HYDE KELLEY

ATTORNEYS AND COUNSELORS AT LAW

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Use of Force
Qualified Immunity and
Critical Incidents – Oh My!

- Use of Force
- In this civil-rights action, Plaintiff Undray Love complains about an incident that occurred when he was being held as a pretrial detainee in Tarrant County Green Bay Jail. See ECF No. 6. Love alleges that, on October 28, 2021, two jail officers—Defendants Officer T. Thorsell and Corporal Phylicia N. Hollie—used excessive force against him, causing him to sustain injuries. As a result of the same incident, Love was convicted of assaulting a public servant and sentenced to two years' imprisonment. He is currently incarcerated in the TDCJ Michael Unit.

- UNDRAY LOVE, INSTITUTIONAL ID NO. 02383027, Plaintiff, v. OFFICER T. THORSELL, ET AL., Defendants. Additional Party Names: Phylicia N. Hollie, No. 4:22-CV-0423-P, 2023 WL 2753982, at *1 (N.D. Tex. Mar. 31, 2023)

Use of Force

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Use of Force

- To prevail on such a claim, a plaintiff bears the burden of showing (1) an injury; (2) which resulted directly and only form the use of force that was excessive to the need; and (3) the force used was objectively unreasonable. See Haddix, 203 F. App'x at 554 (citations omitted).

UNDRAY LOVE, INSTITUTIONAL ID NO. 02383027, Plaintiff, v. OFFICER T. THORSELL, ET AL., Defendants. Additional Party Names: Phylicia N. Hollie, No. 4:22-CV-0423-P, 2023 WL 2753982, at *2 (N.D. Tex. Mar. 31, 2023)

Use of Force

- In evaluating excessive-force claims under the Eighth Amendment, the “core judicial inquiry” is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Cowart v. Erwin, 837 F.3d 444, 452 (5th Cir. 2016) (citing Hudson v. McMillian, 503 U.S. 1, 6–7 (1992)). The focus of this standard is on the official's subjective intent to punish, which is determined by reference to the well-known Hudson factors—the extent of injury suffered; the need for application of force; the relationship between that need and the amount of force used; the threat reasonably perceived by the responsible officials; and any efforts made to temper the severity of a forceful response. See Cowart, 837 F.3d at 452–53 (citations omitted).

- UNDRAY LOVE, INSTITUTIONAL ID NO. 02383027, Plaintiff, v. OFFICER T. THORSELL, ET AL., Defendants. Additional Party Names: Phylicia N. Hollie, No. 4:22-CV-0423-P, 2023 WL 2753982, at *2 (N.D. Tex. Mar. 31, 2023)

Use of Force

- Although a showing of “significant injury” is no longer required, the plaintiff must allege that he suffered at least some form of injury. See Haddix, 203 F. App'x at 554 (citations omitted). The plaintiff must have suffered a more than de minimis physical injury, but there is no categorical requirement that the physical injury be significant, serious, or more than minor. See Roberson v. Dallas Cnty., 207 F.3d 658, 2000 WL 122449, at *1 (5th Cir. 2000) (citing Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999)). The extent of the injury may supply insight as to the amount of force applied. See Cowart, 837 F.3d at 453.

- UNDRAY LOVE, INSTITUTIONAL ID NO. 02383027, Plaintiff, v. OFFICER T. THORSELL, ET AL., Defendants. Additional Party Names: Phylicia N. Hollie, No. 4:22-CV-0423-P, 2023 WL 2753982, at *2 (N.D. Tex. Mar. 31, 2023)

Use of Force

- Qualified Immunity
- To find qualified immunity did not protect Defendant, the Court would need to have held Defendant "violated a statutory or constitutional right." *Morgan*, 659 F.3d at 371 (quoting *al-Kidd*, 563 U.S. at 735). The qualified-immunity analysis requires that a right be "clearly established." *See id.* "A right is clearly established when it is defined 'with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct.' " *Templeton v. Jarmillo*, 28 F.4th 618, 621 (5th Cir. 2022) (quoting *McClendon v. City of Columbia*, 305 F.3d 314, 331 (5th Cir. 2002) (per curiam)). Whether a right is "clearly established" turns on "whether the violative nature of *particular* conduct is clearly established." *al-Kidd*, 563 U.S. at 742 (emphasis added).

  Ramirez v. Killian, No. 2:18-CV-107-Z-BR, 2022 WL 4677629, at *3 (N.D. Tex. Sept. 30, 2022)

Use of Force

- This case arises from an incident that occurred around midnight on January 31, 2019, in Greenwood, Mississippi. Gianni was driving home when Officer Jerry Williams of the Greenwood Police Department observed him turn without signaling. Officer Williams followed Gianni to his residence. When Gianni exited his vehicle, Officer Williams commanded Gianni to stop and lay on the ground. Gianni initially protested, but finally complied when Officer Williams unholstered his taser and approached.[1] Officer Williams then straddled Gianni's back and attempted to handcuff him. Gianni tried to pull away, and Sergeant Kevin Hayes, who had just arrived at the scene, came over to assist. After the officers succeeded in handcuffing Gianni, they hoisted him to his feet and tried to walk him to the patrol car. Gianni continued to yell and resist. One officer unholstered his taser and held it to Gianni's back, warning Gianni that officers would “tase him if they ha[d] to.” A few seconds later, Gianni cried out in pain and yelled, “They shot me with their taser gun.” After continuing to resist for several more seconds, Gianni finally allowed officers to place him in the back of a patrol car.

  Williams v. City of Greenwood, No. 22-60192, 2023 WL 2733467, at *1 (5th Cir. Mar. 31, 2023)

Use of Force

- As a result of the incident, Gianni was charged and convicted of disorderly conduct, failure to signal, no driver's license, no proof of motor vehicle liability insurance, and possession of marijuana.
- Gianni sued the City of Greenwood, Chief of Police Ray Moore, Officer Williams, and Sergeant Hayes under 42 U.S.C. § 1983 for violations of his Fourth, Fifth, Eighth,[2] and Fourteenth Amendment rights and for various state law claims. The district court granted Appellees' motion for summary judgment as to Gianni's federal claims and dismissed them. In light of this holding, the court declined to exercise supplemental jurisdiction over Gianni's state law claims, dismissing them without prejudice. Gianni timely appealed.

Use of Force

- To sue a municipality, a plaintiff must show the existence of (1) "a policymaker," (2) "an official policy," and (3) "a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). Additionally, when, as here, law enforcement officers sued in their individual capacities properly invoke qualified immunity, "the burden shifts to the plaintiff to demonstrate the inapplicability of the defense." *Carroll v. Ellington*, 800 F.3d 154, 169 (5th Cir. 2015). To determine if the plaintiff has met this burden, we ask: "(1) whether the undisputed facts and the disputed facts, accepting the plaintiff's version of the disputed facts as true, constitute a violation of a constitutional right, and (2) whether the [officers]' conduct was 'objectively reasonable in light of clearly established law.' " *Id.* (quotation omitted). Here, "the record evidence, read in the light most favorable to [Gianni], does not show that his [constitutional] rights were violated." *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279–80 (5th Cir. 2016). Therefore, Gianni necessarily failed to satisfy the requirements of either test, and his federal claims fail..

Use of Force

- First, Gianni asserts that Officer Williams and Sergeant Hayes violated his Fourth Amendment rights by using excessive force while attempting to handcuff him and escort him to the patrol car. To establish an excessive force claim, plaintiffs must show that they "suffer[ed] an injury that result[ed] directly and only from a clearly excessive and objectively unreasonable use of force." *Joseph ex rel. Estate of Joseph v. Bartlett*, 981 F.3d 319, 332 (5th Cir. 2020). Several factors guide our analysis when evaluating these claims, including "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

  Williams v. City of Greenwood, No. 22-60192, 2023 WL 2733467, at *2 (5th Cir. Mar. 31, 2023)

Use of Force

- Here, factor three is most relevant. Our precedent explains that a suspect's active resistance to arrest justifies an enhanced degree of force, including the use of a taser. See, e.g., Cloud v. Stone, 993 F.3d 379, 384–87 (5th Cir. 2021) (holding that an officer did not violate a constitutional right when the officer tased a defendant resisting handcuffing); Collier v. Montgomery, 569 F.3d 214, 216, 219 (5th Cir. 2009) (concluding that an officer acted reasonably when he pushed an arrestee onto the hood of his police cruiser after the arrestee resisted the officer's attempts to handcuff him by "pull[ing] his hand back and turn[ing] away from the officer").

- Williams v. City of Greenwood, No. 22-60192, 2023 WL 2733467, at *2 (5th Cir. Mar. 31, 2023)

Use of Force

- There is no question here that Gianni resisted arrest.[4] Moreover, Gianni failed to raise a fact issue as to whether the officers' response was objectively unreasonable under Fifth Circuit precedent. Though Gianni asserts that Officer Williams "repeatedly tased him until he was in the police car," the video plainly shows that Gianni was tased only once. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("We assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene."); *Collier*, 569 F.3d at 219 ("The video evidence shows that [the plaintiff] physically resisted when [the defendant] attempted to place handcuffs on him."). Additionally, even where the video is inconclusive, Gianni presented no evidence to support his assertion that officers struck his side or back; his deposition alleged only one act related to the throat.[5] *See Nola Spice Designs*, 783 F.3d at 536 (explaining burden shift to non-movant on raising a fact issue).

  Williams v. City of Greenwood, No. 22-60192, 2023 WL 2733467, at *2 (5th Cir. Mar. 31, 2023)

Use of Force
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- Gianni asserts three additional § 1983 claims: (1) supervisory liability against Chief Moore, (2) bystander liability against Sergeant Hayes, and (3) municipal liability against the City of Greenwood for failure to train and supervise Officer Williams and Sergeant Hayes. But all three claims are predicated on the existence of a constitutional violation. *See, e.g., Peña v. City of Rio Grande City*, 879 F.3d 613, 619–20 (5th Cir. 2018); *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013); *Piotrowski*, 237 F.3d at 579; *Becerra v. Asher*, 105 F.3d 1042, 1047–48 (5th Cir. 1997). Since Gianni's evidence does not raise a fact issue as to whether Appellees violated his constitutional rights, these claims fail as well.

  Williams v. City of Greenwood, No. 22-60192, 2023 WL 2733467, at *3 (5th Cir. Mar. 31, 2023)

Qualified Immunity

- Justin Davis, an inmate, sued Lieutenant Kristine Gentry under 42 U.S.C. § 1983 for allegedly violating his Eighth Amendment rights.

- JUSTIN TYLER DAVIS, Plaintiff-Appellee, v. LIEUTENANT KRISTINE GENTRY, also known as KRISTEN ZAMBRANO, Defendant-Appellant., No. 21-40186, 2023 WL 2706905, at *1 (5th Cir. Mar. 29, 2023)

Qualified Immunity

- Because this case arises from the denial of [Gentry's] motion for summary judgment," the relevant events are described "in the light most favorable to the nonmoving party," Davis. Plumhoff v. Rickard, 572 U.S. 765, 768 (2014); see also Walsh v. Hodge, 975 F.3d 475, 481 (5th Cir. 2020) (a summary judgment case noting: "When assessing an interlocutory appeal for qualified immunity," we "must ... review the complaint and record to determine whether, assuming that all of [the plaintiff's] factual assertions are true, those facts are materially sufficient" to avoid qualified immunity (quotation omitted)). We thus set forth the facts as supported by Davis

- JUSTIN TYLER DAVIS, Plaintiff-Appellee, v. LIEUTENANT KRISTINE GENTRY, also known as KRISTEN ZAMBRANO, Defendant-Appellant., No. 21-40186, 2023 WL 2706905, at *1 (5th Cir. Mar. 29, 2023)

Qualified Immunity

- Davis is incarcerated by the Texas Department of Criminal Justice. In August 2016, other inmates severely beat Davis and stabbed him eighteen times. Davis was treated at an outside hospital, and prison medical staff issued him a temporary medical pass granting him permission to use a walking cane. He was also transferred to a new facility for his safety.

Qualified Immunity

- A few days after the transfer, two corrections officers came to Davis's cell to escort him to the showers. While Davis was in his cell, the officers attempted to apply “rear-cuff restraints”—in other words, secure Davis's hands behind his back. Because this would prevent Davis from using his cane, Davis asked the officers to use front-cuff restraints instead. They refused, and Davis requested a supervisor. Shortly thereafter, Gentry arrived.[2]
- Davis informed Gentry about his injury and cane pass. According to Davis, Gentry responded, “Well, don't worry about it, the shower is just right there. We're going to support you.” When Davis continued to protest, Gentry threatened Davis with disciplinary action. In response, Davis finally submitted to the rear-cuff restraints.
- .

Qualified Immunity

- As the officers were applying the rear-restraints, Davis's cane fell. Per Davis, when he alerted the officers, they did not pick up the cane. Rather, they responded, “okay, well, we'll support you, here we are,” and stood near the opening of the cell door “ready to grab [Davis].” When Davis tried to take a step, he felt a sharp pain in his leg and fell to the ground. Despite Gentry's and the officers' prior reassurances, Davis contends that they “just let [him] fall down” and “didn't grab [him] ... like they said.”
- Gentry called prison medical personnel to assist. Several minutes later, nurses arrived and transported Davis to the prison's medical clinic. There, he was prescribed medication and new medical restrictions.

Qualified Immunity

- Davis subsequently filed the underlying § 1983 suit, alleging that Gentry violated his Eighth Amendment rights by placing him at a substantial risk of serious harm by disregarding his medical restriction.
-
- Gentry moved for summary judgment based on **qualified immunity**. The district court denied the motion as to this claim, concluding there were several genuine issues of material fact. Gentry timely appealed.

Qualified Immunity

- To determine whether the defense applies on a given set of facts, we ask: (1) whether "the official's conduct violated a constitutional right," and (2) "whether the right was clearly established." *Cunningham*, 983 F.3d at 190–91 (internal quotation marks and citation omitted). "We can analyze the prongs in either order or resolve the case on a single prong." *Id.* at 191 (internal quotation marks and citation omitted); *see also* *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Given the "fact-bound" nature of the constitutional question presented, we take the latter course of action here. *Morgan v. Swanson*, 659 F.3d 359, 385 (5th Cir. 2011) (en banc) (quoting *Pearson*, 555 U.S. at 819). Accordingly, our inquiry focuses solely on whether Gentry's conduct—based on Davis's version of the facts—violated clearly established law.

Qualified Immunity

- “The ‘clearly established’ prong is difficult to satisfy.” *Cunningham*, 983 F.3d at 191. A constitutional right is only clearly established if it is “sufficiently clear that every reasonable official would have understood that what [s]he is doing violates that right.” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quotation omitted). “The central concept is that of ‘fair warning’ ”—that is, for the law to be clearly established, prior precedent must provide officials with “reasonable warning that the conduct then at issue violated [the plaintiff's] constitutional rights.” *Bush v. Strain*, 513 F.3d 492, 501–02 (5th Cir. 2008) (quotation omitted).

Qualified Immunity

- …the district court determined that Davis satisfied this prong because "it is clearly established by the Supreme Court and in the Fifth Circuit that deliberate indifference to a serious medical condition violates the law." *Davis v. Zambrano*, No. 2:18-CV-110, 2020 WL 8513711, at *6 (S.D. Tex. Sept. 8, 2020) (citing *Gobert v. Caldwell*, 463 F.3d 339, 345 (5th Cir. 2006) and *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)). However, this cursory analysis plainly contravenes the Supreme Court's repeated admonition to courts "not to define clearly established law at a high level of generality." *Mullenix*, 577 U.S. at 12 (quotation omitted).

Qualified Immunity

- to satisfy this prong, plaintiffs typically must point to a case that is sufficiently factually similar so as to have "placed the statutory or constitutional question beyond debate." *Mullenix*, 577 U.S. at 12

Legislative Updates - Changing the Rules….

- https://www.tcole.texas.gov/content/bill-tracking

- https://www.cleat.org/services/public-affairs/bill-tracker/

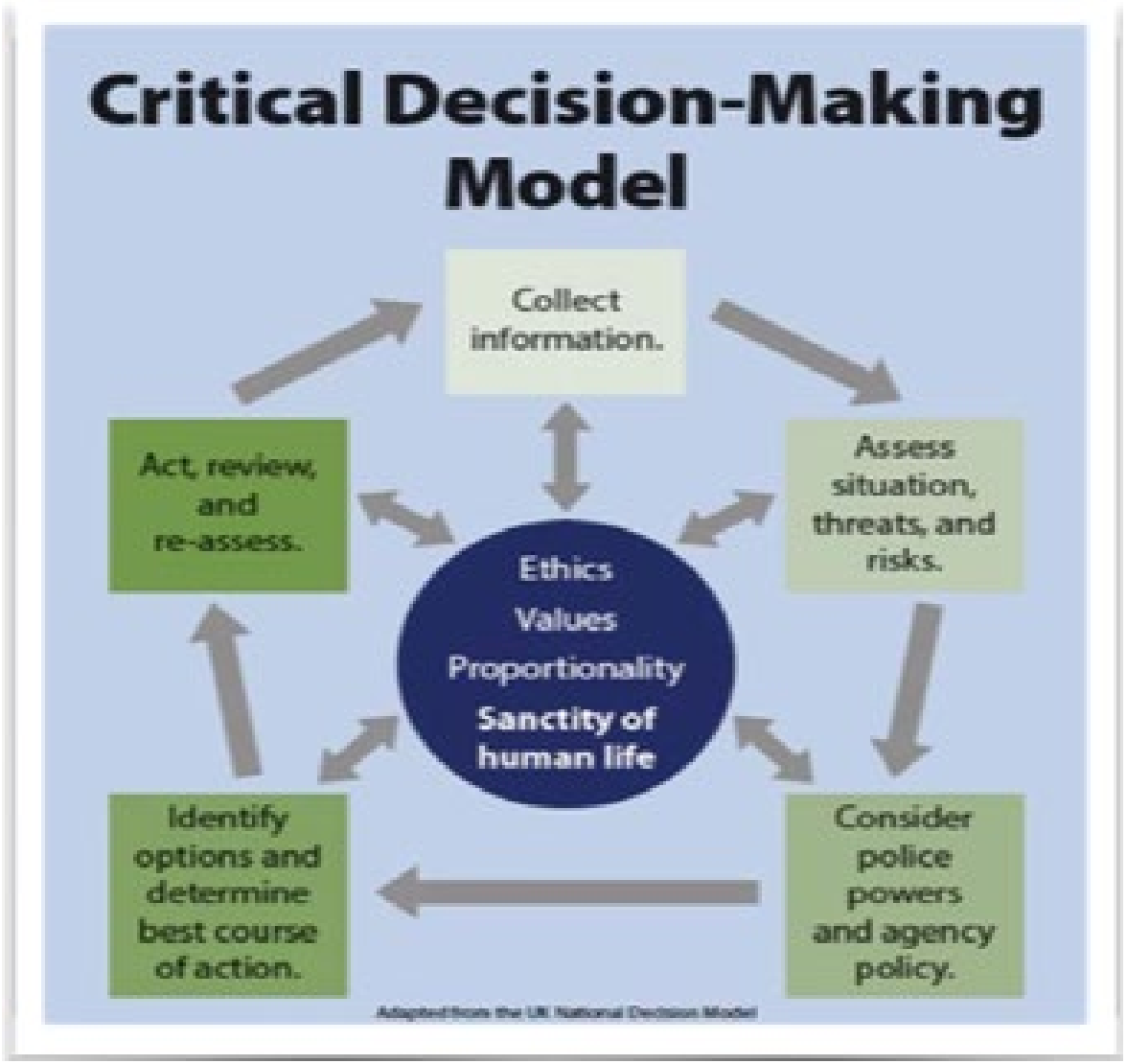

Critical Incidents, Oh My!
"But for the grace of God go I" – a discussion in the wake of Uvalde.

1) Need for Better Training

There is broad recognition among law enforcement officials of the importance of first-line supervisors. However, research on effective supervisory training is sparse, and relatively few law enforcement agencies have strengthened their policies and training practices to emphasize preparing first-line supervisors for the important decisions they must make, particularly those related to critical incidents.

- Critical Response Tool Kit for First-Line Supervisors, Police Executive Research Forum 2016

CDM Graphic Model



INCIDENT COMMAND

Model Policy

Section II – This department shall utilize the National Incident Management System/Incident Command System (NIMS/ICS

INCIDENT COMMAND

Model Policy

Section IV. A. Incident Assessment

1. The first responder shall assess the operational situation immediately upon arrival and proceed according to applicable policies and procedures.

INCIDENT COMMAND

Model Policy

..initial responsibility for management of assigned resources…

INCIDENT COMMAND

Model Policy

The first responder shall maintain command and control of the incident or event until relieved by a higher authority, if necessary.

c. The chief of police or his or her designee shall exercise command and control over all law enforcement resources committed to an incident or event that is citywide or multijurisdictional in nature.

Active Shooter Training

- U.S. Department of Homeland Security
  - HOW TO RESPOND WHEN AN ACTIVE SHOOTER IS IN YOUR VICINITY
    - Step one – Evacuate
    - Hide out
    - Take action against the active shooter
- 2020 TCOLE Active Shooter Response for School-Based Law Enforcement Course #2195 - January 2020
  - **Learning Objective:** The student will be able to compare/contrast an active shooter event and a hostage or barricade crisis
  - **Learning Objective:** The student will be able to identify response priorities during school shootings.
  - **Learning Objective:** The student will be able to explain the need to potentially adopt a solo response to an active shooter event.
  - **Learning Objective:** The student will be able to explain communication strategies for solo officer response.

Active Shooter Training

- An active shooter event involves one or more persons engaged in killing or attempting to kill people in an area occupied by multiple unrelated individuals.U.S. Department of Homeland Security
- vs
- A hostage crisis develops when one or more criminals hold people against their will and try to hold off the authorities by force, threatening to kill the hostages if provoked or attacked.
- An event that starts as an active shooter event can easily morph into a hostage crisis and vice versa. The patrol response and search tactics for dealing with active shooters and hostage/barricade situations are starkly different.

Active Shooter Training

- First responders to the active shooter scene will usually be required to place themselves in harm's way and display uncommon acts of courage to save the innocent. First responders must understand and accept the role of "Protector" and be prepared to meet violence with controlled aggression. The Priority of Life Scale is used to guide first responders during the critical decision-making process that is required to effectively neutralize any threats. As first responders we must recognize that innocent life must be defended. A first responder unwilling to place the lives of the innocent above their own safety should consider another career field.

- This scale does not suggest that any first responder approach the mission with reckless abandon for safety. The first responder using effective tactics coupled with situational awareness can isolate, distract, and neutralize the actor(s), while mitigating the loss of innocent life.

Active Shooter Training

- Place themselves in harm's way.
- Display uncommon acts of courage.
- Be prepared to meet violence with "controlled aggression".
- Recognize that innocent life must be defended.
- Willing to place the lives of the innocent above their own safety should consider another career field.

versus

- No requirement to act with reckless abandon for safety to defend the innocent life threatened by an Active Shooter.

Reckless Abandon, Defined:

- "without care or regard for consequences".
- “in a very wild and reckless way”
- “with rash, unrestrained impulsiveness, enthusiasm, or zeal.”
- “to engage in something with no regard for consequences or safety”

*Source: Internet definitions from “reckless abandon meaning” search 01.29.2023.

Active Shooter Training

- So, what is the standard of conduct for **ALL** Texas Peace Officers?

- Which training are you to follow, NIMS or Active Shooter?
  - How does one decide?
  - If I “rush in” I violate NIMS training and if I follow ICS training, I violate Active Shooter training.
- How about adopting the below standard for Texas Peace Officers:

  In the moments that mattered, all Texas Peace Officers who find themselves first responders to an Active Shooter shall display bravery, courage, sacrifice, integrity and a deep love of the State and a desire to always do what is right?

The Congressional Medal of Honor
Since 1861, only 3,530 Medals awarded to only 3,511 people.

Lake Travis, Texas, 2013 - Flyboarding.