Teaching the New Constitutional Pre-Trial Detainee Standard: "The End of the Legal Twilight Zone"

Description

On June 22, 2015 the United States Supreme Court ended the decade long debate of the appropriate use of force standard for pretrial detainees in *Kingsley v. Hendrickson*[1]. Previously the Fourteenth Amendment standard lay within a fractured body of case law, due to the United States Supreme Court's refusal to address the split throughout the federal circuit courts. According to Irene Baker[2], courts and commentators had referred to the period following arrest but prior to conviction and sentencing, as a "legal twilight zone," which began with the application of the Fourteenth Amendment Due Process Clause to claims of excessive force by law enforcement officials. This twilight zone originated with the Supreme Court decision in the 1952 case *Rochin v. California*."[3] In *Rochin v. California*[4] the Supreme Court concluded, "We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience."

In the 1973 case, *Johnson v. Glick*[5], the Second Circuit Court of Appeals relied on *Rochin*, "While the *Rochin* test, "conduct that shocks the conscience," 342 U. S. at 172, 72 S.Ct. 205, is not one that can be applied by a computer, it at least points the way." The *Johnson* court concluded, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." "In determining whether the constitutional line has been crossed, a court must look to such factors as; 1) The need for the application of force, 2) The relationship between the need and the amount of force that was used, 3) The extent of injury inflicted, and 4) Whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[6] The *Johnson* court also "refused to apply the Fourth Amendment's proscription against unlawful searches and seizures to claims brought by pretrial detainees. In essence, Judge Friendly determined that, because no specific amendment applies to pretrial detainees, the catch-all protection of substantive due process in the Fourteenth Amendment applies to a pretrial detainee's claim of excessive force."[7] While the vast majority of federal courts adopted the *Johnson v. Glick* test in the following years for pre-trial detainees, the next opportunity for the Supreme Court to rule on the *Johnson v. Glick* decision came in 1985.

"In *Tennessee v. Garner*[8], the U.S. Supreme Court first applied the Fourth Amendment to a suspect's claim of excessive force during a seizure. The *Garner* court characterized the Fourth Amendment test as a means of determining whether, under the totality of the circumstances, a particular type of search or seizure was justified. Under this analysis, an officer's use of force becomes excessive when it is objectively unreasonable. In an attempt to guide this analysis, the *Garner* Court noted that an application of the Fourth Amendment must balance the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion."[9]

The 1989 landmark case *Graham v. Connor*[10] began with the United States District Court for the Western District of North Carolina applying the *Johnson v. Glick* four-factor test and granted respondents' motion for a directed verdict." The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of constitutionally excessive force brought against government

officials, rejecting Graham's argument that it was error to require him to prove that the allegedly excessive force was applied maliciously and sadistically to cause harm, and holding that a reasonable jury applying the *Johnson v. Glick* test to his evidence could not find that the force applied was constitutionally excessive." [11] The Supreme Court ruled, "We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard."[12] "Because petitioner's excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson v. Glick* test."[13] In *Graham*, the Supreme Court made it clear the two primary sources of constitutional protection will either be the Fourth Amendment for seized people or the Eighth Amendment for convicted people. "Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today."[14]

The genesis to the end of the legal twilight zone began in December 2010 where Mr. Kingsley was awaiting trial in Monroe County Jail in Sparta, Wisconsin. According to court documents, a deputy performing a cell check noticed a sheet of yellow legal paper covering the light above Mr. Kingsley's bed and ordered him to take it down. Mr. Kingsley refused. Later that afternoon Mr. Kingsley was given another order to take the paper down and a warning of possible disciplinary action. Mr. Kingsley refused. Mr. Kingsley was given the night to consider complying with the orders. The next morning, Mr. Kingsley was given two more orders to remove the piece of paper from covering the light. Mr. Kingsley refused. Mr. Kingsley was ordered to stand up and place his hands behind his back, which he refused. Mr. Kingsley was forcibly transferred to another cell. Once he was on the receiving-cell bunk, the officers attempted to remove the handcuffs. The evidence at trial was conflicting on the later course of events. The defendants say that Mr. Kingsley resisted their effort, pulling the handcuffs apart and trying to get up. Mr. Kingsley denied this resistance at trial. A deputy applied a Taser for five seconds on Mr. Kingsley's back. The Lieutenant then ordered all of the staff to clear the cell. Fifteen minutes later, the staff returned and were able to remove the handcuffs. Mr. Kingsley filed a complaint in Federal District Court claiming two of the officers used excessive force against him in violation of the Fourteenth Amendment's Due Process Clause. The court settled on the following instruction:

"Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:

(1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused some harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:

•The need to use force;

• The relationship between the need to use force and the amount of force used;

• The extent of plaintiff's injury;

• Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and

• Any efforts made by defendants to limit the amount of force used."[15]

In the end the jury found in the officers' favor. On appeal, "Mr. Kingsley contends that the district court conflated the standards for excessive force under the Eighth and Fourteenth Amendments and, as a result, wrongly instructed the jury to consider the subjective intent of the defendants."[16]

On March 3, 2014, the Seventh Circuit disagreed stating, "We evaluate a claim of excessive force not under "some generalized 'excessive force' standard," but "by reference to the specific constitutional standard which governs that right." Graham, 490 U.S. at 394. Mr. Kingsley was a pretrial detainee at the time of the tasing incident; therefore, the Fourteenth Amendment's Due Process Clause is the source of his substantive right and determines the applicable standards to evaluate his claim."[17]

In December 2014, Mr. Kingsley petitioned for a writ of certiorari to the United States Supreme Court asking them to end the clear split among the Federal Circuit Courts thus, "…end decades of disagreement, and decide what constitutional standards govern pretrial detainees' excessive force claims."[18] "The decisions of the courts of appeals will continue to be fractured until this Court [Supreme Court] decides the issue."[19] Certiorari was granted on January 16, 2015.

In March 2015, The National Sheriff's Association filed an amici curiae[20] brief respectfully asking the Court to "Apply the same constitutional standard concerning use of force by correctional staff on incarcerated persons regardless of whether they are pretrial detainees or convicted inmates."[21] The brief recommended the Eighth Amendment standard should be the one universal standard articulated by the Court in *Whitley v. Albers[22]* and *Hudson v. McMillian[23].* Thirty-six Sheriff's organizations joined the brief supporting the recommendation. On April 27, 2015 the United States Supreme Court heard oral arguments concerning the case.

In *Kingsley,* the Supreme Court held the appropriate standard for deciding a pretrial detainee's excessive force claim is an objective standard. The Court offered the following reasons;

- "It is consistent with our precedent" [Graham v. Connor & Bell v. Wolfish[24]]
- "Experience suggests that a objective reasonable standard is workable. It is consistent with the pattern of jury instructions used in several circuits."[25]
- "We are also told many facilities, including the facility at issue here, train officers to interact with all detainees as if the officer's conduct is subject to an objective reasonable standard."
- "Finally the use of an objective reasonableness adequately protects the officer who acts in good faith."

The recommendation by the National Sheriff's Association would have been the most desirable as noted, "The housing and classification of inmates in a jail are not based on their pretrial versus convicted status but rather on a behavioral and security based classification system utilizing a multitude of factors."[26] For agencies and trainers who embrace constitutionally based policies and training methodologies, this recommendation would have eliminated the need to analyze and train the objective reasonableness standard for use of force in the detention setting. Instead, the Court's ruling continues the need for many agencies and trainers to teach at a minimum the Fourth Amendment objective reasonable standard and the Eighth Amendment subjective standard, whether the force was maliciously and sadistically used to cause harm rather than in good-faith effort to maintain or restore discipline.

In *Kingsley*, the Court further provided that when determining the reasonableness or unreasonableness of a use of force, other factors courts may include:

- "The relationship between the need for the use of force and the amount of force used." [Eighth Amendment]
- "The extent of the plaintiff's injury." [Eighth Amendment]
- "Any effort made by the officer to temper or limit the amount of force." [Eighth Amendment]
- "The severity of the security problem at issue." [Eighth Amendment]
- "The threat reasonably perceived by the officer." [Eighth Amendment]
- "Whether the plaintiff was actively resisting." [Fourth Amendment]

"These factors, however, do not replace the *Graham* standard factors of severity of the crime, threat to the officer, and active resistance or evading arrest by flight. Rather, the Supreme Court provided these factors, which were not meant to be an exclusive list, to illustrate the types of objective circumstances potentially relevant to a determination of excessive force."[27]

The training impacts from the *Kingsley* decision comes in two significant areas of importance, use of force decision making through threat assessment and use of force report writing. As noted above, the Court invited using a combination Fourth Amendment and Eight Amendment case factors for analyzing and reporting use of force. Trainers must remember the legal profession and the courts are generally focused on post incident analysis of officer's decisions. Use of force trainers embracing a constitutionally-based training program are focused on teaching use of force decision making at the moment.

The objective standard through *Graham* and *Tennessee* and the subjective standard through *Hudson* provide factors to help guide post incident fact finders in analyzing a use of force incident. For example the objectiveness reasonableness standard for free people being seized and pre-trial detainees through *Graham*, has a factor stating "Whether the suspect poses and immediate threat to the safety of the officer or others"[28]. The subjective standard through *Hudson* for convicted people has a factor stating "Threat reasonably perceived by a responsible official"[29]. Both factors are asking for the same information about the officer's threat assessment at the moment. How threat assessment is trained in a training program is akin to the importance of a sound church doctrine as there is a direct correlation between how officers are trained to process threat cues and their ability to reasonably react at the moment.

In 2002, FBI Special Agent Thomas D. Petrowski, J.D., stated, "The cornerstone of use-of-force training should be threat assessment."[30] Petrowski further explained, "officers must be trained to respond to

the threat of violence and not to the actual violence itself, guarding against the inherent presence of hesitation." Threat assessment when properly trained with the elements of ability, opportunity, and intent can help train officers to reasonably come to their conclusions, as "[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern"[31]. In select use of force training programs, "intent" is not the state of the suspect's mind but rather observable behavioral cues that further the threat from an imminent threat to an immediate threat. "Requiring officers to somehow *mind read a suspect's intent* when he is armed with a gun prior to shooting him is not required by law and builds in an unacceptable mental lag time." [32] The importance of defining imminent v immediate threats cannot be overstated. "Quite often, the misunderstanding in may-shoot scenarios is embedded within our mistaken assumption that imminent threats are synonymous with "immediate threats". From a legal and policy perspective, you can drive a truck through the difference."[33]

If there is still uncertainty which term is more desirable to use consider the following guidance from *Graham* and *Tennessee,* "the suspect poses an immediate threat to the safety of the officers or others," [34] "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[35] "Commerce City's official policy, which authorizes officers to use deadly force "in protection of themselves or others from the immediate threat of death or serious bodily injury (citations omitted) mirrors the constitutional standard."[36] When considering which term to use in training and policy the optimal word seems to be "immediate".

Remember the training of suggested "factors" either from the objective standard through *Graham* and *Tennessee* or the subjective standard through *Hudson*, comes before the post incident analysis. Using these suggested factors in use of force decision making training, marks a constitutionally-based training program. With the Supreme Court's blended guidance of the Fourth Amendment and Eighth Amendment's factors, the following is a suggested report writing template for the detention setting;

- The threat reasonably perceived by the officer?
- Whether the inmate was actively resisting?
- Any effort made by the officer to temper or to limit the amount of force?
- The severity of the security problem at issue?
- The extent of the inmate's injury?

However, the factors and elements must be defined in policy to aid the officer's ability to reasonably make decisions at the moment, articulate and write the use of force report for the post incident analysis. For example, the factor "threat reasonably perceived by the officer", is vague because "threat" is not clearly defined as an imminent or immediate threat. In addition, national organizations, court cases and some state statues provide sources for adopted definitions of "active resistance".

1. *Kingsley v. Hendrickson*, 576 U.S._ (2015) ?

2. Baker, Irene M. (2012) "Wilson v. Spain: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?," St. John's Law Review: Vol. 75: Iss. 3, Article 6. Available at: http://scholarship.law.stjohns.edu/lawreview/vol75/iss3/6 ?

3. Id. ?

4. *Rochin v. California*, 342 U.S. 165, 172 (1952) ?

5. *Johnson v. Glick*, 481 F.2d 1028 (1973) ?

6. Id. ?

7. “Excessive Force Claims: Disentangling Constitutional Standards | Bench and Bar of Minnesota.” *Bench and Bar of Minnesota RSS*. N.p., n.d. Web. 26 Feb. 2015. <http://mnbenchbar.com/2011/07/excessive-force-claims-disentangling-constitutional-standards/>. ?

8. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ?

9. O’Hagan, Eamonn. “Judicial Illumination of the Constitutional Twilight Zone: Protecting Post-Arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement.” *BCL Rev.* 44 (2002): 1357. ?

10. Graham v. Connor, 490 U.S. 386, 394 (1989). ?

11. Id. ?

12. Id. ?

13. Id. ?

14. Id. ?

15. United States Court of Appeals, Seventh Circuit. Michael B. KINGSLEY, Plaintiff–Appellant, v. Stan HENDRICKSON, et al., Defendants–Appellees, No. 12–3639. Decided: March 3, 2014 ?

16. Id. ?

17. Id. ?

18. Kingsley v. Hendrickson No. 14-6368, On Petition of Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (December 17, 2014) ?

19. Id. ?

20. "Literally a friend of the court, someone who is not a party to the case and offers information that bears on the case and is not solicited to assist the court" https://en.wikipeddia.org/wiki/Amicus_Curiae ?

21. Kingsley v. Hendrickson No. 14-6368, On Petition of Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Brief for the National Sheriff's Association ET Al. as Amici Curiae (March 9, 2015) ?

22. *Whitley v. Albers* 475 U.S. 312 (1986) ?

23. *Hudson v. McMillian* 503 U.S. 1 (1992) ?

24. *Bell v. Wolfish* 441 U.S. 520, 559, 99 S.Ct. 1861 (1979) ?

25. The Tenth Circuit has already applied this suggested factor in Estate of Booker v. Gomez 745 F3d 405,409 (10th Cir 2014), wherein the court stated: "We recognize that much of the case law we rely upon [for pretrial claims] deal with excessive force claims under the Fourth, not the Fourteenth Amendment. Although the two standards are different, a finding of excessive force under the Fourth Amendment is highly relevant to the relationship between the amount of force used and the need presented…." ?

26. Kingsley v. Hendrickson No. 14-6368, On Petition of Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Brief for the National Sheriff's Association ET Al. as Amici Curiae (March 9, 2015) ?

27. Daigle, Eric. WWW. *Daiglelawgroup.com* (n.d):n.pag. *Objective Use of Force Standards Defined as to Pre-Trial Deteinees Guidance on Objective Reasonable Standards*. Daigle Law Groyp, Southington, CY 24 June 2015. Web.12 July 2015. http://www.daiglelawgroup.com/wp-content/uploads/2011/05/Kingsley-v.-Hendrickson.pdf ?

28. Graham v. Connor, 490 U.S. 386, 394 (1989). ?

29. *Hudson v. McMillian* 503 U.S. 1 (1992) ?

30. Thomas Petrowski, Use-of-Force Policies and Training – A Reasoned Approach, FBI Law Enforcement Bulletin, Nov., Vol 71 No. 11, 2002 ?

31. *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). ?

32. Davis, Kevin R. Use of Force Investigations: A Manual for Law Enforcement. Bloomington, IN: Responder Media, 2012. Print. ?

33. Aveni, Thomas. “The “Must-Shoot” vs “May Shoot” Controversy.” LAW and ORDER Magazine (2005): 38-44. Web. ?

34. Graham v. Connor, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). ?

35. Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) ?

36. Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009) ?

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