

EXCESSIVE FORCE UNDER FEDERAL LAW
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It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes of the Fourth Amendment.

Justice Frankfurter, *dissenting in U.S. v. Rabinowitz*,
339 U.S. 56, 69 (1950).

Eddie Jones was a young mountain man who was known by local law enforcement authorities for his excessive drinking and his rowdy behavior. But one night in 1999, Jones demonstrated good judgment when he called the sheriff's department and asked them to pick him up and house him for the night. Jones was due in court the next morning, and knew, based on his present level of intoxication, that he would never make it on his own. With Andy Griffith's *Otis* as his model, Jones sent out his plea for help.

The sheriff's department, happy to oblige, retrieved Jones and took him down to the local jail. Jones willingly submitted to handcuffs behind his back and was taken into the "processing" room and set in a chair. As he sat, he grew belligerent, loud and obscene. A deputy, determined to quiet Jones, responded. Jones recalled only that as he was trying to pull his handcuffed hands under his feet to the front, he felt a violent force which sent him to the floor and smashed his face into the concrete. The deputy testified that as he was trying to place a "chin lock" on Jones to restrain him, his forearm *inadvertently* connected with Jones' nose and mouth. One way or the other, Jones ended up lying in a pool of blood with a flattened nose and busted lip.

Jones sued and ultimately won the right to a trial. *See Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003). His case, and others like it, illustrate issues arising in actions brought by suspects, arrestees or other individuals injured by the force or violence of law enforcement officers. This article will explore some of those issues—both legal and practical—and review the federal law and decisions in the area.

The Constitution

The starting point for any analysis of excessive force cases is *Graham v. Connors*, 490 U.S. 386 (1989). In *Graham*, the Supreme Court held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness standard’ rather than under a ‘substantive due process approach.’” 490 U.S. at 395.

Where, as here, the excessive force claim arises in the context of an arrest or an investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right “to be secure in their persons . . . and against unreasonable . . . seizures” of the person.

490 U.S. at 394. In applying this “objective reasonableness” standard, the court must balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” 490 U.S. at 396.

Fourth Amendment or Due Process. One issue which has taken on practical significance in recent years is whether the case involves the Fourth Amendment seizure prohibitions or the Fourteenth Amendment due process clause. This issue depends primarily on the *custodial* status of the plaintiff at the time the force is committed by the officer. If the plaintiff is not in custody, the Fourth Amendment “objective reasonableness” test applies, and the inquiry is whether, under the totality of circumstances perceived by a reasonable officer, the force used was excessive and unreasonable.

If the plaintiff is in custody, on the other hand, the more stringent due process standard applies. For example, in *Robles v. Prince George’s County, Md.*, 302 F.3d 262 (4th Cir. 2002), the defendant deputies, responding to a call of disorderly conduct, determined that the alleged offender, Robles, had outstanding warrants against him from an adjoining county, arrested him and placed him in their police vehicle. The officers then attempted to arrange a prisoner exchange at a shopping center, but when officers from the other county were unavailable, the arresting officers cuffed Robles to a metal pole where they left him, and reported his location to the other county. Officers from the adjoining county picked him up after approximately 10-15 minutes. Robles sued, claiming an unreasonable detention and restraint under the Fourth Amendment.

The Fourth Circuit found that since Robles had already been arrested and taken into custody at the time the alleged violations occurred, the officers' actions were governed by due process standards:

As a pretrial detainee, Robles' treatment and the conditions of his restraint are evaluated under the Due Process Clause of the Fourteenth Amendment. [Citation omitted]. In order to conclude that Robles' rights under this clause were violated it is necessary to find that the officers' actions amounted to punishment and were not merely "an incident of some other legitimate governmental purpose," [citation omitted], and that the injuries resulting from their actions were more than *de minimis*. [Citation omitted].

Applying this test, the court found that since the actions of the officers were not intended as punishment, and not reasonably related to any legitimate law enforcement purpose, and since Robles claimed emotional distress which was more than *de minimis*, Robles had proven a constitutional violation under the Fourteenth Amendment. 302 F.3d at 270.

The above distinction is more than academic. In *Jones*, although the plaintiff was at the jail at the time the force was exerted, since he was not under arrest and not formally in custody, the Fourth Amendment test applied—*i.e.*, whether the officer had used unreasonable and excessive force. In *Robles*, although the plaintiff had not been formally booked for the charge or taken to the jail, since he had been informed he was under arrest and taken into custody, the more stringent due process test applied. Under the due process test, a plaintiff must show that the officer "inflicted unnecessary and wanton pain and suffering"---more than the excessive and unreasonable force required by *Graham*. See *Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998). See also *Hope v. Pelzer*, 536 U.S. 730 (2002) (inmate handcuffed to hitching post for two and one-half hour period; unnecessary and wanton infliction of pain test applied under the Eighth Amendment). For extensive discussion of the history of the Fourth Amendment/Fourteenth Amendment distinction, see *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (*en banc*); *Taylor v. McDuffie*, 155 F.3d 479 (4th Cir. 1998); and *Norman v. Taylor*, 25 F.3d 1259 (4th Cir. 1994) (*en banc*).

Thus, the determination of which constitutional amendment applies can be quite close, and in many cases dispositive. See *e.g.*, *Young v. Prince George's County, Maryland*, 355 F.3d 751 (4th Cir. 2004)(summary judgment for officers reversed since district court erroneously applied the due

process standard rather than the fourth amendment standard; the court discussed, at length, the fine factual line between the Fourth Amendment investigatory stop and the “arrest” which triggers due process standards).

How Excessive is *Excessive*?

The first inquiry in an excessive force case is whether the force or restraint exerted by the officer was unconstitutional. As discussed above, this burden can vary according to the constitutional amendment to be applied. Presumably, however, the factual elements of proof will be similar.

In determining the reasonableness of the force used by the officer, the courts consider the circumstances encountered by the officer, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. These facts must be viewed “from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396.

This requirement, as logical as it may be, may impose significant obstacles under Rule 56 and with the jury, since the facts are often weighted heavily in favor of the officers. A plaintiff’s recollections may be dim or vague because of intoxication or injury. In addition, the typical plaintiff is less intelligent and probably less credible, due to a criminal past. The officer, on the other hand, is the guardian of public safety and is given great latitude, both legally and practically, from the jury’s perspective.

While the plaintiff in *Jones* was ultimately able to overcome summary judgment, the case illustrates the obstacles facing many plaintiffs in proving a case of excessive force. The plaintiff was unable to testify to what hit him. He was only able to recall that he had been in handcuffs (which was disputed), that he had not resisted the officer, and that he ended up on the floor with a smashed face. The plaintiff also presented “boastful” statements of the officer which showed something less than good faith on the officer’s part. This was not enough, however, for the district court which entered summary judgment in favor of the officers. *See Jones v. Buchanan*, 164 F.Supp.2d 734 (WDNC 2001).

The Fourth Circuit, reversing the district court, emphasized the facts that Jones, according to

his evidence, was handcuffed; that he had sustained a serious injury which would not ordinarily have happened without some significant force; and that the officer's boastful comments raised questions concerning the credibility of his version of the facts. This evidence, said the Fourth Circuit, pointed to a reasonable inference that the officer used excessive and unreasonable force under the circumstances, and the plaintiff was entitled to a trial. However, the problems in pitting an intoxicated plaintiff against a police officer, whose conduct must be judged considering the facts as perceived by the officer, would present a similar challenge before the jury.

Other decisions have recognized excessive force under similar factual circumstances. *See Young v. Prince George's County, Md.*, 355 F.3d 751 (4th Cir. 2004) (force excessive under Fourth Amendment where plaintiff stopped in vehicle and told to sit on curb; grabbed by neck, placed in headlock, spun around and forcibly thrown to the ground with knee in his back; plaintiff did not threaten or resist); *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001) (use of pepper spray twice at close range was excessive under Fourth Amendment since plaintiff was unarmed and was not a threat to officers); *Gray-Hopkins v. Prince George's County, Md.*, 309 F.3d 224 (4th Cir. 2002) (force excessive under Fourth Amendment where plaintiff standing still with his hands raised over his head at the time of the fatal shot, was not resisting arrest, and was not posing a threat to the safety of the officers or others); and *Bailey v. D.H. Kennedy*, 349 F.3d 731 (4th Cir. 2003) ("extensive blows and kicks. . . against unarmed" plaintiff unreasonable under the Fourth Amendment).

Other decisions have sided with law enforcement. *See Howerton v. Fletcher*, 213 F.3d 171 (4th Cir. 2000) (force not excessive when officers killed naked man who was approaching third person with a knife); *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002) (force not excessive when officers used minimal force to move plaintiff who had refused command); *Bates v. Chesterfield, Va.*, 216 F.3d 367 (4th Cir. 2000) (evidence in the record showed that plaintiff had initiated all aggression, and that the officers' actions were clearly restrained and moderate in response); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001) (deadly force found objectively reasonable when police officer mistakenly believed that person fleeing from house where armed persons were known to be was threatening to use deadly force on officers); *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) (deadly force found objectively reasonable when "uncontroverted evidence" indicated that officer reasonably believed that suspect was armed and threatening; jury verdict for plaintiff appropriately

set aside); *Cox v. County of Prince William*, 249 F.3d 295 (4th Cir. 2001) (deadly force during investigation of suspected burglar found objectively reasonable when officers had reason to believe they were threatened).

It is difficult to glean general principles from these cases. But, for starters, it appears that in order to prevail, the plaintiff should be able to prove some significant force or some other unjustifiable conduct by the officers, which, as a matter of common sense, one would not expect to be necessary under the circumstances; and little physical resistance or force on the plaintiff's part. This would seem to be as much a matter of common sense as legal analysis, although what is *common*, must be viewed from a fairly conservative (as in pro law-enforcement) perspective.

How Much Injury is Excessive?

While serious injury is not alone sufficient under the Fourth Amendment, it certainly helps prove an excessive force case. *Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994). In other words, to the extent serious injury indicates substantial force, it at least adds weight to the inference of excessive force, particularly if the plaintiff has exerted no or little force in response. And more importantly from a practical perspective, evidence of serious injury is sometimes critical in opening the minds of judges or jurors to the constitutional concerns that law enforcement officers stay within reasonable limits, even when dealing with suspected criminals.

In *Jones*, the court found the severity of plaintiff's injuries—his broken nose and lip—an important factor in its decision reversing summary judgment in favor of the officer. *Jones*, 325 F.3d at 530-531. In *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), the permanent injury to the plaintiff—the loss of a testicle—was a significant component of plaintiff's evidence which ultimately resulted in a verdict of \$900,000. Other decisions indicate that even in the absence of permanent or serious injury, the force used by an officer may be found to be excessive, if the circumstances indicate that the actions of the officer were disproportionate to the resistance of the plaintiff. See, e.g., *Young v. Prince George's County, Md.*, 355 F.3d at 751 (where plaintiff suffered contusions, cut to his lips, bruises, lesions to his wrist, and a strained neck and back); *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001) (pepper spray more than *de minimis* injury).

On the other hand, insubstantial or *de minimis* injury may not support a constitutional

violation. *Graham*, 490 U.S. at 397 (trivial ‘push and shove’ uncognizable as a constitutional violation). See *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002) (4th Cir. 2002) (minor injury indicates lack of excessive force). See also, *Saucier v. Katz*, 533 U.S. 194 (2001).

Under due process analysis, the plaintiff has an affirmative burden to prove that the injury is not *de minimis*. And while the courts have been careful not to quantify this requirement, it is clear that the lack of significant injuries can be fatal to a claim of excessive force by “pretrial detainees.” See *Riley v. Dorton*, 115 F.3d 1159, 1168 (4th Cir. 1997) for extensive discussion of the “injury” requirement with the following wrap-up:

While we do not require that an injury be serious or leave visible marks or scars, we do conclude that “*de minimis* injury can serve as conclusive evidence that *de minimis* force was used.” [Citation omitted]. To hold otherwise would make the most minor and fanciful custodial incidents the routine subjects of federal lawsuits.

Thus, whether viewing the case from a legal perspective or a practical perspective, the extent of injury is a significant component of an excessive force case.

Who’s Liable for Excessive Force?

Under 42 U.S.C. § 1983, anyone acting “under the color of state law and authority” can be held liable for a constitutional violation. In excessive force cases, the defendant will generally be the governmental unit or law enforcement agency and the individual officers committing the force.

Governmental or supervisory liability: The burden of proving liability against a sheriff or municipal police department for a subordinate officer’s constitutional violation was established in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). The Supreme Court found that while the doctrine of *respondeat superior* did not apply in §1983 actions, a plaintiff could establish governmental liability if he proves a “custom, policy, or practice” which caused the violation. *Id.* The Court emphasized that the “touchstone” of governmental liability for the conduct of one acting under authority of the government is “an allegation that official policy is responsible for a deprivation of rights protected by the Constitution.” *Id. at 690*. And policy is established by those “whose acts or edicts may fairly be said to represent official policy.” *Id. at 691*.

Since *Monell*, the Supreme Court has elaborated that under § 1983 official policy may be established by omission, in the failure of responsible officials to make or follow policy or enact

regulations, *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981); by a single action by an officer with final decisionmaking authority, *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); and by deliberate indifference in employing a tortfeasor with an obvious risk that the tortfeasor would violate citizens' constitutional rights. *City of Canton*, 489 U.S. 378; *Board of County Comm'rs. of Bryan County v. Brown*, 520 U.S. 397 (1997).

In *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), the Fourth Circuit recognized several theories of governmental liability for excessive force by individual officers. The first addresses "deficient programs of police training and supervision which are claimed to have resulted in constitutional violations by untrained or mis-trained police officers." 824 F.2d at 1389. The second is based on the failure of supervisors to correct "a widespread pattern of unconstitutional conduct by police officers of which the specific violation is simply an example." *Id.*

Similarly, in *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1993), the court recognized supervisory liability in an action by the survivors of a man killed by a state trooper against the trooper and several of his supervisors for excessive force under § 1983. The evidence, in the light most favorable to plaintiff, showed that the trooper had previously shown a propensity to brutalize detainees, particularly blacks. The court observed that "supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." 13 F.3d at 798. Noting that the supervisor is responsible for the "natural consequences of his actions," the court found that "a reasonable jury could find that Stroud acted with deliberate indifference and that causal link exists between Stroud's inaction and the alleged harm." 13 F.3d at 800-801. The court emphasized that the issue of supervisory liability "is ordinarily one of fact, not law." 13 F.3d at 799.

This burden has proven difficult in many cases. *See, e.g., Sims v. Greenville County*, 2000 U.S. App. LEXIS 6846 (4th Cir. 2000) (unpublished); *Cruz v. Board of Supervisors*, 1993 U.S. App. LEXIS 187 (4th Cir. 1993) (unpublished); *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983); *State of NC, ex rel Wallington v. Antonelli*, 2004 U.S. Dist. LEXIS 5454 (MDNC 2004) (while summary judgment denied on excessive force claim against officer, official capacity claim dismissed "because plaintiffs failed to provide any evidence that a custom or policy was the basis of the purported constitutional violation."); *Dash v. Walton*, 2002 U.S. Dist. LEXIS 19545 (MDNC 2002)

(plaintiff's evidence regarding municipal liability on the part of the city for failure to train, monitor or discipline its police officers was insufficient to create a genuine issue of material fact).

Individual liability: In an action against the officer in her individual capacity, the primary hurdle a plaintiff faces in proving liability is to overcome the officer's qualified immunity defense. *Saucier v. Katz*, 533 U.S. 194 (2001). Qualified immunity is "an entitlement not to stand trial or face the burdens of litigation." *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002). The defense operates to insure that before an officer is subjected to suit, she have fair notice that her conduct is unlawful. *Id.* For that reason, a denial of summary judgment for an officer on immunity grounds is immediately appealable, if the appeal is based on legal grounds. *Gray-Hopkins v. Prince George's County, Md.*, 309 F.3d 224 (4th Cir. 2002).

The qualified immunity defense consists of a two-part test. The court must first determine whether a violation of the plaintiff's constitutional rights has occurred. Once a violation is found, the court must determine whether that right was so clearly established at the time of the violation that a reasonable officer in defendant's position could not have believed he was acting legally. Again, the facts must be evaluated from perspective of a reasonable officer on the scene, and the use of hindsight must be avoided. *Hope v. Pelzer*, 536 U.S. 730 (2002). *Gray-Hopkins*, 309 F.3d 224.

In *Robles*, 302 F.3d 262, the ultimate decision against the plaintiff turned on the court's decision on qualified immunity. Faced with evidence of a clear constitutional violation in the officers' cuffing the plaintiff to a pole, the court found that

the officers should have known and indeed did know, that they were acting inappropriately. But whether they understood their conduct violated clearly established federal law is an altogether different question. . . .The officers' conduct violated police regulations as well as state law and was dealt with under those provisions. But not every instance of inappropriate behavior on the part of police rises to the level of a *federal* constitutional violation. Going forward, officers are now on notice that the type of Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose implicates federal due process guarantees. Going backward, however, and imposing retrospective liability would eviscerate the requirement of notice at the core of the qualified immunity defense.

302 F.3d at 271. In *Jones*, on the other hand, the court found that the deputy had fair notice of the

unconstitutionality of his conduct based on a number of decisions in prior years emphasizing that the use of force by an officer against an unarmed individual who was not physically resisting the officer is excessive. *See Jones*, 325 F.3d at 532-535. The dissent in *Jones* disputed this finding based on *Robles*, 325 F.3d at 536.

Other Issues

Pleas: In the event of a companion criminal case, plaintiffs' counsel must be aware that what is done in criminal court may directly impact on the civil action. For example, a guilty plea to a criminal offense (such as assault on an officer) which negates an element of plaintiff's constitutional claim could operate as a bar to the plaintiff's civil action under the doctrine of judicial estoppel. *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996). Similarly, a conviction for the underlying criminal charge could establish facts which could undermine plaintiff's civil claim through issue or fact preclusion. However, unless the criminal plea or conviction is directly related to the elements of plaintiff's claim, it should have no legal impact. *Prosise v. Haring*, 667 F.2d 1133 (4th Cir. 1981).

Police Experts: Rule 702 of the Rules of Evidence permits expert testimony by "a witness qualified as an expert by knowledge, skill, experience, training, or education" as long as the testimony is based on sufficient facts, is reliable and the evidence assists the jury. It is in the court's discretion to determine whether any particular witness, offered as an expert, is qualified and capable of assisting the trier of fact in the case. *Kopf v. Skyrn*, 993 F.2d 374 (4th Cir. 1993).

Law enforcement experts are often called by both sides in excessive force cases to discuss the "continuum of force" (a rule providing for the graduated use of force by the officer to meet increasing resistance of the individual); to explain the principles governing techniques of force and restraint, and the target areas of the body to strike; and to offer opinion evidence as to the reasonableness of force used by the officers under the objectively perceived circumstances. *Kopf*, 993 F.2d at 379. So long as the evidence meets the requirements of Rule 702, it is generally admitted. *U.S. v Mohr*, 318 F.3d 613, (4th Cir. 2003).

Conclusion

In various ways, commentators over the years have observed that the test of freedom in our system is how we treat the most despised among us. The Fourth Circuit, acknowledging the criminal history of a plaintiff, who had been savagely beaten by police officers and attacked by their dog,

“eventually reduced to senselessness,” suffering severe brain injury, said it eloquently:

Casella was a criminal. He deserved to be arrested and punished; his story stirs little sympathy, much less outrage, in the crowd. The courts cannot be so impassive. We must always remember that unreasonable searches and seizures helped drive our forefathers to revolution. One who could defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.

Kopf, 993 F.2d at 379-380.

In excessive force cases, often we are asking a judge on Rule 56, or a jury at trial, to vindicate one who, if not despised, is at least not respected, against a law enforcement officer who occupies one of the higher levels of our social order. That is a difficult burden in any case. But, armed with our Constitution and cognizant of the facts which can prevail, lawyers should continue to bring actions to vindicate the rights of victims of excessive force.