Covering The Bases: Tips for Litigating Qualified Immunity On Summary Judgment

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Introduction.

As any plaintiff's section 1983 attorney will tell you, nothing is more certain than death, taxes, and a qualified immunity summary judgment motion by the defense. While pretty much any civil case will require an assessment of whether summary judgment is appropriate by one side or the other, in a section 1983 case the defense must always ask whether a try at summary judgment is warranted, and the answer is almost always "yes." The reason for this is qualified immunity. The Supreme Court has emphasized that in light of the purpose of the doctrine—to shield defendants not simply from liability, but participation in litigation—the issue should be raised and determined at the earliest possible point in the lawsuit.[1] Given the relatively low bar that plaintiffs must meet in order to overcome a motion to dismiss under Rule 12(b)(6), i.e., simply make allegations sufficient to avoid dismissal, it is often difficult to successfully assert a qualified immunity argument at the pleading stage, leaving summary judgment as the most viable option for prevailing on the defense.

The purpose of this article is to provide some tips for drafting a successful motion for summary judgment based on qualified immunity. It is not a guide to summary judgment motions in general, and although FRCP Rule 56 sets the general standards for summary judgment, the local federal district courts throughout the country often have varying rules concerning the format of such motions. Instead, the article will focus on the particular issues that arise in the context of qualified immunity summary judgment motions, including particular evidentiary problems, recurring issues and navigating the ins and outs of seeking further appellate review. A motion for summary judgment based on qualified immunity is the strongest weapon in the defense arsenal. The goal is to assist defense counsel in employing this weapon to its greatest effect.

I. Overview of Summary Judgment Standards.

Standards for granting summary judgment. FRCP Rule 56 allows a party to move for summary judgment on a claim or defense and provides that "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." As a result, the question whether a defendant is entitled to summary judgment generally depends upon whether there is a dispute of fact, and if so, whether the dispute is material. As we discuss later, because of the unique aspects of qualified immunity, there may indeed be circumstances where there is a genuine dispute of fact, i.e., the parties disagree on what occurred, but nonetheless the defendant will be entitled to qualified immunity and summary judgment. In those circumstances it is not so much that there is a factual dispute, but whether the dispute is material to disposition of the case. The burden is on the moving party to show the absence of a genuine issue of material fact, either by providing affirmative evidence, or pointing it to the absence of evidence to support the opposing party's position.[2] The latter is generally done by citing discovery responses showing that plaintiff lacks evidentiary support for his or her version of what occurred. Once the moving party meets its burden, it is incumbent on the opposing party to submit admissible evidence creating a genuine issue of material fact. As the Supreme Court has observed, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts," rather, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'"[3]

Although Rule 56 sets a specific standard applicable to all cases, nonetheless, several circuit courts have suggested that the statutory standards have to be applied with particular rigor with

respect to summary judgment motions in excessive force cases where police officers are the only surviving witnesses to the incident.[4]

Evidentiary standards. A motion may be supported by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" under FRCP 56(c)(1)(A). It is important to note that the evidence must be in admissible form. Declarations must be made based on personal knowledge, and documentary evidence should be authenticated, with a proper foundation established. Many attorneys who would never allow a witness at trial to testify as to hearsay, will, nonetheless, submit a declaration rife with hearsay. Similarly, a common evidentiary failing is simply attaching a document to a motion or declaration, without properly authenticating the document or laying the foundations as to why its contents would be admissible. With the advent of body cameras and cameras in police vehicles, and the Supreme Court's decisions in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), video evidence has become commonplace in qualified immunity summary judgment motions.

Absent a stipulation, the party moving for summary judgment based on video evidence must, as with other evidence, authenticate the video and lay a proper foundation for its admission as evidence. Moreover, many courts have local rules governing submission of video evidence, i.e., specifying the number of copies to be submitted to the court, as well as the proper format. In addition, some courts will reject a video as supporting a motion for summary judgment if the motion is premised on viewing the video in slow motion, the reasoning being that the officer did not experience the event in slow motion, hence the video does not accurately depict what the officer perceived.

II. Overview of Qualified Immunity.

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[5] .It involves a two-prong inquiry: (1) whether the facts that a plaintiff has alleged (for a motion to dismiss) or shown (for summary judgment or trial) make out a violation of a constitutional right; and (2) whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.[6] Where a defendant raises both grounds, a court is free to decide whether to address one or both prongs.[7]. In preparing a motion for summary judgment based upon qualified immunity, one of the initial decisions is whether to move on one or both prongs. Many defense counsel almost reflexively move on both grounds, figuring "why not?" However, in many circumstances, determination of whether a constitutional violation actually occurred at all is highly fact-dependent, with the attendant risk that the plaintiff will be able to present a conflicting version of the facts sufficient to defeat the motion. As we discuss in further detail below, the presence of "bad facts" with respect to the merits of whether a constitutional violation occurred, might well counsel towards moving solely on the ground that even assuming the plaintiff's version of the incident is correct, the propriety of the officer's conduct was not clearly established based upon existing case law. Conversely, are there circumstances in which there may be a strong case for moving for summary judgment on the merits, without addressing whether the right was clearly established in light of governing case law?

Almost inevitably, if you are moving for summary judgment on the merits of a constitutional claim, it is worthwhile to also move for summary judgment based on the clearly established law prong. Indeed, for reasons discussed below, a significant debate about whether an underlying constitutional violation occurred at all, invariably strengthens any argument that the officer's conduct does not violate clearly established law.

In my experience, such situations are few and far between. Almost inevitably, if you are moving for summary judgment on the merits of a constitutional claim, it is worthwhile to also move for summary judgment based on the clearly established law prong. Indeed, for reasons discussed below, a significant debate about whether an underlying constitutional violation occurred at all, invariably strengthens any argument that the officer's conduct does not violate clearly established law.

III. Moving for Summary Judgment Based on the Absence of Clearly Established Law.

The United States Supreme Court has repeatedly held that a police officer is entitled to qualified immunity if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the . . . officer[] possessed.[8] In order for the law to be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right."[9]

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In other words, "existing precedent must have placed the . . . constitutional question beyond debate."[10] Moreover, clearly established law must be determined "'in light of the specific context of the case, not as a broad general proposition.'"[11] Indeed, the Supreme Court has repeatedly admonished the appellate courts for defining the clearly established law at too high a level of generality.[12] Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[13]

In drafting a motion for summary judgment based on the clearly established law prong of qualified immunity the focus is on two elements. First, what level of authority is sufficient to define clearly established law? District court cases from my jurisdiction? Circuit court cases from my circuit? State appellate decisions from my jurisdiction? Second, how closely analogous fact wise must the cited cases be to my case in order to constitute "fair notice" to the officer of potential liability?

What court can "clearly establish" the law in question? Precisely what constitutes "clearly established law" is currently an open question, yet to be authoritatively resolved by the Supreme Court. Does there have to be a Supreme Court opinion on point? How about a circuit court opinion from the circuit in which the case arose? How about a case on point from another circuit? How about a district court case from within the circuit where the case arose? How about a relevant state Supreme Court decision from the state in which the case arose? The fact is that at one time or another, any and all of the foregoing have been cited by the Supreme Court as a basis for establishing the governing law for purposes of qualified immunity.

In *Wilson v. Layne*, 526 U.S. 603 (1999), officers violated the Fourth Amendment by bringing reporters into a home during the execution of a warrant when their presence was not in aid of execution. The Court held the officers were entitled to qualified immunity because "[p]etitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[14] The Court also noted that, given the absence of a "decided body of case law,"—including a circuit split on the issue, the officers were not unreasonable in relying on their internal "ride-along" policy, which permitted third parties to accompany officers during certain procedures.[15] Noting that an internal policy "could not make reasonable a belief that was contrary to a decided body of case law," the Court observed that "here the state of the law as to third parties accompanying police on home entries was at best undeveloped," hence "it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies."[16] "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."[17]

The Court found in *Hope v. Pelzer*, 536 U.S. 730 (2002), that state prison officers were not entitled to qualified immunity for handcuffing a prisoner to a hitching post for extended periods of time. The majority acknowledged that no published decisions expressly held that such conduct violated the Eighth Amendment, but noted that officers need only have "fair warning" that their conduct is unlawful (the same standard for criminal statutes to avoid a challenge for vagueness). The majority noted that circuit precedent holding that handcuffing inmates to a fence could violate the Eighth Amendment and that denying prisoners water for purposes of punishment was unconstitutional, gave fair notice to the officers, as did state regulations. The Court concluded that unpublished district court decisions cited by the dissent that rejected similar claims, did not indicate the law was not clearly established.

In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court held that the officers were entitled to qualified immunity for a search conducted based on consent to entry given to a confidential informant, because prior to the Tenth Circuit's decision in the case, "three Federal Courts of Appeals and two State Supreme Courts" had found such consent valid.[18] In fact, "prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision;" thus, "[t]he officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on . . . [such] entries."[19].

The Court held in *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009),that a strip search of a middle school student for a prohibited drug violated the Fourth Amendment based on prior Supreme Court precedent, but concluded that school officials were entitled to qualified immunity because of debate about the scope of the Court's prior opinion: "We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted."[20]

The Court found in *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011), that the Attorney General was entitled to qualified immunity for invoking the material witness warrant procedure as pretext for another investigation because at the time of the events, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional"; one district court's holding to the contrary did not represent "a robust 'consensus of cases of persuasive authority'" to make law clearly established.

In *Ryburn v. Huff*, 565 U.S. 469 (2012), the Court held the officers were entitled to qualified immunity for entering a residence without a warrant when, during an investigation of a shooting threat, the plaintiff abruptly terminated the interview and ran into the house in response to a question of whether there were guns in the residence. The Court emphasized that "[n]o decision of this Court has

found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposite direction.[21]

The Court held in *Reichle v. Howards*, 566 U.S. 658, 663 (2012) that secret service agents were entitled to qualified immunity for arresting the plaintiff for touching the Vice President while expressing opposition to his policies, because, at the time of the arrest, "it was not clearly established that an arrest supported by probable cause could violate the First Amendment." The Court emphasized that "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest."[22] Significantly, for the first time, the Court suggested that circuit court authority might not be enough to render the law "clearly established" for purposes of qualified immunity. In addressing the Tenth Circuit authority, which had been cited as a basis for denying qualified immunity, the court noted: "Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here."[23]

> Given the Court's repeated admonition to the circuits to apply qualified immunity with rigor, both regarding factual similarities between underlying cases and existing precedent, and, more critically, with respect to the binding nature of existing authority, the existence of a circuit split provides a compelling basis for asserting qualified immunity. This would seem especially true of federal officials, who technically operate on a national basis, and whose conduct should not be subject to varying standards of liability depending upon where the underlying incident occurred.

In *Stanton v. Sims*, 134 S. Ct. 3 (2013), the court found that police officers were entitled to qualified immunity for a hot pursuit of a misdemeanor suspect into the curtilage of a residence to effect an arrest because (1) the Court had never addressed the issue of whether an officer may engage in hot pursuit entry to arrest for a misdemeanor; (2) the Ninth Circuit had not clearly addressed the issue, and district courts within the circuit indicated the law was not clearly established; (3) other circuit courts throughout the country were divided on the question; and (4) state courts where the pursuit occurred had held such pursuits were lawful.

The Court concluded in *Lane v. Franks*, 573 U.S. 228 (2014), that the First Amendment barred a government employer from firing an employee on account of testimony the employee gave under oath and outside the scope of his ordinary job responsibility, but that individuals were entitled to qualified immunity because "[a]t the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection. At best, Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity."[24] Similarly, in *Carroll v. Carman*, 135 S. Ct. 348 (2014), the court found that officers were entitled to qualified immunity from a Fourth Amendment claim premised on their alleged unlawful entry into the side yard of a residence to speak with a resident at a side door because the law was not clearly established. The court once again cast doubt on the question of whether circuit court precedent in the jurisdiction where the claim arose could ever constitute clearly established law. The court noted: "Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances," here, "the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity," that decision was inapposite, and "other federal and state courts" rejected the rule adopted by the Third Circuit.[25] As a result, the lawfulness of the officers' conduct was not "beyond debate" and hence, he was entitled to qualified immunity.

In *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), the Court again emphasized, "[w]e have not yet decided what precedents—other than our own— qualify as controlling authority for purposes of qualified immunity."[26] The Court held that the officer in the case before it was entitled to qualified immunity for wrongful arrest because the lower court had relied on a single decision from that court, which the Supreme Court found largely inapposite. The Court emphasized that "'a body of relevant case law' is usually necessary to" clearly establish the law for purposes of qualified immunity.[27] Most recently, in *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) the Court once again noted that it had not decided what precedents other than its own could clearly establish the relevant law, but granted qualified immunity based upon the absence of applicable law within the circuit in which the case arose concerning the precise factual situation confronted by the officer.

Given the varying approaches the Supreme Court has taken with respect to what constitutes a body of law that is sufficiently controlling for purposes of rendering the law "clearly established," the circuit courts have taken different approaches to the issue. Not surprisingly, the Ninth Circuit takes one of the broader approaches in determining what constitutes clearly established law, noting that "for purposes of qualified immunity, a Ninth Circuit precedent is sufficient to clearly establish law within our circuit."[28] The Ninth Circuit has emphasized that in "the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts."[29] Although

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the Ninth Circuit has held that an unpublished district court decision did not clearly establish the federal law, it has indicated that such opinions might clearly establish the law if the defendant officials repeatedly chose not to appeal unfavorable district court decisions in order to avoid adverse circuit court precedent.[30]

The Sixth Circuit has held that a recent case from one circuit is generally not sufficient to constitute clearly established law in another circuit.[31] The Tenth Circuit has held that a conflict among circuit courts on an issue, while relevant to the qualified immunity inquiry, is not dispositive, because it would effectively "bind this circuit by the decisions of others."[32] The Fifth Circuit has similarly rejected the presence of a circuit split as dispositive of the qualified immunity issue when its own precedent establishes that the conduct in question is unlawful.[33]

Given the Court's repeated admonition to the circuits to apply qualified immunity with rigor, both regarding factual similarities between underlying cases and existing precedent, and, more critically, with respect to the binding nature of existing authority, the existence of a circuit split provides a compelling basis for asserting qualified immunity. This would seem especially true of federal officials, who technically operate on a national basis, and whose conduct should not be subject to varying standards of liability depending upon where the underlying incident occurred. The Supreme Court in recent years seems to be heading towards a rule that in all but the most obvious of cases, a defendant will be entitled to qualified immunity virtually any time there is a circuit split, and perhaps whenever the high court itself has not yet spoken on an issue. As a result, in preparing a motion for summary judgment based on the absence of clearly established law, look first to case law within your own circuit, but do not despair if you find nothing directly on point. If anything, the absence of such authority is a good sign, because it provides a strong basis for arguing that the law is not clearly established. Moreover, if the law in your circuit is adverse to your position, look to the law of other circuits, or state appellate courts, which might provide a basis for arguing that the law is not clearly established.

How factually analogous must a case be in order to "clearly establish" the law? After identifying what level of authority is sufficient to establish the law in your jurisdiction, the next question is how factually on point must the case law be? The good news for defendants is that over the last several years the Supreme Court has held that existing authority must be highly factually analogous to the situation confronted by the officers in a particular case in order to constitute clearly established law for purposes of defeating qualified immunity. As the Court emphasized in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014), "[T]he crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced." (Emphasis added.) This is particularly true in cases involving the use of force. In the past, use of force cases were often difficult to knockout via a summary judgment motion because they typically involved numerous underlying factual issues which could spawn a factual dispute for purposes of defeating the motion. However, the Supreme Court has recently emphasized that the fact specific nature of the use of force inquiry itself means that in many, if not most circumstances, the law will not be clearly established and hence an officer may be entitled qualified immunity, even if there is a factual dispute about whether the level of force was reasonable under the Fourth Amendment.

In *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam), the Supreme Court reversed the denial of summary judgment to an officer who had shot an armed suspect shortly after arriving at the scene as back up, finding the officer was entitled to qualified immunity based on the absence of clearly established law governing the factual situation he confronted. In so holding, the Court emphasized that the generalized standards for use of force articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), were not sufficient to "clearly establish" the law in other than the most obvious cases.[34] Instead, the appellate court was required to identify some factually analogous authority—a task made particularly difficult when the case involves unusual facts. As the Court emphasized, that "this case presents a unique set of facts and circumstances," "alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right."[35] Similarly, just last term in *Kisela v. Hughes*, 148 S. Ct. 1148 (2018) (per curiam), the Court again summarily reversed the denial of qualified immunity to an officer based on the absence of clearly established law concerning factual situations closely analogous to those confronted by the officer. The Court highlighted the fact-specific nature of the use of force inquiry, which made it essential that there be some authority directly on point in order to defeat immunity. "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[36]

Although *Kisela's* description of clearly established law as case law that "'squarely governs' the specific facts at issue," is probably the Court's most stringent application of qualified immunity, earlier case law is also helpful in analyzing clearly established law in the use of force context.[37]

The malleable standards governing other aspects of the Fourth Amendment such as arrest and search and seizure, have also led the Supreme Court to require some degree of factual specificity in applicable case law in order to avoid qualified immunity. For example, in the context of wrongful arrest, the recent *Wesby* decision emphasized the absence of case law putting the officers on notice that they could be held liable for wrongful arrest simply based on their assessment of various factors that might have undermined probable cause.[38] As the Court noted, in order to defeat qualified immunity "[i]n the context of a warrantless arrest, the rule must obviously resolve 'whether the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.'"[39] (emphasis added).

IV. Moving for Summary Judgment Based on the Absence of a Constitutional Violation.

As noted, moving for summary judgment on the merits (i.e.,

by establishing that no constitutional violation occurred), can be problematic in that most such determinations are fact intensive, and hence create the risk of a genuine issue of material fact. Nonetheless, under appropriate circumstances it may be worth moving for summary judgment even in a close case because it may strengthen your argument on the "clearly established law" prong of qualified immunity. In cases where the propriety of the officer's underlying conduct is hotly debated, a strong argument can be made that if the question is even close, then qualified immunity should apply. In sum, the unlawfulness of the conduct cannot be "clearly established" if there is serious doubt about the issue.

> How factually analogous must a case be to "clearly establish" the law? After identifying what level of authority will establish the law in your jurisdiction, the next question is how factually on point must the case law be? The good news for defendants is that over the last several years the Court has required that existing authority be highly factually analogous to the situation confronting officers in a particular case in order to constitute clearly established law for purposes of defeating qualified immunity.

The paradigm case concerning the grant of summary judgment based on the merits in a use of force claim is *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the Court held that the undisputed evidence in the form of video of the police pursuit and resulting use of force established that the force was reasonable as a matter of law and hence the plaintiff had no Fourth Amendment claim. In *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014), citing *Scott*, the Court similarly found that the officers were entitled to judgment because the undisputed evidence established that the force used to terminate a pursuit was reasonable as a matter of law. With the increased availability of video evidence, it is anticipated that there will be more opportunities to assert merits-based motions for summary judgment in use of force cases.

The Supreme Court's decision last term in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) provides strong authority in support of moving for summary judgment in wrongful arrest cases. The case has very helpful language concerning the broad discretion given to officers in evaluating the totality of circumstances relevant to probable cause to arrest, and in assessing the credibility of witnesses.[40] In some circumstances the reasonableness of a search may be established as a matter of law. For example, in *City of Ontario v. Quon*, 560 U.S. 746 (2009), the Court found that the plaintiff police officer did not have a reasonable expectation of privacy with respect to a department issued text pager, and hence there was no violation of the Fourth Amendment based upon monitoring text messages on the device.

V. Dealing with Factual Conflicts.

As noted, given the standards for granting summary judgment, the existence of a genuine issue of material fact would seem to be the death knell for any motion. If you have a case with a true dispute as to what occurred think twice before attempting to move for summary judgment absent some argument that the dispute is ultimately not material to whether the defendant is entitled to qualified immunity. It is better to concede an obvious factual dispute and proceed to the "clearly established law" prong of qualified immunity than it is to fight a losing battle that will only divert the court's attention from a truly meritorious argument.

However, the reality is that a factual dispute need not doom a motion for summary judgment based upon either prong of qualified immunity. The key is whether the disputed fact is material to determination of the qualified immunity defense. The fact that an officer is mistaken about a particular fact does not foreclose qualified immunity, as the Supreme Court has made it clear that "[t]he protection of qualified immunity 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.'"[41] Thus, in many cases where there is a factual dispute it is important to make it clear that even assuming the plaintiff's version of the facts is correct, the officer is still entitled to qualified immunity because there is no clearly established law concerning the specific circumstances confronted by the officer.

Moreover, the existence of a genuine issue of fact need not defeat a merits-based motion for summary judgment, depending upon the nature of the constitutional right at issue. In the Fourth Amendment context, it is all too easy to forget that the applicable standard of reasonableness encompasses reasonable mistakes of fact. In sum, an officer need not be correct, just reasonable. This is underscored by the Court's enunciation of the excessive force standard in in *Graham v. Connor*, 490 U.S. 386 (1989), where the Court observed that just as "[t]he Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises" so too "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."[42] An officer need only believe that there is probable cause to believe the force is necessary, and as the Court has observed, "the probable-cause requirement: . . . '[D]oes not deal with hard certainties, but with probabilities.'"[43]

VI. What to Do if You Lose—Appealing the Denial of Summary Judgment Based on Qualified Immunity.

As any plaintiff's lawyer will tell you, one of the main leverage points the defense has in section 1983 cases is the ability to obtain interlocutory review of a trial court's decision denying qualified immunity. Many a case has been brought to a

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standstill by a defendant's appeal of an order denying summary judgment based on qualified immunity. However, not all orders denying summary judgment based on qualified immunity are immediately appealable. In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court held that where a district court denies a motion for summary judgment on qualified immunity based upon its determination of what constituted clearly established law, the order is immediately appealable. The Court reasoned that such an order fell within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).[44] This is because determination of the legal question as to whether the law was clearly established, was independent of the merits of the underlying claim.[45] More significantly, interlocutory appellate review is required because qualified immunity is an immunity not simply from liability, but from participation in litigation at all. Hence, the benefits of that protection would be lost if an officer was required to undergo a full trial, before being able to obtain review of a district court's failure to grant immunity.[46]

In *Johnson v. Jones*, 515 U.S. 304 (1995), the plaintiff asserted that various defendants had either unlawfully beat him or failed to stop other officers from doing so. The officers moved for summary judgment based on qualified immunity, arguing that there was no evidence they had participated in the beating. The district court denied summary judgment, finding that there was evidence that defendants were, contrary to their statements, in or near the room where the beating occurred, and that this created a genuine issue of material fact barring summary judgment. The defendants appealed, and the appellate court dismissed the appeal for lack of jurisdiction.[47]

The Supreme Court affirmed, noting that *Mitchell* held that an order denying summary judgment that was based upon the district court's application of law, i.e., assessing whether or not it was clearly established for purposes of qualified immunity, was subject to immediate review.[48] In *Johnson* however, the defendants were not contesting whether the district court properly applied the law, but rather, whether the district court was correct in assessing that there was sufficient evidence to support plaintiff's account of what transpired. As the Court observed, the question whether a factual dispute is "genuine" is the sort of task performed by trial courts, not appellate courts.[49]

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed the broad scope of appellate review afforded by *Mitchell*. There, the district court had denied defendants' summary judgment motion on qualified immunity, based on its determination that there was a genuine issue of material fact, but without specifying the particular conduct that was subject to the factual dispute. The plaintiff argued that the order was not appealable under *Johnson*, but the Supreme Court rejected the contention, noting that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. P. 56, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable."[50] The Court emphasized that "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; " instead, "summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity" such as whether the law was clearly established with respect to the conduct at issue.[51] Thus, the Court held that the order was appealable, and that in light of the district court's failure to specify precisely what conduct was disputed, the task for the appellate court was "'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed'" and then apply the law to those facts.[52]

At bottom, *Behrens* stands for the proposition that just because a district court denies summary judgment based upon a genuine issue of material fact, that statement in and of itself does not foreclose appellate review. Under such circumstances it is incumbent upon the defendant to show that the alleged factual dispute is not material to resolving the qualified immunity issue. This is underscored by the Court's decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). In *Plumhoff* the district court had denied summary judgment, finding a triable issue of fact on whether the force used by defendants was excessive. However, the Supreme Court dismissed concerns about appealability, noting that no party was really disputing the factual record, but simply the legal significance of the facts:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.[53]

It is worth noting that there is currently a circuit split on whether an order denying summary judgment on qualified immunity based on conflicting inferences that might be drawn from otherwise undisputed evidence, forecloses immediate appellate review under *Johnson*.[54] This issue is particularly significant given the increased use of video in support of motions for summary judgment, as the fact of the video itself may be undisputed, but conflicted inferences may be drawn from what is depicted.[55]

Conclusion.

The qualified immunity defense remains a potent mechanism for obtaining summary judgment on behalf of law enforcement officers and other municipal actors. Local government counsel are well-served to remain knowledgeable about the evolving nuances of qualified immunity—and the optimal time and manner to deploy the defense—so as to minimize the locality's exposure to ever-increasing Section 1983 litigation.

Notes

1. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam); Pearson v. Callahan, 555 U.S. 223, 231 (2009).
2. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).
3. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 US 574, 586-587 (1986).
4. Gonzalez v. City of Anaheim, 747 F. 3d 789, 795 (9th Cir. 2014) ("summary judgment should be granted sparingly in excessive force cases," and "[t]his principle applies with particular force where the only witness other than the officers was killed during the encounter"); Cruz v. City of Anaheim, 765 F.3d 1076, 1079 (9th Cir. 2014) ("[I]n the deadly force context, we cannot simply accept what may be a self-serving account by the police officer"); Texas v. Kleinert, 855 F.3d 305, 310, n.1 (5th Cir. 2017) ("Because Kleinert is the only surviving witness to his encounter with Jackson, we view his testimony with caution."); Flythe v. Dist. of Columbia, 791 F.3d 13, 19 (D.C. Cir. 2015) (same). *But see*, Lamont v. New Jersey, 637 F.3d 177, 182 (3d Cir. 2011) (while courts must carefully scrutinize evidence in deadly force cases, "[t] his is not to say that the summary judgment standard should be applied with extra rigor in deadly-force cases. Rule 56 contains no separate provision governing summary judgment in such cases").
5. Harlow v. Fitzgerald, 457 U.S. 800, 818, (1982)
6. Pearson v. Callahan, 555 U.S. 223, 233 (2009).
7. *Id*. at 236.
8. Anderson v. Creighton, 483 U.S. 635, 641 (1987); White v. Pauly, 137 S. Ct. 548, 551, (2017) (per curiam); Kisela v. Hughes, 138 S. Ct 1148, 1152 (2018).
9. *Anderson*, 483 U.S. at 640.
10. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).
11. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).
12. *See Kisela*, 138 S.Ct, at 1152; City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775-76 (2015); *al-Kidd,* 563 U.S. at 742.
13. *Id*. at 743.
14. Wilson v. Layne, 526 U.S. 603, 617 (1999) (italics added).
15. *Id*.
16. *Id*.
17. *Id*. at 618.
18. *Pearson* v. Callahan, 555 U.S. 223, 244 (2009).
19. *Id*.
20. Safford Unified School Dist. No. 1 v. Redding, 557 U.S. 364, 378-79 (2009).
21. Ryburn v. Huff, 565 U.S. 469. 474 (2012).
22. Reichle v. Howards, 566 U.S. 658, 664-65 (2012).
23. *Id*. at 665-66.
24. Lane v. Franks, 573 U.S. 228, 245 (2014).
25. Carroll v. Carman, 135 S. Ct. 348, 350 (2014).
26. District of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8. (2018).
27. *Id*. at 590.
28. Perez v. City of Roseville, 882 F.3d 843, 856-57 (9th Cir. 2018).
29. Tekle v. United States, 511 F.3d 839, 847 (9th Cir. 2007).
30. *See* Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002).
31. Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989).
32. Garcia v. Miera, 817 F.2d 650, 658 (10th Cir. 1987).
33. *See* Brady v. Fort Bend County, 58 F.3d 173, 175-76 (5th Cir. 1995).
34. White v. Pauly, 137 S. Ct. 548, 552 (2017).
35. *Id*.
36. Kisela v. Hughes, 148 S. Ct. 1148, 1153 (2018).
37. *See, e.g*., Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam) (Officer shot at suspect's moving vehicle from overpass to terminate pursuit: "Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted"); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) (officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered other officers on foot as well as citizens); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (no clearly established law concerning firing at moving vehicle attempting to evade police); City and County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) (no clearly established law concerning use of force against an armed, barricaded and mentally disturbed suspect); Saucier v. Katz, 533 U.S. 194 (2001) (overruled in part, Pearson v. Callahan, 555 U.S. 223 (2009) (officer entitled to qualified immunity for shoving protester: "In the circumstances presented to this officer, which included the duty to protect the safety and security of the Vice President of the United States from persons unknown in number, neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule").
38. District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018).
39. *Id*. (emphasis added).
40. *Id*. at 588-89.
41. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
42. Graham v. Connor, 490 U.S. 386, 396 (citations omitted).
43. Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality); Hill v. California, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .").
44. Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).
45. *Id*. at 527-28.
46. *Id*. at 525-27.
47. Johnson v. Jones, 515 U.S. 304, 308 (1995).
48. *Id*. at 304.
49. *Id*. at 313, 316.
50. *Id*. at 312, 313.
51. Behrens v. Pelletier, 516 U.S. 219, 312-313 (1996).
52. *Id*. (citing *Johnson*, 515 U.S. at 319).
53. *Plumhoff* v. Rickard, 134 S. Ct. 2012, 2019 (2014)
54. *See* Romo v. Largen, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring and collecting cases).
55. *See, e.g., Raines v. Consulting Associates*, 883 F.3d 1071, 1074-75 (8th Cir. 2018) (district court denial of summary judgment based on conflicting inferences to be drawn from video forecloses appellate review under *Johnson*. ML