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Excluding what the officer didn't know at the time of the shooting

EFFECTIVE USE OF MOTIONS IN LIMINE CAN ENSURE THE JURY SEES ONLY THE RELEVANT FACTS IN AN EXCESSIVE-USE-OF-FORCE CASE

When a police officer uses deadly force, the legal question is not what we know now—it is what the officer knew then. This simple principle is often fiercely contested in courtrooms and shapes every evidentiary pre-trial battle in civil rights excessive-force cases. Defense attorneys routinely attempt to smuggle in post-incident information that was unknown to the officer at the time: a subject's criminal history, drug test results, toxicology reports, immigration status, and/or prior incidents unknown to the officer. The effect is predictable. The jury learns extremely prejudicial and marginally relevant evidence casting the victim in a bad light.

The good news for plaintiffs' lawyers: The law is unequivocal: Information unknown to the officer at the time of the use of force is irrelevant to the Fourth Amendment reasonableness inquiry. It was not part of the "totality of the circumstances." It cannot justify the force used. It should not reach the jury. The mechanism used to exclude this prejudicial evidence before it comes into trial is through one or more motions in limine. What this article addresses is how to use well-settled precedent effectively to ensure that only the evidence that should be considered is weighed by the jury.

The constitutional foundation: *Graham* and its progeny

The starting point is *Graham v. Connor* (1989) 490 U.S. 386. In *Graham*, the Supreme Court held that claims of excessive force by law-enforcement officers are analyzed under the Fourth Amendment's objective-reasonableness standard. The inquiry requires courts to assess whether the force was objectively reasonable "in

light of the facts and circumstances confronting" the officer, not the facts learned afterward. (*Id.* at 397.)

That phrase: "facts and circumstances confronting" has enormous evidentiary significance because it sets the temporal and perceptual universe within which the officer's conduct is judged. The standard is not what a reasonable officer would have known had she done more investigation; nor is it what a toxicologist later found in the decedent's blood. The standard is what the officer perceived, at that moment, on that call for service, based on the totality of the circumstances presented to the officer.

The Ninth Circuit has applied this principle repeatedly. In *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 873 n.8, the court was explicit that the prohibition against evaluating officers' actions "with the 20/20 vision of hindsight cuts both ways." (*Id.* at 873 n.8.) In *Hayes v. County of San Diego* (9th Cir. 2013) 736 F.3d 1223, 1232-33, the court affirmed that courts "can only consider the circumstances of which [the deputies] were aware when they employed deadly force."

The California Supreme Court has likewise adopted the *Graham* framework in evaluating objective reasonableness under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514.) Consistent with that approach, jurors are instructed through the standard civil jury instructions on how to assess reasonableness, including application of the *Graham* factors. (See CACI No. 1305B.)

What defendants try to introduce – and why each item must be excluded

The sample categories of excluded evidence follow a predictable pattern. Un-

derstanding each category, and the specific arguments for exclusion, is essential for effective pre-trial motion practice.

Substance use and toxicology

Defendants frequently seek to introduce evidence of a decedent's drug or alcohol use, particularly toxicology results on the date of the incident. The argument, rarely stated so baldly, is that the victim was under the influence and therefore dangerous to the officers and civilians. The problem: Post-incident toxicology reports disclose what was in the decedent's bloodstream, which is information the officer had no access to. An officer who observed behavior consistent with drug use had exactly that: observed behavior. The lab results tell a jury something the officer never knew.

In *Tabares v. City of Huntington Beach* (9th Cir. 2021) 988 F.3d 1119, 1125 n.6, the Ninth Circuit confirmed that unknown facts "are irrelevant to the reasonableness analysis." If the officer did not know the toxicology results, those results did not factor into the decision to use force and cannot retroactively justify it. The officers' observation, for example, that the subject appeared intoxicated or that dispatch mentioned possible drug use, may be relevant. What a laboratory discovered after the fact is not.

Although there is case law (*Boyd v. City & County of San Francisco* (9th Cir. 2009) 576 F.3d 938) that supports the toxicology reports may be relevant and admissible when used to corroborate an officer's initial impressions of the subject being under the influence, it's important in deposition to confirm what the officer knew and suspected at the time of the shooting.

The argument under FRE 401 and

402 is clear: Toxicology results unknown to the officer do not make any fact of consequence more or less probable. The officer's use of force must be judged against what the officer perceived. Unknown lab results are not part of that calculus.

Criminal history

A decedent's criminal record is among the most prejudicial evidence that the defense will seek to introduce. The implication is that a person with a criminal history is dangerous and therefore "deserved" what happened to them. This is exactly the kind of improper character inference the rules prohibit.

The evidentiary argument runs on parallel tracks. First, under FRE 401 and 402: if the officer did not know about the criminal history, it played no role in the decision to use force. It is therefore irrelevant to the liability question.

Courts in the Central District of California have agreed. In *Dunivin v. County of Riverside* (C.D. Cal. June 14, 2024) No. EDCV 21-0040 JGB (DTBx), 2024 WL 3468785, at *6, the court held that "evidence of his criminal history is irrelevant and prejudicial as to the question of liability..." Similarly, in *Tucker v. County of Riverside* (C.D. Cal. Oct. 4, 2018) No. EDCV 16-2274 JGB (DTBx), 2018 WL 6074550, at *2-4, the court excluded criminal history information unknown to the officers.

Second, under FRE 404, character evidence is not admissible to prove that a person acted in conformity with that character on a particular occasion. *Gates v. Rivera* (9th Cir. 1993) 993 F.2d 697, 700, is explicit: "Character evidence is normally not admissible in a civil rights case." For character evidence to be admitted, character must be an essential element of the claim or defense. It is not. Admission of a prior conviction carries a near-certain risk that the jury concludes the decedent was dangerous and the shooting was therefore understandable; exactly the kind of decision on an improper basis that FRE 403 exists to prevent.

Defendants will likely argue that

criminal history is relevant to damages; i.e., because the individual was incarcerated and away from his family, then that detracts from the loss of love, comfort, society, and companionship. (See *Castro v. Cnty. Of L.A.* No. 2:13-cv-06631, 2015 WL 4694070 at *4 ["Decedent's periods of prior incarceration are relevant to noneconomic damages, since incarceration would tend to reduce the amount of 'society and comfort' decedent could provide to his family"].) However, the court can take the same approach as the court in *Castro* and have the parties refer to periods of incarceration as "time away from home" to avoid unfair prejudice. (*Ibid.*)

It's important to understand periods away from the family that the decedent went through and whether or not this period is relevant or marginal and should be excluded.

Restraining orders and prior family incidents

Defendants in domestic-disturbance shooting cases often attempt to introduce the underlying details of any restraining order against the decedent, or prior incidents with family members. The underlying argument is that it demonstrates dangerousness and volatility, thus justifying the shooting. The problem, however, is that the officer frequently does not know the details and only knows what was dispatched over the radio or in the CAD transmissions.

The distinction between general knowledge and specific facts matters here. If dispatch told the officer that there was a possible restraining-order violation, that general information may be relevant because the officer knew it. But the specific filings, the underlying incidents described in declarations, the details of what precipitated the order, if the officer was unaware of those details, have no bearing on reasonableness of the use of deadly force.

This is a factual predicate argument. Counsel should establish at deposition and through dispatch records exactly

what information was transmitted to the officer before and during the call. The motion in limine can then be precisely tailored: not excluding all reference to the restraining order and/or other family dispute, but excluding the specific underlying details the officer did not know. The more granular your exclusion request, the harder it is for the defense to argue you are seeking to hide relevant context.

The hearsay problem

Defendants often introduce unknown information through documents: RAP sheets, toxicology reports, restraining order filings, and medical records. Each of these raises a separate exclusionary argument: hearsay.

Under FRE 801 and 802, an out-of-court statement offered for the truth of the matter asserted is hearsay and is inadmissible unless a recognized exception applies. A toxicology report prepared by a lab technician after the incident is a statement by the technician about what they found. A RAP sheet is a record of prior convictions and arrests. Both are hearsay. The fact that they might otherwise qualify as business records under FRE 803(6) does not resolve the relevance problem; a document can be non-hearsay and still be irrelevant.

Counsel should raise the hearsay objection as an additional ground, not a primary one. The relevance exclusion under FRE 401/402 and the prejudice exclusion under FRE 403 are typically more powerful arguments. But hearsay provides a fallback and, importantly, signals to the court that plaintiffs have thought through every angle. Additionally, in cases where defendants attempt to introduce prior criminal history, courts will require a certified copy of a criminal conviction and cannot rely on hearsay evidence to establish criminal history or other prejudicial evidence.

Structuring the motion in limine

A motion in limine on this issue should be organized around two core ar-

guments with the character evidence and hearsay points as supporting columns.

Lead with the constitutional framework.

Judges in civil rights cases are familiar with *Graham*. Ground the motion in the principle before you get to the rules of evidence. The constitutional analysis drives the evidentiary analysis: The Fourth Amendment standard requires the court to evaluate the officer's conduct against what the officer knew. That constraint logically means that what the officer did not know is outside the relevant inquiry. The rules of evidence give those constitutional principles specific, enforceable teeth.

Develop the FRE 401/402 argument with precision. The key is to establish the factual predicate: What did the officer actually know? Use deposition testimony, dispatch logs, incident reports, and body camera footage to build a clear record of the officer's pre-shooting knowledge. Then map each category of disputed evidence against that record. If the officer's deposition establishes that she had no knowledge of the decedent's prior convictions before arriving on scene, the logical inference is clear – the criminal history had zero influence on the decision to use force and is therefore irrelevant to the liability question.

Layer in FRE 403. Even if a court finds some marginal relevance in disputed evidence, perhaps it speaks to damages, FRE 403 provides a second gate. The danger of unfair prejudice from introducing a decedent's criminal history or drug history to a jury is substantial. The jury cannot be expected to process that information in a vacuum; it will inevitably affect the jurors' sympathy and their evaluation of whether the officer's conduct was reasonable.

Courts have consistently recognized this risk. (*United States v. Hankey* (9th Cir. 2000) 203 F.3d 1160, 1172-1173; *Larez v. City of Los Angeles* (9th Cir. 1991) 946 F.2d 630, 641 n.5.)

Address FRE 404 separately for character

evidence. The character evidence prohibition deserves its own section. Rule 404(a)'s bar on character-conformity evidence is categorical. The defense cannot introduce evidence of a decedent's history of violence, gang affiliation, or drug use to argue that he was acting violently or was dangerously impaired on the day of the incident. *Gates v. Rivera* makes clear that this applies in civil rights cases. Character must be an essential element of a claim or defense, which it is not here.

Request bifurcation in the alternative. If the court is inclined to deny the motion on relevance grounds, perhaps concluding that some of the excluded evidence is relevant to damages even if not to liability, request bifurcation. Separating the liability phase from the damages phase allows the jury to decide whether the use of force was unreasonable without the distorting influence of the decedent's history. If they find liability, the damages evidence can come in during the second phase when the context is appropriate.

Practical tips for the hearing

Judges can push back with a variation of this argument: "Counsel, doesn't the jury deserve the full picture?" The answer is that the full picture is the picture the officer had. That is what the Fourth Amendment requires. The jury is not assessing whether the decedent was a good person or a dangerous person in the abstract, it is assessing whether the officer's use of force was objectively reasonable under the circumstances the officer faced. Expanding the evidentiary universe beyond those circumstances does not give the jury more information; it gives the jury the wrong information.

Be prepared to distinguish cases where courts have admitted some background information. Some courts have allowed evidence of the officer's general knowledge about a subject (prior contacts, dispatch information) while excluding specific unknown details. That distinction is important and defensible. The motion should not overreach by

seeking to exclude everything the defense might want to introduce about the decedent; it should be targeted at genuinely unknown information. Precision strengthens the motion.

Anticipate the damages carveout. Defense counsel will argue that even if the evidence is irrelevant to liability, it is relevant to damages, specifically, to the value of the decedent's life and that it is relevant to the loss of love, comfort, society and companionship.

There is merit to this argument in some cases. But the appropriate remedy is not to let the evidence in during a unified trial. It is to bifurcate. The liability jury should not be asked to evaluate the merits of the officer's actions while simultaneously processing information about the victim's criminal record. Or, in many cases, the remedy is to propose to the trial judge to use terms such as "time away" from family (for incarcerations) or other terms that don't cause undue prejudice under FRE 403.

A note on the "known and unknown" framing

The title of this article deliberately captures both sides of the evidentiary issue. Plaintiffs must fight on two fronts.

The first is keeping out what the officer did not know. That is the subject of this article and the easier of the two battles. The case law is clear. The argument is well developed.

The second, and equally important, is ensuring the jury hears everything the officer did know, and that the jury understands the limitations of that knowledge. In the typical excessive-force case involving someone who appeared to be under the influence of drugs, the officer knew very little. The officer knew there was a call. The officer knew dispatch had relayed some general information. The officer arrived and made a series of rapid decisions based on incomplete information.

The jury must understand how limited that information was, not only to

establish why the officer's decision was unreasonable, but also to underscore why the post-incident evidence the defense wants to introduce is so irrelevant.

That limitation argument is not just evidentiary. It is the heart of the liability case. An officer with minimal information about a subject who appeared impaired and was not armed did not have the information necessary to conclude that lethal force was justified. The more the jury understands about what the officer did not know, the more clearly the officer's decision appears unreasonable, and the more obviously the defense's post-incident evidence appears to be an attempt to substitute hindsight for the constitutional standard.

Conclusion

The *Graham* "totality of the circumstances" standard is what the jury should be focusing upon at trial. The officer's decision must be judged against what the officer knew, not what a toxicologist found, not what a background check would have revealed, and/or not what a family member knew about the decedent's history. The Federal Rules of Evidence: relevance, prejudice, character, hearsay, give plaintiffs' counsel the tools to hold the defense to that standard at trial.

File the motion early. Brief it thoroughly. Ground every argument in the constitutional framework before moving to the evidentiary rules. And if the court

is inclined to let some of the evidence in, ask for bifurcation because a jury that decides liability without the distorting influence of the victim's background is a jury that will apply the law as it is written.

The law is on your side. Make the court enforce it.



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