

CONFRO QUALIFIED



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NTING IMMUNITY

AND THE 'REASONABLE' OFFICER STANDARD

By || **ANTONIO ROMANUCCI,
BHAVANI RAVEENDRAN, AND
CHRISTOPHER BURTON**

While responding to a domestic violence call, Bexar County sheriff's deputies in the San Antonio area shot and killed 41-year-old Gilbert Flores as he stood motionless with his hands in the air approximately 30 feet from the officers, ready to surrender.¹ The entire encounter between Flores and police lasted 12 minutes. Although Flores was armed with a knife, it was not until he surrendered that officers used deadly force.²

Flores's family brought a 42 U.S.C. §1983 claim against the officers for using excessive force in violation of Flores's Fourth Amendment rights. The officers moved for summary judgment based on qualified immunity, but the district court denied the motion; the Fifth Circuit agreed that qualified immunity did not apply and dismissed the officers' interlocutory appeal.³

Civil litigation is one of the few options left when police are not held accountable at the criminal or administrative levels. Gilbert Flores’s story is no different from most §1983 cases brought against police officers—except that in today’s legal climate of overreaching qualified immunity rulings, his case survived summary judgment. More expansive rulings on qualified immunity continue to come down, as the U.S. Supreme Court denies cert in cases that could limit the doctrine’s power.

A Judicially Created Doctrine

In the past 50 plus years, the Supreme Court’s views on qualified immunity have evolved. In 1967, the Court first reasoned that law enforcement officers were entitled to protection from civil suits when acting in good faith.⁴ Fifteen years later, in *Harlow v. Fitzgerald*, the Court expanded its view on qualified immunity, essentially creating the modern-day version of the doctrine.

Courts historically have given deference to officers when conducting this analysis, looking at what the “reasonable officer” would have done in the situation. Courts consider that officers must make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”⁵ But this “reasonable officer” standard can be subjective and can vary widely depending on what circuit your court sits in and who is writing the opinion.

For instance, in *Kisela v. Hughes*, the Ninth Circuit ruled that a police officer was not entitled to summary judgment, but the Supreme Court justices could not agree whether the officer’s actions were reasonable. The majority, in a per curiam opinion without briefing or arguments, held in favor of the officer who shot a woman four times through a chain-link fence after she ignored officers’ commands to drop a knife.⁶ The Court noted that it had previously

held that the reasonableness of the use of force must be judged from an officer’s perspective⁷ and found that officers were entitled to qualified immunity as long as no similar precedent existed showing that a specific use of force was unlawful.⁸

Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, dissented and stated that when assessing the

Under the qualified immunity analysis that most courts apply nationwide, the judge will expect you to show that a constitutional right was clearly established and that the officer violated this right.



objective reasonableness of an officer’s actions, a court must look to the facts of each case, including the “severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight.”⁹

Applying this framework, the dissent concluded that the decision created a “one-sided approach to qualified immunity,” writing that it “is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later.”¹⁰

Show that the constitutional right was clearly established. The other hurdle in the qualified immunity analysis is to prove that the officer violated a clearly established right and that a reasonable officer would have understood that his or her actions violated that clearly established right. Put simply, officers must have had fair notice that their conduct was unlawful.

The *Kisela* majority focused on this second prong, holding that police officers are “entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue”¹¹—but a case does not need to be “directly on point for a right to be clearly established.”¹² The question of “reasonableness” is one of objective reasonableness. The court will not look at the officer’s subjective intent but will consider only the circumstances the officer faced during the violation.

The best way to meet your burden on this prong is to show that clearly established laws prohibited the officer’s actions. The more law the better, and the older the law the better. Both will strengthen your point that a reasonable officer would have been on notice of the violation. The focus of this analysis is on whether the officer had fair notice, so remember that the case law or statute must have been clearly established at the

time of the violation. Any cases or statutes from after the incident involving your client cannot be used.

Confronting qualified immunity at trial. The qualified immunity defense can be raised at any time—even at trial. These cases, however, are few and far between. As in summary judgment, the outcome of your case at this stage will vary depending on the specific facts and court. Circuit courts have not reached a general consensus on how qualified immunity cases should be litigated. The Seventh and Tenth Circuits have ruled that plaintiffs have the burden of proof,¹³ while the First, Second, Third, Fourth, and Ninth Circuits place the burden of pleading and proving a right to qualified immunity on defendants.¹⁴ The Fifth, Sixth, Eighth, and Eleventh Circuits have adopted burden-shifting frameworks.¹⁵

Practice Tips

Much can be done at the outset of the case and throughout discovery to anticipate challenges and prepare for the inevitable motions—and possibly trial.

Before the Case Is Filed

- **State and federal law.** Before drafting the complaint, research whether state immunities or qualified immunity are more likely to apply. For example, in Illinois, when deadly force is applied to a person holding a knife, qualified immunity is a tougher standard to overcome than the applicable state immunities. But if an officer in Illinois uses force after initially responding to a medical emergency dispatch, then the opposite is true.
- **Jurisdiction.** Find the most sweeping applications of qualified immunity in the relevant district and circuit court, and use them as a map on how to allege your complaints. Even in notice pleading jurisdictions, do your due diligence to avoid being

knocked out by a motion to dismiss.

- **Experts.** If possible, consult a local or a regional police practices expert to help guide your pleadings and discovery. From the beginning, build your case around what the reasonable officer standard looks like in the relevant police department and jurisdiction.
- **Jury instructions and other resources.** Read your jurisdiction's pattern jury instructions, common special interrogatories, and verdict forms on qualified immunity, and prepare your pleadings with them as your guide.

Prepare for Dispositive Motions

- **Prior rulings.** Once the case is assigned, research the judge's prior rulings on qualified immunity to see whether you can add to the complaint any allegations that the judge has relied on previously when denying motions based on this defense.
- **Targeted discovery.** Before discovery, pinpoint the facts you'll need to establish to overcome a summary judgment motion based on qualified immunity. Then target document requests and deposition questions specifically to address the defense.
- **Similar circumstances.** Ask nondefendant officers for every incident when they encountered "x" situation. Draw out any similar circumstances that did not result in the illegal use of force.
- **Rules and standards.** Through the testimony of the defendant officers, establish rules by asking what they would do in hypothetical situations similar to the underlying incident. Then, using other officer or witness testimony, show that those rules should have applied to the facts at hand but that the opposite occurred.

AAJ RESOURCES

- **Civil Rights Section**
<https://www.justice.org/community/sections>
- **Police Misconduct Litigation Group**
<https://www.justice.org/community/litigation-groups>
- **Police Misconduct Litigation Packet**
<https://www.justice.org/resources/publications/police-misconduct>
- **WEBINAR**—Creating Change: An Introductory Primer for Police Misconduct and Civil Rights Cases
<https://www.pathlms.com/aaaj/courses>

For example, you could ask the defendant whether in general a retreating, unarmed subject can be shot, and then compare that answer to the underlying incident in which that rule was broken. Consider consulting an expert on practices and policy on the standard of policing in the jurisdiction and what to request.

- **Defense experts.** When deposing a defendant's use-of-force expert witness, draw out, if possible, any version of the incident that the expert agrees would be unreasonable.


Prepare for Trial

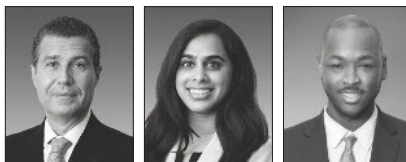
- **Jury instructions and verdict forms.** Read your jurisdiction's pattern jury instructions, common special interrogatories, and verdict forms on qualified immunity, and prepare your opening, closing, direct and cross-examinations, and verdict forms with those in mind. Use the verdict sheet and special interrogatories as demonstratives during closing to arm your allies with the proper instructions to arrive at the verdict without confusion during deliberation.
- **Case law.** In advance, prepare case

law to overcome directed verdict motions, with briefs of the seminal cases on qualified immunity and prepared application of your facts.

- **Fact sheets.** Create a fact sheet of what you need to overcome the affirmative defense and which witnesses or exhibits can establish each fact. Turn the fact sheet into a demonstrative checklist to use during closing.
- **Police witnesses.** If possible, find a nondefendant adverse police officer witness from the same department who can serve as your “reasonable officer.” Look for any officer who admits he or she was not personally “afraid,” personally would not have used deadly force, has never used deadly force, or “wishes it had turned out differently.” Never underestimate

the impact of an officer who speaks less but has never used deadly force in his or her career.

Alarming, the expansion of qualified immunity continues. To represent clients harmed by police misconduct, you must strive to understand the specific challenges this doctrine presents and a judiciary that is unpredictable in its application. 



Antonio Romanucci is a founding partner, **Bhavani Raveendran** is a senior associate, and **Christopher Burton** is a law clerk at Romanucci & Blandin in Chicago. The firm is part of the legal team representing George

Floyd’s family. They can be reached at aromanucci@rblaw.net and b.raveendran@rblaw.net.

NOTES

1. On Petition for Rehearing, *Amador v. Vasquez*, 961 F.3d 721 (5th Cir. June 3, 2020).
2. *Id.* at 724.
3. *Id.* at 731.
4. *Pierson v. Ray*, 386 U.S. 547, 555 (1967).
5. *Graham v. Connor*, 490 U.S. 386, 397 (1989).
6. *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).
7. *Id.* at 1152 (citing *Graham*, 490 U.S. at 396).
8. *Id.* at 1153.
9. *Id.* at 1156–57 (quoting *Graham*, 490 U.S. at 396).
10. *Id.* at 1162.
11. *Id.* at 1153.
12. *Id.* at 1152.
13. See *Reeves v. Churchich*, 484 F.3d 1244 (10th Cir. 2007); *Mannoia v. Farrow*, 476 F.3d 453 (7th Cir. 2007).
14. Alexander A. Reinert, *Qualified Immunity at Trial*, 93 Notre Dame L. Rev. 2065, 2071 (2018).
15. *Id.* at 2071–72.

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