# TENTH CIRCUIT GRANTS IMMUNITY TO OFFICER FOR SHOOTING DRIVER USING CAR AS A DEADLY WEAPON

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On January 5, 2017, the Tenth Circuit Court of Appeals of decided *Clark v. Bowcutt et al.*[i], in which the court decided whether it was reasonable for an officer to shoot and kill a fleeing driver after the officer stepped in front of the suspect's car. The relevant facts of *Clark*, taken directly from the case, are as follows:

> On the evening of October 26, 2012, Deputy Bowcutt was on duty, driving eastbound on Utah State Route 13 in a marked patrol truck. Deputy Bowcutt observed what appeared to be Mr. Burkinshaw urinating on the shoulder of the westbound traffic lane. Mr. Burkinshaw returned to his vehicle, a Volkswagen Jetta, and began driving westbound. Deputy Bowcutt turned his patrol truck into the westbound traffic lane, activated the truck's overhead lights, pulled up behind Mr. Burkinshaw's Volkswagen, and initiated a traffic stop. After Mr. Burkinshaw pulled his Volkswagen to the side of the road, Deputy Bowcutt exited his truck and conversed with Mr. Burkinshaw, learning his name and date of birth. During their brief conversation, Deputy Bowcutt smelled alcohol and observed a brown paper bag in the backseat of the Volkswagen, but did not perform a breathalyzer to confirm his suspicion that Mr. Burkinshaw was intoxicated. Deputy Bowcutt then returned to his truck to check the status of Mr. Burkinshaw's driver's license. At that time, Mr. Burkinshaw drove away. As most relevant here, much of what transpired thereafter was captured on the dashboard camera, with audio capability, mounted in Deputy Boycott's vehicle.
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> Deputy Bowcutt initiated a pursuit, at one point reaching fifty miles per hour on the highway. Approximately one minute into the pursuit, Mr. Burkinshaw signalled before turning left into a residential area and reduced his speed to twenty-five or thirty miles per hour. As the pursuit advanced through the residential area, they encountered one other vehicle driving past in the opposite direction.

> Approximately five minutes into the pursuit, Mr. Burkinshaw turned onto a dead-end road closed off by a cul-de-sac. As Deputy Bowcutt's patrol truck approached, Mr. Burkinshaw attempted to execute a three-point turn. In the meantime, Deputy Bowcutt turned his patrol truck horizontally to block Mr. Burkinshaw's Volkswagen from exiting the cul-de-sac. However, despite the blockage, Mr. Burkinshaw was able to drive his Volkswagen along the shoulder of the road between Deputy Bowcutt's patrol truck and the lawn of a residential property.
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> To prevent Mr. Burkinshaw from advancing, Deputy Bowcutt exited his patrol truck, drew his service weapon, and stepped in front of Mr. Burkinshaw's oncoming Volkswagen. The Volkswagen continued to move forward as Deputy Bowcutt stepped backwards; the Volkswagen's bumper was just inches away from Deputy Bowcutt, and Mr. Burkinshaw offered no indication that he intended to stop. During that time, Deputy Bowcutt shouted "Get out of the car!" twice and "Stop!" six times; he finally fired three rounds at Mr. Burkinshaw through the vehicle's windshield, striking him twice. Mr. Burkinshaw's Volkswagen then skidded onto the main road before crashing into a drainage ditch. Mr. Burkinshaw was pronounced dead at the scene.[ii]

Clark, as the administrator of Burkinshaw's estate, filed suit and alleged, among other things, that Deputy Bowcutt used excessive force in violation of the Fourth Amendment. The district court denied summary judgment and qualified immunity with respect to Deputy Bowcutt, stating that there were issues concerning material facts in dispute; therefore, a jury must decide the facts. Deputy Bowcutt appealed the denial of qualified immunity to the Tenth Circuit Court of Appeals.

The court first examined the legal principles and standards that are relevant in determining whether Deputy Bowcutt used excessive force when he stepped in front of Burkinshaw's car at the end of a pursuit and then shot Burkinshaw as he continued to drive toward him. The court stated

> **We review Fourth Amendment claims of excessive force under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene**." *Tenorio v*. *Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015); *see Graham v*. *Connor*, 490 U.S. 386, 396-97 (1989). "**We assess objective reasonableness based on 'whether the totality of the circumstances justified the use of force,'** and 'pay careful attention to the facts and circumstances of the particular case.'" *Estate of Larsen*, 511 F.3d at 1260 (quoting *Sevier v*. *City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)). More specifically, the Court has articulated that
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> > [the Fourth Amendment reasonableness test's] proper application requires careful attention to the facts and circumstances of each particular case, including **[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight**. *Graham*, 490 U.S. at 396; *accord Thomson*, 584 F.3d at 1313.
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> "**The reasonableness of [an officer's] actions depends both on whether the officers were in danger *at the precise moment* that they used force and on whether [the officers'] own *reckless* or *deliberate* conduct during the seizure unreasonably**

> **created the need to use such force.**" *Sevier*, 60 F.3d at 699 (emphases added) (footnote omitted). Moreover, "[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." *Graham*, 490 U.S. at 396-97; *see also Cordova v. Aragon*, 569 F.3d 1183, 1188 (10th Cir. 2009) ("There is no easy-to-apply legal test for whether an officer's use of deadly force is excessive; instead, we must 'slosh our way through the fact-bound morass of "reasonableness."'" (quoting *Scott*, 550 U.S. at 383)).
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> *Deadly force* is such force that 'create[s] a substantial risk of causing death or serious bodily harm.'" *Thomson*, 584 F.3d at 1313 (emphasis added) (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004)). **The use of deadly force is considered reasonable "only if a reasonable officer in Defendants' position would have had probable cause to believe that there was a *threat of serious physical harm to themselves* or to others**." *Estate of Larsen*, 511 F.3d at 1260 (quoting *Jiron*, 392 F.3d at 415); *see Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("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.")[iii]

The court also went on to state that the Tenth Circuit considers at least four additional factors to assess the degree of threat a suspect poses to an officer. The court stated

> In assessing the degree of threat the suspect poses to the officer, we consider factors that include, but are not limited to: "(1) **whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands**; (2) **whether any hostile motions were made with the weapon towards the officers**; (3) **the distance separating the officers and the suspect**; and (4) **the manifest intentions of the suspect**." *Estate of Larsen*, 511 F.3d at 1260. Notably, "**if threatened by weapon (which may include a vehicle attempting to run over an officer), an officer may use deadly force."** *Durastanti*, 607 F.3d at 664; *accord Scott v. Edinburg*, 346 F.3d 752, 757 (7th Cir. 2003).

The court now turned to the plaintiff's theory of liability in this case. Particularly, the plaintiff argued that it was unconstitutional for the deputy to use deadly force because he "deliberately stepped in front of Burkinshaw's vehicle as it was moving forward and remained in front of the vehicle despite opportunities to move aside" prior to shooting Burkinshaw.[iv]

The court then examined the facts of this case in light of the three factors from *Graham v. Connor* and the four factors from the *Estate of Larson*. The first factor from *Graham* was the severity of the crime at issue. This incident originated when the officer tried to stop Burkinshaw for public urination, which is a misdemeanor and a relatively minor offense. However, when Burkinshaw fled, the crime became a felony under Utah state law, a more serious offense. Further, the flight satisfies the third factor from *Graham*, particularly whether the suspect was attempting to evade arrest by flight, which he was. The second factor was whether Burkinshaw posed an immediate threat to the officer or others. The court stated that they considered

> [W]hether Deputy Bowcutt **"[1] could have reasonably perceived he was in danger at the precise moment that he used force and [2] whether his own reckless or deliberate conduct (as opposed to mere negligence) unreasonably created a need to use force.**" *Durastanti*, 607 F.3d at 664.[v] [emphasis added]

In examining the second *Graham* factor, the court stated that the video from the deputy's patrol car made it "readily apparent" that "Burkinshaw posed an immediate threat to Deputy Bowcutt's safety."[vi] Particularly, the court stated

> Mr. Burkinshaw continued to drive his Volkswagen forward as Deputy Bowcutt stepped backwards; his vehicle's bumper was just inches away from Deputy Bowcutt. Despite Deputy Bowcutt's orders to stop, Mr. Burkinshaw did not. Deputy Bowcutt had mere seconds to react. We conclude that a reasonable officer in Deputy Bowcutt's position "would have feared for his life," *Cordova*, 569 F.3d at 1190, and his actions in firing at Mr. Burkinshaw were reasonable. Even if he was mistaken as to the imminence of the threat to his safety, it is axiomatic that "[a]n officer may be found to have acted reasonably even if he has a mistaken belief." *Durastanti*, 607 F.3d at 666; *see Pearson*, 555 U.S. at 231; *Saucier*, 533 U.S. at 205-06. If a reasonable officer in Deputy Bowcutt's position "would have feared for his life," then the "urgency of terminating the chase would increase and the balance would tip in the officer['s] favor." *Cordova*, 569 F.3d at 1190.[vii]

Again, the plaintiff argued that the deputy could have alleviated that threat by moving out of the way of the car, particularly stating that the deputy "was required to use alternative less intrusive means. Further, the plaintiff argued that his ability to move out of the way was also relevant to the question of whether the deputy was in imminent danger."[viii] However, to this argument, the court stated

> In *Durastanti*, we considered similar arguments and concluded that they were immaterial to the question of whether a police officer could have reasonably perceived he was in danger at the precise moment that he used deadly force. 607 F.3d at 665. Specifically, **we determined it was of no consequence that a video did not capture the police officer stepping into the vehicle's path, firing his first shots, or whether the officer could have stepped out of the way**. *Id*. As in this case, the police officer in *Durastanti* "was in the [vehicle's] path in a very confined area." *Id*. Also, the sounds of the shots could "be heard and less than a second expire[d] between the moment the shots were fired and the moment [the officer] appeared in the video." *Id*. **Most importantly, we noted, based on our precedent, that "officers do not always have to use the least restrictive means as long as their conduct is reasonable**." *Id*.; *accord Cortez*, 478 F.3d at 1146; *Jiron*, 392 F.3d at 414. Guided by *Durastanti*, we reject the foregoing concerns of the district court and Ms. Clark.[ix] [emphasis added]

The plaintiff also argued that the deputy was "reckless" for stepping in front of Burkinshaw's car. However, the court rejected this argument and held

> **We would be hard-pressed to label Deputy Bowcutt's conduct negligent, much less reckless. Deputy Bowcutt's act of stepping in front of the Volkswagen did not unreasonably create the need to use force; the totality of the circumstances shows that his actions were reasonable**[x]. [emphasis added]

The final analysis conduct by the court in this case involved the consideration of the four factors from the *Estate of Larson* to determine the threat posed by Burkinshaw. The first factor was whether the officer ordered the suspect to drop his weapon and whether the suspect complied. Here, the weapon was a car and the deputy ordered him repeatedly to stop; Burkinshaw failed to comply with the deputy's commands. The second factor was whether the suspect made any hostile motions toward the office with the weapon. Here, Burkinshaw's weapon was a car and he did in fact drive toward the deputy. The third factor was the distance between the officer and the suspect. Here, the court noted that the video showed the front bumper of Burkinshaw's car was "mere inches" from the deputy, and Burkinshaw gave no indication that he was going to stop. Lastly, the court considered the manifested intention of the suspect. The close proximity (mere inches) to the deputy and no indication that he intended to stop caused the deputy to "reasonably perceive [Burkinshaw's conduct] as a manifestation of lethal intent."[xi]

**As such, the court held that Deputy Bowcutt acted reasonably under the Fourth Amendment when he shot Burkinshaw as he drove toward him, despite the fact that the deputy stepped in front of the car and did not move out of the way**.

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[i] No. 14-4163 (10th Cir. Decided January 5, 2017)
[ii] Id. at 3-6
[iii] Id. at 14-16
[iv] Id. at 17
[v] Id. at 19
[vi] Id. at 20
[vii] Id.
[viii] Id. at 21
[ix] Id.
[x] Id. at 23
[xi] Id. at 26