

Part II The Objective Test

Hi. I'm Tim Miller and this is Part II of our series of podcasts on use of force. Previously, we said that a police officer effects a seizure under the Fourth Amendment when that officer terminates a free citizen's movement. The seizure must be objectively reasonable. The reasonableness of any seizure is based on the facts. In short, facts make force reasonable. What did the officer see, hear, smell, taste or touch. Using good action verbs in a use of force report helps the officer paint a picture for the court. Action verbs help the court envision what the officer was experiencing on the street. "I saw the suspect clench his fists. He put one foot in front of the other in a fighting stance. His face was beet red and he screamed at me." Facts are relevant; mere conclusions, however, are not relevant. Unsupported conclusions are nothing more than the officer's subjective opinions. And subjective beliefs play no part in the fact bound analysis of whether force was objectively reasonable.

F. So when is Force Reasonable?

The Court in Graham stated, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests ... against countervailing governmental interests at stake." That may sound complicated – especially for a police officer forced to make a split-second decision about a force option. But it's really simply. What did the officer do [to the suspect] – or, what was the *nature of the intrusion*? And, why did the officer do it – or, what was the *governmental interest at stake*? The more intrusive the seizure, the stronger the governmental interest should be.

Connor, for example, stopped Berry and Graham by activating the cruiser's overhead lights. No doubt - investigative detentions like that intrude upon a free citizen's liberty. They are inconvenient and embarrassing. But the government also has an interest in investigating criminal activity. They are reasonable when an officer can articulate facts to support them.

And no doubt - the intrusion on Graham's liberty became

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much greater after the vehicle stop. But a reasonable officer might say, “So did the governmental interest at stake.” The lower courts look to four factors in the Graham decision to find the governmental interest. No single factor should be considered in a vacuum. The Graham factors are:

1. What was the Severity of the Crime?

Connor may have been acting under a reasonable suspicion that Graham stole something from the store when he activated the lights on the cruiser. With facts that Graham committed an armed robbery, Connor may have used a more intrusive means to stop Graham and Berry. Generally, the more severe the crime, the more intrusive the force option may be.

2. Was the Suspect an Immediate Threat?

Whether the suspect is an immediate threat to the safety of the officer or others is generally considered the most important Graham factor. The general rule: The greater the threat, the greater the force option.

For example, vehicle stops pose a threat. To control the scene, an officer may use reasonable force to control the movements of the driver and passengers.¹ Again, a reasonable officer could believe that the governmental interest became much greater after the vehicle stop. Officer Connor told Berry and Graham to wait at the car. But Graham got out. Add that to evidence of Graham’s intoxication, and a reasonable officer might believe that Graham posed a threat to Officer Connor; to other motorists on the adjacent street; and to Graham, himself. So what could a reasonable officer say? Was it objectively reasonable to handcuff Mr. Graham and put him in the back of patrol car - under those facts and circumstances?

3. Was the Suspect Resisting Arrest?

Resisting an arrest, or other lawful seizure, effects several

¹ See *Pennsylvania v. Mimms* and *Maryland v. Wilson* in the Legal Division Reference Book.

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governmental interests. During an investigative detention, it hinders the officer's ability to investigate the crime. It may put the officer, trying to control the suspect, at risk. And it may endanger members of the public who get in the way. Graham's failure to obey Connor's order to stay at the car could affect all three.

4. Was the Suspect Fleeing from a Lawful Arrest?

Like resistance, attempting to evade an arrest frustrates several governmental interests. The general rule is that the more serious the crime, the greater the governmental interest in stopping the suspect, and the more intrusive the seizure may be.

5. There are Other Factors.

The Graham factors are not a complete list, but while the lower courts have listed others, most are a subset of what is generally considered the most important – threat to the officer or others. For example, the courts have considered the number of suspects verses the number of officers as effecting the degree of threat. So does the size, age, and condition of the suspect confronting the officer. The duration of the action is important, especially after one stops to consider how exhausting it is to wrestle someone for two or three minutes. And it should go without saying that any officer would want to know a suspect's propensity for violence or psychiatric history, if possible.

Other factors do not fall neatly under the Graham factors, but do flow naturally out of the Court's decision. The degree of injury suffered by the plaintiff seems relevant in light of the Court's guidance that, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." So in a case where the plaintiff alleges that his handcuffs were too tight, the court may examine the plaintiff's actual injuries - and whether the plaintiff complained so that the officer could correct the problem.

The Ninth and Eleventh Circuit discuss the need for the

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force, particularly in cases where officers used intermediate weapons like batons, tasers, and oleoresin capicum (OC) spray. “It is the need for force which is at the heart of the Graham factors” stated the Ninth Circuit.”²

And time is a factor. Since not every encounter requires a *split-second* decision, the reasonable officer might say, “The more time to choose a force option, the more reasonable it should be.”

Let’s stop here. When we come back we will talk about deadly force and when deadly force is objectively reasonable.

² See *Headwaters Forest Defense v. The County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002)