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"SHOW ME YOUR HANDS!" Analyzing a Critical Element in Qualified Immunity

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AMICUS

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New Challenges on the Horizon for Local Government

The 2023-2024 Supreme Court Term yielded some wins for local government, and other cases where, despite ruling against the governmental entity, the Court declined to impose more far-reaching and detrimental holdings. But the prior Term also produced numerous outcomes which will present challenges for local government. And judging from recent appellate court decisions—many of which are headed to the Supreme Court--there will be ample continuing tests ahead for America's cities and counties.

These cases, including many where IMLA has or will provide amicus support, involve a wide range of issues which could prove complex and costly, including: inmate rights to jury trials, Section 1988 attorney's fees for preliminary injunctions, the extent of "final policymaker" liability, the limits of public nuisance claims, and takings compensation for law enforcement damage to private property.

***Richards v. Perttu*: Inmates and the Seventh Amendment (Supreme Court)**

In 2022, Kyle Richards (Richards), an inmate held by the Michigan Department of Corrections, filed a Section 1983 action alleging that Thomas Perttu (Perttu), a Resident Unit Manager employed at the Baraga Correctional Facility, had sexually harassed him and other inmates, retaliated against them, and destroyed their property and paperwork, in violation of the First, Fifth, and Eighth Amendments. Decades ago, Richards' claim could have been presented to a federal jury via Section 1983. But in 1996, responding to a meteoric rise in inmate actions clogging the federal dockets, Congress passed the Prison Litigation Reform Act (PLRA), which requires inmates to first exhaust all available administrative remedies before bringing a Section 1983 action:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[1]

Against the constraints of the PLRA, however, Richards is asserting a Seventh Amendment right to jury trial. His argument is that Perttu's actions in retaliating against him and destroying his documentation of grievances prevented him from exhausting the administrative remedies intended by the PLRA, and that the analysis of whether he has satisfied the administrative exhaustion requirement will necessarily involve the material facts of his underlying Section 1983 claim. In that circumstance, he says, it would be a deprivation of his Seventh Amendment right to jury trial for a district court judge to assess facts surrounding his exhaustion of administrative remedies.

The Sixth Circuit, reversing the lower court, agreed with Richards, finding that where factual elements which would otherwise require determination by a jury are intertwined with the PLRA-mandated administrative exhaustion analysis, the inmate's Seventh Amendment rights are superior, and a federal jury proceeding is appropriate:

> We therefore conclude that the Seventh Amendment requires a jury trial when the resolution of the exhaustion issue under the PLRA would also resolve a genuine dispute of material fact regarding the merits of the plaintiff's substantive case.[2]

The only other appellate court to have considered the issue—the Seventh Circuit—had not found a right to jury trial on the issue of administrative exhaustion. As that court held:

> [N]ot every factual issue that arises in the course of a litigation is triable to a jury as a matter of right . . . juries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control.[3]

The *Perttu* court declined to follow that analysis, creating a circuit split and instigating the Supreme Court's grant of certiorari on the following issue:

> Whether, in cases subject to the Prison Litigation Reform Act prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim.[4]

In so doing, the Sixth Circuit also opened the door to a potential explosion in inmate litigation. History provides a basis for governmental concern. While litigation at the federal level by state and local inmates was relatively rare through the 1970s, the number of federal civil rights suits brought by inmates steadily increased during the following decades: in 1995 alone, inmates filed almost

40,000 new actions, comprising nearly 20 percent of the federal civil docket.[5] Although some of these inmate suits had merit, the vast majority did not. The National Association of Attorneys General estimated that 95 percent of inmate filings in federal courts were frivolous; and that the preponderance of suits arose from "[j]ailhouse lawyers with little else to do" other than tie the federal "courts in knots with an endless flood of frivolous litigation."[6] That flood was placing a massive financial strain on state and local governments, where more than 80 percent of the nation's inmates are housed. As one sponsor noted, the huge number of frivolous lawsuits posed "an enormous drain on the resources of . . . States and localities, resources that would be better spent incarcerating more dangerous offenders instead of being consumed in court battles without merit."[7]

The PLRA made great strides in reducing inmate litigation. After two decades, the inmate filing rate in United States District Courts dropped by more than half, going from 24.6 filings per 1,000 inmates in 1995 to 12.1 filings per 1,000 inmates in 2018.[8] But the potential for frivolous filings remains. One example of a creative prisoner litigant arises from the Sixth Circuit itself. The inmate in question brought two unsuccessful *in forma pauperis* actions under Section 1983, alleging in one that prison officials were deliberately indifferent to threats against his safety, and in the other filing seven civil cases against state employees. The Sixth Circuit held that the deliberate indifference claim was properly dismissed by the district court judge as frivolous: "After a careful review of the record, we conclude that the factual allegations presented in this matter prevent the plaintiff from making an Eighth Amendment claim with even an arguable basis in law."[9]

The outcome of that case may be less notable than the particulars of the inmate bringing the action. At the time he brought suit, the plaintiff had filed a combined total of over 70 complaints according to Ohio Attorney General figures—seven in the Southern District of Ohio and 50 in the Northern District, as well as 17 appeals in the Sixth Circuit. At least eight of his complaints were dismissed as frivolous prior to the enactment of the PLRA, with an additional six dismissed thereafter.[10]

As IMLA's Supreme Court amicus brief in *Perttu* emphasizes, a decision affirming the Sixth Circuit's PLRA jury trial analysis will spur creative Section 1983 filings, increase inmate litigation before federal juries, stress over-burdened dockets, lengthen time to trial, require more jurors and hours of jury duty, and impose significant costs on already insufficient judicial budgets. *Richards v. Perttu*, no. 23-1324, will be argued before the Court on February 25, 2025.

***Lackey v. Stinnie*: Section 1988 Attorney's Fees for Preliminary Relief (Supreme Court)**

In July 2016, five named plaintiffs brought a class action against the Virginia Department of Motor Vehicles, challenging the constitutionality of a provision of the Virginia Code which required courts to suspend driver's licenses for motorists who fail to pay certain court fines and fees. The plaintiffs alleged the law violated their procedural and substantive due process rights on various grounds, including the lack of a hearing before their suspensions took effect. Finding a likelihood that the plaintiffs would succeed on the merits as to their due process claims, the District Court granted their motion for preliminary injunction, deferring enforcement of the suspension law and reinstating the plaintiffs' driver's licenses.

Before a scheduled bench trial began, the Virginia General Assembly passed a Budget Amendment suspending enforcement of the law for one year, staying the case. At the next legislative session, the suspension law was repealed in full, after which the court dismissed the class action as moot. Although no permanent injunction had issued, and the law was never declared unconstitutional (it was only found to be "likely" unconstitutional), the plaintiffs sought nearly $800,000 in attorney's fees from the State, relying on 42 U.S.C. § 1988(b), which provides that, in certain civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

At issue was the meaning of "prevailing party." The Supreme Court had provided guidance on that question in 2001, holding that, for a party to "prevail" under Section 1988, the relief must be "judicially sanctioned,"[11] and that "[a] defendant›s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" to prevail under the statute.[12] The Court subsequently held that a plaintiff also does not prevail when it obtains preliminary relief but fails to obtain a favorable final judgment—essentially winning a battle but losing the war.[13] But left unanswered was the question of whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction could warrant an award of attorney's fees. In that vacuum, appellate courts have reached contrary conclusions as to whether preliminary relief is a "merits based" result and whether it confers an "enduring" outcome.

The Fourth Circuit initially affirmed the district court's denial of attorney's fees but vacated on rehearing *en banc*. The seven-judge majority enunciated a new rule for determining when a party may be entitled to attorney's fees upon the award of a preliminary injunction:

> When a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees.[14]

The Circuit opined that "all preliminary injunctions" are "solidly merits-based" and should satisfy the "judicial

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Inside Canada *cont'd from page 19*

process of accommodating her disabilities resulted in stress from co-workers' questions about her modified duties which constituted discrimination. The Complainant followed the City's process and filed a complaint with the Director of the Commission ("Director"). The Director found that the Complainant had physical and mental disabilities that required an accommodation, but dismissed the complaint, finding that the City had reasonably accommodated the disabilities in both a temporary and permanent capacity. The Complainant requested a review of the finding.

HELD: Decision to dismiss complaint upheld.

DISCUSSION: The Human Rights Tribunal of Alberta ("Tribunal") reviewed the Director's findings and determined that the City had fulfilled its duty to accommodate, both on a temporary and permanent basis and further found the Complainant's dissatisfaction with the accommodations, which included her preference for a particular modification, did not rise to the level of discrimination. Notably, the Tribunal emphasized the Complainant's responsibility to engage in the accommodation process, noting that delays in submitting her resume and other information hindered its timely resolution. The Tribunal also found that the Complainant's arguments did not demonstrate a breach of her dignity or substantiate her claims of financial loss. The Tribunal concluded that the complaint lacked merit and was unlikely to succeed at a hearing. Furthermore, the Tribunal noted that such issues might be more appropriately addressed through grievance arbitration in a unionized workplace, although this point was not fully explored in this decision. Consequently, the decision to dismiss the complaint was upheld. ML

Amicus *cont'd from page 23*

actions with respect to [the inmate] were undoubtedly within the scope of activities for which he was to set policy."[19]

The Tenth Circuit majority found support in a Texas decision where a county sheriff raped an attempted murder suspect after an interrogation at her home. There, although the County argued that "the Sheriff's actions did not constitute a policy of the County . . . because they violated well-established County policy,"[20] the Fifth Circuit found to the contrary, holding that the Sheriff's actions were "those of the County" because "the County Sheriff is the County's final policymaker in the area of law enforcement."[21]

A dissent in *Sedgwick County* rejected the proposition that Sheriff Hanna's actions were those of the County:

> Hanna advanced a purely personal agenda in committing the sexual assault and acted outside his authorized law-enforcement 'realm' of setting policy for the transportation of prisoners . . . the majority opinion goes too far for me in approving as municipal policy a rogue sheriff's one-time, *secret* action that is unquestionably outside of the sheriff's realm and legitimate policymaking authority.[22]

Importantly, the dissent argued that characterizing the Sheriff's acts as those of the County in this circumstance amounts to *respondeat superior*—a principle clearly disqualified by the Supreme Court in *Monell*, where the Court held that:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.[23]

Sedgwick County was settled before petitioning for Supreme Court review. As such, the Tenth Circuit holding, as well as the Fifth Circuit opinion and others cited by the majority, stand to encourage additional litigation arising out of unauthorized, rogue--and even criminal--acts by "final policymakers," significantly challenging *Monell's* admonition against *respondeat superior* liability for state and local governments.

***Trumbull County v. Purdue Pharma, LP*: Public Nuisance Abrogated by Product Liability Statute (Ohio Supreme Court)**

In August 2022, Ohio's Trumbull and Lake Counties were awarded $650 million in abatement funds by District Court Judge Dan Aaron Polster after a federal jury found that three pharmacies--Walgreens, CVS, and Walmart—had contributed to the opioid crisis due to irresponsible filling of illegitimate opioid prescriptions, failure to maintain accurate dispensing records, and other shortcomings.[24] That setback for the defendants was among the more recent outcomes arising from hundreds of local government cases consolidated in the multidistrict litigation before Judge Polster in Ohio's Northern District: *In re National Prescription Opiate Litigation*, no. 17-MD-2804 (N.D. Ohio).

Central to the *Trumbull* and *Lake* wins was a cause of action widely deployed by governmental plaintiffs against the opioid manufacturers, distributors, prescribers, and retailers: common law public nuisance, defined in the Restatement of Torts as "an unreasonable interference with a right common to the general public."[25] While public nuisance has been held to be inextricably limited to real property-related actions in some jurisdictions, including Oklahoma and North Dakota, it has been widely effective in many opioid cases, helping to force opioid defendants to sign settlements yielding more than $60 billion in abatement funding, increments of which are already being disbursed to communities around the nation.

The pharmacy defendants in *Trumbull* and *Lake* moved to dismiss based on the Ohio Product Liability Act (OPLA), which was "intended to abrogate all common law product-liability claims or causes of action."[25] The Ohio legislature amend-

ed the initial codification to provide that "'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that [the sale, marketing, etc.] of a product unreasonably interferes with a right common to the general public."[27] But a separate section of the OPLA further states that a "'product liability claim' means a claim or cause of action that . . . seeks to recover compensatory damages from a manufacturer or supplier . . ."[28] Noting that the Counties were seeking funds solely for abatement, Judge Polster denied the defendants' motions, concluding that the OPLA does not abrogate absolute public-nuisance claims which seek relief other than compensatory damages.

The pharmacies appealed to the Sixth Circuit, which sought further clarity from Ohio's Supreme Court on the interplay between the OPLA, public nuisance, and abatement, certifying the following question:

> Whether the [OPLA] abrogates a common law claim of absolute public nuisance resulting from the sale of a product in commerce in which the plaintiffs seek equitable abatement, including both monetary and injunctive remedies?[29]

On December 10, 2024, the Ohio Supreme Court answered the certified question in the affirmative:

> [A]ll public-nuisance claims alleging 'that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public' have been abrogated by the OPLA, including those seeking equitable relief.[30]

The decision deprives the Counties of $650 million in abatement funding and stands to silence plaintiffs intending to launch product-related public nuisance actions in Ohio. It offers a potential roadmap to other legislatures determined to curtail product-based litigation in their states and may be the subject of judicial notice elsewhere.

The Ohio public nuisance inquiry will shortly be followed by a similar analysis in West Virginia, whose common law public nuisance is "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." There, Cabell County and the City of Huntington opted out of the statewide distributor opioid settlement and pursued their own public nuisance actions. The Southern District of West Virginia found that public nuisance was inapplicable and granted the defendants' motions to dismiss. On appeal, the Fourth Circuit certified a similar question to the West Virginia Supreme Court of Appeals:

> Under West Virginia's common law, can conditions caused by the distribution of a controlled substance constitute a public nuisance and, if so, what are the elements of such a public nuisance claim?[31]

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Amicus *cont'd from page 31*

The distributor defendants argue that West Virginia's Supreme Court of Appeals has applied the common law of public nuisance only in the context of conduct that interferes with public property such as highways, public grounds, harbors and landings, or shared resources such as clean air and water, and point to Oklahoma's opioid case which limited public nuisance to real property based actions.[32] The localities point out that the Supreme Court of Appeals has applied the common law of public nuisance to "commodities," "the manufacture and distribution of products," and "otherwise-lawful business activities . . . when conducted in a manner that harms the public."[33]

The case will be argued on January 28. Local authorities express optimism over the Fourth Circuit's inquiry after the lower court rejected the plaintiffs' public nuisance cause of action, and much hangs in the balance; estimates are that a negative ruling could cost Huntington and Cabell County up to one billion dollars.[34]

***Baker v. City of McKinney*: Second Look at Police-Caused Damage to Private Property?**

In the past five years, IMLA has provided amicus support in three cases involving Fifth Amendment takings claims against local governments for damage to residences resulting from law enforcement activity.[35] In each, the locality has prevailed: the Fifth, Sixth, and Tenth Circuits have all declined to require governmental compensation to the homeowners. In the Fifth Circuit case, *Baker v. City of McKinney,* the court held that the Takings Clause does not require compensation when it is "objectively necessary" for officers to damage or destroy property in an active emergency to prevent imminent harm to persons.

The *Baker* plaintiff petitioned for Supreme Court review in mid-2024, but certiorari was denied in late November. However, Justice Sotomayor, joined by Justice Gorsuch, authored a statement accompanying the denial, reprising the Court's decades-old instruction that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[36] As she phrased it, "This Court has yet to squarely address whether the government can, pursuant to its police power, require some individuals to bear such a public burden."[37] She expressed sympathy for the Baker plaintiff and inquired whether there is any "objectively necessary" exception to the Takings Clause compensation requirement:

> Whether any such exception exists (and how the Takings Clause applies when the government destroys property pursuant to its police power) is an important and complex question that would benefit from further percolation in the lower courts prior to this Court's intervention.[38]

The full import of the Sotomayor/Gorsuch statement is unclear, but it seems fully plausible that the comment presages a future Supreme Court review, and potential narrowing, of the longstanding principle that governments are not liable for compensating owners whose private property is damaged in the course of legitimate police activity. Such a holding would represent a radical change from traditional latitude afforded law enforcement and emergency response in Takings Clause matters and could subject localities to widespread and costly Takings claims.

Conclusion:

As indicated, on the horizon are various appellate developments that appear disadvantageous for local government. While the outcome of these matters is yet to be seen, local government lawyers should be aware of the challenges ahead. ML

1. 42 U.S.C. § 1997e.
2. Richards v. Perttu, 96 F.4th 911 (6th Cir. 2024).
3. Perttu v. Richards, cert granted, 2024 WL 4394132 (U.S. Oct. 4, 2024)(No. 23-12324).
4. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1558 (2003).
5. 142 Cong. Rec. 8236 (1996) (statement of Sen. Abraham).
6 141 Cong. Rec. 26553 (1995) (statement of Sen. Hatch)
7. 142 Cong. Rec. 8236 (1996) (statement of Sen. Abraham).
8. Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics,* Prison Policy Initiative (April 26, 2021), at Table G, *Change in Prisoner Civil Rights Filings in U.S. District Court and Filing Rates, by State, Fiscal Years 1995 vs. 2012, 2012 vs. 2018, and 1995 vs. 2018*.
9. Wilson v. Yaklich, 148 F.3d 596, 600 (6th Cir. 1997).
10. *Id.*
11. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001).
12. *Id.* at 605.
13. Sole v. Wyner, 557 U.S.74 (2007).
14. Stinnie v. Holcomb, 77 F.4th 200, 210 (4th Cir. 2023).
15. *Id. at 227.*
16. *See e.g.,* Veasey v. Abbott, No. 2:13-CV-193, 2020 WL 9888360 (S.D. Tex. May 27, 2020), aff'd, 13 F.4th 362 (5th Cir. 2021) ($6,790,333.31 fee award); Tennessee State Conference of the N.A.A.C.P. v. Hargett, nos. 3:19-cv00365, 3:19-cv-00385, 2021 WL 4441262 (M.D. Tenn. Sept. 28, 2021), aff'd, 53 F.4th 406 (6th Cir. 2022) ($851,279.44); New York State Rifle & Pistol Assn, Inc. v. Nigrelli, no. 1:18-cv-134, 2023 WL 6200195 (N.D.N.Y. Sept. 22, 2023) ($447,700.82); Chrysafis v. Marks, no. 21-CV-2516, 2023 WL 6158537 (E.D.N.Y. Sept. 21, 2023) ($384,728.86).
17. Whitson v. Bd. of Cnty. Comm'rs, no. 18-CV-02076, 2020 WL 13660757, at *5 (D. Colo. Apr. 17, 2020).
18. Whitson v. Bd. of Cnty. Comm'rs, 106 F.4th 1063 (10th Cir. 2024).

19. *Id*. at 1068.
20. Bennett v. Pippin, 74 F.3d 578, at 583-84 (5th Cir. 1996).
21. *Id*. at 585–86.
22. *Whitson*, *supra* note 18, at 1074.
23. Monell v. Dep't of Soc. Svcs, 436 U.S. 658, 691 (1978).
24. In re National Prescription Opiate Litigation, no. 17-MD-2804 (N.D. Ohio Aug. 22, 2022) "*Track Three*": County of Lake v. Purdue Pharma, L.P. no. 18-op-45032 (N.D. Ohio); County of Trumbull v. Purdue Pharma, L.P. No. 18-op-45079 (N.D. Ohio).
25. 4 Restatement of the Law 2d, Torts, § 821B(1), 87 (1979).
26. Ohio Rev. Code § 2307.71(B).
27. *Id.*
28. *Id*. at § 2307.72(A)–(C).
29. Trumbull County; Lake County; Plaintiff's Executive Committee v. Purdue Pharma, L.P., nos. 22-3750/3751/3753/3841/3843/3844 (6th Cir. Sept. 11, 2023).
30. In re Natl. Prescription Opiate Litigation, Slip Op. No. 2024-Ohio-5744 (Dec. 10, 2024).
31. City of Huntington v. Amerisource Bergin Corp., no. 22-1819 (4th Cir. Mar. 18, 2024).
32. State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2022).
33. Chris Dickerson, *4th Circuit wants state Supreme Court to answer nuisance question in Huntington, Cabell opioid case*, West Virginia Record, Mar. 18, 2024 (https://wvrecord.com/stories/656783579-4th-circuit-wants-state-supreme-court-to-answer-nuisance-question-in-huntington-cabell-opioid-case).
34. *Id*.
35. Lech v. Jackson, 791 Fed. Appx. 711 (10th Cir. 2019); Baker v. City of McKinney, 84 F.4th 378 (5th Cir. 2023); Slaybaugh v. Rutherford County, no. 23-5765 (6th Cir. 2024).
36. Armstrong v. United States, 364 U.S. 40, 49 (1960).
37. Baker v. City of McKinney, no. 23-2363 (denial of certiorari, U.S. Nov. 25, 2024).
38. *Id.*

Show Your Hands *cont'd from page 17*

help.[55] Daniels, believing that Oakes had a gun in the car, calmly asked him to leave the car, but Oakes refused.[56] Officer Wernecke then arrived as backup for Daniels, and both officers talked with Oakes, who still refused to leave the car and refused to let them search it. After several more minutes, feeling they were at an impasse, Daniels radioed for a supervisor.[57]

Sergeant Anderson then arrived, and "he was told that Oakes likely had access to a gun, was depressed and suicidal."[58] Anderson asked Oakes "if the officers could get him help."[59] He also asked Oakes if he was on medication, to which Oakes admitted that he had stopped taking his prescribed medication for depression.[60] Anderson repeatedly asked Oakes to allow them to search the vehicle for a weapon, and Oakes continued to refuse. When Anderson said they would take him out of the car, "Oakes still refused and stated that the officers 'better unsnap.'"[61] Officers Daniels and Wernecke reached for Oakes's arms to bring him out of the car, and "Oakes flailed his hands and repelled the officers' hands."[62] The Eleventh Circuit then describes Oakes's hidden hand movement in a way that is somewhat similar to *Manis* and, later, to *Salazar-Limon*:

> Oakes then reached into the area between the driver's seat and the center console. Oakes's right hand was not within the officers' view. Fearful that Oakes was reaching for his gun, Anderson shouted "gun, gun, gun" to alert the other officers. Anderson did not actually see any gun. He quickly moved to the outside of the open driver's side door and drew his weapon. Daniels and Wernecke also drew their weapons.
>
> **For about thirty seconds**, the officers can be heard on the audio recording repeatedly shouting "**show your hands!**," "**hands up!**," "**one more time, sir hands up!**," and "**let me see your hands now!**" Anderson said he could **see Oakes wiggling his right arm, as if his hand was searching for something** between the seat and console.
>
> At that point, Anderson **saw Oakes jerk his right hand out of the space** between the seat and the console and start to move his arm across his body. From this movement, Anderson thought Oakes had grabbed a gun and was pulling it out. Believing Oakes was "fixing to fire," Anderson shot twice and fatally wounded Oakes. Anderson had not actually seen a gun.[63]

Although Anderson had not seen a gun, it was objectively reasonable in the totality of the circumstances for him to have believed that Oakes had a gun and was reaching for it. Oakes didn't have the gun in his hand when Anderson fired. The gun was found, however, in the place where Oakes had been reaching his hand.[64] The district court granted summary judgment on qualified immunity grounds and the Eleventh Circuit affirmed.[65]

CONCLUSION:

The *Oakes v. Anderson* opinion's concluding paragraph contains an acknowledgment that we who defend officers should never forget: "The events of that day were undoubtedly tragic. One life ended, and many other lives will never be the same."[66] The work of those we defend is very serious, and qualified immunity can protect them from the distractions and pressures of going through a lawsuit. But qualified immunity cannot protect them from the impact of the decision to use deadly force. Officers protect and serve our communities. And we protect and serve our officers. The cases sampled here are just a few of the many that explore the interplay of qualified immunity and visible or hidden hands. The better we understand that interplay, the better we can help to protect those who protect us. ML