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Staff Use of Force Against Prisoners--Part IV: Firearms

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Introduction

Prior articles in this multi-part series on the use of force by correctional staff members against prisoners covered the [general legal standard](#) for permissible use of such force and individual liability for excessive use of force, [governmental and supervisory liability](#) arising out of excessive use of force, and the [use of chemical weapons](#). This article focuses on the use of firearms against prisoners, and how courts have addressed liability issues arising from such use. Later articles in the series will include discussion of the use of Tasers, stun guns and other electronic control devices, and use of dogs. This article, like the others in the series, concentrates on federal civil rights law, and does not discuss, in any detail, liability under state law.

At the conclusion of this article, and each article in the series, a number of useful resources are listed, along with on-line links to the source documents whenever available. The listing of an item does not necessarily imply any endorsement or agreement with the views expressed therein.

Use of Firearms

The use of deadly force by law enforcement, such as firearms, is generally governed by the Fourth Amendment's objective reasonableness legal standard and by the rules set forth by the U.S. Supreme Court in the case of [Tennessee v. Garner](#), No. 83-1035, 471 U.S. 1 (1985). A [prior article](#) in the police civil liability section of this journal addresses that in detail. In [Garner](#), the Court found that a statute was unconstitutional insofar as it authorized the use of deadly force against

an apparently unarmed, non-dangerous fleeing suspect. Such force, the Court stated, may not be used unless it is necessary to prevent an escape and the officer has probable cause to believe that the suspect sought poses a significant threat of death or serious physical injury to either the officer or to other people.

But the use of force against convicted prisoners is not governed by the Fourth Amendment, but by the Eighth Amendment's prohibition on cruel and unusual punishment; see [Whitley v. Albers](#), #84-1077, 475 U.S. 312 (1986) and [Hudson v. McMillian](#), #90-6531, 503 U.S. 1 (1992), and a number of courts have therefore concluded that the rules set forth in [Garner](#) are also inapplicable to the use of firearms against prisoners.

The U.S. Supreme Court's decision in [Whitley](#) involved the shooting of a prisoner during an attempt to rescue a correctional officer taken hostage during a prison riot. The hostage was in a cell on the upper-tier of a two-tier cellblock, and a plan was developed requiring a prisoner security manager to enter the cellblock unarmed, followed by a number of officers carrying shotguns.

The security manager ordered one of the officers to fire a warning shot, and also to shoot low at any inmates climbing the stairs to the upper tier, since he would be climbing the stairs to free the hostage. After a warning shot was given, an officer shot prisoner Gerald Albers in the left knee as he went up the stairs.

Albers, who suffered serious injuries, filed a federal civil rights lawsuit against various prison officials, claiming that they had violated his rights under the Eighth and Fourteenth Amendments. The U.S. Supreme Court agreed that the appropriate legal standard to be applied was the Eighth Amendment's prohibition on "cruel and unusual punishment," and found that the shooting of the prisoner, under these circumstances, did not violate his Eighth Amendment rights.

To violate the Eighth Amendment in the context of attempting to quell a prison disturbance, the Court found, the key question is whether the measures taken "inflicted unnecessary and wanton pain and suffering" and turns on whether the force was applied in a "good-faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm."

Even if the officer shot Albers specifically rather than shooting at the inmates as a group, this did not establish that the officer shot knowing that it was unnecessary to do so. The shooting was "part and parcel" of a good-faith effort to restore prison security in a situation in which an officer's life was at risk because he was a hostage.

Following the Supreme Court's decision, a number of lower court's explicitly rejected the application of *Garner* to cases involving the use of deadly force against prisoners. In [Gravely v. Madden](#), No. 96- 4395, 142 F.3d 345 (6th Cir. 1998), the court ruled that an officer properly used deadly force to shoot and kill an escaped prisoner who was attempting to evade recapture, even though he did not think that the prisoner posed an immediate threat of physical harm to anyone, noting that the Eighth Amendment prohibition on cruel and unusual punishment, rather than the Fourth Amendment restrictions on use of deadly force, provided the proper legal standard to apply to the officer's actions.

This case involved a convict who escaped from a farm detail. He was found and surrounded at a friend's house by correctional officers and shot in the back when he ignored calls to stop as he ran out the back door of the house with something in his hand. Under these circumstances, his rights were not violated, as the shooting was not sadistic or malicious, in violation of the Eighth Amendment.

The use of excessive force to recapture an escaped convict creates a different problem than the use of force to apprehend a nonviolent fleeing felony suspect. The Fourth Amendment is not triggered anew by attempts at recapture because the convict has already been "seized," tried, convicted, and incarcerated. In addition, the historical reasons we provided in our opinion in [Garner](#), 710 F.2d 240, 243-45 (6th Cir. 1983), *aff'd*, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694, for the rule against deadly force on a free citizen not convicted and incarcerated do not apply with respect to escaped convicts.

In [Brothers v. Klevenhagen](#), #93-2453, 28 F.3d 452 (5th Cir. 1994), *cert. denied*, No. 94-795, 513 U.S. 1045 (1994), a federal appeals court ruled that deadly force may be used when necessary to prevent the escape of a pre-trial detainee, even when he is unarmed and is not thought to be dangerous to an officer or other person; The court rejected the argument that the [Tennessee v. Garner](#) rule applies to escaping prisoners; and the U.S. Supreme Court declined review of the case.

The detainee was arrested for auto theft, and after a few hours in a police cell was being transferred to a county jail on outstanding felony and misdemeanor warrants for other offenses. At the jail, he somehow removed his handcuffs, and began to run from the transport vehicle towards an exit. Deputies asked him to stop, but when he did not, fearing that he would escape, they shot twelve times as he crawled under an automatic door, killing him. "The deputies did not act maliciously or sadistically or in an attempt to inflict punishment, but rather followed a constitutional policy that permits deadly force only when necessary to prevent an immediate escape."

[It should be noted that the use of force against pre-trial detainees is usually analyzed under the due process clause of the Fourteenth Amendment, rather than the Eighth Amendment's prohibition on "cruel and unusual punishment. In a footnote in [Graham v. Connor](#), #87-6571, 490 U.S. 386 (1989), the U.S. Supreme Court stated that the "due process clause protects a pre-trial detainee from the use of excessive force that amounts to punishment. After conviction, the Eighth Amendment serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified. Any protection that substantive due process affords convicted prisoners against excessive force is, we have held, at least redundant, of that provided by the Eighth Amendment." Any real distinction between the protection provided to pre-trial detainees and convicted prisoners has been largely "blurred" over the years by the courts, and the legal standard, technical pleading aside, is essentially the same.]

What about circumstances in which a correctional officer uses deadly force in an attempt to restore order in a prison, but arguably injures, or even kills, the wrong prisoner?

In [Torres v. Runyon](#), #02-15273, 80 Fed. Appx. 594 (Unpub. 9th Cir. 2003), cert denied, No. 03-9590. 541 U.S. 1076 (2004), the court ruled that even if a correctional officer shot and killed the wrong prisoner during a violent prison yard fight between two rival gangs, his use of deadly force to break up the disturbance was reasonable, and he was entitled to qualified immunity for claims brought by the prisoner's estate.

The disturbance involved eighteen prisoners and two rival gangs, and the officer shot the prisoner from an observation tower. There was a factual dispute about whether the decedent was an aggressor or victim in the prison yard melee. The officer and a number of other witnesses said that the deceased prisoner was an aggressor, standing upright and "delivering kicks and blows." Witnesses for the plaintiff stated that the prisoner was on the ground when the officer shot him, and the plaintiff also offered forensic evidence tending to show that the entry and exit wounds were consistent with the prisoner lying on the ground, as well as offering the officer's admission that he had specifically targeted the prisoner as an aggressor.

Granting the correctional officer qualified immunity, the federal appeals court noted that there was no evidence that the officer knew the prisoner or acted with any animus toward him. "At most," the court found, he may have been negligent in shooting the wrong person. Ultimately, the appeals court found that it need not resolve the factual dispute over whether the prisoner was an aggressor or not, or was lying on the ground at the time he was shot.

The court stated that the defendant officer and other correctional officers present had yelled repeated verbal warnings to "get down," as well as deploying pepper spray in the yard and firing warning shots in an effort to stop the disturbance, to no avail. The evidence was uncontradicted that the officer aimed at and intended to shoot the inmate whom he saw kicking an unconscious inmate to death, "whether or not he hit the wrong person or was mistaken about which person was hit." The officer fired one shot each at two groups, and hit two inmates, including the decedent, following which the fight stopped soon thereafter.

Under these circumstances, given that the violent assaults in the prison yard continued unabated despite non-deadly force tactics, the officer acted reasonably in using deadly force to secure the safety of inmates "he believed to be defenseless and at the risk of serious bodily injury." The appeals court also noted that the state Department Shooting Review Board found that the officer acted "within established guidelines." The appeals court concluded that it could not say that the officer's conduct "was unreasonable under the circumstances."

Similarly, in [Jeffers v. Gomez](#), No. 99- 15867, 240 F.3d 845 (9th Cir. 2001), a court ruled that two prison guards who fired shots into prison yard disturbance, one of which struck plaintiff prisoner in the neck, were entitled to qualified immunity, even if the plaintiff was being attacked by other prisoners rather than being an attacker. The shots were being used to quell a serious disturbance and hitting the wrong prisoner was negligence at most, not a violation of civil rights.

Another interesting case analyzing the use of deadly force to quell a prison disturbance is [Marquez v. Gutierrez](#), No. 02-15017, 322 F.3d 689 (9th Cir. 2003), *cert. denied*, No. 03-170.540 U.S. 1073 (2003), in which the court concluded that even if there was a triable issue of fact as to whether a correctional officer's decision to shoot a prison inmate in the leg during a disturbance which included an assault on another prisoner was malicious, the officer was entitled to qualified immunity since he could have reasonably believed that shooting this prisoner in order to stop the assault was a good faith effort to restore order.

The case involved a disturbance that broke out in the yard at a California prison. A prisoner claimed that he was attacked by a group of unarmed inmates, but took no violent action himself. A correctional officer observed another inmate lying on the ground while being kicked in the head by two other prisoners. The officer intentionally shot the first prisoner, after prisoners paid no attention to his shouted orders or those shouted by another officer. The shot prisoner filed a federal civil rights lawsuit seeking damages for alleged excessive use of force.

The shot prisoner also disputed the officer's claim that he was one of the prisoners kicking the prisoner on the ground. A federal appeals court held that the officer was entitled to qualified immunity.

The court acknowledged that there would be a constitutional violation if the facts were as the plaintiff prisoner claimed--i.e., that he was doing nothing wrong, merely standing several feet from where other prisoners were kicking the inmate on the ground, but the officer nevertheless shot him intentionally.

The appeals court rejected the plaintiff prisoner's argument that a prison official cannot act maliciously and sadistically while, at the same time, reasonably believing that his actions conform to clearly established law. For purposes of qualified immunity, the court noted, courts may not simply stop with a determination that a triable issue of fact exists as to whether prison officials acted unconstitutionally. The claim of qualified immunity therefore is not defeated simply because a triable issue of fact exists as to whether the officer's decision to shoot the plaintiff was malicious.

Even if the officer's beliefs that the prisoner was involved in the kicking incident and that the prisoner on the ground was in danger of serious harm were mistaken, the court reasoned, he can still be entitled to qualified immunity.

A reasonable official, standing in a tower located 360 feet away from the disturbance, as the officer was, could perceive that both the plaintiff and another inmate were kicking the prisoner on the ground and threatening him with serious injury or death, and that the prisoner on the ground was not capable of protecting himself, even if no kick was actually administered by the plaintiff.

The scenario may look different when gauged against the "20/20 vision of hindsight," but we must look at the situation as a reasonable officer in [this officer's] position would have perceived it. In that light, we believe that a reasonable officer could believe that shooting one inmate in the leg to stop an assault that could have seriously injured or killed another inmate was a good faith effort to restore order, and thus lawful.

Courts have, of course, uniformly upheld the use of deadly force when it is apparently necessary in self-defense or defense of others. See [Garcia v. City of Boston](#), No. 00-2369, 253 F.3d 147 (1st Cir. 2001), holding that an officer properly shot a detainee in the arm after he obtained possession of another officer's gun and had already shot that officer and another prisoner.

Other cases of interest include:

* A prisoner shot and rendered paraplegic during an escape attempt while being transported was awarded nothing by California federal jury on his claim that excessive force was used against him. Mounsaveng v. Krug, No. CIV F 98 6078, U.S. Dist. Ct. E.D. Cal., reported in The National Law Journal, p. B3 (Aug. 13, 2001).

* A jury awarded \$2.3 million in damages to the estate of a prisoner shot and killed by a prison guard attempting to break up an inmate fight in the prison yard; the state reached a \$2.5 million settlement with the prisoner's family following a trial. Adams v. Gomez, U.S. Dist. Ct. San Francisco, Cal., November 30, 1998, reported in Chicago Tribune, Sec. 1, p. 8 (Jan. 2, 1999).

* California Department of Corrections reaches a \$825,000 settlement in a suit over the death of an inmate shot and killed by correctional officers in order to break up a fight with other prisoners. Tate v. Cal. Dept. of Corrections, U.S. Dist. Ct., Fresno, Calif., Nov. 11, 1998, reported in The New York Times, National Edition, p. A25 (November 12, 1998).

* Correctional officers were not entitled to qualified immunity in a lawsuit asserting that they aimed a loaded rifle with live ammunition at a prisoner without provocation or necessity. Thomas v. Gomez, #97-55702, 143 F.3d 1246 (9th Cir. 1998).

* In a suit over the death of an inmate allegedly shot to death by correctional officer, the Eleventh Amendment barred state law damage claims from being asserted by the plaintiffs in federal court when damages, if awarded, would ultimately be paid by the state. Gaston v. Colio, Civil No. 94-1351, 883 F.Supp. 508 (S.D. Cal. 1995).

* A prisoner allegedly injured by stray birdshot when a correctional officer intentionally fired a shotgun at another inmate can sue the firing officer and two other officers who were present, despite the officer's lack of specific intent to injure him. The correctional officers were not entitled to qualified immunity. Robins v. Meecham, 94-15067, 60 F.3d 1436 (9th Cir. 1995).

* Halting the escape of an 18-year-old convicted car thief by shooting him was not an excessive use of force. Kinney v. Indiana Youth Center, No. 91-1473, 950 F.2d 462 (7th Cir. 1991).

* An officer was entitled to qualified immunity for shooting and killing an unarmed pretrial detainee who attempted to escape when he was brought to

court for a hearing, when only a Fourth Amendment claim was asserted. Wright v. Whiddon, #90-8863, 951 F.2d 297 (11th Cir. 1992).

Resources

The following are a few useful resources on the use of force by correctional personnel. It should be utilized together with the similar list of resources in the [first](#), [second](#), and [third](#) articles in this series. Further listings will appear in subsequent articles in this series.

- [Commentary Regarding the Use of Deadly Force in Custodial Situations](#), U.S. Department of Justice. (1995).
- [Ohio Administrative Code provisions on use of force, including deadly force, against prisoners.](#)
- “Police and Correctional Use of Force: Legal and Policy Standards and Implications,” by J. T. Walker. Crime and Delinquency Volume:42 Issue:1 (January 1996) Pages:144-156. [Abstract](#) available online.
- [Pennsylvania Dept of Corrections Policy on Use of Force](#), including deadly force.
- State of Ohio Department of Rehabilitation and Correction [Policy on Use of Force](#), including deadly force.

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Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aol.com
Tel. 1-800-763-2802

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