

EXCESSIVE AND DEADLY POLICE FORCE

UNCONSTITUTIONAL OR REASONABLE CAUSE

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Excessive or deadly force is constitutional only where the use of excessive or deadly force has been determined to be "objectively reasonable" under the intervening circumstances in the apprehensive of a felony suspect resistant to arrest.

A police officer should not be held immune from prosecution for the use of excessive or deadly force during the enforcement of the law unless the actions of the suspect have necessitated the use of force to prevent the imminent danger to the life of the officer or the lives of the innocent.

The scope of this writing will not decide the moral question of a police officer's use of excessive or deadly force but, will address the variant constitutional standards of reasonable cause under the Fourth Amendment.

THE 4TH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These fundamental rights were born out of the injustices and oppressive rule placed upon the colonists whose homes were unjustifiably intruded and whose person was unduly seized by police officials.

During the drafting of the Fourth Amendment, common-law rule at the time allowed police officers *any* force necessary, including deadly force, to seize or capture a felony suspect attempting to flee which is still upheld today. Due to the less severe nature and low risk of harm brought by an offender suspected of a misdemeanant act, such deadly force was and is prohibited.

Of historical note, felony crimes at that time, were not as pervasive as today and those committed were punishable by death. In addition, weaponry was rudimentary and law enforcers were not equipped with modern or advanced technology in the apprehensive of a suspect, leaving a police officer's personal safety in peril. [1] In fact, "handguns were not carried by police officers until the latter half of the century." [2]

In the context of law enforcement today, the climate has changed. While there is no uniform consensus to the common-law rule, the acceptance and use of deadly force against a fleeing felon is now only recognized in less than half the States. Some States have even expressly adopted the provisions set forth in Model Penal Code (1962) or modified its application, which states in pertinent part, "*The use of deadly force is not justifiable . . . unless . . . (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.*" [3]

Interestingly, most police department policies are "more restrictive than common-law rule" [4] and the seemingly future trend is to limit the use of deadly force to only occurrences where it is necessary to prevent the loss of life or serious injury.

REASONABLE CAUSE

While there is no defined or explicit legal meaning of "reasonableness" under the Fourth Amendment, the Court has ruled its application shall be viewed upon each particular case and the standards, upon which an law enforcement officer's conduct shall meet, must be based upon the *totality* of the facts and circumstances at the scene. This includes the following criteria: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest; or (4) whether he is attempting to evade arrest by flight. [5]

RELEVANT CASE LAW

Currently, most alleged violations of the Fourth and Fourteenth Amendments are brought against defendant-police officers and/or governmental agencies under 42 U.S.C. § 1983 [6].

Tennessee v. Garner, 471 U.S. 1 (1985)

In the landmark case of Tennessee v. Garner, the Supreme Court found "reasonable cause" to be absent and the police officer's deadly shooting of the suspect unconstitutional.

In the late evening on October 3, 1974, police officers were summoned to a private home in response to a break-in by a prowler. At the scene, Officer Hymon observed a young, slight, male suspect, Garner, (later found to be 15 years old) and whom he was "reasonably" sure was unarmed. Though Officer Hymon shouted, "police, halt", the suspect attempted to flee over a fence. Believing Garner would elude arrest, the officer fired his weapon, shooting him in the back of the head leading to his death. After the shooting, ten dollars and a purse taken from the residence were found on his body.

Under Tennessee statute [7], an officer is within his authority to use deadly force in the detainment of a fleeing felony suspect. It was held that the Officer Hymon had "employed the only reasonable and practicable means of preventing escape . . . and that Garner . . . assumed the risk of being fired upon". at 5.

However, the Supreme Court disagreed, setting new precedent by overruling the longstanding common-law rule that deadly force is provided for against all escaping felony suspects, no matter the circumstances, and declaring the officer's conduct unconstitutional. The Court held that Officer Hymon could not *reasonably* have believed that a young, slight and unarmed suspect posed a serious and dangerous threat to his life or others. In fact, Hymon's own justification for the shooting was merely to prevent Garner's escape. at 21.

Graham v. Connor, 490 U.S. 386 (1989)

In Graham v. Connor, the Supreme Court decided the reasonable standards constituting excessive force in the apprehensive and "seizure" of a **non-felony** citizen.

Graham, a diabetic, suffering from low blood sugar due to an insulin reaction, asked a friend drive him to the store to purchase some orange juice to thwart the effects. Due to long line of customers at the store, Graham hurriedly left and instead asked to be taken to friend's house. Officer Connor witnessing Graham's behavior and believing it suspicious, followed Graham's vehicle and made an investigatory stop. Though Graham advised Officer Connor of his medical condition, the officer ordered that Graham be detained until after his investigation.

During the course of the ensuing events that followed, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder and a continuing loud ringing in his right ear.

Both the district and appellate courts found the officers' use of force "appropriate under the circumstances," and "was not applied maliciously or sadistically for the very purpose of causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive situation." at 391.

Relying on Tennessee, supra, the Supreme Court vacated the lower courts decisions, opining, "the excessive force claim arises in the context of an arrest or investigatory stop of a **free citizen** . . . invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable. . . seizures" of the person." at 395. [Emphasis added]

Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003)

The Appellate Court in Drummond v. City of Anaheim, also determined the force used by the Anaheim police to be excessive and unconstitutional.

Here, the Anaheim police were called to assist Plaintiff, Drummond, in obtaining medical attention. Drummond who had a history of mental illness and due to lack of medication,

was in a hallucinating and agitated state. The officers requested an ambulance for transportation to a medical facility however, before the ambulance arrived, the officers decided to take, the unarmed Drummond, into custody, "for his own safety."

Eyewitnesses later confirmed that although Drummond was cuffed, "knocked to the ground" and offered no resistance, two of the officers placed their weight on his back and neck to restrain him. Drummond, who weighed 160 pounds, repeatedly told the officers that he could not breathe and that they were choking him, however, the officers disregarded his pleas and continued apply their weight.

Within twenty minutes, Drummond had fallen into a coma and suffered brain damage, leaving him in a permanent vegetative state.

Drummond's medical expert stated that to a reasonable medical probability he suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The doctor believes this was due to the police officers' compression weight preventing Drummond the ability to properly breathe by inhaling and exhaling in a normal manner.

In review, the Court noted there was no suspicion of a crime and the police involvement was merely to assist an individual in need of medical attention. Further and more importantly, though Drummond's mental state was cause for concern, once Drummond was handcuffed, placed on the ground, and not resisting arrest, there was no longer a threat or the need for additional physical force.

Therefore applying the standards under *Graham*, the Court concluded the force exerted was not only severe, but "wholly unwarranted" and further ruled that any "reasonable officer would have understood such force to be constitutionally excessive." at 1063.

CONCLUSION

In analyzing the "reasonableness" of what constitutes a particular use of force the Court in *Graham*, supra, stated, it must be "**judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight**" and, provide "allowance . . . that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of

force that is necessary in a particular situation." The Court went further, stating, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

[Emphasis added] [8].

This is further established in Saucier v. Katz, 533 U.S. 194, 205, (2001), which states, "the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective" and "an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat", Terry v. Ohio, 392 U.S. 1, 20, (1968).

A police officer's actions are based on the unpredictability of the moment and the totality of the events and circumstances. It is on those conclusions that the reasonable standard shall apply and constitutionality weighed.

It is indisputable that police officers face life and death situations everyday to maintain order and pursuit of the law in a complex society. It is because of this burden that we have traditionally granted officers the authority to use all available means necessary to safely enforce the law, including the use of deadly force. However, this power must not go without scrutiny.

Consider the case of 23-year old minor league baseball player Robbie Tolan [9], son of former MLB star and World Series champion Bobby Tolan.

On New Year's Eve, December 31, 2008, Officer Edwards observed Tolan driving "a little erratically." The officer assuming the vehicle was stolen and that Tolan and his passenger (his cousin) were about to rob a home, detained the two men after they pulled into the driveway of the home of Tolan's parents in Bellaire, Texas. In attempting to run a license plate number, Officer Edwards incorrectly gave the dispatcher the wrong license number of Tolan's SUV. Due to the mistaken license number the dispatcher informed Officer Edwards the vehicle "might" be stolen.

Sergeant Cotton arrived at the scene, as Tolan's parents, in their pajamas, exited their front door where they found their son and his cousin prone on the ground. Sergeant

Cotton failing to ask the Tolans if they knew the two men, ordered Tolan's father to put his hands up and also assume the position. Thereafter and despite Mrs. Tolan's protestations that he (Tolan) was her son, and had done nothing wrong, Sergeant Cotton slammed her into the garage door. Robbie Tolan immediately began to rise, telling Sergeant Cotton to, "*get your hands off my mother.*"

Sergeant Cotton, without warning, turned and fired three times, striking Tolan, once in the chest.

In May 2010, Sergeant Cotton was acquitted of aggravated assault. He told jurors that he shot Tolan because he believed his life was in danger after seeing Tolan reach into his waistband, presumably for a weapon. (Tolan was unarmed).

Tolan nearly died from the gunshot and the bullet remains lodged in his liver. It is unknown if he will ever play baseball again.

It is the duty of the Court to determine the reasonableness of an officer's questionable conduct and balance this governmental interest with those of the people. For without this judicial oversight, we will once again fall prey to the injustices our forefathers fought so hard against.

Endnotes:

[1] [Legal-dictionary.thefreedictionary.com/deadly+force](http://legal-dictionary.thefreedictionary.com/deadly+force).

[2] *Tennessee v. Garner*, 471 U.S. 1, 15 (1985); L. Kennett & J. Anderson, *The Gun in America* 150-151 (1975).

[3] "The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." American Law Institute, Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962).

[4] *Tennessee v. Garner*, 471 U.S. 1, 18 (1985).

[5] *Graham v. Connor*, 490 U.S. 386, 396 (1989); Recent Fourth Amendment Developments in Use of Force @ www.aele.org/zigmund2004.

[6] 42 U.S.C. § 1983, states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity . . .

[7] The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. 5*5 § 40-7-108 (1982).

[8] *Graham v. Connor*, 490 U.S. 386, 397 (1989).

[9] nationalsportsreview.com/.../an-hbo-“real-sports”; sports.espn.go.com/mlb/news/story