TENTH CIRCUIT UPHOLDS IMMUNITY FOR OFFICER WHO SHOOTS CAR CHASE SUSPECT

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On August 1, 2017, the Tenth Circuit Court of Appeals decided *Johnson v. Peay*[i], in which the court discussed whether an officer who shot a fleeing car chase suspect is entitled to qualified immunity regarding an excessive force suit. The relevant facts of *Johnson,* taken directly from the case, are as follows:

> Johnson initiated the underlying car chase when Deputy Christian Peay of the Morgan County Sheriff's Department, Sergeant Peay's brother, attempted to initiate a traffic stop due to the fact that Johnson was driving late at night without her headlights on. Johnson failed to yield to Deputy Peay, even after he activated his overhead emergency lights and siren, and led Deputy Peay on a high-speed chase lasting over half an hour. Law enforcement deployed spike strips, which flattened three of Johnson's tires. Nevertheless, she persisted in her attempt to evade arrest. Johnson did not stop even after several tires came off her truck's wheel rims altogether. Instead, Johnson continued to flee and drive erratically; she drove off the right shoulder of the interstate, went back across both lanes, and struck the cement barrier in the middle of the divided highway. Johnson eventually exited the interstate and turned onto a rural road, but still refused to yield to Deputy Peay or any of the other law enforcement vehicles that had joined the pursuit by that time.
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> After she exited the interstate, Johnson stopped and began to turn her truck around to face the officers. Several law enforcement vehicles, including both Sergeant Peay's and Deputy Peay's vehicles, lined up across the road to block Johnson's westbound path. Cameras located on the dashboards of these law enforcement vehicles recorded the rest of the encounter. Sergeant Peay exited his vehicle and verbally ordered Johnson to stop and get out of her truck. Instead of stopping, Johnson began to pull forward toward Sergeant Peay's vehicle and bumped into it with her truck. She then backed up and began to pull forward again, turning and bumping into Deputy Peay's stationary vehicle with even greater force than the first collision and breaking the grill guard at the front of the vehicle. By then, Deputy Peay had also exited his vehicle but dropped out of Sergeant Peay's view. Sergeant Peay therefore did not know whether Deputy Peay was under Johnson's truck, had been struck by Johnson's truck, or if he had been pinned between the two

> vehicles. As Johnson's truck collided with Deputy Peay's vehicle, Sergeant Peay fired a single shot at Johnson's truck. The bullet passed through Johnson's windshield and struck her in the head. After securing the scene, officers called for and provided immediate medical attention for Johnson. Johnson survived the gunshot but suffered serious injuries and lost the vision in her left eye.
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> Officers recovered a half-empty bottle of vodka at the scene, which Johnson indicated she purchased from a gas station a few hours before the incident. It was later determined that Johnson had a blood alcohol level of 0.358 at the time of the incident, more than four times the legal limit in Utah. And Johnson stated that she "had every intention of trying to kill [herself]," "want[ed] to die," and was attempting "death by cop." Supp. App. at 98, 110. In the aftermath of the incident, Johnson was cited for a variety of violations and eventually pleaded guilty to failure to respond to an officer's signal to stop (a third degree felony) and driving under the influence of alcohol or drugs (a class B misdemeanor).
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> Meanwhile, the Davis County Attorney's Office investigated Sergeant Peay's use of force under state law governing a "peace officer's use of deadly force." *See* Utah Code. Ann. § 76-2-404. The office determined that Sergeant Peay's "use of potentially lethal force . . . was not *necessitated* by the facts" and the shooting did "not squarely fit with the letter, scope and intent of" state and related federal law, but ultimately declined to prosecute Sergeant Peay because "a unanimous jury would not convict Sergeant Peay of a crime when presented with all of the evidence." App. at 63-64.[ii]

At the conclusion of the County Attorney's investigation, Johnson filed suit in federal district court and alleged that Sergeant Peay violated the Fourth Amendment and clearly established law when he shot her. The district court granted qualified immunity to Sergeant Peay and dismissed the suit. Johnson appealed to the Tenth Circuit Court of Appeals.

The Tenth Circuit first noted that in order to defeat qualified immunity, a plaintiff must show that the law was "clearly established" such that another reasonable officer in the same situation would have known that his conduct was unlawful. The court stated

> Moreover, the Supreme Court has repeatedly emphasized that "'clearly established law' should not be defined 'at a high level of generality'" and "must be 'particularized' to the facts of the case." *White v*. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (citations omitted). "Such specificity is especially important in the Fourth Amendment context," where the Supreme Court has recognized it may be "difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (quoting *Saucier*, 533 U.S. at 205). **When a case "presents a unique set of facts and circumstances," this quality "alone [is] an important indication . . . that [the officer's] conduct did not violate a 'clearly established' right.**" *See Pauly*, 137 S. Ct. at 552 (citations omitted). **That is, when there is no case "where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment," it is unlikely that the officer's conduct violated "clearly established" law**. *See id*.[iii] [emphasis added]

After the court defined the "clearly established" law requirement to defeat qualified immunity, court next set forth the legal standard for deadly force to prevent escape. Regarding this standard, the court stated

> **In general, it is not "constitutionally unreasonable" for an officer to prevent a suspect's escape by using deadly force when the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others**." *Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004) (per curiam) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).[iv] [emphasis added]

The court then noted that legal precedent regarding excessive force in car chases presents a "hazy legal backdrop" for officers. The first case the court of appeals examined was *Brosseau v. Haugen*[v], decided by the Supreme Court in 2004. In this case, Officer Brosseau shot Haugen as he attempted to flee in his vehicle after a pursuit where the officer was fearful for other officers who she believed were in the immediate area and other citizens in the area. The Supreme Court stated that Haugen "posed a major threat to, among others, officers at the end of the street." The court then held that prior case law, "by no means clearly established that Brosseau's conduct violated the Fourth Amendment."[vi]

The second Supreme Court case the Tenth Circuit examined was *Scott v. Harris.*[vii] In this case, the Supreme Court held that the officer did not violate the Fourth Amendment when he rammed Harris' car off the road at over 90 mph when Harris had been fled at over 90 mph, disregarded red lights, drove on the wrong side of the road and placed motorist's and officer's lives at risk.

The third Supreme Court case the court examined was *Plumhoff v. Rickard.*[viii] In this case, the court held that "an officer acted reasonably when he fatally shot a fugitive who was intent on resuming a chase that posed a deadly threat for others on the road."[ix]

The last Supreme Court case the court examined was *Mullenix v. Luna.*[x] In this case, the court held that an officer did not violate clearly established law when he shot a fleeing suspect six times from an overpass when the suspect was "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers and who was moments away from encountering an officer."[xi]

The court then held that the law was not clearly established in the factual circumstance that Sergeant Peay faced with Johnson. The language used by the court is quoted below because it will explain their rationale in upholding immunity for the sergeant. The court stated

> These cases require us to take a close look at the unique set of facts and circumstances facing Sergeant Peay. Johnson's injuries are undeniably tragic. And it is quite possible that Sergeant Peay overreacted. **It is not our job, however, to evaluate the incident "with the 20/20 vision of hindsight" from "the peace of a judge's chambers" while leisurely watching the end of the encounter by video.** *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citations omitted). **Rather, we must judge the reasonableness of a particular use of force "from the perspective of a reasonable officer on the scene" and our calculus "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a**

particular situation." *Id*. at 396-97 (citations omitted). As the district court noted, in the sequence of events leading up to the shooting, Johnson

> showed no signs of yielding to the officers' lights and sirens during the chase, even when she had to drive on tire rims after three of her tires disintegrated from damage caused by tire spikes. And after she slowed to a stop, Ms. Johnson immediately backed up and drove straight toward the officers and the patrol cars that blocked her path. Her truck was only feet away from the officers and their cars. She deliberately ran into Sergeant Peay's car, even as he was pointing a gun at her through the windshield and ordering her to stop. . . . Then she revved her engine, backed up again, turned her steering wheel, and aimed for other cars. App. at 10-11.

In other words, at the time of Sergeant Peay's use of force, the officers "were no longer dealing with a traffic stop," but "with an unknown driver who disobeyed officers' commands to pull over and who led the officers on a thirty-minute chase" before "maneuvering . . . a big pickup truck in an aggressive way in close proximity to officers." *Id*. at 11-12. According to the undisputed record, Sergeant Peay was unaware of the precise location of Deputy Peay, not knowing whether he was "under [Johnson's] vehicle, if she had hit him, or if she was pinning him between the vehicles." Supp. App. at 79. **As the Supreme Court said in *Mullenix*, it has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity" where an officer reasonably believed he or others were in danger**. 136 S. Ct. at 310. Johnson cannot cite, and our independent review does not reveal, any case indicating that an officer's use of deadly force is constitutionally impermissible in a situation roughly analogous to the one Sergeant Peay faced here.[xii] [emphasis added]

Johnson argued that the video contradicted Sergeant Peay's version of events and that the district court credited the sergeant's version of events in reaching its decision. However, the court of appeals, after a review the video of the pursuit, stated that the video evidence "depicts a sequence of events corroborating the undisputed testimony of the officers and entitling Sergeant Peay to qualified immunity."[xiii]

Therefore, the court of appeals affirmed the grant of qualified immunity for Sergeant Peay.

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[i] No. 16-4160 (10th Cir. Decided August 1, 2017)
[ii] Id. at 2-5
[iii] Id. at 6-7
[iv] Id. at 7
[v] 543 U.S. 194 (2004)
[vi] Johnson at 8 (quoting Brosseau, 543 U.S. at 201)
[vii] 550 U.S. 372 (2007)

[viii] 134 S. Ct. 2012 (2014)
[ix] Johnson at 8 (quoting Plumhoff, 134 S. Ct. at 2022)
[x] 136 S. Ct. 305 (2015)
[xi] Johnson at 8-9 (quoting Mullenix, 136 S. Ct. at 309)
[xii] Id. at 9-10
[xiii] Id. at 12