



## UNITED STATES SUPREME COURT GRANTS QUALIFIED IMMUNITY IN CASE OF WOMAN WITH MENTAL IMPAIRMENT SHOT BY OFFICER

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The case does not give any guidance for law enforcement operations other than the indication that the law was not clearly established when this particular shooting occurred.

*Kisela v. Hughes*, PER CURIAM, 2018 U.S. LEXIS 2066; 2018 WL 1568126 (April 2, 2018)<sup>1</sup>

As a reminder at the outset of this article, we note that when officers are sued for a violation of civil rights, the officer(s) often seek to have the case dismissed based on summary judgment and/or qualified immunity. Under summary judgment the officer argues, even if the court takes the plaintiff's version of events as what occurred, the officer did not violate the plaintiff's civil rights. The court has two options in dealing with this first question. One, the court can decide whether the officer's actions violated the constitutional rights of the plaintiff. In the alternative the court can simply skip this first question. If the court decides that the officer's actions were constitutional then the case is dismissed because the officer's motion for summary judgment is granted.

If the court determines that the officer's actions violated the constitution or the court skips the first question, the court will then turn to the qualified immunity question, which is whether the law was clearly established such that officers would understand that the conduct violated the constitution. If the law was not clearly established at the time the officer acted, the officer is entitled to qualified immunity. If the law was clearly established then the case moves on to trial.

In this case, the United States Supreme Court declined to decide whether the shooting was Constitutional and moved directly to the second question of whether the law was clearly established at the time of the shooting such that a reasonable officer would know that the conduct violated the Constitution. As such, we cannot say that this is a Constitutional shooting.

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<sup>1</sup> *Kisela v. Hughes*, PER CURIAM, 2018 U.S. LEXIS 2066; 2018 WL 1568126 (April 2, 2018)

The Court recounted the facts in *Kisela* as follows:

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a \$20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted [her] to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get \$20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. *Ibid.* Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention."

Commentary: I would note that this is a case where plaintiff, through an expert would likely opine, that if the officers had slowed down and obtained information from Chadwick, who was on the scene, the shooting would not have occurred.

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The federal trial court granted summary judgment to Officer Kisela, however the United States Court of Appeals for Ninth Circuit reversed, finding that based on the plaintiff's facts, there was a clearly established constitutional violation.

The United States Supreme Court began its review by citing *Tennessee v. Garner*<sup>2</sup> and quoting: “where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”

The Court then moved to *Graham v. Connor*,<sup>3</sup> indicating:

“that the question whether an officer has used excessive force ‘requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.’ The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’ And ‘[the, calculus of reasonableness 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 circumstance.”

The Court then decided to skip the first question as to whether or not Officer Kisela's action in shooting Hughes was constitutional writing: “Here, the Court need not, and does not, decide whether Kisela violated the *Fourth Amendment* when he used deadly force against Hughes. For even assuming a *Fourth Amendment* violation occurred, a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

The Court noted that although it does not take a case directly on point to give officers notice of clearly established law, “for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. [cites omitted] In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.”

On clearly established law analysis the Court wrote:

“This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.”

The Court made clear that the *Fourth Amendment* generally and use of force particular does require some level of specificity of a similar case to put an officer on notice.

The Court wrote:

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<sup>2</sup> *Tennessee v. Garner* 471 U.S.1 (1985).

<sup>3</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

“[S]pecificity is especially important in the *Fourth Amendment* context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” 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. Precedent involving similar facts can help move a case beyond the otherwise “hazy border between excessive and acceptable force” and thereby provide an officer notice that a specific use of force is unlawful.

“Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers.” But the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an ‘obvious case.’” *Ibid.* Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.” (Cites Omitted).

The Court then returned to the facts of the case to determine that the law was not clearly established and that Kisela was entitled to qualified immunity. The Court reasoned:

“Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the *Fourth Amendment*.”

#### **Dissent:**

In a strongly worded dissent, Justice Sotomayor pointed out that one of the non-shooting officers testified that he wanted to continue with verbal persuasion at the time of the shooting. Justice Sotomayor pointed to several facts in plaintiff’s version of events that would lead her to conclude that the shooting violated the *Fourth Amendment* including:

Hughes stood stationary about six feet away from Chadwick, appeared “composed and content,” Appellant’s Excerpts of Record 109 (Record), and held a kitchen knife down at her

side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he “wanted to continue trying verbal command[s] and see if that would work.” *Id.*, at 120. But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured...If this account of Kisela’s conduct sounds unreasonable, that is because it was.

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