SELECTED MATERIALS ON USE OF FORCE-POINTING GUNS

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I. Change in Summary Judgment Methodology - *Pearson v. Callahan*, 129 S.Ct. 808, 172 L. Ed. 2d 565 (2009). This is a warrantless search case, not an excessive force case. It changes the summary judgment procedure announced in *Saucier v. Katz*. It is no longer necessary in every case to determine, in rigid order, first, whether plaintiff has shown a violation of the constitution, and second, whether that right was clearly established. Courts may now go directly to the question of whether the alleged right was clearly established, and if it finds that it was not, find in favor of the government official. This encourages judicial economy, is consistent with the general rule that courts should not reach constitutional issues if they don't have to and reduces the chance that a court will find that a defendant violated the constitution, but that defendant has no ability to challenge that finding on appeal.

II. Pointing Submachine Gun Unreasonable - *Baird v. Renbarger*, 576 F. 3d 340 (7th Cir. 2009). Officer Renbarger participated in the execution of a search warrant at an industrial park. The officers were looking for an antique Lincoln to determine whether its engine number had been altered. Renbarger carried a nine millimeter submachine gun and used it to round up and detain a group of 11 identified people, who worked for several businesses, and an unidentified group of Amish workers. No one recalled him putting his finger on the trigger, but he did point the gun at the detainees for a period of time.

The district court denied Renbarger's motion for summary judgment on the excessive force claim, holding that a reasonable jury could find both that it was objectively unreasonable to round up and detain the individuals with a submachine gun, and that his actions were so unreasonable that they violated clearly established law.

The Seventh Circuit affirmed, finding that Renbarger pointed a gun at people when "there was no suggestion of danger, either from the alleged crime that was being investigated or the people he was targeting." The critical point, wrote the court, is that "while police are not entitled to point their guns at citizens when there is no hint of danger, they are allowed to do so when there is a reason to feel danger." The Court distinguished the following cases from *Baird*:

A. *Williams v. City of Champaign*, 524 F. 3d 826 (7th Cir. 2008) - Okay to point guns at person reasonably believed to have committed a double robbery

moments before.

B. *L.A. County v. Rettele*, 550 U.S. 609 (2007) - Police execute search warrant to obtain evidence of fraud and identify theft. Officers did not know that the suspect had sold the house to innocent parties. Officers awakened husband and wife and detained them naked, for one to two minutes, at gunpoint, while they verified that no weapons were in the bedroom. Police conduct was justified because they knew that one of the suspects they were searching for owned a registered handgun.

C. *Muehler v. Mena*, 544 U.S. 93 (2005) - Police executed a search warrant for deadly weapons and believed a gang member recently involved in a drive-by shooting lived on the premises. Okay to point guns at occupants and detain them in handcuffs for the duration of the search.

D. *McNair v. Coffey*, 279 F. 3d 463 (7th Cir. 2002) - Officer had probable cause to stop vehicle for unpaid parking tickets, and activated emergency lights. Suspects did not immediately stop, allegedly because it was a bad neighborhood and they wanted to get out of it. When suspects stopped, they were surrounded by eight squads, and multiple officers leveled guns at them.

The court pointed to the following cases to supports it ruling:

A. *Jacobs v. City of Chicago*, 215 F. 3d 758 (7th Cir. 2000) - Officers broke down door of apartment when executing search warrant on what was supposed to be a single family residence. Holding gun to the head of innocent occupant for more than 10 minutes violated 4th Amendment.

B. *McDonald v. Haskins*, 966 F. 2d 292 (7th Cir. 1992) - During a lawful search of the McDonald residence, officer held a gun to the head of the 9 year old plaintiff and threatened to pull the trigger. The court rejected, as dicta, the statement in *Wilkins v. May*, 872 F. 2d 190, 194 (7th Cir. 1989) cert. denied, 493 U.S. 1026 (1990), that "the action of a police officer in pointing a gun at a person is not, in and of itself, actionable....," stating this only applies to actions in the course of an arrest.

C. *Motley v. Parks*, 432 F. 3d 1072, 1089 (9th Cir. 2005) - holding a gun on a 5 week old infant is unreasonable force.

D. *Robinson v. Solano County*, 278 F. 3d 1007, 1015-16 (9th Cir. 2002) - Pointing gun at the head of 64 year old unarmed suspect in dog shooting case was excessive force.

E. *Holland v. Harrington*, 268 F. 3d 1179, 1192-93 (10th Cir. 2001) - SWAT team executing search and arrest warrant not justified in continuing to hold minors at gunpoint after scene was under control.

Troublesome Judicial Statements in Summary Judgment Decisions We Received This Year

A. "Here, the crime was a purse-snatching at knife point by a woman on foot. A reasonable jury could find that the use of drawn firearms, followed by the order that Durrah lie on the ground and handcuffing, were not reasonable in these circumstances." Durrah v. City of Wauwatosa, 07-C-0426 (E.D. Wis. 2009).

B. "Although Schmalz was indeed very intoxicated, [.334] a jury could conclude that he posed little immediate threat to the officers or anyone else at the time, and there is no indication that he was belligerent or doing anything other than attempting to flee very ineffectually. This is especially true if other officers were also present. If the jury so concludes, it could find that the amount of force used, enough to break a pelvic bone – was unreasonable. . . . If a jury believed Schmalz, he was so oblivious that he didn't even know there was a police officer behind him. If that is true, a surprise tackle from behind, combined with the force that broke Schmalz's pelvis, could have been excessive, and that would have been a violation of clearly established Fourth Amendment law." Schmalz v. Oleszak, 08-C-313 (E.D. Wis. 2009).

C. We are seeing more and more of "A factual inquiry into an excessive force claim nearly always requires a jury to sift through the disputed factual contentions and to draw inferences therefrom." *Valind v. Retzer, et al*, 05-C-0702 (E.D. Wis. 2009), citing *Abdullahi v. City of Madison*, 423 F. 3d 763, 767 (7th Cir. 2005).