

**3. Albuquerque police officers' own recklessness sometimes led to their use of deadly force.**

In evaluating the totality of the circumstances surrounding an officer's use of deadly force, courts have considered "whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (citations and internal quotation marks omitted). We reviewed several incidents that provide reasonable cause to believe that the officers were reckless and that their recklessness contributed significantly to their decision to use deadly force.

For example, in March 2012, an officer shot Daniel Tillison after approaching him without waiting for backup. The officer was responding to an anonymous call about an individual selling stereo equipment in a parking lot. When the officer arrived, Tillison was sitting in his car, which the officer believed might be stolen (he had received conflicting information prior to making contact with Tillison). The officer approached the driver's side of the car with his gun drawn. This is an important fact. If the officer believed Tillison posed such a threat to the officer or public safety that it was necessary to draw his weapon, it is not at all clear why the officer did not take cover and wait for other officers to assist him. There was no exigency that required the officer to act immediately; it was the officer who decided when to approach Tillison. The officer spoke to Tillison, recounting that Tillison was evasive and appeared to be reaching for something in the car. Tillison tried to get out of the car, but the officer pushed the door closed. Tillison then backed into the officer's vehicle and an adjacent truck. The officer shot at one of the vehicle's tires. As Tillison attempted to drive forward, the officer stated that he saw something that resembled a gun in Tillison's hand and that Tillison

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<sup>23</sup> Order on Motion for Summary Judgment, *Wharton v. City of Albuquerque*, No. CV-2010-06590 (N.M. 2d Judicial Dist. filed on May 28, 2010).

*see Scott*, 550 U.S. at 382-84 (2007) (noting that a car can itself be a deadly weapon that can justify the use of deadly force).

Other instances of officer recklessness that led to unreasonable uses of deadly force involved officers from the department's SWAT unit who acted without proper discipline or control. SWAT stands for Special Weapons and Tactics, and officers assigned to SWAT units are generally among the most highly trained in a police department. Officers in the SWAT unit are entrusted with complex weaponry and are called upon to handle the most dangerous situations that police encounter. SWAT units typically operate under strict protocols and carry out operations in a highly planned and organized fashion.

In force incidents we reviewed, we found instances in which the SWAT unit did not operate with the discipline and control that would be expected of them, and this lack of discipline contributed to unreasonable uses of deadly force. The officer who shot and killed Alan Gomez, for example, was assigned to the SWAT unit. When he arrived on the scene, the officer took a position near the house where Gomez was keeping his brother and his girlfriend from leaving without consulting the commanding officer and without following any kind of a plan for handling the crisis. He also did not seek or obtain the approval of the commanding officer before using deadly force. He acted on his own authority from the moment he arrived on the scene until he fired his weapon. The recklessness of his behavior at the scene supports our finding that his use of deadly force was unreasonable. *Zia Trust*, 597 F.3d at 1154-55.

The officer who shot and killed Kenneth Ellis was not a member of the SWAT unit, but commanding officers within and over SWAT were present when Ellis was shot. The department's reports on the shooting make it clear that the SWAT commanding officers failed to exert control over the scene, such as by making a plan for handling the crisis, determining where officers should be positioned, or deciding what roles each officer would fulfill, though our consultants would have expected them to take on these roles and establish control and lines of authority. The lack of scene control contributed to a chaotic environment and allowed the shooting officer to act on his own accord when he shot and killed Ellis. *See Allen*, 119 F.3d at 841-44 (noting that the failure to follow protocols can be a ground for liability for the use of deadly force).

#### **B. APD Engages in a Pattern or Practice of Unconstitutional Use of Less Lethal Force.**

We find that the department engages in a pattern or practice of unreasonable use of less lethal force. There is a pattern of APD officers using force that is unnecessary and unreasonable against individuals who pose little, if any, threat, or who offer minimal resistance. Officers too precipitously resort to the use of Tasers, prone restraints (referred to as "face-down stabilization techniques" by APD), leg sweeps, front kicks, face-down arm-bar takedowns, and strikes to legs and thighs. We reviewed incidents where officers applied force against individuals who were unable to understand or yield to commands but posed a minimal threat to the officers. Many subjects of excessive force had indications of mental illness, physical disabilities, intoxication, and other incapacity. In most instances, these individuals were engaging in lawful activities or committing minor infractions.

We formed our conclusions about APD's practices based on a review of APD's own documentation. This information enabled us to review the identical documents that APD