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Qualified Immunity After *White v. Pauly*

by Mike Bersani

This past January, the U.S. Supreme Court in *White v. Pauly,* 137 S.Ct. 548 (2017) (*per curiam*), reaffirmed that "clearly established law" for purposes of qualified immunity should not be assessed at a high level of generality but, rather, must be particularized to the facts of the case. In approving of the defendant officer's qualified immunity defense, the Court commented that the "uniqueness of facts and circumstances" facing the officer at the time of the incident should have indicated to the lower courts that the law was not clearly established. In light of this comment, *White* should make it difficult for plaintiffs to defeat a qualified immunity defense in many cases.

In *White*, several police officers approached a house to investigate a reported road rage incident that had occurred earlier in the evening. Two brothers occupied the house but apparently believed that the police were the combatants from a prior road rage incident. The brothers armed themselves and warned the "suspected intruders" that they had guns. One of the brothers stepped out of the back door and fired two warning shots. Officer White arrived late and saw the second brother point a gun out of a window. White crouched behind a stone wall and fatally shot the second brother. White did not give any warning before using deadly force. The estate of the decedent filed suit under 42 U.S.C. §1983 claiming use of excessive force. The 10th Circuit affirmed the denial of summary judgment for the officer, finding that qualified immunity did not apply because the case law under *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985), clearly established that the use of deadly force by Officer White violated the Fourth Amendment.

The U.S. Supreme Court reversed, and took the 10th Circuit to task for "fail[ing] to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." 137 S.Ct. at 552. The Court stated that *Graham* and *Garner* lay out the law only at a general level and do not themselves create clearly established law outside of an obvious case of excessive force. *Id.* The Court found it important to note that the 10th Circuit believed the case presented a unique set of facts and circumstances in light of Officer White's late arrival at the scene, which should have indicated to the 10th Circuit that White's conduct did not violate any clearly established right. *Id.* The Court concluded that it was not settled under the Fourth Amendment that an officer who arrives late to an active scene could not assume that proper procedures had been taken by other officers in properly identifying themselves. *Id.*

While *White* did not break any new legal ground, it is significant because it continues the Supreme Court's trend of reversing federal appellate courts that have denied qualified immunity to law enforcement defendants. *See, e.g., Thompson v. Howard*, Case No. 15-3338 *10, fn. 9 (3rd Cir. 2/17/17) (collecting cases). The Supreme Court seems to have raised the ante for plaintiffs to find analogous precedent to defeat a qualified immunity defense. One could argue that every excessive force case presents unique facts and circumstances. While the Court has historically cautioned that a case on point is not required to defeat qualified immunity, the "uniqueness of the facts and circumstances" comment, in reality, mandates that plaintiff find that case in order to overcome qualified immunity.


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Since *White* was decided, some appellate courts have heeded the Supreme Court's admonitions. In *Thompson*, the 3rd Circuit recently held that a police officer did not violate clearly established law by shooting a fleeing suspect who had crashed his car into an occupied police cruiser, reasoning that no existing case squarely governed the facts faced by the officer. In *Scott v. Kent County*, Case No. 16-1587 *13 (6th Cir. 2/17/17), the 6th Circuit affirmed qualified immunity for a correctional officer because the plaintiff failed to identify an existing case where it had been determined it was unreasonable to take down a disruptive jail inmate after the inmate took a step toward the officer in close quarters during a cell transfer. Those cases that have denied qualified immunity in the aftermath of *White* cited specific precedent existing at the time of the incident to support the plaintiff's position. In *Folks v. Petitt*, Case No. 16-3596 *11-12 (6th Circuit 1/23/17), the 6th Circuit held that it was clearly established that forcibly slamming a non-resisting, cooperative person on the hood of a car violated the Fourth Amendment. Similarly, in *Hatcher v. Bement*, Case No. 16-10488 *14 (5th Cir. 1/19/17), the 5th Circuit held that fatally shooting a suspect who was bent over, squinting, wiping pepper spray from his eyes, and then slowly walking away, violated the Fourth Amendment.

While *Folks* and *Hatcher* may very well be examples of patently obvious excessive force, one has to ask whether they truly follow the Court's warnings in *White*. The dichotomy between active and passive resistance is not easy for an officer to discern in the field.

For example, take the all too familiar situation where a suspect actively resists arrest and is lawfully shot with a Taser. He then sits on the ground and refuses to obey commands to lie down and put his hands behind his back to be handcuffed. Can the police assume that he is done actively resisting and is surrendering? Are the facts unique enough that a reasonable officer would not have known that continuing to use significant force violates the suspect's constitutional rights? *See Brooks v. City of Aurora*, 653 F.3d 478 (7th Cir. 2011) (affirming qualified immunity because the use of pepper spray was not clearly established as to an arrestee who had ceased active, physical resistance, but had not yet submitted to the officer's authority or been taken into custody and still posed an immediate threat of resistance or flight).

What if the suspect is mentally ill and not acting rationally? Does he have to pose an immediate danger to the police or others to justify the continued use of significant force? *See Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016) (holding that Taser use is excessive when used on mentally ill person who did not pose an immediate danger to the officers; but, finding that the law was not clearly established at the time of the incident); *Cyrus v. Town of Mukwonago*, 624 F.3d 856 (7th Cir. 2010) (holding that a jury could find that it was constitutionally impermissible to apply multiple activations of Taser on a mentally ill person who was not actively or violently resisting the police). Or is it enough that he is a danger to himself? *See Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016) (finding that officers' use of a Taser on a disruptive, disoriented hospital patient who needed life-saving medical treatment was not clearly established).

The Supreme Court is clearly concerned about the civil liability risks that the police face in grappling with these real life decisions every day. By stressing that the lower courts should not define "clearly established law" too generally, and commenting that the "uniqueness of the facts and circumstances" repel the notion that the law is clearly established, the Court is clearly doubling down on the deference that the lower courts should afford police officers in assessing qualified immunity defenses.

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