. 2009).

25. *Id.* at 342–43.

26. *See id.* at 343.

27. *Id.* at 347.

28. *E.g.*, *Jacobs v. City of Chicago*, 215 F.3d 758, 773–74 (7th Cir. 2000) (opining that officers may violate the plaintiff's Fourth Amendment rights when they pointed a gun at an elderly man's head for ten minutes even after realizing that he was not the desired suspect); *McDonald v. Haskins*, 966 F.2d 292, 294–95 (7th Cir. 1992) (reasoning that pointing a gun at a nine-year-old child during a search and threatening to pull the trigger was "objectively unreasonable").

29. *Robinson v. Solano County*, 278 F.3d 1007, 1014 (9th Cir. 2002) (en banc).

30. *Id.*

31. *See Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir. 2005) (en banc).

E. *Tenth Circuit*

Similarly, in *Holland v. Harrington*, the Tenth Circuit held that holding children at gunpoint after the officers had gained complete control of the situation “was not justified under the circumstances.”³² In that decision, the court reasoned that:

The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time . . . Where a person has submitted to the officers’ show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use. Pointing a firearm directly at a child calls for even greater sensitivity to what may be justified or what may be excessive under all the circumstances.³³

Furthermore, in *Cortez v. McCauley*, the Tenth Circuit specifically held that “[p]hysical contact is not required for an excessive force claim—patently unreasonable conduct is.”³⁴

F. *First Circuit*

The First Circuit has also recognized that detaining occupants at gunpoint incident to the search of a home can become unreasonable. In *Mlodzinski v. Lewis*, police conducted a raid on a home seeking to both arrest a seventeen-year-old boy suspected of committing an assault, and to find a nightstick with which he allegedly used to commit the assault.³⁵ Officers entered the bedrooms of the suspect’s fifteen-year-old sister and parents. The officer who entered the sister’s bedroom pointed an assault rifle at her for seven to ten minutes and brought her downstairs, where she continued to be detained during the search.³⁶

The court held that it was unreasonable for an officer to point a rifle at the head of a non-threatening and handcuffed young girl

32. *Holland v. Harrington*, 268 F.3d 1179, 1193 (10th Cir. 2001).

33. *Id.* at 1192–93.

34. *Cortez v. McCauley*, 478 F.3d 1108, 1131 (10th Cir. 2007).

35. *Mlodzinski v. Lewis*, 648 F.3d 24, 29 (1st Cir. 2011).

36. *Id.* at 30.

for seven to ten minutes, which, the court concluded, was beyond the time necessary to arrest the only suspect.³⁷

When the police entered the parents' bedroom, according to the suspect's mother, an officer kept his gun trained at her head for approximately half an hour while she was lying partially nude on the bed.³⁸ Like the conclusion arrived at with respect to the suspect's sister, the court held, "The circumstances of [the plaintiff's] detention in bed are unlike those in which a reasonable officer could have thought that keeping a gun pointed at her head was lawful."³⁹

III. FEDERAL CIRCUITS EXPRESSLY DISALLOWING GUNPOINT SEIZURE CLAIMS (FOURTH, SECOND, AND ELEVENTH CIRCUITS)

A. *Fourth Circuit*

The Fourth Circuit takes a different approach to these claims, describing them as "excessive use-of-weapons allegations" that are a "species" of excessive force claims.⁴⁰ In *Bellotte v. Edwards*, police officers executed a warrant search of a house in the middle of the night where one of the residents, Mr. Bellotte, was suspected of possessing child pornography. Officers entered the home with guns drawn and detained Mrs. Bellotte and her children at gunpoint while the premises were searched. Mrs. Bellotte and two of her daughters were in their respective bedrooms asleep. The suspect, Mr. Bellotte, was not at the home that night.⁴¹

In analyzing the excessive force claims brought by the Bellottes in a § 1983 action, the court, relying on its earlier decision in *Taft*

37. *See id.* at 38.

38. *Id.* at 30–31.

39. *Id.* at 39. The court examined the relevant factors laid out in *Graham* and reasoned that:

While the [police] officers did initially have to make split second decisions to assess [the plaintiff's] threat level and the possible need for restraint, that does not characterize the entire period in the bedroom, which she says was half an hour. Rather, it quickly became clear, on plaintiffs' version of the facts, that [the plaintiff] was not the suspect, that she was not trying to resist arrest or flee, that she was not dangerous, and that she was not trying to dispose of contraband or weapons. Further, she was completely compliant with all orders. These are all relevant factors under *Graham* that undercut any claim that defendants acted reasonably.

Id.

40. *Bellotte v. Edwards*, 629 F.3d 415, 424 (4th Cir. 2011).

41. *Id.* at 418–19.

v. Vines,⁴² held that “[i]nvestigating officers may take such steps as are reasonably necessary to maintain the status quo and to protect their safety during an investigative stop.”⁴³ The court concluded that “although approaching a suspect with drawn weapons is an extraordinary measure, such a police procedure has been justified in this circuit as a reasonable means of neutralizing potential danger to police and innocent bystanders.”⁴⁴ Finding against the plaintiffs, the court reasoned that the police had good reason to fear for their safety because they were walking into an unsecured room and that no excessive force was used when pointing their weapons.⁴⁵

B. *Second Circuit*

The Second Circuit’s treatment on this issue is curious. The court of appeals has, at least, made the suggestion on one occasion that “[c]ircuit law could very well support [a] claim that a gunpoint death threat issued to a restrained and unresisting arrestee represents excessive force.”⁴⁶ However, the federal district courts have not followed that suggestion. In fact, since that Second Circuit decision, the district courts still maintain that “the vast majority of cases within the Second Circuit hold that merely drawing weapons when effectuating an arrest does not constitute excessive force as a matter of law.”⁴⁷ Therefore, it appears that the district courts within the Second Circuit expressly disallow claims of excessive

42. *Taft v. Vines*, 83 F.3d 681 (4th Cir. 1996).

43. *See Bellotte*, 629 F.3d at 425.

44. *Id.* (internal citations omitted).

45. *Id.* at 426.

46. *See Mills v. Fenger*, 216 F. App’x 7, 10 (2d Cir. 2006).

47. *See Dunkelberger v. Dunkelberger*, No. 14-CV-3877, 2015 WL 5730605, at *15 (S.D.N.Y. Sept. 30, 2015) (“[The defendant’s] approach with his gun drawn does not constitute excessive force as a matter of law.” (citing *Cabral v. City of New York*, No. 12 Civ. 4659, 2014 WL 4636433, at *11 (S.D.N.Y. Sept. 17, 2014))); *Mittelman v. County of Rockland*, No. 07-CV-6382, 2013 WL 1248623, at *13 (S.D.N.Y. Mar. 26, 2013) (“Likewise insufficient is [the] plaintiff’s assertion that the officers pointed guns at him. A threat of force does not constitute excessive force.”); *Askins v. City of New York*, No. 09 Civ. 10315, 2011 WL 1334838, at *3 (S.D.N.Y. Mar. 25, 2011) (“While the Second Circuit has noted that circuit law could very well support a claim that a gunpoint death threat issued to a restrained and unresisting arrestee represents excessive force, [the] plaintiff’s assertion that a gun was pointed at his head cannot be the basis of a claim for excessive force.” (alterations and internal quotation marks omitted)); *Aderonmu v. Heavey*, No. 00 Civ. 9232, 2001 WL 77099, at *3 (S.D.N.Y. Jan. 26, 2001) (dismissing excessive force claim based on an interrogation at gunpoint because the plaintiff “fail[ed] to allege that any physical force was used against him during his interrogation, or that any injuries resulted from [the] defendants’ allegedly unconstitutional conduct”).

force based only on the brandishing of firearms, regardless of the reasonableness of the police action.

C. *Eleventh Circuit*

The Eleventh Circuit's decision in *Courson v. McMillian* solidified that the Eleventh Circuit allowed officers to draw "weapons when approaching and holding individuals for an investigatory stop . . . when reasonably necessary for protecting an officer or maintaining order."⁴⁸ Trial courts within the Eleventh Circuit have followed that line of reasoning in rejecting claims of excessive force based only on the pointing of guns while being detained.⁴⁹

However, a more recent Eleventh Circuit decision appears to open the door to the possibility of abrogating that reasoning. In *Croom v. Balkwill*, the Eleventh Circuit stated in a footnote that "[a]n officer's decision to point a gun at an unarmed civilian who objectively poses no threat to the officer or the public can certainly sustain a claim of excessive force."⁵⁰ The court even cited some of the cases from other circuits discussed above that allowed excessive force claims where no physical harm occurred.⁵¹ Thus, conditions may be ripe in the Eleventh Circuit to follow the lead of those circuits expressly allowing excessive force claims for gunpoint seizures.

IV. FEDERAL CIRCUITS ANALYZING EXCESSIVE FORCE CLAIMS RE SEIZURE AT GUNPOINT BASED ON THE INJURY SUSTAINED BY THE PLAINTIFF (FIFTH CIRCUIT)

A. *Fifth Circuit*

The Fifth Circuit held in *Flores v. City of Palacios* that "[a] plaintiff alleging an excessive force violation must show that she has

48. *Courson v. McMillian*, 939 F.2d 1479, 1494–95 (11th Cir. 1991).

49. *See, e.g., Raby v. Baptist Med. Ctr.*, 21 F. Supp. 2d 1341, 1350 (M.D. Ala. 1998) (holding that the police officer's actions of sticking his pistol through the window of the plaintiff's car and pointing it at the plaintiff's head was not excessive force and stating that "where the officer merely points a gun at a suspect in the course of arresting him, the suspect would have no basis for claiming . . . excessive force" (internal citations omitted)); *see also Roberts v. City of Hapeville*, No. 1:05-CV-1614-WSD, 2007 WL 521901, at *6 n.12 (N.D. Ga. Feb. 15, 2007) (holding that the plaintiff's allegation that an officer pointed a gun at his neck during the course of an arrest was insufficient to state a claim for excessive force).

50. *Croom v. Balkwill*, 645 F.3d 1240, 1252 n.17 (11th Cir. 2011).

51. *Id.*

suffered ‘at least some injury.’ While certain injuries are so slight that they will never satisfy the injury element, psychological injuries may sustain a Fourth Amendment claim.”⁵² The court went on to specifically affirm that “no physical injury is necessary to state a Fourth Amendment claim.”⁵³

It would thus appear that in the Fifth Circuit, one could maintain an excessive force claim where police unreasonably detain someone at gunpoint. However, at least one federal district court within the Fifth Circuit appeared to interpret the Fifth Circuit’s holding in *Flores* to require at least some medical evidence in order to prove the claim of psychological injury. In *Strickland v. City of Crenshaw*, the district court reasoned that the Fifth Circuit in *Flores* accepted the plaintiff’s allegation that the plaintiff suffered a diagnosable mental disorder (PTSD), which suggests that “some form of medical evidence is generally required to establish a psychological injury.”⁵⁴ This interpretation may be unduly burdensome in light of the Fifth Circuit’s previous decision in *Petta v. Rivera* where the court held that “[a] police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian’s face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him.”⁵⁵

V. CIRCUITS THAT HAVE YET TO SQUARELY ADDRESS THE ISSUE (EIGHTH AND D.C. CIRCUITS)

A. *Eighth Circuit*

The Eighth Circuit has not yet squarely addressed the issue of whether a § 1983 action for excessive force can be maintained based only on a seizure at gunpoint. But there has been at least one federal district court that allowed such a claim to go forward.⁵⁶ The Eighth Circuit Court of Appeals has addressed the issue of excessive force based on brandishing guns in the context of criminal

52. *Flores v. City of Palacios*, 381 F.3d 391, 397–98 (5th Cir. 2004) (internal citations omitted).

53. *Id.* at 401.

54. *Strickland v. City of Crenshaw*, 114 F. Supp. 3d 400, 416 (N.D. Miss. 2015). *See also* *Casto v. Plaisance*, No. 15-817, 2016 WL 2855468, at *6 (E.D. La. May 16, 2016) (holding that the plaintiff’s excessive force claim against the police officer for brandishing a gun at him failed because the plaintiff’s momentary fear was not more than *de minimus* psychological injury).

55. *Petta v. Rivera*, 143 F.3d 895, 905 (5th Cir. 1998) (citing *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)).

56. *See Wilson v. Lamp*, 142 F. Supp. 3d 793, 805–06 (N.D. Iowa 2015).

cases. In *United States v. Fisher*, the Eighth Circuit declared, “It is well established, however, that when officers are presented with *serious danger* in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety.”⁵⁷

This well-established principle is derived from the Supreme Court’s decision in *Terry v. Ohio*, which explained the Fourth Amendment standards and limits on police officers making a brief investigatory detention.⁵⁸ In *Terry*, the Court understood the need for a police officer to make certain intrusions of a person for the safety and protection of the officer, but only when the officer has a reasonable and justifiable belief that the person whom the officer is investigating is armed and dangerous.⁵⁹

It appears logical, then, from the Supreme Court’s decision in *Terry* and the Eighth Circuit’s decision in *Fisher*, that if police do not have a specific, particularized suspicion that a suspect is armed and dangerous, brandishing weapons to coercively force that person to follow police instructions is unreasonable under the Fourth Amendment.

Furthermore, unlike the Fifth Circuit, the Eighth Circuit has held that “a citizen may prove an unreasonable seizure based on an excessive use of force without necessarily showing more than *de minimis* injury.”⁶⁰ The Eighth Circuit had previously held that a plaintiff bringing an excessive force claim who suffered post-traumatic stress disorder satisfied the court’s requirement that a plaintiff suffer “actual injury” from the alleged excessive force.⁶¹ Thus, conditions could be ripe for the Eighth Circuit to join the other circuits that allow an excessive force claim based on an unreasonable brandishing of guns during the course of a seizure.

57. *United States v. Fisher*, 364 F.3d 970, 973 (8th Cir. 2004) (emphasis added).

58. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

59. In *Terry v. Ohio*, the Court reasoned:

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24.

60. *Chambers v. Pennycook*, 641 F.3d 898, 901 (8th Cir. 2011).

61. *Dawkins v. Graham*, 50 F.3d 532, 535 (8th Cir. 1995).

B. *D.C. Circuit*

The D.C. Circuit has not squarely addressed the issue either. However, one circuit court decision may have given tacit approval to an excessive force claim based on pointing firearms at the plaintiff during a seizure. In *Youngbey v. District of Columbia*, the federal district court held that, if the plaintiff's version of the facts were true, it was unreasonable for police officers, while executing a search warrant of a residence, to detain the plaintiff at gunpoint five to ten minutes after the premises were secured.⁶²

On the police officers' appeal, the D.C. Circuit reversed the district court in part.⁶³ The reversal related to the district court's decision that the police officers were not entitled to qualified immunity as to whether the police acted reasonably regarding their "no-knock entry" of the residence.⁶⁴ However, the court held that the remaining issues should proceed to trial.⁶⁵ The D.C. Circuit did not discuss the excessive force claim, though the decision does not appear to indicate that the specific issue was appealed.

VI. FACTORS TO EXAMINE IN GUNPOINT SEIZURE CASES

What factors should the practitioner or jurist look for when faced with an apparent unlawful seizure at gunpoint? As with so much of Fourth Amendment jurisprudence, whether an exercise of force is excessive will vary depending on the facts and circumstances of the specific case.⁶⁶ The factors laid out in *Graham* are the starting point: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."⁶⁷

Many of the cases seem to turn on whether the police have a reasonable belief that their safety is at risk due to a reasonable

62. *Youngbey v. District of Columbia*, 766 F. Supp. 2d 197, 213 (D.D.C. 2011).

63. *See Youngbey v. March*, 676 F.3d 1114, 1126 (D.C. Cir. 2012).

64. *See id.*

65. *See id.*

66. *See, e.g., Binay v. Bettendorf*, 601 F.3d 640, 649 (6th Cir. 2010) ("[T]he fact that it is *sometimes* reasonable to use handcuffs and guns when detaining suspects does not support Defendants' argument that the amount of force used *in this case* was objectively reasonable.").

67. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

suspicion that the suspect is armed with guns, or the detainees are disobeying the police officers' instructions.⁶⁸

In cases where the detention at gunpoint is made pursuant to a warrant to search a residence, adequate justification may exist for the initial brandishing of firearms while executing the warrant. This is due to the existing probable cause that a suspect is wanted on violent criminal charges, or the place to be searched is suspected of narcotics trafficking, both of which are factors indicating the possible presence of guns.⁶⁹

In such cases, the length of the seizure at gunpoint, and who is being detained, may be critical.⁷⁰ The police must give careful attention to non-suspects who happen to occupy the place to be searched. As the court in *Mlodzinski* observed, if a gun is pointed at an occupant of a residence for only a short period while police gain control of the situation, that could affect the outcome of an excessive force claim.⁷¹

CONCLUSION

There appears to be a trend among the federal circuits to place greater attention on the issue of whether the actions of the police were unreasonable, and less attention to the injury caused by the force used. As the Tenth Circuit concluded in *Holland v. Harrington*, "The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of

68. See, e.g., *Deskins v. City of Bremerton*, 388 F. App'x 750, 752 (9th Cir. 2010) (holding that the officer was in danger when the officer was alone and the defendant disobeyed instructions); *United States v. Trueber*, 238 F.3d 79, 94 (1st Cir. 2001) (holding that the officer's safety was at risk when the suspect was stopped for trafficking narcotics, "a pattern of criminal conduct rife with deadly weapons" (internal citation omitted)); *United States v. Lloyd*, 36 F.3d 761, 762–63 (8th Cir. 1994) (opining that the police acted reasonably when they brandished their weapons upon encountering an individual at a location where police were investigating a report that a man's life was threatened by several men who had machine guns, shotguns, hand guns, and drugs); *United States v. Jackson*, 652 F.2d 244, 249 (2d Cir. 1981) (holding that drawing a firearm was reasonable when a police officer came across a driver that was suspected of escaping an armed bank robbery).

69. For a collection of cases holding generally that the real or legitimately suspected presence of dangerous activity may be adequate justification to brandish a firearm see *Deskins*, 388 F. App'x at 752; *Trueber*, 238 F.3d at 94; *Lloyd*, 36 F.3d at 762–63; *Jackson*, 652 F.2d at 249.

70. See, e.g., *Mlodzinski v. Lewis*, 648 F.3d 24, 40 (1st Cir. 2011).

71. See *id.* ("[T]he situation would be very different if, given the execution of these warrants, [the plaintiff] had been detained with a weapon pointed at her for only a very short period needed while she was being cuffed, her husband was being escorted out of the room, and her son was being apprehended.").

deadly force.”⁷² Some courts seem to recognize the psychological injury that can accompany a loaded gun pointed at one’s head even though no physical contact is made. Practitioners and jurists should be sensitive to this reality in defining what constitutes “excessive” force.

72. *Holland v. Harrington*, 268 F.3d 1179, 1192 (10th Cir. 2001).