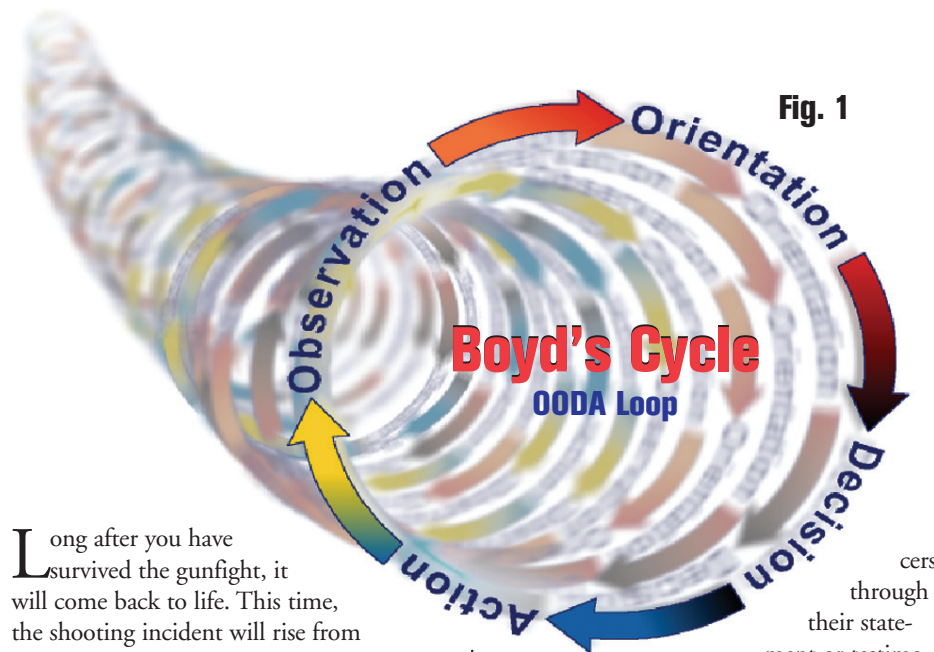


How to accurately and persuasively explain the **use of force**

By Luis Robles



Long after you have survived the gunfight, it will come back to life. This time, the shooting incident will rise from the ashes within the walls of internal affairs, a use-of-force review board or a courthouse.

So how do you prepare for *this* contingency? Becoming fluent in the language of special weapons and tactics is a good start. Sometimes, a lawyer who understands use-of-force can point out specific areas you should address. However, for you to produce a persuasive statement or testimony which will convince skeptical internal affairs investigators, board members or jurors requires more.

Typically, officer report writing and testimony follow a linear, chronological path. This method of presentation may serve you well for an uneventful DUI arrest. But a simple explanation of the facts is not enough for an officer-involved shooting. Indeed, this method of presentation fails to capture the speed, danger and complexity which are part of every shooting.

When I first began working on officer-involved use-of-force cases, I thought the lawyers who defended officers had already created a system that would guide the offi-

cers through their statement or testimony. After years of searching legal publications and discussing this issue with lawyers in different states, I found that no such system exists. I now realize I was looking in the wrong place. I should have begun my search by asking my officer-clients for guidance.

From my officer-clients, I quickly learned that their powers of observation were far greater than mine. These officers quickly assessed the significance of information they collected, decided on a course of action, and then took action, adjusting their response as the situation changed. After all these years, I am still amazed at how quickly their minds processed information and their bodies responded. My being impressed, however, did not help me explain my client's actions to judges or juries.

On the recommendation of one of my officer-clients, I then read "Sound Doctrine: A Tactical Primer," by Charles "Sid" Heal.¹ This book introduced me to an invaluable tool which helped me understand a concept which had until then eluded me. The name of this tool is the OODA

Loop (Observation, Orientation, Decision, Action), originally called the Boyd's Cycle after its creator, Colonel John Boyd, USAF Ret.²

Colonel Boyd believed that any conflict could be viewed as a duel during which each opponent observes his adversary's actions, orients himself to the unfolding situation, decides on the most reasonable response and then acts. The person (in this case, either the officer or suspect) who moves through this OODA Loop the quickest gains a significant advantage by disrupting his opponent's ability to respond effectively. Colonel Boyd showed in detail how the OODA Loop creates continuous and unpredictable change, and argued that our nation's military tactics, strategy and weapons should be based on the idea of shaping and adapting to this change — and doing so faster than one's adversary.

For those of you who are students of military tactics, you might find my use of the OODA Loop slightly unorthodox. If you hold such a belief, allow me to show you that a truly useful tool, such as the OODA Loop, easily transcends its traditional boundaries.

In the OODA Loop lies all the elements of an officer/suspect encounter stripped to its barest essentials — observe, orient, decide and act (See Figure 1). Aside from the practical application of the OODA Loop to your day-to-day work, the OODA Loop readily creates a structure which an officer can use to explain any incident, especially a critical incident such as an officer-involved shooting.

Observation. You should list the information that you have observed, heard or otherwise collected, and the source of that information. The information should be presented in an objective manner, free of distortions, bias or subjective interpretations. To

the extent the situation allowed you to do so, you should present all available facts and circumstances, including time, distances and speed, if applicable. If you made assumptions and estimates, you should identify that you have in fact made assumptions or estimates, how you made them and why you made them. Qualifying your estimates of time, distances and speed is especially important.

You must list the unknowns; that is, specifically identify potentially useful information you do not know. As described by the United States Supreme Court, you operate in a world that is "tense, uncertain and rapidly evolving." The only thing that is certain is that you will never have complete and perfect information. Instead, you must embrace the fact that your information is incomplete and use this fact to explain the danger that you faced.

Orientation. This is the process where you take the facts and circumstances that you learned and analyze them using your training and experience. Stated more specifically, officers use their training and experience to interpret the known information and reach a reasonable conclusion as to the

level of threat posed by the suspect.

Some examples which illustrate orientation are appropriate at this juncture. At a domestic violence call, an officer observes a suspect:

1. becoming increasingly more animated/exaggerated in his movements;
2. increasing his verbal or physical resistance to an officer's verbal commands;
3. moving his feet into a balanced or fighting stance;
4. staring at, through and past an officer (also called the 1,000-yard stare);
5. increasing his muscular tension (jaw clenches, neck muscles tighten);
6. making fists; and/or
7. dropping his shoulder.

These observations of the suspect, viewed through the lens of training and experience, form the factual basis for an officer's conclusion that the suspect has begun the process of assaulting the officer.

After "interrupting" a drug buy, as another example, an officer observes that a suspect's:

1. jacket or shirt hangs unevenly as a

result of a heavy object;

2. excessive, bulky clothing is inconsistent with the weather; and/or
3. waistband or lapel areas have an unnatural bulge.

Based on the officer's knowledge of danger cues, these observations of the suspect form the factual basis for an officer's conclusion that the suspect possesses a weapon.

After stopping a suspect who the officer believes was involved in a burglary the previous night, the officer observes the suspect:

1. using verbal misdirection (denying his identity, blaming someone else);
2. subtly creating distance between the suspect and the officer; and/or
3. turning his body in the direction of a potential avenue of escape.

Viewed through the lens of training and experience, these observations form the factual basis for an officer's conclusion that the suspect is attempting to flee.

During your assessment of the facts and circumstances, you should also incorporate the law governing the use of force. As you may know, the United States Supreme



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Fig. 2

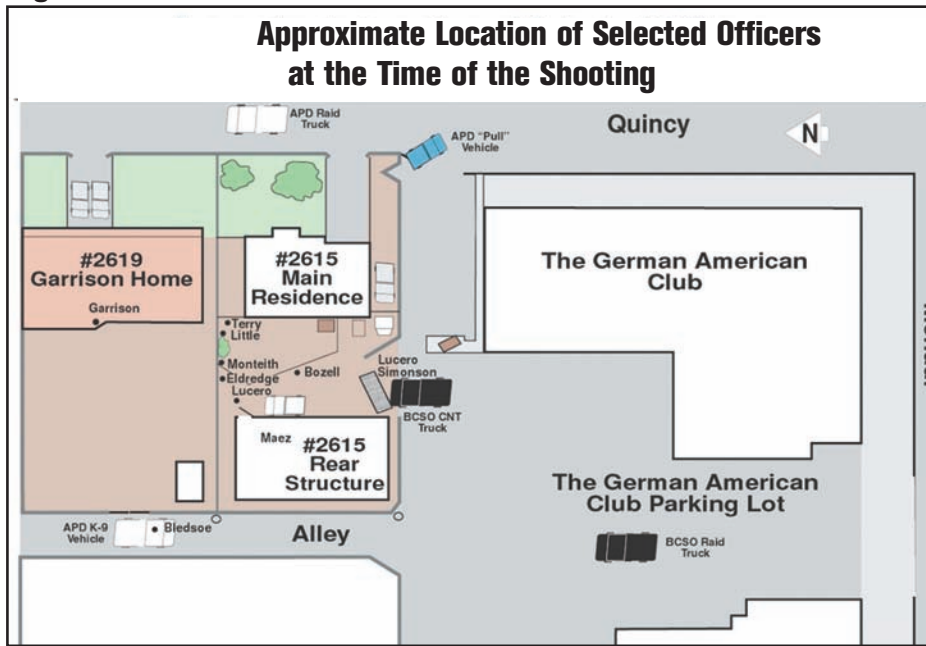
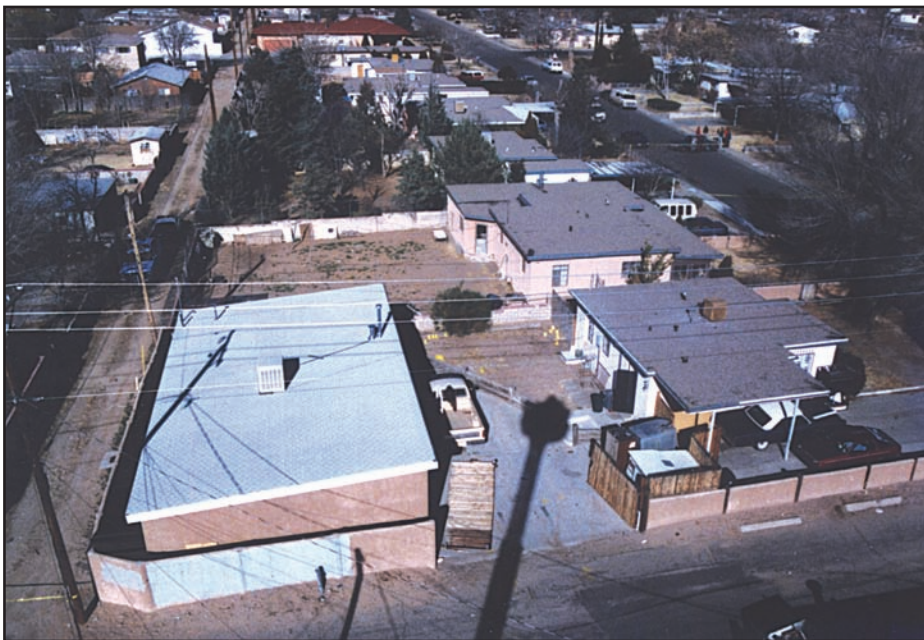


Fig. 3



Court's decision in *Graham v. Connor*³ established the objective reasonableness test. This test is the analytical model by which all use-of-force cases are reviewed. As required by *Graham*, an officer's use-of-force is assessed by examining the facts and circumstances known to the officer, including a review of the following:

1. the severity of the suspect's crimes;
2. the immediacy of the threat posed by the suspect to the safety of the officers or others; and

3. whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

A thorough statement should address each one of these three factors.

As set forth in *Tennessee v. Garner*,⁴ an officer is authorized to use deadly force when the officer has probable cause to believe that the suspect poses a threat of serious bodily harm to an officer or another person. In other words, you must explain in detail that the suspect's method for deliver-

ing force was capable of causing serious bodily injury, and that the suspect was poised to immediately deliver that force against you, a fellow officer or civilians.

Decision. You should explain the course of action you decided to take in response to the situation you were facing. In the team environment, your "decision" may include an explanation of your unit's strategy, tactics and techniques.

Strategy (overall direction). Explain how the team intended to employ available resources to achieve a successful resolution. You can explain the strategy as the goal of your unit's deployment. For example, peacefully resolving the standoff with the armed suicidal subject, freeing the hostages without injury to anyone, etc.

Tactics. Explain the methods used to accomplish a particular mission or solve a certain problem. For example, your tactical unit called in another tactical unit from a nearby agency so that the two teams could simultaneously enter the two structures which were subject to a narcotics warrant.

Techniques. Explain the procedures you or another officer used to perform a specific task, such as how you employed a piece of equipment. For example, you and Officer Jones used a 50-pound handheld ram to breach the front door, allowing the entry team access to the interior of the house.

Action. You should then explain the implementation of your decision and its outcome. If the situation changed before you implemented your decision, explain how you responded. If the changed circumstances are substantial, you may need to set out your "new" observations, orientation, decision and action(s). In the following section, examples are provided of what the term "action" means.

Application of the OODA Loop to an officer-involved shooting

At this point, you might be thinking to yourself, "Theory is one thing, but practical application in the real world is quite another." To address your concerns, please consider the following statement as a good example of how the OODA Loop can assist you in constructing your statement in use-of-force cases.

On Dec. 16, 1996, the SWAT teams of Albuquerque Police Department and the Bernalillo County Sheriff's Department exe-

cuted a warrant at 2615 Quincy, NE, Albuquerque, New Mexico. (See Figures 2 and 3). At approximately 0608 hours Albuquerque PD SWAT Officer H. Neal Terry, shot Ralph Garrison. By 0917 hours that same morning, Albuquerque PD Violent Crimes Detective Rick Foley interviewed Officer Terry about this incident. **The following is an unedited transcript of Officer Terry's statement about the Garrison shooting.**

The statement is color-coded to indicate the following:

Observation
Orientation
Decision
Action

Detective Foley: This is Detective Rick Foley with the Albuquerque Police Department. Today's date is December 16, 1996. The time is approximately 0917 hours. Presently at the Albuquerque Police Department. Also present with me is Detective Carla Gondara and Detective Andrew Ortiz with the Bernalillo County Sheriff's Department, Officer Neal Terry with APD's SWAT, and accompanying him is Officer Steve Rodriguez, also from APD SWAT.

Neal, before we get started, just so we know, prior to going on tape, I advised you of your rights, correct?

Officer Terry: That's correct.

Detective Foley: And you understand your rights?

Officer Terry: Yes, I do.

Detective Foley: And you're willing to talk to us at this time?

Officer Terry: Yes, I am.

Detective Foley: Okay. Could you just go ahead and just start from the beginning, where you're assigned, what the search warrant was for, what your duties were, how you were dressed, and just kind of take us step by step, up until the events, and then at the end, we'll ask you some questions.

Officer Terry: On the 16th of December 1996, I was part [of] a warrant service team with [the] Albuquerque Police Department and assisted by the Bernalillo County Sheriff's Department SWAT team. We had a warrant service to serve. The location was

approximately Menaul and Quincy.

Our briefing time was at 0300 hours on the same morning, and we arrived and were briefed in regard to the warrant. The information that we received during the briefing was presented by Officer Mark Mitchell and Acting Sgt. Steve Rodriguez, with Lt. Ruben Davalos present, and the members of the Albuquerque Police Department White Collar Crime Unit detectives, the names I don't recall.

The warrant service that we were being briefed in regard to at this location, the reason that SWAT was called on to serve the warrant service was, first of all, for the fortifications at the location. We were told that there was wrought iron on the location where the warrant was to be served at. Additionally, the suspects at the locations had extensive criminal histories and were involved in activities that would indicate that there was a — what we would consider a high-risk warrant service. At one point in the briefing, the White Collar Crime detective said that he had conferred with Dan Wolfe of the Repeat Offender Project with the Albuquerque Police Department, and that one of the primary suspects was known to carry a 9-millimeter handgun on his person, and that he had had prior dealings with the subject.

At the briefing, we were given a packet that showed a diagram of the exterior of the locations that we were to serve the warrants at, as well as maps and diagrams for prior staging areas and routes from the staging areas to the warrant service location itself. At the service location, there were two different buildings primarily that had to be cleared, one of which would be assigned to the Albuquerque Police Department SWAT team, and the second location would be handled by the Sheriff's Department SWAT team. I was on the team with the Albuquerque Police Department that would clear what appeared to be a single family dwelling residence on Quincy.

Our plan was as follows. We would go from the substation to the staging area at American Furniture at about Carlisle and Menaul, and once at that location, we would wait for additional intelligence information that would be supplied by both officers driving by and looking at the location, and a fly by by the Customs helicopter, which would be able to give us an idea of what the situation was inside the compound where we couldn't get a visual on it.

And we did proceed from the substation up to that staging area, and waited there. At that point, the helicopter made a fly-by, and also a drive-by was made by Officer John Messimer. They indicated that lights were on at the location, that there was activity there.

My particular assignment on this warrant service was to be a member of the entry team that went into the residence. I was in the stack between — behind Officer Ray DeFrates, and depending on how the breaching portion of the operation went, I was to be number three or number four into the house on the warrant service. Our plan consisted of arriving at the scene and staging the entry team in a position of safety. At the same time, the — Officer John Messimer would act as the cover officer, and Officer Mitchell and Sergeant Bill Kurth would set the pull hooks on the wrought iron on the front door, at the same time knocking and announcing our presence and intentions in regard to serving the search warrant.

If we were not given admittance into the location in a reasonable amount of time, we would then force entry into the location. Means of breaching or getting in, our primary plan was to pull the wrought iron with the pull vehicle, and then to breach the door behind it with a one-man hand ram, and then we would go float in with the entry team. If the hooks were to fail, there we had Officer DeFrates with a breaching shotgun in position, to breach the wrought iron with breaching rounds, and also the interior door with a breaching round, in order to secure our entry.

As it actually turned out, when we arrived, there was activity there, and as the officers approached the front door, a subject came to the front door. I couldn't see the subject, but I could hear the officers yelling at the house, saying, "Let me see your hands" and announcing who we were, what our purpose was there and telling them to open the door for admittance into the residence. There was some dialogue back and forth between the officers and whoever was inside, and the wrought iron was opened and the door was opened, and the entry team moved in.

I believe I was the fourth one in. I'm not positive on that, but approximately number four in the stack going through the door. And as I came in, I went through the living room area, and two officers had started clearing the living room area, and I

flowed toward the rear of the residence. Whoever was in front of me, two officers peeled off to the right, and I saw a hallway, an open doorway to my left. And I approached the doorway, and prior to entering that room, I sounded off that I needed to have another entry team member with me. Somebody sounded off behind me that they were with me, and we went into that room and cleared it. There was nobody in the room that I cleared.

After clearing the room and finding nobody inside it, I told the officer I was with to hold the room, and that I would exit and see if my assistance was needed in the rest of the residence. I sounded off coming out, and all the rooms had a sufficient number of officers in it, and there was one suspect inside that had been detained and secured. Seeing that they didn't need my assistance anywhere else, and I checked to see if a secondary search had been conducted of all the locations inside the residence. I talked to one of the other entry guys and I'm not sure which one it was at this point, but he assured me that a secondary search had been done.


I noticed in the kitchen area there was a door in the kitchen that led out into the backyard, which was in kind of a separate compound in the area, where the Sheriff's Department was going to be clearing that area and that building (sic). Officer Rob Smith was there in the front room, and I told him to turn and cover the kitchen door from where he was at. Not to go out in there, but to cover it, in case anything came back our direction, and which he did.

I then exited the residence and began walking around the outside of it, to see if there were any vehicles or areas that hadn't been cleared of individuals, headed into the backyard, which took me into the compound area, which the Sheriff's Department SWAT team had been assigned to secure, then walked to the north, which put me on the northwest corner of the residence that I had been inside.

At that point, I saw Deputies Eric Little and Monteith were covering down into the next yard to the north, and their attention was directed specifically at a back door at that location. I approached Deputy Little and asked him how the operation had progressed at the rear of the residence. At that point, he told me that there had been a subject come out of the house directly to the north while they were securing the location.

He said that the subject had yelled something to the effect of, "What the 'F's' going on out here? That's my house." He said that the deputies then identified themselves as law enforcement officers, and told him to go back inside his residence. He said that the guy had gone back inside the residence, and that they were watching the area for officer safety purposes, as their first encounter with him had been somewhat hostile, and they didn't know at that point what his intentions or involvement in the overall scheme of things was.

Shortly after that, I noticed that an area on the north side of the residence I had been in I did not think probably had been cleared by anybody. I asked Eric where the dog was that was supposed to be in the backyard. We had received information in the briefing that there was a Rottweiler that ran loose in that area of the property. Eric told me that there hadn't been a dog there when they made entry. I started looking around, trying to see, you know, possibly where the animal was at, as it potentially posed a threat to the officers in the area, and



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saw this area to the north of the residence in which I had been in, and thought that it was a probability that the dog was penned up in this little area.

I then started talking to Eric again, and asked him if that area had been cleared, trying to establish whether or not the possibility remained of there being a threat in that particular location. It was during this interchange with Deputy Little that I heard somebody to the left of me yell, "Gun, gun!" At that time, I immediately turned and looked at the area and the house north of the warrant service location where Deputies Monteith and Little had been covering, as I thought that to be the most likely area that the threat would be manifesting itself.

When I looked up there, I saw a white male subject at the back of the door. He had in his right hand what appeared to be a semi-automatic handgun. It looked to me to be a 1911 mechanism-type pistol, and appeared to be a chrome or stainless steel finish, and looked to be like it was a 5-inch version of the firearm. In the subject's left hand, there was a second object also. I wasn't sure what the second object was in his left hand, but I positively identified the object in his right hand as being a 1911-type handgun.

Deputy Little was just to the left of me and slightly forward of me. I took a small step to the right to ensure that I would clear the deputy, and brought my weapon to bear upon the threat. As I observed the subject, it appeared as though the — the door was starting to — to come open or had been opened, and began to extend his right arm with the pistol in it. I watched the muzzle of the gun, and it started in a — a position pointing toward the ground, and it began to rise in the direction of Deputy Monteith, and additionally, the other deputies that were still in the process of clearing the second structure at the warrant service location.

It was at that point than (sic) I made the determination that Deputy Monteith and the other deputies that were at that location were directly in front of that muzzle, and the subject's actions and seeing the weapon in his hand left me with no doubt that he was placing them in jeopardy, and I feared that they were in danger of great bodily harm and/or death via the use of the

handgun. As the subject continued to bring the handgun up and aiming at the deputies, I then placed the aiming mechanism on my AR15 on the torso area of the subject at that door.

I then fired a single shot, aiming at the torso area, came out of recoil, could still see the subject standing at that location, aimed the weapon again, and fired a subsequent shot. After the second shot was fired, I fired that second shot, then the subject dropped from my view, and I couldn't see him any longer. I then maintained my position and held on that doorway, at which time, a team of deputies crossed the fence into that yard, and approached the doorway from which the threat had come. As they approached it, I heard a second shot after the deputies had reached the doorway area.

And once they were in an area where I felt that I was ineffective, as far as protecting other members of the team in that position, then directed my attention to the other opening on the dwelling itself, and also that area which I initially had been trying to clear, where I thought perhaps the dog was located. I climbed the fence, looked into the area, and cleared it with a light. Didn't see a dog or a threat in that area. Also did not see any further threats or movement from the house from which our assailant had appeared. I then remained in that position.

Shortly thereafter, I was approached by Lieutenant Davalos and Acting Sergeant Rodriguez. They didn't know at that point what had transpired, but had heard the firearms discharge. I then quickly explained to them what had transpired and safed my weapon, and Lt. Davalos then isolated me from the remaining members of the team until I was approached and talked to by the investigators that subsequently arrived.

Conclusion of Officer Terry's account.

Color Key

Observation
Orientation
Decision
Action

Six days after the shooting occurred, the Estate of Ralph Garrison filed a civil rights lawsuit in the United States District Court, claiming excessive force. Using Officer Terry's statement, I prepared an affidavit which I successfully used to win this case on motion.⁵ The district court's decision in Officer Terry's favor was upheld by the Tenth Circuit Court of Appeals.⁶ The United States Supreme Court denied the Estate's request for additional review.⁷

Conclusion

Observation, orientation, decision, and action. The OODA Loop is a powerful yet simple explanation of how human beings make tactical decisions. By using the OODA Loop in your use-of-force statements and testimony you can harness its power to help you defeat your paper adversaries. ♦

Endnotes

1. Heal, Charles "Sid." Sound Doctrine: A Tactical Primer (Lantern Books 2000).
2. See Coram, Robert, Boyd: The Fighter Pilot Who Changed the Art of War (Little, Brown and Company 2002).
3. Graham v. Connor, 490 U.S. 386 (1989).
4. Tennessee v. Garner, 471 U.S. 1 (1985).
5. Garrison, Ben v. Chief Joe Polisar, et al., CIV 96-1801 LH/DJS (D.N.M.) [Docket No. 137].
6. Garrison, Ben v. Chief Joe Polisar, et al., 229 F.3d 1163, 99 WL 2193 (10th Cir. 2000).
7. Garrison, Ben v. Chief Joe Polisar, et al., 532 U.S. 994 (2001).

About the author



Luis Robles is an attorney with the law firm of Robles, Rael, & Anaya. His civil practice focuses on civil rights defense litigation. He has defended numerous state and local governmental agencies in police misconduct, First Amendment,

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