

Discussion

In *Maryland v. Craig*, 497 U.S. 836 (Cal. 1990), the U.S. Supreme Court established that sexually abused minors can testify under closed-circuit testimony and still not violate the Confrontation Clause if there are concerns that they will experience trauma by testifying in front of their accuser. In *Medina*, the Supreme Court of Iowa elucidated that even adults could be excused from in-person testimony if there is a possibility that they might be traumatized by testifying in the presence of their accuser.

In *People v. Stritzinger*, 668 P.2d 738 (Cal. 1983), the California Supreme Court had noted that the evidentiary bar for making an exception for a victim or witness to testify in person is high. There, the district court excused the victim from in-person testimony under the Confrontation Clause based solely on the report of the victim's mother. Upon appeal, the California Supreme Court ruled that the testimony of the victim's mother was legally insufficient and that medical testimony was needed to support a mental health diagnosis. In contrast, the district court in *Medina* considered the testimony of Dorothy's therapist and that of the guardian *ad litem* when making their determination on the presence and severity of mental illness for Dorothy and her brother, the potential for further traumatization, and how in-person testimony could affect their ability to testify in court.

Taken together, these decisions illustrate that, although the bar to make an exception to the Confrontation Clause is high, courts have considered the potential of further traumatizing abuse victims in ruling upon such exceptions. Further, courts do not make these exceptions lightly and are required to rely on credible evidence provided by caregivers or health care providers in making exceptions to the right to confront one's accuser.

Police Officer's Use of Force on Person in Mental Health Crisis

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Officers Are Protected by Qualified Immunity When Use of Force Is Objectively Reasonable

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In *Hart v. City of Redwood City*, 99 F.4th 543 (9th Cir. 2024), the Ninth Circuit Court of Appeals considered whether a police officer's use of force against a suicidal individual was objectively unreasonable and violated the standards for qualified immunity. The court ruled that the officer's actions were not objectively unreasonable and did not violate the individual's Fourth Amendment rights. The officer was entitled to qualified immunity.

Facts of the Case

On December 10, 2018, Kristin Hart observed her husband, Kyle Hart, cutting his throat and wrists with a knife. She called 911 to report that he was attempting suicide. When Officers Roman Gomez and Leila Velez arrived, they observed Mrs. Hart in the front yard pleading with them to help her husband, who was in the backyard with a knife. Before approaching Mr. Hart, the officers decided Officer Velez would use her taser and Officer Gomez would use his firearm if necessary. The officers provided slightly different testimonies regarding what occurred next.

Officer Gomez indicated Mr. Hart was facing away from them, holding a knife to his throat. Officer Velez stated he was facing them with the knife held out at shoulder height. Mr. Hart moved toward both officers, despite being instructed twice to "drop the knife" (*Hart*, p 546). Although the officers disagreed about the speed with which Mr. Hart approached, both testified that he quickly got within close range. Officer Velez used her taser, but it was ineffective, as one probe missed Mr. Hart. The officers also provided differing accounts regarding whether Officer Gomez used his firearm at the same time or after the taser was deployed. Regardless, he fired five shots, striking Mr. Hart in the upper torso three times. Medical

assistance arrived shortly thereafter, but Mr. Hart was pronounced dead upon arrival at the hospital.

Mrs. Hart and her children filed a lawsuit against Redwood City, the police chief, and the police officers, alleging that the officers' use of deadly force against Mr. Hart violated his Fourth Amendment rights. The defendants filed a motion for summary judgment based on the grounds they were entitled to qualified immunity (i.e., protection of government officials from personal liability when performing their jobs), but their motion was denied. The district court relied on *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), which indicated that it is "objectively unreasonable" for an officer to shoot an unarmed man who is "emotionally disturbed" (*Hart*, p 547). Specifically, the district court found that, although Mr. Hart had a knife, he was unarmed in the way this term was commonly understood. Additionally, Mr. Hart did not pose a threat to others, had not committed a serious offense, and was suicidal. Furthermore, it was unclear whether the officers provided adequate warning that force would be used. The defendants appealed this decision.

Ruling and Reasoning

The Ninth Circuit Court of Appeals considered whether the use of force employed by Officer Gomez was objectively reasonable. The court referenced *Graham v. Connor*, 490 U.S. 386 (1989), in which the U.S. Supreme Court balanced the intrusiveness of the use of force with the individual and governmental interests. Because deadly force constitutes a clear and serious intrusion, the court considered three factors in determining the extent of the government's interest: the immediate threat posed to officers, severity of the offense, and Mr. Hart's level of resistance or attempt to evade arrest.

Regarding the immediate threat, the plaintiffs argued Mr. Hart posed less of a threat, given he had already harmed himself before the officers arrived. They cited *Tan Lam v. City of Los Banos*, 976 F.3d 986 (9th Cir. 2020), in which the court ruled that a wounded individual may no longer pose an immediate threat. But the Ninth Circuit determined that *Tan Lam* differed because the individual in that case was no longer armed as he approached the officers when he was fatally shot. Conversely, in *Hart*, it was undisputed that the officers "literally had only seconds to react to a nonresponsive man quickly approaching them with a knife" (*Hart*, p 550). Mr. Hart presented

an immediate threat to the officers' safety. The court emphasized another *Graham* factor that the reasonableness of the use of force should be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Hart*, p 549, citing *Graham*, p 396).

Next, the Ninth Circuit indicated Mr. Hart's actions would have resulted in charges of assault and resisting arrest, noting the severity of those crimes contributed to the immediate threat and reasonableness of the use of force. Finally, the appellants argued Mr. Hart passively, rather than actively, resisted the officer's commands. But the court said Mr. Hart's failure to comply with the officers' instructions, coupled with his quickly approaching them while brandishing a knife, constituted more than passive resistance.

The court also considered whether Mr. Hart's rights were clearly established. The appellants cited three cases they believed established the unlawfulness of Officer Gomez's actions. The Ninth Circuit noted all three cases were dissimilar to the present case when considering the officers' available response time, the presence and lethality of the suspects' weapons, and the fact that several of these suspects were not approaching the officers in a threatening manner. Additionally, one of the cases was decided after the present case and could not have informed Officer Gomez.

The Ninth Circuit Court of Appeals ruled that the district court erred by denying Officer Gomez qualified immunity. The court indicated the appellants failed to demonstrate the officer's actions were objectively unreasonable, and therefore, Mr. Hart's Fourth Amendment rights were not violated. Additionally, the plaintiffs did not show that such rights were clearly established at the time of the conduct in question.

Discussion

This case raises important points for forensic experts who may be involved in cases claiming excessive use of force by police officers against persons with mental illness. A central argument made by the plaintiffs in *Hart* was that the officers' decision to shoot Mr. Hart, who was suicidal, was unreasonable. When determining whether the use of force was reasonable, the court acknowledged other factors may be taken into consideration, including a suspect's apparent mental illness. Although jurisdictions vary on their standards for qualified immunity, the *Hart* court stated that it has historically "refused to create two tracks of excessive force analysis, one for the

mentally ill and one for serious criminals” (*Hart*, p 555, citing *Crawford v. City of Bakersfield*, 944 F.3d 1070 (9th Cir. 2019), p 1078).

The court discussed its reasons for refusing to create two such tracks. Specifically, the governmental interest in the use of force is substantial when there is a significant threat of harm to others. Part of the *Graham* analysis is consideration of whether an officer is under immediate threat. In *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), the court noted police officers are not obligated to put themselves in danger, regardless of whether the suspect is mentally ill. Safety of the officers and others should take priority.

Here, the court found it convincing that Mr. Hart posed an imminent threat to himself and the officers. Therefore, use of force was not objectively unreasonable, regardless of his mental illness at the time. Forensic psychiatric experts may nevertheless be asked to assess a subject’s emotional and mental state preceding and at the time of officer use of force and to provide context about a person’s behaviors. In some jurisdictions, the criminal intent of the subject preceding officer use of force is also something considered in the assessment of qualified immunity and may be a question posed to forensic evaluators.

First Amendment and Conversations between Counselors and Clients

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**State Ban on Conversion Therapy Lawfully
Regulates Professional Conduct of Mental
Health Clinicians**

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Key words: First Amendment; professional conduct; incidental regulation of speech; Article III standing; conversion therapy

In *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), the Tenth Circuit Court of Appeals considered a licensed professional counselor’s argument that a Colorado law prohibiting conversion therapy violated her First Amendment rights. The court upheld a ban on conversion therapy as a regulation of the counselor’s conduct, not speech. The court found that restrictions on professional conduct that incidentally involve speech are not violations of First Amendment rights.

Facts of the Case

In September 2022, Kaley Chiles, a practicing Christian and licensed professional counselor in Colorado, brought a pre-enforcement challenge against regulatory agencies in federal court, seeking a temporary injunction to bar enforcement of Colorado’s Minor Therapy Conversion Law (MTCL) of 2019 (Colo. Rev. Stat. § 12-245-101 and § 12-245-202 (2019)). She alleged that the MTCL violated the Free Speech and Free Exercise Clauses of the First Amendment.

The MCTL was added to Colorado’s Mental Health Practice Act in 2019. Under the MCTL, a mental health professional may not utilize conversion therapy with a client under 18 years old. Conversion therapy is a practice that attempts to modify a person’s sexual orientation or gender identity. Potential consequences of violating the MCTL include a fine and revocation of a provider’s license.

Ms. Chiles had some clients with a biblical view of sexuality, meaning their attractions and feelings do not dictate their behavior regarding their sexual orientation and gender identity. According to Ms. Chiles, her clients desire to uphold the tenets of their faith and live a life consistent with their religion. She argued that not being able to do so could lead to a variety of mental health concerns. Ms. Chiles claimed she solely implements talk therapy and she did not seek to cure or change her clients’ sexual orientation; rather, she claimed she assists clients with their desired goals of therapy, which may include modification of sexual attractions and behaviors. Additionally, she does not attempt to alter attraction or behavior if her minor clients do not express a desire for this change.

Ms. Chiles asserted she was unable to provide treatment fully exploring same-sex attraction and behavior with certain clients because of the MCTL. She maintained the MCTL restricted her freedom of expression, because the law rendered her unable to