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Success On Appeal In Section 1983 Cases-- Tips For Successfully Litigating Section 1983 Issues On Appeal.

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INTRODUCTION

If you litigate cases under 42 U.S.C section 1983, you will almost inevitably wind up on appeal at some point. Section 1983 cases fill the federal appellate courts. This is largely because the issue of qualified immunity can be raised at any point in the proceedings, and if it is denied, in most cases the defendant has the right to an immediate appeal. As one federal appellate judge has observed, "there are few days of oral argument in the life of an appellate judge that do not involve at least one qualified immunity interlocutory appeal." *Romo v. Largen*, 723 F.3d 670, 680 (6th Cir. 2013) (Sutton, J. concurring.)

In addition, section 1983 is the primary means by which plaintiffs can assert constitutional tort claims against municipalities, and the availability of attorney fees provides an incentive for plaintiff's attorneys to seek relief under the federal statute in addition to, or sometimes in lieu of, ordinary state tort claims. The result can be large damage and fee awards in cases involving significant constitutional issues, that are often subject to intense publicity.

The purpose of this article is to address several issues that come up frequently in appeals in section 1983 cases. Some are legal issues, while others are tactical issues. The goal is to provide a quick refresher course for experienced practitioners, as well as an introduction to important appellate section 1983 issues for attorneys new to the field.

I. ISSUES CONCERNING THE TIME TO APPEAL.

Final Judgments.

As in any other federal civil case, a losing defendant in a section 1983 case has the right to appeal from a judgment following either a bench or jury trial. 28 U.S.C. section 1291.

Interlocutory Denials Of Qualified Immunity.

All section 1983 litigators are, or certainly should be familiar with 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982). 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. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Where a defendant raises both grounds, a court is free to decide whether to address one or both prongs. *Id.* at 236.

The Supreme Court has held that qualified immunity is an immunity from suit, not just liability, and hence should be raised and decided at the earliest opportunity. Thus, it can be asserted on a motion to dismiss under FRCP 12(b)(6), and if the motion is denied, that order (unlike a typical order denying a motion to dismiss) is immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The same is generally true of an order denying a motion for summary judgment based on qualified immunity. *Id*.

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). *Id*. at 527. 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. *Id.* at 527-28. More significantly, interlocutory appellate review is required because, as noted, 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. *Id*. at 525-27.

However, in *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court held that not all orders denying summary judgment based on qualified immunity are immediately appealable. In *Johnson* the plaintiff asserted that various defendants had either unlawfully beat him or failed to stop other officers from doing so. *Id*. at 307. The officers moved for summary judgment based on qualified immunity, arguing that there was no evidence they had participated in the beating. *Id.* at 307-08. 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. *Id.* at 308. The defendants appealed, and the appellate court dismissed for lack of jurisdiction. *Id.*

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. *Johnson*, 515 U.S. 304. 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. *Id.* at 313, 316.

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. *Id.* at 312-13. 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." *Id.* 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." *Id.* at 313. 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. *Id.*

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. *Id.* (citing *Johnson*, 515 U.S. at 319).

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.

Id. at 2019.

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*. *See Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring and collecting cases). 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. *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*). Several federal appellate court judges have decried the lack of clarity in applying *Johnson* and expressly requested the Supreme Court to address the issue. *Tuuamalemalo v. Greene*, 946 F.3d 471, 480, 485 (9th Cir. 2019) (W. Fletcher, J., concurring) (*Johnson* has caused "analytic chaos," and the Supreme Court should "revisit the issue soon"); *Colston v. Barnhart*, 146 F.3d 282, 286 (5th Cir. 1998) (DeMoss, J., dissenting from denial of rehearing en banc) (writing in "hopes" of "attract[ing] the Supreme Court's attention to the increasingly complex panorama of doctrine and dissent" arising from *Johnson*).

The Supreme Court has made it clear that just because an officer may have the right to an immediate appeal of the denial of qualified immunity, this does not mean that the appellate court will have jurisdiction to review the denial of summary judgment on a *Monell* claim against the municipality that employees the officer. In *Swint v. Chambers County Com'n*, 514 U.S. 35, 38, (1995) the Court held that where the district court denied qualified immunity to employees, the fact that the officers had the right to appeal did not allow the municipal defendant to appeal the denial of summary judgment premised on the issue that no policy-maker had engaged in any conduct causing the alleged violation. The key to the Court's ruling was that resolution of the *Monell* issue was not inextricably intertwined with the qualified immunity issues that were properly before the appellate court.

However, where resolution of the qualified immunity issue effectively resolves any claim against the municipality, then an appellate court may exercise pendent appellate jurisdiction over the denial of summary judgment as to the municipality. The best example of this is where the qualified immunity issue is premised on the fact that no constitutional violation occurred in the first place. *See*,

Huskey v. City of San Jose, 204 F.3d 893, 904-905 (9h Cir. 2000); *Mattox v. City of Forest Park*, 183 F.3d 515, 523–24 (6th Cir.1999); *Moore v. City of Wynnewood*, 57 F.3d 924, 929–31 (10th Cir.1995).

One point to bear in mind is that just because you can take an immediate appeal from denial of qualified immunity, does not mean that it is always wise to do so. For example, although an order denying a motion to dismiss under FRCP 12(b)(6) based on qualified immunity is immediately appealable it is often a good idea to forego an immediate appeal and instead later raise the issue by way of motion for summary judgment where the facts of the case have largely been established. The standard of review in assessing the sufficiency of a complaint for purposes of a motion to dismiss is extremely favorable for plaintiffs and taking an appeal of a complaint with extremely broad allegations can result in an opinion denying qualified immunity that might have ramifications down the road in the same, or other cases.

II. APPELLATE ISSUES CONCERNING THE CLEARLY ESTABLISHED LAW PRONG OF QUALIFIED IMMUNITY.

The Clearly Established Law Prong Of Qualified Immunity.

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." *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). 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." *Anderson*, 483 U.S. at 640. In other words, "existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Moreover, clearly established law must be determined "'in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Indeed, the Supreme Court has repeatedly admonished the appellate courts for defining the clearly established law at too high a level of generality. *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. Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. at 743.

In evaluating, and ultimately prosecuting an appeal from the denial of 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?

Which Court Can "Clearly Establish" The Law For Qualified Immunity?

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." *Id*. at 617 (italics added). 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. *Id.* 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." *Id.* "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." *Id.* at 618.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court found 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. *Id.* at 244. In fact, "prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision." *Id.* 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." *Id.*

In Safford Unified School Dist. No. 1 v. Redding, 557 U.S. 364 (2009), the Court found 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." *Id.* at 378-79.

In *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011), the Court found 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." *Id*. at 474.

In *Reichle v. Howards*, 566 U.S. 658, 663 (2012), the Court held 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." *Id.* at 664-65. 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." *Id.* at 665-66.

In *Stanton v. Sims*, 571 U.S. 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.

In *Lane v. Franks*, 573 U.S. 228 (2014), the Court held 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." *Id.* at 245.

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. *Id*. at 350-51 (italics added). As a result, the lawfulness of the officers' conduct was not "beyond debate" and hence, he was entitled to qualified immunity. *Id*. at 352.

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." 138 S. Ct. at 591 n.8. 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. *Id*. at 590.

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.

After almost 20 years of rigidly construing the clearly established law test to require some reference to existing case law putting an officer on notice that his or her conduct was unlawful, in *Taylor v. Riojas*, 141 S. Ct. 52 (2020)(per curiam) the Court resurrected *Hope*'s "fair notice" test. In *Taylor*, the Court held that even in the absence of specific case law addressing similar facts, correctional officers were not entitled qualified immunity, because the alleged conduct – holding a prisoner in a cell "teeming with human waste" for six days – was so egregious that any officer would be on notice that such conduct was unlawful.

Most recently, in *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) and *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam) the Court found that officers were entitled to qualified immunity based on the absence of clearly established law, and in *Rivas-Villegas* the Court again emphasized that it had not decided what precedent could render the law to be clearly established, and only assumed that Circuit precedent would be relevant. 142 S. Ct. at 7.

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." *Perez v. City of Roseville*, 882 F.3d 843, 856-57 (9th Cir. 2018). 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." *Tekle v. United States*, 511 F.3d 839, 847 (9th Cir. 2007). Although 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. *See Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

The Sixth Circuit has held that a recent case from one circuit is generally not sufficient to constitute clearly established law in another circuit. *Eugene D. v. Karman*, 889 F.2d 701, 706 (6th Cir. 1989).

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." *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987). 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. *See Brady v. Fort Bend County*, 58 F.3d 173, 175-76 (5th Cir. 1995).

Given the Supreme Court's repeated admonition to the circuit courts to apply qualified immunity with rigor, both with respect to the factual similarity between the underlying case 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 to be especially true of federal officials, who technically operate on a national basis, and whose conduct should not be subjected to different 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 an appeal from the denial of 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 required 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 especially 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. *White*, 137 S. Ct. at 552. 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."

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*. *Id.* at 1153.

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. *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")).

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 *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. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). As the Court noted: "In 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.'" *Id.* (emphasis added).

III. APPELLATE ISSUES CONCERNING THE MERITS PRONG OF QUALIFIED IMMUNITY.

Issue selection is critical in prosecuting any appeal, and particularly important in an appeal concerning qualified immunity. In evaluating a potential qualified immunity appeal, one of the initial decisions is whether to raise arguments on the merits prong as well as the clearly established law prong. Many defense attorneys almost reflexively raise both grounds on appeal, figuring "why not?" However, in many circumstances, determination of whether a constitutional violation actually occurred at all is highly fact dependent. The result is that in an appeal from denial of summary judgment, the appellate court must broadly construe the plaintiff's evidence, and in any appeal following trial the court will generally presume the jury found every fact sufficient to support the judgment. Often, the presence of "bad facts" with respect to the merits of whether a constitutional violation occurred, strongly suggest that any appeal be limited to arguing 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 arguing only merits based issues on appeal, without addressing whether the right was clearly established in light of governing case law? In our experience, such situations are few and far between. Almost inevitably, if you are appealing on the merits of a constitutional claim, it is worthwhile to also appeal based upon the clearly established law prong. Indeed, a significant debate about whether an underlying constitutional violation occurred at all, invariably strengthens any argument that the officer's conduct should not be held to violate clearly established law.

The paradigm case concerning a merits based qualified immunity argument 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 in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) provides strong support for merits based arguments 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. *See id.* at 588-89.

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.

Moreover, the existence of a genuine issue of fact need not defeat an appeal from a merits-based motion for summary judgment or judgment after jury trial, depending upon the nature of the constitutional right at issue. In the Fourth Amendment context, it is 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." 490 U.S. at 396 (citations omitted). 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.'" *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 . . . .").

IV. AVOID FRCP 50 WAIVERS.

In *Ortiz v. Jordan*, 562 U.S. 180 (2011) the Supreme Court held that a denial of correctional officers' motion for summary judgment based on qualified

immunity was unreviewable on appeal from a final judgment in the case following trial. The Court noted that the petitioners had not sought immediate, interlocutory review of the summary judgment denial and had not renewed their argument by way of a motion for judgment under Rule 50. The Court emphasized that any challenge based on sufficiency of the evidence can only be preserved where a party moves for judgment under Rule 50(a), and then renews the motion post-trial under Rule 50(b).

The Court declined to address the argument that a Rule 50 motion was not required because qualified immunity presented a pure legal issue, finding that the immunity issue actually turned on disputed issues of fact and that the officers' appeal was really a sufficiency of the evidence claim that could only be preserved by filing proper Rule 50 motions.

It should be noted that there is a Circuit split on whether a Rule 50 motion is required in order to preserve a purely legal issue for appellate review. The First, Fourth and Eighth Circuits require Rule 50 motions to be filed in order to preserve even a purely legal argument for further review. *Ji v. Bose Corp.*, 626 F.3d 116, 127-128 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995); *Lopez v. Tyson Foods Inc.*, 690 F.3d 869, 875 (8th Cir. 2012). However, a majority of the federal circuits will review a denial of summary judgment that was based on a "purely legal" argument even if that argument was not renewed under Rule 50. See, e.g., *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012); *Revolution Eyewear Inc. v. Aspex Eyewear Inc.*, 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Barber v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 295 F. App'x 786, 789 (6th Cir. 2008); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Construction Laborers' Trust Funds for So. Calif.*, 382 F.3d 897, 902

(9th Cir. 2004); *Wolfgang v. Mid-America Motorsports*, 111 F.3d 1515, 1521 (10th Cir. 1997)

Because the line between an issue of law and a mixed question of fact and law is often blurry, even if you practice in a jurisdiction that does not require Rule 50 motions to preserve legal issues, the best policy is to make certain that a qualified immunity argument is made at the close of evidence under Rule 50(a), and then renewed in a post-trial motion under Rule 50(b).

V. EVALUATING THE DOWNSIDES OF APPEAL.

Putting aside the relative strength of arguments on appeal, there are many factors to consider in making a decision whether to appeal.

Financial Costs.

Interest On The Judgment.

For most public entities, the cost of paying interest on a judgment pending disposition of an appeal is a relatively minor consideration. This is because many states limit the rate of interest running on a judgment against a public entity (for example, in California judgments against a public entity bear a 7% rate of interest, as opposed to 10% against private parties), or the general rate of interest on a judgment is minuscule. The latter is true of federal judgments, where the interest rate is set by the T-bill auction rate at the time the judgment is entered. (28 U.S.C. §1961.) Given current interest rates over the last several years, judgments in federal cases have been accruing interest at less than 2% a year.

Bond Expenses.

The expense of posting a bond pending appeal is also rarely a consideration for public entities in deciding whether or not to appeal. This is because many states exempt public entities from having to post a bond to secure a judgment. And, where the judgment constitutes a lien on the property of the judgment creditor, federal courts will follow state law in terms of posting a bond to secure a stay pending appeal. (FRCP 62(f).) Where the judgment does not create a lien, the federal court must set an amount of bond, but courts can often be convinced to effectively waive the bond, or set it at an extremely low amount, given the fact that most public entities have little difficulty in establishing that they will be able to pay any judgment. Unlike private companies, public entities rarely go out of business. Moreover, if a bond is required, public entities can often obtain one at very low rates, given the fact that they are unlikely to default on any obligation.

In addition, given the minuscule federal interest rate on judgments, many federal judges are willing to set a very low bond amount—only slightly more than the amount of the judgment—to reflect the fact that so little interest will accrue during the pendency of an appeal.

The Record On Appeal.

The record on appeal generally consists of two components, the written documents filed in the trial court—often referred to as the clerk's transcript or clerk's record—and a transcript of the oral proceedings before the trial court, generally referred to as a reporter's transcript. In some states, the clerk's record is essentially the entire lower court file, which may be transmitted to the appellate court for purposes of the appeal. In other states, the parties may designate which documents from the trial court they want collected and submitted to the appellate court, with the appellant paying the initial charge to prepare the documents,

although some states exempt public entities from such costs. In other states, and some of the federal circuits, the parties themselves submit an excerpt of record or appendix containing the documents they believe are necessary for proper review of the issues on appeal.

The expense of preparing the written record can vary widely depending upon how large the lower court record is. In cases where the party prepares an excerpt of record or an appendix, there is also the added cost of attorney or paralegal time incurred in preparing the documents for submission to the appellate court.

Preparation of a reporter's transcript for an appeal can be costly. A trial lasting several weeks may result in a reporter's transcript cost of several thousand dollars, depending upon local court reporter rates.

Attorneys' Fees.

As with any litigation, the largest potential expense on appeal is attorneys' fees. In many respects, it may be easier to provide an estimate of potential attorneys' fees incurred in prosecuting or defending an appeal than it would be for trial proceedings, because, as noted, the appellate record is fixed. You know how long the trial was, as well as how many documents were submitted to the court, and most experienced appellate attorneys should be able to estimate how much time it will take to review a transcript of a particular length, or go through the necessary documents in preparing arguments for appeal. Similarly, an experienced appellate attorney should be able to estimate how much legal research will need to be done and how long it will take to draft a brief.

There may be somewhat more uncertainty with respect to accurately estimating the attorneys' fees that will be incurred in responding to an appeal. This is because those costs are dependent on the size and effectiveness of the appellant's

opening brief. An extensive, thorough brief, will obviously require the expenditure of more time in preparing a response, than a cursory brief that raises a few arguments.

In section 1983 cases a public entity must consider not simply what it will pay its attorneys for prosecuting or defending an appeal, but the possibility that it might end up having to pay an opponent's fees on appeal as well. It is not uncommon in some cases to have the liability for attorneys' fees outstrip the actual damage award. See, e.g., *Bravo v. City of Santa Maria*, 810 F. 3d 659 (9th Cir. 2016) (affirming $1 million fee award based on $5,002 judgment).

Political Cost/Benefit.

Concern About Reinforcing Failure.

Since appeals often come at the end of a case, after a very unhappy result, a common question before pursuing an appeal is whether the public entity is simply throwing good money after bad. Having spent hundreds of thousands, and even in some cases, millions of dollars to prosecute or defend the case through trial, there is always a serious question about whether it is worth continuing to fight.

Keeping A Controversial Case In The Spotlight.

Many appeals follow years of litigation between the parties, and often involve highly contentious, political issues. Since very few appeals are resolved within a short timeframe, the reality is that a case may remain pending for many months, even years after judgment in the trial court. Moreover, when the appellate court renders a decision, the case may become "news" again, and depending upon the result, start a cycle of controversy all over again.

Maintaining A Reputation For Strong Defense.

Many a weak, if not frivolous appeal, has been pursued in the name of maintaining a reputation for strongly defending or prosecuting a public entity's position. "We don't rollover," or "we stand behind our officers," are phrases that often accompany the filing of an insubstantial, albeit not entirely meritless appeal. Although few opportunistic plaintiffs appear to be deterred from filing questionable suits based upon a reputation for strong defense, nonetheless, there are certainly circumstances in which a public entity must appeal an improper judgment even where the amount at issue may be relatively small. This generally occurs where the case involves an issue of law that is likely to recur, and presents a particularly good vehicle for having an appellate court resolve the issue.

Could We End Up Worse?

Although it is always difficult to accept an adverse judgment, nonetheless, even in the face of defeat, sometimes you just have to "declare victory and go home." For example, a public entity might have been hit with a rather meager judgment in a case where liability was questionable, and there is a solid basis, at least from a legal standpoint, for seeking a new trial on appeal. In such circumstances, it is important that the public entity evaluate its potential exposure to a larger damage award on remand in the event of a reversal on appeal.

In addition, it is important to remember the axiom "bad cases make bad law." A public entity always needs to assess the risk that it might make bad law by appealing a marginal value case on a problematic record that will adversely affect future cases.

Can The Case Settle On Appeal?

Settlement Dynamics On Appeal.

It is extremely difficult to settle a case on appeal. In the trial court, the highly uncertain nature of trial drives settlement because neither party can be confident in the ultimate result. Once judgment has been entered, and one party has won and the other lost, that uncertainty evaporates. On appeal, the parties have vastly disparate bargaining power. Even if an appellant has a strong argument to present on appeal, as noted, given the institutional bias of appellate courts in favor of affirmance, few parties responding to an appeal are willing to compromise much in order to resolve the case short of disposition by the appellate court.

Generally, a case will not settle on appeal unless both sides perceive some jeopardy in the case being resolved by the appellate court. For example, a successful plaintiff facing an immunity argument on appeal may agree to a lower amount, in order to avoid being out of court entirely. On the other hand, a plaintiff with a substantial judgment facing an argument on appeal that would result in nothing more than a new trial, may well elect to "roll the dice," figuring that there will always be a chance to engage in settlement negotiations again if the matter ends up returning to the trial court. In addition, the long delay in many appellate courts may prompt a plaintiff to accept a compromise amount simply in order to assure immediate payment of some sort.

Appellate Mediation.

The backlog in many appellate courts has prompted some courts to create mediation programs. Sometimes the mediators are local attorneys, other times they may even be appellate court justices, and some federal circuits employ full-time trained mediators in an effort to resolve cases on appeal. As in the trial court, a strong mediator may be very helpful in resolving a case before the parties incur the substantial cost of further prosecuting or defending the action. An appellate mediator who understands the rules and standards governing appeals, may be able

to more strongly present reasons why, for example, a responding party should feel some jeopardy on appeal, or why an appellant might be overly optimistic about the chances of success on appeal.