**9.25 Particular Rights—Fourth Amendment—Unreasonable**

**Seizure of Person—Excessive Force**

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force [in making a lawful arrest] [and] [or] [in defending [himself] [herself] [others]] [and] [or] [in attempting to stop a fleeing or escaping suspect]. Therefore, to establish an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officer[s] used excessive force.

Under the Fourth Amendment, a police officer may use only such force as is “objectively reasonable” under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer’s subjective intent or motive is not relevant to your inquiry.

In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including:

(1) the nature of the crime or other circumstances known to the officer[s] at the time force was applied;

(2) whether the [plaintiff] [decedent] posed an immediate threat to the safety of the officer[s] or to others;

[(3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;]

(4) the amount of time the officer had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;

(5) the relationship between the need for the use of force and the amount of force used;

(6) the extent of the [plaintiff’s] [decedent’s] injury;

(7) any effort made by the officer to temper or to limit the amount of force;

(8) the severity of the security problem at issue;

[(9) the availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff;]]

[(10) the number of lives at risk (motorists, pedestrians, police officers) and the parties’ relative culpability; *i.e.*,which party created the dangerous situation, and which party is more innocent;]

[(11) whether it was practical for the officer[s] to give warning of the imminent use of force, and whether such warning was given;]

[(12) whether the officer[s] [was] [were] responding to a domestic violence disturbance;]

[(13) whether it should have been apparent to the officer[s] that the person [he] [she] [they] used force against was emotionally disturbed;]

[(14) whether a reasonable officer would have or should have accurately perceived a mistaken fact;]

[(15) whether there was probable cause for a reasonable officer to believe that the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm; and]

[“Probable cause” exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.] [and]

[(16) *insert other factors particular to the case.*]

**Comment**

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

In general, all claims of excessive force, whether deadly or not, should be analyzed under the objective reasonableness standard of the Fourth Amendment as set forth in *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021), *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017), *Scott v. Harris*, 550 U.S. 372, 381-85 (2007), *Graham v. Connor*, 490 U.S. 386, 397 (1989), and *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985). *See also* *Lombardo*, 141 S. Ct. at 2241 n.2 (explaining that objective reasonableness standard applies whether excessive force claim is brought under Fourth Amendment or Fourteenth Amendment). The objective reasonableness of such conduct is assessed by balancing the nature and quality of the intrusion on Fourth Amendment rights against the government’s countervailing interest in the force used. *Estate of Aguirre v. County of Riverside*, 29 F.4th 624, 628 (9th Cir. 2022) (quoting *Graham*, 490 U.S. at 396); *see Mendez*, 137 S. Ct. at 1546 (“‘[D]etermining whether the force used to effect a particular seizure is reasonable requires balancing of the individual’s Fourth Amendment interests against the relevant government interests.’” (internal quotation marks omitted) (quoting *Graham*, 490 U.S. at 396)); *Williamson v. City of Nat’l City*, 23 F.4th 1146, 1151 (9th Cir. 2022) (“To determine whether an officer’s actions were objectively reasonable, we consider: ‘(1) the severity of the intrusion on the individual’s Fourth Amendment rights by evaluating the type and amount of force inflicted, (2) the government’s interest in the use of force, and (3) the balance between the gravity of the intrusion on the individual and the government’s need for that intrusion.’” (quoting *Rice v. Morehouse*, 989 F.3d 1112, 1121 (9th Cir. 2021)).

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396; *see* *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015); *see also Demarest v. City of Vallejo*, 44 F.4th 1209, 1226 (9th Cir. 2022) (“[A]n ‘officer’s use of force cannot be deemed excessive based on facts that he [or she] reasonably would not have known or anticipated.’”). Further, the “analysis is not static, and the reasonableness of force may change as the circumstances evolve.” *Hyde v. City of Willcox*, 23 F.4th 863, 870 (9th Cir. 2022); *see also Andrews v. City of Henderson*, 35 F.4th 710, 715 (9th Cir. 2022) (“All determinations of unreasonable force 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.” (internal quotation marks omitted)). An officer’s subjective intent or motivation is not relevant to the reasonableness inquiry. *See Graham*, 490 U.S. at 397; *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1116 (9th Cir. 2017).

In assessing a claim of excessive force, the jury should consider the three non-exclusive factors set forth by the Supreme Court in *Graham v. Connor*. *See* *Williamson*, 23 F.4th at 1153; *Rice*, 989 F.3d at 1121. These factors are commonly referred to as *Graham* factors. *See, e.g.*, *Estate of Aguirre*, 29 F.4th at 628. The three *Graham* factors are: (1) the severity of the crime at issue; (2) whether the individual posed an immediate threat to the safety of the officers or others; and (3) whether the individual was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396; *Seidner v. de Vries*, 39 F.4th 591, 599 (9th Cir. 2022); *see also* *Estate of Aguirre*, 29 F.4th at 628 (describing second *Graham* factor as “the level of immediate threat [the individual] posed to the officer or others”). The Ninth Circuit has repeatedly emphasized that “the most important *Graham* factor” is whether the individual posed an immediate threat to the safety of the officers or others. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (internal quotation marks omitted); *see, e.g.*, *Hyde*, 23 F.4th at 870; *Williamson*, 23 F.4th at 1153. The importance of this second *Graham* factor was highlighted by the Ninth Circuit when it held that the immediacy of the threat of a person pointing a replica gun at officers outweighed the bulk of *Graham* factors favoring the person fatally shot. *Estate of Strickland v. Nevada County*, 69 F.4th 614, 621-22 (9th Cir. 2023) (distinguishing the case from other replica/toy gun cases on the basis that in those cases the persons holding the toy/replica guns did not point it at officers and the courts’ analysis did not hinge on the misidentification of the gun).

“Other factors, in addition to the three *Graham* factors, may be pertinent in deciding whether a use of force was reasonable under the totality of the circumstances.” *Nehad v. Browder*, 929 F.3d 1125, 1137 (9th Cir. 2019); *see also Mattos*, 661 F.3d at 441 (“[W]e examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.” (internal quotation marks omitted)).

In *Kingsley v. Hendrickson*, the Supreme Court listed several additional factors that are relevant to an excessive force inquiry. *See* 576 U.S. 389, 397 (2015). The Supreme Court has referred to these factors as the *Kingsley* factors. *See, e.g.*, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021). The *Kingsley* factors are:

“the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.”

*Lombardo*, 141 S. Ct. at 2241 (quoting *Kingsley*, 576 U.S. at 397); *accord* *Demarest*, 44 F.4th at 1225; *Hyde*, 23 F.4th at 870.

Additional factors set forth by Ninth Circuit in prior cases include:

1. the type and amount of force used, *see Seidner*, 39 F.4th at 596; *Williamson*, 23 F.4th at 1151–52 (“The nature and degree of physical contact are relevant to this analysis, as are the ‘risk of harm and the actual harm experienced.’” (citations omitted)); *see also* *Lombardo*, 141 S. Ct. at 2241 (listing as factor: “‘the relationship between the need for the use of force and the amount of force used’” (quoting *Kingsley*, 576 U.S. at 397));

2. “whether ‘less intrusive alternatives’ were available to law enforcement,” *Seidner*, 39 F.4th at 599; *see* *Nehad*, 929 F.3d at 1138 (listing as factor: “‘the availability of alternative methods of capturing or subduing a suspect’” (quoting *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005))); *see also* *Lombardo*, 141 S. Ct. at 2241 (listing as factor: “‘any effort made by the officer to temper or to limit the amount of force’” (quoting *Kingsley*, 576 U.S. at 397)); *Nehad*, 929 F.3d at 1138 (“Police need not employ the least intrusive means available; they need only act within the range of reasonable conduct.”); *Rice*, 989 F.3d at 1124 (“officers ‘need not avail themselves of the least intrusive means of responding to an exigent situation’”);

2. “‘the number of lives at risk’” and the parties’ “‘relative culpability,’” *Mattos*, 661 F.3d at 441 (quoting *Scott*, 550 U.S. at 384); *see Williamson*, 23 F.4th at 1153 (“Where an arrestee’s conduct risks the lives or safety of innocent bystanders, the court also considers her relative culpability under the second [*Graham*] factor.”);

3. whether the officers independently evaluated the situation when they arrived, *see* *Rice*, 989 F.3d at 1122 (“[O]fficers have a duty to independently evaluate a situation when they arrive, if they have an opportunity to do so.”);

4. whether the individual “was given ‘proper warnings’ before force was used,” *Seidner*, 39 F.4th at 599 (quoting *Rice*, 989 F.3d at 1122); *see* *Nehad*, 929 F.3d at 1137 (“Whether an officer warned a suspect that failure to comply with the officer’s commands would result in the use of force is another relevant factor in an excessive force analysis.”); *see also Estate of Aguirre*, 29 F.4th at 628 (“Before using deadly force, law enforcement must, ‘where feasible,’ issue a warning.” (quoting *Garner*, 471 U.S. at 11-12));

5. whether the officers were responding to a domestic violence disturbance, *see George v. Morris*, 736 F.3d 829, 839 (9th Cir. 2013) (“Domestic violence situations are ‘particularly dangerous’ because ‘more officers are killed or injured on domestic violence calls than on any other type of call.’” (quoting *Mattos*, 661 F.3d at 450));

6. “whether it should have been apparent to officers that the person they used force against was emotionally disturbed,” *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1126 (9th Cir. 2021) (quoting *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011)); *see* *Crawford v. City of Bakersfield*, 944 F.3d 1070, 1078 (9th Cir. 2019) (“‘[W]hether the suspect has exhibited signs of mental illness is one of the factors the court will consider in assessing the reasonableness of the force used.’”);

7. where “‘an officer’s particular use of force is based on a mistake of fact, . . . whether a reasonable officer would have or *should* have accurately perceived that fact,’” *Nehad*, 929 F.3d at 1133 (emphasis in original) (quoting *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011)); *see also Torres*, 648 F.3d at 1127 (“[U]nder *Graham*, whether the mistake was an *honest* one is not the concern, only whether it was a *reasonable* one”);

8. whether the police officer failed “to identify himself or herself as such,” *Nehad*, 929 F.3d at 1138;

9. when the use of deadly force is at issue, whether the office has probable cause to believe that the individual poses a significant threat of death or serious physical injury to the officer or others, *see Tabares*, 988 F.3d at 1126 (“Under federal law, deadly force can be reasonable only if 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.” (internal quotation marks omitted) (quoting *Garner,* 471 U.S. at 3)); *see also Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) (“use of deadly force against a non-threatening suspect is unreasonable” (citing *Garner,* 471 U.S. at 11–12)); and

10. when deadly force is at issue, how quickly the officer used deadly force after encountering the individual, *see A. K. H v. City of Tustin*, 837 F.3d 1005, 1012 (9th Cir. 2016) (finding “most important” that officer at issue “escalated to deadly force very quickly”).

The jury must consider “the type and amount of force,” *Seidner*, 39 F.4th at 596, which may be quantified. “Some uses of force can be quantified categorically. The best example is shooting a firearm, which by definition is ‘deadly force’: force that ‘creates a substantial risk of causing death or serious bodily injury.’” *Id.* “Most often, however, quantifying a particular use of force requires consideration of the ‘specific factual circumstances’ surrounding the event.” *Id.* “For example, [the Ninth Circuit] has classified deployment of a police dog as both a severe use of force and a moderate use of force depending on the suspect’s condition when the dog was ordered to attack, how long the attack lasted, and whether the dog was within its handler's control.” *Id.* Similarly, “physical contact like hitting and shoving” and “roadblocks” are each “a type of force that must be quantified in reference to the surrounding circumstances.” *Id.* at 597. In *Seidner*, the Ninth Circuit held that an officer who used his patrol car to block a suspect fleeing on his bicycle had used “intermediate force,” defined as “force *capable* of inflicting significant pain and causing serious injury.” *Id.* at 599. The court declined to create “a blanket rule that using a vehicle to block the path of a quickly moving cyclist, without allowing sufficient distance for the cyclist to avoid a collision, constitutes deadly force,” because “[n]ot all roadblocks used [to stop cyclists] present the same level of risk, and the extent of the ‘risk of harm and the actual harm experienced’ are essential inquiries in determining whether an officer’s actions were reasonable under the Fourth Amendment.” *Id.*

If deadly force is used, it is excessive unless the officer has “probable cause to believe that the suspect poses a significant threat of death or serious physical injury.” *Garner*, 471 U.S. at 3. By contrast, “the use of intermediate force must be justified by more than ‘a minimal interest’ held by the government.” *Seidner*, 39 F.4th at 600. “[A] suspect’s previous violent conduct does not justify non-trivial force where the suspect poses no immediate safety threat.” *Andrews*, 35 F.4th at 719.

The first *Graham* factor, the “severity of the crime at issue,” should be modified as appropriate when officers are acting in a “community caretaking capacity” rather than to counter crime. *Ames v. King County*, 846 F.3d 340, 349 (9th Cir. 2017). In such circumstances, “the better analytical approach” focuses the inquiry on the seriousness of the situation that gives rise to the community-caretaking function. *See id.* Also, with respect to the severity-of-the-crime *Graham* factor, the factor slightly weighs in favor of defendant officers who used force when the plaintiff was not involved in a crime but nevertheless had information useful to address an unfolding emergency of a threatened school shooting. *Bernal v. Sacramento Cnty. Sheriff’s Dep’t*, 73 F.4th 678, 694 (9th Cir. 2023) (citing *Ames*, 846 F.3d at 349).

It is not error for a trial court to decline to single out one factor in the reasonableness inquiry, when the instructions properly charge the jury to consider all of the circumstances that confronted the officer. *See Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) (affirming district court declining “bad tactics” instruction). It is not error for a trial court to decline to instruct explicitly on the availability of “alternative courses of action” when the instructions as a whole “fairly and adequately cover[ed] the issues presented.” *Brewer v. City of Napa*, 210 F.3d 1093, 1096-97 (9th Cir. 2000).

In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017), the Supreme Court rejected the Ninth Circuit’s “provocation rule” and abrogated *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). The provocation rule had permitted a law enforcement officer to be held responsible for an otherwise reasonable use of force when the officer intentionally or recklessly provoked a violent confrontation through a warrantless entry that was itself an independent Fourth Amendment violation. In *Mendez*, the Supreme Court eliminated this rule.

In *Sabbe v. Washington County Board of Commissioners*, 84 F.4th 807, 819-25 (9th Cir. 2023), the Ninth Circuit considered the circumstances under which a law enforcement PIT maneuver using an armored personnel carrier, which weighs several times as much as a typical police cruiser, could constitute excessive force.

*Revised Dec. 2023*