CASES



by Erich R. Eiselt, Assistant General Counsel

Excessive Force: "Possibility of Acceleration" Justifies Close-Range Shooting of Driver By Police Officer

Officers on the Anaheim, California Police Department noticed a van being driven erratically. They checked the van's plates, found that it had been involved in a prior narcotics stop and pulled the vehicle over after it continued to weave in its lane.

As two officers approached, the driver (Gonzalez) appeared to be hiding contraband in his clenched fist. He ignored orders to open his hands. One officer on the driver's side began hitting Gonzalez's arm with a flashlight. When Gonzalez moved one hand towards his mouth while reaching down below the seat with his other hand, one officer applied a carotid restraint (a "sleeper hold") to Gonzalez's neck while his partner entered the van on the passenger side and began punching Gonzalez's head and face.

Gonzalez attempted to put his vehicle in gear, and the passenger-side officer began hitting him in the head with his flashlight. The van lurched forward with the passenger-side officer still inside. He tried to knock the gearshift but Gonzalez slapped his hand away. As the vehicle began to accelerate, the officer shot Gonzalez in the head at close range without further warning, killing him. The officer testified that less than 10 seconds had elapsed and the vehicle had traveled 50 feet at most.

Gonzalez's father and daughter sued the officers and the City of Anaheim (City) under 42 U.S.C. § 1983 for violation of their Fourteenth Amendment right of familial association and of Gonzalez's Fourth Amendment right to be free from unreasonable and excessive force.

The district court granted summary judgment for the City, holding that the force used throughout the encounter was reasonable; the officers' conduct did not violate plaintiffs' Fourteenth Amendment rights.

On appeal Gonzalez's representatives again alleged that the officers used excessive force in hitting Gonzalez with their flashlights, using a carotid restraint and finally shooting Gonzalez in the head at close range.

Under the Fourth Amendment, police may use only such force as is "objectively reasonable in light of the facts and circumstances confronting them." *Graham v. Connor,* 490 U.S. 386, 397 (1989) (internal quotation marks omitted). *Graham* provides three factors to be considered when evaluating the need for force: (1) the severity of the crime, (2) whether the suspect posed an immediate threat to the officers or others, and (3) whether the suspect was actively resisting arrest. *Id.* at 396.

The Ninth Circuit analyzed each element of the alleged excessive force.

1. The flashlight strike to Gonzalez's arms: Officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat; the initial flashlight strike was reasonable given Gonzalez's refusal to listen to the officers' demands to open his hands.

2. The carotid restraint, the punches to Gonzalez's face, and the flashlight strikes to Gonzalez's head: The court applied the three *Graham* factors:

- The first factor, the severity of the crime, weighed in the officers' favor; they had reason to believe the suspect had committed a "felony-grade offense."
- The second factor, the immediacy of the threat, also weighed in favor of the officers, because Gonzalez was reaching down between the door and the seat with his left hand, potentially locating a weapon.
- The last *Graham* factor was whether Gonzalez was "actively resisting arrest or attempting to evade arrest by flight." Here again, the balance weighed in favor of the officers: When Gonzalez attempted to put the van in drive, his active resistance became attempted flight.

3. The shot to Gonzalez's head. Case law supported the proposition that, as an unbuckled passenger in a fast-moving vehicle driven by an escaping suspect, the officer had "probable cause to believe that the suspect pose[d] a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S 1, 3 (1985); (various additional cases were cited).

Plaintiffs countered that the officers' testimony that the van traveled only 50 feet indicated that the vehicle was traveling so slowly that it could not have been a threat.

The court found that the "possibility of acceleration" created a threat to the officer's life. The vehicle's tires had squealed as Gonzalez "floored" it, and the officer had no duty to await further risk before taking action: "absolute certainty of harm need not precede an act of self-protection" (citation omitted).

Gonzalez's representatives also alleged that the officers' conduct violated their due process right to familial association. The substantive due process claim required that they show that the officers' conduct "shock[ed] the conscience." Because the officers had no time to deliberate, plaintiffs had to show that the officers had a "purpose to harm" Gonzalez for reasons unrelated to legitimate law enforcement objectives. This they could not do. The Ninth Circuit upheld the district court's decision, finding that the officers had not used excessive force.

Circuit Judge Clifton dissented: "'Deadly force cases pose a particularly difficult problem, because the officer defendant is often the only surviving eyewitness.' This is one of those cases. Rafael Gonzalez is dead and cannot speak for himself."

He saw a "glaring inconsistency" in the record, and could not accept the majority's conclusion that the officer was "an unbuckled passenger in a rapidly accelerating van with an escaping and noncompliant suspect." To the contrary, the elements