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LAW REVIEW

"SUICIDE BY POLICE" IN SECTION 1983 SUITS: RELEVANCE OF POLICE TACTICS

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"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics

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I. INTRODUCTION

The term "suicide by police" describes a situation in which a suicidal, distraught and often unbalanced individual comes into contact with law enforcement officers and, through his or her life threatening actions, precipitates or causes the police to retaliate in self-defense or defense of others by killing the person. The term has been academically defined as a situation in which "[i]ndividuals, bent on self destruction, engage in life threatening and criminal behavior in order to force the police to kill them."[1]

An increase in the incidence of "suicide by police" has focused attention on how various federal and state courts have dealt with the issue of police tactics in these situations. In the Section 1983[2] civil rights suit, most federal courts have taken a fairly restrictive view of the circumstances under which police tactics leading up to a shooting may be the basis for a claim. In some courts, however, a much broader view has been taken, and the police have been successfully sued as a result of allegedly poor tactics. While agreeing that there must be some basis for looking at police tactics, this law review article asserts that any such scrutiny must give deference to the fact that "suicide by police" situations are ambiguously dangerous and that there is little evidence that any particular tactics lead to satisfactory outcomes across situations.

This thesis is drawn by first examining the evolution of the relatively recent term "suicide by police" and similar terms. Next, the article summarizes the law of the federal circuits relating to a determination of "objective reasonableness" under the Fourth Amendment focusing on the specific fact patterns and time-frames of

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1. Vernon J. Geberth, *Suicide-by-Cop: Inviting Death From the Hands of a Police Officer,* LAW & ORDER, July, 1993, at 105.

2. 42 U.S.C. § 1983 (1994). The term "Section 1983" refers to all lawsuits brought under this act.

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police shootings that have led to excessive force civil rights litigation. With this analysis in hand, the few true "suicide by police" cases are examined with an emphasis as to how the specific "suicide by police" and/or "death wish" evidence was handled by the various trial and reviewing courts. This article then surveys the relevance and thus general admissibility of police tactics in various excessive force police shooting cases. Differences in the treatment of this evidence by the various circuits and state courts is also examined, culminating in a close discussion and analysis of two recent "suicide by police" cases, one from California and the other from Michigan.

II. EVOLUTION, USE AND ANALYSIS OF THE PHRASE "SUICIDE BY POLICE"

While it is not a matter of clear record as to when the phrase "suicide by police" or the related terms "suicide by cop" and "police assisted suicide" first appeared in our legal lexicon, the notion itself may date back as far as Section 1983.[3] The concept of "suicide by police" was treated academically as early as 1985 in a forensic medical journal that described a case of "provoked shooting by police as a mechanism for suicide."[4] By 1991, a more colloquial version of the phrase "suicide by police" (i.e. "suicide by cop") appeared in a California newspaper article that stated, "[s]uicide-by-cop is a growing problem in San Diego."[5] This article is thought to be the first printed use of the phrase "suicide by cop." It appears that the newspaper media prefer the more informal "suicide by cop" term.[6] For purposes of this article, the phrases are treated synonymously.

While the term "suicide by cop" has been used informally at least since the early 1980s, the first references in the scholarly and professional literature date to 1992.[7] In 1993, two studies of the "suicide by police" concept were published that looked at specific cases.[8] "Suicide by police" continued to gain recognition in the field of criminal justice. The phenomenon was occurring with such

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3. Alan Feuer, *Drawing a Bead on a Baffling Endgame: Suicide by Cop*, N.Y. TIMES, June 21, 1983, at A3. The journalist attributes the initial coining of the phrase "suicide by cop" to Los Angeles County Medical Examiner Karl Harris.

4. R. N. Jenet & R. J. Segal, *Provoked Shooting as a Mechanism for Suicide*, AM. J. MED. & PATH. 6 at 274-75.

5. Clark Brooks, *Suicide by Cop*, SAN DIEGO UNION-TRIBUNE, Aug. 26, 1991, at C1.

6. *See, e.g.*, Brian Murphy, *Spree Suspect May Have Wanted to Die*, DETROIT FREE PRESS, Feb. 1, 2000, at 2B. *See also* Feuer, *supra* note 3; Brooks, *supra* note 5.

7. Gary W. Noesner & John T. Dolan, *First Responder Negotiation Training*, FBI L. ENF. BULL., Aug., 1992, at 1-4; William A. Geller & M. Scott, *Deadly Force: What We Know*, WASHINGTON, D.C., POLICE EXEC. RES. FORUM, 1992.

8. Geberth, *supra* note 1, at 105; C. R. Van Zant, *Suicide By Cop*, 60 POLICE CHIEF, at 24-30 (1993).

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regularity in police shootings that in 1998, five separate studies appeared on various aspects of the subject.[9] One of these studies examined all shootings by the Los Angeles County Sheriff's Department from 1987 through 1997 and concluded, under strict criteria, that as many as 10 percent of the shootings were incidents of "suicide by police." In the last year of the study, 1997, the rate of the suicidal shootings rose to a surprising 25 percent.[10]

The co-author of this law review article, Professor Robert Homant, co-authored a comprehensive study of the "suicide by police" phenomenon for publication in the *Journal of Criminal Justice.*[11] In this study, the authors collected all known incidents of "suicide by police." They included the incidents published in all the prior studies, incidents taken from the few reported court decisions as well as from various newspaper accounts, and incidents referred to the authors by criminal justice professionals. In all, the Homant study analyzed a total of 123 police shooting incidents classified as "suicide by police."[12] The widely varying factual scenarios of these incidents were then categorized and rated for a "dangerousness" factor on both a real and perceived basis.[13] The results of the incident categorization were then analyzed regarding their relative dangerousness, lethality, pathology and planning, effect on the shooting officer, and other situational variables (e.g., reason for police response, duration of incident, and number of officers on the scene).[14] The authors concluded from their analysis:

> With a federal appellate court case focusing on the issue, medical examiners calling for categorizing such deaths, a spate of recent media attention, and several current studies documenting its frequency, there can be little doubt that police officer assisted suicides is a topic whose time has come. As this phenomenon receives more media and professional/academic attention, one unfortunate by-

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9. H. Range Hutson, et al., *Suicide by Cop,* 32 ANNALS EMER. MED., at 665-69 (1998); Daniel B. Kennedy, *Suicide by Cop,* FBI L. ENF. BULL, Aug., 1998, at 21-27; V. B. Lord, One Form of Victim Precipitated Homicide: The Use of Law Enforcement Officers to Commit Suicide (1998) (unpublished paper presented at Annual Meeting of Academy of Criminal Justice Sciences, Louisville, KY) (on file with the *University of Detroit Mercy Law Review*); Richard B. Parent & Simon Verdun-Jones, *Victim-Precipitated Homicide; Police Use of Deadly Force in British Columbia,* 21 POLICING 432 (1998); Edward F. Wilson, et al., *Homicide or Suicide: The Killing of Suicidal Persons by Law Enforcement Officers,* 43 J. FORENSIC SCI. 46 (1998).

10. Hutson, et al., *supra* note 9.

11. Robert J. Homant, et al., *Real and Perceived Danger in Police Officer Assisted Suicide,* J. CRIM. JUST. at 1-10 (forthcoming May 2000).

12. *Id.*

13. *Id.*

14. *Id.*

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product may be the encouragement of marginally suicidal individuals to try this method.[15]

If this turns out to be true and the rate of "suicide by police" shootings increases, as strongly suggested in a recent analysis of the Los Angeles County Sheriff shootings, [16] courts can expect to be faced with increasing civil rights litigation asserting police use of excessive force in "suicide by police" incidents. This, in turn, will bring police tactics into focus in such cases. Indeed, court cases have now begun to emerge in which the plaintiff has first raised the issue of "suicide by police," in order to make the argument that the police used improper tactics in handling suicidal individuals. It is the purpose of this article to review the relevance of "suicide by police" for determining the objective reasonableness of a police shooting.

III. CIVIL RIGHTS SUITS ALLEGING EXCESSIVE FORCE

The normal vehicle for a plaintiff to seek redress for an unjustified police shooting is a Section 1983 suit. This civil rights law prohibits violations of citizens' constitutional rights by agents of state government, including police officers. [17] "Suicide by police" lawsuits brought under Section 1983 typically include claims for "excessive force," "failure to train" (the law enforcement officer) and state law assault and battery. According to a 1996 study, the Section 1983 civil rights suit is "the most utilized and lucrative form of liability litigation against law enforcement officers."[18]

When a police officer shoots someone in the line of duty, this shooting is generally considered to be a "seizure," or an arrest. The issue is whether the shooting constituted excessive force, and thus was a violation of Fourth Amendment rights.[19] The question of whether the force was excessive is analyzed under the "objective reasonableness" standard, first articulated by the United States Supreme Court in *Graham v. Connor*.[20] When this standard is applied to a police shooting, it in effect means that the shooting officer(s) must have a reasonable belief that deadly force is necessary, given the facts as known (or reasonably believed) at the instant of the

15. *Id.*

16. Hutson, *supra* note 9.

17. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* created a parallel means of litigation against federal law enforcement agents.

18. D. K. Chiabi, *Police Civil Liability: An Analysis of Section 1983 Actions in Eastern and Southern Districts of New York*, 21 AM. J. CRIM. JUST. 83 (1996).

19. *See* Tennessee v. Garner, 471 U.S. 1, 7-22 (1985).

20. 490 U.S. 386, 388 (1989).

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shooting.[21] The necessity for deadly force, in turn, is governed by *Tennessee v. Garner*,[22] which requires that the person shot pose an immediate threat of serious physical harm to the officer or others.[23]

In making the determination of objective reasonableness in the deadly force context, the *Tennessee v. Garner* Court instructed subsequent courts to consider the "totality of the circumstances."[24] The more delicate inquiry thus becomes how broadly or narrowly to view these circumstances.

A. *Admissibility of Pre-Seizure Evidence*

1. *How the Federal Circuits Have Ruled*

Because the relevant facts for determining whether a shooting is objectively reasonable include only those facts known to the officer at the time of the shooting, neither the intentions nor motives of the police officers nor of the subject are directly relevant.[25] The *Graham* Court expressly proscribed the use of hindsight when assessing the circumstances surrounding a police shooting for reasonableness.[26] Thus, whether a person was attempting "suicide by police" when he came at officers with a knife is not relevant; what matters is the degree of danger that a reasonable officer would perceive himself (or others) to be in, given what the shooting officer was aware of at the time. This principle was clearly articulated by the Seventh Circuit in *Palmquist v. Selvik*,[27] the first reported decision involving a true suicide by police case.

While the "suicide by police" scenario is a relatively novel twist to recent Section 1983 litigation, the admissibility of circumstances surrounding a police shooting, particularly the occurrences leading up to the police confrontation, is an often-litigated issue in excessive force lawsuits. Despite uniformity in the circuits regarding the requisite focus on the immediate time frame of the shooting, the federal circuits have differed slightly as to the precise scope of this time frame analysis. The central issue in all such cases is whether the

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21. *Id.* at 396.

22. 471 U.S. 1 (1985).

23. *See id.* at 11. The Supreme Court in *Garner* gave the example of preventing the escape of an offender who has committed a crime involving the threatened infliction of serious physical harm as a situation in which deadly force may be used. Nevertheless, courts are often inclined to impose a more restrictive definition of "immediate danger."

24. *Id.* at 8-9.

25. *Graham*, 490 U.S. at 388.

26. *Id.* at 396.

27. 111 F.3d 1332 (7th Cir. 1997).

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"circumstances confronting [the officers]"[28] are limited to the moments immediately preceding the shooting incident or whether the scope of such circumstances also may include prior actions of the suspects and of the officers as well as other events occurring over the span of the entire confrontation incident. A majority of the circuits have adopted a narrow time-frame analysis when making the crucial determination of the constitutional reasonableness of the officers' shootings.

The Sixth Circuit addressed this inquiry in *Dickerson v. McClellan.*[29] In that case, police officers arrived at the scene with information that nine shots had been fired by a drunk and disorderly person at a private residence. The police allegedly entered the residence with guns drawn and without announcing their presence, as police policy arguably required. Dickerson was shot and killed.[30] In their Section 1983 lawsuit, plaintiffs asserted "that the conduct preceding the shooting is relevant to the issue of the objective reasonableness of the force."[31]

The Sixth Circuit's *Dickerson* panel recognized that the critical issue in the case was to determine "how broadly to view the circumstances relevant to the excessive force issue," and concluded that the scope of the inquiry was limited to the moments immediately preceding the shooting.[32] In so limiting the scope of the inquiry, the *Dickerson* panel relied on the analysis of two Sixth Circuit cases as well as decisions from several other circuits.[33]

One of the decisions relied upon by the *Dickerson* court was *Plakas v. Drinski,*[34] where the Seventh Circuit stated:

> The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble, which the police officer is sworn to cause, which society pays

28. *Graham,* 490 U.S. at 397.

29. 101 F.3d 1151 (6th Cir. 1996).

30. *Id.* at 1154-55.

31. *Id.* at 1160.

32. *Id.* at 1161-62.

33. *Id. See, e.g.,* Russo v. City of Cincinnati, 953 F.2d 1036, 1044-45 (6th Cir. 1992). Police conduct was broken into three distinct phases with the police force escalating from non-deadly force, *e.g.,* use of a taser, to deadly force. *See also* Pleasant v. Zamieski, 895 F.2d 272, 276 (6th Cir. 1990). Determination of the reasonableness of the police conduct was broken into two segments: (1) the police decision to draw weapons, and (2) the decision not to return the weapon to its holster.

34. 19 F.3d 1143 (7th Cir.), *cert. denied,* 513 U.S. 820 (1994).

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> him to cause and which, if kept within constitutional limits, society praises the officer for causing.[35]

Following this analysis, the *Drinski* panel, like the Sixth Circuit in *Dickerson*, "carved up" the incident into segments, the last of which involved the use of deadly force against the suspect. In doing so, the court noted that it could "not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct."[36]

The Seventh Circuit's seminal decision on the time-frame issue in excessive force cases is *Sherrod v. Berry*.[37] The *Sherrod* panel viewed the time-frame inquiry very narrowly, holding:

> Knowledge of facts and circumstances gained after the fact . . . has no place in the. . .jury's post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise, . . . the jury would possess more information than the officer possessed when he made the crucial decision. Thus, we are convinced that the objective reasonableness standard . . .requires that [the officer's] liability be determined exclusively upon an examination and weighing of the information [the officer] possessed *immediately prior to and at the very moment he fired the fatal shot.*[38]

Consequently, the Sixth and Seventh Circuits would exclude all pre-seizure evidence of a suspect's "death wish" or other circumstances making it possible to characterize a specific suspect as suicidal. The narrow scope of the time-frame analysis in these circuits significantly pares down the ability of either the excessive force claimant or the defending police officer to cast the incident as one of a "suicide by police."[39]

The Eighth Circuit, in *Gardner v. Buerger*[40] cited the *Sherrod* decision of its sister circuit in ruling that, "unreasonable police behavior before a shooting does not necessarily make the shooting unconstitutional; we focus on the seizure itself – here, the shooting – and not the events leading up to it."[41] Similarly, the Eleventh Circuit

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35. *Id.* at 1150.

36. *Id.*

37. 856 F.2d 802 (7th Cir. 1988).

38. *Id.* at 805 (emphasis added).

39. Not all pre-seizure evidence, if admitted, automatically attaches to the benefit of the police officer. *C.F., e.g., Sherrod,* in which the plaintiff successfully introduced at trial pre-seizure evidence that he was unarmed and this evidentiary ruling was deemed error, and *Palmquist,* in which police unsuccessfully tried to introduce pre-seizure evidence at trial of the decedent's "death wish," along with other suicide by police evidence.

40. 82 F.3d 248, 253 (8th Cir. 1996).

41. *Id.*

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also followed a Seventh Circuit ruling (the *Drinski* decision) when adopting a narrow time-frame analysis of a police shooting.[42]

The Fourth Circuit, in two cases involving exclusion of pre-seizure evidence indicating that the shooting officers did not follow proper police procedures, adopted a narrow scope of the shooting time-frame in ruling that the officers' actions were constitutionally reasonable despite their purported failure to follow police policy to the letter.[43] In contrast to the narrow time-frame analysis adopted by the Fourth, Sixth, Seventh, Eighth and Eleventh Circuits, the Tenth Circuit adopted a broader scope in *Allen v. Muskogee.*[44] In this case, the entire police confrontation lasted approximately 90 seconds and involved officers' attempts to disarm the suspect while he sat in his vehicle. Officers were attempting to disarm the suspect when he began shooting in the direction of several of the officers and was subsequently killed by the officers' return fire.[45]

In reversing the granting summary of judgment for the officers, the *Allen* panel addressed the objective reasonableness inquiry:

> The reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force. . . . We will thus consider an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force.[46]

While the effect of the Tenth Circuit's ruling in *Allen* concerned whether genuine issues of material fact existed relative to defendant police officers' summary judgment, the case could be used in Tenth Circuit "suicide by cop" cases, or in excessive force cases in general, to support the admissibility of pre-seizure evidence concerning the objective reasonableness of the police tactics.

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42. Menuel v. City of Atlanta, 25 F.3d 990, 996-97 (11th Cir. 1994).

43. *See* Drewitt v. Pratt, 999 F.2d 774, 778-79 (4th Cir. 1993). *See also* Greenridge v. Ruffin, 927 F.2d 789, 791-92 (4th Cir. 1991). In *Drewitt,* the non-uniformed officer allegedly failed to display his badge while making an investigatory stop of a motorist; whereas in *Greenridge,* the police allegedly violated procedure relative to effecting a nighttime prostitution arrest.

44. 119 F.3d 837 (10th Cir. 1997).

45. *Id.* at 839.

46. *Id.* at 840 (quoting Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 (10th Cir. 1995)).

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2. *Palmquist v Selvik:*[47] *The First True "Suicide by Police" Decision*

The Seventh Circuit decision in *Palmquist v. Selvik,* stemmed from an incident that occurred in Bensenville, Illinois in 1990. The Bensenville police responded to an early morning call to the effect that Paul Palmquist had been screaming obscenities and incoherent statements, had broken his neighbor's windows, and had threatened to kill the newspaper delivery person.[48]

The police encountered Palmquist brandishing a long, rusty muffler pipe and a fan blade.[49] When the officers attempted to arrest Palmquist, he refused to cooperate. He spread his arms wide, exposing his chest, and invited offices to kill him.[50]

After several more verbal exchanges, during which Palmquist repeatedly challenged police to kill him, Palmquist eventually swung his pipe at an officer who had slipped and fallen.[51] At this point, Officer Selvik shot Palmquist two or three times in the leg. Palmquist fell, but got back up and said to Selvik, "You only winged me—you'll have to kill me."[52] He then swung the pipe in the direction of Selvik.[53] Shots directed at Palmquist's pipe-wielding arm failed to stop him, and Selvik eventually fired a total of 17 times, hitting Palmquist 11 times and killing him.[54]

Palmquist's mother brought a Section 1983 suit claiming excessive force in the seizure of her son as well as inadequate training by the Village of Bensenville.[55] The case was bifurcated into separate liability and damages trials. Following the trials, the jury awarded Mrs. Palmquist $165,000.[56]

Officer Selvik claimed on appeal that the trial court improperly excluded evidence of Palmquist's "death wish," and that such evidence amounted to "suicide by police."[57] The excluded testimony concerned, among other things, the fact that Palmquist had told a friend just the previous day that he intended to provoke the police to kill him.[58] According to another friend, Palmquist had lost his job about a month earlier, his drinking problem had worsened, he was

47. 111 F.3d 1332 (7th Cir. 1997).
48. *Id.* at 1335.
49. *Id.*
50. *Id.*
51. *Id.* at 1336.
52. *Id.*
53. *Palmquist,* 111 F.3d at 1336.
54. *Id.*
55. *Id.*
56. *Id.* at 1337.
57. *Id.*
58. *Id.* at 1338.

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depressed, and he wanted to die.[59] A neighbor who lived in the apartment below Palmquist also stated that Palmquist had told him about one month before the incident that he wanted to be killed by the police.[60]

Both the trial court and the Seventh Circuit seemed inclined to find some relevance for Selvik's proffered suicide evidence and some admissibility for this evidence, even if for a limited purpose. The trial magistrate judge, for example, initially only partially excluded the suicide evidence and the other pre-seizure evidence.[61] In the trial court's initial ruling on plaintiff's motion in limine, it allowed evidence of Palmquist's arrest on the evening prior to the confrontation for Driving Under the Influence (DUI) and marijuana possession.[62] More significantly, the court ruled that Officer Selvik could present the "suicide by police" evidence under the Federal Rule of Evidence 404 (a) (2) "first aggressor" exception to the inadmissibility of character evidence stating the suicide evidence could be used to determine Palmquist's motive and intent.[63]

This ruling was short lived, however, as the trial magistrate judge subsequently clarified his evidentiary ruling by limiting the admission of the "death wish" evidence for the limited purpose of corroborating or rebutting factual eye-witnesses.[64] The trial court further trimmed its initial ruling on the suicide evidence by allowing a cautionary jury instruction to the effect that the "death wish" evidence was irrelevant to the excessive force claim.[65] Shortly before trial, plaintiff was able to obtain reconsideration of the suicide evidentiary ruling. Relying squarely on the *Sherrod* decision, the trial court excluded all "suicide by police" and "death wish" evidence.[66] Thus, at the time of trial, Officer Selvik could proffer to the jury evidence of only those facts of which he was aware on the morning of the shooting.

On appeal, the Seventh Circuit essentially agreed with the logic of the trial court's ruling and upheld the award insofar as it pertained to the excessive force claim.[67] The *Palmquist* panel took care to note, however, that much testimony concerning "suicide by police" had in

59. *Palmquist*, 111 F.3d at 1338.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1339.
65. *Palmquist.* 111 F.3d at 1339.
66. *Id.*
67. *Id.* at 1344-46. The "failure to train" verdict rendered against the Village of Bensenville was reversed on grounds that plaintiff's evidence on this claim was insufficient. *Id.* at 1343-47.

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fact been admitted.[68] All of the testimony concerning Palmquist's asking the officers to shoot him had been admitted as known to Selvik at the time of the shooting.[69] Furthermore, both sides' experts, in commenting on the appropriateness of the police response, described the case as being about "suicide by police."[70] The appellate court then buttressed its support of the trial court's exclusion of the additional testimony by asserting that such testimony would have been cumulative and prejudicial,[71] and if excluded improperly by the trial court, the exclusion would amount to harmless error.[72] The court's basic premise seemed to be that such evidence would have been admissible had it served to help resolve a significant factual dispute. Without such a factual dispute, however, the "suicide by police" and "death wish" evidence would have taken the jury's focus away from Palmquist's behavior (which was essential in the reasonableness determination) and placed facts before the jury of which even Officer Selvik himself was not aware at the time of the shooting.[73]

Like the trial court, the Seventh Circuit in *Palmquist*, despite its decision upholding exclusion of the "suicide by police" evidence, seemed predisposed to finding some way in which the evidence could be admitted. Consider the following strongly worded dicta:

> Unlike the analysis of admission of this character evidence during the liability phase, a more persuasive argument can be made for its admission during the damages phase. Evidence that Palmquist wanted the police to kill him is directly relevant to his life expectancy. Exclusion of this evidence could have had a highly prejudicial impact on the jury's ultimate award to the plaintiff of $165,000.... Statements that Palmquist wanted to die certainly affected how long he would be expected to live, and thus what amount of money to award his mother and his estate.[74]

The *Palmquist* panel continued in dicta to admonish Officer Selvik's appellate counsel for failing to properly develop and argue this point on appeal, citing case law that effectively tied the court's hands from ruling on this aspect of admissibility of the "suicide by police" evidence.[75]

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68. *Id.* at 1341.
69. *Id.*
70. *Palmquist*, 111 F.3d at 1341.
71. *Id.*
72. *Id.* at 1342.
73. *Id.* at 1340.
74. *Id.* at 1342.
75. *Id.*

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In sum, then, according to *Palmquist*, either side may introduce testimony about "suicide by police" if it was (or should have been) known to the police that this is what the subject was attempting (and presumably this knowledge should have had some bearing on police tactics), or if information about the subject's motivation had sufficient probative value to help resolve a dispute as to the relevant facts (e.g., whether a subject may or may not have appeared to be reaching for a weapon even though there was none). Evidence about suicide is also admissible in the damages portion of a lawsuit because such evidence is relevant to the subject's life expectancy and goes directly to the question of the amount of money, if any, to be awarded to the plaintiff. In all other cases, suicide evidence will be excluded.

3. Scrutiny of Police Tactics

It is not clear from *Palmquist* whether the jury based its liability decision solely on the degree of danger faced by Selvik at the time he shot Palmquist, or whether they felt that better police tactics in handling a disturbed person would have obviated any need to shoot. Police tactics, however, seemed to be the main issue in the following Indiana "suicide by police" incident.

In *Wallace v. Davies*,[76] the incident began when Christopher Davies called a mental health facility trying to reach his counselor.[77] When told that the counselor was not there, Davies stated that he was going to kill himself. The mental health worker called the police, who dispatched officers to try to find Davies to prevent a possible suicide.[78]

Officers Hartman and Wallace arrived at the apartment complex and attempted to find Davies' unit. The number that officers had been given for Davies' apartment led them to believe that it was on an upper floor, but they subsequently determined that it was ground level.[79] The implication is that this "mistake" caused the officers to walk past the ground level windows of Davies' apartment, alerting him to the fact that police were coming to stop him.[80] The officers proceeded down a stairwell and came to the door of the apartment. Hartman then slowly tried the doorknob, apparently in an attempt to determine if the door was unlocked, and Davies therefore probably inside.[81] As Hartman turned to signal Wallace that the door was in

76. 676 N.E.2d 422 (Ind. Ct. App. 1997).
77. *Id.* at 424.
78. *Id.*
79. *Id.* at 425.
80. *Id.*
81. *Id.*

fact unlocked, the door opened, and a shotgun barrel appeared, followed by Davies, who stepped out with the gun angled upwards in the "port arms" position.[82] Davies looked at Hartman and started turning, lowering the angle of the shotgun.[83] Hartman fired once, fatally wounding Davies.[84]

Davies' widow brought suit, under both Section 1983 and Indiana tort law.[85] At trial, the plaintiff presented expert testimony to the effect that it was ridiculous and unreasonable for the officers to have gone down the stairway and test the doorknob.[86] The jury evidently agreed and awarded Mrs. Davies $1,400,000.[87] The defendants appealed the verdict on the grounds that it was not supported by the evidence presented at trial and that the verdict was error as a matter of law.[88] The Indiana Appeals Court upheld the verdict.[89]

Although *Wallace* appears to place a heavy burden on police to be "tactically correct" in handling a suicidal person, two aspects of the decision make it a poor case for establishing any sort of precedent about police liability relative to an excessive force claim. As in *Palmquist,* the flawed features of *Wallace* were precipitated by purported failings of the officers' appellate counsel. First, the Indiana Court of Appeals was careful to point out that the defendant's sole focus on appeal concerned the insufficiency of the evidence supporting the jury's verdict, rather than a challenge to the trial court's denial of summary judgment.[90] The Indiana Court of Appeals further noted that Wallace was not appealing the trial court's jury instructions (specifically, a lack thereof) pertaining to pre-seizure conduct nor the trial court's rulings on the admissibility of evidence.[91]

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82. *Wallace,* 676 N.E.2d at 425 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1768 (G. & C. Merriam Co. ed., 1976)) (defining the "port arms position" where the weapon "is held diagonally in front of the body so that the barrel is at the left shoulder.").

83. *Id.* at 425.

84. *Id.*

85. *Id.*

86. *Id.* at 427.

87. *Id.* at 425.

88. *Wallace,* 676 N.E.2d at 425-26.

89. *Id.* at 430.

90. *Id.* at 425-26.

91. *Id.* Despite the ruling of *Sherrod v. Berry,* 856 F.2d 802, (not cited by the Indiana Court of Appeals' decision in *Wallace* despite its relevance to this case and despite the fact that *Sherrod,* although a federal case, is nonetheless instructive on the admissibility issue because it is a case from the Seventh Circuit, which circuit geographically encompasses the state of Indiana) narrowly construing the admissibility of pre-seizure evidence, the *Wallace* panel remarked that any error relative to admission of pre-seizure evidence was waived because the defendants neither offered a proposed jury instruction to limit the jury's consideration of such

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Many police shooting cases are resolved by summary judgment in favor of the police, because their qualified immunity requires evidence of a high level of negligence before a case is to be allowed to go to trial. Furthermore, this evidence generally has to show that the shooting itself was unjustified at the time of the incident, as opposed to showing that poor tactics led to the shooting.[92] In *Wallace*, however, the defendants neglected to appeal the trial court's denial of summary judgment, and this avenue of relief was lost to them.

An even more serious limitation on the *Wallace* ruling is that the defendants failed to argue at trial that evidence as to the officers' pre-seizure conduct (e.g., turning the doorknob) should have been excluded from the jury's determination of whether the shooting itself had been unreasonable.[93] The court of appeals, therefore, declined to deal with this issue, treating it as waived.[94] It merely concluded that a reasonable jury could have concluded that Wallace did not act as a reasonable police officer when he shot Davies.

It is not clear in *Wallace* whether the jury's decision was based on the conclusion that Officer Wallace was not really in danger when he shot Davies, and should have realized this, or whether they also were influenced by expert testimony to the effect that the officers were unreasonable for having gotten into such a situation in the first place.

Poor police tactics were more clearly implicated in *Rowland v. Perry*.[95] Although not a "suicide by police" situation, the logic used by the Fourth Circuit has direct implications for the issue of how police handle such situations. Police officer Perry attempted to intervene in a dispute over a five-dollar bill.[96] A possible misunderstanding and an escalating use of force resulted in a mildly retarded Rowland suffering a disabling injury.[97]

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evidence, objected to the jury instruction provided on this point, nor sought to exclude the evidence at trial. *Id.*

92. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-821 and *Anderson v. Creighton*, 483 U.S. 635, 640, (1987), are generally cited for the standards for summary judgment based on qualified immunity in Section 1983 cases. A good example of summary judgment in a probable suicide by police incident is *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691 (1st Cir. 1994). Roy was shot and seriously wounded when he advanced on two officers, flailing his arms and holding two knives. The appellate court upheld the trial court's summary judgment for the defense, pointing out that the police may have done the wrong thing [tactically] but "they were not 'plainly incompetent'" and that therefore they were entitled to immunity from suit. *Id.*

93. *Wallace*, 676 N.E.2d at 426-27.

94. *Id.*

95. 41 F.3d 167 (4th Cir. 1994).

96. *Id.* at 171.

97. *Id.* at 171-72.

Officer Perry was sued for excessive force and moved for summary judgment based on qualified immunity.[98] The trial court denied summary judgment and the Fourth Circuit upheld this ruling. In explaining its decision, the *Rowland* panel stressed that it was applying a totality of circumstances test[99] to the entire episode, specifically rejecting a segmented, step-by-step approach to the time-frame analysis under which the appellate court conceded that each of Perry's actions became reasonable.[100] The appellate court characterized the time-frame segments propounded by Officer Perry as artificial, stating, "it is impossible to escape the conclusion that a man suffered a serious leg injury over a lost five-dollar bill."[101]

In contrast to both *Rowland* and *Wallace*, *Plakas v. Drinski*[102] offers a different approach for analyzing police tactics. Plakas was involved in a single car accident that eventually led to his arrest for drunk driving.[103] He escaped custody, ran to some friends' house where he maneuvered his handcuffs from back to front and picked up a poker.[104] After a series of confrontations, he was eventually cornered in a field by three police officers with guns drawn.[105]

For at least a quarter hour, the police, especially Officer Drinski, attempted to talk Plakas into surrendering.[106] Plakas responded that either he or Drinski was going to die there.[107] He challenged the police to go ahead and shoot, because his life wasn't worth anything.[108] He often repeated these thoughts. Eventually, with poker raised, Plakas charged at Officer Drinski. Drinski was unable to retreat, which was not required, and fired once, killing Plakas.[109]

Plakas' estate brought a wrongful death Section 1983 suit. Plaintiff's attorney presented expert testimony that Plakas was

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98. *Id.* at 171.

99. The "totality of circumstances" approach for analyzing police shootings is prescribed by *Tennessee v. Garner*. It seems, however, that *Rowland* badly misapplies the Supreme Court's concept. In *Garner* the totality of circumstances was clearly meant to apply to all those things known to the shooting officer, at the time of the shooting; second guessing the officer's decisions leading up to shooting was clearly rejected as inappropriate. *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996) is a good example of a federal appellate decision that uses totality of circumstances in the narrow sense of all those factors relevant at the time of the shooting.

100. *Rowland*, 41 F.3d at 173-74.

101. *Id.* at 174.

102. 19 F.3d 1143 (7th Cir. 1994).

103. *Id.* at 1144.

104. *Id.* at 1145.

105. *Id.*

106. *Id.* at 1146.

107. *Id.*

108. *Plakas*, 19 F.3d at 1146.

109. *Id.*

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attempting a "suicide by police," and that therefore police should have used alternative means of subduing Plakas, in order to avoid shooting.[110] Specifically mentioned were the possibilities of a chemical spray, possessed by one of the officers, or use of a police dog, which had been offered some minutes earlier by the Indiana State Police.[111]

The trial court granted summary judgment to the defendant. In rejecting the plaintiff's appeal, the Seventh Circuit concluded that there is no requirement that officers "use the least intrusive or even less intrusive alternatives in search and seizure cases," holding that all that is required is that the officers acted reasonably.[112]

In its decision, the *Plakas* panel set out a method for analyzing an officer's pre-shooting behavior by breaking the situation into segments.[113] At each decision point in the police officers' interaction with Plakas (arresting, tracking, drawing weapons, etc.), the police behavior was deemed by the appellate court as being reasonable.[114] Therefore, at the time of the shooting, only the reasonableness of the deadly force based on what Officer Drinski knew at that time was relevant.[115] Although the court did not spell out a test for what would make one of the preliminary tactics unreasonable, the clear implication is that the tactic would have to amount to a constitutional violation of Plakas' rights, e.g., would in itself have to constitute the use of excessive force. Even more problematic, it is not clear what the implication would be if the use of a chemical spray at the time of the shooting would have had some particular probability of controlling Plakas.[116]

Another "suicide by police" incident that raised the issue of police tactics occurred in *Rhodes v. McDannel*.[117] Police received a call that James West was chasing Shari Heffington inside the house with a

110. *Id.* at 1148.

111. *Id.*

112. *Id.* at 1149.

113. *See supra* Section III A 1 of this article.

114. *Plakas*, 19 F.3d at 1150.

115. *Id.*

116. The point here is that while a shooting may be clearly justified if failure to shoot would result in death or serious injury to someone, the availability of an alternative to shooting would logically make the shooting unnecessary and therefore unreasonable. However, less than lethal weapons, and other alternatives (*e.g.*, tackling the subject), will almost always be more risky to police or bystanders than the use of deadly force against the subject. The authors could not find a decision addressing the issue of the probable efficacy of alternatives in calculating the reasonableness of deadly force. *See* Robert J. Homant & D. B. Kennedy, The Effectiveness of Less than Lethal Force in Suicide by Cop Incidents (1999) (unpublished manuscript, on file with the *University of Detroit Mercy Law Review*).

117. 945 F.2d 117 (6th Cir. 1991).

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machete.[118] Several police arrived, and Heffington escorted two of them into the house.[119] Despite their drawn guns, West appeared and advanced on the officers with the machete.[120] West ignored several repeated orders to drop his knife. Finally, when West had advanced within four to six feet, Officer McDannel shot and killed him.[121] Tonya Rhodes, representing West's estate, brought a Section 1983 suit against McDannel for gross negligence (with respect to his tactics) and use of unreasonable deadly force.[122] The trial court granted summary judgment to the defendant and the federal appeals court upheld the ruling.[123]

In explaining its decision in *Rhodes,* the court held that to be grossly negligent, the officer would have to have intentionally (i.e., not accidental behavior) done something unreasonable with disregard to a known risk, or at least with a high probability that harm would follow.[124] The implication here is that grossly negligent behavior preceding a shooting could ultimately make an otherwise justified shooting actionable. Had this standard been applied in *Wallace v. Davies,* it seems doubtful that the jury's decision could have been sustained.

B. State vs. Federal Standards in the Reasonableness Determination of a Police Shooting

It is important to note that the standard for judging police conduct and tactics prior to a shooting may vary greatly from court to court. This is partly due to the slight differences in rulings in different federal appellate circuits[125] and also to the different standards that may apply if a suit is brought under state law on an ordinary civil assault and battery claim. This point is clearly articulated by the Tenth Circuit holding in *Quezada v. County of Bernalillo.*[126]

In *Quezada,* three officers approached a woman, Griego, who was sitting in a parked car and appeared to be in some sort of trouble.[127] Griego eventually picked up a handgun, pointed it at her head, and told the officers to leave her alone because she wanted to kill

118. *Id.* at 118.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Rhodes,* 945 F.2d at 126.
124. *Id.* at 120.
125. *See supra* Part III A 1 of this article.
126. 944 F.2d 710 (10th Cir. 1991).
127. *Id.* at 712.

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herself.[128] She refused the officers' requests to get out of the car and attempted to drive off, but was blocked by a police car.[129]

Because Griego had pointed her gun in his direction, one of the officers, Sauser, had his gun drawn.[130] The officers continued to try to get Griego to put the gun down and exit the car. Suddenly she turned toward Sauser and sighted her gun at him.[131] Sauser shot three times, mortally wounding her.[132]

Griego's mother, Quezada, brought suit in the name of the estate under both Section 1983 and New Mexico tort law.[133] Following a bench trial, plaintiff was awarded $1,243,876.[134] The trial court ruled that Sauser had been negligent in placing himself in a position of danger, which had resulted in his need to use deadly force.[135] Defendants appealed on a number of grounds.

Although falling short of an outright dismissal of the Section 1983 claims, the Tenth Circuit's *Quezada* panel concluded that the trial court had misapplied the concept of ordinary negligence under state law to the Section1983 excessive force aspects of the suit.[136] In effect, the appellate court upheld the finding of negligence under the state law claim, but argued that such negligence was not enough to meet the objective reasonableness test that *Graham v. Connor* had established.[137] The trial court was ordered to reconsider its ruling in light of *Graham*.[138] *Quezada* is, therefore, one of the few cases that raises the notion of forum shopping relative to a Section 1983 excessive force case.

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128. *Id.*

129. *Id.* at 713.

130. *Id.*

131. *Id.* at 713.

132. *Quezada*, 944 F.2d at 713.

133. *Id.* at 712.

134. *Id.* at 713.

135. *Id.* It is a basic principle of negligence law that intervening criminal acts prohibit negligence-based liability to the extent they are unforeseeable. *See, e.g., Williams v. Cunningham Drug Stores*, 418 N.W.2d 381, 385 (Mich. 1987) and its progeny. Even if Sauser's actions in standing too close to the car were negligent, this hardly gave Griego the right to aim her weapon at him. It was this aiming of the weapon, not Sauser's position, that was the proximate cause of Griego's death. It may be that the trial court took Griego to be a disturbed person, and her pointing the gun at Sauser could then be seen as the foreseeable act of someone not responsible for her behavior. It would be interesting to see whether police attempting to arrest a "normal" criminal would also be held liable for the criminal's death in an otherwise parallel situation. The appeals court did not address these points.

136. *Id.* at 720-22.

137. *Id.* at 717-18.

138. *Quezada*, 944 F.2d at 716-17.

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Plaintiffs in such a case appear to have five options for where to file a case and what claims to include in the action. As set forth herein, the most common type of claim is the Section 1983 civil rights suit filed in federal court.[139] It appears from a review of the cases that the next most common type of suit combines Section 1983 with a state tort law claim for wrongful death filed in federal court. Plaintiffs also have the option of filing in state court, solely bringing the Section 1983 claim or combining the federal civil rights claim with the state law tort of wrongful death. Finally, plaintiffs have the option of confining their case to a state law tort claim filed in state court.

Although the authors could not find case law addressing this issue, it seems that cases combining state law torts and a Section 1983 claim in a single lawsuit contain conflicting standards for the admissibility of pre-seizure evidence. As discussed in this article, admissibility of pre-seizure evidence in Section 1983 cases is limited to the moments immediately preceding the shooting.[140] If a claim is brought solely on a wrongful death theory of gross negligence,[141] on the other hand, there is arguably a wider latitude of admissibility on the pre-seizure evidence, although, as stated, no case law is available on this point. Depending on the facts of a case, it would seem plausible for a plaintiff to contemplate which forum and which set of claims provides the better platform on which to build a successful case with such pre-seizure evidence. A factor that may influence a plaintiff's counsel to file in federal court, on the other hand, is the provision for attorney fees should the Section 1983 claim be successful.[142] A related inquiry is how a court would treat the admissibility of pre-seizure evidence in a single trial containing both a Section 1983 claim and a state tort claim where such evidence would be excluded in the Section 1983 portion of the suit and yet be admissible in the state tort claim. The legal strategy and assessment involved with such a decision is beyond the scope of this article.

C. Police and Suicide Intervention

Suicide interventions, such as in the *Quezada* case above, are only one of the many types of scenarios that may evolve into "suicide by

139. Chiabi, *supra* note 18, at 83-85.

140. *See Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988), *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), and the other cases cited in section III A 1 of this article.

141. In Michigan, for example, gross negligence is one of the exceptions to liability of a government actor under the Governmental Immunity Act. MICH. COMP. LAWS ANN. § 691.1407(2)(C) (West 1987).

142. 28 U.S.C. § 2412 (a) (1) (1994).

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police" incidents.[143] Nevertheless, along with domestic fights and "disturbed persons," such interventions have been found to make up the majority of suicides by police.[144] They are also the type of "suicide by police" most likely to result in a lawsuit, since there tends to be more opportunity for the police to engage in police tactics.

While almost all police departments have at least some training pertaining to suicide intervention, up until recently very few have dealt specifically with "suicide by police" scenarios. An exception is California, where researchers have been studying the phenomenon for a number of years. In fact, the California Commission on Peace Officer Standards and Training (POST) has recently (July/August, 1999) sponsored a two-part POST telecourse specific to suicide by cop. This telecourse and its accompanying manual contain extensive information and tactical advice for dealing with "suicide by police" scenarios. It is somewhat ironic, therefore, that a recent California state appeals court decision has given police officers extensive protection from negligence suits in state court.

1. Tactics: An Illustrative Case from California

Adams v. Freemont [145] stemmed from an incident in which police had been summoned to help with an apparently suicidal man, Patrick Adams. Adams had a chronic drinking problem and had fired a gun in his house and refused to communicate with family members.[146] The police eventually located him sitting under a bush in the backyard, half clothed and pointing a gun at himself.[147] Due in part to their fear that Adams might attempt a "suicide by police," the police approached Adams very cautiously.[148]

The use of a trained police dog to get a response from Adams and a trained negotiator both failed to contain the situation, although some communication was established.[149] Adams expressed indifference as to whether the police shot him, but both the police and Adams tried to make clear that they had no intention of hurting

143. Robert J. Homant & Daniel B. Kennedy, *Suicide by Police: A Proposed Typology of Law Enforcement Officer Assisted Suicide,* POLICING at 13-24 (forthcoming Jan. 2000).

144. *Id.* The two other main types of scenarios involve cornered offenders who prefer death to imprisonment and preplanned confrontations where the subject intentionally manipulates some sort of encounter with police with the prior intention of being killed. *Id.* These two types are much less likely to result in lawsuits.

145. 80 Cal. Rptr.2d 196 (Cal. Ct. App. 1998).

146. *Id.* at 198-99.

147. *Id.* at 200.

148. *Id.*

149. *Id.*

each other.[150] Adams repeatedly asked the police to leave, but they responded that they had to do their job.[151]

Finally, Adams said that he knew how to make them leave, and a shot was heard.[152] Several armed police officers who had their guns trained on Adams' position believed that they had been fired on and they returned fire, hitting Adams several times.[153] The initial shot proved to have been Adams shooting himself.[154] The self-inflicted wound would probably have been fatal, but the medical examiner was apparently unable to say whether Adams would have died had the police not fired and had medical attention been given immediately.[155] In any event, this was not a "suicide by police" incident, but rather one in which the concern over "suicide by police" affected police tactics. Adams' spouse and stepdaughter sued for negligence and wrongful death.[156] After hearing widely differing expert testimony on whether the police had acted reasonably, a jury agreed with plaintiffs and awarded them over five million dollars.[157] Defendants appealed on numerous grounds.

The California Court of Appeals overturned the jury's verdict and ordered judgment for the defense.[158] The appeals court determined that under California law the police have no duty to intervene in suicide situations.[159] Because Adams was determined to already be suicidal when the police arrived, the negligent intervention by the police could not be found to be the cause of the suicide.[160] The court seemed to ignore one aspect of the plaintiffs' case here. Plaintiffs had not merely alleged that the police had failed to prevent the suicide; they had also offered expert testimony to the effect that Adams would probably not have committed suicide had the police just left.[161] While such testimony seems speculative at best, the fact that the point was not addressed leaves the final ruling somewhat ambiguous.[162] It would seem, however, that at least in those

150. *Id.* at 201.
151. *Adams,* 80 Cal. Rptr.2d at 201.
152. *Id.*
153. *Id.* at 210-12.
154. *Id.*
155. *Id.* at 202.
156. *Id.* at 198.
157. *Adams,* 80 Cal. Rptr.2d at 206.
158. *Id.* at 224.
159. *Id.* at 216-24.
160. *Id.* at 211.
161. *Id.* at 203.
162. *Id.* The majority decision did not totally overlook the plaintiff's claim that the police were the cause of the suicide. Rather, they dismissed the point as being an example of a legal conclusion being offered in the guise of expert testimony. A dissenting opinion, by Justice Kline, which seems to totally ignore the dangers to

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suicides by police that emerge from suicide interventions, police in California are fairly well protected from state-level claims that they intervened negligently. Plaintiff would appear to have the burden of proving that the death would not have happened had not the police intervened in a negligent fashion.

2. Tactics: An Illustrative Case from Michigan

Many of the above issues were revisited in a Michigan case, *Crouch v. Breischaft*.[163] In *Crouch*, two officers confronted Pamela Crouch, who had been attempting to kidnap a storeowner against whom she had a grudge. Armed with a loaded revolver, Crouch refused to comply with repeated commands yelled by Officer Breischaft.[164] She frequently told the officers to go ahead and shoot her because she had nothing to live for anyway.[165]

A third officer, Chase, subsequently arrived at the side of the building that stood behind Crouch. As he was out of her field of vision, Chase attempted to sneak up on Crouch, using a slight incline for partial cover. She spotted him, however, and when he continued to advance on her, Crouch raised her gun in his direction. Chase fired. Crouch recoiled and raised the gun again as Breischaft fired. She died within a few minutes. [166] Her husband brought a Section 1983 suit in federal court, alleging excessive force.

Plaintiff offered expert testimony to the effect that the tactics of both Breischaft and Chase were negligent. Breischaft should have attempted to calm Crouch down and establish rapport, while Chase should not have left cover and precipitated the situation. With more time, Crouch would surely have cooperated.

The defense was prepared to offer expert testimony to the effect that Crouch had committed "suicide by police." Much information supported the conclusion that Crouch intended to die when she kidnapped the storeowner. Whether or not she also intended to kill the storeowner was less clear. Although this information was unknown by the officers on the scene and therefore probably not admissible, the plaintiff's expert had described the incident as a probable "suicide by police," and it was the plaintiff's contention that other tactics would have worked to control Crouch. This contention made it necessary to analyze Crouch's motivation.

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police in this type of suicide intervention, at least deals with the issue of whether the police worsened the situation and is probably a more legally well reasoned position, even though the outcome seems much less desirable. *Id.* at 225-46 (Kline, J. dissenting).

163. No. 5:97-CV-220 (W.D. Mich. June 2, 1999).

164. *Id.* at 2-3.

165. *Id.* at 4.

166. *Id.*

While plaintiff's expert was correct that most police trainers would recommend keeping cover in dealing with a disturbed person, there were other circumstances (e.g., arrival of children at a neighboring roller rink) that provided a reason for resolving the situation quickly. Furthermore, there is nothing in the research on "suicide by police" to suggest that stalling necessarily leads to a better outcome.[167]

Before a "battle of the experts" could ensue, the defense moved for summary judgment on the grounds that at the time of the shooting, Chase was in immediate danger and therefore the shooting was objectively reasonable. Plaintiff's expert had conceded as much, but plaintiff argued that the unreasonableness of the behavior leading up to the situation nullified the reasonableness of the shooting. Citing *Dickerson v. McClellan,* the district court agreed with the defendant and granted summary judgment. The district court concluded that the inquiry into objective reasonableness was limited to the moments immediately preceding the shooting. However ill advised the tactics of Breischaft and Chase may have been, they did not justify Crouch raising a loaded weapon in Chase's direction, which even plaintiff's expert conceded was a shoot situation.

Obviously, from the cases reviewed above, other federal districts and courts applying state negligence law may be much more inclined to scrutinize the pre-shooting behavior of the officers. The Sixth Circuit decision in *Crouch* is silent as to what the circumstances would have to be in order for the pre-shooting behavior to be relevant. Perhaps this court would follow the lead of those circuits where gross negligence could be a basis for finding an otherwise objectively reasonable shooting to be a Section 1983 violation. Or, perhaps in a Section 1983 suit, the pre-shooting tactics would have to amount to a constitutional violation in their own right (e.g., excessive force during the early phase of an arrest scenario might trigger a series of events leading to a shooting).

IV. CONCLUSION

It would seem that more thought must be given to setting a standard for scrutinizing tactics in police shooting cases in general and in "suicide by police" incidents in particular. A blanket refusal to look at such tactics would seem to invite reckless and irresponsible police behavior. On the other hand, holding police responsible for having someone aim a shotgun at them because they checked a doorknob, as in *Wallace,* would at best be likely to have a chilling effect on police intervention into any situation.

167. Homant & Kennedy, *supra* note 89.

The dicta in *Plakas,* to the effect that the tactical behavior must itself constitute excessive force, may serve as a useful guideline for Section 1983 suits, but states may wish to adopt a somewhat looser policy for state negligence suits. Whatever standard is adopted, however, certain tentative findings about "suicide by police" should be kept in mind. First, most "suicide by police" situations present a high level of danger. In one study, only 22 percent of such situations involved an empty gun or a prop of some sort; in most situations the subject confronted an officer or a bystander with actual lethal force. More importantly, most police were unable to distinguish the non-dangerous situations, as evidenced by the somewhat higher lethality rate in these incidents.[168] Second, a study of police tactics found that relatively high-risk tactics, such as attempting to tackle the subject, had the highest rate of successful outcomes.[169] While no department would recommend such tactics out of safety concerns for the officers, neither does it seem fair to penalize the officer who uses such an approach, and to thus reward the subject who was responsible for creating the original situation. Especially on the state level, it will take the combined wisdom of courts and the state legislatures to determine the level of scrutiny to which they wish to subject the police.

168. Homant, et al, *supra* note 11 at 10.
169. Homant & Kennedy, *supra* note 89.

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