

Police Misconduct and Civil Rights Law Report

Vol. 8, No. 5

September/October, 2005

BEYOND GRAHAM: DEFINING DEADLY FORCE IN NON-FIREARM CASES

by Lynne Wilson*

Introduction

Early this year, an *en banc* panel of the Ninth Circuit Court of Appeals made a little-noticed but potentially seismic change in the landscape of police excessive force cases. *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005), cert. denied, 125 S. Ct. 2938, 162 L. Ed. 2d 866 (U.S. 2005). What appeared to be the main holding in *Smith* was a ruling that Smith's conviction for resisting arrest did not bar his excessive force claim under 42 U.S.C. § 1983. *Smith*, 394 F.3d at 693, citing *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (claim barred if it necessarily implies the invalidity of conviction). But the *Smith* panel also ruled on what may turn out to be a far more important issue: "We also take this occasion to bring our circuit into line with the others with respect to the definition of 'deadly force.'" *Smith*, 394 F.3d at 693 (expanding previous definition to include "substantial risk of causing ... serious bodily injury"). That innocuous statement may not only reverberate for years through future excessive force cases but also creates new opportunities for all attor-

neys who litigate such cases, including those who do not practice in the Ninth Circuit.

The Supreme Court has never actually defined what "deadly force" is, even though it has set out the standard for its use. *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (invalidating as unconstitutional a Tennessee statute that permitted shooting a fleeing burglary suspect but not defining "deadly force"). Before *Smith*, every federal circuit but the Ninth that addressed this issue used a variation of the "deadly force" definition found in the Model Penal Code [MPC]: "force that creates a substantial risk of causing death or serious bodily injury." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997); *In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3d Cir. 1995); *Robinette v. Barnes*, 854 F.2d 909, 912, 102 A.L.R. Fed. 605 (6th Cir. 1988); *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987); *Pruitt v. City of Montgomery, Ala.*, 771 F.2d 1475, 1478-80 n.10 (11th Cir. 1985); *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976), judgment vacated, 431 U.S. 171, 97 S. Ct. 1739, 52 L. Ed. 2d 219 (1977).

Only the Ninth Circuit rejected the traditional deadly force definition, choosing instead to define "deadly force" more narrowly as limited to "force which is reasonably likely to cause death." *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660 (9th Cir. 1997), as amended on denial of reh'g and reh'g en banc,

*The author is an attorney in private practice in Seattle, WA and a frequent contributor to the *Police Misconduct and Civil Rights Law Report*. She wishes to thank Los Angeles attorney Donald W. Cook for originating the idea for this article.



Thomson/West, has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson/West are not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Police Misconduct and Civil Rights Law Report

is published by Thomson/West, 50 E. Broad St., Rochester, NY 14694. ISSN 0738-0623

40281071

(Mar. 31, 1998) (emphasis added). Using the *Vera Cruz* definition, a police agency could limit *Garner's* deadly force rule to firearms, thereby precluding application of *Garner* to other police weapons or restraints no matter how high the risk of serious injury. Moreover, when it comes to police dogs, police read *Vera Cruz* as broadly holding that a dog can never be deadly force when used against a suspect. United States Police Canine Association, "The Police Dog as an Instrumentality of Force," (2004) (use of police service dogs is governed by the law of excessive not deadly force); International Association of Chiefs of Police Training Key No. 559 (2003) (*Vera Cruz* provides "strong precedent" that the use of a canine is not deadly force).

In *Smith*, the Ninth Circuit reversed *Vera Cruz*, stating that it recognized not only the importance of conformity with other circuits but also the need to adopt "a definition that is more compatible with the practicalities and realities of today's physical confrontations." It stated that:

..."deadly force" has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model Penal Code. We define deadly force as *force that creates a substantial risk of causing death or serious bodily injury* (emphasis added).

Smith, 394 F.3d at 693. Because *Smith* adopted the traditional definition, many police agencies and their lawyers are now justifiably concerned that levels of force such as "batons, Tasers, bean bag rounds, etc. *could* now be considered by a federal trial court ... as constituting deadly force ... and thus requiring the level of justification commensurate with deadly force." Jones & Mayer, "Case Alert Memorandum: U.S. Supreme Court Denies Review in *Smith v. Hemet*," (06/22/05).

At one level, all *Smith* did was to define "deadly force" the same way that seven other federal circuits addressing the issue (as well as the police themselves) defined it. *Smith*, 394 F.3d at 705. But there are two aspects of the decision that make it significant and highlight the importance of the now "universal" definition of deadly force.

The first aspect is the context in which the Ninth Circuit concluded that the traditional definition was better than *Vera Cruz's* restrictive one. *Smith* held that a police canine attack that did not result in incapacitation or surgery (let alone death) could not only be excessive force under the circumstances in which the canine was used but could also have amounted to deadly force as now defined. *Smith*, 394 F.3d at 707 (remanding to the trial court for further consideration of the deadly force question). By contrast, *Vera Cruz* held that a police canine attack involving more serious injuries requiring surgery and hospitalization was not deadly force as a matter of law. *Vera Cruz* had not presented evidence "that

the force used, in the circumstances in which it was used, posed more than a remote possibility of death." *Vera Cruz*, 139 F.3d at 663 (affirming defense jury verdict on excessive force claim where trial court refused to instruct the jury on the deadly force rule). It is now clear that a much more careful look at the nature and type of force used and the circumstances surrounding that use dictates whether deadly force applies in a particular case.

The second aspect is that by placing itself in line with other circuits (and the police) on the definition of "deadly force" (if not the application of it), the Ninth Circuit made Supreme Court review of the traditional "universal" definition unlikely. The Supreme Court has in fact denied certiorari. *City of Hemet, Cal. v. Smith*, 125 S. Ct. 2938, 162 L. Ed. 2d 866 (U.S. 2005). Unless the traditional definition adopted by most circuits and the police is itself challenged, lawyers can assume that the traditional definition defines "deadly force" under the Fourth Amendment.

The significance of *Smith* is that by using the traditional deadly force definition, *any* police use of force is "deadly" if a plaintiff proves that the force as used "created a substantial risk of causing death or serious bodily injury." See, e.g., *Pruitt v. City of Montgomery, Ala.*, 771 F.2d 1475 (11th Cir. 1985) (shooting at suspect's legs deadly force because it was "capable of causing serious bodily injury"). Once a use of force has been categorized as "deadly," the more restrictive *Tennessee v. Garner* standard for deadly force applies rather than the more lenient standard under *Graham v. Connor* for non-deadly but excessive force. This increases the likelihood that a trier of fact will find that the force violated a plaintiff's constitutional rights. Compare *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (deadly force may not be used unless 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) with *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (question in a non-deadly excessive force case is whether the force used was reasonable in light of all the relevant circumstances). Says Donald W. Cook, the Los Angeles attorney who represented (with his partner Robert Mann) Robert Vera Cruz and now represents Thomas Smith, the difference between having *Garner* rather than *Graham* apply to your set of facts is the difference between having strict scrutiny rather than rational basis scrutiny apply to your equal protection claim: Under one you almost always win, under the other you more often than not lose.

This article will explain the definitional issue not addressed in *Tennessee v. Garner*, the background for the Ninth Circuit's reasoning in *Smith* and how that reasoning differed from *Vera Cruz*. It will also explore how the "deadly force" issue has played out in police canine cases, the key arena where the definitional battle has

taken place. Finally, the article will look at the possibility of applying the deadly force definition to police uses of other non-firearm types of force.

Defining Deadly Force

Tennessee v. Garner

Tennessee v. Garner established a special rule concerning deadly force, but it did not define "deadly force." In *Garner*, the force used was obviously deadly. The officer intentionally used his firearm to shoot the unarmed, 15-year-old Edward Garner. *Garner*, 471 U.S. at 3-4. Many references appear in *Garner* to the use of firearms as equivalent to deadly force, but there is nothing in the opinion that restricts deadly force to firearms. *Garner*, 471 U.S. at 31 (O'Connor, J., dissenting).

The question decided in *Garner* was the constitutionality of using deadly force to prevent the escape of an unarmed suspected felon. To justify the shooting, the officer relied on a Memphis Police Department policy that in turn tracked a Tennessee statute. The statute provided that "[i]f, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." *Garner*, 471 U.S. at 4. Although the Department's policy was "slightly more restrictive than the statute," it still allowed "the use of deadly force in cases of burglary." *Garner*, 471 U.S. at 5.

Garner held that where a "suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." It held that the Tennessee statute violated the Fourth Amendment's "reasonableness" requirement as applied and to the extent that it authorized the use of deadly force against "such fleeing suspects." *Garner* further set forth a high threshold for the use of deadly force: "[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12.

In arriving at this standard, *Garner* looked to the trend of many state legislatures and law enforcement agencies to narrow the circumstances in which deadly force could be used. Because many states use it as a guide, *Garner* also explicitly looked to language found in the Model Penal Code § 3.07. MPC § 3.07 states that deadly force is not justifiable unless the arrest is for a felony and the crime involved the use or threatened use of deadly force or "there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." *Garner*, 471 U.S. at n.7.

Garner rejected the felony rule as not a viable one in the modern world. *Garner*, 471 U.S. at 14 (drawing the

line at felonies versus misdemeanors makes no sense today when "numerous misdemeanors involve conduct more dangerous than many felonies"). However, *Garner* did adopt in large part the Model Penal Code provision for when deadly force is authorized, even if it did not limit such force to firearms. *See, e.g., Garner*, 471 U.S. at 31 (O'Connor, J., dissenting) ("By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk").

Graham v. Connor

Unless it is conceded that the non-firearm force was deadly, nearly all non-firearm excessive force cases are now decided under the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *Graham* was decided four years after *Garner* and sets forth a "reasonableness" test for deciding whether a particular use of police force is excessive.

In *Graham*, the Court held that in an excessive force case, the "reasonableness" inquiry is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation" (emphasis added). *Graham*, 490 U.S. at 397. Furthermore, "[i]ts proper

Police Misconduct and Civil Rights Law Report

is prepared under the auspices of the
National Police Accountability Project

Editorial Board

Chip Berlet, Marc S. Blesoff, Russell C. Green,
Charles Hoffman, Mary Rita Luecke, Marena McPherson,
Mathew J. Piers, Peter Schmiedel, G. Flint Taylor,
David Thomas, John Wylie, Clifford Zimmerman

Issue and Recent Cases Co-Editors

Peter Schmiedel, G. Flint Taylor, Clifford Zimmerman

PUBLISHER'S STAFF

Daniel Dick, *Attorney Editor*
Specialty Composition, *Electronic Composition*

Published bimonthly by
Thomson/West

Editorial Offices: 50 Broad Street E.,
Rochester, New York 14694
Tel.: 585-546-5530 Fax: 585-258-3708
Customer Service: P.O. Box 64833
St. Paul, MN 55164-0833
Tel: 800-328-4880 Fax: 612-687-6674

Subscription: \$210 for six issues
© 2005 Thomson/West
ISSN 0738-0623

application requires 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, citing *Garner*, 471 U.S. at 8-9 (the question is “whether the totality of the circumstances justify[es] a particular sort of seizure”).

Garner sets up a “bright line” test for the use of deadly force since it requires that the officer must have “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others” before the force used can be held reasonable under the Fourth Amendment. *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Garner*). In contrast, the *Graham* test is a flexible one, requiring more of a balancing of the severity of the crime, the threat posed and whether the person is resisting.

Because *Garner* requires more justification for using deadly force than is required under *Graham*, force that is justified under *Graham* may be unjustified under *Garner*. Consequently, a jury must be instructed on the *Garner* standard when the police use “deadly force.” See, e.g., *Monroe v. City of Phoenix, Ariz.*, 248 F.3d 851 (9th Cir. 2001).

A Force in Search of a Definition

In the absence of a clear definition of “deadly force” from the Supreme Court, federal circuit courts addressing this issue found one. One of the first post-*Garner* courts to do so was the Eleventh Circuit in *Pruitt v. City of Montgomery, Ala.*, 771 F.2d 1475 (11th Cir. 1985). *Pruitt* involved a police officer’s purposeful shooting at a young, unarmed burglary suspect’s legs in order “to stop him.” *Pruitt*, 771 F.2d at 1479 n.10. The shooting caused permanent paralysis in one of *Pruitt*’s legs. The trial court granted *Pruitt*’s motion for partial summary judgment against the City of Montgomery on the issue of § 1983 liability, stating that there was no fact dispute that shooting at an unarmed fleeing burglary suspect to prevent his escape was unconstitutional “deadly force” as a matter of law. In upholding the trial court, the Eleventh Circuit emphasized that there was no “genuine issue of fact material to the question whether Kidd had probable cause to believe that *Pruitt* posed a physical threat to himself or to others.” *Pruitt*, 771 F.2d at 1484.

More importantly, *Pruitt* stated that the officer’s shooting at a suspect’s legs was deadly force even if the officer lacked the intent to kill because the officer used “force capable of causing serious bodily harm.” *Pruitt*, 771 F.2d at 1479-80 n.10. In so doing, *Pruitt* looked to the MPC’s definition of “deadly force” as “force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm.” *Pruitt*, 771 F.2d at 1479-80 n.10,

quoting Model Penal Code § 3.11(2). *Pruitt* also noted that one other circuit court had previously adopted the MPC’s definition in a § 1983 case. *Pruitt*, 771 F.2d at 1479-80 n.10, citing *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976), judgment vacated, 431 U.S. 171, 97 S. Ct. 1739, 52 L. Ed. 2d 219 (1977).

In another shooting case, the Tenth Circuit noted that “the use of deadly force does not occur only when the suspect actually dies.” *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987). *Ryder* involved the shooting of a fourteen-year old girl as she was running from an armed robbery of a pizza store. The jury returned a verdict in favor of the defendants, finding that *Ryder*’s constitutional rights were not violated when she was shot by one of the officers. On appeal, *Ryder* upheld the verdict and in the process of doing so, agreed with the other circuits that the MPC definition of “deadly force” applied and that the shooting was clearly “deadly force” regardless of the result. *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11, citing Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. C.R.-C.L. L. Rev. 361, 363 (1976) (deadly force is “such force as under normal circumstances poses a high risk of death or serious injury to its human target, regardless of whether or not death, serious injury or any harm actually results in a given case”).

In a non-firearm case, the Fifth Circuit addressed the question of whether hogtying someone clearly high on drugs in a prone position in the back of a police car constituted “deadly” rather than “excessive” force. *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (characterizing deadly force claims as a subset of excessive force claims). On interlocutory appeal from the trial court’s denial of the officers’ motions for summary judgment, *Gutierrez* looked at the officers’ claim that because no court had ruled that hogtying was deadly force in November 1994 when the incident occurred, they were entitled to qualified immunity as a matter of law. *Gutierrez*, 139 F.3d at 445. *Gutierrez* noted that although guns were the “paradigmatic example of ‘deadly force,’” *Garner* had failed to address “whether other police tools and instruments can also be characterized as ‘deadly force.’” *Gutierrez*, 139 F.3d at 446 (citing numerous cases involving canines, roadblocks and prone restraints).

Gutierrez agreed with other courts looking at this issue that “deadly force” is generally described as force “carry[ing] with it a substantial risk of causing death or serious bodily harm.” *Gutierrez*, 139 F.3d at 446. The court then noted that in November 1994 both the San Antonio Police Department in its policies and the State of Texas in its statutes had essentially incorporated that definition. *Gutierrez*, 139 F.3d at 446, citing Tex. Penal Stat. Ann. § 1.07(17) and SAPD Procedure 501.03(C) (“‘Deadly Force’ means force that is intended or known by the actor to cause, or in the manner of its use or in-

tended use, is capable of causing death or serious bodily injury.”). *Gutierrez* concluded by holding that both the definition of “deadly force” [essentially the same as the MPC] and the standard for its use under *Garner* were clearly established at the time of the incident. *Gutierrez*, 139 F.3d at 449. It denied the officer’s appeal, stating that material fact disputes required trial on the question of whether or not the officers’ placing of a highly-agitated hogtied person in a prone position in the back of the police car was “objectively reasonable” under the circumstances. *Gutierrez*, 139 F.3d at 450.

These cases highlight the complex issues that need to be addressed in deadly force cases that, unlike *Garner*, do not involve an officer’s use of a firearm to stop a fleeing suspect. One thing is clear, however. By 1998, most federal courts addressing this question in the “gray areas” placed the threshold for using deadly force at a level that under the MPC definition allowed for less than lethal injuries (or no injuries at all) resulting from force being used that created only a “substantial risk of serious bodily injury” but not necessarily death.

This trend has been enhanced by the reality that the vast majority of states (including the District of Columbia and Puerto Rico, but excepting Michigan and Ohio) define “deadly force” (either in case law or by statute) to include force capable of causing “serious bodily injury.” *See, e.g.*, Del Code Ann. Title 11 § 471(d); Kan. Stat. Ann. § 21-3215(1); N.Y. Penal Law § 10.00(11); Tex. Penal Code Ann. § 9.01(3), etc. [Complete list on file with author.] The same is true of nearly all law enforcement agencies at all levels of government. *See, e.g.*, U.S. Dept. of Justice, “Commentary on the Use of Deadly Force in Non-Custodial Situations,” (1995) (“the use of any force that is likely to cause death or serious physical injury”); International Association of Chiefs of Police Model Use of Force Policy (“any use of force that is likely to cause death or serious bodily harm”). Despite the unanimity among courts and the police in defining deadly force, the police have fought its application to police dogs used to bite.

Deadly Force in Canine Cases

Background Regarding Police Use of Canines

Police use of canines presents a fertile area for coming to a consensus on what constitutes a “substantial risk of serious bodily injury” in the real world. Although “sicing” a dog on someone is not the same as shooting them with a gun, dogs can easily inflict “serious bodily injuries.” As a police tool, using a dog to bite can satisfy the traditional deadly force definition. *See, e.g.*, *State v. Sinks*, 168 Wis. 2d 245, 483 N.W.2d 286 (Ct. App. 1992) (“common knowledge” that a large dog which bites is likely to cause serious injury); *People v. Nealis*, 232 Cal. App. 3d Supp. 1, 283 Cal. Rptr. 376, 378. Dep’t Super. Ct. 1991) (using dog to attack a person can be a deadly weapon). The disputes over when

an officer’s use of a dog is appropriate under a given set of circumstances and how much of a significant risk a dog bite poses are intense ones.

According to the United States Police Canine Association (“USPCA”), there are approximately 16,000 police “canine units” (a dog and a handler) nationwide. About 70% of them operate under “find and bite” training and deployment, with the remaining 30% operating under “find and bark” training and deployment. 8/16/05 email to author from USPCA’s Terry Fleck. “Find and bite” means that the dog automatically bites the suspect even if he is motionless unless called off by the handler. Under “find and bark,” the dog does not bite the suspect unless the suspect moves. D. Reaver, “The Search & Bark vs. the Search & Bite Method of Deployment,” Nov. 1982 DOG SPORTS.

There has been much controversy over whether the “find and bark” method of training results in fewer injuries, especially to suspects who are hiding from the police. The International Association of Chiefs of Police takes the position that the “find and bark” method “is the preferred approach to canine training and deployment” in part because it increases flexibility in deploying the dog, because the dog is trained not to bite non-resistant suspects, and because it results in fewer injuries when the dog is off leash. IACP Training Key No. 559 (2003).

However, whether trained in “find and bark” or “find and bite,” all police dogs are trained to and are expected to bite. And when the dog bites, whether it be a “find and bark” or a “find and bite” dog, there are no differences in the objectives in biting. The dog is supposed to bite hard, with a full mouth bite, anywhere on a person’s body, and to bite for as hard as the dog can for as long as it can, until commanded to stop. M. Mooring, “From the Dog House,” *The Thin Blue Line* (June 1990) (“Police dogs are trained to ... bite hard and hold on to their quarry until commanded to let go”); BARWIG, HILLIARD, SCHUTZHUND—THEORY AND TRAINING METHODS 166, 176 (1991) (“dog grips the sleeve with its entire jaw”). Moreover, should the dog lose its bite, it will try to re-bite. J. Grewe, *THE POLICE SERVICE DOG: TO PROTECT AND TO SERVE* 61 (1989) (dog “keep[s] biting until his handler gives him the voice command to stop”).

All police dogs are alike in terms of breed, size and bite training—large, usually German Shepherds, selected in part for their aggressiveness and willingness to bite and attack. Grewe, *supra* at 7. One can therefore draw reasonable inferences on the risk of death or serious injury from a police dog attack. Declaration of Dr. Peter C. Meade (6/22/02) (submitted in *Smith*). A trained attack dog can exert enough pressure with its jaws to penetrate light sheet metal. Goldstein, “Management of Human and Animal Bite Wounds,” *Journal of Am. Academy Dermatology* (December 1989). Consistent with the dog’s training, a police dog in fact does bite whatever

part of the body it can reach, including areas that include major arteries. Meade Declaration at pp. 4-5.

When attacked by a police dog, a person will automatically respond by trying to stop it by kicking, by trying to run away from it or, if armed, by trying to kill it. *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1550, 13 Fed. R. Serv. 3d 1235 (11th Cir. 1989); *Mettler v. Whittedge*, 165 F.3d 1197 (8th Cir. 1999). Persons bitten by police dogs usually suffer more bites and more severe lacerations than persons bitten by conventional dogs. Snyder & Pentecost, "Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites," Sept. 1990 ANNALS OF EMERG. MED. 983, 985 (study of injuries inflicted by police dogs). This is because the person's struggle against the bite causes tearing of skin, muscle, tendons and ligaments. It will also happen when the dog shakes its head to and fro. Snyder & Pentecost, *supra*. Police dogs are also much more likely to inflict life-endangering injuries than an ordinary dog. Meade Declaration at p. 7.

Robinette v. Barnes

One early post-*Garner* (but pre-*Graham*) case took on the question of whether the use of a trained dog on a felony suspect constituted deadly force. *Robinette v. Barnes*, 854 F.2d 909, 102 A.L.R. Fed. 605 (6th Cir. 1988). The facts in *Robinette* highlight how dangerous police dogs can be: Briggs, a burglary suspect, was hiding in a darkened building. Officer Barnes commanded the dog to "find him" and within a few minutes found Briggs lying in a pool of blood. The dog had Briggs' neck in his mouth. Briggs was pronounced dead on arrival. *Robinette*, 854 F.2d at 911.

The sole claim brought under § 1983 was whether the "use of a police dog to apprehend Briggs constitutes unnecessary deadly force which deprived him of his fourth and fourteenth amendment rights." *Robinette*, 854 F.2d at 911. On appeal from the trial court's dismissal of the claim on summary judgment, the Sixth Circuit applied *Garner* and looked at whether the use of a police dog in the circumstances presented was reasonable. But first, the *Robinette* court noted, as other courts had, that *Garner* did not define deadly force. It therefore looked to the Model Penal Code § 3.11(2) for its definition, i.e., "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm." *Robinette*, 854 F.2d at 911.

Based on the MPC definition, *Robinette* concluded that two factors must be looked at to determine if a particular law enforcement tool constitutes deadly force: (1) the intent of the officer to inflict death or serious bodily harm, and (2) the probability that the law enforcement tool, when employed to facilitate an arrest, creates a "substantial risk of causing death or serious bodily harm." *Robinette*, 854 F.2d at 912.

It held, applying these two factors to the facts presented, that the officer did not employ deadly force to apprehend Briggs when he commanded his dog to find him in the dark building. First, there was no indication that the officer *intended* Briggs to die or suffer serious bodily harm. Second, it held that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm.'" *Robinette*, 854 F.2d at 912. *Robinette* emphasized that it had no evidence before it that the dog had done anything other than what it was trained to do when it seized Briggs' neck and "[g]iven the remote chance that this particular scenario would occur, we cannot conclude that Barnes released the dog with the knowledge that by doing so, he was creating a 'substantial risk' that the dog might kill Briggs." *Robinette*, 854 F.2d at 912.

Robinette stated, however, that "an officer's intent in using a police dog, or the use of an improperly trained dog" could transform the use of the dog into deadly force. It concluded by stating that while it did not dispute the fact that "trained police dogs can appear to be dangerous ... the mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Robinette*, 854 F.2d at 913 (also concluding without analysis that the use of the police dog was not objectively unreasonable under the circumstances).

Robinette stands as a prime example of the importance of marshalling medical and police expert testimony to present the case that a particular police method or tool or instrument "creates a substantial risk of causing ... serious bodily harm." Deadly force is *not* determined by the actual injury sustained. Rather, it is the *risk* of death or serious injury that controls. *See, e.g., Mattis*, 547 F.2d at n.2 (determinative factor was *risk* of death or serious injury to its human target regardless of whether any actual harm results); *Ryder*, 814 F.2d at 1416-17 ("deadly force does not occur only when the suspect actually dies"). The outcome in *Robinette* was predictable since the plaintiff offered *no* evidence that death or serious injury was a reasonably foreseeable outcome. *Robinette*, 854 F.2d at 912-13. *See also Matthews v. Jones*, 35 F.3d 1046, 1994 FED App. 0327P (6th Cir. 1994) (upholding MPC definition but finding use of dog objectively reasonable where dog did not bite hiding suspect until he "instinctively" moved).

Chew v. Gates

Until 1998, the Ninth Circuit seemed to be moving in a direction toward officially adopting a variation of the MPC's definition of "deadly force." In *Chew v. Gates*, the court remanded to the trial court a case involving another unarmed, non-threatening "hiding" suspect who sustained severe lacerations to his left side and forearm during a police dog attack. *Chew v. Gates*, 27 F.3d 1432,

1436 (9th Cir. 1994). Although the case was remanded for retrial on the excessive force question, *Chew* also stated that a genuine issue of material fact was presented “with respect to whether the Los Angeles Police Department’s use of dogs constitutes ‘deadly force.’” *Chew*, 27 F.3d at 1454 (Norris, J., concurring) (“*Chew* proffered considerable evidence that the LAPD dogs, as trained and deployed, create a substantial risk of serious injury to suspects”).

But *Chew* also questioned the police practice of unleashing “a German Shepherd trained to seize suspects by ‘biting hard and holding,’ by mauling and sometimes seriously injuring them” and referred to it as a “use of force that at the very least approaches deadly proportions” (emphasis added). *Chew*, 27 F.3d at 1443. Although the concurring opinion in *Chew* referred to the MPC definition of “deadly force,” the majority opinion neither referred to nor adopted it. *Chew* was settled out of court and the Los Angeles Police Department changed its policy and training to “find and bark” in 1995. Summary Page, United States Police Canine Association, <http://www.k9fleck.org/k9sum.htm>.

In 1998, the Ninth Circuit reversed gears on its course towards an MPC definition of “deadly force.” *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997), as amended on denial of reh’g and reh’g en banc, (Mar. 31, 1998). Robert Vera Cruz had been involved in an argument with employees at a local Del Taco restaurant. He was attacked by a police dog during his subsequent attempt to leave the scene. He sustained a large laceration and several puncture wounds on his upper right arm, requiring surgery and eight days in the hospital. *Vera Cruz*, 139 F.3d at 660. He sued the City of Escondido and the officers under § 1983, claiming that he was the subject of an “unreasonable seizure in violation of the Fourth Amendment.” *Vera Cruz*, 139 F.3d at 661. A jury found that the officer who released the dog had not used excessive force.

On appeal, Vera Cruz argued that the district court erred in refusing to instruct the jury on “the deadly force rule of *Garner*.” *Vera Cruz*, 139 F.3d at 661. The district court held that “the evidence presented in this case would not permit a reasonable jury to find that the force applied against the plaintiff was deadly force.” *Vera Cruz*, 139 F.3d at 661.

On appeal, the Ninth Circuit first noted the lack of “deadly force” definition in *Garner*:

While the Supreme Court in *Garner* established a special rule concerning deadly force, it did not explain what is meant by that phrase. In fact, what the phrase means is far from obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly.... Yet we do not read *Garner* as covering

all uses of force that might result in death, no matter how remote the possibility. The question is, how likely must death be in order to consider the force deadly?

Vera Cruz, 139 F.3d at 661. The court then addressed Vera Cruz’s urging the court to formally adopt the MPC’s definition of deadly force, i.e., “force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.” *Vera Cruz*, 139 F.3d at 661, citing MPC § 3.11(2). Vera Cruz argued that he was entitled to a deadly force instruction “because he presented evidence that police dogs can cause serious injury.” *Vera Cruz*, 139 F.3d at 661.

The court noted that although it had mentioned the MPC definition in three previous dog bite cases, those references were merely dicta and two of them simply referred to the “fact that one of our colleagues [Judge Norris] relied on the Model Penal Code in his lonely effort to define deadly force in *Chew v. Gates*.” *Vera Cruz*, 139 F.3d at 661, citing *Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir. 1996), and *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995). In none of those cases did the plaintiffs present any evidence that police dogs were capable of causing more than “superficial bites” which did not “require serious medical attention.” *Vera Cruz*, 139 F.3d at 661.

Unlike the three earlier cases, *Vera Cruz* “squarely” presented the question of whether “force likely to result in serious injury (but not death) amounted to deadly force.” *Vera Cruz*, 139 F.3d at 661. His injuries required surgery and eight days of hospitalization. At trial, four witnesses testified that “such injuries are not unusual; police dogs can—and often do—cause serious harm.” *Vera Cruz*, 139 F.3d at 661–62. However, Vera Cruz presented no evidence that “dog bites are likely to result in death.” *Vera Cruz*, 139 F.3d at 661–62. Thus, the court was faced with the question of “whether force capable of inflicting serious—but not fatal—injuries qualifies as lethal [sic] force under *Garner*.” *Vera Cruz*, 139 F.3d at 662.

In ruling on this issue, *Vera Cruz* rejected the MPC’s definition as “inapposite to the Fourth Amendment context.” It pointed to the different purposes of the Model Penal Code definition and *Garner*’s deadly force rule:

The Model Penal Code is designed to govern criminal liability; *Garner*’s deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment. We decline to put police doing their jobs in the same category as criminals doing theirs....

Vera Cruz, 139 F.3d at 662. More importantly, however, *Vera Cruz* held that the “definition of deadly force is also at loggerheads with Fourth Amendment case law.” Because the “central consideration” under the MPC

definition is the “subjective intent of the actor,” that consideration is an “impermissible consideration in the Fourth Amendment context.”

While it makes perfect sense for criminal law purposes to consider whether “the actor uses [the force] with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury,” the question in police brutality cases is “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”

Vera Cruz, 139 F.3d at 662, quoting Model Penal Code § 3.11(2) and *Graham*, 490 U.S. at 397. Finally, *Vera Cruz* held that the MPC definition would turn the deadly force rule into a “serious bodily injury” rule, “rendering *Garner*’s distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in *Garner*.” *Vera Cruz*, 139 F.3d at 662.

In so holding, *Vera Cruz* noted that other circuits had adopted the Model Penal Code definition. However, it pointed out that two of the cases involved shootings, clearly “deadly force” after *Garner* and one decided well before *Garner* did not deal with the issue of what constitutes deadly force. *Vera Cruz*, 139 F.3d at 662, citing *Ryder*, *supra*; *Pruitt*, *supra*; and *Mattis*, *supra*. The court discounted the Sixth Circuit’s use of the MPC definition in *Robinette* as one that also did not consider the “substantial risk of causing ... serious bodily injury” prong of the MPC definition. *Vera Cruz*, 139 F.3d at 662.

After rejecting the MPC definition, *Vera Cruz* crafted its own: “[D]eadly force is that force which is reasonably likely to cause death.” *Vera Cruz*, 139 F.3d at 663. It held that there were two bases found in the Supreme Court’s reasoning in *Garner* to support such a restrictive definition. First was the comment in *Garner* that the use of deadly force “actually frustrates the interest of the criminal justice system because it is a ‘self-defeating way of apprehending a suspect If successful, it guarantees that [the criminal justice] mechanism will not be set in motion.”” *Vera Cruz*, 139 F.3d at 663, quoting *Garner*, 471 U.S. at 10. Second, the *Garner* Court concluded that “any law enforcement benefits, such as discouraging escape attempts, don’t outweigh a nonviolent suspect’s fundamental interest in his own life.” *Vera Cruz*, 139 F.3d at 663, citing *Garner*, 471 U.S. at 10-11. According to *Vera Cruz*, both of these considerations “hinge on the assumption that the use of deadly force threatens a suspect’s life.... Were this assumption relaxed ... these concerns would be implicated to a far lesser degree and the Court may well have struck the balance differently.” *Vera Cruz*, 139 F.3d at 663.

Applying its “reasonably likely to cause death” definition to the facts before it, the court stated that *Vera Cruz*

had presented no evidence at trial that police dogs can kill under any circumstances. It also stated that assuming that “under highly unusual circumstances” a police dog could kill a suspect, the prospect of “such an extreme aberration” only illustrates the point that the use of a dog does not carry with it a “reasonable probability of causing death.” *Vera Cruz*, 139 F.3d at 663, citing *Robinette*, 854 F.2d at 912 (no deadly force even though suspect bled to death after police dog bit him in the neck). *Vera Cruz* concluded:

Were the rule otherwise, all uses of force would be subject to *Garner*’s deadly force requirements because almost any use of force could cause death under peculiar enough circumstances. To be entitled to a deadly force instruction, a plaintiff must present evidence that the force used, in the circumstances under which it was used, posed more than a remote possibility of death. Because *Vera Cruz* presented no such evidence, the district court did not err in refusing to give a deadly force instruction.

Vera Cruz, 139 F.3d at 663. Finally, the court stated that a two-part test would apply to whether a particular use of force is reasonably likely to cause death: (1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy. “The greater the force, the less accurately it need be directed to cause death.” *Vera Cruz*, 139 F.3d at 663 n. 4 (distinguishing between a bullet fired directly at a victim and a bullet shot in the air as warning).

Smith v. City of Hemet

As noted at the beginning of this article, law enforcement groups can and have used the Ninth Circuit’s “reasonably likely to kill” definition to draw a clear line that non-firearm uses of force generally and the use of police dogs specifically can never be deadly force. *See, e.g.*, International Association of Chiefs of Police Training Key No. 559 (2003) (*Vera Cruz* provides “strong precedent” that the use of a canine is not deadly force). The Ninth Circuit’s rejection of *Vera Cruz*’s definition just seven years later has significant implications for future excessive force cases and in the depth of its analysis bearing on excessive force issues. *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005), cert. denied, 125 S. Ct. 2938, 162 L. Ed. 2d 866 (U.S. 2005) (deadly force is “force that creates a substantial risk of causing death or serious bodily injury”).

Smith is an *en banc* ruling with eleven out of the twenty-six active circuit judges on the Ninth Circuit participating in the decision. The majority opinion was written by Judge Stephen Reinhardt on behalf of eight judges in the majority. A dissenting opinion only addressed the *Heck* issue. None of the eleven judges on the *en banc* panel participated in the *Vera Cruz* case.

Facts

The circumstances surrounding the arrest of and injuries suffered by Thomas Smith were very different from those presented to the court in *Vera Cruz*. One night in August 1999, Thomas Smith's wife called 911 to report that he "was hitting her and/or was physical with her." *Smith*, 394 F.3d at 693. She informed the dispatcher that her husband did not have a gun, there were no weapons in the house and he was clad in his pajamas. *Smith*, 394 F.3d at 693. The first officer to arrive on the scene found Smith on the porch and asked him to remove his hands from his pockets. Smith refused to do so and went back into the house. Smith came back out, complied with the instruction to show his hands but then refused to put his hands on his head and walk towards the officer. *Smith*, 394 F.3d at 693.

When he refused a second time, another officer informed Smith that a police dog would be sent to subdue him and that it might bite him. With no warning, Smith was sprayed in the face with pepper spray, slammed against the front door, thrown onto the porch, and attacked by the police dog. The dog bit Smith on his right shoulder, neck area and arm. *Smith*, 394 F.3d at 694. As one of the officers attempted to secure Smith's arms, the canine officer ordered the dog to bite Smith again. The dog then bit Smith on his left side and shoulder blade. Once he was off the porch, Smith tried to shield one of his arms from the dog's attack. The canine officer ordered the dog to bite Smith a third time. The dog bit Smith on his buttocks. While this was happening, Smith was also pepper-sprayed four more times, with two of the sprayings occurring after the dog had broken his skin and one occurring after the officers had pinned him to the ground. *Smith*, 394 F.3d at 693. Paramedics eventually arrived and attended to his injuries.

Conviction Not a Bar

Smith pled guilty to resisting or obstructing a public officer under California Penal Code §148(a)(1), a misdemeanor. He was sentenced to 36 months probation. Much of the majority opinion in *Smith* focuses on the question of whether, under *Heck v. Humphrey*, this conviction barred Smith's § 983 action for unreasonable and excessive force under the Fourth Amendment. *Smith*, 394 F.3d at 695-99. Ultimately, the Ninth Circuit reversed the trial court's dismissal of his claim on this basis, concluding that the acts of excessive force underlying his § 1983 claim may have occurred *after* the acts on which his conviction may have been based (refusing to take his hands out of his pockets and refusing to put his hands on his head and turn around). Because it was not clear from the record whether the facts that underlay Smith's conviction occurred "during the course of his unlawful arrest," defendants were not entitled to summary judgment on the basis of *Heck v. Humphrey*. *Smith*, 394 F.3d at 699.

Excessive Force

Smith went on to determine whether the force used under the circumstances was excessive under the framework outlined in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). It pointed out that *all* claims that law enforcement officers have used excessive force (including deadly force) in the course of an arrest are analyzed under the "reasonableness" standard of the Fourth Amendment. *Smith*, 394 F.3d at 700, *citing Graham*, 490 U.S. at 396. That analysis requires balancing the "nature and quality of the intrusion" on the person's liberty with the "countervailing governmental interests at stake" to determine if the force was "objectively reasonable" under the circumstances. *Smith*, 394 F.3d at 701, *citing Graham*, 490 U.S. at 397. Although the *Smith* court looked at the three relevant factors included in the *Graham* opinion (severity of crime, threat to officers or others and whether suspect is resisting or fleeing), it also pointed out that *Graham* does not limit the "reasonableness" analysis to those factors alone. In some cases, "the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." *Smith*, 394 F.3d at 701, *citing Chew*, 27 F.3d at 1441 n.5 (other factors include whether a warrant was issued, whether the plaintiff was armed, whether more than one officer or one arrestee was involved, whether the plaintiff was sober, the nature of the arrest charges, and other "dangerous or exigent circumstances").

Smith looked to previous cases that held that because excessive force cases are so fact-intensive, "summary judgment in excessive force cases should be granted sparingly." *Smith*, 394 F.3d at 701, *citing Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002). In assessing whether the reasonableness of the force was an alternative basis for upholding the summary judgment, *Smith* looked first to the "quantum of force used to arrest Smith." It held that by even the defendant officers' own accounts, "the force used against Smith was severe." The Hemet Police Department's own policy classified both the uses of pepper spray and police dogs as "intermediate force," the most "severe force authorized short of deadly force." *Smith*, 394 F.3d at 701. Looking at the facts most favorably to Smith, the officers slammed him against a wall, threw him on the ground, pepper-sprayed him repeatedly and permitted the dog to attack him three times, the last time while he was pinned to the ground. *Smith*, 394 F.3d at 701. Further, although the officers flushed the pepper spray out of his eyes after his arrest, they did not flush it out of the wounds that resulted from the dog bites.

The *Smith* court then looked at the three *Graham* factors. First, there was no basis for believing that Smith was armed or posed a threat to anyone's safety. His wife informed the police that he had no weapons in the house. Once he removed his hands from his pajama pockets,

there was no reason for the officers to believe that he posed any “immediate threat to the safety of the officers or others.” *Smith*, 394 F.3d at 702 (noting that the defendant officers conceded that he posed no significant threat of death or serious injury). A rational jury could believe that at no time did Smith pose a danger to the officers or to others. Second, the nature of the alleged crime (he allegedly grabbed his wife’s breast very hard) provided “little, if any, basis for the officers’ use of physical force.” *Smith*, 394 F.3d at 703. Third, to the extent that Smith resisted arrest (by refusing to obey the officers’ commands), the officers admitted that “it lasted for only a brief time” and he showed no signs of fleeing. *Smith*, 394 F.3d at 703.

Finally, *Smith* assessed the availability of other methods that could have been used to capture or subdue Smith. On this point, Smith offered a declaration from a police training and standards expert who concluded that the officers could have and should have used control holds to complete the arrest rather than sic the dog on him once he was restrained on the ground. *Smith*, 394 F.3d at 703. A rational jury could rely on this expert evidence to assess whether the force used on Smith was reasonable.

Considering all of these factors, *Smith* concluded that the question of whether the force used was reasonable “cannot be resolved in favor of the defendants on summary judgment.” In so holding, it pointed out that in other cases, the court had held that many lesser uses of force “could be unreasonable in the particular circumstances.” *Smith*, 394 F.3d at 704, citing *Santos*, 287 F.3d at 853-54 (shoving); *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1130-31 (9th Cir. 2002), as amended, (Jan. 30, 2002) (using pepper spray on non-violent protesters).

Deadly Force

Smith addressed whether the use of the canine on Smith was unreasonable deadly force. The court pointed to the *Garner* test for deadly force, i.e., that it cannot be used “unless it is necessary to prevent escape and 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.” *Smith*, 394 F.3d at 704 (citing cases where the use of deadly force was held justified, such as where a suspect threatens an officer with a gun or a knife). Because there was no fact dispute in *Smith* that the use of deadly force would have been appropriate, the issue was actually whether the use of the dog constituted deadly force under the facts presented.

Smith revisited the question of what definition of deadly force was correct, given the lack of such a definition in *Garner*. It decided to reverse the earlier holding in *Vera Cruz* that deadly force means “force reasonably likely to kill.” *Smith*, 394 F.3d at 705. *Smith* adopted the traditional definition used by seven other circuits, one that is “identical in most respects to that set forth in

the Model Penal Code” § 3.11(2). *Smith*, 394 F.3d at 705. *Smith* recognized that under *Vera Cruz*, the Ninth Circuit stood alone in utilizing a definition that “upon reconsideration we find to be unduly restrictive.” *Smith*, 394 F.3d at 705. In reversing *Vera Cruz*, *Smith* recognized the importance of “consistency across jurisdictions” and the importance of adopting a definition “more compatible with the practicalities and realities of today’s physical confrontations.” *Smith*, 394 F.3d at 705.

In so holding, *Smith* stated that many of the concerns expressed in *Vera Cruz* were overstated. A definition including the phrase “substantial risk of serious bodily injury” is used by police officers in all fifty states as well as the District of Columbia and Puerto Rico, without “the difficulties we feared.” As important, it is the definition that the City of Hemet’s police department used at the time Smith was arrested. Thus, the traditional definition posed no more of a burden on law enforcement than they “have voluntarily chosen to impose upon themselves.” *Smith*, 394 F.3d at 706, citing *Garner*, 471 U.S. at 18-20 (discussing the importance of actual police department policies when adopting a Fourth Amendment rule).

Smith also addressed a key issue raised in *Vera Cruz*, the “alternative subjective component” that is contained in the MPC definition. In addressing this issue, *Smith* stated:

Like the *Vera Cruz* court, we attribute the inclusion of an alternative subjective component in the Model Penal Code definition to the fact that the Model Panel Code is primarily designed to govern criminal liability. However, the definition of deadly force used in the other circuits in § 1983 cases ... is designed for use in implementing the Fourth Amendment and necessarily differs in one minor respect from the Model Penal Code’s definition. For Fourth Amendment purposes, the objective part of the test must be employed In short, courts do not use the subjective alternative when they apply the “deadly force” test in § 1983 cases.

Smith, 394 F.3d at 706.

Smith held that under the objective part of the Model Penal Code definition, what is looked at is whether the force employed “creates a substantial risk of causing death or serious bodily injury.” Simply because that definition varies from the full Model Penal Code version “is no reason for us not to employ a test that is now universally accepted throughout the country.” *Smith*, 394 F.3d at 706.

Furthermore, simply because the Model Penal Code is used to evaluate the conduct of criminal defendants is no reason to reject it. Many courts, including the Supreme Court itself, have used the Model Penal Code “as persuasive authority in interpreting the Constitution.”

Both the police we honor and the criminals we prosecute are subject to the same binding Constitution. We refuse to fabricate a constitutional distinction between police and civilians that, far from being based on any constitutional explanation, has been overwhelmingly rejected by judges and law enforcement officials nationwide.

Smith, 394 F.3d at 706. *Smith* concluded by stating that it would leave to the district court on remand the opportunity to apply the new and “universally accepted definition” of the term “deadly force” to the facts presented.

Status of Case on Remand

Smith’s attorneys, Donald W. Cook and Robert Mann, have just filed a motion for partial summary judgment, to be heard October 17, 2005. The question put to the district court is whether the dog attack on Smith violated *Garner*’s deadly force rule as a matter of law. They argue that, based on the medical testimony of Dr. Peter Meade (plaintiff’s medical expert), a trained police dog like the one used on Smith was “likely to cause serious injury or death.” The dog not only “created a substantial risk of causing serious bodily injury to Mr. Smith” by biting him, but by biting him on his upper right arm, the dog attack “was reasonably likely to kill Mr. Smith.” Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Partial Summary Judgment and/or Summary Adjudication (09/19/05). They point to testimony from the officer who ordered the dog to bite Smith that he admitted that, had he been trained that his dog was “reasonably capable of causing serious injury,” he would not have let the dog bite. The officers conceded that they were not justified in using deadly force.

Applying the Deadly Force Definition in Other Non-Firearm Cases

One recent, but pre-*Smith*, case out of the Ninth Circuit demonstrates how significant the change to the now “universally accepted” definition of deadly force can potentially be in the context of the “realities of today’s physical confrontations.” *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), cert. denied, 124 S. Ct. 2871, 159 L. Ed. 2d 775 (U.S. 2004). In *Drummond*, Anaheim police officers responded to two different calls for medical assistance involving the same mentally ill man, Brian Drummond. In response to the first call, the officers determined that Drummond was not a danger to himself or others and therefore refused to transport him to a medical facility where he could obtain much needed medication. In response to a second call the next night, officers recognized Drummond, who was hallucinating, in an agitated state and at risk of hurting himself by running into traffic. *Drummond*, 343 F.3d at 1054. The officers called for an ambulance but before it arrived decided to take Drummond into custody “for his own safety.” *Drummond*, 343 F.3d at 1054.

One officer knocked Drummond to the ground where his arms were cuffed behind his back as he lay on his stomach. Although he offered no resistance, another officer “put his knees into Mr. Drummond’s back and placed the weight of his body on him.” A second officer also put his knees and the weight of his body on Drummond’s, with one knee on his neck. *Drummond*, 343 F.3d at 1054. Drummond weighed 160 pounds at the time and at least one of the officers weighed 225 pounds. With the two officers’ leaning on his neck and upper torso, Drummond fell into respiratory distress. Two eyewitnesses verified that he repeatedly told the officers that he could not breathe and that they were choking him. The officers did not respond to his requests and according to one of the eyewitnesses, “were laughing during the course of these events.” *Drummond*, 343 F.3d at 1054.

After about twenty minutes, the officers placed Drummond in a “hobble restraint,” which was used to bind his ankles. After the restraint was applied, Drummond lost consciousness. The officers performed CPR on him until paramedics arrived. Although he was revived after seven minutes, Drummond sustained brain damage and is now in a “permanent vegetative state.” *Drummond*, 343 F.3d at 1055. His medical expert submitted a declaration stating that to a reasonable medical probability, Drummond “suffered a cardiopulmonary arrest caused by lack of oxygen to his heart” caused in turn by his inability to breathe. This occurred when Drummond was placed face down on the ground “and the police officers set upon his back preventing the anterior wall of his chest from expanding.” *Drummond*, 343 F.3d at 1055.

On Drummond’s subsequent § 1983 claim against the officers and the City of Anaheim, the trial court held that there was no constitutional violation and even if there was, the law was not sufficiently clearly established that a reasonable officer would have known the conduct to be unconstitutional. Consequently, it held that all defendants were entitled to summary judgment as a matter of law.

On appeal, the Ninth Circuit reversed, holding that the “facts alleged constitute a constitutional violation.” It held, under the *Graham* test for excessive force claims, that “under the circumstances, the officers’ use of severe force was constitutionally excessive.” *Drummond*, 343 F.3d at 1063 (Anaheim Police Department’s own training bulletin warned officers that kneeling on a subject’s neck or back to restrain him can result in “compression asphyxia”). It also held that “under the circumstances, a reasonable officer would have had fair notice that the force employed was unlawful, and that any mistake to the contrary would have been unreasonable.” *Drummond*, 343 F.3d at 1063.

Because the question of whether “kneeling on a subject’s neck or back to restrain him” fits within the

definition of “deadly force” was not before the *Drummond* court, it did not rule on that issue. However, in determining that doing so was excessive force as a matter of law, the court assessed its severity:

Although the officers in this case did not shoot or beat Drummond, *the force allegedly employed was severe, and under the circumstances, capable of causing death or serious injury.* ... Under similar circumstances, in what has come to be known as “compression asphyxia,” prone and handcuffed individuals in an agitated state have suffocated under the weight of the restraining officers.

Drummond, 343 F.3d at 1056 (emphasis supplied). There is no doubt that had the “deadly force” question been before the court in *Drummond*, it would have ruled that the officers’ kneeling on his neck and back met the now “universally accepted” definition of being a “force that creates a substantial risk of causing death or serious bodily injury.” See also *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001) (force from cloth-cased, lead-filled rounds

fired from a 12-gauge shotgun “was obviously enough to cause grave physical injury” and thus excessive even if it did not meet the *Vera Cruz* test for “deadly force”).

Conclusion

Because of the significant victory in *Smith v. City of Hemet*, we have now entered a new era. *Smith* makes it clear that deadly force is not limited to firearms, that *Garner’s* deadly force rule applies to *any* police use of force that meets the definition. If a plaintiff presents evidence that the weapon, tactic or device creates a “substantial risk of death or *serious bodily injury*,” then he or she is entitled to have the force analyzed under *Garner* and not just *Graham*. Evidence of the risk of harm will necessarily require declarations from experts, either those familiar with the device or tactic or those with medical expertise in its effects. But moving your case into *Garner’s* strict scrutiny standard not only makes a judgment in your favor more likely, but it may have the ultimate effect of reducing the seemingly endless tide of cruel and deadly police tactics.