**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 when [*insert factual basis of claim*].

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 type and amount of force used;

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

[(7) 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;]

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

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

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

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

[(12) 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]

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

“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.

**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 applied in *Scott v. Harris*, 550U.S. 372, 381-85 (2007), *Graham v. Connor*, 490 U.S. 386, 397 (1989), *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985), and *Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019). 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). Moreover,

In assessing reasonableness, the court should give “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”  *Graham*, 490 U.S. at 396. “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.” *Id.* (citation omitted). In addition, “[t]he 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.”  *Id.* at 396-97.

*Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010).

As the Ninth Circuit has noted, the Supreme Court did not limit the

reasonableness inquiry to the factors set forth in *Graham*:

Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officers. In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.

*Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (citation and internal quotation marks omitted).

On the other hand, 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). Importantly, although officers must consider the availability of other, less

intrusive means, officers “need not avail themselves of the least intrusive means of responding to

an exigent situation; they need only act within that range of conduct we identify as reasonable.”

*Hughes v. Kisela*, 841 F.3d 1081, 1087 (9th Cir. 2016) (quoting *Scott v. Henrich*, 39 F.3d 912,

915 (9th Cir. 1995)); *see also Williamson v. City of National City*, 23 F.4th 1146, 1151 (9th Cir. 2022) (quoting *Lowry v. City of San Diego*, 858 F.3d 1248, 1259 (9th Cir. 2017) (“It is . . . well-established that police officers ‘are not required to use the least intrusive degree of force possible.’”); *see also O’Doan v. Sanford*, 991 F.3d 1027, 1037 (2021) (listing factors).

The Ninth Circuit has repeatedly emphasized that the most important factor is “whether the suspect posed an immediate threat to the safety of the officers or others.” *See, e.g., S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017) (internal quotation marks omitted); *Orn v. City of Tacoma*, 949 F.3d 1167 (9th Cir. 2020); *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (concluding that “use of a chokehold on a non-resisting restrained person violates the Fourth Amendment”). If it is clear that a suspect does not pose an immediate threat to the

safety of officers or others, it does not matter (i) if the officers know the suspect is armed, (ii)

whether the suspect previously engaged in violent conduct, or (iii) the nature of the suspected crime. *See Andrews v. City of Henderson*, 35 F.4th 710, 719 (9th Cir. 2022) (stating that officers violate Fourth Amendment when, without providing warning and without attempting less-violent means of effecting an arrest, they tackle and pile on top of relatively calm, non-resisting suspect who poses little immediate threat of safety). If deadly force is used the officer must have “probable cause to believe that the suspect poses a significant threat of death or serious physical injury.” *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

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).

The first factor, “the nature of the crime or other circumstances known to the officer at

the time force was applied,” should be modified as appropriate when the officers are acting under their community caretaking function rather than to counter crime. 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 Ames v. King Cnty*., 846 F.3d 340, 349 (9th

Cir. 2017). “[O]fficers have a duty to independently evaluate a situation when they arrive, if they have an opportunity to do so.” *Rice v. Morehouse*, 989 F.3d 1112, 1122 (9th Cir. 2021) (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1277 (9th Cir. 2001)). “[O]fficers have a duty to independently evaluate a situation when they arrive, if they have an opportunity to do so.” *Rice v. Morehouse*, 989 F.3d 1112, 1122 (9th Cir. 2021) (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1277 (9th Cir. 2001)).

Other relevant factors may include (1) whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed, *see Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011); *see also Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) (“Even when an emotionally disturbed individual is ‘acting out’ and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.”), and (2) how quickly the officer(s) used deadly force after encountering the plaintiff or decedent. *A. K. H. v. City of Tustin*, 837 F.3d 1005, 1012 (9th Cir. 2016).

The “relative culpability” of the parties— *i.e.*, which party created the dangerous situation and which party is more innocent— may also be considered in determining the reasonableness of the force used. *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (citing *Scott*, 550 U.S. at 384).

“Deadly force is the most severe intrusion on Fourth Amendment interests because an individual has a ‘fundamental interest in his own life’ and because, once deceased, an individual can no longer stand trial to have his ‘guilt and punishment’ determined.” *Estate of Aguirre*, 29 F.4th at 628 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). For this reason, “[b]efore using deadly force, law enforcement must, ‘where feasible,’ issue a warning.” *Estate of Aguirre*, 29 F.4th at 620 (quoting *Garner*, 471 U.S. at 11-12)). If a suspect no longer poses an immediate threat, then the subsequent use of deadly force is unreasonable. *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017). Whether the use of deadly force is reasonable is highly fact-specific. *Wilkinson*, 610 F.3d at 551. *See also Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2242 (2021) (stating that use of *per se* rule “would contravene the careful, context-specific analysis required by this Court’s excessive force precedent”); *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (“[T]here are no per se rules in the Fourth Amendment excessive force context; rather, courts ‘must still slosh [their] way through the factbound morass of ‘reasonableness.’’” (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007))).

Whether the officers are facing or expecting a domestic disturbance is a specific factor relevant to the totality of the circumstances in assessing an excessive force claim. *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.’”).

“When an officer’s particular use of force is based on a mistake of fact, we ask whether a

reasonable officer would have or should have accurately perceived that fact.” *Torres v. City of*

*Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011) (citing *Jensen v. City of Oxnard*, 145 F.3d 1078,

1086 (9th Cir. 1998)) (emphasis in original). “[W]hether the mistake was an honest one is not

the concern, only whether it was a reasonable one.” *Id*. at 1127 (emphasis in original).

A police officer’s attempt to “terminate a dangerous high-speed chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.” *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014) (“[I]f officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”). But the use of deadly force to stop a slow-moving vehicle when the officers could easily have stepped aside violates the Fourth Amendment. *Villanueva v. California*, 986 F.3d 1158, 1170 (9th Cir. 2021) (citing *Acosta v. City & Cnty. of S.F.*, 83 F.3d 1143, 1146 (9th Cir. 1996), *as amended* (June 18, 1996), *abrogated on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001)).

In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), the Supreme Court rejected the Ninth Circuit’s “provocation rule” and abrogated *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). That 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.

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