QUALIFIED IMMUNITY UPDATE

DARRELL G. NOGA, *Dallas*
Brown Fox, PLLC

State Bar of Texas
33RD ANNUAL
ADVANCED GOVERNMENT LAW
July 29-30, 2021

CHAPTER 7

DARRELL G-M NOGA
BROWN FOX PLLC
8111 Preston Road, Suite 300
Dallas, Texas 75225
(214) 367-6091
(214) 327-5001 fax

darrell@brownfoxlaw.com

BIOGRAPHICAL INFORMATION

Darrell Noga is an AV Rated experienced trial and appellate attorney who has successfully handled a wide variety of cases, with an emphasis on representation of diverse governmental entities and their individual officers and employees, including numerous Texas municipalities, in employment, civil rights, land use and other litigation, as well as in civil service matters and labor negotiations. He has also represented private corporate clients in employment investigations and litigation. Darrell has successfully tried numerous cases in state and federal courts, and has successfully argued before the Texas Supreme Court, the Fifth Circuit of Appeals and various other courts of appeal. He has been a frequent lecturer for Texas State Bar seminars and other professional groups. Over the years Darrell has also authored numerous articles and publications addressing diverse litigation issues and tactics, employment law topics, defense of governmental entities and many other practice areas and issues. Darrell has been selected as panel counsel for the Texas Municipal League Intergovernmental Risk Pool, and has represented numerous Texas municipalities for over twenty-five years.

EDUCATION

- Georgetown University Law, Washington, D.C., J.D. 1984
- DePaul University, Chicago, IL, M.A. 1981, with highest honors
- DePaul University, Chicago, IL, B.A. 1979, with highest honors

BAR ADMISSIONS

State Bar of Texas
Dallas Bar Association
U.S. Court of Appeals for the Fifth Circuit
U.S. District Courts for Northern, Eastern, Southern and Western Districts of Texas
Supreme Court of Texas
Illinois State Bar (inactive)

PRINCIPAL PRACTICE AREAS

Governmental Litigation and Civil Rights
Land Use
Labor/Employment

PROFESSIONAL ACTIVITIES AND HONORS

- State Bar of Texas
- Dallas Bar Association
- Defense Research Institute (DRI)
- Texas City Attorneys Association
- Former Course Director for Texas State Bar Seminar on Suing and Defending Governmental Entities and former and current State Bar Planning Committee Member
- Frequent Lecturer at Texas Municipal League Intergovernmental Risk Pool's Annual Attorney Workshop
- Guest Lecturer for University of Texas at Arlington Executive MBA Program
- Selected to Texas Super Lawyers, 2020 and 2021

Representative sample of Publications

Recent Developments Regarding Qualified Immunity and a Modest Proposal
Recent Developments in Individual Immunities
Investigating and Evaluating Sexual Harassment Claims in the Age of #MeToo
Accident Review Policies: Help or Hindrance?
Police Hot Pursuit Cases
Handling a Trio of Management Issues: Reasonable Accommodation, Leave and Return to Work Under Current Law
Civil Rights Claims- A Trial Lawyer's Perspective
Pleas to the Jurisdiction
Hot Topics in Damages
Recent Developments in Individual & Collective Rights of Governmental Employees
Sovereign Immunity: Bar to Damage Suits Only?
Application of Section 101.106 of the Texas Tort Claims Act
Defending Fair Housing Act Claims and HUD Complaints
Best Practices in Recruiting and Hiring New Employees

TABLE OF CONTENTS

I. INTRODUCTION 1

II. QUALIFIED IMMUNITY 101: THE BASICS 2

III. RECENT DECISIONS OF IMPORT CONCERNING QUALIFIED IMMUNITY 2
- A. *Walsh v. Hodge*, 975 F.3d 475 (5th Cir. 2020) 3
- B. *Joseph on behalf of Estate of Joseph v. Bartlett*, 981 F. 3d 319 (5th Cir. 2020) 3
- C. *Mayfield v. Currie*, 976 F. 3d 482 (5th Cir. 2020) 4
- D. *Cunningham v. Castloo*, 983 F. 3d 185 (5th Cir. 2020) 5
- E. *Ramirez v. Guadarrama*, 2021 WL 2637199 (5th Cir. 2021) 5
- F. *Tucker v. City of Shreveport*, 998 F. 3d 165 (5th Cir. 2021) 6
- G. *Kelson v. Clark*, 2021 WL 2472496 (5th Cir. 6/17/21) 7
- H. *Taylor v. Rojas*, 141 S. Ct. 52 (2020) / Addressing Fifth Circuit (Texas) decision 7

IV. CONCLUDING THOUGHTS: WHERE DO WE GO FROM HERE? 8

EXHIBIT A 9

QUALIFIED IMMUNITY UPDATE

I. INTRODUCTION

This paper will serve to supplement the presentation and written materials that we prepared last year for the State Bar's Advanced Government Law Seminar, which addressed recent developments concerning qualified immunity, significant analytical debate as to the doctrine in the Fifth Circuit Court of Appeals, and some suggestions for potential refinements to the doctrine of qualified immunity. Now, I am not so egotistical to think that last year's paper must have been widely disseminated, nor do I get royalties depending on how many copies I circulate, so the reader should be reassured that by attaching last year's paper as an Exhibit herein, I do so for the reader's convenience and to provide a logical context for this update. The attached EXHIBIT A should certainly be helpful for new attendees to the Seminar, and it should also be a convenient refresher for those who did attend last year, as it addresses the recent trends of our legal system when applying the doctrine of qualified immunity, just as this paper shows where we are today. We also make cross- reference to content in EXHIBIT A throughout the course of this paper.

As we know, especially in Texas courts, both state and federal, longstanding concepts of immunity are critical defense mechanisms for public officials, particularly, but not limited to, law enforcement officers. This is not only true in a legal sense as a benefit in courts of law, but also in a more practical sense as it allows these public officials and officers to do their respective jobs. Thus, attacking or eroding the doctrine of qualified immunity invariably increases legal exposure to suit and liability and, as to another result often overlooked, also causes a hindrance to public officials and police trying to do their everyday jobs. Attacks on the doctrine of qualified immunity are no doubt politically popular with some audiences today, but a reasonable person possessed of the capacity for critical thought also has to assess the danger to society as a whole and the serious societal consequences that could result from erosion or abolition of the doctrine.

Unfortunately, we may soon see some of those societal consequences take effect. On a national scope, police officers are leaving their jobs in what appear to be record numbers. Recruitment of replacement officers is a current problem, certain politicians are seeking to defund or limit police academy training and classes (while supposedly claiming a need for better police training), and state legislators are gearing up to attack the doctrine. To wit, Colorado passed legislation banning qualified immunity as a defense in June of 2020, see 2020 Colo. Legis. Serv. Ch. 110 (S.B. 20-217); Colo. Rev. Stat. Section 13-21-131. Within the past year, Connecticut, Massachusetts, and New York City have also approved bills limiting qualified immunity, though none of these were as broad as the Colorado bill or the New Mexico statute discussed below.

More recently, and close to home, on April 7, 2021, New Mexico signed into law a bill barring any and all government employees from asserting qualified immunity as a defense in state courts and creating new avenues for plaintiffs to sue governmental entities. *See* New Mexico Civil Rights Act, 2021 New Mexico Laws Ch. 119 (H.B. 4). In an article published the day H.B. 4 was signed, Forbes contributor Nick Sibilla was gleeful at the signing of H.B. 4.

Nick Sibilla, *New Mexico Bans Qualified Immunity For All Government Workers, Including Police*, Forbes, Apr. 7, 2021, https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=342b53979ad6

He pointed out the New Mexico Civil Rights Act would make it "much easier for victims of police violence and other government abuses to sue for damages." I hate to be the one to break it to Nick, but the new legislation also makes it easier for anyone to sue the government for damages, whether or not they were actually "victims" as that word used to be understood in the English language.

However, as last year's paper in EXHIBIT A illustrates, the United States Supreme Court has firmly refused to erode the doctrine of qualified immunity. This will set up an interesting future interaction with these new state statutes, and the impact on State budgets will remain to be seen, especially if the State has strong indemnity provisions for its public officials and officers. As our Forbes contributor Mr. Sibilla noted somewhat regretfully in his article; "Since qualified immunity is a federal doctrine, it can only be fully abolished by Congress or the Supreme Court. But state and local lawmakers can still act to protect everyone's constitutional rights." I suppose the implicit assumption in that statement is that the Supreme Court does not act to protect everyone's constitutional rights, which should illustrate the absurdity of this new state/federal dichotomy.

I have previously suggested that qualified immunity is precisely the sort of topic that should be analyzed carefully and not merely by emotional response. That has not been the case recently to be sure, and it is not at all a helpful approach. To illustrate, I will quote from our "contributor" Mr. Sibilla a couple of more times in regard to his "analysis" of the New Mexico bill abolishing qualified immunity. He states: "Thanks to HB 4, New Mexico is now at the forefront of a growing trend to hold government officials accountable." Having defended government officials for more than 25 years against those seeking to hold them "accountable," I was unaware this was a new trend. He also claims and quotes his own colleague at the Institute for Justice that qualified immunity denies victims a "remedy for violations of their

constitutional rights." That is not the case, as the doctrine as applied either determines there was no violation of constitutional rights that occurred or that no such rights were clearly established at that time.

Not seeing the irony, Mr. Sibilla quotes New Mexico Governor Michelle Lujan Grisham's claims that HB 4 was not "anti-police," rather as the Governor (vaguely) put it: "This bill does not endanger any first responder or public servant- so long as they conduct themselves professionally within the bounds of our constitution….." Putting aside the ambiguity in whatever the Governor means by "professionally," I think that quote sums up our problem, as statistics on a national basis show that any sort of use of force encounters with police are a rarity, see EXHIBIT A, "Some Facts About Police and Public Encounters", at page 3. In fact, the numbers show the vast majority of first responders and public servants have thus typically conducted themselves professionally. Making it easier to sue them and try to hold them personally liable is unwarranted from a factual standpoint and continues to promote a harmful false narrative.

As to the remainder of this paper, for purposes of thoroughness and clarity and in consideration of those readers who may not be as familiar with the doctrine, I am going to again BRIEFLY provide some basics as to the doctrine of qualified immunity and its evolution, will then address recent Fifth Circuit Court of Appeals and U.S. Supreme Court decisions which illustrate current judicial application of the doctrine and which provides an update as to same. I will conclude with some related thoughts pointing out possible areas where the doctrine may continue to evolve. So with some introductory context now in place, let's continue to try to apply some critical thinking to a critical topic.

II. QUALIFIED IMMUNITY 101: THE BASICS

Qualified immunity developed in response to the expansion of 42 U.S.C. Section 1983 in *Monroe v. Pape*, 365 U.S. 167,187 (1961), which allowed federal courts to enforce constitutional rights against state actors via Section 1983. Basically, *Monroe v. Pape* converted an 1871 statute addressing constitutional violations committed "UNDER COLOR OF" any State statute, ordinance, regulation, custom, or usage, into a version under Section 1983 that allowed federal courts to consider constitutional violations committed "WITHOUT" authority of any statute or ordinance and the like, including constitutional violations which clearly also violated state law. Obviously, this increased litigation as the scope of the types of claims covered increased, and so to help balance matters and find a way to more expeditiously dispose of baseless claims, the Supreme Court applied and expanded concepts of qualified immunity previously in place at common law to police officers sued under Section 1983. *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). As an aside, the reader will be aware that there are other sorts of immunities afforded to public officials or employees of diverse sorts, like prosecutorial or judicial immunities, but this paper's focus is on qualified immunity, which is typically applied in connection with law enforcement officers. However, as the cases discussed herein illustrate, other public employees like state university professors and paramedics may also assert qualified immunity.

The balancing act the Supreme Court was promoting was clear: on one hand protecting and enforcing constitutional rights afforded citizens, on the other hand allowing police and other public officials to do their jobs without fear of personal liability and suit, while also protecting the public treasury and society from the costs of having to defend claims without merit. The doctrine operates as a necessary filter, as well as a recognition that society at large deserves to have the public peace preserved to conduct their daily affairs. The doctrine also recognizes that, to keep that peace, police officers are on occasion faced with dangerous and exigent circumstances that most types of workers are not, and must be given the ability to deal with such circumstances. The Supreme Court has consistently taken pains to insure that qualified immunity is immunity from both suit and liability. See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The judicial rationale in the evolution and application of qualified immunity, at least from the perspective of the United States Supreme Court, is that it is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S.335, 341, (1986). In considering whether qualified immunity applies, courts are directed to undertake a two-step analysis: (1) whether a constitutional violation has occurred; and (2) whether the law was so "clearly established" at the time that every reasonable officer would have known that the conduct at issue was illegal. *See, Pearson*, 555 U.S. at 232. Case law evolved to allow courts to choose which of these two steps it wanted to consider first. *Id*. at 555 U.S. 236. Moreover, in considering if the law was "clearly established", the Supreme Court has consistently required that such evaluation not be at "a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, (2011). Thus, a generality such as a "right to be free of excessive force" will not suffice in itself to put a police officer on notice that his or her conduct was unlawful. It is hoped this summary of the doctrine will assist in framing consideration of the following cases.

III. RECENT DECISIONS OF IMPORT CONCERNING QUALIFIED IMMUNITY

The following seven cases out of the Fifth Circuit Court of Appeals addressing qualified immunity, and the only opinion addressing same from the United States Supreme Court in the last twelve months, have been selected as of particular recent interest and will be addressed in summary fashion below to provide an overview of issues arising in applications of the doctrine. These recent decisions are instructive, as some address application of qualified immunity

in scenarios other than the police arrest situations which are more often encountered, and also remind us that other governmental actors apart from police may be entitled to assert qualified immunity.

Following up on the Fifth Circuit's vigorous debate as to application of qualified immunity in the *Cole v. Carson* decisions discussed at length in EXHIBIT A, and the role alleged factual disputes may play in same, the recent decisions addressed below also illustrate that the Fifth Circuit appears to be keeping an eye out for disputed material factual issues that would prevent application of the doctrine. We also see a continued emphasis by Circuit Judge Willett in claiming that more precedent needs to be created by focus on whether a constitutional violation occurred (the first prong of the qualified immunity analysis), while in the same case others like Circuit Judge Oldham are taking a contrary position and arguing there is no need to reach the merits if the law was not clearly established in the first instance (the second prong of the qualified immunity analysis). Keep in mind in reviewing the discussion below that, as discussed in EXHIBIT A, the U.S. Supreme Court has generally continued to support application of qualified immunity, albeit with the limitations in its recent opinion we discuss herein, and recall that in May of 2020 the Supreme Court had thirteen different qualified immunity cases with certiorari petitions pending and denied certiorari on all thirteen cases. So, without further ado, let us check out the latest from the Fifth Circuit and our Supreme Court on qualified immunity.

A. *Walsh v. Hodge*, 975 F.3d 475 (5th Cir. 2020)

This case is interesting as it involves claims of immunity by University of North Texas Health Science Center professors and administrators rather than police. The facts involve a former medical school professor who sued under Section 1983 alleging a violation of due process rights. He alleged he was denied a fair hearing in regard to a student's sexual harassment claims against him before the individual Defendants voted to fire him. The individual Defendants moved for summary judgment and asserted qualified immunity. The district court partially granted the motion, holding that Plaintiff Walsh received adequate notice of the charges, but otherwise denied the motion. Defendants filed an appeal.

The Fifth Circuit held that the fact that one of the grievance committee members knew the accuser was not enough to establish bias showing due process was violated, but for our purposes then relied on the "not clearly established" prong of qualified immunity analysis to address the accused's rights of cross-examination. Specifically, the Court of Appeals noted it was a matter of first impression as to whether the accused professor should have been permitted to test the credibility of his accuser by submitting questions to the grievance committee to propound to the accuser. The Court noted that it was not a clearly established constitutional right for the Plaintiff professor to test the credibility of the student. Therefore, faculty members and administrators were entitled to qualified immunity as they could not have known they were violating a constitutional right by not allowing Walsh to do so. The Court reversed the trial court's denial of qualified immunity and rendered judgment for the Defendants.

B. *Joseph on behalf of Estate of Joseph v. Bartlett*, 981 F. 3d 319 (5th Cir. 2020)

This case is significant because it illustrates competing views between Fifth Circuit Judges on how courts should analyze qualified immunity decisions.

The family of a man that died after being repeatedly struck and stunned with stun guns during his arrest sued two police officers for excessive use of force. In addition, the family also brought claims against eight other officers that were present during the use of force but did not intervene. All ten officers filed a motion for summary judgment asserting qualified immunity. The district court denied the officers' motion.

On appeal, the Fifth Circuit affirmed the district court's denial of qualified immunity regarding the two officers that used force. In contrast, the Fifth Circuit found that the bystander officers were entitled to qualified immunity because neither the plaintiff nor the district court identified the applicable clearly established law. However, while the Fifth Circuit had the ability to grant qualified immunity based on this error alone without reaching the merits of the underlying claim, the majority opinion (authored by Circuit Judge Don R. Willett) chose to first address the constitutional merits of the bystander liability claim before analyzing the clearly established law second prong of the qualified immunity analysis.

In explaining the majority's rationale, Circuit Judge Willett offered the following discussion in a footnote:

> For years, our court has found value in addressing the constitutional merits to develop robust case law on the scope of constitutional rights. For instance, shortly after [*Pearson v. Callahan*, 555 U.S. 223 (2009)] was decided, our en banc court chose to address the First Amendment merits even though a majority of the court concluded that the defendants had not violated clearly established law. . . . We have found the merits analysis particularly appropriate in Fourth Amendment cases, which frequently involve qualified immunity. . . . The big-picture takeaway: Forgoing a knotty constitutional inquiry makes for easier sledding, no doubt. But the inexorable result is "constitutional stagnation"—fewer courts establishing law at all, much less clearly doing so. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing

> precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

This analysis matches previous critiques of qualified immunity offered by Circuit Judge Willett. *See Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019); *see also*, discussion of Judge Willett's dissenting opinion in the Cole case in EXHIBIT A, at page 7.

In response, Circuit Judge Andrew Oldham wrote a concurring opinion which, in contrast, focused on the second prong of the qualified immunity analysis as to whether the law was clearly established. In it, Circuit Judge Oldham noted that he agreed with the majority's holdings but disagreed with addressing the constitutional merits of the bystander claim. Explaining his position, Circuit Judge Oldham succinctly stated the following:

> Where "it is plain that a constitutional right is not clearly established," the Supreme Court permits us not to reach the underlying constitutional merits. . . . I would accept that invitation in this case. Doing so seems particularly wise here because the district court did not fully resolve the constitutionality of each bystander officer's conduct. And while I agree that "Plaintiffs fail to identify any case" to support their constitutional claims against the bystander officers . . . I think that militates in favor of avoiding those claims rather than adjudicating them.

As an aside, and consistent with the holdings in some of the other cases discussed herein, Judge Oldham correctly emphasizes that any application of qualified immunity must be done on an individual basis and not collectively as to defendants. While this case does not mandate that courts first address the merits of a claim (prong one) when considering qualified immunity, it does further illustrate Circuit Judge Willett's willingness and seeming desire to do so, and also shows that some of his colleagues on the bench do not share his concern or agree with his approach.

C. ***Mayfield v. Currie*, 976 F. 3d 482 (5th Cir. 2020)**

The family and estate of a deceased political activist filed suit against a law firm, police officers, the city, the mayor, and the chief of police chief alleging civil conspiracy, negligent infliction of emotional distress, wrongful death, and violations of the decedent's Fourth Amendment rights. In part, one of the officers filed a motion to dismiss asserting qualified immunity. The district court denied the motion, and the officer appealed. The Fifth Circuit reversed and remanded without reaching the merits of the Fourth Amendment claims.

While the majority's analysis of this case is fairly straightforward, the significance of this case is found in Circuit Judge Willett's concurring opinion. In it, Circuit Judge Willett again argues the importance of precedent and the need to address both prongs of the qualified immunity analysis and states the following:

> [J]ust because we can jump straight to prong two without undertaking the nettlesome task of determining if anyone's rights were violated doesn't mean we should. Leapfrogging the constitutional merits does make for easier sledding. But such skipping, jurists and scholars lament, leads to "'constitutional stagnation'—fewer courts establishing law at all, much less clearly doing so."
>
> The modern immunity regime, as with many judge-invented doctrines, could use greater precision. And one way to advance constitutional clarity is to give courts and public officials more matter-of-fact guidance as to what the law prescribes and proscribes. Yes, scrutinizing the alleged constitutional offense requires more work. More time. More resources. Overworked federal courts already resemble Lucy and Ethel in the chocolate factory.
>
> But since we require plaintiffs to prove a violation of clearly established law, it seems only fair that we do our part in establishing what that law is. How can a plaintiff produce precedent if fewer courts are producing precedent? How can a plaintiff show a violation if fewer courts are showing what constitutes a violation?

Again, this does not alter the courts' ability to exercise discretion in choosing the order of analysis in a qualified immunity case. However, it does further evince Circuit Judge Willett's persistent call for district courts in the Fifth Circuit to address the first prong of the qualified immunity analysis whenever possible.

D. *Cunningham v. Castloo*, 983 F. 3d 185 (5th Cir. 2020)

In this case, the Fifth Circuit reversed and remanded a denial of qualified immunity because the district court improperly defined clearly established law at too high a level of generality. .

A former sheriff's deputy sued the sheriff and county alleging that the sheriff violated her Fourteenth Amendment right to procedural due process by denying her request for a name-clearing hearing. More specifically, the former deputy alleges that after being informed of her termination for improper use of chain of command and lying, without further explanation, she asked to speak with the sheriff but was not allowed to speak with him. The district court held that such conduct amounted to a denial of a name-clearing hearing in violation of procedural due process and denied the sheriff's motion for summary judgment asserting qualified immunity.

On appeal, the Fifth Circuit held that the district court committed a "methodological error" by defining the clearly established law too generally. The panel specifically examined the two cases relied on by the lower court to identify the clearly established law. The first relied-on case, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), was deemed by the Fifth Circuit to be completely inapplicable because it involved a procedural due process challenge to a state law prohibiting the sale of alcohol to specific individuals. The second case, *Bledsoe v. City of Horn Lake*, 449 F.3d 650 (5th Cir. 2006), was found to be factually dissimilar and "incapable of providing 'fair notice' of a procedural-due-process violation." Bledsoe could not provide fair notice because the Fifth Circuit found no procedural-due-process violation in that case. Because of its misplaced reliance on these inapplicable cases, the district court could not determine whether the violative nature of the particular conduct in this case was clearly established, and therefore, it was a reversible error to deny the sheriff's assertion of qualified immunity.

E. *Ramirez v. Guadarrama*, 2021 WL 2637199 (5th Cir. 2021)

In this per curiam opinion, the Fifth Circuit reversed the district court's denial of qualified immunity for two police officers. The trial court had determined that more factual development was needed and the Fifth Circuit disagreed, reversing the denial of qualified immunity and remanding to the district court with instructions to dismiss the claims against the two police officers.

The facts were tragic and involved a mentally ill or unstable person whose family called the police for help. The son of Mr. Olivas had called 911 reporting his father was threatening to kill himself and burn down the family's home. When officers arrived, they smelled the odor of gasoline and found Mr. Olivas holding a red gas can. One officer allegedly shouted that if they tased Mr. Olivas "…he is going to light on fire." One officer sprayed Olivas with OC spray and about that time Olivas doused himself in gasoline and the officers thought he was holding a lighter. Two officers tased Olivas and he burst into flames, with the fire spreading and eventually burning the house down. The officers safely evacuated the family members, but Olivas later died from his injuries.

Mr. Olivas' wife and son sued the City of Arlington and the two officers who tased the deceased alleging a Fourth Amendment violation. The officers asserted qualified immunity and did so via a Rule 12(b)(6) motion to dismiss rather than summary judgment. The district court denied the motion finding more factual development was necessary. After appeal, on a limited remand the trial court then denied the officers' motion for reconsideration and ruled on the merits and the officers appealed. Noting that a de novo review applied to the Rule 12(b)(6) motion as well as qualified immunity, the Fifth Circuit emphasized the "degree of granularity involved in the qualified immunity analysis", citing in footnote #3 of the opinion to their decision in *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) that the dispositive question is whether the violative nature of PARTICULAR conduct is clearly established (emphasis in original). The basis of this approach is to insure an officer has fair notice that his conduct is unlawful. The opinion also emphasized in footnote #4 that it was error for the trial court not to consider each individual police officer's entitlement to qualified immunity on a separate basis.

In this context, the Court emphasized the danger posed not only to himself but to others in Olivas' threats to burn down the house as well as the fact that arson as threatened was a felony. The Court examined the *Graham v. Connor* excessive force factors, 490 U.S. 386, 393-94 (1989), and found the severity of the crime (arson) and the immediate and substantial risk of harm to the safety of the officers and others present showed the officers' conduct was reasonable. The Court also commented that no alternative course of action was shown and reminded us that it was improper to judge the situation in hindsight. Note the comment by the Court that "…certainly, we, who are separated from the moment by more than three years, cannot conclude that (the officers), in the exigencies of the moment, acted unreasonably. Thus, no constitutional violation of the Fourth Amendment was found as to either officer's conduct when individually analyzed, and the district court's denial of qualified immunity was reversed, and the case remanded for entry of an order dismissing all claims against the two officers.

F. *Tucker v. City of Shreveport*, 998 F. 3d 165 (5th Cir. 2021)

This Fourth Amendment case involves another reversal of a trial court's denial of qualified immunity for police officers in an alleged excessive force case. An arrestee claimed excessive force was used against him when he was being handcuffed. The trial court denied the officers' motion for summary judgment on qualified immunity grounds and on interlocutory appeal the Fifth Circuit reversed and remanded and held that qualified immunity applied to the takedown of and strikes applied to the arrestee, Interestingly, there was a dissent from Judge Higginson which we will examine a bit further on.

Also of interest is the fact that the Court of Appeals noted it lacked jurisdiction to review the district court's assessment of disputed facts and thus advised it would focus "solely" on examining the materiality of factual disputes the trial court determined were genuine, thus limiting review to the "legal significance of the conduct…deemed sufficiently supported for purposes of summary judgment (citing to the *Cole* case discussed in EXHIBIT A)." Judge Engelhardt advised that for the most part the Court of Appeals agreed with the district court's factual account but "ultimately part ways with the district court" as to the "legal significance of those facts." As an aside, the Court agreed there were two separate instances of force, i.e., when two of the officers took Tucker to the ground and when officers punched and kicked him while on the ground.

In that context, some of the key takeaways from the opinion for the practitioner are:

- The second prong of the qualified immunity analysis encompasses two inquiries; whether the alleged constitutional right was clearly established at the time and, if so, whether the conduct of the defendants was objectively unreasonable in light of same
- Whether conduct is objectively reasonable is usually a question of law for the court and not a question of fact for the jury
- Assertion of qualified immunity alters the burden of proof, as plaintiff must negate same if properly raised and it is plaintiff's burden to show why qualified immunity does not apply
- Inferences are still drawn in plaintiff's favor but the court can only consider the facts that were knowable to the defendant officers
- Reasonableness of conduct is judged against the law at the time and the established law is not to be defined at a high level of generality
- Specificity is especially important in Fourth Amendment cases
- Qualified immunity is justified unless NO reasonable officer could have acted as defendants did or EVERY reasonable officer would NOT have acted as defendants did

So how did the Fifth Circuit arrive at disagreement with the trial court? First, they noted the district court and Plaintiff Tucker and his attorneys mostly referred to and relied upon merely general principles and had cited numerous cases where qualified immunity was denied but in cases which were not factually comparable. Moreover, the Court also reviewed the police video and found the trial court was ignoring parts of same in an effort to construe facts in Tucker's favor, here, as to whether he resisted handcuffing or pulled his arm away from the police. They also noted other facts known to the officers and not given effect by the trial court as to the high crime area, other factors supporting the officers had safety concerns, Tucker's anger, flailing arms and the smell of marijuana, as well as Tucker's comments and the testimony of one of the officers who thought he was losing his grip on Tucker. Tucker also had a knife in his pocket. The officers also testified initially they were just trying to get Tucker on the ground to control him and handcuff him. The Court determined that all of these facts known to the officers created a "tense, uncertain and rapidly evolving" scenario and no law would have put the officers on notice they could not use a takedown in such cases. It was held error for the trial court not to have granted summary judgment on the takedown. The majority dismissed as immaterial the dissent's argument that the video did not "blatantly contradict" Tucker's version.

Similarly, the Court found it error not to have granted summary judgment on the strikes applied to Tucker while he was on the ground, as the evidence and video showed he was physically resisting (even assuming Tucker did not intend to strike the officers) and the officers were entitled to use force to gain control of Tucker and handcuff him. The Court noted the strikes were "controlled." More importantly, the Court noted the "fatal flaw" for Tucker was that he never alleged the officers continued to strike him AFTER he was subdued and cuffed. At his deposition, Tucker did not recall any officer hitting him after he was handcuffed and all the officers denied doing so.

Moreover, the trial court itself had cited pertinent authority that controlled strikes in a similar scenario would not necessarily violate the Fourth Amendment. Hence, the supposed factual dispute the trial court relied upon as to the use of force on the ground was immaterial since precedent allowed use of force to subdue a resisting arrestee and Tucker never asserted a claim alleging that force was used on him AFTER he was subdued. Tucker also never disputed the officers' testimony that he was pulling his arms away from them and failing to put them behind his back. Because of

these factors, the Court found the trial court erred in not granting summary judgment on qualified immunity as to the force used while Tucker was on the ground as well as in regard to the takedown itself.

The Court termed the situation "regrettable" but noted Tucker could have obeyed and pulled his vehicle over immediately or could have put his hands behind his back and complied with the officers' directives. The Court also used an apt boxing analogy to point out there was no referee around to ring a bell and require all to "return to their corners" to reconsider their strategies.

The dissent by Judge Higginson simply tried to assert that disputed questions of fact existed as to whether Tucker actively resisted arrest and seemed to rely only on Plaintiff's claims he was not resisting. The dissent also somewhat dodges the video evidence by saying it did not "blatantly" contradict Tucker's version as opposed to saying it confirmed Tucker's version. The dissent also starts going "big picture" rather than focusing on the factual issues noted by the majority, and refers to "recent attention given to the issue of qualified immunity and violent police-citizen encounters," and cites to some of the opinions in the *Cole* case discussed in EXHIBIT A. The dissent also shows his hand by claiming that judging such police conduct should be a jury issue vital to "public trust." Given how police are now often portrayed to the public, with disrespect and animus promoted in many cases, and in light of some of the related misinformation and false narrative, I respectfully disagree and am more confident in keeping these issues questions of law. The Supreme Court decision discussed below and the many cases where qualified immunity has been denied establish the judiciary is generally quite capable of sorting out those who do not deserve the protections of qualified immunity.

G. *Kelson v. Clark*, 2021 WL 2472496 (5th Cir. 6/17/21)

This case is notable primarily for our dissenting Judge Higginson in the above *Tucker* case now being able to write the majority opinion and deny qualified immunity. This involved a Fourteenth Amendment failure to treat and deliberate indifference to serious medical needs as well as a wrongful death claim brought against two paramedics and others. The trial court denied the paramedics' motion to dismiss (not motion for summary judgment) and the paramedics filed an interlocutory appeal. The Fifth Circuit panel with Judge Higginson writing the opinion affirmed the trial court's denial of qualified immunity.

The facts are tragic as a homeless man (Mr. Fletcher) was assaulted and robbed outside a Dallas soup kitchen and later again assaulted with a punch to the head, then hitting his head on a wall. Bystanders called police and the police called paramedics, who laughed at Fletcher though he said he needed medical attention for his apparently visible head injuries. The police had apparently assumed Fletcher was drunk, charged him with public intoxication and booked him into a cell where he was again ignored and later found unresponsive. He died shortly thereafter due to a bleed from his head injuries. The paramedics also allegedly falsified their reports as to contact with him and were later indicted.

Though Judge Higginson noted that when qualified immunity was asserted in a motion to dismiss the court had an "obligation" to carefully scrutinize the complaint before subjecting public officials to the burdens of discovery, and the burden is on plaintiffs to show the defense is inapplicable, the facts as alleged were sufficient to show Fletcher was a pre-trial detainee and entitled to the protections of the Fourteenth Amendment as a result. Thus, there was a constitutional violation and the facts as alleged could support a refusal to treat and deliberate indifference. The Court distinguished other cases where paramedics were granted qualified immunity for what amounted to negligence allegations for not treating a patient in a certain way, as opposed to not treating them at all, as alleged in this case. Also of note is that the demeanor of the paramedics as alleged was deemed relevant to whether they were deliberately indifferent. Similarly, the Court had no problem finding the law was clearly established as to the rights of a pretrial detainee under the Fourteenth Amendment. As an aside, we note that footnote #5 of the opinion confirmed that while district courts should ordinarily state on the record and specify the reasons for denying qualified immunity, the brief dismissal order in this case made it clear the trial court had denied based on disputed issues of material fact.

H. *Taylor v. Rojas*, 141 S. Ct. 52 (2020) / Addressing Fifth Circuit (Texas) decision

This decision is the only one we found from the U.S. Supreme Court addressing application of qualified immunity within the last twelve months. Another opinion mentioned but did not reach the issue of qualified immunity. Interestingly, this also was a Fifth Circuit case, and it involved claims for declaratory and injunctive relief based on allegations by a Texas prison inmate that his Eighth amendment rights were violated by housing him in unconstitutional conditions showing deliberate indifference to his health and safety. The trial court had granted the prison official defendants' motion for summary judgment, the Fifth Circuit affirmed in part and reversed in part and remanded, and the Supreme Court granted certiorari. The per curiam opinion held that the Court of Appeals properly ruled the conditions of confinement as alleged violated the Eighth Amendment's prohibition against cruel and unusual punishment, but that the Court of Appeals had erred in granting officials qualified immunity on the basis the law was not clearly established as the Supreme Court found that those officials had fair warning their acts were unconstitutional. This is one of those "we know it when we see it" decisions, as the Fifth Circuit had found the law was not "clearly

established" but the Supreme Court held that no reasonable correctional officer could have concluded it was constitutionally permissible to house Taylor in such conditions. No more "fair warning" was necessary.

The Supreme Court called the facts "particularly egregious" and the details are disgusting. Taylor was apparently kept for six days in a pair of "shockingly unsanitary" cells, one of which was covered with massive amounts of human waste and the second of which was frigidly cold and had only a clogged floor drain to dispose of bodily wastes. As he feared his food and water would be contaminated (supposedly waste was even packed in the water faucet), Taylor did not eat or drink for four days. Taylor then got moved to a frigidly cold cell with a clogged drain, so that after a long time when he was forced to relieve himself, the drain overflowed and raw sewage spilled out. Because the cell had no bunk and he had no clothing, Taylor had to sleep naked on the floor amongst the sewage. He also claimed he was not allowed to be taken to a toilet.

We present the facts not gratuitously but to show how easy a call this was for the Supreme Court. The Fifth Circuit apparently agreed that the conditions violated the Eighth Amendment but somehow determined the law was not clearly established that prisoners could not be so confined. In doing so the Court of Appeals appeared to misinterpret and expand some vague dicta in a prior opinion as Justice Alito noted and as discussed below. The Supreme Court disagreed and pointed out that in some cases (such as this one) a general constitutional rule already identified in the law may apply with obvious clarity to a situation. The Court also confirmed that an "officer by officer" analysis would be required on remand as to deliberate indifference, though some comments in the record noted by the Supreme Court signaled to them that at least some of the officers were clearly deliberately indifferent.

An interesting aside for purposes of this paper is that a dissent is indicated by Justice Thomas with no related textual contribution, and Justice Alito concurred in the judgment but wrote that the Court should not have reviewed the case and granted certiorari in the first place. He is on board with the result but argues that review should be limited to misapplication of rules of law. In this case, Justice Alito points out that the Supreme Court was not accusing the Fifth Circuit of failing to apply the correct legal standards, but rather disagreed with the Fifth Circuit's application of the law to the particular facts, and the Supreme Court should not be reviewing debatable evidentiary points. He notes the Fifth Circuit did find a constitutional violation and thus qualified immunity would not be available in similar cases in the future. However, Justice Alito also agreed that summary judgment on qualified immunity should not have been granted. There had been prior dictum in another case by the Supreme Court as to whether holding a prisoner in a "filthy" cell for a few days "might be tolerable" but he notes that such dicta would not justify relying on same in this case.

IV. CONCLUDING THOUGHTS: WHERE DO WE GO FROM HERE?

Between this paper and EXHIBIT A, the reader has a fairly comprehensive guide to where the doctrine of qualified immunity stands in the Fifth Circuit Court of Appeals and in the U. S. Supreme Court. What is unclear is where qualified immunity stands in the future in Texas. There have been signals that certain Texas legislators are eager to follow the path of Colorado and New Mexico and enact statutes radically gutting or modifying the doctrine of qualified immunity. If that occurs and plaintiffs and their attorneys are provided with a far easier path to sue governmental entities and officials in Texas state courts, there will be a predictable adverse impact on the public treasury and the State budget, as well as an increased burden on state courts from litigants forum shopping to avoid federal courts.

As we noted last year in regard to this topic, there are ways to address qualified immunity and some of the concerns with the way the doctrine is applied without gutting the defense. Proponents of the New Mexico bill discussed earlier in the paper tried to claim they did so by enacting a related damages cap, but that cap was placed at $2 million and thus is not much of a balance to abolishing the defense. Other ways to address the concerns that may make more sense are to consider requiring making it mandatory for courts to first consider the first prong of the analysis as to whether a constitutional violation occurred, as Judge Willett suggested, to increase precedent. Also, burdens of proof could be eased on plaintiffs by going beyond prior analogous case precedent in proving that an officer was on notice that the law was clearly established, such as allowing Police Department policies or other pertinent evidence to be considered in some way. Alternatively, focus could be placed on distinguishing application of qualified immunity in certain categories of cases where it is most critical to protect an officer's discretion in light of tense, rapidly evolving or exigent circumstances. The doctrine could then be applied differently or modified in cases that do not present such scenarios, such as the *Kelson* case or the *Taylor* case discussed herein. Perhaps an analogous procedure to FRCP 7 mechanisms can be used to screen if a case should involve qualified immunity at all. In this vein, perhaps setting related dollar limits on certain claims similar to jurisdictional limits for some courts, or more realistic damage caps as per the Texas Tort Claims Act, could be evaluated. Of course, many other options can be developed that continue to protect both the public and public employees apart from these suggestions.

Frankly, the cases as updated and discussed in this paper show no dramatic departure or unusual application of qualified immunity and rather appear to confirm that the Fifth Circuit and Supreme Court know when qualified immunity fits the case and when it does not. A fair reading of the cases herein certainly does not establish that courts

are using qualified immunity to let bands of rogue public officials run wild, wreaking havoc on the public. In Texas at least, and for now, courts are holding steady on application of qualified immunity and while some of the judiciary would clearly like to see modifications in the doctrine, as evidenced by the discussion herein, those modifications will likely await the attention of the legislative branch. Until then, qualified immunity remains a valuable protection for governmental officers and officials and for the public at large.

We hope the reader has found this paper useful and we sincerely appreciate any consideration given to the material presented herein.

EXHIBIT A

RECENT DEVELOPMENTS REGARDING QUALIFIED IMMUNITY AND A MODEST PROPOSAL

DARRELL G-M NOGA, *Dallas*
Brown Fox PLLC

State Bar of Texas
32ND ANNUAL
ADVANCED GOVERNMENT LAW
July 30-31, 2020

CHAPTER 13

Copyright 2020

DARRELL G-M NOGA
BROWN FOX PLLC
8111 Preston Road, Suite 300
Dallas, Texas 75225
(214) 367-6091
(214) 327-5001 fax

darrell@brownfoxlaw.com

BIOGRAPHICAL INFORMATION

Darrell Noga is an experienced trial and appellate attorney who has successfully handled g a wide variety of cases, with an emphasis on representation of diverse governmental entities and their individual officers and employees, including numerous Texas municipalities, in employment, civil rights, land use and other litigation, as well as in civil service matters and labor negotiations. He has also represented private corporate clients in employment investigations and litigation. Darrell has successfully tried numerous cases in state and federal courts, and has successfully argued before the Texas Supreme Court and various courts of appeal. He has been a frequent lecturer for Texas State Bar seminars and other professional groups. Over the years Darrell has also authored numerous articles and publications addressing diverse litigation issues and tactics, employment law topics, defense of governmental entities and many other practice areas and issues. Darrell has been selected as panel counsel for the Texas Municipal League Intergovernmental Risk Pool, and has represented numerous Texas municipalities for over twenty-five years.

EDUCATION

- Georgetown University Law, Washington, D.C., J.D. 1984
- DePaul University, Chicago, IL, M.A. 1981, with highest honors
- DePaul University, Chicago, IL, B.A. 1979, with highest honors

BAR ADMISSIONS & CERTIFICATIONS

State Bar of Texas
Dallas Bar Association

U.S. Court of Appeals for the Fifth Circuit
U.S. District Courts for Northern, Eastern, Southern and Western Districts of Texas
Supreme Court of Texas
Illinois State Bar Association (inactive)

PRINCIPAL PRACTICE AREAS

Governmental Litigation and Civil Rights
Public/Regulatory
Labor/Employment

PROFESSIONAL ACTIVITIES

- Defense Research Institute (DRI)
- Texas City Attorneys Association
- Former Course Director for Texas State Bar Seminar on Suing and Defending Governmental Entities and former and current State Bar Planning Committee Member
- Frequent Lecturer at Texas Municipal League Intergovernmental Risk Pool's Annual Attorney Workshop

- Guest Lecturer for University of Texas at Arlington Executive MBA Program

Representative sample of PUBLICATIONS

Recent Developments in Individual Immunities

Investigating and Evaluating Sexual Harassment Claims in the Age of #MeToo

Accident Review Policies: Help or Hindrance?

Police Hot Pursuit Cases

Handling a Trio of Management Issues: Reasonable Accommodation, Leave and Return to Work Under Current Law

Civil Rights Claims- A Trial Lawyer's Perspective

Pleas to the Jurisdiction
Hot Topics in Damages
Recent Developments in Individual & Collective Rights of Governmental Employees
Sovereign Immunity: Bar to Damage Suits Only?
Application of Section 101.106 of the Texas Tort Claims Act
Defending Fair Housing Act Claims and HUD Complaints
Best Practices in Recruiting and Hiring New Employees

TABLE OF CONTENTS

I. INTRODUCTION 1

II. QUALIFIED IMMUNITY – THE CONCEPT 1

III. SOME FACTS ABOUT POLICE AND PUBLIC ENCOUNTERS 3

IV. THE LEGAL BATTLEGROUND – THE WHY BEHIND THE QUALIFIED IMMUNITY DEBATE 3
A. Analysis of Cole 4
1. Majority 4
2. Jones' Dissent 5
3. Smith Dissent 6
4. Willett Dissent 7
5. Ho/Oldham Dissent 7
6. Duncan Dissent 9

V. THE SOCIAL COSTS 9

VI. REFINING QUALIFIED IMMUNITY 10

VII. CONCLUSION 13

EXHIBIT A - COLE V. HUNTER, ET AL. 5TH CIRCUIT OPINION 14

EXHIBIT B - "LAW ENFORCEMENT USE -OF- FORCE 'STANDARDS,' DEGREES OF CERTAINTIES, AND SCIENTIFIC RELIABILTIES", BY MICHAEL BRAVE 89

EXHIBIT C - BUREAU OF JUSTICE STATISTICS, NOVEMBER, 2015 SPECIAL REPORT ON POLICE USE OF NONFATAL FORCE, 2002-2011; TABLE 9 96

EXHIBIT D - FBI CRIMINAL JUSTICE INFORMATION SERVICES, 2016 CRIME IN THE UNITED STATES; TABLE 21A 97

RECENT DEVELOPMENTS REGARDING QUALIFIED IMMUNITY AND A MODEST PROPOSAL

I. INTRODUCTION

When I was assigned this topic by the State Bar of Texas Planning Committee this past January, little did I know that I would be addressing a topic that would months later explode upon the national scene. Any number of pundits on news talk shows were suddenly opining on a doctrine that used to primarily be the concern of attorneys like yours truly, who has spent the best part of his career litigating constitutional issues and defending local government, including law enforcement branches. Even latenight talk show hosts like John Oliver (who originates from England by the way) were advancing their "hot sports opinions" as to qualified immunity. Now, unfortunately, our country has never lacked for individuals who are happy to opine without knowing what they are actually talking about, or without putting any analysis or research into a topic. The topic of qualified immunity is no exception. However, in contrast to opining about local sports teams, which can generally be harmlessly done based on emotion rather than facts, and often is, to do so as to the topic of qualified immunity, a critical defense mechanism for effective law enforcement, is quite dangerous and has serious societal consequences.

Does that mean that the doctrine can never be evaluated and perhaps adjusted or refined if it makes sense to do so? Absolutely not and this paper does not suggest otherwise as you shall see if you read on. However, the current growing attacks on qualified immunity, from the judicial, legislative and executive branches to varying degrees, seem to, at least in part, unfortunately be premised on some of the same emotional responses that trigger recent calls to abolish law enforcement, or at least take financial resources away from police. Ironically, such reactions will ultimately first harm those citizens in most need of police protection. If you care to investigate how such attacks on police will play out in the real world, that is a bit beyond the scope of this paper but I refer you to the documented increasing crime rates in those cities where the actions of local politicos have most harshly targeted, limited and abandoned police, or you can study what happened recently to the neighborhood in Minnesota where the residents announced publicly they would all stop calling the police. The results were entirely predictable.

Perhaps the greatest duty the government has is to preserve the public peace and "domestic tranquility" and to give its citizens the security needed to conduct their daily affairs. This need for peace and security is one of the fundamental reasons social groups bonded together in the first place. This paper will make it clear that such fundamental purpose of government cannot be carried out without some form of qualified immunity to protect police officers in the exercise of their good faith discretion. But as will also be clear from this paper, there is room for discussion as to how the concept of qualified immunity is applied and implemented and as to how courts evaluate the defense.

To give the reader a quick road map as to the scope of this paper, I will briefly cover the basics of the doctrine of qualified immunity, present some factual statistical background to give context to the qualified immunity discussion, address the legal battleground as to application of qualified immunity, as dramatically displayed by the Fifth Circuit, address social issues and costs if the defense is gutted, and present some issues or proposals that may be worthy of consideration for those who seek to refine qualified immunity rather than abolish it. In addressing the legal battleground we will consider what may be properly termed the "originalist" myth, along with the judicial issues in play as exemplified by the qualified immunity "free for all" put on paper by the Fifth Circuit Court of Appeals in regard to the *Cole v. Hunter, et al.* en banc decision. As to the legal battleground, we will jump ahead and ruin the ending by noting that the U.S. Supreme Court recently considered cert petitions on thirteen cases involving qualified immunity from multiple Circuits below in its May 15, 2020 conference, only to deny cert on twelve of them, once again reschedule consideration of the thirteenth case (*Davis v. Ermold*), and leave qualified immunity unchanged for now. So, with that introduction for context, let us try to bring some reasoned analysis to one of the "hot topics" of these dangerous times.

II. QUALIFIED IMMUNITY – THE CONCEPT

Qualified immunity is a judicially created doctrine actually developed as a way to level the playing field after an expansion of 42 U.S.C. Section 1983 as per *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484 (1961). Fifth Circuit Judge Edith Jones described the *Monroe* decision in her dissent in the *Cole* case, which will be discussed in detail later in this paper, as the Supreme Court having "unleashed federal courts to enforce constitutional commands against state actors pursuant to 42 U.S.C. § 1983." See attached Exhibit A, *Cole v. Carson* and *Cole v. Hunter, et al.*, No 14-10228 and No.15-10045, en banc opinion at page 30, filed 8/20/19, revised 8/21/19; hereinafter cited as "*Cole* op." The reference back to *Monroe* will be important when we address what I call the "originalist myth" later on in this paper. To wit; Justice Scalia and Justice Thomas both noted that *Monroe v. Pape* converted an 1871 statute which covered constitutional violations committed "under color of" any statute, ordinance, regulation, custom or usage of any State",

into a statute under Section 1983 that covered constitutional violations committed "WITHOUT" the authority of any statute, ordinance, and the like, even covering constitutional violations committed in clear violation of state law.

As a result of this statutory expansion, and as Judge Edith Jones points out, a foreseeable consequence was that a "deluge of litigation would follow." *Cole* op., p. 30. Therefore, to help balance the scales and dispose of claims without merit, the Supreme Court decided that police officers sued under Section 1983 should enjoy qualified immunity as per immunities accorded at common law. *Pierson v. Ray*, 386 U.S. 547, 556-57, 87 S.Ct. 1213, 1219 (1967). While 42 U.S.C. § 1983 itself does not provide an exception to the general right to recover damages from an official whose actions violate federal law or constitutional rights, the United States Supreme Court has held the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Wyatt v. Cole*, 504 U.S. 158 (1992) (quoting *Pierson v. Ray*, 386 U.S. 547 (1967)).

In doing so the Court recognized that it was the police officer who was the government actor most frequently involved in day to day contacts with citizens and thus most frequently exposed to Section 1983 claims. The evolution of qualified immunity has then continued for over fifty years in an effort to strike a balance between preventing constitutional abuses and protecting police and society at large from the various costs created by having to defend meritless claims. Because of those costs, the Supreme Court has consistently emphasized that this is immunity from suit as well as from liability. See, *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985); *Pearson v. Callahan*, 555 U.S. 223,231, 129 S.Ct. 808, 815 (2009). The judicial rationale behind qualified immunity is that it is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335,341 (1986)).

The doctrine of qualified immunity shields officials from liability insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This protection applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. FEDERAL TRIAL HANDBOOK CIVIL § 7:3 (4th ed. 2010) In the wake of such doctrinal development, the application of qualified immunity "requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813. Qualified immunity is "the best attainable accommodation of competing values." *Id.*, at 814. It is certainly true that government officials do not always act as they should. But at the same time, "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Id.* The Supreme Court consistently recognizes that such costs include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* In its current state, qualified immunity allows officials to know that "they will not be held personally liable as long as their actions are reasonable in light of current American law." *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). As such, officials can know whether they are protected from liability "without entangling themselves in the vagaries of the English and American common law." *Id*. at 643. In this context, and, given the discretion necessary for effective law enforcement, every police department in the country trains its officers in reliance upon qualified immunity.

Without further reciting the history of qualified immunity jurisprudence let us cut to the present where we have a two-step analysis in play. In assessing whether qualified immunity applies, courts are to consider: 1) whether a constitutional or statutory violation has occurred; and 2) whether the law was so "clearly established" at the time that every reasonable officer would have known that the conduct in question was illegal. *See, Pearson v. Callahan,* at 555 U.S. 232, 129 S. Ct. at 815-16. The fact that case law later allowed courts to pick and choose which of these two steps it wanted to undertake first, *Pearson*, 555 U.S. at 236, 129 S.Ct.at 818, is at least one basis for the current difficulties some have with the defense of qualified immunity, as we will discuss in considering possible modifications to implement the defense. After all, the Supreme Court has been stringent in insisting that in deciding whether a police officer had fair notice that particular conduct was unlawful we cannot evaluate "clearly established law" at a "high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). That requirement of sufficient factual comparability placed upon plaintiffs to show law was "clearly established " has proven a difficult burden, as the Supreme Court has made it clear that generalities like a "right to be free of excessive force" will not suffice to put an officer on notice that his or her conduct was unlawful. So that sets the stage for the remaining portions of this paper.

Keep in mind that in theory "qualified immunity represents the norm," *Harlow*, 457 U.S. at 807, and courts should deny a defendant immunity only in rare circumstances, *see Brady v. Fort Bend Cty.*, 58 F.3d 173, (5th Cir. 1995). Once an official asserts qualified immunity as an affirmative defense, the burden shifts to the plaintiff to demonstrate that the official is not entitled to its protection. *See Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015); *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010); *see also* 59 AM. JUR. 3D *Proof of Facts* § 291 (2000).

III. SOME FACTS ABOUT POLICE AND PUBLIC ENCOUNTERS

Entire books and many papers can be, and have been, authored as to crime and police statistics and the analysis of same. Now while that topic is pertinent to the topic at hand, it is beyond the scope of this paper to address same in detail. Nonetheless, it seems both necessary and helpful to have some statistical sources in hand to provide further context for the qualified immunity debate. In this context the author has to acknowledge a debt of gratitude to Michael Brave, an attorney, consultant, trainer and sworn officer who has immense law enforcement expertise in a variety of roles, and who has authored some very valuable articles on police encounters, enforcement standards, officer accountability and the data behind these issues. Because much of the current qualified immunity debate has been provoked by, and seems to hinge on, use of force incidents, I have attached to this paper as a resource for the reader should they care to explore this aspect of the debate further an excellent article Mr. Brave just wrote in June of 2020, entitled "Law Enforcement Use-of-Force 'Standards,' Degrees of Certainties, and Scientific Reliabilities," which was published in the Defense Research Institute Publication "For the Defense." Exhibit B.

For purposes of this paper I want to call the reader's attention to some of the statistical evidence cited by Mr. Brave in the attached article. He writes on page 25 of the attached:

> "Law enforcement officers' use of force in the United States, comparable to Canada, the United Kingdom, and Australia, is quite rare, force is used in an estimated one in 110 criminal arrests, and one in 1,000 law enforcement officer-public encounters or calls for service (citation omitted). One firearm injury is estimated to occur in 149 use-of force events, or in 73,623 calls for service, and one firearm death is estimated to happen in 893 use-of-force incidents, or in 1,041,737 calls for service (citation omitted)."

Mr. Brave's article goes on to reference statistics showing one temporally related death for 1000 use of force incidents where non-conducted energy weapons were involved, one temporally related death for every 3000 incidents with conducted energy weapons (tasers) used, and one temporally related death estimated per 194 vehicle pursuits or in 54,714 traffic stops. Studies from Bureau of Justice statistics as of October, 2018 and other studies show that on average these use of force events with tragic outcomes will occur far less than once per the span of a law enforcement officer's career.

The Bureau of Justice Statistics branch of the U.S. Department of Justice, which is the principal federal agency responsible for measuring crime and justice system statistics, confirms the rarity of use of force and related fatalities. In their November, 2015 Special Report on Police Use of Nonfatal Force, 2002-11, Table 9, attached hereto for your convenient reference as Exhibit C, describes the prevalence of use of force during police contact from 2002-11. The table shows that with an average annual population of 230,811,742, 0.4% of the population experienced any police use of force, and deadly force data documenting those killed by police had an average annual number of 1,242 or 0.0002% of the population, with average annual numbers killed of 547 White, 369 Black and 232 Hispanic. When you consider the huge number of police/public encounters of any sort across the nation, and the fact that according to FBI crime reporting data in 2018, in Texas alone, for instance, there were 43,637 violent crime incidents and 49,008 offenses reported by 260 submitting law enforcement agencies in the State, the fortunate rarity of use of force encounters, especially those resulting in deadly force, is striking.

For instance, if you refer to Exhibit D, the attached Table 21A as to 2016 Crime in the United States statistics from the FBI's Criminal Justice Information Services, you will note the total arrests on page 1 of 8,421,481 and the point is clear. Rogue police officers are not roaming around the United States using the doctrine of qualified immunity as a shield giving them "carte blanche" to violate the constitutional rights of Americans and focusing on minorities in the process. That narrative is demonstrably false and does a disservice to the vast majority of the men and women who put themselves on the line every day and in every way to serve and protect. While there may be reasons to refine the defense of qualified immunity, doing so to put the clamps on murderous uncontrolled police officers seeking out citizens to abuse them is not one of those reasons. The fact that some politicians in the public eye and some of what passes these days for "reporters" promote that narrative is unconscionable and should be offensive to any fair minded person.

IV. THE LEGAL BATTLEGROUND – THE WHY BEHIND THE QUALIFIED IMMUNITY DEBATE

In this section of the paper I want to highlight some of the areas of conflict in differing judicial views of qualified immunity. Individuals and groups from radically different perspectives, including the plaintiffs' bar and the Cato Institute, have been taking increasing shots in recent years at qualified immunity and they make strange bedfellows indeed. Should you care to delve deeper into these various perspectives and supporting legal arguments, I would commend you to: Joanna C. Schwartz, The Case Against Qualified Immunity, 93 Notre Dame L. Rev. 1797, 1800 (2018); Aaron L. Nielson & Christopher J. Walker, The New Qualified Immunity, 89 S.Cal. L. Rev.1, 23-24 (2015)

and Nielson & Walker, A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853, 1856-63 (2018); Karen M. Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm.& Mary Bill Rts. J. 913, 925 (2015); and William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 49-61 (2018).

But it is not the focal point of this paper to further dissect these academic critiques in detail. Rather, it is most appropriate for our purposes to look at these competing viewpoints on qualified immunity in the context of what our courts are saying since our judges are applying the defense. In that regard, our own Fifth Circuit Court of Appeals has recently presented us with a perfect intellectual battleground to study which helps to understand the current parameters of the conflict over application of qualified immunity. That Fifth Circuit battleground is mapped in the pages of the majority en banc opinion and the multiple dissents in the related cases of *Cole v. Carson* (No. 14-10228) and *Cole v. Hunter and Cassidy* (No.15-10045). The diverse and often powerfully worded opinions of the Judges are worthy of further careful attention, and because of the importance to this paper of the en banc opinion in the conjoined *Cole v. Carson* and *Cole v. Hunter* cases I have therefore taken the liberty of appending the 75 pages of opinion and the various dissents in their entirety as Exhibit A for the reader's convenient reference. Since I will be referring to the opinion quite a bit, for the sake of convenience I will cite to the attached August 20, 2019 (revised 8/21/19) en banc opinion hereafter as "*Cole* op., page (#). "

The facts of the case are tragic and are particularly compelling because they involve a 17 year old male with mental health issues, suicidal ideation, and access to and possession of loaded firearms. The underlying events occurred on October 25, 2010, which shows how long this litigation has been wending its way back and forth between the trial and appellate courts. To summarize a complicated factual scenario, after being put on notice of Ryan Cole being suicidal and armed, and of threats he had made, Officers Cassidy and Hunter were assisting in the search for Cole when the teenager suddenly emerged from dense bushes about ten to twenty feet from Officer Hunter with a loaded pistol pointed at his own head and finger on the trigger, and then turned in the officer's direction. Officer Cassidy was aware that Cole had threatened to shoot anyone who tried to take his gun and had already refused a police order to drop his weapon before Cole then retreated into the brush. Officer Hunter had watched Cole walk down train tracks ignoring other officers who were yelling at him to drop his pistol. Both officers were aware of related warning bulletins issued to multiple area law enforcement agencies and three nearby schools regarding Cole.

When Cole turned toward police with finger on the trigger, after he suddenly emerged from the bushes to the surprise of the police, seven shots were fired and two from officer Hunter hit Cole, one in the left arm penetrating his body and one grazing his left arm. Cole's own gun discharged (Plaintiffs claim involuntarily) and he shot himself in the head but not fatally, rather leaving Cole with cognitive impairment, partial paralysis and other mental and physical disabilities. Note that none of Officer Cassidy's shots hit Cole and in footnote #2 of her dissent Judge Edith Jones questioned why Cassidy was still in the suit if he did not shoot Cole, as qualified immunity should be applied individually to each defendant. As an aside, Officer Carson was present at the scene but did not shoot, and the claims against him relate to alleged fabricated evidence charges which remained, and which were not challenged by the dissent and were not part of the qualified immunity debate. Note also that the involved officers were no billed by a Dallas County grand jury.

The dispute between the majority and the various dissents in the *Cole* en banc opinion (and keep in mind that the U. S. Supreme Court recently denied the petition for certiorari filed by Defendant Officer Hunter (along with denying 11 other qualified immunity cert. petitions) revolve around four concepts that are common to the debate about qualified immunity. First is the alleged presence, or not, of disputed material facts which preclude qualified immunity and must be left for the trier of fact to determine. A sub-issue in this regard is what should be the time frame to start considering the factual information known to the officers which informs their actions. Second is the nexus this fact pattern has to the legal issues of whether the law was "clearly established", so that officers were on fair notice they could not use force in these circumstances. Third is the interpretation of, and deference to, U.S. Supreme Court precedent and direction as regards qualified immunity. Fourth is the legitimacy of qualified immunity in the first instance and whether it should be limited on "originalist" grounds or otherwise. To cover these issues most efficiently we will be best served by reviewing these various bases as all are variously presented in support of the Fifth Circuit Judges' positions expressed in *Cole* per the attached opinion.

A. Analysis of Cole

1. Majority

Eighteen Circuit Judges considered *Cole* with Judges Higginbotham and Clement, then Senior Judges, participating as members of the original panel. I will spare the reader the numerous and maze like procedural steps that got us to the attached August of 2019 opinion, merely noting that even the U.S. Supreme Court had been given a prior crack at the case, in *Hunter v. Cole*, 137 S.Ct. 497 (2016), granting cert in 2016, vacating and remanding for consideration in light of the *Mullenix v. Luna* decision at 136 S.Ct. 205 (2015) (per curiam). Judge Higginbotham's

majority opinion was joined by ten other Judges. Essentially the majority opinion claimed that questions of fact and competing narratives prevented application of qualified immunity as to the excessive force claim. The majority determined that if the facts were taken in a light most favorable to the non-movant Plaintiffs with reasonable inferences drawn in their favor, a reasonable jury could find that *Cole* did not pose an immediate threat to the officers when they opened fire, The majority cited the district court's conclusion that the law was clearly established that "shooting a mentally disturbed teenager, who was pointing a gun the entire time at his own head and facing away from the officer, in an open outdoor area, and who was unaware of the officer's presence because no warning was given prior to the officer opening fire, was unlawful." *Cole* op., at page 14. The majority claimed that the summary judgment facts as determined by the district court were that *Cole* posed no threat to the officers to support firing without warning and this is an "obvious" case. *Cole* op., at p. 15.

The majority opinion indicates the officers were now arguing a different set of facts than the ones found by the district court, and commented on how helpful the Cato Institute's amicus briefing was in arguing that the factual dispute is beyond the court's jurisdiction. The majority also undoubtedly shortchanges what were the relevant facts known to the officers, dismisses key pre-encounter events as disputed in relation to the officers' knowledge, and asserts that all that matters is what was known when the officers shot "Ryan". *Cole* op., p. 20 (note the contrast between referring to "Ryan" as opposed to Judge Higginbotham's reference on p.2 to the police officers as "government workers."). The majority affirmed the denial of summary judgment on the excessive force claim, made other rulings, and returned the case to the district court for trial consistent with the opinion. Judge Elrod, joined by six other Judges, presented a brief concurring opinion essentially claiming the majority was taking no position on public policy issues as to policing and the mentally ill but simply lacked jurisdiction to review the genuineness of a fact issue on an interlocutory appeal of a denial of summary judgment based on qualified immunity. *Cole* op., p.23.

So if we look at the four issues or areas of conflict identified above, clearly the majority opinion focus is not only on disputed facts, but also on arguing that if those facts are construed in the light most favorable to the Coles, then the law is "clearly established" that the officers' conduct was violative of the constitution. As to the other two issues presented, the majority would claim it was following Supreme Court precedent and, indeed, cited the Supreme Court decision in *Mullenix as supporting their position*. *Cole* op., pp.13-14. The majority also does not facially quibble with the legitimacy of qualified immunity though, as the dissents point out, they seriously undercut its application. The majority's reference to the help provided by amicus Cato Institute is a good indication where they actually stand on the defense of qualified immunity, as is the fact that the Supreme Court had to previously tell the Fifth Circuit to follow *Mullenix* and the guidance therein after they tried to substitute their judgment as to what was a "sufficient" threat in that case.

2. Jones' Dissent

In response, we get a series of vigorous dissents to ponder. First is a dissent by Judge Edith Jones, joined by five other Judges. Judge Jones wastes no time staking her position, starting her dissent with:

> "What 'clearly established law' says that only a rogue cop would have shot at this mentally disturbed teenager within 3 to 5 seconds as the teen emerged from dense bushes ten to twenty feet away from Officer Hunter and, with his finger on the trigger of a loaded pistol pointed in the direction of his own head, began turning in the officer's direction?" *Cole* op., p. 24.

She describes the majority as dangerously unrealistic in its reasoning that officers cannot shoot without first announcing themselves or looking down the barrel of a gun. Judge Jones asserts that neither the Fifth Circuit nor the Supreme Court has held that police officers in close quarters with an armed suspect ready to shoot just need to hope they are faster on the draw and more accurate. *Cole* op., p. 24. Judge Jones then hits at the case's prior procedural history and references the Supreme Court's prior remand from the original panel denying immunity, saying that she thought that "meant something." *Id*.

Judge Jones does a very good job in pointing out that an officer's complete understanding of facts leading up to an event are important because they inform whether a "reasonable officer" could have believed his life or the lives of others were endangered. She criticizes the majority for truncating and failing to consider all the relevant facts known to the officers which gave them a heightened sense of danger. She also makes the relevant legal point that the appellate court reviews "de novo" the materiality of any relevant facts, and if the material facts as to immunity were actually in dispute then the court of appeals should have dismissed the appeal entirely for want of jurisdiction as it can only consider questions of law. *Cole* op., p. 27 at note 3.

Judge Jones summarizes the majority's immunity argument as holding that the law was clearly established that deadly force could not be used on a fleeing person who did not pose a severe and immediate risk to the officers or

others, and the central issue in dispute was whether Cole pointed his gun at Officer Hunter. However, she points out that this same approach previously resulted in the Supreme Court reversing them, with the Supreme Court commenting that given Cole's conduct they cannot say that only a plainly incompetent officer or one knowingly violating the law would have perceived a sufficient threat. Judge Jones comments that given this second attempt the Fifth Circuit panel conceded the deficiencies of its "no sufficient threat" approach and then pivoted to hold that if taken in the light most favorable to Plaintiffs then Cole's conduct posed "no threat" (citing *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985). (That prior *Cole* opinion was vacated by vote to reconsider the case en banc).

Judge Jones then attacks the majority opinion as ignoring undisputed material facts as to the officers' knowledge and points out that the majority cites unpublished Fifth Circuit cases without precedential impact as supposed "clearly established law". She deemed it "incredible that this court would cite our avowedly non-precedential decisions for that purpose." *Cole* op., at p. 28, note 4. Judge Jones then frames the "only legal question that needs to be addressed by this court" as

> "[w]hether, under the circumstances of this five-second confrontation *every* reasonable police officer would have reasonably perceived *no* life-threatening danger such that deadly force could be used to incapacitate *Cole* without a preliminary warning. Put otherwise, as a matter of law, was it clearly established that officers may not fire on a suspect, armed and ready to shoot a pistol, who is turning in their direction with one of their brethren ten to twenty feet away, unless the gun barrel points at them or they first shout a warning and await his response?" *Cole* op., p.29.

The point Judge Jones also emphasizes is that qualified immunity is intended to make sure officers are on notice their conduct is unlawful before they are subjected to suit, and that is judged from the perspective of a reasonable officer on that scene and not with 20/20 hindsight. *Cole* op., p.32. As Judge Jones correctly emphasizes, for purposes of assessing qualified immunity the question is whether ANY reasonable officers could have believed that *Cole*'s split-second turning toward them posed a life-threatening danger such that lethal force was necessary. *Cole* op., p. 34. She also criticizes the majority's reliance on *Garner* and points out that *Garner* does not render it "clearly established" that an officer has to give a warning and await a suspect's response before shooting. She also correctly points out that the majority opinion does not actually answer the immunity question as to whether EVERY reasonable officer in this factual scenario would have known he could not use deadly force, and reminds all that the feasibility of giving a warning is only a part of the overall Fourth Amendment analysis. *Cole* op., p.37, and at note 11.

In concluding portions of her dissent, Judge Jones also persuasively shows that Fifth Circuit precedent had upheld qualified immunity even where officers used force on suspects who did not actually have weapons but where the officers reasonably believed they were reaching for weapons. She also cites Fifth Circuit precedent that does not require officers to wait until a defendant turns toward them with weapon in hand before applying deadly force to insure their safety. *Cole* op., pp.42-43 Judge Jones concludes by characterizing the majority opinion as repeating every error identified by the Supreme Court when it granted summary reversal in *Mullenix* and sent the *Cole* case back for reconsideration She denies the law was "clearly established" and points out that the majority cites "not one case from this court denying qualified immunity under similar circumstances." *Cole* op., pp. 44-45. As Judge Jones concludes: "It is not 'clearly established' that police officers confronting armed, mentally disturbed suspects in close quarters must invariably stand down until they have issued a warning and awaited the suspect's reaction or are facing the barrel of a gun." *Cole* op., p.45. Tellingly, Judge Jones describes Officers Hunter and Cassidy as neither plainly incompetent nor themselves lawbreakers, and states that while "we are confident a jury will vindicate their actions, they deserved qualified immunity as a matter of law." *Cole* op., p. 45

3. Smith Dissent

Judge Jerry Smith also dissented. His pointed dissent lists numerous "red flags" pointing to "grave error" committed by the en banc majority and he suggests peace officers in Texas, Louisiana or Mississippi can "Abandon hope" if they ever have only a few seconds to react to dangerous confrontations with "well-armed potential killers." *Cole* op., p. 46. For our forecasting purposes, it is important to note Judge Smith's comment that given the new count of Judges "there is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires." *Id*. He bases this conclusion on the fact that the en banc court consists of 16 active judges and two senior judges on the original panel and of the 16 active judges nine joined the majority opinion. *Cole* op., p. 46 at note 1. Judge Smith also emphasizes numerous facts known to the police officers but ignored by the majority and states that officers still do not know what the "clearly established law" is, as the *Cole* majority fails to articulate same.

Both Judge Jones and Judge Smith's dissents focus on the pertinent factual issues to the qualified immunity analysis and the failure to define what "clearly established" law has been violated. Both note that Supreme Court and Fifth Circuit precedent have not been followed. Both discuss the rationale for qualified immunity.

4. Willett Dissent

Judge Don Willett presents his own dissent and it uniquely does question the legitimacy of the current qualified immunity doctrine, but yet suggests that such matters are the province of the Supreme Court and he is bound to take direction from same and the majority does not. His dissent is particularly useful for this paper as he is uneasy with what he describes as an "entrenched, judge-invented qualified immunity regime" that "ought not be immune from thoughtful reappraisal." *Cole* op., p. 49.

Rather than focus on the particular facts of the *Cole* case, Judge Willett's dissent indicates that he is particularly focused on the "clearly established law" prong of the qualified immunity analysis as it is outcome-determinative in most cases. In his view, application of that prong makes it seem like public officials can get away with anything, as long as they were the first ones to do it. He (perhaps in overbroad fashion) describes qualified immunity as "insulating incaution" and creating a gap between rights and remedies that allows constitutional violations to go unchecked. *Id.* He describes the bar to plaintiffs as not insurmountable but "sky-high." And though much of his dissent is conclusory, he does correctly point out that courts often leapfrog the first prong as to whether the Constitution has been violated and just jump to the second prong and decide there is no factually analogous precedent. In this regard, he asks how plaintiffs are to produce precedent when fewer courts are creating precedent and constitutional questions go unanswered because no one has answered them before. Judge Willett also acknowledges that there are reform possibilities to "mend it, don't end it." *Cole* op., p. 51. The author will discuss some options to "mend it" later in this paper. Notwithstanding his issues with current application of the doctrine of qualified immunity, Judge Willett dissents, as he is of the opinion that clear Supreme Court precedent demands it and states "…we would be ill advised to treat the reform of immunity doctrine as something for this court rather than that Court. *Cole* op., p.53. So, Judge Willett takes a different approach, essentially does not revisit the facts, and only looks at clearly established law in a general sense. However, he does explicitly defer to Supreme Court precedent and addresses his qualms as to the legitimacy of the qualified immunity doctrine as currently applied.

5. Ho/Oldham Dissent

Judge Willett's thoughts are followed by another compelling and far less dispassionate treatment of the issues in a dissent from Judges James Ho and Andrew Oldham, joined by Judge Jerry Smith. This dissent covers all four of our qualified immunity bases; factual issues, clearly established law, treatment of Supreme Court precedent and legitimacy of the qualified immunity doctrine.

Judges Ho and Oldham ask if summary reversals by the Supreme Court mean nothing to the majority and cite to the reversal of the Fifth Circuit in *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (per curiam) and the direction in the prior *Cole* case from the Supreme Court to reconsider in light of *Luna*. They point to a long history of the Supreme Court using the "extraordinary remedy of a summary reversal" (citations omitted) to enforce proper application of qualified immunity. *Cole* op., p. 54. As to clearly established law, Judges Ho and Oldham correctly point out that the Supreme Court has repeatedly held it is not to be defined at a high level of generality, and that the dispositive question is "whether the violative nature of *particular* conduct is clearly established" (citations omitted). *Cole* op., p. 55. Judges Ho and Oldham ask where the clearly established law is in this case, and their response is: "Unbelievably, the en banc majority says we don't need any." They then debunk the majority's claims that this is an "obvious" case and powerfully point out many other cases with far more questionable fact patterns where qualified immunity was upheld, and characterize the *Cole* decision as "*Mullenix* all over again." *Cole* op., p. 56.

Judges Ho and Oldham say the Supreme Court's message could not be clearer but the majority "does not get it" and argue that this is just another attempt to extrapolate the *Garner* decision to different facts. *Id.*, p. 57. They correctly note that there is no clearly established law that would require officers to first announce themselves though caught in an open position and hope not to get shot, particularly in a case where other officers had previously ordered *Cole* to put down his gun and he refused and threatened to kill anyone who tried to disarm him. Judges Ho and Oldham also criticize the majority opinion for containing innuendo that Officers Hunter and Cassidy were "wannabe cowboys looking for a gunfight," stating that

> "We are in no position to make such accusations. No member of this court has stared down a fleeing felon on the interstate or confronted a mentally disturbed teenager who is brandishing a loaded gun near his school." *Cole* op., p. 58.

Judges Ho and Oldham in this dissent actually use the powerful image of the court "sneering at cops on the beat from the safety of our chambers." *Cole* op., p. 58. This dissent also accuses the majority of dodging responsibility for the decision by claiming a lack of jurisdiction by pointing out that this applies to the *GENUINENESS* of a factual dispute and does not when factual disputes are *IMMATERIAL*, especially as any factual issues do not insulate the legal questions as to what is clearly established law. Judges Ho and Oldham make the very strong point that since the majority has ruled the clearly established law is "obvious" they must have had jurisdiction to do so. *Cole* op., p. 59

The Ho/Oldham dissent also provides considerable insight into the fundamental underpinnings of criticisms of qualified immunity which they characterize as the Fifth Circuit's "war with the Supreme Court's qualified immunity jurisprudence". *Cole* op., p. 59. They see two themes for this conflict. One is that the doctrine and related Supreme Court precedent conflicts with a plaintiff's right to a jury. This dissent says, in essence, thanks for your honesty in favoring jury trials but it is not up to "inferior court judges" to prefer juries to the direction of the Supreme Court. They emphasize they are bound to follow Supreme Court precedent.

The second theme touches on what I have previously referred to in this paper as the "originalist" myth. The term "originalist" is used herein to refer to someone who purports to rely on strict interpretations of the Constitution and related common law precedent. When applied to qualified immunity I refer to it as a myth, because the U.S. Supreme Court which has guided this judicially created doctrine has never held that immunity must derive only from the common law but rather in light of common law tradition. *Anderson v. Creighton*, 483 U.S. 635, at 644-45 (1987). Also, the pure originalist is like Bigfoot, kind of hard to find. I have observed that most who claim to be strict originalists operate selectively and when convenient, and wind up abandoning the approach when it suits them to do so.

Even a supposed "originalist" like Justice Thomas, who raised theoretical concerns as to qualified immunity in *Ziglar v. Abbasi*, 137 S.Ct. 1843,1872 (2017), seems to have forgotten his teaming up with Justice Scalia in *Crawford-El*, 523 U.S. at 611-12 (1998). In the dissent by Justice Scalia which he joined in *Crawford-El*, Justice Thomas agreed that the judicial expansion of qualified immunity was a needed balance to the expansion of Section 1983 from the 1871 statute. Moreover, it appears that even an originalist like Justice Thomas may often be questioning the scope and application of the doctrine rather than the doctrine of qualified immunity itself, especially given his concern that the Supreme Court is inventing standards not found in common law. Judges Ho and Oldham apparently are also sensitive to consistency as to applying an originalist approach in *Cole*, as they claim that they are originalists but that a "principled originalist" would not "cherry pick" what rules to revisit depending on popular opinion. *Cole* op., pp. 60-61.

Judges Ho and Oldham in dissent point out that an originalist debate over qualified immunity has been going on for some 20 years and they duly note Justice Thomas' concerns with qualified immunity as not found in the Constitution. *See*, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017). However, they also seize upon the prior decision in *Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., joined by Thomas, J., dissenting). In that decision Justices Scalia and Thomas recognized that there were other non-originalist precedents like the expansion of Section 1983's coverage in *Monroe v. Pape*, *infra*, and therefore a principled originalist would recognize that while qualified immunity may not be part of the common-law immunities that existed when Section 1983 was first enacted, Section 1983 at its inception looked nothing like its expanded version now, which expansion necessitated the development of the qualified immunity doctrine and defense.

Justices Scalia and Thomas are described by the Ho/Oldham dissent as recognizing that it would be better to leave matters balanced than to reconfigure law in a one-sided manner. In other words, you cannot apply just the common law embodied in the 1871 version of Section 1983 when that statute does not exist any longer in that form. *Cole* op., p. 61. Moreover, this dissent rightly points out difficulties with applying the original understanding of the Fourth Amendment as to "unreasonable seizure" in the *Cole* case. The dissent asks, "Does the majority seriously believe that it is an 'unreasonable seizure,' *as those words were originally understood at the Founding*, for a police officer to stop an armed and mentally unstable teenager from shooting innocent officers, students, and teachers?" *Cole* op., p. 62.

Judges Ho and Oldham then address the "social costs" of undercutting the doctrine of qualified immunity and emphasize the "profound practical consequences" given the delicate balance of competing interests that qualified immunity is intended to strike. They cite the social costs identified in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) as well as the language in *San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015) noting "the importance of qualified immunity to society as a whole", *Id.*, at 1774, n.3. They then assert that the majority opinion undoes that delicate balance and strips the officers' defenses without regard to attendant social costs. *Cole* op., pp.62-63. In making this point Judges Ho and Oldham note in *Cole* op., p.63, at note 2, that low officer morale today and shortages in police officer recruitment are already some of the adverse social costs and cite related supporting articles. They powerfully conclude by stating "There's no excuse for ignoring the Supreme Court again today." *Cole* op., p. 64. However, in a peculiar or , at least, ironic postscript, the Supreme Court later ignored this dissent in denying cert. in *Cole* in May of 2020.

6. Duncan Dissent

Finally, the last participant in the *Cole* battle royale over qualified immunity is Judge Duncan. His dissent is joined by Judges Smith, Owen, Ho and Oldham. Judge Duncan's focus is on the underlying facts and the notion that "clearly established law" is entirely unclear in this case. He states that he wants to write separately to emphasize all of the facts that led up to the shooting which provide further reason to reverse. *Cole* op., p. 65. He indicates the district court erred in excluding consideration of events that led up to the shooting, which truncated the qualified immunity analysis. He also argues that when these pre-encounter facts are considered the majority's claim that this is an "obvious" case collapses, and it is clear to him that the only thing "obvious" in this case is that no case law told the officers how to respond when they met Cole emerging from the woods with his finger on the trigger of a loaded gun. *Cole* op., p.66. Judge Duncan asserts the majority decision is precedent that seriously undermines officers' ability to trust their judgment in split second decisions involving lethal force. *Cole* op., pp.66-67. Judge Duncan concludes his dissent by countering the majority's reliance on the *Baker v. Putnal* case where an officer shot an unarmed passenger in a truck. Judge Duncan points out that there is no dispute in *Cole* that *Cole* had a gun in his hand and thus the *Baker* case gives no guidance to the officer in the field as to how to handle the situation that arose in *Cole*. As Judge Duncan notes, "Baker does not come close." *Cole* op., p. 75.

So thanks to the reader who has stuck with us so far in analyzing the compelling *Cole* en banc opinion and dissents attached hereto. It is hoped that the preceding detailed review was a worthwhile endeavor in aiding understanding of the current state of and debate over qualified immunity. To recap, the majority opinion and the multiple dissents in *Cole* address and highlight these four key areas of inquiry in assessing qualified immunity:

1) What are the facts which are material to the qualified immunity analysis and what is the relevant timeline?
2) Was the law clearly established so an officer would know his conduct violated the law?
3) How is applicable precedent from the Supreme Court and the relevant court of appeals being treated, and is due deference being given to the Supreme Court's direction?
4) What "philosophical" issues as to qualified immunity, if any, have been raised by the court?

These are the critical areas of analysis we need to evaluate when considering past and future decisions applying qualified immunity and the opinion in *Cole* illuminates them in a real world context.

V. THE SOCIAL COSTS

Again, an entire paper and many books could be written on this topic. But given recent events transpiring in this country it seems worthwhile to make a point or two as to that delicate balance that qualified immunity strives to strike between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). There is no more dramatically compelling exercise of governmental power and authority than when it can involve use of lethal force. As Judge Edith Jones said in her dissent in *Cole*:

> "The increasingly risky profession of law enforcement cannot put those sworn to 'serve and protect' to a Hobson's choice: place their lives on the line by heroic forbearance or risk their financial security in defense of lawsuits." *Cole* op., p. 24.

As Judge Jones notes, the Supreme Court has repeatedly and plainly stated that the purpose of qualified immunity is to prevent precisely that quandary. Moreover, though thankfully use of force incidents and especially use of lethal force incidents are a statistically small percentage of police/public encounters, as documented herein, it is inescapable that it is the police whose profession requires them to be exposed to such scenarios and not a government accountant or any other number of governmental employees.

In his dissent in *Cole*, op. at p.48, Judge Jerry Smith quoted at length from a prior opinion written by Judge Clement in her dissent in *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019). I want to present that lengthy quote here as it sums up precisely why qualified immunity is critical to police officers, and thus to society by extension. Judge Smith notes with irony that Judge Clement now sided with the majority in *Cole,* and the irony will be apparent. Here is what Judge Clement had to say:

> "The implications of the majority's mistakes cannot be minimized. The majority decides that qualified immunity can be endangered by an affidavit filed at summary judgment that creates a fact issue nowhere else supported by record evidence.

> Worse still, it seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force. Qualified immunity is designed to respect that judgment, requiring us to second-guess only when it clearly violates the law. The standard acknowledges that we judges – mercifully – never face that split second. Indeed, we never have to decide anything without deliberation – let alone whether we must end one person's life to preserve our own or the lives of those around us.
>
> The qualified immunity standard stops this privilege from blinding our judgment, preventing us from pretending we can place ourselves in the officers' position based on a cold appellate record. It prevents us from hubristically declaring what an officer should have done – as if we can expect calm calculation in the midst of chaos.
>
> The majority opinion, written from the comfort of courthouse chambers, ignores that deference. Instead, it warns officers that they cannot trust what they see; they cannot trust what their fellow officers observe; they cannot trust themselves when posed with a credible threat. It instructs them, in that pivotal split second, to wait. But when a split second is all you have, waiting itself is a decision – one that may bring disastrous consequences".

Given current events in this country, those comments by Judge Clement are even more compelling. The current wave of attacks on law enforcement, many politically motivated, are putting police officers at added risk, and exacerbating the morale and recruitment problems noted by Judges Ho and Oldham in their dissent. If qualified immunity is gutted it is worth questioning who on earth would want to become a police officer? The police candidate may properly ask, "Let's see, you want me to possibly risk my life, my family, my reputation and perhaps my freedom (if you encounter a particularly political DA let's say) so I can protect the lives and property of strangers? And I am also going to be collectively demonized by folks who don't know me at all, who don't respect me because they don't respect any authority other than themselves? And politicians who have never been in harm's way, and who certainly would never consider giving up legislative immunity, are going to target me when it suits them politically? And I get paid what? Let me think about it. No."

Contrary to what some media coverage seems to try to portray, the vast majority of Americans, perhaps now a silent majority, not only do not hate the police, they respect their service and realize that they need them. And we do need them, and many of those who want to abolish the police are those who would most profit from their absence. Just take a look at what happens when police are told to get out of the picture, as per the documented violent crimes occurring in whatever the "autonomous zone" in Seattle was called.

And because society needs the police, the police need to be able to do their jobs and not to be hesitant to respond. Qualified immunity helps police officers to do their jobs by providing at least some sense of security and some respect for their judgment in dangerous situations. For those who say that qualified immunity provides a blank check for police to run wild and act irresponsibly, the facts, statistical evidence and the many years qualified immunity has been in place and applied by the courts do not support such thesis. Indeed, statistics as to the sheer volume of police/public contacts which do not result in any conflict or use of force at all indicate that we are not suffering from some new wave of rogue police actions.

Anyone familiar with police are also well aware of each department's internal affairs divisions and the numerous cases of related internal discipline of police. When an officer behaves improperly, criminally or otherwise, we have mechanisms in place to address same. Keep in mind as well how police work has evolved so drastically over the years, with technological changes and the variety of skills and volume of information an officer needs increasing exponentially. The increasing demands we have placed on police likewise demand more adequate protections need to be in place.

Now all that being said, this paper and this author are not suggesting that police should be immune from oversight or that certain areas of police reform cannot be examined that would positively impact both police and the community at large. This is true of policing in general, and it is true of qualified immunity in particular. For instance, South Carolina Senator Tim Scott recently introduced a police reform bill that has much content worthy of serious consideration. The last section of this paper will suggest some possible areas of inquiry to refine the doctrine of qualified immunity and adopts what Judge Willett referred to as the "mend it, don't end it" approach.

VI. REFINING QUALIFIED IMMUNITY

Let us assume for the sake of debate that you think the bar has been set too high for plaintiffs and qualified immunity needs some fine-tuning. If so, consider turning qualified immunity into a three step process whereby courts would return to the pre-*Pearson* days when they were required to first analyze whether a constitutional or statutory violation had occurred. Then, the second step assessing "clearly established" law could possibly be broadened beyond consideration of case precedent to include the officer's directly pertinent departmental policies, guidelines and training

mandates, perhaps using such information only if there was no clearly established case precedent. The second step should then be bifurcated so that the objective reasonableness of the officer's conduct can be judged if necessary, which as a practical matter is actually already a consideration in assessing whether the officer should have been on notice that his conduct violated clearly established law. As a lawyer, I do have to note that the author presents these suggestions strictly subject to and without waiving prior contrary positions expressed in briefing or otherwise, which support the doctrine in its current state.

If you first require courts to determine if the facts show that a constitutional or statutory violation has occurred, as used to be the case in the days of *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001), it helps create the precedent that would further inform the "clearly established law" second prong. One could suggest scrapping the change in procedure created in *Pearson*, 555 U.S. at 236, whereby courts could opt to skip right to the second step to look for clearly established law of sufficient factual particularity. The current permission to skip to prong two may impair the development of constitutional precedent. If a constitutional or statutory violation is found, then we go to the second prong which should be split in two as the Fifth Circuit effectively did in *Griggs v. Brewer*, 841 F.3d 308 (5th Cir. 2016).

In *Griggs v. Brewer*, the court was asked to determine whether an officer's conduct was lawful during a traffic stop and subsequent sobriety test. Plaintiff argued that the officer used excessive force by (1) executing a takedown maneuver, (2) punching him while attempting to handcuff him, and (3) punching him in the face while in the police car. *Id*. Before beginning its analysis, the Fifth Circuit noted that "[a] court must measure the force used under the facts as a reasonable officer **would perceive them**, not necessarily against the historical facts." *Id*. (emphasis in original) (quoting *Hill v. Carroll Cty., Miss.*, 587 F.3d 230, 234 (5th Cir. 2009)). While acknowledging the general right to be free from excessive use of force, the court narrowly considered whether the complained-of conduct was "clearly unreasonable in the light of clearly established law." *Griggs*, 841 F.3d at 313. The court ruled that the officer was entitled to qualified immunity. Illustrating the exacting nature of what at least used to be the Fifth Circuit's "clearly established right" analysis, the court held that the second prong was not met because "[Fifth Circuit] precedent does not clearly establish that this 'takedown' maneuver—against a drunken, erratic suspect who is resisting arrest—is constitutionally unreasonable" and found "no authority establishing that it was unreasonable for an officer to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect." *Id*. at 314.

So you see what occurred in *Griggs* is that the Fifth Circuit essentially treated the second prong of the qualified immunity analysis as two distinct inquiries : 1) was the allegedly violated right clearly established at the time of the incident and, if so, 2) was the conduct of the Defendant objectively unreasonable in light of that clearly established law. The point of that analysis as to the objective reasonableness of the officer's actions at issue was the need to judge if officers of reasonable competence would disagree whether plaintiff's rights were violated. If there could be such disagreement, then qualified immunity remains intact.

Since much criticism of qualified immunity is based on the allegedly excessive burdens placed on plaintiffs, one might also suggest broadening "clearly established law" not only to consider case precedent but in certain circumstances also a police department's policies and standard operating guidelines, and perhaps an officer's particular training, that DIRECTLY bears on underlying events. After all, if we are trying to determine if an officer is on fair notice that her conduct is unlawful, it seems likely that a specifically on point departmental policy or training mandate would be more to mind for them than a legal opinion. Thus, if an officer reacts in a situation directly contrary to department policy it would seem of consequence even if there is no sufficient factually analogous precedent on point. However, there are complexities to this approach. For more discussion as to the complicated interplay of legal standards with departmental guidelines and policy, please refer to the attached Michael Brave article, Exhibit B, which does an admirable job addressing such interplay.

In regard to the second prong one might also suggest possibly including guidance to exempt categories of cases from immunity analysis that present sufficiently egregious facts and consider whether "reckless disregard of the consequences" standards used in tort cases would be appropriate. After all, we are told that immunity is intended to protect all but the "plainly incompetent", so perhaps we could put some legal parameters in place to help us exempt the "plainly incompetent" from immunity analysis. We need to distinguish such cases from those cases involving reasonable action or mistakes of judgment that are protected by qualified immunity. Whether we are presented with such cases could possibly be addressed in preliminary fashion in the same way the FRCP 7 process now in place is used to force plaintiffs to show why immunity is not appropriate.

In regard to the "third" prong we suggest adding, it is really separating out the objective reasonableness issues which the Fifth Circuit raised in *Griggs* in regard to the second prong. Recall that whether an officer acted in an objectively reasonable fashion is part and parcel of considering the officer's actions in light of clearly established law. Case law is clear in that if officers of reasonable competence can disagree on whether an officer's actions violated established rights then immunity remains intact. This is not a radical concept, as Texas state courts have been focused

on objective reasonableness for years in analyzing the defense of official immunity under state law, which protects officials in the performance of their discretionary duties conducted within the scope of their authority if done in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 657, n.7 (Tex. 1994); *Telthorster v. Tennell*, 92 S.W.3d 457, 461 (Tex. 2002).

To determine whether a public official acted in good faith, Texas courts apply an objective standard and must determine whether a reasonably prudent official, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred. *Chambers*, 883 S.W.2d at 656; *see also Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 163-164 (Tex. 2004); *Telthorster*, 92 S.W.3d at 465. As an element of official immunity, the standard of good faith does not test the carelessness or negligence of an official, nor does it examine an official's motivation. *Joe*, 145 S.W.3d at 164. Importantly, the good faith standard "does not inquire into 'what a reasonable person **would have done**,' but into 'what a reasonable [person] **could have believed**.'" *Telthorster*, 92 S.W.3d at 465 (emphasis original). As a result of this standard, an official need not show that all reasonably prudent officials would have made the same decision. *Welch v. Milton*, 185 S.W.3d 586 at 598 (Tex. App. - Dallas, 2006). Instead, the official must only show that a reasonable officer could have believed his conduct was lawful based on the same information he had at the time. *Chambers*, 883 S.W.2d at 656; *Joe*, 145 S.W.3d at 162, 164; *Welch*, 185 S.W.3d at 598. When examining the issue of good faith, a court will only consider objective evidence." *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). "[A] court must measure good faith in official immunity cases against a standard of objective legal reasonableness, without regard to the officer's subjective state of mind." *Wadewitz*, 951 S.W.2d at 466; *accord Chambers*, 883 S.W.2d at 656. "When a public official considers two courses of action that could reasonably be believed to be justified, and selects one, he satisfies the good faith prong of official immunity as a matter of law." *Texas Dept. of Pub. Safety v. Rodriguez*, 344 S.W.3d 483, 493 (Tex. App.—Houston [1st Dist.] 2011, no pet.). "[T]he good-faith standard is analogous to an abuse-of discretion standard that protects all but the plainly incompetent or those who knowingly violate the law. *Texas Dep't of Pub. Safety v. Bonilla*, 481 S.W.3d 640, 643 (Tex. 2015) (quotations omitted).

To this author, one of the most prominent causes of frustration with qualified immunity seems tied to the decision in *Pearson* to shift the analysis from the prior two step process requiring a threshold determination of a constitutional violation, before looking at the second step as to whether the actor had fair notice his conduct was unlawful. 555 U.S. at 236. By allowing courts to skip to the second step as to whether there is factual precedent of sufficient particularity to put the officer on notice of unlawful conduct, it seems clear that the development of precedent is being hindered. If courts were forced to first determine whether a violation of the constitution occurred, then we would have more "clearly established law" on the books.

More to the point, it appears the real root of concerns with qualified immunity is that given this current analytical approach, the burdens placed on plaintiffs to overcome the defense are too high. It is a heavy burden to force a plaintiff to provide authority so factually analogous to a given factual scenario. To wit; there are multiple cases involving shootings but the fact patterns will vary greatly. Witness the majority in *Cole* trying to use the *Baker* case as precedent where Baker was unarmed and Cole had a gun in his hand. In this regard it also seems a bit artificial to focus on legal precedent that would "clearly establish" proper behavior as opposed to the behavior itself. Isn't the search for "clearly established law" that cannot be defined at a high level of generality really a focus on whether the officer was on notice if particular conduct was justified? Again, looking at police department policies may help determine an officer's notice as to his conduct's lawfulness and will help assess justified conduct.

Also, as suggested, why not focus more on the objective reasonableness of the conduct at issue? As we suggest, the second prong of the current analysis could be split accordingly and borrow, for instance from the Texas approach to gauging official immunity under state law, with its focus on the objective reasonableness of the conduct at issue, as well as in the Fifth Circuit opinion in *Griggs*. That would avoid the case complained of by Judge Willett in *Cole*, where he refers to an incident where a police officer fired at a family dog and instead hit a ten year old child. *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019). In that case the court granted immunity because it could find no "materially similar case." *Id.*, at 1307-08. Why not focus on the objective reasonableness of the conduct? This question is particularly germane since there appears to obviously be a different approach in many circuit courts of appeal as to what "clearly established law" means.

In the end, recall that the doctrine of qualified immunity is intended to protect all but the "plainly incompetent or those who knowingly violate the law." The current argument indicates that some believe the doctrine is now also protecting the plainly incompetent and those who violate the law. I do not share that belief, but rather note that the doctrine is also intended to protect public officials against what are essentially "judgment calls" that may be reasonably disputed in hindsight. Those who do not like the defense of qualified immunity are prone to conflate those judgment calls with plain incompetence or knowing illegality, which approach is neither accurate or honest.

VII. CONCLUSION

In May of this year the United States Supreme Court considered thirteen different qualified immunity cases with cert petitions pending. Only in two of the cases had the lower court denied immunity, including the case of *Hunter v. Cole* from the Fifth Circuit discussed at length herein. These cases were all distributed for the May 15, 2020 conference and many interested watchers hoped that the Supreme Court would send a meaningful message addressing the qualified immunity debate discussed in this paper. The message sent by the Supreme Court in the June 15, 2020 Order List was to deny cert on twelve of the thirteen cases, though Justice Thomas continued to express his "strong doubts" as to qualified immunity and dissented from denial of cert in the *Baxter v. Bracey* Sixth Circuit case. The thirteenth case, *Davis v. Ermold* (#19-926), involving a denial of marriage licenses to same sex couples, where qualified immunity was denied, was once again rescheduled for future conference and the cert petition unresolved.

As a result, the opponents of qualified immunity will have to wait for another day. The proponents of qualified immunity, on the other hand, can for now breathe a sigh of relief, as police in this country currently have enough problems to deal with. Of course, this respite only extends to the judicial branch, as the legislative branch, including Senator from Indiana Mike Braun, is seeking to limit qualified immunity. The Democrats in the House, on the other hand, are proposing legislation trying to eliminate the defense entirely. Still no mention of eliminating legislative immunity for Congress.

I want to conclude this paper by trying to avoid the political, as justice is, by definition, supposed to be blind, and rather simply point out the irrational absurdity of the current national treatment of law enforcement. Recently on social media, an officer posted a video noting that when he came to work he was told there was going to be a protest to defund the police, but that the organizers had requested a police presence to protect them, while they marched to defund the police. The irony was not lost on the officer. It seems difficult to argue that one of the most fundamental purposes of government is to ensure peace and domestic tranquility and to keep its citizens safe. You need police to do so and they need to have the support to do their jobs. If you take away or gut qualified immunity you are going to make a difficult job almost impossible, and there will be more officers in court and depositions defending themselves in civil suits than there will be on the street. Further, if qualified immunity is abolished, who is going to pay for the results? The answer is we will all pay in many ways. Will the officers who remain on the job be completely indemnified by taxpayers as they face a new wave of civil suits before juries now conditioned by certain media coverage to view police in a bad light? Will a lessened police presence embolden criminals? What is worse is that gutting qualified immunity will encourage the officers who remain to think twice about responding to a potentially dangerous call. Why put your life, your family's finances or perhaps your freedom and career in jeopardy? Why be a police officer at all?

But on the other side of the equation, the law has always been in a state of evolution, policing has evolved along with the demands on officers, and there is no reason not to examine if the doctrine of qualified immunity can be improved. The fact that qualified immunity is a judicially created doctrine and defense is itself nothing new. There have also been other immunities available under the common law and there are plenty of other examples in the law, like the Sherman Antitrust Act, where Congress enacted a broad statutory mandate and then gave courts the latitude to shape its contours. Given the radical expansion of claims under Section 1983 by the Court in 1961 in *Monroe v Pape*, there is nothing unusual about that same Court crafting a scheme of qualified immunities to balance a statute some (like Justice Scalia) would say the Court itself created rather than the legislature. And there is thus also nothing unusual about that defense continuing to evolve. We have suggested some of the ways that evolution can occur in this paper, but echoing Judge Willett in *Cole*, when it comes to qualified immunity it is most assuredly a case of "mend it, don't end it."

REVISED August 21, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2019
Lyle W. Cayce
Clerk

No. 14-10228

RANDY COLE; KAREN COLE; RYAN COLE,

Plaintiffs-Appellees

v.

CARL CARSON,

Defendant-Appellant

* * * * * * * * * * * * * * * * *

No. 15-10045

RANDY COLE; KAREN COLE; RYAN COLE,

Plaintiffs-Appellees

v.

MICHAEL HUNTER; MARTIN CASSIDY,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC FOLLOWING REMAND FROM THE UNITED STATES SUPREME COURT

No. 14-10228 c/w No. 15-10045

Before STEWART, Chief Judge, and HIGGINBOTHAM, JONES, SMITH, DENNIS, CLEMENT, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and JAMES L. DENNIS, EDITH BROWN CLEMENT, JENNIFER WALKER ELROD, LESLIE H. SOUTHWICK, CATHARINA HAYNES, JAMES E. GRAVES, STEPHEN A. HIGGINSON, GREGG COSTA, and KURT D. ENGELHARDT, Circuit Judges:[1]

The Supreme Court over several years has developed protection from civil liability for persons going about their tasks as government workers in the form of immunity; not the absolute immunity enjoyed by prosecutors and judges, but a qualified immunity. Today we again repair to issues inherent in the qualification. The doctrine protects at the earliest stage of litigation at which the defense's application is determinable. To that end, courts have developed procedures and pretrial practices, including appellate review of pretrial denials, otherwise interlocutory and unappealable, and a reply to an answer under Rule 7(a) on order of the district court, particularized to address the defense of immunity in a motion to dismiss or for summary judgment. When those processes do not yield pretrial resolution, as with competing factual narratives, the full reach of qualified immunity gives way to a trial, the first point at which its application is determinable. And in obeisance to constitutional mandate, the worker's defense enjoys a right to the protection of a jury—long a bastion interposed between the state and person, and assured by the Founders. And it signifies that today the district judge has multiple

[1] Judges Higginbotham and Clement, now Senior Judges of this court, are participating as members of the original panel.

ways to present fully the claims and defenses to a jury to ensure the government worker a full draw upon his immunity defense,[2] including resolution of the competing factual narratives, one of which—or a meld of both—may foreclose liability.[3]

In this case, police officers from Sachse, Texas argue that the district court should have sustained their defense of qualified immunity on their pretrial motions to dismiss and for summary judgment. Ryan Cole and his parents Karen and Randy (collectively "the Coles") sue Officer Carl Carson, Lieutenant Martin Cassidy, and Officer Michael Hunter of the Sachse Police Department under 42 U.S.C. § 1983. The Coles allege that the officers violated Ryan Cole's Fourth and Fourteenth Amendment rights during an incident in which Cassidy and Hunter shot Ryan without warning, and then lied about what happened. The officers filed dispositive pretrial motions in the district court, asserting the defense of qualified immunity. The district court denied these motions, concluding that immunity could not be determined at this stage of the proceeding. In *Cole I*, a panel of our court affirmed the denial of summary judgment as to the Coles' Fourth Amendment excessive-force claim and the denial of the motion to dismiss the Coles' Fourteenth Amendment false-charge claim, but reversed denials of the motion to dismiss the Coles' Fourth Amendment and *Brady* claims attacking the alleged fabrication of evidence.[4]

---

[2] *See* FED. R. CIV. P. 49; Fifth Circuit Civil Pattern Jury Instructions 10.3. *See also McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000).

[3] In any treatment of the jury's role in stepping between state-afforded process and an individual defendant, it bears emphasis that the district judge can impanel a jury of at least six and as many as twelve members whose verdict, absent the parties' agreement otherwise, must be unanimous.

[4] *Cole v. Carson* ("*Cole I*"), 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016).

The Supreme Court vacated *Cole I*, and remanded for consideration in light of its intervening decision in *Mullenix v. Luna*.[5] On remand, the panel affirmed the denial of summary judgment as to the excessive-force claim. Because the Coles' other claims were unaffected by the reasoning of *Mullenix*, the panel reinstated *Cole I*'s holdings on the fabrication-of-evidence claims. We reheard this case en banc to reconsider disposition of the Coles' excessive-force claim in light of *Mullenix*.

We conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion and the record as to the Coles' excessive-force claim. Limited by our jurisdiction to the materiality of factual disputes, we AFFIRM the denial of summary judgment on this claim and DISMISS Cassidy and Hunter's appeal. The Coles' remaining claims are unaffected by the reasoning of *Mullenix*, and so, as in *Cole I*, we AFFIRM denial of the motion to dismiss the Coles' Fourteenth Amendment false-charge claim; REVERSE denial of the motion to dismiss the Coles' Fourth Amendment and *Brady* fabrication-of-evidence claims based on qualified immunity; and return the case to the district court for trial and resolution of issues consistent with this opinion.

I

A.

On October 25, 2010, at around 10:30 a.m., the Sachse Police Department called available units to the neighboring town of Garland, Texas. There police were searching for Ryan Cole, a seventeen-year-old white male,

---

[5] *Hunter v. Cole*, 137 S. Ct. 497 (2016) (granting certiorari, vacating, and remanding for consideration in light of *Mullenix v. Luna*, 136 S. Ct. 205 (2015) (per curiam)).

reported to be walking in the neighborhood with a handgun. Officer Michael Hunter responded by proceeding immediately to the Garland neighborhood. In a statement given on the day of the incident, Hunter related that on arriving in the neighborhood, he overheard a civilian stating that Ryan had given up one of his guns, and that he had unsuccessfully tried to persuade Ryan to not keep his handgun. Hunter searched the area, and saw two officers following Ryan, who was walking away from them holding his gun to his head, approaching a wooded area along Highway 78. Although told by officers that things were under control, Hunter volunteered to go behind the wooded area and possibly intercept Ryan, and suggested that Officer Carl Carson, who was also present, join him.

Four years later, after this litigation had commenced, Hunter for the first time recalled that the civilian he had overheard had described an altercation with Ryan in which Ryan had threatened him. He also then for the first time recalled hearing police-radio transmissions indicating that officers were protecting nearby schools because of "[Ryan]'s dangerous conduct which posed a risk of serious harm to a great many innocent in the vicinity." Hunter otherwise learned nothing "that would cause [him] to believe [Ryan] was violent or wanted to hurt anyone."[6] Hunter understood that Ryan was suicidal, and, four years after the incident, he also raised the possibility that Ryan was using suicide as a pretext to evade the police.

Meanwhile, Lieutenant Martin Cassidy had also heard the original dispatcher's summons. Cassidy called the Sachse Police Department for more information. On the day of the incident, Cassidy swore that he learned "this

[6] In a 2014 declaration, Hunter stated that Cole refused a police officer's order to surrender his weapon. Hunter did not testify that he knew this fact at the time.

subject had shown up at [a] residence with a handgun and had just recently been seen walking away." But, four years later, after this litigation had commenced, like Hunter, Cassidy remembered learning more, including that Ryan "had threatened to shoot anyone who tried to take his gun"; had refused an order to drop his weapon; and might be headed for Sachse High School "to possibly engage in violence." Cassidy also decided to intercept Ryan on Highway 78.

The three officers separately arrived at the side of Highway 78 at around the same time. Hunter parked his motorbike and drew his duty weapon; Cassidy also drew his firearm and advised Carson to be ready to use his taser. The officers started walking along the tree line. A steep embankment rose from railroad tracks to the area along Highway 78. Ryan would have to climb this embankment to approach the tree line. Cassidy and Hunter used both the edge of the embankment and the vegetation to conceal themselves as they walked. Hunter also removed his white motorcycle helmet in order to be less conspicuous. Cassidy soon heard a message over the police radio: Ryan was ascending to the tree line. Hunter heard movement in the brush, and signaled to his colleagues.

What occurred next is disputed. Viewing the summary judgment evidence and drawing reasonable inferences in the light most favorable to the non-movant Coles, the district court determined that a reasonable jury could find the following: Ryan backed out from the tree line in front of Hunter and Cassidy, "unaware of the Officers' presence."[7] Ryan was holding his handgun

[7] *Cole v. Hunter*, 68 F. Supp. 3d 628, 645 (N.D. Tex. 2014). Viewing the evidence in a light most favorable to the Coles, the district court relied on the physical and audio evidence as interpreted by the Coles' expert crime-scene reconstructionist

pointed to his own head, where it remained.[8] "[Ryan] never pointed a weapon at the Officers,"[9] and "never made a threatening or provocative gesture towards [the] Officers."[10] "Officers [Cassidy and Hunter] had the time and opportunity to give a warning" for Ryan to disarm himself.[11] However, the officers provided "no warning . . . that granted [Ryan] a sufficient time to respond,"[12] such that Ryan "was not given an opportunity to disarm himself before he was shot."[13] Hunter and Cassidy then shot Ryan multiple times. Officer Hunter's first shot struck Ryan as he was oriented away from the officers at a 90-degree angle—that is, he was not facing Officer Hunter.[14] Following impact of the first shot, as Ryan's body turned or fell towards Hunter, he shot him a second time.[15] As an involuntary reflex to being shot, Ryan pulled the trigger, shooting himself in his temple.[16] But the officers did not know that.

Following the shooting, the three officers remained together at the scene. The Coles allege that during this time the officers conspired to insulate Cassidy and Hunter from liability with a fabricated narrative in which Ryan was facing Hunter and pointed his weapon at the officer, at which point Cassidy and

Thomas Bevel who opined that "no evidence . . . would indicate Mr. Cole was or could have been aware of the presence of the police officers prior to the time he was shot."

[8] *Cole*, 68 F. Supp. 3d at 644.

[9] *Cole*, 68 F. Supp. 3d at 644; *id.* at 645 ("[T]he evidence supports Plaintiffs' argument that Cole did not know of the Officers' presence.").

[10] *Cole*, 68 F. Supp. 3d at 645–46.

[11] *Id.* at 645. A reasonable jury could find the officers had up to five seconds during which they could have called out to Cole, sufficient time to make a warning according to Cole's expert.

[12] *Cole*, 68 F. Supp. 3d at 645.

[13] *Id.* 644–45 ("Cole was shot before he had an opportunity to disarm himself.").

[14] *Id.* at 644.

[15] *Cole*, 68 F. Supp. 3d at 644.

[16] *Id.*

Hunter fired on Ryan in defense. Eventually, members of the Garland Police Department arrived and took control of the scene, but did not follow the standard procedure of separating witnesses to ensure independent recollections. Instead, Cassidy and Hunter were allowed to return to their police station together. Later that day, the officers provided statements to investigators. Hunter stated that he had no chance to issue a command to Ryan. Cassidy and Carson, however, swore that, when Ryan backed out from the brush, they heard Hunter shout a warning to him. Hunter and Cassidy stated that Ryan then turned towards Hunter and pointed his handgun at Hunter, at which point both officers—fearing for Hunter's life—opened fire defensively.[17]

The Dallas County District Attorney presented the officers' narrative to a grand jury, which no-billed the officers and charged Ryan with felony aggravated assault of a public servant. As a result of the charge, Ryan, incapacitated in intensive care, was placed under house arrest. About a month after the indictment, investigators received a ballistics report from the crime lab. The ballistics analysis, taken together with stippling observed around Ryan's head wound, made clear that Ryan had shot himself in the temple, confounding the officers' account.[18] Dallas County prosecutors then dropped the aggravated assault charge, accepting Ryan's plea to misdemeanor unlawful carry of a weapon, a $500 fine, and forfeiture of his handgun.

Ryan suffered permanent injuries, including cognitive impairment, partial paralysis, and other serious mental and physical disabilities.

---

[17] Carson stated he could not see Cole's movement because Hunter obstructed his line of sight.

[18] Stippling refers to a discoloration of the skin caused by hot gases and residue released immediately around a discharging firearm.

B.

The Coles brought, inter alia, four Section 1983 claims against the officers. First, they allege a violation of Ryan's Fourth Amendment right against the use of excessive force arising from the shooting. Second, the Coles allege a violation of Ryan's Fourteenth Amendment right against the imposition of false charges arising from the fabrication of evidence. Third, they allege a violation of Ryan's Fourth Amendment right against unreasonable seizures arising from the fabrication of evidence. Fourth, they allege a *Brady* violation arising from the fabrication of evidence. The officers filed a motion to dismiss these claims under Rule 12(b)(6), asserting qualified immunity defenses. The district court denied the motion in a January 2014 Memorandum Opinion and Order.[19] Carson alone appealed the denial of the motion to dismiss the Coles' three fabrication-of-evidence claims based on qualified immunity. The district court stayed these fabrication-of-evidence claims pending Carson's appeal, allowing the Coles limited discovery against Cassidy and Hunter's qualified immunity defenses to the excessive-force claim. With that discovery complete, the two officers moved for summary judgment, rearguing qualified immunity. The district court denied their motion and Cassidy and Hunter appealed.

The officers' appeals were consolidated. In 2015, in *Cole I*, a panel of this court affirmed the district court's denial of summary judgment on the Coles' excessive-force claim, affirmed denial of the motion to dismiss the Coles'

---

[19] The Coles filed an initial complaint in September 2012. The officers moved to dismiss or in the alternative requested that the district court order a Rule 7(a) reply to the immunity defense. The district court then afforded the Coles opportunity to file a Rule 7 reply or amended complaint. The Coles filed an amended complaint. The officers then filed a second motion to dismiss.

Fourteenth Amendment false-charge claim, and reversed the denial as to the Coles' Fourth Amendment and *Brady* fabrication-of-evidence claims, finding the qualified immunity defense applicable for these claims. The officers petitioned the Supreme Court for a writ of certiorari. In November 2016, the Supreme Court granted certiorari, vacated the panel's judgment, and remanded the case for further consideration in light of *Mullenix v. Luna*,[20] decided in the intervening time.[21]

On remand from the Supreme Court, recognizing that its jurisdiction was limited to determining the materiality of factual disputes that the district court determined were genuine, the panel once again held that the applicability of qualified immunity for Cassidy and Hunter could not be determined at the summary judgment stage.[22] Finding the Supreme Court's remand order reached no further, the panel reinstated the *Cole I* opinion on the Coles' three fabrication-of-evidence claims.[23] The officers moved for rehearing en banc, which we granted.[24]

---

[20] 136 S. Ct. 305 (2015).

[21] As this court and others have acknowledged, when the Supreme Court grants, vacates, and remands ("GVRs") a case, it does not make a decision on the merits of the case nor dictate a particular outcome. *See Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013); *Kenemore v. Roy*, 690 F.3d 639, 641–42 (5th Cir. 2012); *see also Texas v. United States*, 798 F.3d 1108, 1116 (D.C. Cir. 2015); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013); *Gonzalez v. Justices of Mun. Court of Bos.*, 420 F.3d 5, 7 (1st Cir. 2005).

[22] *Cole v. Carson*, 905 F.3d 334, 347 (5th Cir. 2018), *reh'g granted,* 915 F.3d 378, 379 (5th Cir. 2019).

[23] *Id.* at 341–42.

[24] *Cole*, 915 F.3d at 379.

II

A.

We hear this case on remand from the Court for further consideration in light of *Mullenix*. We do not reach issues unaddressed by the mandate on remand,[25] and so we hold as in *Cole I* with respect to the Coles' three fabrication-of-evidence claims. First, we affirm the district court's denial of the motion to dismiss the Coles' Fourteenth Amendment claim regarding the imposition of false charges.[26] Second, finding qualified immunity applicable, we reverse the denial of the motion to dismiss the Coles' claim that the alleged fabrication of evidence violated the Fourth Amendment.[27] Lastly, finding qualified immunity applicable, we reverse the denial of the motion to dismiss the Coles' claim that the alleged fabrication of evidence entailed a *Brady* violation.[28]

---

[25] Appellants argue that the Supreme Court's 2017 decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), changes the legal landscape and justifies revisiting the Coles' Fourteenth Amendment false-charge claim. *Manuel* holds that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case," and, therefore, that the plaintiff in that case "stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention." *Manuel*, 137 S. Ct. at 918–19. It does not hold that the Fourth Amendment provides the exclusive basis for a claim asserting pre-trial deprivations based on fabricated evidence. We have already so determined in *Jauch v. Choctaw County*: "*Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees." *Jauch v. Choctaw Cty.*, 874 F.3d 425, 429 (5th Cir. 2017), *cert. denied sub nom. Choctaw Cty. v. Jauch*, 139 S. Ct. 638 (2018).

[26] *See Cole I*, 802 F.3d at 766–74.

[27] *See id.* at 764–65.

[28] *See id.* at 765.

B.

The qualified immunity inquiry includes two parts. In the first we ask whether the officer's alleged conduct has violated a federal right; in the second we ask whether the right in question was "clearly established" at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct.[29] The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time.[30]

On an appeal of a denial of summary judgment on the basis of qualified immunity, our jurisdiction is limited to examining the materiality of factual disputes the district court determined were genuine.[31] "[I]n an interlocutory appeal we cannot challenge the district court's assessments regarding the sufficiency of the evidence—that is, the question whether there is enough evidence in the record for a jury to conclude that certain facts are true."[32] "[W]e lack jurisdiction to resolve the genuineness of any factual disputes" and "consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment."[33] Like the district court, we must view the facts and draw reasonable inferences in the light most favorable to the plaintiff and ask whether the defendant would be entitled to qualified

---

[29] *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam).

[30] *Id.*

[31] *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 408 (5th Cir. 2009); *see also id.* ("If the determination of qualified immunity would require the resolution of a genuinely disputed fact, then that fact is material and we lack jurisdiction over the appeal.").

[32] *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc)).

[33] *Id.* (internal quotations omitted).

immunity on those facts.[34] The Supreme Court has summarily reversed this court for failing to take the evidence and draw factual inferences in the non-movants' favor at the summary judgment stage.[35] In doing so, the Court emphasized that the requirement is no less binding "even when . . . a court decides only the clearly-established prong of the standard."[36] Within the limited scope of our inquiry, review is de novo.[37]

As instructed, we turn to the guidance provided by the Supreme Court in *Mullenix*. In that case, the Court reviewed a denial of qualified immunity to an officer who had shot and killed a fugitive in a car chase. This court had decided that the officer violated the clearly established rule that deadly force was prohibited "against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[38] The officer in *Mullenix* reasonably perceived some threat of harm, but we had held the threat was not "sufficient." The Supreme Court reversed our decision. It found that the rule we articulated lacked a referent to define the "sufficiency" of threats.[39] Precedents provided a "hazy legal backdrop," at best.[40] Given these deficient sources, an officer could not reasonably derive an applicable rule to govern his or her conduct in the situation.[41] Finding that we had defined the applicable rule with too much

---

[34] *Lytle,* 560 F.3d at 409.
[35] *Tolan*, 572 U.S. at 660.
[36] *Id.* at 657.
[37] *Trent*, 776 F.3d at 376.
[38] *Mullenix*, 136 S. Ct. at 308–09 (internal quotation marks omitted).
[39] *Id.* at 309.
[40] *Id.* at 309–10.
[41] *Id.*

"generality,"[42] the Court reversed our holding that the officer had violated clearly established law.[43]

Under *Mullenix*, application of clearly established law is undertaken with close attention to the relevant legal rule and the particular facts of the case. Here, based on the facts taken in the light most favorable to the non-movant Coles, and with reasonable inferences drawn in their favor, the district court determined there were genuine factual disputes as to Ryan's and the officers' conduct, upon which a reasonable jury could find "[Ryan] . . . did not pose an immediate threat to the officers" when they opened fire.[44] It held that "on October 25, 2010, the date of the shooting, the law was clearly established" that "shooting a mentally disturbed teenager, who was pointing a gun the entire time at his own head and facing away from the officer, in an open outdoor area, and who was unaware of the officer's presence because no warning was given prior to the officer opening fire, was unlawful."[45] As we will detail, the officers ask us to consider a different set of facts, but we cannot do so. We lack jurisdiction to reconsider the district court's factual determinations on an appeal from denial of summary judgment on qualified immunity.

Tennessee v. Garner announced the principle that the use of deadly force is permitted only to protect the life of the shooting officer or others: "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

---

[42] *Id.* at 311.
[43] *Id.* at 312.
[44] *Cole,* 68 F. Supp. 3d at 645.
[45] *Id.* at 643.

force to do so."[46] *Garner* also requires a warning before deadly force is used "where feasible,"[47] a critical component of risk assessment and de-escalation. The Supreme Court has repeatedly stated that this rule can be sufficient in obvious cases, and this court has applied it in such cases, without dependence on the fact patterns of other cases.[48]

The summary judgment facts, as determined by the district court, are that Ryan posed no threat to the officers or others to support firing without warning. The "Officers had the time and opportunity to give a warning and yet chose to shoot first instead."[49] This is an obvious case. Indeed, Officer Hunter conceded that he would have had no basis to fire upon Ryan unless Ryan had been facing him and pointing a gun at him.

This case is obvious when we accept the facts as we must. It is also informed by our precedent. Before 2010, *Baker v. Putnal* established clearly that Cassidy's and Hunter's conduct—on the facts as we must take them at this stage—was unlawful. For in *Baker*, members of the public told Officer Michael Putnal, a police officer patrolling a crowded Galveston beach area during spring break, that "someone had entered the crowd with a pistol-gripped shotgun."[50] Minutes later, Officer Putnal heard gunfire and saw the

---

[46] *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

[47] *Id.* at 11–12; *see also Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997).

[48] *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam); *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277–78 (5th Cir. 2015); *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012).

[49] *Cole*, 68 F. Supp. 3d at 645.

[50] *Baker v. Putnal*, 75 F.3d 190, 193 (5th Cir. 1996).

crowd scurrying.[51] There was "a good deal of confusion on the beach."[52] Two people directed the officer to a car in which the gunman was supposedly sitting.[53] Putnal then saw Wendell Baker Jr. and another man sitting in a truck parked on the beach.[54] The parties disputed what happened next. Putnal stated he saw Baker loading a magazine into a handgun, that he warned Baker to freeze or drop the gun, that Baker instead turned the gun upon Putnal, at which point Putnal fired, killing Baker.[55] However, witnesses "state[d] that [Baker] took no threatening action . . . as the officer approached the truck," that Putnal issued no warning to Baker, and that "Baker . . . may have barely had an opportunity to see Putnal before [the officer] fired his gun."[56] The parties did not dispute that Putnal had been searching for a gunman, and that a gun had been recovered from Baker's seat, although they disputed whether and how Baker had been holding it, that is, whether he pointed it at Putnal.[57] It was also undisputed that Baker was turning to face Putnal from his seat, although medical reports indicated from "the nature of the wounds . . . that Baker . . . was not facing Putnal when he was shot."[58] Baker's survivors sued the officer, bringing, inter alia, a Fourth Amendment excessive-force claim.[59] The district court granted Putnal qualified immunity, crediting his account

---

[51] *Id.*
[52] *Id.* at 198.
[53] *Id.* at 193.
[54] *Id.*
[55] *Id.* at 198.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 193.

that he had fired in response to Baker turning and aiming the gun at him.[60] On appeal, we reversed and remanded the excessive-force claim for trial.[61] Recognizing the dispute as to the officer's warning, Baker's turn, and the position of Baker's gun, we found "simply too many factual issues to permit the Bakers' § 1983 claims to be disposed of on summary judgment."[62] "Chaos on the beach and Baker['s] mere motion to turn and face Putnal are not compelling reasons to find that [the officer's] use of force was not excessive as a matter of law."[63] Viewing the facts and drawing inferences "in the light most favorable to the nonmoving party," we held that "[t]he number of shots and the nature of the wounds raise . . . more of a question of fact than a court may dispose of on summary judgment."[64]

The Supreme Court's more recent qualified immunity decisions do not shift this analysis. In *Kisela v. Hughes*, police officers in Tucson, Arizona responded to a call that a woman was behaving erratically with a knife and that she had been hacking at a tree.[65] When officers arrived on scene, the suspect, Amy Hughes, emerged from a house holding a large kitchen knife, and approached to within "striking distance" of a bystander in the driveway.[66] One of the officers, Andrew Kisela, whose further approach was impeded by a chain-link fence, repeatedly ordered Hughes to drop the knife, but Hughes did not

---

[60] *Id.* at 197.
[61] *Id.* at 198.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 198–99.
[65] *Kisela v. Hughes*, 138 S. Ct. 1148, 1151 (2018) (per curiam).
[66] *Id.*; *id.* at 1154.

follow his commands.[67] Kisela then fired on Hughes through the fence.[68] Hughes brought a Section 1983 excessive force claim against Kisela.[69] Reviewing a denial of qualified immunity to Kisela, the Supreme Court held that, in light of the officer's limited knowledge of the situation and Hughes's refusal to follow his repeated commands to drop the knife while within striking distance of the bystander—obstinance that heightened the risk of immediate harm to another—the law did not clearly establish that the officer's resort to deadly force was unlawful.[70]

In this case, Officers Cassidy and Hunter found themselves in a search for a suicidal teenager who they knew had already encountered fellow officers and walked away from them with his gun to his head, non-responsive, but without aggressive action. The circumstances of the officers' encounter with Ryan, as in *Baker*, remain heavily disputed: as to whether Ryan was aware of the officers, whether and how he turned and aimed his gun, and whether Hunter warned Ryan to disarm himself. The district court here defined the facts in a 21-page opinion, finding genuine disputes regarding these facts, and, viewing these disputes in a light most favorable to the Coles, concluded that a reasonable jury could find that Ryan made no threatening or provocative gesture to the officers and posed no immediate threat to them. Unlike in *Kisela*, where the officer repeatedly warned an armed suspect to disarm, yet that suspect, facing the officer and hearing his warnings, refused to disarm, here the district court concluded that a reasonable jury could find Cassidy and

---

[67] *Id.* at 1151.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1153.

Hunter opened fire upon Ryan without warning, even though it was feasible. On these facts, the officers' conduct violates clearly established law.

Rather than engage on the facts as we must take them at the summary judgment stage, the officers repeatedly argue from a different set of facts. While the district court found that Ryan was initially facing away from the officers when they fired the first shot, the officers now describe his "armed turn towards Officer Hunter." While the district court found that Ryan kept his gun aimed at his own head and never pointed it at the officers, the officers now suggest that Ryan's gun was "below his head," moving towards Hunter, and then only momentarily turned back towards Ryan's head at the moment he fired (ignoring Hunter's sworn statement that he fired only when the gun was pointed toward him—a story prosecutors accepted until a ballistics report exposed its impossibility). And although the district court found that Ryan was not given an opportunity to disarm himself, the officers contend that he was warned to disarm before being shot. "Had the Officers delayed longer, reaction time lag would have precluded their ability to stop [Ryan] from shooting Officer Hunter," they argue. Based on this alternative set of facts, echoed again in oral argument to us as a full court, and in the teeth of those found by the district court, the officers now contend Ryan posed a "deadly threat," and no clearly established law in 2010 put the officers' response of firing in self-defense beyond the law.

The Coles and amicus Cato Institute are correct that it is beyond our jurisdiction to consider the officers' set of facts, a narrative evolving over time. "[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street," the caselaw "will not permit summary

judgment in favor of the defendant official. . . . [A] trial must be had."[71] Whereas the officers will have a chance to present their factual narrative—and to question the Coles'—at trial, they cannot contest the facts in the current appeal.[72]

The dissents also take issue with the disputed facts. Judge Duncan focuses on what he terms "undisputed pre-encounter events." But, particularly in light of the officers' evolving stories, it is disputed whether any of the events recounted were known to Hunter or Cassidy when they fired on Ryan. The dissent cites to the reports and affidavits of other officers and individuals to describe the events occurring before Hunter and Cassidy were called to the scene.[73] But looking at the evidence in the light most favorable to the Coles, Hunter and Cassidy were not aware of the disturbance at the Coles' house the previous night, the alleged cache of weapons left at the Reeds' house, Ryan's alleged suicidal threat, or his threat to shoot anyone who came near him.

And of course, what matters is what the defendant officers knew when they shot Ryan. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam) ("Because this case concerns the defense of qualified immunity . . . the Court

---

[71] *Saucier v. Katz*, 533 U.S. 194, 216 (2001) (Ginsburg, J. concurring). *see also Tolan*, 572 U.S. at 660; *id.* at 662 (Alito, J., joined by Scalia, J., concurring in the judgment) (agreeing that "summary judgment should not have been granted" in that case because of the genuine issues of material fact); *Lytle*, 560 F.3d at 408–09.

[72] *Cf. Tolan*, 572 U.S. at 660 ("The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to [the plaintiff's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.").

[73] Recall that Hunter was a late-arriving officer who was not instructed by the Sachse or Garland police departments to pursue Ryan. *See supra* at 4.

considers only the facts that were knowable to the defendant officers."); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (stressing that "a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer"). The dissents overlook the fundamental reason most of these facts should not be part of the analysis: we consider only what the officers knew at the time of their challenged conduct. "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam); *see also Brown v. Callahan*, 623 F.3d 249, 253 ("An official's actions must be judged in light of the circumstances that confronted him, without the benefit of hindsight." (citing *Graham v. Connor*, 490 U.S. 386, 396–97 (1989))). Despite the many "red flags" listed by the dissents as known to others, only those known to Hunter and Cassidy are relevant to the qualified immunity analysis.

Judge Jones's dissent fares no better in addressing some of the key facts of the shooting itself. Contrary to its assertion, the district court found that Ryan was facing at a 90-degree angle away from the officers when he was first shot. *Cole*, 68 F. Supp. 3d at 644. As for the "warning," the district court found that a reasonable jury could conclude that Ryan "was not given an opportunity to disarm himself before he was shot." *Id.* Relitigating the district court's assessment of factual disputes is not our role on interlocutory review.

What Hunter and Cassidy knew before shooting at Ryan, whether they warned him before doing so, and what actions Ryan took before being shot are all disputed. The district court must afford Cassidy and Hunter qualified immunity at the earliest point the defense's applicability is determinable. Here, we have not yet reached that point. It will be for a jury to resolve what

happened on October 25, 2010. The district court did not err in denying the officers qualified immunity at the summary judgment stage.

III

The district court determined that genuine disputes of fact regarding Cassidy's and Hunter's entitlement to qualified immunity remain. We AFFIRM the district court's denial of summary judgment on the Coles' excessive-force claim and DISMISS Cassidy and Hunter's appeal; AFFIRM denial of the motion to dismiss the Coles' Fourteenth Amendment false-charges claim; REVERSE denial of the motion to dismiss the Coles' Fourth Amendment and *Brady* fabrication-of-evidence claims; and return the case to the district court for trial and resolution of issues consistent with this opinion.

No. 14-10228 c/w No. 15-10045

JENNIFER WALKER ELROD, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and EDITH BROWN CLEMENT, CATHARINA HAYNES, STEPHEN A. HIGGINSON, GREGG COSTA, and KURT D. ENGELHARDT, Circuit Judges, concurring:

I concur fully in the majority opinion. Despite the outcry of the dissenting opinions, there is no new law being made or old law being ignored. The majority opinion takes no position on the public policy issues of the day regarding policing and the mentally ill. Rather, it follows the longstanding *en banc* rule that "we lack jurisdiction to review the *genuineness* of a fact issue" on an interlocutory appeal of a denial of summary judgment based on qualified immunity. *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (*en banc*) (quoting *Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016)); *Kinney v. Weaver*, 367 F.3d 337, 341, 346–47 (5th Cir. 2004) (*en banc*). As the able district court determined, the facts are very much in dispute.

No. 14-10228 c/w No. 15-10045

EDITH H. JONES, Circuit Judge, joined by SMITH, OWEN, HO, DUNCAN and OLDHAM, Circuit Judges, dissenting:

What "clearly established law" says that only a rogue cop would have shot at this mentally disturbed teenager within 3 to 5 seconds as the teen emerged from dense bushes ten to twenty feet away from Officer Hunter and, with his finger on the trigger of a loaded pistol pointed in the direction of his own head, began turning in the officer's direction? The majority state this is an "obvious case" for the denial of qualified immunity: the officers could not shoot without first announcing themselves to Cole or looking down the barrel of his gun. What is so obvious? Contrary to the majority's dangerously unrealistic proposition, "action beats reaction" every time. *Ontiveros v. City of Rosenberg,* 564 F.3d 379, 384 (5th Cir. 2009). Neither we nor the Supreme Court has ever held that police officers confronted in close quarters with a suspect armed and ready to shoot must hope they are faster on the draw and more accurate. The increasingly risky profession of law enforcement cannot put those sworn to "serve and protect" to a *Hobson*'s choice: place their lives on the line by heroic forbearance or risk their financial security in defense of lawsuits. The Supreme Court has repeatedly stated in plain terms that the purpose of qualified immunity is to prevent precisely this quandary.

Respectfully dissenting, we are convinced that the Supreme Court's remand from the original panel opinion denying immunity meant something; the governing Supreme Court law is foursquare in the corner of

Officers Hunter and Cassidy; and they were entitled to receive summary judgment confirming their immunity from suit, not simply from liability.[1]

I. Background

A. Undisputed facts

The majority opinion paints a picture of the relevant facts that has evolved considerably from the first and second panel opinions to this final majority version. *Compare Cole v. Carson,* 802 F.3d 752, 755-56, 758 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole,* 137 S. Ct. 497 (*Cole I*), *with Cole v. Carson,* 905 F.3d 334, 337-340 (5th Cir. 2018) (*Cole II*), *and supra.* Qualified immunity for the use of deadly force is assessed at the moment a law enforcement officer confronts a suspect, *Graham v. Connor,* 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989), but the officer's understanding of facts leading up to the event color the question whether "a reasonable officer" could have believed his life or the lives of others were endangered. *White v. Pauly*, 137 S. Ct. 548, 550, 552 (2017). To the majority's picture, it is necessary to add undisputed facts recited in the prior opinions and undisputed evidence from plaintiffs' experts. Hornbook summary judgment law holds that although disputed facts are viewed in the light most favorable to non-movants, the entire record must be considered. *Scott v. Harris,* 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007). Further, this court reviews *de novo* the materiality of the relevant facts. *Foley v. Univ. of Houston, Sys.,* 355 F.3d 333, 337 (5th Cir. 2003).

---

[1] We do not challenge the majority's decision to leave in place fabricated evidence charges against these two officers and Officer Carson. Only Carson, who was present at the encounter but did not shoot, appealed the district court's refusal to dismiss that claim. The Supreme Court has not been clear on the constitutional basis for such a claim, so we have no ground to criticize the majority. *Compare Manuel v. City of Joliet,* 137 S. Ct. 911 (2017), *with McDonough v. Smith,* 139 S. Ct. 2149 (2019), (refusing to rule on the constitutional grounding of such claims).

First, both officers who shot at Cole were aware that he had mental issues. Officer Cassidy had learned that Cole "had threatened to shoot anyone who tried to take his gun and had refused an order to drop his weapon." *Cole II*, 905 F.3d at 338. Officer Hunter watched Cole walk steadily down the train tracks ignoring other police who were yelling at him to stop and put down his 9 mm semi-automatic pistol. Both officers were aware that a bulletin had been disseminated about Cole to all law enforcement in Garland and Sachse, and three nearby schools in the vicinity of Highway 78, where Cole was heading, were being protected. *Cole II*, 905 F.3d at 337-38.

Second, Cole emerged from the vegetation, unaware of the officers' presence, within ten to twenty feet of Officer Hunter, and as he turned toward the officers, three to five seconds elapsed. That's less time than it takes to read the preceding sentence. Cole initially stood at a 90 degree angle to the police and then began turning counterclockwise toward them. His movement is conceded by plaintiffs' expert, supported by the ballistic evidence, and recounted in the district court opinion. *Cole II*, 905 F.3d at 338 ("Cole began to turn counterclockwise."). Plaintiff's expert opines this interval was sufficient for the officers to command Cole to disarm and observe his reaction.

Third, his loaded pistol was pointed within thirty inches toward his head, *Cole I*, 802 F.3d at 756, and Cole's finger was on the trigger.

Next, the officers fired seven shots, two of which hit Cole. Officer Hunter's first shot hit Cole in the left arm, penetrating his body from the left. Another of Hunter's shots merely grazed Cole's left arm as he continued to turn and was facing Hunter. *Cole II*, 905 F.3d at 339. Cole's gun, according to the plaintiffs, involuntarily discharged and hit him in the head, "leaving stippling—gunpowder residue around the wound due to the gun being fired from less than thirty inches away." *Cole I*, 802 F.3d at 756.

Finally, the bodycam evidence shows that some officer began to issue a warning at about the time the shooting started. *Cole II*, 905 F.3d at 338.

B. Prior panel reasoning

The district court denied qualified immunity to Hunter and Cassidy for the shooting[2] and refused to dismiss the allegations of falsified evidence against Hunter, Cassidy, and Carson.

The original panel opinion affirmed,[3] concluding as to the excessive force allegation that "if the Coles' version of the evidence is believed, it was not objectively reasonable to use deadly force against Ryan Cole when the teenager emerged on foot from the wooded area with a gun to his own head and turned left." With regard to immunity, the panel held that by October 2010, "reasonable officers were on notice that they could not lawfully use deadly force to stop a fleeing person who did not pose a *severe and immediate risk to the officers or others,* and they had many examples of the sorts of threatening actions which could justify deadly force. Turning left while unaware of an officer's presence is not among them." *Cole I*, 802 F.3d at 762 (emphasis added) (footnote omitted). The panel's principal support for its legal reasoning was *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014), *rev'd sub nom. Mullenix v. Luna,* 136 S. Ct. 305 (2015). According to the panel, "the central [disputed] issue" is "whether Ryan pointed his gun at Officer Hunter." *Cole I*, 802 F.3d

---

[2] Query why Officer Cassidy, whose shots didn't hit the victim, can be sued? This court has held that qualified immunity must be applied individually to each defendant. *Meadours v. Ermel*, 483 F.3d 417, 421-22 (5th Cir. 2007). But no one raised the point here.

[3] The correct disposition if this court agrees there are material fact issues in dispute regarding qualified immunity would be to dismiss the appeal, because our appellate jurisdiction exists only over questions of law. *Mitchell v. Forsyth,* 472 U.S. 511, 529-30, 105 S. Ct. 2806, 2816-17 (1985).

at 762. Absent such a threatening gesture, Cole was said to present no sufficient threat. *Id.*

The next panel opinion was formulated after the Supreme Court reversed us in *Mullenix* on the grounds that "none of our [the Supreme Court's own] precedents 'squarely governs' the facts here. Given [the suspect's] conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as [the officer] did." 136 S. Ct. at 310. On this second go-round, the panel conceded the deficiency of the "no sufficient threat" rule, but then concluded that, taken in the light most favorable to the plaintiffs, Cole's conduct posed "no threat" when he was shot, *Cole II*, 905 F.3d at 343, and the officers therefore violated a clearly established "no threat" rule. *Tennessee v. Garner* is cited as the basis for this "bright line" rule.[4] 471 U.S. 1, 105 S. Ct. 1694 (1985). This opinion was vacated by a vote to reconsider the case en banc.

C. The Current Majority Opinion

Pivoting yet again, the en banc majority opinion commences with a paean to "the worker's . . . right to the protection of a jury," not even bothering to cite Supreme Court authorities that explain why qualified immunity is immunity from suit, not just liability. The majority opinion omits or ignores material undisputed facts recited above—the knowledge of the officers, Cole's turning toward them, the significance of his finger in a loaded pistol, and the

[4] The panel curiously described so-called clearly established law in both of its opinions with references to unpublished, non-precedential Fifth Circuit cases. The Supreme Court has expressed uncertainty over whether any circuit court **cases**, as opposed to its own decisions, may set out "clearly established law." *See Dist. of Columbia v. Wesby,* 138 S. Ct. 577, 591 n. 8 (2018); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); *Reichle v. Howards*, 566 U.S. 658, 665-66, 132 S. Ct. 2088, 2094 (2012). It is incredible that this court would cite our avowedly non-precedential decisions for that purpose.

three to five second interval—and hides behind the assertion that, relevant to qualified immunity, there are "genuine factual disputes as to Ryan's and the officers' conduct" such that a reasonable jury could find that Cole posed no "immediate threat" to the officers or others. Two paragraphs later, asserting that Cole posed "no threat . . . to support firing without warning," the majority deem this an "obvious case" for denial of immunity, because the "officers had time and opportunity to give a warning and yet chose to shoot first instead." The "obvious case" rationale again derives, in the majority's view, from *Garner*, fortified only by one Fifth Circuit case and the Supreme Court's decision in *Kisela v Hughes*.[5]

DISCUSSION

The only legal question that needs to be addressed by this court is whether, under the circumstances of this five-second confrontation, *every* reasonable police officer would have reasonably perceived *no* life-threatening danger such that deadly force could be used to incapacitate Cole without a preliminary warning. Put otherwise, as a matter of law, was it clearly established that officers may not fire on a suspect, armed and ready to shoot a pistol, who is turning in their direction with one of their brethren ten to twenty feet away, unless the gun barrel points at them or they first shout a warning and await his response?

The majority deny qualified immunity, seeming to answer on the basis of "disputed fact issues" that Cole posed "no threat." The majority's reasoning

[5] This dissent focuses on the majority opinion because Appellees' briefing offered nothing in addition to the meager authorities cited by the majority to support their "clearly established law" theory.

is at too high a level of generality. And the majority ignore the critical criterion for qualified immunity in Fourth Amendment cases: the reasonableness of the officers' reasonable perceptions. In sum, the majority here double down on the mistakes that got our court reversed in *Mullenix*.[6]

Before discussing these problems in detail, it is necessary to recapitulate the reasoning behind the Supreme Court's qualified immunity cases. The majority's bare mention of the standards for qualified immunity ignores the Court's rationale for the defense. Beginning with *Monroe v. Pape* in 1961, the Supreme Court unleashed federal courts to enforce constitutional commands against state actors pursuant to 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 484 (1961). A foreseeable consequence of facilitating such lawsuits was that a deluge of litigation would follow, at least some of it ill-founded or frivolous. What was to be done to limit claims to those that might have merit? The Court decided in *Pierson v. Ray* that police officers sued under Section 1983 should enjoy qualified immunity accorded at common law. 386 U.S. 547, 556-57, 87 S. Ct. 1213, 1219 (1967).

For over fifty years, the Court has developed the standards of qualified immunity, well aware from the beginning that "the local police officer" is "that segment of the executive branch . . . that is most frequently and intimately involved in day-to-day contacts with the citizenry, and hence, most frequently exposed to situations which can give rise to claims under Sec. 1983 . . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 244-45, 94 S. Ct. 1683, 1691-92 (1974). The

---

[6] In *Mullenix,* the Supreme Court reversed this court and held an officer entitled as a matter of law to qualified immunity when he shot, and killed, a suspect fleeing from the police in his car at high speed. Following *Mullenix,* the Supreme Court vacated the judgment and remanded *Cole I,* no doubt in part because *Cole I* heavily relied on the reversed panel decision in *Mullenix*.

breadth of this shield represents a deliberate balance between affording a damages remedy for constitutional abuses and the social and personal costs inflicted by meritless claims. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038 (1987). The costs to society include the costs of litigation, the diversion of limited public resources, the deterrence of able people from going into public service, and the danger that fear of being sued will discourage officials from vigorously performing their jobs. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736 (1982). The devastating costs imposed by unfounded lawsuits on officers otherwise entitled to immunity are reputational, potentially employment-related, financial and emotional. For these reasons, the Court has repeatedly explained that qualified immunity shields public officials not just from liability but from suit. *See Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985); *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009) ("Qualified immunity is lost if a case is erroneously permitted to go to trial."). Some in the lower federal courts may disapprove of the Court's half century of authorities, but we may not functionally disregard them.

Nearly as venerable as the general defense of qualified immunity are the decisions applying it to Fourth Amendment claims against law enforcement officers. *Anderson v. Creighton* affirmed in 1987 that a law enforcement officer who participates in a warrantless search may be entitled to qualified immunity "if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful." 483 U.S. at 638, 107 S. Ct. at 3038. Justice Scalia's opinion reminded that "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (internal quotation marks omitted). In determining the objective legal reasonableness of the allegedly unlawful action, "[i]t should not be surprising . . . that our cases

establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640, 107 S. Ct. at 3039.

Two years later, the Court clarified that for alleged Fourth Amendment excessive force violations, reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872. The calculus of "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97, 109 S. Ct. at 1872. Ultimately, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ." *Id.* at 397, 109 S. Ct. at 1872. Quoting these statements from *Graham*, the Court later explained that the test for qualified immunity for excessive force "has a further dimension" in addition to the deferential, on-the-scene evaluation of objective reasonableness. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158 (2001). Justice Kennedy explained: "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes hazy border between excessive and acceptable force and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.* at 206, 121 S. Ct. at 2158 (internal citation and quotation marks omitted).

Evaluating the qualified immunity defense is thus a two-step process. The first is to determine whether the Fourth Amendment has been violated by conduct that, viewed from the officer's perspective and information at the time, is objectively unreasonable.[7] The second step assesses the objective legal reasonableness of the action, that is, whether every reasonable officer would have known that the conduct in question was illegal. *See Pearson*, 555 U.S. at 232, 129 S. Ct. at 815-16. The illegality must have been apparent, as held in cases that are factually similar to the situation confronting the officer. *White,* 137 S. Ct. at 542. Immunity must be granted to all but the plainly incompetent or those who knowingly violate the law. The Supreme Court has enforced immunity where officers acted negligently, *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3039-40; or when they could have used another method to subdue a suspect, *Mullenix*, 136 S. Ct at 310; or when the law governing their behavior in particular circumstances is unclear. *White*, 137 S. Ct. at 552. The Court emphasizes that the specificity of the applicable "clearly established" rule is especially important in Fourth Amendment cases. *Mullenix,* 136 S. Ct. at 308.

By denying plaintiffs their "day in court" at a preliminary stage, qualified immunity operates as a counterintuitive, albeit vital, defense. Thus, the Supreme Court has regularly reversed denials of qualified immunity where lower courts misapplied the standards. *See Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (citing eleven Supreme Court cases in five years reversing lower courts in the qualified immunity context including *Mullenix v. Luna*, 136 S. Ct. 305 (2015), *Taylor v.*

[7] For present purposes, we "address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place." *Mullenix,* 136 S. Ct. at 308; *Pearson,* 555 U.S. at 236, 129 S. Ct. at 818 (constitutional violation or qualified immunity may be decided first).

Barkes, 135 S. Ct. 2042 (2015); *City and County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015); *Carroll v. Carman*, 574 U.S. 13, 135 S. Ct. 348 (2014); *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012 (2014); *Wood v. Moss*, 572 U.S. 744, 134 S. Ct. 2056 (2014); *Stanton v. Sims*, 571 U.S. 3, 134 S. Ct. 3 (2013); *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088 (2012); *Ryburn v. Huff*, 565 U.S. 469, 132 S. Ct. 987 (2012); *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011)). Unfortunately, the majority here has fallen into the trap of "letting the jury sort out the truth" despite the gravity of the situation these officers faced.

As explained above, it is undisputed that the two officers confronted and then shot at Cole as he emerged from dense bushes ten to twenty feet from Officer Hunter, unaware of their presence, and began to turn in their direction. This all happened within three to five seconds. While he turned, Cole held a loaded 9mm semiautomatic pistol, finger on the trigger, pointed in the direction of his own head. The officers knew he was mentally distraught, had ignored other police commands to disarm, had issued threats, and proceeded walking in the direction of nearby schools.

For immunity purposes, the question phrased one way is whether *any* reasonable officers could have believed that Cole's split-second turning toward them posed a life-threatening danger such that lethal force was necessary. Alternatively, what "clearly established law" held as of October 2010 that under all of the relevant circumstances, deadly force was not justified unless either a warning was given and the suspect allowed a chance to react, or the suspect actually turned his loaded pistol on the officer? The answer here directly parallels the Supreme Court's reasoning in *Mullenix*, which the majority seriously shortchanged.

In *Mullenix*, this court had denied qualified immunity to a trooper whose shot fatally wounded a suspect fleeing police in a high-speed chase. The Supreme Court's basic criticism of the panel decision was this: "In this case, the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. Yet this Court has previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 308-09 (internal quotation marks and citation omitted).

The majority here posit as clearly established law, indeed an "obvious case," that a police officer may not use deadly force—without prior warning—against an armed, distraught suspect who, with finger in the pistol's trigger, posed "no threat" while turning toward an officer ten to twenty feet away. But in *Mullenix,* the Supreme Court reversed this court because "[t]he general principle that deadly force requires a sufficient threat hardly settles this matter." *Id.* at 309. Likewise, here, the majority's "no threat" and "obvious case" conclusions do not settle the matter of clearly established law.[8]

That the majority here purport to extract clearly established law from *Tennessee v. Garner* was rebuked in *Mullenix.* The Supreme Court corrected this court by summary reversal because the Court itself had summarily rejected applying the general standard of *Tennessee v. Garner* to deny qualified immunity. *Mullenix,* 136 S. Ct. at 309 (*citing Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 599 (2004)). Instead, the "correct inquiry" was

[8] Worse, it treats as a disputed fact issue for immunity purposes what is clearly an issue of law. *See Wyatt v. Fletcher*, 718 F.3d 496, 502-03 (5th Cir. 2013).

whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the precise situation she confronted. *Id.* Including *Mullenix* and *Brosseau*, a series of Supreme Court cases has held that *Tennessee v. Garner* does not state "clearly established law" governing the use of deadly force other than in *Garner*'s precise factual context, the shooting of an unarmed burglary suspect fleeing away from an officer.[9] The confrontation in this case with an armed, ready-to-fire suspect is "obviously" different.

We fail to understand how the denial of qualified immunity to Officers Hunter and Cassidy can be rescued simply by intoning that this is an "obvious case" under *Garner*. *Garner* affirmed the constitutionality of deadly force against suspects when necessary to protect the life of officers or others "if, where feasible, some warning has been given." 471 U.S. at 11-12, 105 S. Ct. at 1701.[10] But *Garner* in no way renders "clearly established" a requirement to give a warning, and await the suspect's response, before shooting. Nor does it mandate that the suspect's weapon be trained on the officer or others. Like the rest of the calculus surrounding Fourth Amendment reasonableness, the "feasibility" of any such potentially deadly delay or factual nuance must be subjected to case-specific balancing with deference paid to the officer's reasonable perceptions in the midst of a tense situation. *Graham,* 490 U.S. at 396, 109 S. Ct. at 1872. Indeed, in describing its holding at the outset, *Garner* states only that "[deadly] force may not be used unless it is necessary to prevent the escape [of an apparently unarmed suspected felon] and the officer

---

[9] *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *White*, 137 S. Ct. at 552.

[10] Turning on distinctly different facts, *Garner* alone does not establish pertinent clearly established law here, and the majority does not contend as much.

has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3, 105 S. Ct. at 1697.[11] No mention of a warning appears in this introduction, and "probable cause," not a fact-specific test, is the measure of the threat of harm.

Characterizing this case as a "no threat" or "obvious" Fourth Amendment violation is wrong for additional reasons. Whether, under the material undisputed facts, Cole presented "no threat" to a reasonable police officer is the relevant issue to assess a Fourth Amendment violation. But the immunity question, which the majority elides, is whether *every* reasonable officer in this factual context would have known he could not use deadly force. *See Pearson,* 555 U.S. at 232, 129 S. Ct. at 815-816. The majority's analysis conflates these inquiries. Second, the importance of grounding the inquiry in a specific factual context cannot be overstated. In this case, if Officer Hunter had stood a hundred feet away from Cole, or Cole had not been turning toward the officers, or Cole had put the handgun in his pocket and wasn't touching it, the analysis of qualified immunity could be quite different. Third, describing a situation as posing "no threat" is a conclusion, not an explanation or, as the majority seems to think, an exception to defining clearly established law in a specific context. No doubt there are rare "obvious" cases of Fourth Amendment violations

---

[11] The majority cites *Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997), for the necessity of giving a warning "where feasible" before the use of deadly force. Oddly, *Colston* then immediately holds that the officer there "lying on his back with Colston nearby, had to immediately decide whether to shoot. In light of the totality of the circumstances facing Barnhart, Barnhart's failure to give a warning was not objectively unreasonable." *Id.* The feasibility of a warning is part of the overall Fourth Amendment analysis, not an independent sine qua non of official conduct.

committed by officers who are plainly incompetent or who knowingly violate the law. In the wide gap between acceptable and excessive uses of force, however, immunity serves its important purpose of encouraging officers to enforce the law, in "tense, uncertain and rapidly evolving" split-second situations, rather than stand down and jeopardize community safety.[12]

In their sole, erroneous dependence on *Garner,* the majority, "can cite no case from [the Supreme] Court denying qualified immunity because officers [entitled to apprehend Cole] selected one dangerous alternative over another." *Mullenix,* 136 S. Ct. at 310. The *Mullenix* Court showed that if anything, "clearly established law" was contrary to the plaintiff's position. The Court cited two prior Supreme Court car chase cases that resulted in immunity even though the fugitives—unlike the suspect in *Mullenix*—had not verbally threatened to kill any officers in their path. *Id.* at 310 (*citing Scott,* 550 U.S. at 384, 127 S. Ct. at 1778; *Plumhoff*, 572 U.S. at 777, 134 S. Ct at 2022). And in *Mullenix* itself, as here, the trooper had not warned the fugitive before shooting at his speeding car. These cases "reveal[ed] the hazy legal backdrop against which Mullenix acted," *Id.* at 309. Accordingly, the Court admonished, "[w]hatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances beyond debate." *Id.* at 311 (internal quotation marks omitted).

Not only do the majority cite "no case" in which the Supreme Court denied qualified immunity to an officer who used deadly force against a

---

[12] *Compare Wesby,* 138 S. Ct. at 590 ("Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. But a body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause.") (internal citation and quotation marks omitted).

mentally distraught individual in circumstances like the present case, but to the contrary, the Court required qualified immunity in two somewhat similar cases. In *Sheehan*, officers used deadly force to subdue a mentally ill woman during an armed confrontation. The Court restated that the Fourth Amendment is not violated even if police officers, with the benefit of hindsight, may have made some mistakes, because "[t]he Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" *Sheehan,* 135 S. Ct. at 1775 (quoting *Plumhoff*, 572 U.S. at 775, 134 S. Ct. at 2020).

Even closer to this case is *White v. Pauly*, where an officer arriving at the scene of an armed confrontation shot and killed a suspect without knowing whether his earlier-arrived colleagues had identified themselves as police. 137 S. Ct. at 550-51. In *White*, the Court chastised the lower court for "misunderst[anding]" the "clearly established" analysis by relying on the generalized pronouncements in *Graham* and *Garner*. *Id.* at 552. Whether Officer White should have second-guessed the preceding conduct of fellow officers hardly presented an "obvious case" pursuant to *Garner*. The Court speculated that perhaps, given the three-minute delay between when he arrived and when shots rang out, Officer White "should have realized that [a warning about police presence] was necessary before using deadly force." *Id*. There is a world of difference between three minutes and three seconds, which Officer Hunter had here, and between Officer White's securing himself behind a stone wall fifty feet from the suspect and Officer Hunter's standing fully exposed only ten to twenty feet away from Cole. The majority cannot reconcile the Supreme Court's insistence upon qualified immunity in *White* with their denial of the defense to Officers Hunter and Cassidy.

Kisela v. Hughes, cited in support of the majority, in no way articulates clearly established law concerning the necessity of a warning. First, the Court in *Kisela* overturned the Ninth Circuit's denial of qualified immunity without addressing the preliminary Fourth Amendment violation. 138 S. Ct. at 1152. A decision holding only that there was no "clearly established law" cannot itself have defined "clearly established law." The Court also criticized the Ninth Circuit for failing to implement correctly the rule that an officer has not "violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.* at 1153 (internal quotation marks omitted). The Court catalogued all the relevant circumstances of the confrontation that provoked the shooting: a knife-armed, threatening suspect, whose bizarre behavior had been called in to 911, disobeyed officers' commands to disarm for up to one minute before they felt compelled to shoot. *Id.* The Court concluded, "[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect [the third party] would violate the Fourth Amendment." *Id.* Also "far from obvious" is the case before us, in which the officers had five seconds, not a whole minute, in which to decide whether to shoot at Cole.

Finally, the Supreme Court's decision in *Tolan v. Cotton* adds nothing to the substance of the qualified immunity discussion. In *Tolan,* the Court enumerated four critical, disputed evidentiary contentions relating to the officer's perception of danger to himself and thus to qualified immunity. 572 U.S. 650, 657-59, 134 S. Ct. 1861, 1866-67 (2014). Because this court had failed to credit the plaintiff's disputed version of these facts, the Court vacated summary judgment for the officer and remanded without deciding any merits

issue. *Id.* at 657, 134 S. Ct. at 1866. In contrast, this dissent credits only undisputed material facts and plaintiffs' version of disputable facts.

Like this court's panel in *Mullenix*, the majority here offer no controlling Supreme Court precedent, including *Garner,* to support that "clearly established law" mandated that the officers hold their fire until they had both warned Cole and given him a chance to drop his gun or until he pointed the loaded weapon directly at them.

For good measure, the *Mullenix* Court also considered the potential similarity of lower court decisions that dealt with qualified immunity. 136 S. Ct. at 311. Fifth Circuit case law, the Court noted, did not "clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly." *Id.* at 311 (*citing Lytle v. Bexar County*, 560 F.3d 404, 412 (5th Cir. 2009)). But the Court quoted with approval an Eleventh Circuit case that granted immunity to a sheriff's deputy who fatally shot a mentally unstable individual "who was attempting to flee in the deputy's car, even though at the time of the shooting the individual had not yet operated the cruiser dangerously. The court explained that 'the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect…'" *Id.* at 311 (*quoting Long v. Slaton*, 508 F.3d 576, 581-82 (11th Cir. 2007)). Here, too, the thrust of *Mullenix* contradicts the majority's logic and holding.

Moreover, to the extent it is relevant[13], Fifth Circuit law does not support denying qualified immunity to Officers Hunter and Cassidy. The district court

[13] *See* fn. 4, *supra.*

and, inferentially, the majority demand that qualified immunity be granted only if the suspect either disobeys immediate commands to disarm or points his weapon at the officers. The district court described such threatening actions as a *Manis* act.[14] It is true that in previous deadly force cases, this court approved qualified immunity for officers who reasonably believed that a non-compliant suspect was reaching toward where he could retrieve a weapon. *See Manis,* 585 F.3d at 842; *see also Reese v. Anderson,* 926 F.2d 494, 500-01 (5th Cir. 1991); *Young v. City of Killeen, Tx.,* 775 F.2d 1349, 1352 (5th Cir. 1985). The hitch in these particular cases is that there wasn't actually a weapon, yet the officer's objectively reasonable perception was determinative as a matter of law. In another such officer shooting case, this court upheld qualified immunity where the suspect, who was being interrogated for drunk driving at the side of a freeway, turned to walk away from the officer, then appeared to turn around toward him while reaching under his shirttail for what the officer thought could be a concealed weapon. *Salazar-Limon v. City of Houston,* 826 F.3d 272, 278 (5th Cir. 2016). This court added, "[f]urthermore, …in the context of this case, it is immaterial whether Salazar turned left, right, or at all before being shot. Specifically, we have never required officers to wait until a defendant turns toward them, with weapon in hand, before applying deadly force to ensure their safety." 826 F.3d at 279 n. 6.

While a "*Manis* act" can sustain qualified immunity even where no weapon is visible, it is not logical for an additional "act" to be mandated where the officers confront a suspect armed, ready to shoot his pistol, and turning toward them. An officer may be forced into shooting an unarmed suspect by a

[14] *Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009).

Manis act, and thus obtain qualified immunity. But it is perverse and inconsistent with Fifth Circuit law to hold that the officer has no qualified immunity because she is constitutionally forbidden to shoot an armed suspect in close quarters without either looking down the barrel of the weapon or awaiting his response to her command.

In fact, that is exactly what this court has not held. In *Ramirez v. Knoulton,* 542 F.3d 124, 127 (5th Cir. 2008), police shot a suspect they believed to be suicidal as he stood in profile to them, with a handgun in his right hand, and brought his hands together in front of his waist." He "never raised his weapon nor aimed it at the officers." *Id.* at 129. The court held that based on the officers' reasonable perception, no Fourth Amendment violation occurred, because the Constitution "does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." *Id. at 130. See also Colston,* 130 F.3d at 100*; Ontiveros*, 564 F.3d at 385 (holding no constitutional violation where officer thought suspect was reaching into his boot for a weapon during confrontation in a mobile home). As the Supreme Court put it in *Mullenix,* "the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here." 136 S. Ct. at 312.

The majority describe only one Fifth Circuit police shooting case, out of dozens this court has decided, as an "obvious case." *Baker v. Putnal,* 75 F.3d 190 (5th Cir. 1996). Whether that characterization applies to the claimed Fourth Amendment violation in *Baker*, to qualified immunity analysis, or simply to this court's decision to remand for trial is unclear in the majority opinion. *Baker,* however, says nothing about the merits of the case or about clearly established law, holding instead that "[t]here are simply too many factual issues to permit the Bakers' § 1983 claims to be disposed of on summary

judgment." *Baker,* 75 F.3d at 198. Hence, like *Kisela*, *Baker* cannot support any rule of clearly established law, much less explain what law is "obvious." Significantly, in *Baker,* whether the suspect was holding a gun visible to the officer was an important hotly contested issue, with eyewitnesses contradicting the officer's account of the incident. *Baker*, 75 F.3d at 198. Cole's case, in contrast, does not involve a "chaos on the beach" incident. The undisputed facts are starkly different here. It is undisputed, at a minimum, that Cole was holding a loaded weapon, his finger in the trigger, as he emerged from the woods; he was turning toward the officers; and they had five seconds to react. *Baker* does not show that the officers' conduct in *Cole* violated clearly established law.

To sum up, the majority opinion here repeats every error identified by the Supreme Court when it granted summary reversal in *Mullenix* and sent the instant case back for reconsideration. The majority's "clearly established" rule has changed, but not its errors. *Tennessee v. Garner* does not formulate "clearly established law" with the degree of specificity required by the Supreme Court's decisions on qualified immunity. The majority's "no threat" and "obvious case" statements pose the issues here at an excessive level of generality. The majority has no Supreme Court case law demonstrating that Officers Hunter and Cassidy were either plainly incompetent or had to know that shooting at Cole was unconstitutional under the circumstances before them and with the knowledge they possessed—he was mentally distraught; he was armed with his finger in the pistol's trigger; he was very close to Hunter; he had been walking in the direction of schools for which extra police protection had been ordered; and he had ignored other officers' commands to stop and drop his weapon. And they had three to five seconds to decide how dangerous he could be to them. The majority cites not one case from this court denying

qualified immunity under similar circumstances. *Mullenix* aptly summed it up for our purposes: "qualified immunity protects actions in the hazy border between excessive and acceptable force." 136 S. Ct. at 312 (internal quotation marks omitted). "[T]he constitutional rule applied by the Fifth Circuit was not 'beyond debate.'" *Id*.

It is not "clearly established" that police officers confronting armed, mentally disturbed suspects in close quarters must invariably stand down until they have issued a warning and awaited the suspects' reaction or are facing the barrel of a gun. "This was not a belief in possible harm, but a belief in certain harm. The fact that they would later discover this to be a mistaken belief does not alter the fact that it was objectively reasonable for them to believe in the certainty of that risk at that time." *Carnaby v. City of Houston,* 636 F.3d 183, 188 n.4 (5th Cir. 2011). That is the law in the Fifth Circuit, and the majority has pointed to no clearly established law otherwise. Shooting at Cole may not have been the wisest choice under these pressing circumstances, but the officers' decision, even if assailable, was at most negligent. Hunter and Cassidy were neither plainly incompetent nor themselves lawbreakers. While we are confident a jury will vindicate their actions, they deserved qualified immunity as a matter of law. We dissent.

No. 14-10228 c/w No. 15-10045

JERRY E. SMITH, Circuit Judge, dissenting:

This is a "red flag" case if ever there was one. The en banc majority commits grave error, as carefully explained in the dissents by Judge Jones, Judge Willett, Judges Ho and Oldham (jointly), and Judge Duncan. Yet eleven judges join the majority.

Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react to dangerous confrontations with threatening and well-armed potential killers. In light of today's ruling and the raw count of judges,[1] there is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires.

Red flags abound. Judge Duncan cogently details the "rich vein of facts" describing this plaintiff's undisputed actions in the hours leading up to the shooting.[2]

- Red flag: a 9mm semi-automatic handgun and ammunition.
- Red flag: a double-barrel shotgun with shells.
- Red flag: a .44 magnum revolver.
- Red flag: a .38 revolver.
- Red flag: a suspect who had broken into a gun safe and stolen an unknown quantity of weapons and ammunition.
- Red flag: a police visit the night before to the suspect's house because of a disturbance with his parents.

---

[1] This en banc court consists of the sixteen active judges, plus two senior judges who were on the original panel. Of those sixteen active judges, nine join the majority opinion.

[2] I especially refer the reader to Part I of Judge Duncan's dissent, which sets forth the context and narrative of red-flag facts that easily justify qualified immunity. All three dissents persuasively explain the law of qualified immunity that the majority overlooks.

• Red flag: a suspect with a dangerous knife at his parents' house.

• Red flag: a suspect who had a wild look in his eye and was smoking K2.

• Red flag: a suspect, distraught over breaking up with his girlfriend, moving toward the school where she was a student.

• Red flag: a suspect near an elementary school.

• Red flag: a suspect with personal issues including drug abuse.

• Red flag: a suspect seen running through the woods with at least three weapons.

• Red flag: a suspect irate and distraught.

• Red flag: a suspect who said he would shoot anyone who came near him.

• Red flag: a suspect armed with at least one handgun and possibly three.

• Red flag: a suspect who had refused police demands to drop his weapon.

• Red flag: a suspect who deposited a cache of weapons and ammunition at a friend's house after arguing with his parents.

• Red flag: a suspect who yelled obscenities at an officer.

• Red flag: a suspect who had threatened to kill his girlfriend and himself.

• Red flag: a suspect whom the district court described as troubled.

• Red flag: a suspect described in his complaint as suffering from obsessive compulsive disorder, treated with medications from numerous medical professionals, and having poor judgment and impaired impulse control.

* * * * *

Normally we expect police officers to recognize such red flags and to respond appropriately. Instead of protecting these officers from obvious danger to themselves and the public, however, the en banc majority orders them

to stand down. What is the hapless officer to do in the face of today's decision? What indeed is the "clearly established law" that the majority now announces? The judges in the majority do not say.

The law of qualified immunity was poignantly summarized in 2019 by a dissenting judge who is now in the majority. Today's en banc ruling turns those words to dust.[3]

I respectfully dissent.

---

[3] *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting), *petition for rehearing en banc pending*:

> The implications of the majority's mistakes cannot be minimized. The majority decides that qualified immunity can be endangered by an affidavit filed at summary judgment that creates a fact issue nowhere else supported by record evidence.
>
> Worse still, it seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force. Qualified immunity is designed to respect that judgment, requiring us to second-guess only when it clearly violates the law. The standard acknowledges that we judges—mercifully—never face that split second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person's life to preserve our own or the lives of those around us.
>
> The qualified immunity standard stops this privilege from blinding our judgment, preventing us from pretending we can place ourselves in the officers' position based on a cold appellate record. It prevents us from hubristically declaring what an officer should have done—as if we can expect calm calculation in the midst of chaos.
>
> The majority opinion, written from the comfort of courthouse chambers, ignores that deference. Instead, it warns officers that they cannot trust what they see; they cannot trust what their fellow officers observe; they cannot trust themselves when posed with a credible threat. It instructs them, in that pivotal split second, to wait. But when a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences.

No. 14-10228 c/w No. 15-10045

DON R. WILLETT, Circuit Judge, dissenting:

I repeat what I said last month: The entrenched, judge-invented qualified immunity regime ought not be immune from thoughtful reappraisal.[1]

Qualified immunity strikes an uneasy, cost–benefit balance between two competing deterrence concerns: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[2] By insulating incaution, the doctrine formalizes a rights–remedies gap through which untold constitutional violations slip unchecked. The real-world functioning of modern immunity practice—essentially "heads government wins, tails plaintiff loses"—leaves many victims violated but not vindicated. More to the point, the "clearly established law" prong, which is outcome-determinative in most cases, makes qualified immunity sometimes seem like unqualified impunity: "letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."[3]

That said, as a middle-management circuit judge, I take direction from the Supreme Court. And the Court's direction on qualified immunity is increasingly unsubtle. We must respect the Court's exacting instructions—even as it is proper, in my judgment, to respectfully voice unease with them.[4]

---

[1] *Zadeh v. Robinson*, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

[2] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (flagging these "two important interests").

[3] *Zadeh*, 928 F.3d at 479.

[4] *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling prior precedent whose unsoundness had been "aptly described" by the court of appeals).

No. 14-10228 c/w No. 15-10045

I

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[5] While this bar is not insurmountable, it is sky-high. And it is raised higher when courts leapfrog prong one (deciding whether the challenged behavior violates the Constitution) to reach simpler prong two: no factually analogous precedent. Merely proving unconstitutional misconduct isn't enough. A plaintiff must cite functionally identical authority that puts the unlawfulness "beyond debate" to "every" reasonable officer.[6] Last month, for example, the Eleventh Circuit, noting no "materially similar case" (thus no "clearly established law"), granted immunity to a police officer who fired at a family's dog but instead shot a 10-year-old child lying face-down 18 inches from the officer.[7] Not only that, the court "expressly [took] no position" as to "whether a constitutional violation occurred in the first place."[8] Translation: If the same officer tomorrow shoots the same child while aiming at the same dog, he'd receive the same immunity. *Ad infinitum*.

The Supreme Court demands precedential specificity. But it's all a bit recursive. There's no earlier similar case declaring a constitutional violation because no earlier plaintiff could find an earlier similar case declaring a constitutional violation. "Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered

---

[5] *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[6] *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

[7] *Corbitt v. Vickers*, 929 F.3d 1304, 1307–08 (11th Cir. 2019).

[8] *Id.* at 1323.

them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell."[9]

II

In recent years, individual Justices have raised concerns with the Court's immunity caselaw.[10] Even so, the doctrine enjoys resounding, even hardening favor at the Court. Just three months ago, in a case involving the warrantless strip search of a four-year-old preschooler, a strange-bedfellows array of scholars and advocacy groups—perhaps the most ideologically diverse amici ever assembled—implored the Court to push reset.[11] To no avail. This much is certain: Qualified immunity, whatever its success at achieving its intended policy goals, thwarts the righting of many constitutional wrongs.

Perhaps the growing left–right consensus urging reform will one day win out. There are several "mend it, don't end it" options. The Court could revisit *Pearson*[12] and nudge courts to address the threshold constitutional merits rather than leave the law undeveloped.[13] Even if a particular plaintiff cannot

[9] *Zadeh*, 928 F.3d at 479–80 (Willett, J., concurring in part, dissenting in part).

[10] Four sitting Justices "have authored or joined opinions expressing sympathy" with assorted critiques of qualified immunity. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (including Justices Thomas, Ginsburg, Breyer, and Sotomayor, plus recently retired Justice Kennedy); *see, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam).

[11] *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019), *cert. denied*, No. 18-1173, 2019 WL 1116409, at *1 (May 20, 2019). As for congressional reform, Congress's refusal to revisit § 1983 suggests Article I acquiescence.

[12] 555 U.S. at 236.

[13] As observers have cautioned, unfettered *Pearson* discretion contributes to "constitutional stagnation" by impeding the development of precedent. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 23–24 (2015).

benefit (due to the "clearly established law" prong), this would provide moving-forward guidance as to what the law prescribes and proscribes. Short of that, the Court could require lower courts to explain *why* they are side-stepping the constitutional merits question.[14] Or the Court could confront the widespread inter-circuit confusion on what constitutes "clearly established law."[15] One concrete proposal: clarifying the degree of factual similarity required in cases involving split-second decisions versus cases involving less-exigent situations. The Court could also, short of undoing *Harlow* and reinstating the bad-faith prong, permit plaintiffs to overcome immunity by presenting *objective* evidence of an official's bad faith.[16] Not *subjective* evidence of bad faith, which *Harlow*, worried about "peculiarly disruptive" and "broad-ranging discovery," forbids.[17] And not unadorned *allegations* of bad faith. But objective evidence that the official actually realized that he was violating the Constitution.

Prudent refinements abound. But until then, as Judge Jones explains in today's principal dissent, the Supreme Court's unflinching, increasingly emphatic application of "clearly established law" compels dismissal.

III

I remain convinced that contemporary immunity jurisprudence merits "a refined procedural approach that more smartly—and fairly—serves its

---

[14] *Id.* at 7.

[15] *See, e.g.*, RICHARD FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1047–50 (7th ed. 2015) (noting the difficulties of applying the clearly-established-law test); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 n.68 (2015) ("[W]hether a right is found to be 'clearly established' is very much a function of which circuit (and I would add, which judge) is asking the question, and how that question is framed.").

[16] *Harlow v. Fitzgerald* prevents plaintiffs from relying on *subjective* evidence of bad faith. 457 U.S. 800, 815–16 (1982).

[17] *Id.* at 817.

intended objectives."[18] Yet I also remain convinced that a majority of the Supreme Court disagrees. My misgivings, I believe, are well advised. But we would be ill advised to treat the reform of immunity doctrine as something for this court rather than that Court.[19]

For these reasons, I respectfully dissent.

---

[18] *Zadeh*, 928 F.3d at 481 (Willett, J., concurring in part, dissenting in part).

[19] As for the sidelong critique of me in the dissenting opinion of Judges Ho and Oldham, it is, respectfully, a pyromaniac in a field of straw men. I have not raised originalist concerns with qualified immunity. My concerns, repeated today, are doctrinal, procedural, and pragmatic in nature. Nor has my unease with modern immunity practice led me to wage "war with the Supreme Court's qualified-immunity jurisprudence." I am a fellow dissenter today, notwithstanding my unease, precisely because I believe the Court's precedent compels it. In short, I have not urged that qualified immunity be repealed. I have urged that it be rethought. Justice Thomas—no "halfway originalist"—has done the same. *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

JAMES C. HO and ANDREW S. OLDHAM, Circuit Judges, joined by JERRY E. SMITH, Circuit Judge, dissenting:

Apparently SUMREVs mean nothing.

In *Luna v. Mullenix*, 773 F.3d 712 (5th Cir. 2014), we sent a state trooper to a jury "in defiance" of "the concept and precedents of qualified immunity." 777 F.3d 221, 222 (5th Cir. 2014) (Jolly, J., dissenting from denial of rehearing en banc). The Supreme Court summarily reversed us. *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam). Then they GVR'd us in *this* case and ordered us to reconsider our obvious error in light of *Mullenix*.

The en banc majority instead doubles down. That is wrong for all the reasons Judge Jones gives in her powerful dissent, which we join in full. We write to emphasize the en banc majority's unmistakable message: Four years after *Mullenix*, nothing has changed in our circuit.

I.

The Supreme Court has not hesitated to redress similar intransigence from our sister circuits—often through the "extraordinary remedy of a summary reversal." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (quotation omitted). *See*, *e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam) (summarily reversing the Ninth Circuit); *Kisela*, 138 S. Ct. 1148 (per curiam) (same); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (reversing the D.C. Circuit); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) (summarily reversing the Tenth Circuit); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) (reversing the Ninth Circuit); *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam) (summarily reversing the Third Circuit); *Wood v. Moss*, 572 U.S. 744 (2014) (reversing the Ninth Circuit); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (reversing the Sixth Circuit); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam) (summarily reversing the Ninth Circuit); *Reichle v. Howards*, 566 U.S. 658 (2012) (reversing the Tenth Circuit);

Ryburn v. Huff, 565 U.S. 469 (2012) (per curiam) (summarily reversing the Ninth Circuit); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (same); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam) (same).

In each of these cases, the Supreme Court reminded lower courts that qualified immunity requires us not only to identify a clearly established rule of law, but to do so with great specificity. Everyone agrees, of course, that Ryan Cole has a constitutional right not to be seized unreasonably. But "that is not enough" to subject a police officer to the burdens of our civil litigation system. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The Supreme Court has "repeatedly told courts . . . not to define clearly established law at [that] high level of generality." *al-Kidd*, 563 U.S. at 742. Rather, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 136 S. Ct. at 308 (citation omitted).

Only by identifying a specific and clearly established rule of law do we ensure that the officer had "fair notice"—"in light of the specific context of the case, not as a broad general proposition"—that his or her *particular* conduct was unlawful. *Brosseau*, 543 U.S. at 198 (citation omitted). *See also*, *e.g.*, *Sheehan*, 135 S. Ct. at 1776 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (same); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (same).

So where is our clearly established law at issue here? Unbelievably, the en banc majority says we don't need any. That's so, they say, because "[t]his is an obvious case." *Ante*, at 16. That's obviously wrong for three reasons.

First, the Supreme Court to date has *never* identified an "obvious" case in the excessive force context. And the majority thinks this is the first? A case where a mentally disturbed teenager—who has a loaded gun in his hand with

his finger on the trigger; who has repeatedly refused to be disarmed; who has threatened to kill anyone who tries to disarm him; who poses such a deadly threat that police have been deployed to protect innocent students and teachers at his nearby high school—turns toward the officers just ten to twenty feet away, giving them only seconds to decide what to do in response. Really?

Second, the Supreme Court has granted qualified immunity in much tougher cases than this one. In *Plumhoff*, for example, officers fired 15 shots and killed two *unarmed* men who fled a traffic stop. In *Brosseau*, an officer shot an *unarmed* man who refused to open his truck window. In *Kisela*, officers shot a woman who was hacking a tree with a kitchen knife. In *Sheehan*, officers shot an old woman holding a kitchen knife in an assisted-living facility. In all of these cases, the Court held the officers were entitled to qualified immunity.

Third, this is *Mullenix* all over again. There our court relied on clearly established law as articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* involved an unarmed man who fled from police after stealing $10. An officer fatally shot Garner in the back of the head as he attempted to climb a fence. Our court then extended *Garner* to Mullenix's case—which involved a man who led police on a high-speed car chase after violating his probation. A state trooper attempted to end the chase by shooting the speeding car's engine block—but he missed the engine, hit the driver in the face, and killed him. *See Luna*, 773 F.3d at 719–20 (discussing *Garner*). The Supreme Court summarily reversed us because—as should be painfully obvious from the Court's serial reversals in this area—that's not how qualified immunity works. *See Mullenix*, 136 S. Ct. at 308–09 (holding our court erred in our extrapolation of *Garner* to

new facts). And they GVR'd us *in this very case* to fix our mistakes in light of *Mullenix*. The Supreme Court's message could not be clearer.[1]

Still, somehow, today's majority does not get it. Here, as in *Mullenix*, the majority attempts to rely on *Garner* to establish the governing rule of law. From *Garner*, the majority somehow divines a rule that an officer cannot shoot a mentally disturbed teenager holding a gun near his school. This is demonstrably erroneous. In fact, one thing that unites the Supreme Court's recent reversals in cases involving qualified immunity and excessive force is the attempt by lower courts to extrapolate *Garner* to new facts. *See Mullenix*, 136 S. Ct. at 308–09; *Scott v. Harris*, 550 U.S. 372, 381–82 (2007) (same); *Allen v. City of West Memphis*, 509 F. App'x 388, 392 (6th Cir. 2012) (extrapolating *Garner*), *rev'd by Plumhoff*, *supra*.

Moreover, there are additional parallels between *Mullenix* and this case. Consider the supposed requirement that an officer take some sort of non-lethal measure before using lethal force. In *Mullenix*, our court used the power of 20-20 hindsight to say that a reasonable officer should have used spike strips to

---

[1] The Supreme Court issues GVRs when, as here, legal error infects the judgment below. *See*, *e.g.*, *Hicks v. United States*, 137 S. Ct. 2000, 2000–01 (2017) (Gorsuch, J., concurring) (defending GVR because "[a] plain legal error infects this judgment" and because petitioner "enjoys a reasonable probability of success" in getting judgment reversed on the merits); *id.* at 2002 (Roberts, C.J., dissenting) ("[W]ithout a determination from this Court that the judgment below was wrong or at least a concession from the Government to that effect, we should not, in my view, vacate the Fifth Circuit's judgment."). As the cert petition explained, our panel denied qualified immunity "based on the same rationale" on "which this Court reversed in *Mullenix*." Pet. at i, 2016 WL 4987324. We think it obvious the Supreme Court GVR'd because it agreed. And tellingly, the majority does not offer an alternative theory to explain the GVR. We ignore the Court's message at our peril. *See, e.g.*, *Smith v. Mitchell*, 437 F.3d 884 (9th Cir. 2006) (granting habeas relief to a state prisoner because the evidence was insufficient to prove she shook her grandbaby to death); *Patrick v. Smith*, 550 U.S. 915 (2007) (GVR'ing i/l/o *Carey v. Musladin*, 549 U.S. 70 (2006)); *Smith v. Patrick*, 519 F.3d 900 (9th Cir. 2008) (again granting habeas relief); *Patrick v. Smith*, 558 U.S. 1143 (2010) (GVR'ing i/l/o *McDaniel v. Brown*, 558 U.S. 120 (2010)); *Smith v. Mitchell*, 624 F.3d 1235 (9th Cir. 2010) (again granting habeas relief); *Cavazos v. Smith*, 565 U.S. 1 (2011) (SUMREV'ing).

stop the chase. *See* 773 F.3d at 720–21. The Supreme Court emphatically rebuked us. *See* 136 S. Ct. at 310. They told us that an officer does not have to expose himself or other officers to harm when the suspect has already refused to be disarmed. That meant Trooper Mullenix did not have to wait to see if the fleeing felon would shoot or run over the officer manning the spike strips. *See id.* at 310–11.

So too here. In this case, the majority complains that the officers did not provide sufficient warning. But there was no clearly established law requiring Officers Cassidy and Hunter to announce themselves—while caught in an open and defenseless position—and hope not to get shot. That is particularly true here because officers previously ordered Cole to put down his gun, he refused, and he threatened to kill anyone who attempted to disarm him.

And in *Mullenix*, as here, we accused the police officers of being cowboys. Earlier on the day of the shooting, Trooper Mullenix received a negative performance review for "not being proactive enough as a Trooper"; so in the aftermath of the shooting, Mullenix said to his supervisor, "How's that for proactive?" 773 F.3d at 717; *see also* 136 S. Ct. at 316 (Sotomayor, J., dissenting). The panel opinions and en banc majority opinion in this case likewise seethe with innuendo that Officers Hunter and Cassidy were wannabe cowboys looking for a gunfight. We are in no position to make such accusations. No member of this court has stared down a fleeing felon on the interstate or confronted a mentally disturbed teenager who is brandishing a loaded gun near his school. And the *Mullenix* Court held that the qualified-immunity standard gives us no basis for sneering at cops on the beat from the safety of our chambers. *See* 136 S. Ct. at 310–11 (majority op.) (citing Brief for National Association of Police Organizations et al. as *Amici Curiae*). Yet here we are. Again.

II.

The majority cannot dodge responsibility for today's decision by pointing to the limits of appellate jurisdiction. *See ante*, at 13–14 (majority op.); *ante*, at 1 (Elrod, J., concurring). We obviously lack interlocutory appellate jurisdiction to review the *genuineness* of an officer's fact dispute. *See*, *e.g.*, *Johnson v. Jones*, 515 U.S. 304, 313–14 (1995); *Kinney v. Weaver*, 367 F.3d 337, 346–47 (5th Cir. 2004) (en banc) (applying *Johnson v. Jones*).

But that does nothing to defeat jurisdiction where, as here, the factual disputes are *immaterial*. That is why the Supreme Court repeatedly has rejected such no-jurisdiction pleas from those who wish to deny qualified immunity. *See, e.g.*, *Plumhoff*, 572 U.S. at 771–73; *id.* at 773 (noting existence of genuine fact dispute did not defeat appellate jurisdiction in *Scott v. Harris*).

All the fact disputes in the world do nothing to insulate this *legal* question: Is this an "obvious case" under *Garner*—notwithstanding a mountain of SUMREVs, GVRs, and pointed admonitions from the Supreme Court? The majority says yes. *Ante*, at 16. They obviously must have jurisdiction to say so. With respect, it makes no sense to say we lack jurisdiction to disagree with them.

III.

What explains our circuit's war with the Supreme Court's qualified-immunity jurisprudence? Two themes appear to be at play.

First, the majority suggests we should be less than enthused about Supreme Court precedent in this area, because it conflicts with plaintiffs' jury rights. To quote the panel: "Qualified immunity is a judicially created doctrine calculated to protect an officer from trial before a jury of his or her peers. At bottom lies a perception that the jury brings a risk and cost that law-enforcement officers should not face, that judges are preferred for the task—a

judgment made by appellate judges." *Cole v. Carson*, 905 F.3d 334, 336 (5th Cir. 2018). Or in the words of today's majority: "The Supreme Court over several years has developed protection from civil liability for persons going about their tasks as government workers" (a rather curious way to describe the men and women who swear an oath to protect our lives and communities). *Ante*, at 2. But "the worker's defense" must yield, in cases like this, "in obeisance to [the] constitutional mandate" of a jury trial. *Id.*

We appreciate the majority's candor. But inferior court judges may not prefer juries to the Justices.

Second, some have criticized the doctrine of qualified immunity as ahistorical and contrary to the Founders' Constitution. *Ante* at 2 (suggesting denial of qualified immunity is commanded by "the Founders"); *compare* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49–61 (2018), *with* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856–63 (2018); *see also Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante), *revised on petition for reh'g en banc*, 928 F.3d 457, 473 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

As originalists, we welcome the discussion. But separate and apart from the fact that we are bound as a lower court to follow Supreme Court precedent, a principled commitment to originalism provides no basis for subjecting these officers to trial.

The originalist debate over qualified immunity may seem fashionable to some today. But it is in fact an old debate. Over two decades ago, Justices Scalia and Thomas noted originalist concerns with qualified immunity. But they also explained how a principled originalist would re-evaluate established

doctrines. *See Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., joined by Thomas, J., dissenting).

A principled originalist would not cherry pick which rules to revisit based on popular whim. A principled originalist would fairly review decisions that favor plaintiffs as well as police officers. As Justice Scalia explained in a dissent joined by Justice Thomas, a principled originalist would evenhandedly examine disputed precedents that *expand*, as well as limit, § 1983 liability:

> [O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted . . . . [But] [t]he § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. I refer, of course, to the holding of *Monroe v. Pape*, 365 U.S. 167 (1961), which converted an 1871 statute covering constitutional violations committed "*under color of* any statute, ordinance, regulation, custom, or usage of any State," Rev. Stat. § 1979, 42 U.S.C. § 1983 (emphasis added), into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law.

Id. at 611.

Justices Scalia and Thomas ultimately concluded that it is better to leave things alone than to reconfigure established law in a one-sided manner. If we're not willing to re-evaluate all § 1983 precedents in a balanced and principled way, then it "is perhaps just as well" that "[w]e find ourselves engaged . . . in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote." *Id.* at 611–12.

Translation: If we're not going to do it right, then perhaps we shouldn't do it at all.

Subjecting these officers to trial on originalist grounds is precisely the unprincipled practice of originalism that Justices Scalia and Thomas railed against. And not just for the procedural reasons they identified in *Crawford-El*. What about the original understanding of the Fourth Amendment, which the plaintiffs here invoke as their purported substantive theory of liability in this case? Does the majority seriously believe that it is an "unreasonable seizure," *as those words were originally understood at the Founding*, for a police officer to stop an armed and mentally unstable teenager from shooting innocent officers, students, and teachers?

And make no mistake: Principled originalism is not just a matter of intellectual precision and purity. There are profound practical consequences here as well, given the important and delicate balance that qualified immunity is supposed to strike. As the Supreme Court has explained, qualified immunity ensures that liability reaches only "the plainly incompetent or those who knowingly violate the law." *Mullenix*, 136 S. Ct. at 308 (quotation omitted). And absent plain incompetence or intentional violations, qualified immunity must attach, because the "social costs" of any other rule are too high:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alterations and quotations omitted); *see also*, *e.g.*, *Sheehan*, 135 S. Ct. at 1774 n.3 (noting "the importance of qualified immunity to society as a whole").

For those who have expressed concerns about a "one-sided approach to qualified immunity," *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *see also Zadeh*, 902 F.3d at 499 & n.10 (Willett, J., concurring dubitante) (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)); 928 F.3d at 480 & n.61 (Willett, J., concurring in part and dissenting in part) (same), look no further than the majority opinion. The majority undoes the careful balance of interests embodied in our doctrine of qualified immunity, stripping the officers' defenses without regard to the attendant social costs.[2]

Now *that* is a one-sided approach to qualified immunity as a practical matter. And as Justices Scalia and Thomas have observed, it's also a one-sided approach to qualified immunity as an originalist matter: It abandons the defense without also reconsidering the source and scope of officers' liability in the first place. *See Crawford-El*, 523 U.S. at 611–12 (Scalia, J., joined by Thomas, J., dissenting). To quote Justice Alito: "We will not engage in this halfway originalism." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2470 (2018). *See also id.* (criticizing litigants for "apply[ing] the Constitution's supposed original meaning only when it suits them"); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J.,

---

[2] Those social costs are particularly stark today given widespread news of low officer morale and shortages in officer recruitment. *See, e.g.*, Ashley Southall, *When Officers Are Being Doused, Has Police Restraint Gone Too Far?*, N.Y. TIMES, July 25, 2019, at A22; Martin Kaste & Lori Mack, *Shortage of Officers Fuels Police Recruiting Crisis*, NPR (Dec. 11, 2018, 5:05 AM), https://n.pr/2Qrbrnq; Jeremy Gorner, *Morale, Policing Suffering in Hostile Climate, Cops Say; 'It's Almost Like We're the Bad Guys,' Veteran City Officer Says*, CHI. TRIB., Nov. 27, 2016, at 1.

concurring in the judgment) ("[I]t would be freakish to single out the provision at issue here for special treatment.").[3]

* * *

Our circuit, like too many others, has been summarily reversed for ignoring the Supreme Court's repeated admonitions regarding qualified immunity. There's no excuse for ignoring the Supreme Court again today. And certainly none based on a principled commitment to originalism.

Originalism for plaintiffs, but not for police officers, is not principled judging. Originalism for me, but not for thee, is not originalism at all. We respectfully dissent.

---

[3] In a footnote, Judge Willett notes that his criticism of the Supreme Court's qualified immunity precedents is not based on originalist grounds. *Ante*, at 4 n.19. To our minds, that makes his criticism harder, not easier, to defend. If his concerns are based on practical and not originalist considerations, then he should address them to the Legislature, rather than attack the Supreme Court as "one-sided." *Zadeh*, 902 F.3d at 499 & n.10 (Willett, J., concurring dubitante) (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)). He also invokes Justice Thomas's opinion in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017). But that opinion cites Justice Scalia's opinion in *Crawford-El*, which (as we explained above) warns qualified immunity skeptics not to engage in halfway originalism.

No. 14-10228 c/w No. 15-10045

STUART KYLE DUNCAN, Circuit Judge, joined by SMITH, OWEN, HO, and OLDHAM, Circuit Judges, dissenting:

The majority opinion overlooks or omits undisputed material facts showing that any reasonable officer would have viewed Ryan Cole as a severe threat. Before the shooting, the defendant officers: (1) were tracking a distraught suspect wandering through the woods armed with a loaded 9mm semi-automatic handgun; (2) who had earlier that morning off-loaded a cache of weapons and ammunition at a friend's house; (3) who had already refused to give up his pistol when confronted by the police; and (4) who had threatened to "shoot anyone who came near him." Cole did not dispute those facts and, indeed, convinced the district court they were irrelevant. Joining Judge Jones' dissent in full, I respectfully dissent on the additional grounds provided by these pre-encounter facts.

No one doubts some of the events on October 25, 2010—when the officers violently encountered Cole in the woods near Garland, Texas—are disputed. The question is whether those disputes are *material*. *See, e.g.*, *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 483 (5th Cir. 2001) ("threshold issue" on qualified immunity appeal "is whether the facts the district judge concluded are *genuinely disputed* are also *material*"). Judge Jones' dissent compellingly shows they are not: Resolving all disputes in Cole's favor, the undisputed facts still show the officers violated no clearly established law. Jones Dissent at 2–3, 11–22. The majority thus errs by concluding that "competing factual narratives" bar it from deciding qualified immunity. Maj. at 3.

I write separately to emphasize what led up to the shooting, and also to explain why those undisputed events provide further reasons to reverse. The majority and Judge Jones focus on the shooting itself, as did the district court. But the prelude to the shooting gives unavoidable context for evaluating the

officers' actions.[1] Surprisingly, the district court did not even analyze those stage-setting facts, which it mistakenly deemed irrelevant. *See Cole v. Hunter,* No. 3:13-CV-02719-O, 2014 WL 266501, at *13 n.5 (N.D. Tex. Jan. 24, 2014); *Cole v. Hunter*, 68 F. Supp. 3d 628, 642–43 (N.D. Tex. 2014). So, to assess their impact, we must "undertake a cumbersome review of the record." *Johnson v. Jones*, 515 U.S. 304, 319 (1995). That extra work is sometimes imperative, as here, "to ensure that the defendant's right to an immediate appeal on the issue of materiality is not defeated solely on account of the district court's failure to articulate its reasons for denying summary judgment." *Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. 1998), *denying reh'g in* 130 F.3d 96 (5th Cir. 1997).

This detailed record review (*see* Part I) compels two conclusions (*see* Part II). First, the district court erred by excluding the undisputed events before the shooting. That error—based on a misreading of our precedent—truncated the qualified immunity analysis. That alone requires reversing the summary judgment denial. Second, in light of those pre-encounter facts, the majority's insistence that this is an "obvious case" collapses. Maj. at 16. Given what confronted the officers, the majority cannot say what they did was "obviously" unlawful. The only thing obvious is that no case told the officers, clearly or otherwise, how to respond when they met Cole that morning, emerging from the woods with his finger on the trigger of a loaded gun.

By denying qualified immunity and making the officers run the gauntlet of trial, the majority sets a precedent that "seriously undermines officers' ability to trust their judgment during those split seconds when they must

[1] *See, e.g., Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (courts "must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer"); *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (whether a "particular" seizure was justified depends on "the totality of the circumstances").

decide whether to use lethal force." *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting).

I.

The majority begins "around 10:30 a.m.," less than an hour before the shooting. Maj. at 4. But events began to unfold much earlier.[2] Around 2 a.m. that morning, Cole knocked on the door of his friend, Eric Reed Jr., to show him "a 44 magnum revolver." Awakened by the knocking, Eric Jr.'s father (Eric Sr.) left his room, saw Cole with the gun, and told him to leave. Eric Jr. convinced Cole to leave the revolver because "he [did not] need to be carrying a weapon around."

Around 8 a.m., Eric Jr. gave his father Cole's gun. Eric Sr., a retired Sachse police officer, then notified Officer Vernon Doggett, who came to the Reeds'. Eric Jr. told his father and Doggett that "[Cole] told him there were more guns on the side of the house." There, they found "a double barrel shot gun with some shot gun shells and what appeared to be a plastic bag with 9mm bullets," which Doggett secured. Eric Jr. also explained Cole "had broken up with his girlfriend and was going to kill himself and his girlfriend."

Doggett was a resource officer for Sachse High School, where Cole and his girlfriend attended. He contacted Sergeant Garry Jordan, told him about the guns, and asked to meet at the school. Doggett reported that Cole "may be at school with a 9mm handgun." Another officer checked whether Cole was in class, and Jordan searched the parking areas for Cole.

---

[2] All of these facts come from reports and transcriptions of radio transmissions made within a day or two of the incident. None come from affidavits submitted by the officers years later. And, as explained below, none of these pre-encounter facts was disputed by Cole or analyzed by the district court.

Not finding him, Jordan went to Coles' and spoke to his parents. He learned that, the previous evening, officers had responded to a disturbance there. Officers had found Cole's father "holding Ryan down" because "he did not want [Cole] to leave the residence with the pocket knife that he had." He said "his son had a wild look in his eye and . . . had been smoking K2." While the officers found there had been no assault, all agreed it was "a good idea for Cole to stay the night with a friend." The Coles had not seen Ryan since then but reported he had "apparently returned home during the night and had opened the gun safe, removed an unknown amount [*sic*] of weapons, and reset the combination."

Meanwhile, Eric Jr. noticed Cole was back. He asked Cole if he was armed and Cole showed him a "38 revolver" and a "9mm semiauto." He convinced Cole to give him the revolver, but Cole told him he was not "getting the 9mm." Cole also said that the 9mm was loaded and that he did not "wanna use it on [Eric Jr.]" Cole stated that "he would shoot anyone who came near him." Cole left, and Eric Jr. called his father, who called the police.

Around 10:49 a.m., Officer Stephen Norris radioed "all available Sachse officers" to respond to the area of the Reed residence. He reported Cole was "observed running south of the location with 3 weapons, one a loaded 9mm." He also reported Cole was "irate and distraught and stated he would shoot anyone who came near him." Around the same time, Sachse Officer Michael Hunter was dispatched to assist Jordan at the Coles', but on arrival he was told by Sachse Officer Carl Carson he was not needed. As Hunter was leaving, he heard Norris' call advising Cole was "in the area . . . with a gun." Hunter

stated he "did not know the specifics of the call at this point," but proceeded to the Reeds' residence. In response to Norris' call, Jordan also left the Coles'.

Sachse Officer Martin Cassidy also received Norris' dispatch and went to the area Norris indicated. He was given Cole's description and advised that Cole was "armed with at least one handgun and possibly three." Cassidy spoke with Norris on the phone about "the proximity of Armstrong Elementary School to the location where [Cole] was last seen." Cassidy therefore went to check on the school and a nearby shopping center for any signs of Cole.

Meanwhile, Hunter arrived at the Reeds', where he met Jordan and Carson. Hunter overheard Eric Jr. say he had gotten "one gun" from Cole but that Cole had left "armed with a 9mm handgun." "Hunter put [Cole's] description out to other officers," and then he and Carson went to search for Cole. After speaking with the officers, Eric Jr. checked for more guns and found "6 firearms around [his] house."

Jordan then observed Officers Elliott and Sneed pass by in a patrol unit. Those officers found Cole nearby. Elliott reported that "Sneed . . . advised [Cole] to show his hands." Instead, Cole "reached into his waist band and pulled a pistol and placed it to his head after about three steps and refused to obey Lt. Sneed['s] commands." When Jordan arrived, Sneed "drew his duty weapon and yelled at [Cole] to drop the weapon," but Cole refused. As Cole continued eastbound towards Highway 78, Sneed "warned [Cole] that [he] would shoot him in the back if he tried to get to the highway or walk toward any innocent bystanders." Cole "would occasionally turn his head and yell obscenities at [Sneed]." Two other officers then parked "directly in front of [Cole's] path." To avoid them, Cole turned "northbound and began walking the railroad tracks." Jordan was constantly updating dispatch about Cole's movements. "Suddenly, [Sneed] observed [Cole] cut eastbound and run up a hill and into the brush

towards Highway 78." Dispatch reported that Cole was "off tracks coming through tree lines towards [Highway] 78."

Hunter, Carson, and Cassidy were monitoring Cole's movements from the dispatches. They arrived separately at the part of Highway 78 where Cole was thought to be. Hunter noted "[Cole] appeared to be walking towards the railroad track," and he advised Carson "[they] needed to go out to the highway and intercept [him]." Cassidy advised Carson to get out his taser and follow Cassidy. Hunter "parked further south on Highway 78 as [he] figured [Cole] would be on the railroad track paralleling Highway 78 at about [his] location." He guessed correctly. As Hunter "began to look for cover since [he] was out in the open," Cole "walked out from the brush approximately 10 to 20 feet from [Hunter]."

What followed was the shooting.

II.

Cole did not dispute these stage-setting events in opposing summary judgment. To the contrary, he argued any "prior events" before the shooting were "irrelevant." The district court agreed, excluding from its qualified immunity analysis the "events" from "earlier that morning," *Cole*, 2014 WL 266501, at *13 n.5, and focusing solely on what happened "immediately before and during the shooting." *Cole*, 68 F. Supp. 3d at 644. That mistake skewed the district court's analysis and provides yet another reason why we should reverse.

First, the district court erred by excluding everything that happened before the officers' five-second encounter with Cole. That approach artificially truncates the qualified immunity analysis. In assessing qualified immunity, we "[c]onsider[ ] the specific situation confronting [officers]," *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015), which "must be judged from

the perspective of a reasonable officer on the scene[.]" *Graham v. Connor*, 490 U.S. 386, 396 (1989). A "reasonable officer" does not shape his decisions based only on the seconds when he confronts an armed suspect; instead, he acts based on *all* relevant circumstances, including the events leading up to the ultimate encounter. *See, e.g., Escobar v. Montee*, 895 F.3d 387 (5th Cir. 2018) (courts evaluate excessive force claims "from the perspective of a reasonable officer on the scene, paying 'careful attention to the facts and circumstances of each particular case'") (quoting *Graham*, 490 U.S. at 396). That is precisely how the Supreme Court has instructed lower courts to assess whether force is excessive: The seminal case, *Tennessee v. Garner*, asks whether a seizure was justified, based not only on the immediate seizure, but on "the totality of the circumstances" facing the officers. 471 U.S. 1, 9 (1985). And qualified immunity cases, both from the Supreme Court and our court, routinely consider the background facts that shaped an officer's confrontation with a suspect in order to evaluate the officer's ultimate use of force.[3]

The district court's sole contrary authority was our statement in *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011), that the excessive force inquiry "is confined to whether the [officer or another person] was in danger *at the moment of the threat.*" But the district court overread *Rockwell*. We made that statement in *Rockwell* to reject the notion that officers' negligence *before*

---

[3] *See, e.g., Mullenix v. Luna*, 136 S. Ct. 305, 306 (2015) (assessing officer's shooting of suspect during car chase beginning with events preceding the "18-minute chase"); *Plumhoff v. Rickard*, 572 U.S. 765, 768–70 (2014) (assessing officer's shooting of suspects in Memphis, Tennessee after lengthy car chase beginning with traffic stop in "West Memphis, Arkansas"); *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004) (evaluating officer's shooting of fleeing suspect beginning with events "[o]n the day before the fracas"); *Colston*, 130 F.3d at 100 (determining officer's failure to warn was not objectively unreasonable "[i]n light of the totality of the circumstances facing [the officer]") (citing *Garner*, 471 U.S. at 10).

a confrontation determines whether they properly used deadly force *during* the confrontation. *See id.* at 992–93 (rejecting argument that "circumstances surrounding a forced entry" bear on "the reasonableness of the officers' use of deadly force"). The cases *Rockwell* cited say that plainly. *See, e.g., Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) ("[R]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm.").[4] And the key case *Rockwell* quoted for the "moment-of-the-threat" point recognized that pre-confrontation events could "set the stage for what followed in the field." *Bazan*, 246 F.3d at 493.

By misreading our cases, the district court blinded itself to a rich vein of facts—facts Cole did not dispute below—that round out the picture of the officers' violent encounter with Cole. At a minimum, that error alone requires reversing the denial of summary judgment and remanding for reconsideration of the officers' actions in light of *all* relevant undisputed facts. *See, e.g., White v. Balderama*, 153 F.3d 237, 242 (5th Cir. 1998) (concluding "limited remand" was appropriate given "lack of specificity in . . . district court's order denying summary judgment on the basis of qualified immunity").

Second, the undisputed pre-encounter events underscore why, contrary to the majority's view, this is far from an "obvious case." Maj. at 16. An "obvious case," the Supreme Court has explained, is one where an officer's actions are

---

[4] Our cases continue to apply the *Rockwell* "moment-of-the-threat" principle in this way. *See, e.g., Shepherd v. City of Shreveport*, 920 F.3d 278 (5th Cir. 2019) (explaining that, because the excessive force inquiry is "confined to whether the officer was in danger at the moment of the threat[,] . . . [t]herefore, any of the officers' actions leading up to the shooting are not relevant") (emphasis added) (internal quotes and citation omitted); *Harris v. Serpas*, 745 F.3d 767, 772–73 (5th Cir. 2014) (same) (discussing *Rockwell*).

plainly unlawful under a generalized legal test, even if those actions do not contravene a "body of relevant case law." *Brosseau*, 543 U.S. at 199 (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)); *see also, e.g., White v. Pauly*, 137 S. Ct. 548, 552 (2017) (an "obvious case" means that "in the light of pre-existing law the unlawfulness [of the officer's actions] must be apparent") (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (cleaned up). As I understand the majority opinion, it believes this is an obvious case because a jury could find that (1) Cole "posed no threat" to the officers; (2) the officers fired "without warning"; and (3) the officers had "time and opportunity" to warn Cole, but did not. Maj. at 15. According to the majority, this scenario would plainly violate *Garner*'s generalized test that an officer may not use deadly force to apprehend a suspect who "poses no immediate threat to the officer," unless he warns the suspect "where feasible." *Id.* (quoting *Garner*, 471 U.S. at 11–12).

Judge Jones' dissent shows that, even resolving all disputed facts in Cole's favor, the officers did not "obviously" violate *Garner*'s generalized test during the immediate shooting—that is, when in the space of five seconds at most, the officers met Cole at a distance of 10–20 feet as he backed out of the woods, still armed, and began to turn. Jones Dissent at 11–12. But if we include the undisputed facts leading up to the shooting, the notion that this is an "obvious case" crumbles. To believe that, we would have to blind ourselves to the facts that (1) the officers were searching for an irate, distraught suspect; (2) who was wandering through the woods armed with a loaded semi-automatic handgun; (3) who had refused police demands to turn over his weapon; (4) who had just that morning deposited a cache of weapons and ammunition at his friend's house; and (5) who had threatened to "shoot anyone who came near him." Those were the "totality of the circumstances" facing the officers, *Colston*, 130 F.3d at 100, and they were not disputed by Cole or the district court. Given

those circumstances, the officers might have taken any number of actions when they met Cole in the woods that morning—they might have warned him, or shot him, or shot in the air, or retreated, or remained frozen in place to see what he would do. But to say it is "obvious" what they should have done is to denude the concept of an "obvious case" of any meaning.

Once stripped of the conceit that this is an "obvious case," the majority has nothing left to justify its holding. The Supreme Court has bluntly told us that, outside the "obvious case" scenario, "*Garner* . . . do[es] not by [itself] create clearly established law[.]" *White v. Pauly*, 137 S. Ct. at 552. And, of course, the majority does not try to claim that the facts of *Garner* are anything like this case. In *Garner*, a police officer shot a fleeing, unarmed burglar in the back of the head. The officer admitted he did not even suspect the burglar was armed. *See* 471 U.S. at 3 (noting the officer "saw no sign of a weapon" at the time he shot and, afterwards, admitted "[he] was 'reasonably sure' and 'figured' that [the suspect] was unarmed"). Apples and oranges does not capture the chasm between that case and this one.

The majority does claim that our 1996 decision in *Baker v. Putnal*, "clearly established" that the officers' conduct here was unlawful. Maj. at 16 (citing 75 F.3d 190, 193 (5th Cir. 1996)). That is mistaken. In *Baker*, Officer Putnal was patrolling a crowded beach area when gunfire erupted. *Id.* Witnesses directed Putnal "toward a red car which they said contained the shooters." *Id.* He approached that car, but then saw two people sitting in another vehicle, a truck. *Id.* One of the truck's passengers, Wendell Baker, "turned in Putnal's direction . . . [and] Putnal shot and killed [him]." *Id.* While a pistol was recovered from the truck, the plaintiffs denied Baker "was holding a pistol" when shot. *Id.* at 196. In other words, a jury could have found Baker was not holding a gun when Putnal killed him.

It is not hard to grasp the key difference between *Baker* and this case. When shot, Baker was *possibly not even holding a gun*. When shot, Cole was *undisputedly holding a gun*. Imagine this conversation between a police officer and the police department's lawyer:

> OFFICER: I heard the Fifth Circuit just decided this *Baker* case. What does it tell me I should or shouldn't do in the field?
>
> LAWYER: Well, *Baker* says you lose qualified immunity if you shoot someone sitting in a car doing nothing more threatening than just turning in your direction. In other words, someone you don't even see holding a weapon.
>
> OFFICER: Makes sense. But tell me this. What if the person I approach *is* holding a gun?
>
> LAWYER: Well, *Baker* doesn't speak clearly to that situation. I mean, the jury in *Baker* could have found the guy didn't even have a gun in his hand when the officer shot him.

In other words, contrary to the majority's view, *Baker* could not have "established clearly that Cassidy's and Hunter's conduct . . . was unlawful" when they shot Cole as he emerged from the woods with his finger on the trigger of a loaded gun. Maj. at 16. To guide officers in the field, a controlling precedent must be "sufficiently clear that every reasonable [officer] would have understood that what he is doing violates" the Constitution. *Mullenix*, 136 S. Ct. at 308 (cleaned up). *Baker* does not come close.

The officers deserve qualified immunity on the excessive force claims. I respectfully dissent.

GOVERNMENTAL LIABILITY

Officer Accountability

Law Enforcement Use-of-Force "Standards," Degrees of Certainties, and Scientific Reliabilities

By Michael Brave

The standards governing officer use-of-force are often misunderstood or misinterpreted. Clarifying these misperceptions may resolve many instances of standards mistakes currently plaguing law enforcement agency accountability.

During his first week on patrol, Law Enforcement Officer Smith is emergency dispatched to a naked male acting crazy, who just snapped, attacking cars on the highway. Officer Smith and other law enforcement officers respond to the call, a violent struggle with several less lethal force options and restraint applications ensues, and while in Emergency Medical Services care, the man suffers unexpected, sudden, cardiac death. In the aftermath, several important pieces of evidence are overlooked and lost forever; no one creates an objective, annotated incident timeline; neutralizes conflicts or myths; identifies and synopsizes all key issues and concepts; or properly applies human factors limitations. The medical examiner fails to consider numerous potential causes or contributors to the death; fails to identify, support, or cite a specific mechanism of alleged causation; wholly fails to base all findings on the greater weight of current scientifically reliable literature to a reasonable degree of medical and scientific certainty; rules the death a "homicide," even when the officers' actions were not causal; and lists the officers' actions as causal or contributory to the death. Officer Smith is criminally



■ Michael Brave, LAAW International LLC, in Mesa, Arizona, is an attorney, consultant, trainer, and sworn officer. He serves on the DRI Government Enforcement and Corporate Compliance and Governmental Liability Committees. His experience includes a wide-range of comprehensive law enforcement risk and liability and litigation management services. He has been retained as an expert in 250-plus, and has been involved in 600-plus, proceedings involving international inquests, state and federal civil rights issues, and others.

prosecuted, civilly sued, and terminated from employment.

The post-incident decision makers—the investigators, the medical examiner, the law enforcement agency executives, the municipal legislative body, the prosecutors—fail to capture and preserve several key pieces of objective evidence; fail to capture and create an accurate objective timeline cited to the evidence; fail to consider human factors; inappropriately apply several different standards of care and degrees of certainty; and fail to apply current scientifically and reliably based general and specific causations. The outcomes are personally devastating to (former) Officer Smith, and extremely costly to the city, community, and society.

The point of this story is the extreme importance of getting the very rare incident "right" before, during, and after the incident, the first time, including properly establishing policy and training standards; collecting objective evidence; and ensuring that autopsy and investigatory conclusions are solidly grounded in the greater weight of current established science, to the correctly applied degrees of certainties and applied to the appropriate standards of care. Sadly, while very rare, there are too many instances where this approach does not occur. Officer Smith does not care about how "very rare" such a scenario is; his new career, his future, his family, perhaps his freedom and his life are over.

In performing their duties, law enforcement officers regularly risk their well-being, lives, careers, families' futures, and their freedoms. Law enforcement officers' use-of-force decisions and incident outcomes, as well as detentions, arrests, mental health interventions, vehicle pursuit decisions, and other actions and inactions, are all subject to "standards." When a law enforcement officer "violates" one or more of these "standards," it can result in employment discipline, sanction, demotion, or termination; civil lawsuits, including personal punitive damages; state and/or federal criminal prosecutions; and other negative consequences. This article helps explain use-of-force policies, procedures, training, guidelines, incidents, standards, incidents, and consequences to minimize the foreseeable, potential risks for officers and law enforcement agencies associated with use-of-force incidents.

Law Enforcement Realities

"Terminal television syndrome" has resulted in many people, including some jurors, believing that law enforcement officers have the training, judgment, ethics, skills, abilities, resilience, and invincibility of Texas Ranger Cordell Walker (played by Chuck Norris, in *Walker, Texas Ranger*, a CBS television series from 1993 to 2001). However, in the United States, the average law enforcement officer has fewer hours of training than the average barber, about one-half the hours of a cosmetologist, less training than a mortician, and in some instances, less training than a manicurist. In some jurisdictions, for a probationary period, a person can be a sworn, armed, law enforcement officer with zero training.

According to the U.S. Department of Justice's Bureau of Justice Statistics, as of June 30, 2016, there were 15,322 general purpose law enforcement agencies in the United States, defined as "municipal, county, and regional police departments; most sheriffs' offices; and primary state and highway patrol agencies." Shelley Hyland, Full-Time Employees in Law Enforcement Agencies, 1997–2016, NCJ 251762, Bur. Justice Stat. (Aug. 2018). Of those, 3,012 were sheriff's offices, of which 55 percent employed less than twenty-five full-time sworn officers. Additionally, in 2013, of the 15,322 general purpose law enforcement agencies, 12,000-plus were local police departments, of which 48 percent employed fewer than ten full-time sworn officers, and 71 percent served fewer than 10,000 residents. Also, the sheriff's departments had 12,356 sworn, part-time officers, and nationwide, there were more than 29,000 local police reserve or auxiliary officers. Hyland, *supra*; Connor Brooks, Sheriffs' Offices, 2016: Personnel, NCJ 252834, Bur. Justice Statistics (Oct. 2019); Brian A. Reaves, Local Police Departments, 2013: Personnel, Policies, and Practices, NCJ 248677, Bur. Justice Statistics (May 2015); Brian A. Reaves, General Purpose State and Local Law Enforcement Agencies, Local Police Departments, 2013: Personnel, Policies, and Practices, NCJ 248677, at 2, Bur. Justice Statistics (May 2015).

Law enforcement officers' use of force in the United States, comparable to Canada, the United Kingdom, and Australia, is quite rare; force is used in an estimated one in 110 criminal arrests, and one in 1,000 law enforcement officer–public encounters or calls for service *See* Table 1, *Comparative Use-of-Force Frequencies.* One firearm injury is estimated to occur in 149 use-of-force events, or in 73,623 calls for service, and one firearm death is estimated to happen in 893 use-of-force incidents, or in 1,041,737 calls for service. William P. Bozeman, *Injuries Associated with Police Use of Force*, 3 J. of Trauma & Acute Care Surgery 84, 466–72 (2018). Law enforcement officer-involved subject (non-firearm) temporal arrest-related deaths are very rare, with one temporal death estimated in 1,000 use-of-force incidents (non-conducted energy weapon involved), and one temporal death estimated in 3,000 conducted energy weapon (CEW) use-of-force events. M.W. Kroll, M.A. Brave et al., *Benefits, Risks, and Myths of TASER® Handheld Electrical Weapons*, 7 Human Factors & Mechan. Engineering for Def. & Safety 1, 3 (2019).

However, in the United States, the average law enforcement officer has fewer hours of training than the average barber, about one-half the hours of a cosmetologist, less training than a mortician, and in some instances, less training than a manicurist.

For pursuits, there is one estimated pursuit involved in 282 traffic stops, and one temporal death estimated in 194 pursuits, or in 54,714 traffic stops.

Table 1

Comparative Use-of-Force Frequencies

	Canada				USA		Totals of Studies 2,4–6 (not "1" or "3")	(7) Older Comp. Orange Co. (FL) 2003–2004[8]
	(1) Hall (2012)[1]	(2) Hall (2015)[2]	(3) Baldwin (2016)[3]	(4) Baldwin (2018)[4]	(5) Ross, (2016)[5] (2018)[6]	(6) Bozeman (2018)[7]		
Contacts/Interactions/Calls/Arrests								
Police–Public Interactions (PPI)	1,566,908	3,250,000	5,400,000	10,900,000			14,150,000	
Calls for Service (CFS)					876,503	1,041,737	1,918,240	1,503,650
Total PPI and CFS (PPI/CFS)							16,068,240	
Criminal Arrests (CA) (part of CFS)					110,173	114,064	224,237	76,877
Force (Use of Force (UOF), Conducted Energy Weapons (CEWs))								
All Uses of Force (UOF) in PPI/CFS	1,269	4,828	4,799	9,009	1,085	893	15,815	1,264
Partial subset of UoF – Uses of CEW (received CEW exposure)	334	671			217	504	1,392	945
Handcuffed		4,056:4,373			1,042			
Number in "Prone Restraint"	537:1,255	2,000:4,373			1,085			
Excited Delirium (ExDS) per UoF				1:58				
Deaths (temporal, not causal)	1	1	2	4	0	1 (gun)	6	
"1" death per x PPI/CFS	1,566,908	3,250,000	2,700,000	2,725,000	No death	1,041,737	2,678,040	
Deaths per UoF encounter	1:1,269	1:4,828	1:2,400	2:2.252	0:1,085	1:893	1:2,636	
UOF, CEW, CA, per PPI/CFS/CA								
UoF per PPI/CFS	1:1,235	1:673	1:1,125	1:1,210	1:807	1:1,167	1:1,016	1:1,189
UoF per CA					1:101	1:128	1:113	1:61
Exposure use of CEW per PPI/CFS	1:4,691	1:4,829			1:5,000	1:2,067	1:3,251	1:1,591
Exposure use of CEW per CA					1:500		1:500	1:78
Deaths caused by CEW	0	0	0	0	0	0	0	
Add'l – CEW presence compliance		199						

1. C.A. Hall, et al. *Incidence and Outcome of Prone Positioning Following Police Use of Force in a Prospective, Consecutive Cohort of Subjects,* 19 J. Forensic Leg. Med. 2, 83–89 (2012).
2. C.A. Hall, et al. *Restraint in police use of force events: examining sudden in custody death for prone and not-prone positions.* Journal of forensic and legal medicine 31 (2015): 29-35. [This is an updated study that includes Hall's 2012 study.]
3. S. Baldwin, et al. *Distinguishing features of Excited Delirium Syndrome in non-fatal use of force encounters.* Journal of forensic and legal medicine 41 (2016): 21-27.
4. S. Baldwin, et al. *Excited delirium syndrome (ExDS): Situational factors and risks to officer safety in non-fatal use of force encounters.* International journal of law and psychiatry (2018) 60, 26-34. [This is an updated study that includes Baldwin's 2016 study.]
5. D.L. Ross & M.H. Hazlett. *A prospective analysis of the outcomes of violent prone restraint incidents in policing.* Forensic Res Criminol Int J 2, no. 1 (2016): 00040.
6. D.L. Ross & M.H. Hazlett. *Assessing the symptoms associated with excited delirium syndrome and the use of conducted energy weapons.* Forensic Res Criminol Int J. 2018;6(3):187–196.
7. W.P. Bozeman, et al., *Injuries associated with police use of force.* Journal of trauma and acute care surgery 84, no. 3 (2018): 466-472.
8. Ogden, D., Hotaling, C. Orange County (Florida) Sheriff's Office Taser Task Force. Report March 4, 2005.

Thus, on average, these rare, significant events with tragic outcomes occur far less than once per law enforcement officer career. E. Davis, Contacts Between Police and the Public, 2015, NCJ 251145, Bur. Justice Statistics (Oct. 2018); B.A. Reaves, Special Report: Police Vehicle Pursuits, 2012-2013, NCJ 250545, Bur. Justice Statistics (May 2017).

Additionally, the non-firearm, temporal law enforcement officer-involved deaths, occur, on average, less than once per career for all related law enforcement officer-incident decision makers, often including law enforcement supervisors, investigators, trainers, and executives; coroners, medical examiners, forensic pathologists, and their investigators; prosecutors and their investigators; and employment commissions and political office holders.

Law Enforcement Standards

In guiding and analyzing law enforcement use of force, one of the constant complications is the significant chasm between the correctly applied legal standards and the many more restrictive inserted "standards" from other sources. Simply ask someone, including law enforcement officers, "What is excessive force?" The responses will be quite broad, often emotionally biased, or conflated with something else, and almost always "incorrect." Neutralizing, or at least clarifying, standards' errors from law enforcement agency policy and training, to law enforcement officer guidance, to judge and jury, may clarify understanding and significantly resolve many of the standards misuses in law enforcement officer and law enforcement agency accountability. See Table 2 for examples of law enforcement officer use-of-force legal standards in relation to society's expectations.

Law enforcement standards are often assumed to be quite simple and easily applied, while our systems often can make them exceedingly complicated. Determining what the applicable standard is can be complicated.

The U.S. Federal Constitutional Standards

The "legal" standards usually include the appropriately applied, federal constitutional legal standards, and any more restrictive, appropriately applied, state statutory or other standards to which law enforcement officers are held accountable. As for the appropriately applied federal constitutional standard, this is sometimes misconstrued. Meaning, the Fourth Amendment's "objective reasonableness" standard, as applied to non-federal law enforcement officers via the incorporation doctrine of the Fourteenth Amendment, is often taught to them, or applied as the "only" federal constitutional force standard, when this is simply incorrect. The Fourth Amendment's objective reasonableness standard most often applies when a law enforcement officer seizes or searches a "free" person. A "free" person is one who is not an incarcerated detainee or person incarcerated post-conviction. "Free persons" include those in the United States and its territories, legally or illegally, citizens or not.

Civil Liability via 42 U.S.C. §1983, and Its Criminal Counterpart, 18 U.S.C. §242

The primary vehicle for law enforcement officer or law enforcement agency civil liability is 42 U.S.C. §1983, and its related statutes, including 42 U.S.C. §1988 (Civil Rights Attorney's Fees Award Act of 1976). While the civil violation of 42 U.S.C. §1983 for a law enforcement officer's use of force requires the officer to have violated the law "knowingly," the criminal counterpart for "willful" violations is primarily 18 U.S.C. §242. Recently, there was an instance during the criminal prosecution of a law enforcement officer for a use of force where a prosecution "expert" cited the civil ("knowing") standard and then inappropriately equated it with the criminal "willful" standard. The expert also apparently confused the civil standard of proof (by a preponderance of the evidence), with the criminal standard of proof (beyond a reasonable doubt).

Clearly Established Law: Qualified Immunity

The Fourth Amendment "addresses [the] 'misuse of power,' not the accidental effects of otherwise lawful conduct." *Brower v. Cty. of Inyo*, 489 U.S. 593, 596 (1989). Law enforcement officers are immune from suit under 42 U.S.C. §1983, unless they have "violated a statutory or constitutional right

Table 2

Law Enforcement Use of Force and Society's Expectations

Legal Standards
• **Federal Constitutional Standards:** Law enforcement officers will not knowingly violate the law or misuse their government endowed authority. For criminal prosecution, the "knowingly" is elevated to "willfully."
• **More Restrictive State Standards:** a more restrictive state standard may or may not exist.
Society's Law Enforcement Officer Use-of-Force Expectations (far more restrictive than appropriately applied legal standards):
• **Minimum Force Necessary:** Use only the minimum force necessary to accomplish lawful objectives (United Nations standard.)
• **Force Mitigation:** Use, e.g., verbal de-escalation, distance, time, and backup as force mitigation opportunities.
• **Immediate Threat:** Use force only to neutralize an "immediate" threat.
• **Proportionate Force:** Force must be proportionate to the threat.
• **Necessary Force:** Use no more force than "necessary."
• **Last Resort:** Use force only as a last resort.
• **Physical Presence De-escalation:** Avoid use of force by physical presence intimidation.
• **Immediately Cease Force upon Neutralizing Its Need:** Instantly, upon need for force ending, cease any use of force.
• **Avoid Using Force on Special Populations** (especially if not an "immediate threat" situation).
• **Avoid Using Force on Restrained Subjects** (especially if not an "immediate threat" situation).
• **Minimize Restraint Force.**
• **Maximize Post-Force Care.**

that was clearly established at the time of the challenged conduct." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it." *Id.* That means that "existing precedent… [has] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). When properly applied, this exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Id.* at 743.

Other "Standards"

In addition to the appropriately applied "legal" standards, law enforcement officers are often held accountable to other, almost always more restrictive, or prohibiting, standards, such as so-called "best practices"; "preferred practices"; generally accepted law enforcement practices; law enforcement agency policies, procedures, and guidelines; training standards; manufacturers' warnings for force-option products; standards published by law enforcement associations, special interest groups, advocacy groups, professional organizations, and government entities; and numerous others.

While many courts find that the "legal" standards are the appropriate ones to rely on to adjudicate law enforcement officers' conduct properly, some courts also find relevant, but not dispositive, the fact that an officer's alleged conduct appears to have violated agency policies. While certainly not suggesting that a violation of agency policies is sufficient to make out a constitutional violation, some courts have found agency policy and corresponding notice to law enforcement officers relevant in analyzing the reasonableness of a particular use-of-force incident under the totality of the circumstances. Some courts have described a factual dispute as important because it may be difficult to conclude that officers acted reasonably if they performed an action that had been banned by their agency or of whose dangers in the circumstances they had been warned. *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 732, n.8 (5th Cir. 2018), *cert. denied sub nom. City of Fort Worth, Tex. v. Darden*, 139 S. Ct. 69 (2018), *see also Darden v. City of Fort Worth, Texas*, No. 18-11624, ___ Fed.Appx. ___, 2020 WL 1983192 (5th Cir. Apr. 24, 2020).

Additionally, some courts admonish an expert for opining on issues of law or drawing legal conclusions; however, the expert may opine on matters that touch on whether an officer violated the law, or complied, or did not comply, with other standards, such as Peace Officer Standards and Training (POST) guidelines. For example, although an expert may not come out and say, "Officer X used excessive force," the expert may be allowed to testify that the officer did not comply with applicable law enforcement guidelines and procedures that provide a framework on the use of "excessive force," such as POST guidelines. Further, the expert may not use "judicially defined" or "legally specialized" terms in expressing opinions. The expert also may not state what the law is, or state that the POST guidelines are the law (because

Figure 1

Criminal Justice Probability Approximation Illustration Graphic

(© 2020 LAAW International, LLC. All rights reserved.)

Descriptive Approximation (%)	Levels of Certainty	Notes/Comments
100%	100% 100% Perfection Outcome 100% Perfection Decisions (20/20 hindsight) 100% Perfection Evaluation 100% Perfection Observations/Knowledge	Some Plaintiffs, Critics, Negative Law Enforcement Activists Elevated or Conflated Standard
95–99%	Beyond a Reasonable Doubt Substantial Likelihood	Criminal Proof Standard
75–85%	Clear and Convincing	Punitive Damages
50.1%	Preponderance of the Evidence – (more likely than not)	Civil Proof Standard
	Arrest – Probable Cause (Fair Probability)	4th Amendment Arrest Standard
	Arrest – "Arguable" Probable Cause	4th Amendment Civil Liability Standard
	Frisk – Reasonable Suspicion	4th Amendment Frisk Standard
	Brief Detention – Reasonable Suspicion	4th Amendment Brief Detention
	4th Amendment Objective Reasonableness Standard Threshold	
	Mere Hunch	
	Plausible It Could Happen	
	Potentially It Could Happen	
	Possible It Could Happen	

they are not). Opposing counsel can cross-examine the expert about the relevance of the POST guidelines and present to the jury that the POST guidelines are not binding law. *See, e.g.*, *Garcia v. Cty. of Riverside*, No. CV 5:18-00839 SJO (ASx), 2019 WL 4282903 (C.D. Cal. June 7, 2019).

The "Eggshell-Skull Rule" in 42 U.S.C. §1983 Excessive Force Cases

Some courts have found the "eggshell-skull rule" applicable in 42 U.S.C. §1983 excessive force cases. *Darden*, 880 F.3d at 728. According to the eggshell-skull rule, a tortfeasor takes his or her victim as he or she finds the victim. And when a subject's preexisting medical conditions increases that person's risk of death during a struggle, in that way, the law enforcement officer contributed to the subject's death, and thus, the plaintiff can show that the officer's use of force was the direct and only cause of the subject's death.

Degrees of Certainty

Sometimes, law enforcement officers, medical examiners, decision makers, and others may misapply the degree of certainty standard. In one recent deposition, a plaintiff's attorney aggressively challenged a law officer defendant that the officer did *not* have one hundred percent certainty in identification of the subject. In such a case, an officer may benefit from understanding what the relevant degrees of certainty are, and why the attorney's attack was incorrect and unwarranted.

To take another example, in some medical examiner autopsy reports, the medical examiner will not state the degree of certainty with which the examiner holds the report's critical statements, opinions, findings, and conclusions. Obviously, this can result in significant, and very costly, foreseeable negative consequences. Figure 1 is a

Table 3

Proof Level Requirements

Law Enforcement Officer, Expert, and Medical Examiner's Comparisons

Law Enforcement Officer (actions must be based upon "Objectively Reasonable")	"Experts" in Federal Court Federal Rules of Evidence Federal Rules of Civil Procedure	Forensic Pathologist, Medical Examiner, or Coroner's Report, Findings and Conclusions
Facts	FRE 702, FRCP 26(a)(2)(B), *Daubert*	None required
Bases Justifications	FRE 702 • Qualifications – knowledge, – skill, – experience, and – training, or education. • Methodologically reliable – based on sufficient facts or data, – the product of reliable principles and methods, and – applied the principles and methods reliably to the facts. • Scientifically reliable foundations • Reasonable degree of certainty • *Daubert* trilogy, and progeny FRCP 26(a)(2)(B) requirements	One required Often **ASSUMED** • based on sufficient facts/data • methodologically reliable • objective mechanism of injury • greater weight of knowledge • based on science • FRE 702, FRCP 26 compliant • *Daubert* trilogy compliant • in most states • by most courts • by most decision makers NOT held accountable – in most states cannot be challenged Often inappropriately based on • failure to consider all causes • failure to specify "but for" • inaccuracies • possibilities • false equivalencies • *ipse dixit*
Definitive degrees of certainty • Reasonable suspicion (detention) • Reasonable suspicion (frisk) • Probable cause (arrest) • Probable cause (search)	**Definitive degrees of certainty** • Reasonable degree of medical or scientific certainty based on reliable foundation, evidence, and scientific support	**Definitive degrees of certainty** • ASSUMED to reasonable degree of medical and scientific certainty—even when it is not
Insufficient degrees of certainty • Possibility • Hunch	**Definitive degrees of certainty** • Anything less than reasonable	**Insufficient degrees of certainty** • Sometimes none

teaching example of using an illustration to compare levels of certainty visually.

Medical Examiner Errors

Law enforcement officer non-firearm temporal arrest-related deaths, as mentioned, are very rare and occur less than once (on average) per career, for all involved, including medical examiners, and their investigators. Medical examiners are responsible for determining cause, contributors, and manner of death. However, the myriad issues, concepts, and foundations of non-firearm temporal arrest-related deaths are often quite overwhelming and may require an encyclopedic knowledge of the key issues and concepts to find correctly. When the typical medical examiner states that he or she is an expert in all deaths, it is like a podiatrist stating that the podiatrist is an expert in all medicine. We would not ask the podiatrist to perform an infant heart transplant, nor would we ask an experienced marital dissolution attorney to defend an international, multi-country, maritime treasure allocation distribution litigation. Remember, not all medical examiners have expertise in all of the intricacies of use-of-force scenarios.

One way to illustrate this to officers, which they can instantly visualize, is to ask them what justification they must have to detain, frisk, arrest, use force, or search a person legally? Then, compare that to the levels of proof that a medical examiner is required to have, or usually does have. Then, compare that to the Federal Rules of Evidence and Federal Rules of Civil Procedure as they would apply to law enforcement experts. The analysis is often striking. Table 3, Proof Level Requirements, graphically illustrates this comparison.

Rely on the Greater Weight of Current Scientific Knowledge and Literature

The law sometimes lags science by more than a decade. What was scientifically believed or known a decade ago may not reflect the current state of scientific knowledge that adheres to the greater weight of known and published science. When medical examiners, law enforcement experts, and others are not current on the incident-relevant science, the results can be quite costly. In this context, this is currently true in numerous alleged positional asphyxiation scenarios, restraint asphyxia, conducted energy weapon electrocution, and other related use-of-force incidents.

To Sum Up: Considerations

When considering use of force by law enforcement officers, broadly evaluate policies, procedures, training, guidelines, incidents, standards, and the aftermath and consequences while working to minimize the potential associated risks by doing the following:

- Approach officer policy and training from the perspective that these materials will be shown to a judge and jury, and they may not immediately understand the standard and how it is to be applied properly to conduct, free of myths, outdated science, vagaries, ambiguities, and conflations.
- In officer policies and training, clearly explain the differences among standards, especially those that are more restrictive than the legal standards, and the differences among them pertaining to the potential violation consequences, as though such information and justification is being explained to a jury.
- Clearly distinguish "legal" standards from guidelines and other "standards."
- Carefully avoid unintentionally conflating a policy, training, best or preferred practice, or some other standard, with the appropriately applied legal standards, including levels of culpability, and make these clearly understandable to the trier of fact.
- Be clear on the realities of use-of-force frequency, human factors, and societal expectations, among other expectations.
- Cautiously avoid "conflating" two items to draw a broader unsupported conclusion, including avoiding "false equivalencies."
- Correctly apply proper levels of professional, medical, or scientific certainty.
- Only use current, appropriately scientifically reliable findings, statements, and conclusions that adhere to the greater weight of the established science.
- Finally, consider a use-of-force event from multiple perspectives and time frames. *See* Table 4, Use-of-Force Event Evaluation Continuum.

Table 4

Use-of-Force/ARD Incident Timeline Considerations

Pre-Event	During Event	Immediate Aftermath	Investigation	Actions
Policies • "Legal" standard • Need to know • Can reference • Definitions • Special purpose Procedures Training Custom FTO Guidance Study/memory aids	What LEO • Records • Remembers • Can apply • Procedures • Outcomes • Temporal outcomes: • "Motorola Memory" • Reporting	Contacts Supervisor response Executive response LEOs' statements Objective timeline Objective evidence Recordings synced	Investigations • Incident • Medical examiner • Criminal: – local – task force – state – federal • Special interest • Outside investigators • Other	Criminal (federal) Criminal (state) Criminal (other) Inquest Civil Internal discipline Special interests Media Community

© LAAW International, LLC. Used here with permission.

TABLE 9
Prevalence of use of force during police contact, 2002–11

Race/ Hispanic origin of resident	Average annual population	Total persons experiencing police use of force			Nondeadly force				Deadly force	
					Nonincarcerated persons[a]		Persons in jail[b]		Persons killed by police[c]	
		Average annual number	Percent of population	PPCS contribution to average annual number	Average annual number	Percent of population	Number	Percent of population	Average annual number	Percent of population
All races	230,811,742	812,852	0.4%	88%	715,475	0.3%	96,962	0.04%	1,242	0.0002%
White	163,435,095	476,034	0.3%	94	445,512	0.3%	29,975	0.02%	547	0.0003%
Black	27,112,646	204,845	0.8%	78	159,113	0.6%	45,362	0.17%	369	0.0014%
Hispanic	27,236,094	107,219	0.4%	84	90,141	0.3%	16,846	0.06%	232	0.0009%

Note: Includes U.S. residents age 16 or older. Based on most recent police contact in prior 12 months.

[a]Based on data on the threat or use of force during police contact from the BJS Police–Public Contact Survey, 2002, 2005, 2008, and 2011.

[b]Based on data on the threat or use of force at time of arrest from the BJS Survey of Inmates in Local Jails, 2002.

[c]Based on the upper bound estimate of law enforcement homicides from the BJS Arrest-Related Deaths collection, 2003–09 and 2011.

Sources: Bureau of Justice Statistics, Police–Public Contact Survey, 2002, 2005, 2008, and 2011; Survey of Inmates in Local Jails, 2002; and Arrest-Related Deaths collection, 2003–09 and 2011.

U.S. DEPARTMENT OF JUSTICE • FEDERAL BUREAU OF INVESTIGATION • CRIMINAL JUSTICE INFORMATION SERVICES DIVISION

2016 CRIME in the UNITED STATES

Table 21

Arrests

by Race and Ethnicity, 2016
[13,049 agencies; 2016 estimated population 257,112,535]

Table 21A

	Total arrests						Percent distribution[1]						Total arr	
	Race												Ethnici	
Offense charged	Total	White	Black or African American	American Indian or Alaska Native	Asian	Native Hawaiian or Other Pacific Islander	Total	White	Black or African American	American Indian or Alaska Native	Asian	Native Hawaiian or Other Pacific Islander	Total[2]	Hispan or Latinc
TOTAL	**8,421,481**	**5,858,330**	**2,263,112**	**171,185**	**103,244**	**25,610**	**100.0**	**69.6**	**26.9**	**2.0**	**1.2**	**0.3**	**6,647,012**	**1,221,0**
Murder and nonnegligent manslaughter	9,374	4,192	4,935	108	109	30	100.0	44.7	52.6	1.2	1.2	0.3	6,882	1,3
Rape[3]	18,606	12,571	5,412	233	309	81	100.0	67.6	29.1	1.3	1.7	0.4	13,896	3,7
Robbery	76,267	33,095	41,562	663	659	288	100.0	43.4	54.5	0.9	0.9	0.4	60,116	12,6
Aggravated assault	304,626	191,205	101,432	6,374	4,678	937	100.0	62.8	33.3	2.1	1.5	0.3	250,762	61,0
Burglary	164,641	112,651	47,991	1,613	1,925	461	100.0	68.4	29.1	1.0	1.2	0.3	130,179	27,1
Larceny-theft	833,558	575,105	231,199	14,933	10,277	2,044	100.0	69.0	27.7	1.8	1.2	0.2	624,800	91,2
Motor vehicle theft	68,170	44,970	20,955	1,018	895	332	100.0	66.0	30.7	1.5	1.3	0.5	52,786	14,1
Arson	7,767	5,593	1,813	218	120	23	100.0	72.0	23.3	2.8	1.5	0.3	5,495	9