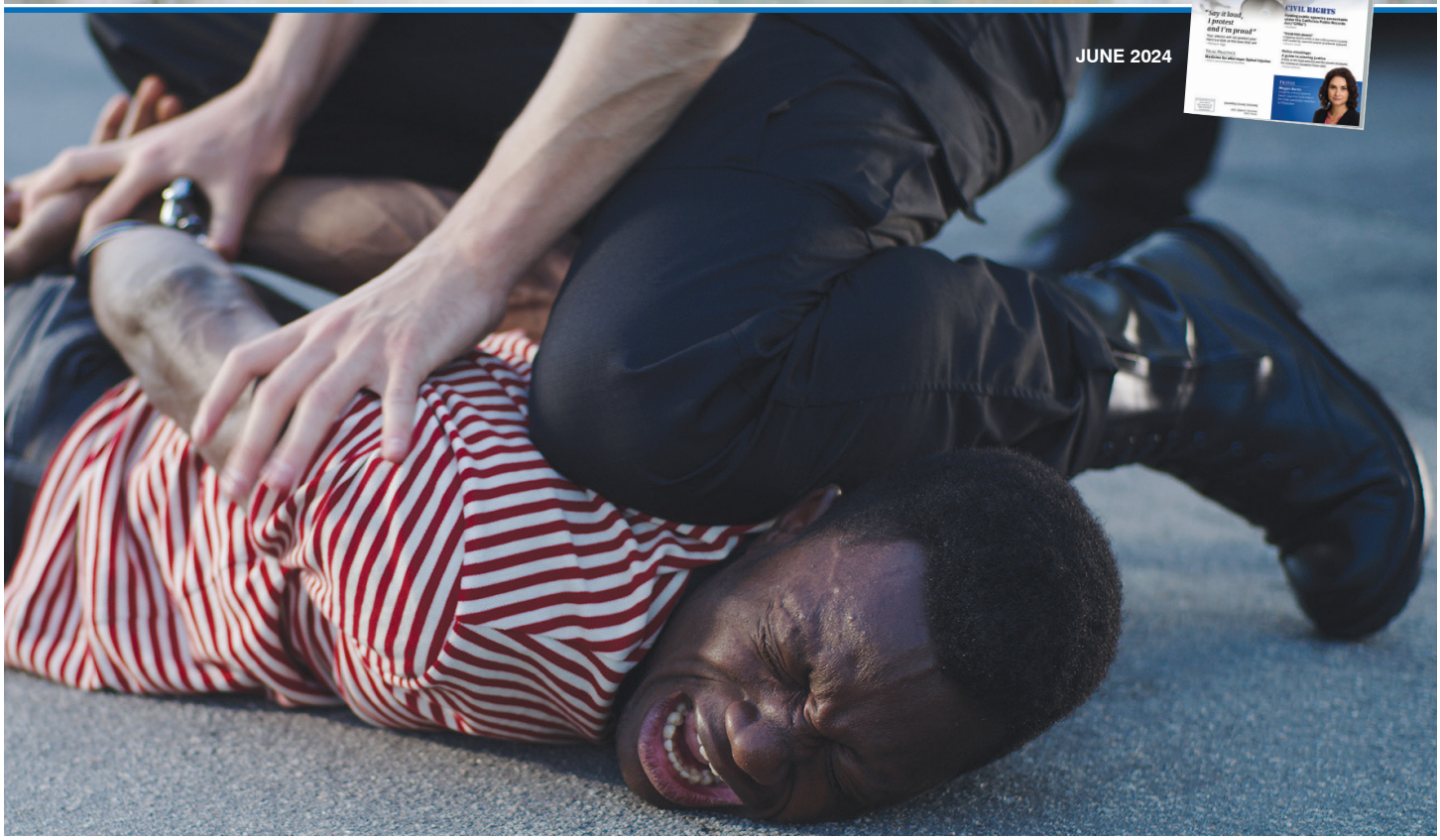


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"Hold him down!"

Litigating deaths caused by restraint and/or positional asphyxia while in law-enforcement custody

By Michael S. Carrillo

On the evening of May 25, 2020, the world changed when Minneapolis police officer Derek Chauvin, and other officers, killed George Floyd by kneeling on his neck, back, and legs for nine minutes and 29 seconds. The restraint of Floyd, recorded by bystanders, went viral and began one of the largest protest movements in U.S. history.

Anyone who saw Mr. Floyd take his last breath, with or without training in positional or restraint asphyxia, could see that it was Chauvin's knee and the weight of the other officers on Mr. Floyd's back and legs that killed him. Despite the coroner listing the manner of death as homicide and finding that the cause of death was due to "cardiopulmonary arrest" from "law-enforcement-subdual, restraint, and neck compression," people, including Chauvin's legal team, falsely claimed that Mr. Floyd died from a drug overdose.

Restraint and/or positional asphyxia while in law-enforcement custody has been discussed since the early 1990s. This is not a new phenomenon. As early as 1995, the U.S. Department of Justice, National Institute of Justice, prepared a bulletin discussing the dangers of positional asphyxia highlighting that it could lead to deaths. (*U.S. Department of Justice, Office of Justice Program, National Institute of Justice, National Law Enforcement Technology Center,* June 1995.)

Police agencies such as the LAPD trained their officers on the dangers of positional or restraint asphyxia as early as 1999. The LAPD published a training bulletin on in-custody deaths in July 1999 regarding the risks of restraint asphyxia. Today, attorneys for the LAPD claim that this training bulletin was "de-published" in 2008, likely to support claims of qualified immunity. Trial lawyers have battled these asphyxia cases for decades, including my mentor for such cases, civil rights lawyer, Dale Galipo.

Initial steps to take

In asphyxia-death cases, grieving families are told that their loved one died in police custody but are provided no details on the circumstances. This is on purpose. If a client suspects that their loved one died due to police restraint, it is important to try to have an independent autopsy performed. Often, medical examiners' offices are so connected to law-enforcement agencies that they are protective of law enforcement. For example, law-enforcement investigators may request a private meeting with the medical examiner to provide their interpretations of the evidence (which has occurred in prior cases we have handled). Or, coroner investigators, who provide the details of the

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incident to the pathologist performing the autopsy, are not always given the complete picture. This includes the omission of critical details such as video footage depicting the incident leading to the decedent's death. This could greatly affect the ultimate findings since video can corroborate a homicidal death instead of an accidental drug overdose or other potential cause. If you cannot obtain a second autopsy, do not worry, the case is not over.

Once you obtain the autopsy report, be on the lookout for indicators of asphyxia including petechial hemorrhaging in the eyes, anoxic encephalopathy, and the identification of restraint as a "contributing factor" in the death. While not conclusive of restraint asphyxia, these are indicators in an autopsy report of possible restraint asphyxia.

Objectively reasonable force and the physiology of a struggle

Officers in California are entitled to use objectively reasonable force to effect an arrest, to prevent escape, or to overcome resistance. (Pen. Code, § 835a, subd. (b).) Objectively reasonable force is based on the "totality of the circumstances" which is further defined as "all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force." (Pen. Code, § 835a, subd. (e)(3); see also *Graham v. Connor* (1989) 490 U.S. 386.)

Peace officers undergo training that teaches them to be ready and physically capable of taking control of a subject. (California Commission on Peace Officers Standards and Training (POST) Learning Domain 33:3-1.) Officers are further required to justify their actions if the subject refuses to follow verbal commands, physically resists, or attempts to attack the peace officer during a detention or arrest situation. (*Ibid.*) "The primary goal of using force is to gain control of a subject" and when applying force, "If the subject resists or does not respond to the control hold, the peace officer may apply additional force or other force options, which cause the subject to comply." (*Id.* at 33:3-4.)

Danger of the prone position

Much too often, when officers attempt to carry out these functions of taking control, they end up on the back of a suspect while that individual is in a prone position. That leads to fatal consequences if officers ignore pleas for help, such as, "I Can't Breathe!" Police officers are trained that once a suspect is in handcuffs while in a prone position, the officer should put the suspect in the "recovery position" which means on their left side to ensure adequate oxygen is reaching the individual. Many poorly trained officers believe that, "If you can speak, you can breathe." Such a belief contradicts good policing.

The U.S. Department of Justice in their June 1995 National Law Enforcement Technology Center Bulletin, identified the physiology of a struggle that could lead to death during a prone restraint detention as the following:

- A suspect is restrained in a face down position, and breathing may become labored
- Weight is applied to the person's back – the more weight, the more severe the degree of compression
- The individual experiences increased difficulty breathing
- The natural reaction to oxygen deficiency occurs – the person struggles more violently
- The officer applies more compression to subdue the individual

(*U.S. Department of Justice, Office of Justice Program, National Institute of Justice, National Law Enforcement Technology Center,* June 1995, p. 1-2.)

The basic science behind asphyxia deaths

If you are looking for the entire scientific explanation behind positional/restraint asphyxia, this article is not for you. In the simplest terms, the heart pumps blood that is rich in oxygen throughout the body. When the body is functioning properly, the lungs are supplying oxygen to the blood and eliminating carbon dioxide and the circuit continues.

Asphyxia simply means a "lack of oxygen or excess of carbon dioxide in the body that results in unconsciousness and often death and is usually caused by interruption of breathing or inadequate oxygen supply." (*Merriam Webster Online Dictionary*.) When someone lies prone, the weight of the body, and any other weight applied to the back, presses down on the abdomen and prevents the diaphragm from moving up and down as it normally would. The inability to adequately blow out carbon dioxide (acidosis) due to the diaphragm's failure to function properly, can cause carbon dioxide levels within the blood to rise rapidly. The excess carbon dioxide will lead to hypoxia (low levels of oxygen in the tissue). Hypoxia caused by an interruption of breathing is a trigger for cardiac dysrhythmia and arrest. Cardiac arrhythmia and cardiac arrest cause ischemic brain injury and make death almost imminent.

Exertion in the suspect and other risk factors means the body will require a great deal more oxygen and both the rate and depth of breathing increase. Those other risk factors include drug/alcohol intoxication, obesity, or pre-existing heart conditions.

While keeping the science in mind, also remember that you only have to prove that the officer's actions were objectively unreasonable and excessive, which led to the death. You can prove that by showing that the restraint itself was a contributing factor to the death, even if it was not the only factor.

Qualified immunity and asphyxia

To overcome qualified immunity, the plaintiff needs to establish that an officer's conduct violated a constitutional right and that the law was clearly established. (*Drummond ex rel. Drummond v. City of Anaheim* (9th Cir. 2003) 343 F.3d 1052, 1056.) In *Drummond*, the Ninth Circuit observed, "The officers – indeed, any reasonable person – should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater

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than reasonable." (*Id.* at 1059.) The *Drummond* court held: "We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case." (*Id.* at 1062.) The court reasoned that because there was publicity about recent cases of asphyxiation, and that the Anaheim Police Department training materials discussed compression asphyxia, that was persuasive enough when evaluating whether the particular use of force was constitutionally reasonable. (*Id*. at 1060.)

Indeed, courts in other circuits have also determined that police officers restricting individuals' breathing under similar circumstances carries a significant risk of positional asphyxia and therefore violates the right to be free from excessive force. (*Weigel v. Broad* (10th Cir. 2008) 544 F.3d 1143, 1154-55 [noting "the relationship between improper restraints and positional asphyxiation" and recognizing that "breathing problems [are] created by pressure on the back and placement in a prone position, especially when an individual is in a state of 'excited delirium.' These breathing problems lead to asphyxiation"]; *Champion v. Outlook Nashville, Inc*. 6th Cir. 2004) 380 F.3d 893, 903 [holding that the law was "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is face-down prone position after being subdued and/or incapacitated constitutes excessive force"].)

While *Drummond* and similar cases are favorable to establish that an asphyxia death by officers was obvious, that decision was recently distinguished in a case that severely limited asphyxia cases. In *Perez v. City of Fresno* (9th Cir. 2024) 98 F.4th 919, City of Fresno police officers used their body weight to hold down and restrain Joseph Perez while he was in a prone position to strap him to a backboard so that he could be transported to the hospital. The court in *Perez* found that the law was not clearly established, nor was it otherwise obvious to those officers, when they were directed by medical personnel to strap him to the backboard, that it violated Perez's constitutional rights. (*Id*. at 922.) The Ninth Circuit court distinguished *Perez* from *Drummond* by finding "material factual differences" in that the restraint of Drummond occurred before paramedics arrived and the officers in *Perez* were not acting under the direction of medical personnel who had responded to the scene. (*Id*. at 926.)

While *Perez* is not favorable for plaintiffs, *Drummond* is still good law and remains so for the asphyxia cases. Our hope is that *Perez's* "material factual differences" compared to *Drummond* can help us distinguish our cases in the future.

Recent state-law changes

Recently, California has enacted new laws to protect the civil rights of its residents from the dangers of positional asphyxia, ensuring individuals are protected from lethal law-enforcement tactics. In 2022, in response to the George Floyd incident, AB 490 went into effect, codifying Government Code section 7286.5, which defined positional asphyxia as a "means situating a person in a manner that compresses their airway and reduces the ability to sustain adequate breathing. This includes, without limitation, the use of any physical restraint that causes a person's respiratory airway to be compressed or impairs the person's breathing or respiratory capacity, including any action in which pressure or body weight is unreasonably applied against a restrained person's neck, torso, or back, or positioning a restrained person without reasonable monitoring for signs of asphyxia." This was a major win for those seeking justice for loved ones who died under these circumstances for several reasons.

As a result of this law, defense experts can no longer argue that positional asphyxia does not exist. AB 490 requires agencies to address and implement a policy on positional asphyxia: "A law-enforcement agency shall not authorize techniques or transport methods that involve a substantial risk of positional asphyxia." (Gov. Code, § 7286.5, subd. (a)(2).) We have seen police departments throughout the state respond and establish training bulletins to address AB 490, which will save lives.

In 2023, civil-rights advocates celebrated another victory when AB 360 passed. AB 360 changed Evidence Code section 1156.5 to prohibit the use of "excited delirium" as being admissible in a civil action. As a result, defense experts can no longer rely on "junk science" to attempt to contradict the evidence that demonstrates an asphyxia death.

These legislative changes have prompted law-enforcement agencies to adopt policies that conform with these laws, protecting individuals that encounter law enforcement in California.

For civil-rights advocates, the recent changes in state law provide us with the basis to make a similar argument, as in *Drummond*, to overcome qualified immunity. Given the publicity of similar restraint and/or positional asphyxia cases (such as that of George Floyd), compounded with officer training regarding the new state laws about restraint asphyxia, the actions involved were likely constitutionally unreasonable as the law has now clearly been established in this state.

Attorney Michael S. Carrillo graduated from Purdue University and obtained his J.D. from Whittier Law School in 2008. His practice focuses on civil rights and the representation of sexual-assault victims.


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