Stone Busailah, LLP
A Partnership of Professional Law Corporations

1550 East Colorado Blvd., Suite 320, Pasadena, California 91106 Tel (626) 683-5600 Fax (626) 683-5656

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SUPREME COURT CLARIFIES AND REFINES OFFICERS' QUALIFIED IMMUNITY IN "EXCESSIVE FORCE" CASES

Kisela v. Hughes, 584 U.S. ___ (2018)
Supreme Court of the United States, decided April 2, 2018

By Robert Rabe, Esq. and Michael P. Stone, Esq.

Andrew Kisela, a police officer in Tucson, Arizona, shot Amy Hughes. Kisela and two other officers arrived on the scene after hearing a police radio report that Hughes was acting erratically with a knife. When Kisela fired, Hughes was holding a large kitchen knife and had taken steps toward another woman standing nearby, and refused to drop the knife after at least two commands to do so. The question the Court had to answer was whether at the time of the shooting, Kisela's actions violated clearly established law.

Hughes sued Kisela, alleging that he used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but our Court of Appeals for the Ninth Circuit reversed, and said that the record was sufficient to demonstrate Kisela violated the Fourth Amendment. The court then said that the violation was clearly established because, in its view, the constitutional violation was "obvious". The Supreme Court granted Kisela's petition *for certiorari*.

The Supreme Court made it clear that it was not deciding whether on the facts, Kisela violated the Fourth Amendment when he used deadly force - "[f]or 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." "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The Court referenced two of the first cases on this general subject. In *Tennessee v. Garner*, 471 U.S. 1,11 (1985), the Court held that "[w]here 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." In *Graham v. Connor*, 490 U.S. 386, 396 (1989), the Court noted that "[t]he '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 "[t]he 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 situation." This particular passage forms the backbone of contemporary and enlightened police use of force policies.

The Court noted the general rules set forth in "*Garner* and *Graham* do not by themselves create clearly established law outside an 'obvious case'." "[I]t 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 [officer] in the defendant's shoes would have understood that he was violating it." The Court then remarked, this "is a necessary part of the qualified-immunity standard, and it is part of the standard that the Court of Appeals here failed to implement in a correct way."

The Court referenced the case of *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005). In *Blanford*, the police responded to a report of a man walking through a residential neighborhood carrying a sword and acting in an erratic manner. The police shot the man after he refused their commands to drop his weapon. The police believed (perhaps even mistakenly), that the man posed an immediate threat to others. In *Blanford*, the Court of Appeals determined that the use of deadly force did not violate the Fourth Amendment. The Supreme Court stated,"[b]ased on that decision, a reasonable officer could have believed the same thing was true in the instant case" and said that Kisela could not be held liable for the unreasonable use of deadly force, because it was "far from an obvious case" in light of the urgency of the situation and the woman's strange behavior.

In a *Per Curiam* decision, that is, "by the Court" without a designated author, the Supreme Court reversed the judgment, and remanded the case for "further proceedings consistent with [their] opinion" (a dismissal in favor of the police officer defendant). Justice Sotomayor, in a dissent that is significantly longer than the opinion itself, is upset with "the majority's apparent view that the decision below was so manifestly incorrect as to warrant 'the extraordinary remedy of a summary reversal'." Such dispositions are rare, and "usually reserved by [the Supreme] Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." She also believed that the summary reversal was "symptomatic of 'a disturbing trend regarding the use of [the Supreme] Court's resources' in qualified immunity cases" - that the Court "routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts

wrongly afford officers the benefit of qualified immunity in these same cases'."

In this case, the Supreme Court rebuked our Ninth Circuit judges, stressing that it had "repeatedly told courts - and the Ninth Circuit in particular - not to define clearly established law at a high level of generality" because otherwise police officers in the field will have trouble figuring out what they can or cannot do. This case is the fifth such summary reversal in the past four years. It is worth noting that the Supreme Court treats qualified immunity not just as ordinary settled law, but as an area of law so important that it is worth deciding a series of cases that would never earn the Court's attention if they involved a different legal issue. Moreover, the Court seems uninterested or unable to find cases where a lower court wrongly denied relief to a person whose constitutional rights were violated. At a time when legislators are introducing bills in an attempt to override the *Garner* and *Graham* decisions and Departments seem anxious to publicize the past misdeeds of their officers, it is nice to know that *the Supreme Court still has your back*.

Stay Safe and immune!

Robert Rabe is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.

Michael P. Stone is the founder and principal partner of Stone Busailah, LLP. His career in police and the law spans 50 years. He has been defending law enforcement for 38 years in federal and state, criminal, civil, administrative and appellate litigation.