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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JAN FEB 2022 VOL.63 NO.01

BIAS AND PREJUDGMENT IN THE QUASI-JUDICIAL DECISION-MAKING PROCESS

THE PUBLIC RELEASE OF BODY CAMERA VIDEOS

PUBLIC NUISANCE: MUNICIPALITIES AND THE COMMON GOOD



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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Section 1983 Petitions of Interest

IMLA recently filed or will shortly be filing amicus briefs in support of Petitions for Supreme Court certiorari from two Section 1983 cases arising out of the Ninth Circuit: *Bohanon v. Lawrence* and *County of Los Angeles v. Tekoh*. While getting a Petition granted is always a longshot statistically (there is a less than 1% chance of getting the Court to grant any given Petition), both cases involve well developed circuit splits on important issues of federal law involving law enforcement that could draw the Court's attention. Additionally, both cases arise out of the Ninth Circuit, which in the last Term made up 23% of the Court's docket and was reversed 94% of the time.

Bohanon v. Lawrence

In this case, the Ninth Circuit dismissed an interlocutory appeal of the denial of qualified immunity brought by three Las Vegas police officers. Keith Childress, Jr. skipped bail after being convicted of robbery, assault, and kidnapping. When the dispatcher sought officer assistance in apprehending Childress, it was erroneously conveyed that he was wanted for attempted homicide. The dispatcher also indicated that it was unknown if he was armed, but that a gun had been recovered in a vehicle he had been seen exiting earlier in the day.

When the officers located Childress fleeing into a residential neighborhood carrying a black object in his right hand, which at least one officer believed was a firearm, a standoff ensued. The officers repeatedly warned Childress to get on the ground, to "drop the gun" and not to approach or else he would be shot. Childress disregarded many commands (including that he would be shot if he walked toward the officers), advanced, and was shot multiple times by two officers. Another officer deployed a police canine, which bit Childress for approximately 15 seconds until the officers were able to get him in handcuffs. Virtually all the exchange was captured on video. While the video does not show a gun, Childress' right hand and arm are not visible in much of the footage, given the angle of the cameras. A gun was not recovered on the scene and the black object turned out to be Childress' cell phone.

At the summary judgment stage, the district court denied the officers' request for qualified immunity.[1] The court separated out the use of force into two incidents: a first round of shots and then a second round of shots 2-5 seconds later, once Childress was on the ground.[2] As to the first round of shots, the court concluded that the officers' use of lethal force was objectively reasonable under the Fourth Amendment given their reasonable mistaken belief that the black object in Childress' hand was a firearm and due to his refusal to obey their commands.[3]

The court concluded that once Childress was on the ground, however, disputed facts existed as to whether the remainder of the officers' shots were reasonable under the Fourth Amendment.[4] The court rejected the officers' arguments that Childress remained a threat because his hands were moving, and they believed he had a gun.[5] The court explained that because the officers testified that they did not see Childress pull a gun out of his pocket, and they could not see a weapon in his hand, it was a disputed material fact as to whether Childress was still a threat after having been shot.[6] The court then denied qualified immunity, concluding the law was clearly established that, assuming the facts in the light most favorable to the plaintiff, shooting a suspect who is lying down bleeding on the ground and who poses no threat of serious bodily injury is unreasonable under the Fourth Amendment.[7] As to the use of the K-9, the court denied qualified immunity because it was clearly established that the deployment of the K-9 after Childress was on the ground having been shot was objectively unreasonable.[8]

On appeal, the Ninth Circuit held that it lacked jurisdiction because disputed material facts existed as to whether Childress continued to be a threat to the officers after the first volley of shots.[9] The court rejected the officers' argument that video evidence "blatantly contradicts" the district court's version of the facts.[10]

By way of background, in *Mitchell v. Forsyth*, the Supreme Court held that

because qualified immunity is an immunity from suit, pretrial orders denying qualified immunity are immediately appealable.[11] Ten years later, in *Johnson v. Jones,* the Supreme Court concluded that defendants cannot immediately appeal "fact-related" determinations related to the denial of qualified immunity.[12] In *Johnson,* Jones claimed that five police officers beat him, resulting in his hospitalization.[13] Three of the officers claimed they not only did not beat him, but were not even present for the alleged excessive force.[14] The Supreme Court held that the district court's conclusion at summary judgment that there were genuine disputes of fact about whether these officers were involved in the alleged excessive force was not a "final decision" that can be appealed on an interlocutory basis.[15] Nine years later, in *Plumhoff v. Rickard,* the Court rejected an argument by the Respondent that *Johnson* should preclude review of the case on an interlocutory basis, concluding that the Petitioners were arguing their conduct did not violate the Fourth Amendment or clearly established law, rather than "purely factual issues."[16]

This case will resolve the question of whether and in what circumstances, federal courts of appeals have jurisdiction over an appeal from a district court's denial of summary judgment based on qualified immunity. Since the Supreme Court's decision in *Johnson,* a circuit split has developed on this issue and *Johnson's* application.[17]

IMLA believes appellate jurisdiction over issues of qualified immunity should be uniform, clear, and predictable for local governments in this country. Additionally, the purpose of qualified immunity is an immunity from suit, not liability. Thus, the denial of appellate jurisdiction implicates important policy considerations for local governments and officials. If courts lack jurisdiction to hear interlocutory appeals in these cases, local governments will be caught up in protracted litigation and costlier settlements.

Vega v. Tekoh

In this case, Deputy Vega responded to a sexual assault report, and he did not *Mirandize* Terence Tekoh, the suspect, prior to asking questions about the incident. The parties' versions of the facts differ sharply. Tekoh claims the officer essentially trapped him in a small windowless room for 35-40 minutes, put his hand on his gun during the questioning, and used racial epithets while questioning him.[18] Deputy Vega denies Tekoh's allegations about the questioning. He believed his questioning was non-custodial and therefore did not require *Miranda* warnings.

Though many factual disputes exist, both parties agree that *Miranda* warnings were not provided and that Tekoh ultimately agreed to write down what happened, confessing to the crime both in writing and in conversation.[19] Tekoh was arrested and charged in state court for the sexual assault. The prosecutor introduced the confession against him at trial as evidence of his guilt, and the judge admitted the confession.[20] Despite the confession, the jury returned a verdict of not guilty.[21]

After his acquittal, Tekoh sued Deputy Vega under 42 U.S.C. § 1983 for violating his Fifth Amendment right against self-incrimination. This resulted in two civil trials. At the first trial, the district court refused to instruct the jury that Deputy Vega must be found liable for the Fifth Amendment claim if the jury determined that Vega violated *Miranda* when obtaining the incriminating statements that were later used against the suspect at his criminal trial.[22] In doing so, the court held that *Miranda* announced a "prophylactic rule" and that a Section 1983 plaintiff could not "use a prophylactic rule to create a constitutional right" triggering Section 1983 liability.[23] The jury returned a verdict for Deputy Vega, concluding that there had been no unconstitutional coercion of the confession.[24]

After the first trial, the court determined it had erred in instructing the jury on a Fourteenth Amendment due process violation, rather than a Fifth Amendment self-incrimination violation. It therefore ordered a new trial. This time, the court instructed the jury to consider the totality of the circumstances of the questioning—including its location, length, whether the person was free to leave, the manner of questioning, as well as whether Vega provided a *Miranda* warning—to determine whether Vega had "improperly coerced or compelled" Tekoh's confession.[25] Once again, the jury rejected the Fifth Amendment claim and returned a verdict for Deputy Vega.[26]

Tekoh appealed to the Ninth Circuit, arguing that introduction of his un-*Mirandized* statement at his criminal trial on its own constituted a violation of his Fifth Amendment rights remediable under Section 1983.[27] The Ninth Circuit agreed, holding that "the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim."[28] In coming to its conclusion, the Ninth Circuit acknowledged a circuit split on the issue.[29]

The Petition for Certiorari raises the question of whether a plaintiff may state a claim for relief against a law enforcement officer under 42 U.S.C. § 1983, based on an officer's failure to provide the warning prescribed by the Supreme Court in *Miranda v. Arizona*. As Judge Bumatay explained in his dissent from denial for rehearing en banc:

> [T]his case has nothing to do with whether *Miranda* warnings are required before custodial interrogation—they are. Neither does it deal with whether un-*Mirandized* statements must be excluded from the government›s case-in-chief—Supreme Court case law says they should be. Nor does this case ask whether Tekoh was coerced into confessing—our court deemed coercion irrelevant. Instead,

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> the narrow question before the court was whether the introduction of an un-*Mirandized* statement at trial *alone* constitutes the violation of a "right" secured by the Constitution. Our court›s answer? Yes, the lack of *Miranda* warnings violates the Fifth Amendment even if subsequent statements were freely and voluntarily given.[30]

IMLA filed an amicus brief in this case, explaining first that we believe *Miranda* is an important holding, but the result for a *Miranda* violation is the exclusion of a confession in a criminal case, not the creation a substantive right under Section 1983 for which there would be civil liability. This case presents an opportunity for the Court to address the circuit split, which currently results in a scenario in which law enforcement (and local governments) are liable for a Section 1983 violation due to the introduction of an un-*Mirandized* confession at a criminal trial based solely on their geography.

Conclusion

The Supreme Court requested a response in the *Tekoh* case, which means at least one Justice is interested in the case at this juncture, but it takes four to grant certiorari. Given the briefing schedule, the earliest the Court would possibly grant certiorari in that case would be late January or early February, which means there is an outside chance the Court could hear the case at the end of the current term (if it grants the Petition). The *Lawrence* case was filed later and so if the Court grants certiorari, it would not hear the case until the fall of 2022 at the earliest. As noted at the outset, odds are never in the Petitioner's favor for getting a grant of certiorari, but both of these cases provide compelling issues that the Court will need to address at some point given the ongoing circuit splits involved. ML

1. Lawrence v. Las Vegas Metro. Police Dep't, 451 F. Supp. 3d 1154, 1170 (D. Nev. 2020).
2. *Id*. at 1164-65.
3. *Id.* at 1169.
4. *Id.*
5. *Id.* at 1169-70.
6. *Id.*
7. *Id.* at 1170.
8. *Id.* at 1171.
9. Lawrence v. Bohanon, 847 F. App'x 516, 516-17 (9th Cir. 2021).
10. *Id.* at 517.
11. Mitchell v. Forsyth, 472 U.S. 511, 525-27 (1985).
12. Johnson v. Jones 515 U.S. 304, 307 (1995).
13. *Id.* at 307.
14. *Id.* at 308.
15. *Id.* at 313.
16. Plumhoff v. Rickard, 572 U.S. 765, 773 (2014).
17. As Judge Fletcher of the Ninth Circuit recently explained in another case involving this same issue, "the law in this area is extraordinarily confused." Est. of Anderson v. Marsh, No. 19-15068, 2021 WL 139733, *735 (9th Cir. Jan. 15, 2021) (Fletcher, J. dissenting). In his dissent in the *Marsh* case, Judge Fletcher goes on to cite several cases from other circuits which also note the confusion of the law in this area. *See*, *e.g.*, Diaz v. Martinez, 112 F.3d 1, 3 (1st Cir. 1997) ("The dividing line that separates an immediately appealable order from a nonappealable one in these purlieus is not always easy to visualize."); Camilo-Robles v. Hoyos, 151 F.3d 1, 8 (1st Cir. 1998) ("Cases are clear enough at the extremes. ... [But d]etermining the existence *vel non* of appellate jurisdiction in cases closer to the equator is more difficult. ... If this were not complex enough, the district judge is not legally obliged to explain the basis on which a denial of summary judgment rests."); Walton v. Powell, 821 F.3d 1204, 1209 (10th Cir. 2016) ("[W]e have struggled ourselves to fix the exact parameters of the *Johnson* innovation."); Barry v. O›Grady, 895 F.3d 440, 446 (6th Cir. 2018) ("Each of our too-many-to-count additional glosses on *Johnson* is needlessly complicated. ..." (Sutton, J., dissenting)). Judge Fletcher closed his dissent with the following plea to the Supreme Court: "I respectfully ask the Supreme Court to tell us clearly, in an appropriate case, whether and in what circumstances an interlocutory appeal may be taken when the district court, viewing disputed evidence in the light most favorable to plaintiff, has denied a motion for summary judgment based on qualified immunity." *Est. of Anderson,* 2021 WL 139733 *742.
18. Tekoh v. Cty. of Los Angeles, 985 F.3d 713, 715-16 (9th Cir. 2021).
19. *Id.* at 715.
20. *Id.* at 716.
21. *Id.*
22. *Id.* at 717.
23. *Id.*
24. *Id.*
25. *Id.* at 717-18.
26. *Id.* at 718.
27. *Id.*
28. *Id.* at 723.
29. *Id.*
30. Tekoh v. Cty. of Los Angeles, 997 F.3d 1260, 1265 (9th Cir. 2021).

Inside Canada *cont'd from page 33*

is satisfied that the issue before it raises a question of law. The Applicant argued that the Board erred in law by failing to consider section 685(2) of the *MGA*, which allows a person affected by a development permit to appeal. The Applicant argued he was an affected person as the new distribution centre which was planned to be only one kilometre away would result in serious traffic safety issues around his business. The Court found that the Board had considered the *MGA* and correctly held that the Applicant was not an affected person. The Court noted that although geographic proximity is an important factor for consideration if an applicant is an affected person, so is the consideration of significant impact on the applicant by the proposed development. The