Issues With Video Evidence On Appeal

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Practical Issues

- Check Local Rules for special rules concerning use and retention of video evidence.
- Reference time stamps on video to avoid confusion in citation to record on appeal.
- Provide accurate and sufficient number of copies of video evidence for appellate court.

Legal Issues

- Strong evidence for summary judgment -- *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. ___, 134 S. Ct. 2012 (2014).
- Circuit split on appealability of denial of summary judgment based on differing inferences to be drawn from what appears on video.

The Issue

- *Mitchell v. Forsyth*, 472 U.S. 511 (1985) – denial of qualified immunity based on an issue of law is immediately appealable as collateral order under *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949).
- *Johnson v. Jones*, 515 U.S. 304 (1995) – denial of qualified immunity based on disputed issue of fact not appealable.

Circuit Split

- What if an evidentiary fact is undisputed, but different inferences can be drawn from the fact? If summary judgment on qualified immunity is denied, does *Johnson* foreclose immediate review?
- Yes – see *Franklin, ex rel. Franklin v. Peterson*, 878 F.3d 631 (8th Cir. 2017); *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013) (collecting cases)
- No –*Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016).

Impact On Video Evidence

- Aspects of video evidence often undisputed, i.e. when and where taken.
- What happens if there is a dispute about what the video depicts, i.e. reaching for a waistband or not, moving towards an officer or not?

Raines v. Burningham, 883 F.3d 1071 (8th Cir. 2018) – Case Study

- Plaintiff stabs roommate who flees to closet and summons police.
- Plaintiff exits building, confronts several officers. Refuses commands to drop knife.
- Officer approaches with Taser, when other officers perceive plaintiff moving towards officer, they fire.
- Video camera on Taser captures incident.

The Video



Decision

- Trial court denies summary judgment on qualified immunity -- issue of fact on whether video shows plaintiff moving towards officer.
- Eighth Circuit dismisses appeal under *Johnson* –video is inconclusive, hence no appellate jurisdiction to even consider whether a reasonable officer might perceive a valid threat, or assess whether the law was clearly established.
- If correct, hard to see how there is jurisdiction to review motions based on video evidence as in *Scott v. Harris*.