

PUBLICATION

A Victory for Qualified Immunity. A Trend to Continue?

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Events from recent years related to alleged police misconduct raised major questions surrounding the protections afforded by qualified immunity to police officers in excessive force claims. Two recent Supreme Court decisions emphasize the complexity of the qualified immunity doctrine, but signal that the United States Supreme Court is not retreating from its support of the doctrine.

In a pair of to-be-published *per curiam* opinions, *Rivas-Villegas v. Cortesluna* and *City of Tahlequah v. Bond*, the Supreme Court reversed the lower courts' denials of application of qualified immunity on the grounds that neither officer committed violations of clearly established law. In both cases, the Court did so without hearing oral argument.

Qualified Immunity in Excessive Force Claims

In general, application of qualified immunity in excessive force claims is a fact-intensive inquiry but follows the traditional method of application of qualified immunity in other contexts. Qualified immunity attaches when an officer's conduct does not violate clearly established statutory or constitutional rights which a reasonable officer would have known. See *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (*per curiam*). A right is clearly established when it is "sufficiently clear that every reasonable [officer] would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (*per curiam*) (internal quotation marks omitted). Additionally, "existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551 (alterations and internal quotation marks omitted). Determinations of whether an officer utilized excessive force depend on the facts and circumstances of the particular case. See *Graham v. Connor*, 490 U.S. 386, 396 (1989). Thus, to demonstrate a violation of a clearly established law, a litigant must identify a case that put the officer on notice that his *specific conduct* was unlawful. See *Rivas-Villegas v. Cortesluna*, 595 U. S. ____ (2021) (*per curiam*).

***Rivas-Villegas v. Cortesluna*, 595 U. S. ____ (2021) (*per curiam*)**

In *Rivas-Villegas*, Union City, California police officers responded to a domestic violence call possibly involving a chainsaw. Officer Rivas-Villegas then commanded, "come out, put your hands up, walk out towards me." Cortesluna put his hands up and Rivas-Villegas told him to "keep coming." As Cortesluna walked out of the house and toward the officers, Rivas-Villegas said, "Stop. Get on your knees." The Plaintiff stopped ten to eleven feet from the officers. Another officer then saw a knife sticking out from the front left pocket of Cortesluna's pants and shouted, "he has a knife in his left pocket, knife in his pocket," and directed Cortesluna, "don't put your hands down," "hands up." Cortesluna turned his head toward the instructing officer but then lowered his head and his hands in contravention of the officer's orders. Another officer twice shot Cortesluna with a beanbag round from his shotgun, once in the lower stomach and once in the left hip.

After the second shot, Cortesluna raised his hands over his head. Rivas-Villegas then straddled Cortesluna and placed his left knee on the left side of Cortesluna's back, near where Cortesluna had a knife in his pocket. He raised both of Cortesluna's arms up behind his back. Rivas-Villegas was in this position for no more than eight seconds before standing up while continuing to hold Cortesluna's arms.

Cortosluna filed suit under 42 U.S.C. § 1983 alleging that Officer Rivas-Villegas exhibited excessive force. Officer Rivas-Villegas asserted he was entitled to qualified immunity since he did not violate clearly established law. The Ninth Circuit held that Officer Rivas-Villegas was not entitled to qualified immunity because existing precedent put him on notice that his conduct was unlawful, and his conduct constituted excessive force. In reaching this conclusion, the Ninth Circuit relied solely on *LaLonde v. County of Riverside*, 204 F. 3d 947 (CA9 2000). The Ninth Circuit reasoned that *LaLonde* and this case involve suspects who were lying face-down on the ground and were not resisting either physically or verbally, on whose back the defendant officer leaned with a knee, causing allegedly significant injury.

On petition for writ of certiorari, the Supreme Court disagreed with the Ninth Circuit finding that *LaLonde* was distinguishable. In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, *LaLonde* was unarmed. In contrast, Cortosluna had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case video evidence shows, and Cortosluna does not dispute, that Rivas-Villegas placed his knee on Cortosluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. In contrast, *LaLonde* testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.

The Supreme Court further held that Cortosluna failed to demonstrate a single case that gave Officer Rivas-Villegas notice that his conduct was unlawful. Absent sufficient notice, Officer Rivas-Villegas was entitled to qualified immunity. His petition for certiorari was granted.

***City of Tahlequah v. Bond*, 595 U. S. ____ (2021) (per curiam)**

In *City of Tahlequah*, officers responded to a call of an inebriated ex-husband trespassing in the garage of his ex-wife. Officers began speaking with the man when one officer took a step closer to him. The man responded by walking to the back of the garage towards tools. The man picked up a hammer, placed it at shoulder length, and pointed the hammer in the direction of the officers. No officer was within six feet of the man. Following numerous commands to drop the weapon, the man raised the hammer further back behind his head and took an aggressive stance, suggesting to officers that he may throw or otherwise use the weapon. In response, and after verbal commands to put down the weapon were unsuccessful, the officers fired their weapons killing the man.

The decedent's estate filed suit alleging that the officers were liable under 42 U. S. C. §1983, for violating his Fourth Amendment right to be free from excessive force. The decedent's estate argued the officers' actions were excessive because they cornered the man into the back of the garage recklessly creating a situation that inevitably resulted in the use of lethal force. The trial court agreed. On appeal, the Tenth Circuit concluded that several cases, most notably *Allen v. Muskogee*, 119 F. 3d 837 (CA10 1997), clearly established that the officers' conduct was unlawful.

On petition for writ of certiorari, the Supreme Court disagreed with the Tenth Circuit and found that none of the precedent relied upon by the decedent's estate or the Tenth Circuit involved a Fourth Amendment violation under similar circumstances. Specifically, the Court found the facts in *Allen* were dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. By contrast, the officers in this case engaged in a conversation with the decedent, followed him into a garage at a distance of six to ten feet, and did not yell until after he picked up a hammer. Thus, the Court could not conclude that *Allen* "clearly established" that their conduct was reckless or that their ultimate use of force was unlawful. As such, the officers were entitled to qualified immunity. The petition for certiorari was granted.

Effect of Supreme Court's Ruling

Despite recent history related to excessive force claims against police officers around the country, the Supreme Court's rulings in these cases reinforce the fundamental guidance of qualified immunity. A litigant bringing a 42 U.S.C. § 1983 claim must identify specific conduct that has previously been held to have violated an individual's rights in that respective jurisdiction. "It is not enough that a rule be suggested by then-existing precedent," the Court wrote. "The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Absent such a showing, no litigant will be able to penetrate the qualified immunity shield.

Following the Supreme Court's rulings in these cases, it is even more critical that municipal police departments learn and train on the specific conduct that courts in their jurisdictions have determined to be excessive force. A municipality that fails to train on such unlawful conduct could expose itself to *Mone//* liability under 42 U.S.C. § 1983 for failure to train.

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