SECTION 1983: QUALIFIED IMMUNITY

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I. QUALIFIED IMMUNITY : PRELIMINARY PRINCIPLES

A. Basic Doctrine

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). The immunity is "immunity from suit rather than a mere defense to liability." ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985).

See ***Tapley v. Collins***, 211 F.3d 1210, 1214, 1215 (11th Cir. 2000) ("In *Gonzalez* the plaintiff argued that the existence of the good faith defenses in the Fair Housing Act meant that Congress intended to abrogate the defense of qualified immunity to claims under that act. We unequivocally rejected that argument and held that qualified immunity is a defense to the Fair Housing Act, despite the inclusion of a good faith statutory defense. . . . We cited eleven federal appeals court decisions holding that qualified immunity is available as a defense to claims arising under eight different federal statutes. . . *Gonzalez* forecloses Tapley's contention, and the district court's holding, that the existence of an explicit good faith defense in [the Federal Wiretap Act] rules out the defense of qualified immunity. . . . [C]ourts should not infer that Congress meant to abolish in the Federal Wiretap Act that extra layer of protection qualified immunity provides for public officials simply because it included an extra statutory defense available to everyone."). *Accord* ***Blake v. Wright***, 179 F.3d 1003 (6th Cir.1999); ***Babb v. Eagleton***, No. 07-CV-24-TCK-SAJ, 2008 WL 2492272, at *3, *4 & n.4 (N.D. Okla. June 18, 2008) ("First, the Court must address whether quasi-judicial absolute immunity is a defense to a Title III claim, which presents a question of first impression in the Tenth Circuit. Father argues that the only defenses to a Title III claim are those listed in the statute, see, e.g., 18 U.S.C. § 2511(2)(a)-(i) (setting forth specific exceptions to Title III liability), and that the Court may not apply any defenses existing solely at common law, such as quasi-judicial immunity. . . The Court concludes that quasi-judicial absolute immunity is a defense to Title III liability, notwithstanding the fact that it is not listed as a specific statutory exception in the text of Title III. In the context of prosecutors performing quasi-judicial functions, federal courts have indicated that quasi-judicial immunity can serve as a defense to a Title III claim. . . . In addition, there is authority holding that qualified immunity extended to government actors is a defense to Title III liability. [citing cases] . . . .The Tenth Circuit has not directly weighed in on the

question of whether qualified immunity is a defense to Title III. In the case of *Davis v. Gracey*, 111 F.3d 1472, 1481-85 (10th Cir.1997), the court addressed separately the issues of whether officers were entitled to qualified immunity from § 1983 liability and whether officers qualified for a statutory defense to Title III liability. This led the Sixth Circuit to classify the Tenth Circuit as having 'implied' that statutory defenses and qualified immunity are 'separate defenses.'. . However, the Court does not interpret *Davis* to hold or imply that federal common-law immunity doctrines are not defenses to Title III claims."); *Contra* ***Berry v. Funk***, 146 F.3d 1003 (D.C.Cir.1998).

See also ***Gonzalez v. Lee County Housing Authority***, 161 F.3d 1290, 1299, 1300 (11th Cir. 1998) ("Neither the text nor the legislative history of section 3617 [of Fair Housing Act] indicates that Congress intended to abrogate the qualified immunity to which executive-branch officials were entitled under common law. Because of this fact and in light of the importance of protecting officials' decision-making capacity, we conclude that executive-branch officials sued in their individual capacities under section 3617 may assert the defense of qualified immunity. In reaching this conclusion, we follow the only other court of appeals that has considered the matter. *See Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C.Cir.1997) (allowing public officials sued in their individual capacities under section 3617 to plead the affirmative defense of qualified immunity); *see also Baggett v. Baird*, No. Civ.A.4:94CV0282-HLM, (N.D.Ga. Feb. 18, 1997) (granting summary judgment on the basis of qualified immunity in section 3617 action). Our holding also is consistent with various decisions in which this court and others have held that public officials are entitled to assert the defense of qualified immunity when sued under a federal statute other than section 1983.").

The Eleventh Circuit has held that "for qualified immunity purposes, the term 'damages' includes costs, expenses of litigation, and attorneys' fees claimed by a plaintiff against a defendant in the defendant's personal or individual capacity." ***D'Aguanno v. Gallagher***, 50 F.3d 877, 881 (11th Cir. 1995). The court noted:

> In the present case, these kinds of monetary claims might follow from plaintiffs having a successful outcome (if they do) on their federal-law-based demands for injunctive and declaratory relief. . . The policy that supports qualified immunity--especially removing for most public officials the fear of personal monetary liability--would be undercut greatly if government officers could be held liable in their

> personal capacity for a plaintiff's costs, litigation expenses, and attorneys' fees in cases where the applicable law was so unsettled that defendants, in their personal capacity, were protected from liability for other civil damages. . . . Put differently, if a defendant has qualified immunity for damages, the defendant has good faith immunity for the purposes of fees and so on.

Id. at 881-82.

But see ***Meredith v. Federal Mine Safety and Health Review Commission***, 177 F.3d 1042, 1049 (D.C. Cir. 1999) ("In this case, the UMWA sought an order under section 105(c) of the Mine Act. . . directing the party accused of unlawful discrimination to take affirmative action to abate the violation--a purely equitable remedy. In one of the complaints, the UMWA additionally sought payment of attorney's fees; but where attorney's fees are provided for by statute, as here, qualified immunity has no application."); ***Tonya K. v. Board of Educ. of the City of Chicago***, 847 F.2d 1243, 1246 (7th Cir.1988) (attorneys' fee award does not violate qualified immunity); ***Helbrans v. Coombe***, 890 F. Supp. 227, 232 (S.D.N.Y. 1995) ("[T]he defense [of qualified immunity] has no application to a request for attorneys [sic] fees under Section 1988.").

B. Affirmative Defense

Although qualified immunity is an affirmative defense, *see* ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980), once the defendant pleads qualified immunity, the majority of circuits hold that the burden then shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.,* ***Gardenhire v. Schubert***, 205 F.3d 303, 311(6th Cir. 2000) ("The defendant bears the initial burden of coming forward with facts to suggest that he acted within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in his position would have clearly understood that he was under an affirmative duty to refrain from such conduct."); ***Pierce v. Smith***, 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified immunity defense by establishing the violation of clearly established law); ***Magdziak v. Byrd***,

96 F.3d 1045, 1047 (7th Cir. 1996); ***Dixon v. Richer***, 922 F.2d 1456, 1460 (10th Cir. 1991).

See also ***Buckley v. Fitzsimmons***, 20 F.3d 789, 793 (7th Cir. 1994) (Where the defense had not been waived, the court observed that "[a]lthough qualified immunity is an affirmative defense, [citing *Gomez*] no principle forbids a court to notice that such a defense exists, is bound to be raised, and is certain to succeed when raised.).

See also ***Alexander v. Tangipahoa Parish Sheriff Dept.***, No. 05-2423, 2006 WL 4017825, at *5 (E.D. La. Oct. 2, 2006) ("Although there is some authority to the contrary, it appears that the majority of courts, including the Fifth Circuit, currently hold that the court 'may raise the issue of qualified immunity sua sponte.' [collecting cases]").

C. Timing and Questions of Waiver

In ***Guzman-Rivera v. Rivera-Cruz***, 98 F.3d 664, 667 (1st Cir. 1996), the Court discusses the question of when, during the course of the litigation, the defense may be raised:

> Because the doctrine of qualified immunity recognizes that litigation is costly to defendants, officials may plead the defense at various stages in the proceedings. Specifically, defendants may raise a claim of qualified immunity at three distinct stages of the litigation. First defendants may raise the defense on the pleadings, in a motion to dismiss. . . . Second, if a defendant cannot obtain a dismissal on the pleadings, he or she may move for summary judgment . . . . Finally, the defense is, of course, available at trial.

See also ***Parker v. Gerrish***, 547 F.3d 1, 11-13 (1st Cir. 2008) ("Gerrish contends, in the alternative, that his decision to fire the Taser was at worst a reasonable mistake in judgment for which he should receive qualified immunity. Parker contends that Gerrish waived this defense by failing to raise it in his Rule 50(a) motion. . . . [W]e have held that even if a defendant raises qualified immunity at summary judgment, the issue is waived on appeal if not pressed in a Rule 50(a) motion. . . . .Gerrish does not dispute this proposition, but rather argues that he did raise qualified immunity in his motion under Fed.R.Civ.P. 50(a). Gerrish admits that

the oral motion did not use the term 'qualified immunity,' but argues that he addressed every prong of the qualified immunity analysis. . . . Gerrish contends that he dealt with the first prong of the qualified immunity analysis, whether there was a constitutional violation, while discussing the excessive force issue. While it is true that Gerrish argued that there was no constitutional violation, he argued only that issue and did not place it in the context of a qualified immunity argument. Gerrish next points to his argument that 'the Taser itself has not been declared by any court as a *per se* unconstitutional use of force.' Gerrish contends that argument invoked the second prong of the qualified immunity analysis, whether his actions violated 'clearly established' law. But this argument was made entirely in the context of an argument that there was no unconstitutional use of force. Gerrish did not refer to 'clearly established law' and made no effort to address his argument to qualified immunity. Similarly, Gerrish contends that he addressed the third prong of the qualified immunity analysis, whether a reasonable officer would have known that his conduct was unlawful, when he argued that 'an objectively reasonable officer in Officer Gerrish's position' would have seen Parker's arm movement as a threat to Caldwell justifying the Taser usage. But, as noted above, the excessive force analysis is also keyed to the perceptions of an objectively reasonable officer. Thus, Gerrish's discussion is again simply addressed to the argument that Gerrish did not use excessive force. In this way, the oral Rule 50(a) motion only argued that the evidence was insufficient to support a finding of a constitutional violation. Though Gerrish stated that there were two issues, he only argued the excessive force issue. Gerrish did not specify qualified immunity as the legal basis for his motion or give the district court judge adequate notice that he was renewing that claim in this context."); ***Noel v. Artson***, No. 07-1987, 2008 WL 4665418, at *2 (4th Cir. Oct. 22, 2008) ("Our cases have been consistent on one thing: that to be preserved for appeal, the defense of qualified immunity must be raised in a timely fashion before the district court. . . . Here, plaintiffs would suffer prejudice because they had no chance to address the issue in their opposition to summary judgment. It was not until their reply to plaintiffs' opposition to the summary judgment motion that defendants even argued the immunity defense, and '[c]onsidering an argument advanced for the first time in a reply brief ... entails the risk of an improvident or ill-advised opinion ....' Our cases require that an affirmative defense be raised in a timely fashion for a reason: what happened here deprived plaintiffs of any chance to brief the question and receive a fully considered ruling. The failure to raise the defense in a timely fashion likewise deprived the district court of orderly process and this court of the full benefit of the district court's reasoning. To permit appellate review in these circumstances would reward parties who bypass settled procedural requirements, and would encourage

imprecise practice before the trial courts. Accordingly, we decline to entertain this interlocutory appeal and remand the action for further proceedings in the district court."); ***Evans v. Fogarty***, 2007 WL 2380990, at * 6 n.9 (10th Cir. Aug 22, 2007) ("Although the defense of qualified immunity provides public officials important protection from baseless and harassing lawsuits, it is not a parachute to be deployed only when the plane has run out of fuel. Defendants must diligently raise the defense during pretrial proceedings and ensure it is included in the pretrial order."); ***Ahmad v. Furlong***, 435 F.3d 1196, 1202-04(10th Cir. 2006) ("We agree with the D.C. Circuit that the best procedure is to plead an affirmative defense in an answer or amended answer. And, as that court pointed out, absence of prejudice to the opposing party is not the only proper consideration in determining whether to permit an amended answer; a motion to amend may also be denied on grounds such as ' "undue delay, bad faith or dilatory motive ..., or repeated failure to cure deficiencies by amendments previously allowed."'. . Accordingly, courts should not permit a party to circumvent these other restrictions on amendments simply by filing a dispositive motion rather than a motion to amend. . . But that concern can be obviated without a strict requirement that the answer be amended before raising a defense in a motion for summary judgment. Rather than demanding that the defendant first move to amend the answer, we need only apply the same standards that govern motions to amend when we determine whether the defendant should be permitted to 'constructively' amend the answer by means of the summary-judgment motion. Because we review for abuse of discretion a district court's ruling on a motion to amend, . . . we apply the same standard to a ruling on whether an affirmative defense may first be raised in a motion for summary judgment. . . . [H]aving accepted the district court's determination that qualified immunity with respect to the RLUIPA claim was not pleaded in the Amended Answer, but also having concluded that it was adequately raised by the summary-judgment motion, we consider whether Appellants should have been precluded from constructively amending their answer by raising the defense in the motion. No grounds for such preclusion are apparent to us. Indeed, perhaps because Mr. Ahmad read the Amended Answer as asserting the defense, his response to the motion for summary judgment raised no objection to Appellants' claiming RLUIPA qualified immunity. Nor did his counsel at oral argument point to any prejudice he would have suffered had the district court considered the defense. In particular, counsel acknowledged that no additional discovery would have been necessary. We therefore hold that the defense could be raised for the first time in the summary-judgment motion. Had the district court ruled otherwise, the ruling would have been an abuse of discretion."); ***Isom v. Town of Warren,*** 360 F.3d 7, 9 (1st Cir. 2004) ("[D]efendants did not raise immunity as an issue at the time of their Rule

50 motion, and so they have waived that defense as a grounds for the motion."); ***Anthony v. City of New York,*** 339 F.3d 129, 138 n.5 (2d Cir. 2003) ("Anthony argues that Officers Collegio and Migliaro waived the defense of qualified immunity by failing to assert that defense in their answer before the district court. . . Officers Collegio and Migliaro first raised the defense in their motion for summary judgment, which the district court implicitly construed as a motion to amend the answer. Although affirmative defenses like qualified immunity must be pleaded in response to a pleading, see Fed.R.Civ.P. 8(c), the district court may, in its discretion, construe a motion for summary judgment as a motion pursuant to Fed.R.Civ.P. 15(a) for leave to amend the defendant's answer."); ***Brown v. Crowley,*** 312 F.3d 782, 787, 788 (6th Cir. 2002) (Defendants waived right to present issue of qualified immunity on appeal, where, "[a]lthough the defendants preserved the defense in their first responsive pleading and in their answer to Brown's complaint, they did not pursue this argument before the district court in the motion for summary judgment that they filed after the case was remanded. . . . On the other hand, . . .the judgment of the district court must be vacated and the case remanded for further proceedings, because the district court erred in its application of the law to Brown's retaliation claim. The defendants will thus be free to reassert their immunity defenses in the district court. . . . By declining to consider qualified immunity defenses on appeal that were not raised properly before the district court, moreover, we might encourage future defendants to properly raise this defense at the district court level."); ***Hill v. McKinley,*** 311 F.3d 899, 902 (8th Cir. 2002) ("The defendants raised the qualified immunity defense in their answer to Hill's third amended and substituted complaint, but did not file a motion for summary judgment, as is the usual practice. Although the defendants did not receive the benefit of an early resolution to their claim of qualified immunity, the defense is not waived by failure to assert it by motion prior to trial."); ***St. George v. Pinellas County,*** 285 F.3d 1334, 1337 (11th Cir. 2002) ("While the defense of qualified immunity is typically addressed at the summary judgment stage of a case, it may be, as it was in this case, raised and considered on a motion to dismiss. . . . The motion to dismiss will be granted if the 'complaint fails to allege the violation of a clearly established constitutional right.' . . . Whether the complaint alleges such a violation is a question of law that we review *de novo,* accepting the facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. . . . The scope of the review must be limited to the four corners of the complaint. . . While there may be a dispute as to whether the alleged facts are the actual facts, in reviewing the grant of a motion to dismiss, we are required to accept the allegations in the complaint as true."); ***Skrtich v. Thornton,*** 280 F.3d 1295, 1306 (11th Cir. 2002) ("This Circuit has held that

qualified immunity is a question of law that may be generally asserted (1) on a pretrial motion to dismiss under Rule 12(b)(6) for failure to state a claim; (2) as an affirmative defense in the request for judgment on the pleadings pursuant to Rule 12(c); (3) on a summary judgment motion pursuant to Rule 56(e); or (4) at trial. *Ansley v. Heinrich,* 925 F.2d 1339, 1241 (11th Cir.1991). However, all these pleadings must conform to the Federal Rules of Civil Procedure. In this case, because a responsive pleading--an answer--had been filed, under the plain language of Rule 12(b), a motion to dismiss would have been inappropriate."); ***Marsh v. Butler County,*** 268 F.3d 1014, 1023 (11th Cir. 2001) (en banc) ("We apply the qualified immunity defense to dismiss a complaint at the 12(b)(6) stage where, (1) from the face of the complaint, (2) we must conclude that (even if a claim is otherwise sufficiently stated), (3) the law supporting the existence of that claim--given the alleged circumstances--was not already clearly established, (4) to prohibit what the government-official defendant is alleged to have done, (5) before the defendant acted."); ***Provost v. City of Newburgh,*** 262 F.3d 146, 161 (2d Cir. 2001) ("Because [Defendant officer] did not specifically include a qualified immunity argument in his pre-verdict request for judgment as a matter of law, he could not have included such an argument in his post-verdict motion even had he attempted to do so."); ***Eddy v. Virgin Islands Water and Power Authority,*** 256 F.3d 204, 210 (3d Cir. 2001) ("We agree with the conclusions of the First and Sixth Circuits that the defense of qualified immunity is not necessarily waived by a defendant who fails to raise it until the summary judgment stage. Instead, the District Court must exercise its discretion and determine whether there was a reasonable modicum of diligence in raising the defense. The District Court must also consider whether the plaintiff has been prejudiced by the delay."); ***Sales v. Grant***, 224 F.3d 293, 296, 297 (4th Cir. 2000) ("In concluding that Mason and Grant have waived their right to assert qualified immunity, we do not hold categorically that a section 1983 defendant must pursue the defense of qualified immunity on every occasion possible in order to preserve his right to raise that defense later in the proceedings. Rather, we hold only that where, as here, a defendant only cursorily references qualified immunity in his answer to a section 1983 complaint, and thereafter fails to mention, let alone seriously press, his assertion of that affirmative defense, despite filing several dispositive motions in the district court and despite participating in a trial on the merits of the section 1983 claim, that defendant may not actively pursue his claim of qualified immunity for the first time on remand after appeal."); ***Thompson v. City of Tucson Water Department***, No. CIV 01-53-TUC-FRZ, 2006 WL 3063500, at *6 n. 14 (D. Ariz. Oct. 27, 2006) ("The Court notes, however, that the Ninth Circuit case law doesn't address the exact issue before the Court. While there is case law indicating that

qualified immunity can be raised in a Rule 50 motion, the case law does not address whether qualified immunity can be considered waived by a defendant where he raises the issue in a motion for the first time on the fourth day of trial. It seems equitable to hold that waiver would apply in such circumstances. However, as the Ninth Circuit has generally found that qualified immunity can be raised in a Rule 50 motion, the Court will err on the side of caution and find that the qualified immunity defense has not been waived."); ***Garcia v. Brown***, 442 F.Supp.2d 132, 143, 144 (S.D.N.Y. 2006) ("[T]his Court's Individual Practice Rules require that any defendant planning to claim qualified immunity must (1) file a pro forma motion for summary judgment on that ground along with his answer; (2) depose the plaintiff and file additional papers in support of the qualified immunity motion within thirty days thereafter; and (3) obtain a decision on the motion before conducting further discovery. *See* Ind. Practices of J. McMahon, Rule 3(C). The defendants in this case did not follow this procedure, but rather waited until the end of discovery to move for summary judgment on the ground of qualified immunity. Under my rules, the failure to obtain a qualified immunity determination at the outset means that I will not consider the defense on a belated motion, leaving the matter for trial. However, Brown counters that under this Court's Individual Practice Rule, a plaintiff who brings an action in which a defense of qualified immunity is to be anticipated must send defense counsel a copy of this rule. According to defendants' reply papers, plaintiffs did not do so. As neither party appears to have complied with this Court's Individual Practice Rules, I will consider the motion."); ***Philpott v. City of Portage***, No. 4:05-CV-70, 2006 WL 1008868, at *1, *2 (W.D. Mich. Apr. 14, 2006) ("Here, defendant did not initially raise the defense of qualified immunity and he was properly subjected to a deposition. The defense of immunity is an affirmative defense . . . and may be waived like any other defense at different stages of litigation. . . Thus, it can be waived during the discovery process, yet nevertheless raised later in a motion for summary judgment. . . But now that the defense of qualified immunity has been raised, this court is required to address it--prior to permitting further discovery--absent a finding that material facts are in fact in dispute. . . The burden is on the party seeking additional discovery to demonstrate why such discovery is necessary prior to resolution of the issue of qualified federal immunity. The affidavits and other papers filed by the plaintiff fail to convince the court that the purpose of further discovery concerning Trooper Whiting, such as the purported need to delve into unrelated past incidences to see if a credibility problem exists, would have any bearing on the legal issues set forth above which underlie a qualified immunity defense. Accordingly, defendant's motion for a protective order staying further discovery as to this defendant (docket no. 41) is GRANTED pending resolution of the defense of

qualified immunity."); ***Lee v. McCue***, 410 F.Supp.2d 221, 225 (S.D.N.Y. 2006) ("In *Saucier,* the United States Supreme Court directed that issues of qualified immunity should be decided before discovery. Accordingly, this Court issued a Local Rule requiring that any defendant who planned to claim qualified immunity (1) file a pro forma motion for summary judgment on that sole ground with his answer; (2) depose the plaintiff and file papers in support of the motion within thirty days thereafter; and (3) obtain a decision on the motion before conducting any further discovery. The plaintiff's deposition enables the moving defendants to obtain all the particulars of plaintiff's claim and, after hearing them, to evaluate whether--viewing the facts most favorably to plaintiff--the defense of qualified immunity is likely to succeed. The defendant officers in this case did not follow my Local Rule. Instead, they waited until the close of discovery to move for summary judgment on all available grounds. Under this Court's Local Rule, 'A plaintiff who brings an action in which a qualified immunity defense is ordinarily asserted shall send defense counsel a copy of this rule. Failure to proceed in accordance with these rules after receipt of such notice shall operate as a waiver of the defense of qualified immunity as a matter of law.' Plaintiff did not demonstrate that he complied with this rule by sending a copy of this Court's qualified immunity rule to defense counsel and did not argue waiver in his opposition to the motion. I thus have no way of determining whether the defense was waived. Counsel for both sides are directed to observe this rule in the future."), *aff'd*, 218 Fed. Appx. 26 (2007) ; ***Broudy v. Mather,*** 366 F.Supp.2d 3, 9 n.7 (D.D.C. 2005) ("Plaintiffs first argue that Defendants' claim of absolute immunity is precluded, or waived, because it was 'not raised in their initial motion to dismiss filed over a year and a half ago.'. .. This argument is unconvincing. The Sixth Circuit, faced with the issue of waiver of the qualified immunity defense at the pleadings stage in *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir.1994), concluded that 'the trial court has discretion to find a waiver if a defendant fails to assert the defense within the time limits set by the court or if the court otherwise finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes.' Both the First and Third Circuits have adopted this position. [citing cases] This issue has not been directly addressed by our Circuit. These cases, however, present a well-reasoned analysis. Applying that analysis to the instant case, it is clear that Defendants have not waived the absolute immunity defense. First, Defendants raised the defense of qualified immunity in their initial motion to dismiss. While it is true that they did not raise the defense of absolute immunity until the instant Motion, the Court cannot say that Defendants failed to exercise a 'reasonable modicum of diligence in raising the defense.' . . Second, Plaintiffs would not be significantly prejudiced by the delay generated by claims of absolute immunity. Moreover, Plaintiffs have had ample

opportunity to brief the issue."); ***Tiffany v. Tartaglione,*** No. 00 Civ. 2283(CM) (LMS), 2004 WL 540275, at *2 (S.D.N.Y. Mar. 5, 2004) ("Plaintiff is incorrect that defendants waived their opportunity to move for qualified immunity as a matter of law by not so moving with their answer. My individual rules currently impose such a requirement, consistent with the United States Supreme Court's directive, in *Saucier v. Katz,* 533 U.S.194 (2001), that the issue of qualified immunity as a matter of law be determined at the earliest point in a case--preferably prior to discovery--so that an officer who is entitled to the doctrine's protections can take full advantage of them. However, I only added that requirement to my individual rules in 2003. While defendants should have made this motion far earlier in the case as a matter of logic, no such rule bound them to make the motion prior to discovery when this case was in that posture."); ***Shepard v. Wapello County,*** 303 F. Supp.2d 1004, 1012 (S.D. Iowa 2003) ("Preliminarily, the Court notes that defendants make a point of stating that qualified immunity 'ordinarily should be decided by the court long before trial. . . That is true. The reason the issue was not decided long before trial in this case was that defendants did not present it until their Rule 50(a) motions made during trial. [footnote omitted] When qualified immunity is raised after a trial in which the plaintiff has prevailed, the first question in the qualified immunity analysis is, examining the trial evidence in the light favorable to plaintiff, was the evidence 'so one-sided that defendants were entitled to prevail as a matter of law' on the constitutional claim.").

See also ***Falkner v. Houston***, 974 F. Supp. 757, 759-61 (D. Neb. 1997), where the court explains:

> Under the objective reasonableness standard set forth in *Harlow*, in the ordinary case a defendant official may prevail on the qualified immunity defense at any one of four progressive findings: (1) Defendant's challenged conduct is not a violation of constitutional or federal law as currently interpreted; or (2) Although defendant's challenged conduct is a violation of constitutional or federal law as currently interpreted, that violation was not "clearly established" at the time of defendant's challenged conduct; or (3) The facts are undisputed, and a reasonable officer, confronting these facts and circumstances at the time of her challenged conduct, would not have understood that conduct to have violated plaintiff's clearly established constitutional or federal rights; or (4) The facts are disputed, and viewing the facts in the light most favorable to plaintiff--that is,

> assuming that the plaintiff will prove his allegations --a reasonable officer, confronting these facts and circumstances at the time of her challenged conduct, would not have understood that conduct to have violated plaintiff's clearly established constitutional or federal rights. . . . Simply stated, unless there is a good reason for doing so, it is much more efficient, for all concerned, for the defendant to present the defense at the outset. . . .In the exceptional case, where detailed factual findings significantly affect the qualified immunity inquiry, it may be appropriate to defer presentation of the defense until trial. Such cases are rare, however, and consideration of a request to defer presentation of the defense requires a case-by-case determination in accordance with the facts peculiar to the inquiry. . . At the very least, the defendant official should show that significant disputed facts would very likely preclude a successful motion to dismiss or for summary judgment on qualified immunity grounds and that the filing of such a motion would be nothing but a waste of time and money.

But see ***Dixon v. Parker,*** No. 01 C 7419, 2002 WL 99747, at *1 (N.D. Ill. Jan. 25, 2002) (unpublished order of Judge Shadur) ("Given the repeated teachings from the highest judicial sources (see particularly *Saucier v. Katz,* 121 S.Ct. 2151 (2001)), this Court continues to be amazed at the stubborn persistence of counsel for law enforcement personnel (whether as here from the Attorney General's Office, or from the Cook County State's Attorney's Office, or from the City of Chicago Corporation Counsel's Office) in invariably asserting qualified immunity defenses in a Pavlovian manner, rather than only selectively where such a defense is appropriate. In this instance Dixon's allegations, when accepted as gospel in AD [Affirmative Defense] terms, cannot spare defendants the need 'to stand trial or face the other burdens of litigation' (*Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985))--and so qualified immunity plays no legitimate role at this stage. If factual development were to change that, so that (for example) a qualified immunity defense might extricate one or more defendants from the case (say on a Rule 56 motion for summary judgment, see *Saucier*), the defense may be raised at that time. For the present, however, the advancement of that defense is just wrong."); ***Gonzalez v. Albarran,*** No. 99 C 4589, 2000 WL 655960, at *1 & n.1 (N.D. Ill. May 19, 2000) ("It is of course fundamental to the concept of an AD [affirmative defense] that it accepts the plaintiff's allegations as true but goes on to state some legal basis for the responding defendant's nonliability . . . . Yet Albarran's First AD is predicated on the proposition that 'a reasonable police officer objectively viewing the facts and circumstances that

confronted Officer Albarran and having the information that Office Albarran possessed could have believed his actions to have been lawful and not in violation of any clearly established law.' That position is totally at odds with the allegations of FAC [first amended complaint] as to Albarran's unprovoked imposition of unreasonable and excessive force on Gonzalez, and so it simply cannot stand as an AD. . . . [T]here is no way that a defense of qualified immunity can come into play under the FAC, because it will require either a trial or a successful motion for summary judgment to demonstrate Gonzalez' allegations to be untrue. . . . It is really time that the City's Corporation Counsel's Office changed its position of asserting an AD of qualified immunity in cases such as this. Definitive case law from the Supreme Court (and from our Court of Appeals as well) squarely teaches the inappropriatness of that concept in the type of head-on factual confrontation situation that is involved here, and the Corporation Counsel's stated concern as to the possible waiver of a qualified immunity defense is wholly without merit.").

D. Discretionary Function

In some cases qualified immunity has been denied because the official was not performing a discretionary function. *See, e.g.,* ***Groten v. California,*** 251 F.3d 844, 851 (9th Cir. 2001) ("Although the Fourteenth Amendment right to due process in the application procedure may not have been clearly established at the time of the alleged violations, Groten alleged that the appellees refused to give him the proper application materials and did not allow him to apply for the licenses which he sought. These ministerial acts are unshielded by qualified immunity, which protects 'only actions taken pursuant to discretionary functions.'"); ***In re Allen***, 106 F.3d 582, 593 (4th Cir. 1997) (holding "that an official who performs an act clearly established to be beyond the scope of his discretionary authority is not entitled to claim qualified immunity under § 1983."), *reh'g en banc denied*, 119 F.3d 1129 (4th Cir. 1997); ***Brooks v. George County***, 84 F.3d 157, 165 (5th Cir. 1996) (where Mississippi law imposed on Sheriff "a non-discretionary duty to keep records of work performed by pretrial detainees and to transmit those records to the board of supervisors so that pretrial detainees [could] be paid[,]" Sheriff was not entitled to qualified immunity on plaintiff's due process claim.). *See generally* ***Dugas v. Jefferson County***, 931 F. Supp. 1315, 1321 n.4 (E.D. Tex. 1996) (collecting circuit court cases commenting on the limited scope of the ministerial exception). *See also* ***Atteberry v. Nocona General Hospital***, 430 F.3d 245, 257 (5th Cir. 2005) ("The Plaintiffs argue that these alleged violations of state statutes imposed non-discretionary duties upon Norris and Perry, vitiating their qualified immunity defense altogether. Qualified immunity is

only available when an official acts 'within the scope of [his or her] discretionary authority.'. . . In both the Plaintiffs' complaint and in their briefs before this court, this argument is tenuous. It is enough, at this point, to say that some of these statutes may create non-discretionary duties which would vitiate qualified immunity, and others may create duties with an element of discretion.").

See also ***Jones v. City of Atlanta***, No. 06-12140, 2006 WL 2273171, at *4 (11th Cir. Aug. 9, 2006) (not published) ("In this case, Officers Stone and Frye have not proven that they were acting within the scope of their discretionary authority when they interacted with Jones. The officers do not dispute that they were outside of their police jurisdiction when they allegedly violated Jones's constitutional rights. And, they have presented nothing to support a finding that their interaction with Jones was undertaken in performance of their official duties. While they suggest, in a footnote in their appellate brief, that Georgia law authorizes police officers to arrest those committing crimes in their presence even if the crime is committed outside of the officers' police jurisdiction, Officers Stone and Frye did not contend in the district court nor on appeal that they were arresting Jones. Instead, they have maintained that they intended to render him aid. And, Dr. Richard Clark, the City of Atlanta Police Department's head of Planning and Research, testified that, in such circumstances, City of Atlanta police officers have only the same authority as an ordinary citizen when they are outside the territorial jurisdiction of the City of Atlanta. . . Thus, Officers Stone and Frye are not entitled to summary judgment grounded upon qualified immunity for their actions during the interaction with Jones."); ***Holloman ex rel. Holloman v. Harland,*** 370 F.3d 1252, 1263-67, 1283 (11th Cir. 2004) ("To even be potentially eligible for summary judgment due to qualified immunity, the official must have been engaged in a 'discretionary function' when he performed the acts of which the plaintiff complains. . . It is the burden of the governmental official to make this showing. . . A defendant unable to meet this burden may not receive summary judgment on qualified immunity grounds. . . While a number of our cases omit this step of the analysis, . . .binding Supreme Court and Eleventh Circuit precedents require us to consider expressly this critical threshold matter. . . . In many areas other than qualified immunity, a 'discretionary function' is defined as an activity requiring the exercise of independent judgment, and is the opposite of a 'ministerial task.'. . In the qualified immunity context, however, we appear to have abandoned this 'discretionary function / ministerial task' dichotomy. In *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir.1995), we interpreted 'the term "discretionary authority" to include actions that do not necessarily involve an element of choice,' and emphasized that, for purposes of qualified immunity, a governmental actor

engaged in purely ministerial activities can nevertheless be performing a discretionary function. Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities. Our inquiry is two-fold. We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize. . . . [T]o pass the first step of the discretionary function test for qualified immunity, the defendant must have been performing a function that, but for the alleged constitutional infirmity, would have fallen with his legitimate job description. Of course, we must be sure not to characterize and assess the defendant's act at too high a level of generality. Nearly every act performed by a government employee can be described, in general terms, as ostensibly 'furthering the public interest.' If we jump to such a high level of abstraction, it becomes impossible to determine whether the employee was truly acting within the proper scope of his job-related activities. Consequently, we consider a government official's actions at the minimum level of generality necessary to remove the constitutional taint. . . . .After determining that an official is engaged in a legitimate job-related function, it is then necessary to turn to the second prong of the test and determine whether he is executing that job-related function--that is, pursuing his job-related goals--in an authorized manner. The primary purpose of the qualified immunity doctrine is to allow government employees to enjoy a degree of protection only when exercising powers that legitimately form a part of their jobs. . . . Under this standard, Allred--as a matter of law--was undoubtedly engaged in a discretionary function in chastising Holloman for raising his fist during the Pledge of Allegiance and later referring him to Harland for punishment. . . .[but] [p]raying goes sufficiently beyond the range of activities normally performed by high school teachers and commonly accepted as part of their job as to fall outside the scope of Allred's official duties, even if she were using prayer as a means of achieving a job-related goal. It is not within the range of tools among which teachers are empowered to select in furtherance of their pedagogical duties. . . . We emphasize that, at this juncture, we are not denying Allred summary judgment on qualified immunity grounds against this claim because we feel her acts violated the Establishment Clause. Instead, we are holding her ineligible for qualified immunity as a matter of law because she failed to establish that her act--this type of act--fell within her duties or powers as a teacher. The fact that Allred is a teacher does not mean that anything she says or does in front of a classroom necessarily constitutes an exercise of her discretionary powers or is a job-related function. . . . Consequently, Allred is not even potentially entitled to summary judgment on qualified immunity grounds against Holloman's Establishment Clause

claim."); ***Vicari v. Ysleta Independent School Dist***., No. EP-06-CA-131-FM, 2008 WL 577171, at *21 (W.D. Tex. Feb. 4, 2008) ("The exception to qualified immunity for functions that are 'ministerial' rather than 'discretionary' is quite narrow. For qualified immunity purposes a duty is 'ministerial' only where the statute or regulation [in question] leaves no room for discretion--that is, it 'specifies the precise action that the official must take in each instance.'. . Moreover, 'the ministerial-duty exception applies only where it is a violation of the ministerial duty that gives rise to the cause of action for damages.'. . Here, Vicari does not claim Miller is liable because he violated a YISD regulation; rather she seeks damages based on Miller's purported taking of her salary without due process, in violation of the Fourteenth Amendment. . . Thus, the issue before the Court is whether Miller violated any clearly established constitutional right rather than whether he violated a YISD policy. . . Further, the Eighth Circuit Court of Appeals has concluded 'the ministerial-duty exception to the qualified immunity defense is dead letter' law . . . . Indeed, it appears the First, Fifth, and Seventh Circuits have, like the Eighth Circuit, challenged the ministerial-discretionary distinction's relevance in the qualified immunity context. . . In addition, the Second Circuit has concluded a subordinate employee is entitled to qualified immunity when the subordinate performs a solely ministerial task by carrying out an order which is: (1) not facially invalid, and (2) issued by a superior employee who is himself entitled to qualified immunity . . . With these principles in mind and to the extent it is necessary for the Court to determine whether Miller's actions were 'discretionary' or merely 'ministerial,' after examining the relevant summary judgment evidence, the Court concludes Miller's actions were discretionary as a matter of law. The district regulations in question do not sufficiently specify the precise action that officials such as Miller must take in each instance to make actions taken pursuant to those regulations 'ministerial,' as the Supreme Court has narrowly defined the term. . . In sum, the Court concludes Miller is eligible to raise the defense of qualified immunity with regard to Vicari's § 1983 claim against him." (footnotes omitted)); ***Peterson v. Crawford***, 2007 WL 2908220, at *4, *6 (M.D.Ga. Sept. 28, 2007) ("Plaintiffs raise an underlying issue that is not often addressed in the most common Fourth Amendment cases, that is whether Defendant Crawford is even entitled to qualified immunity under any set of facts now before the Court.Plaintiff argues that Crawford did not have the authority to make the initial stop or arrest at all. The question raised is whether the lack of authority to make the initial stop and arrest means that Crawford acted outside his discretionary authority, thereby defeating Crawford's attempt to invoke the defense of qualified immunity . . . . No matter the parameters of Crawford's actual authority, it cannot be said that Defendants have carried the burden of showing that Crawford had general arrest

powers. When Defendant Griffin talked about a school police officer making an arrest off campus, he was talking about intervening in a crime being committed in the presence of the school officer. Even though he deputized Crawford, Sheriff Saba unequivocally stated that campus police officers did not have the authority to make a stop or arrest away from campus. Crawford's reliance on O.C.G.A. § 17-4-60 . . . further negates the argument that Crawford had general arrest powers and was acting within his discretionary function. Georgia's citizen's arrest statute presupposes that the individual is not a state actor with arrest powers. The statute also requires that the actor actually witness the commission of a felony or that its commission be within his immediate knowledge. . . . In the present case, Crawford cannot be a private citizen acting under O.C.G.A. § 17-4-60 and invoke the defense of a government actor, i.e., qualified immunity . Further, in this case, at the time of the stop, Defendant had not seen Plaintiff commit a felony. The Court finds that Defendant Crawford has failed to carry his burden of showing that he acted within his discretionary function. As such, Crawford is not able to avail himself to the defense of qualified immunity."); ***Scheuerman v. City of Huntsville***, ***AL***, 499 F.Supp.2d 1205, 1218 (N.D. Ala. 2007) ("While qualified immunity protects officials performing discretionary duties, it is not at all clear to the court that qualified immunity protects an off-duty bank fraud investigator who becomes angry after allegedly being tailgated, and who admittedly is not engaging in a traffic stop. If Weaber was not performing a traffic stop, then what was he doing? And how can he be performing a discretionary duty that qualified immunity was designed to protect?In some ways, Weaber's act of exiting his vehicle can be analogized to an off-duty officer who walks into a bar and becomes angry when someone bumps into him. If the officer confronts the person with his gun drawn, can he be said to be acting within his discretionary authority? Or is he, instead, abusing his authority? Does the mere fact that he is a police officer when he engages in the confrontation entitle him to qualified immunity? Of course not.Defendant has cited no case law to indicate how he would be qualifiedly immune from suit under such circumstances. To be sure, off-duty police officers performing discretionary duties can be entitled to qualified immunity. But it is not clear from the record before this court that defendant was acting pursuant to his discretionary authority for purposes of qualified immunity in this instance. The defendant must first establish that he was acting within his discretionary authority in performing a contested act before 'the burden shifts to the plaintiff to show that qualified immunity is not appropriate.' *Lee,* 284 F.3d at 1194. Defendant has failed to do so."), *aff'd,* 2008 WL 656080 (11th Cir. Mar. 12, 2008); ***Street v. City of Bloomingdale***, 2007 WL 1752469, at *4 (S.D.Ga. June 15, 2007) ("In the instant case, Defendants have failed to even address whether their actions

were part of their discretionary job functions. Accordingly, their motion to dismiss on qualified immunity grounds is DENIED."); ***Reed v. Okereke,*** No. 1:04-CV-1064-JOF, 2006 WL 2444068, at *19 (N.D. Ga. Aug. 22, 2006) ("The Court concludes that Defendants are not entitled to qualified immunity. For qualified immunity to apply, Defendants have the initial burden of showing that they engaged in a discretionary function. . . . .Defendants' motion for summary judgment is silent on the issue of whether Defendants were acting within the scope of their discretionary functions. In fact, Defendants' motion for summary judgment fails to identify the individual Defendants or their roles in the Fulton County Waste Management system. . . Without evidence of Defendants' job functions, they have not met their burden of showing that they were engaged in discretionary functions. . . As a result, Defendants are not entitled to summary judgment on the §§ 1981 and 1983 claims on the basis of qualified immunity."); ***Rodriguez v. McClenning***, No. 03 Civ. 5269(SAS), 2005 WL 937483, at *6 & n.95 (S.D.N.Y. Apr. 22, 2005) (not reported) ("Here, qualified immunity does not protect McClenning because the sexual assault of a prison inmate is outside the scope of a corrections officer's official duties. *Boddie* established that the sexual assault of a prison inmate by a prison employee serves no legitimate punitive purpose. . . New York State law criminalizes any sexual contact initiated by a prison employee against an inmate. . . A corrections officer who sexually assaults a prison inmate does not mistakenly judge how he should carry out his duties; instead, such conduct blatantly disregards a New York State criminal statute and Second Circuit case law. . . . In sum, both of McClenning's arguments for summary judgment on the sexual assault claim fail. If McClenning engaged in the alleged sexual assault, that conduct would constitute an Eighth Amendment violation because such behavior violates contemporary standards of decency. Qualified immunity cannot protect McClenning as the sexual assault of a prison inmate falls outside the scope of a corrections officer's official duties. . . . In his motion for summary judgment, McClenning argued that he is entitled to summary judgment on the basis of qualified immunity because sexual assault is not a clearly established Eighth Amendment violation. Since qualified immunity does not apply to McClenning's alleged acts, the question of whether the sexual assault of a prison inmate is a clearly established Eighth Amendment violation need not be addressed."); ***Rossignol v. Voorhaar***, 321 F.Supp.2d 642, 647, 648 (D. Md. 2004) ("The typical qualified immunity case involving police officers centers around action that is unquestionably taken in the course of the officers' discretionary function of enforcing a community's laws. Thus, whether the questioned action was taken within the scope of the officer's employment is rarely debated within this legal genre. This element is nevertheless a crucial piece of a qualified immunity analysis, for without it, the claim

of immunity is not permitted. . . . Defendants' briefing focuses on the lack of action under color of law as the main counter-point to the bulk of Rossignol's claims. The effectiveness of this strategy is evidenced by this Court's being persuaded, upon its first consideration of the case, that despite its abhorrence for Defendants' actions, they were not taken under color of law sufficient to trigger a cause of action under §1983. With the benefit of the Fourth Circuit's contrary determination, however, this Court can now only conclude that this case falls into that category of actions taken under color of law, yet outside of the scope of the actors' employment as law enforcement officers. . . . Accordingly, the same arguments made in Defendants' briefs that persuaded this Court in its prior opinion that their actions were not taken under color of state law, now lead it to conclude that the defense of qualified immunity is unavailable to any of the defendants in this action.").

See also ***Kjellsen v. Mills***, 209 Fed. Appx. 927, 2006 WL 3544923, at **1-3 (11th Cir. Dec. 8, 2006) (" In the qualified immunity context, a discretionary function includes actions that 'are of a type that fell within the employee's job responsibilities.' *Hollman,* 370 F.3d at 1265. This Court asks whether the government employee was (1) performing a legitimate job-related function (pursuing a job-related goal (2) through means that were within her power to utilize. . . In applying the above test, the most difficult task is characterizing a defendant's conduct. If framed too narrowly, such as whether it was within a defendant's discretion to violate a plaintiff's constitutional rights, 'the inquiry is no more than an untenable tautology.' *Hollman* 370 F.3d at 1266. If framed too generally, such as whether it was within a defendant's discretion to perform acts to further the public interest, then every act performed by a government employee would qualify. *Id.* The test developed by this Circuit is to characterize a government official's actions 'at the minimum level of generality necessary to remove the constitutional taint.' *Id.* Therefore, applied to this case, we should not ask whether the Appellants had the right to wrongfully withhold mitigating evidence from the prosecutor and the court; rather, this Court should ask whether the Appellants had the power to withhold test results for any reason. . . . Although the Appellants failed to present sufficient evidence that they acted in their discretionary capacities in their briefs to this Court and their motion for summary judgment in the district court, such evidence exists in the record. The district court was correct in finding there was insufficient evidence based on what Appellants presented to it on summary judgment. We remand, however, because of the importance of deciding issues of qualified immunity as early as possible in a proceeding and because evidence exists in the record that should be more fully briefed to and analyzed by the district court.") (*See opinion after remand,*

Kjellsen v. Mills, 517 F.3d 1232 (11th Cir. 2008) (rejecting plaintiff's Fourth Amendment malicious prosecution claim and Sixth Amendment denial of compulsory process claim); ***Harbert International, Inc. v. James***, 157 F.3d 1271, 1281-83 (11th Cir. 1998) ("To establish the defense of qualified immunity, the burden is first on the defendant to establish that the allegedly unconstitutional conduct occurred while he was acting within the scope of his discretionary authority. . . If, and only if, the defendant does that will the burden shift to the plaintiff to establish that the defendant violated clearly established law. . . The doctrine of qualified immunity was developed to defray the social costs of litigation against government officials. . . . When a government official goes completely outside the scope of his discretionary authority, he ceases to act as a government official and instead acts on his own behalf. Once a government official acts entirely on his own behalf, the policies underlying the doctrine of qualified immunity no longer support its application. For that reason, if a government official is acting wholly outside the scope of his discretionary authority, he is not entitled to qualified immunity regardless of whether the law in a given area was clearly established. . . . While Harbert alleges the defendants engaged in a myriad of unlawful and improper conduct, only the conduct that caused Harbert's alleged constitutional injury is relevant to the discretionary authority inquiry. That conduct consists of the defendants' allegedly improper handling of Harbert's claim for extra compensation and their decision to withhold damages from Harbert under a liquidated damages clause in the construction contract. The determinative question is whether the defendants had the authority to receive and process Harbert's claims for compensation, and whether they had the authority to decide whether to withhold damages from Harbert under a liquidated damages clause of the construction contract. . . . With the inquiry properly defined, we see the defendants have met their burden of demonstrating that their conduct was undertaken pursuant to their duties and that they were acting within the scope of their authority when the allegedly unconstitutional conduct occurred."); ***Sims v. Metropolitan Dade County***, 972 F.2d 1230, 1236 (11th Cir.1992) (rejecting the contention that "any time a government official violates clearly established law he acts beyond the scope of his discretionary authority" as "untenable" and explaining that "the question of whether the defendants acted lawfully [is distinct from] the question of whether they acted within the scope of their discretion"); ***Randles v. Hester,*** No. 98CV1214, 2001 WL 1667821, at *7 (M.D. Fla. June 27, 2001) (not reported) ("Given the position that the Department of Corrections has taken in related litigation, one could conclude that Defendant, in ignoring Department of Corrections' written policies, the known risk of harm for exposure to contaminated blood and the availability of protective clothing and

equipment, stepped outside the scope of his discretionary authority and lost the protection of qualified immunity, if applicable."); ***Conner v. Tate,*** 130 F. Supp.2d 1370, 1378, 1379 (N.D. Ga. 2001) ("The Eleventh Circuit has held that the qualified immunity defense is available to officers in their individual capacities accused of violating the Federal Wiretap Act. *Tapley v. Collins,* 211 F.3d 1210, 1216 (2000). Neither party has addressed in their briefs whether the police officers and other officials in this case were acting within their discretionary authority when the alleged violations occurred. A "[g]overnment official proves that he acted within the scope of his discretionary authority for purposes of establishing qualified immunity by showing objective circumstances that would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of this authority." *Hutton v. Strickland,* 919 F.2d 1531, 1537 (11th Cir.1990); *Jordan v. Doe,* 38 F.3d 1559, 1566 (11th Cir.1994). It is unclear from the facts outlined in the Complaint what duties the individual Defendants were performing when they distributed the contents of the taped conversations. Neither Plaintiff nor Michael Tate were under investigation by the department, and Defendant Tate was not operating as an undercover or confidential informant when the tapes were made. . . Given that the officers have not established that their actions as alleged in the Complaint were in the performance of their duties and within the scope of their authority, the Court holds that the Defendants were not acting within their discretionary authority. Therefore, at least at this stage of the litigation, the individual Defendants are not entitled to the defense of qualified immunity."); ***Adams v. Franklin***, 111 F. Supp.2d 1255, 1266, 1267 (M.D. Ala. 2000) ("In determining whether a defendant acted within the scope of his or her discretionary authority, the test is not whether the government official acted lawfully. Rather, the court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of the government official's discretionary duties. [citing *Sims*] Based on the foregoing, the court must ask whether Rogers and Estes were, at the very least, acting within the scope of the outer limits of their discretionary authority in detaining Plaintiff and in making decisions regarding his medical needs. In other words, under the first step, the court does not examine the manner in which Rogers and Estes performed their duties.").

See also ***Varrone v. Bilotti***, 123 F.3d 75, 82 (2d Cir. 1997) ("The continued validity of the ministerial-discretionary function distinction in determining qualified immunity has been questioned. . . . Both the Supreme Court and this court, however, have continued to articulate the distinction. . . We need not here decide whether the distinction continues to have validity because we conclude that even if these two

subordinate officers performed solely a ministerial function in conducting the strip search, they still have qualified immunity for carrying out the order, not facially invalid, issued by a superior officer who is protected by qualified immunity. . . . Those two subordinate officers are entitled to qualified immunity for conducting the strip search of Varrone pursuant to the facially lawful order of their superior officer, even if making the search involved the performance of a ministerial function."); ***Roberts v. Caise***, No. Civ.A.5:04-01-JMH, 2005 WL 2454634, at *4, *5 (E.D. Ky. Oct. 3, 2005) ("In several other recent cases, the Sixth Circuit has found that defendants who failed to provide medical care to prisoners were not entitled to qualified immunity at the summary judgment stage, but the court did so not on the basis of the ministerial nature of the challenged activities, but rather on the grounds that the defendants were deliberately indifferent. [citing cases] In other words, the Sixth Circuit went straight to the qualified immunity analysis without regard to the ministerial nature of the defendants' actions. Other circuits have explicitly rejected the argument that the availability of qualified immunity rests on a distinction between ministerial and discretionary acts. [citing cases] As described by the Eleventh Circuit, courts that have applied the ministerial/discretionary distinction have done so based on a misreading of the Supreme Court's decision in *Harlow*. . . . The Supreme Court in *Harlow* held that 'government officials performing discretionary functions' are entitled to immunity so long as they do not violate clearly established rights. . .An unduly narrow reading of *Harlow* only allows for immunity for nonministerial functions. A better reading, according to recent case law from other circuits, interprets the 'discretionary functions' language from *Harlow* as meaning simply that the government officials must be acting within the scope of their discretion, i.e., within the scope of their authority. . . Language from recent decisions indicates that the Sixth Circuit follows the latter reading of *Harlow*: 'Qualified immunity protects government officials from civil liability for actions taken within their official discretion.'. . [I]t would be anomalous to hold Caise personally liable for removing the extension cord, when he was required to do so by BOP procedures.").

E. "Extraordinary Circumstances"

In ***Harlow***, the Court indicated that there may be some cases where, although the law was clearly established, "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." 457 U.S. at 819. This "extraordinary circumstances" exception is applied rarely and generally in

the situation where the defendant official has relied on advice of counsel or on a statute, ordinance or regulation that is presumptively constitutional.

1. Reliance on Advice of Counsel

See e.g., ***Sueiro Vazquez v. Enid Torregrosa De La Rosa***, 494 F.3d 227, 235, 236 (1st Cir. 2007) ("Reliance on advice of counsel alone does not per se provide defendants with the shield of immunity. . . . This case does not involve advice from private counsel, who may have financial incentives to provide exactly the advice the client wants. Rather, it involves advice from the office of the Secretary of Justice of Puerto Rico, which has much broader duties and obligations. Reliance on the advice of Puerto Rico's chief legal officer, advice the defendants were required to follow by Puerto Rico law, was not unreasonable here. . . We leave for another day the hypothetical situation in which there is very strong evidence that newly appointed or elected defendant state officials acted in conspiracy with the chief public legal officer to produce and act on plainly unreasonable legal advice meant to result in the violation of a plaintiff's clearly established rights under federal law. *Cf. Vance v. Barrett,* 345 F.3d 1083, 1094 n. 14 (9th Cir.2003).This case does not come close to being that situation. Plaintiffs ask us to get into the legal question of whether the Secretary of Justice correctly or even reasonably interpreted Puerto Rico law as to whether plaintiffs' appointments were null and void. That is not an appropriate inquiry for the federal court engaged in an immunity analysis. Even if the Secretary's advice were wrong or not even within the reasonable range of interpretations (and the Secretary's advice was within a reasonable range), that would not itself mean that reasonable officials in the position of defendants would understand that they were acting in violation of plaintiffs' clearly established constitutional rights. At oral argument, plaintiffs argued that Torregrosa de la Rosa's request for an opinion from the Secretary contained a 'mischaracterization' of Sueiro's job duties and description, that this mischaracterization was motivated by political discrimination, and that this led the Secretary astray. Other circuits have denied immunity to officers in Fourth Amendment cases where officers manipulate evidence to mislead a prosecutor into authorizing an arrest. *See, e.g., Sornberger v. City of Knoxville,* 434 F.3d 1006, 1016 (7th Cir.2006). . . . We leave for another day whether there is an analogy to these cases for mandated reliance on advice of the Secretary of Justice in a First Amendment political termination case which turns on a state law classification issue. This theory was not raised in the district court, nor was it raised in the plaintiffs' opening brief in this court, and it is twice forfeited."); ***Miller v. Administrative Office of the Courts***, 448 F.3d 887, 896, 897(6th Cir. 2006) ("In this case,

Administrator Vize and Judge Wine conducted a pre-termination investigation into Miller's status to determine whether any special procedures needed to be followed in order to lawfully terminate her. The advice they received from the AOC's Director, its attorney, and its Personnel Director was consistent--that Miller was a nontenured employee. Given this information, a reasonable officer would not have clearly known that terminating Miller without the procedures required only for tenured employees was unlawful. This is not a case where the official responsible for terminating a government employee was 'plainly incompetent' or 'knowingly violat[ed] the law.'. . Rather, Vize and Wine took precautionary measures to ensure that Miller was nontenured and, whether or not she was in fact nontenured, those precautionary measures, under the circumstances, rendered reasonable their decision to terminate Miller without a hearing. Furthermore, even if we were to conclude that Miller had met her burden in the second step of the qualified immunity analysis, we would still hold that Vize and Judge Wine are entitled to qualified immunity under the third step that this court occasionally employs. The decision to terminate Miller was simply not 'objectively unreasonable' based on the information Vize and Wine had received in their pre-termination investigation."); ***Silberstein v. City of Dayton***, 440 F.3d 306, 317, 318 (6th Cir. 2006) ("The Board Members also argue that their actions were objectively reasonable because they relied upon the advice of counsel that Silberstein was an unclassified employee. This circuit has determined that reliance on counsel's legal advice constitutes a qualified immunity defense only under 'extraordinary circumstances,' and has never found that those circumstances were met. . . .The Board Members cannot cloak themselves in immunity simply by delegating their termination procedure decisions to their legal department, as the availability of such a defense would invite all government actors to shield themselves from S 1983 suits by first seeking self-serving legal memoranda before taking action that may violate a constitutional right. . . There is no evidence that the Board Members' circumstances were in any way extraordinary. The Board Members argue that they are not attorneys, but this fact alone cannot give rise to 'extraordinary circumstances.' A reasonably competent public official is presumed to know the law governing his or her conduct."); ***Armstrong v. City of Melvindale***, 432 F.3d 695, 701, 702 (6th Cir. 2006) ("Defendants present two arguments that they did not violate a clearly established right. First, they again proffer the forfeited argument regarding the Michigan drug forfeiture laws. Second, they argue that the assurances of constitutional propriety gained from consultation with Prosecutor Plants, her review of the warrant and supporting affidavit, and the judge's issuance of the warrant rendered reasonable their belief that probable cause supported the issuance of the warrant. . . . The district court never reached the question of whether the officers'

reliance on the issuance of the warrant was unreasonable. It instead focused only on the fact of a constitutional violation. This suggests a misconception; even with a constitutional breach, the law accords qualified immunity protection under appropriate circumstances. This case presents such circumstances. Defendants consulted with Prosecutor Plants because they were uncertain as to whether a warrant to search the Melvindale premises was constitutional. Plants not only advised them that a warrant would be constitutionally permissible, she also sanctioned a draft of the warrant and supporting affidavit. . . Only then did Defendants apply to a judge for the warrant. With the judge's approval, Defendants executed the search, and Plaintiffs do not allege that the search exceeded the scope of the warrant. . . . Defendants wrongly believed that probable cause supported the warrant, but their mistake was not so unreasonable as to deny them qualified immunity. . . . Because the officers exercised reasonable professional judgment in applying for the warrant and because reasonable officers in Defendants' position might have believed that the warrant should have issued, we cannot say that Defendants violated a clearly established right by conducting the search of Plaintiffs' business."); ***Cox v. Hainey***, 391 F.3d 25, 34-36 (1st Cir. 2004) ("[T]he appellant submits that a police officer should not be able to insulate himself from liability for an erroneous determination simply because he obtained a prosecutor's blessing to arrest upon evidence that did not establish probable cause. We agree with the appellant's premise that a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one. That is not to say, however, that a reviewing court must throw out the baby with the bath water. There is a middle ground: the fact of the consultation and the purport of the advice obtained should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity. Whether advice obtained from a prosecutor prior to making an arrest fits into the totality of circumstances that appropriately inform the qualified immunity determination is a question of first impression in this circuit. In *Suboh v. Dist. Atty's Office of Suffolk Dist.,* 298 F.3d 81 (1st Cir.2002), we noted the question but had no occasion to answer it. *See id.* at 97. In dictum, we implied that if an officer seeks counsel from a prosecutor anent the legality of an intended action and furnishes the latter the known information material to that decision, the officer's reliance on emergent advice might be relevant, for qualified immunity purposes, to the reasonableness of his later conduct. . . Other courts, however, have spoken authoritatively to the issue. [collecting circuit cases] . . . .We agree with our sister circuits and with the implication of the *Suboh* dictum that there is some room in the qualified immunity calculus for considering both the fact of a pre-arrest consultation and the purport of the advice received. As a matter of practice, the incorporation of

these factors into the totality of the circumstances is consistent with an inquiry into the objective legal reasonableness of an officer's belief that probable cause supported an arrest. It stands to reason that if an officer makes a full presentation of the known facts to a competent prosecutor and receives a green light, the officer would have stronger reason to believe that probable cause existed. And as a matter of policy, it makes eminently good sense, when time and circumstances permit, to encourage officers to obtain an informed opinion before charging ahead and making an arrest in uncertain circumstances. . . . Although we acknowledge the possibility of collusion between police and prosecutors, we do not believe that possibility warrants a general rule foreclosing reliance on a prosecutor's advice. . . . We caution, however, that the mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow. Rather, that consultation comprises only one factor, among many, that enters into the totality of the circumstances relevant to the qualified immunity analysis. . . The primary focus continues to be the evidence about the suspect and the suspected crime that is within the officer's ken. In considering the relevance of an officer's pre-arrest consultation with a prosecutor, a reviewing court must determine whether the officer's reliance on the prosecutor's advice was objectively reasonable. . . Reliance would not satisfy this standard if an objectively reasonable officer would have cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy. . . Law enforcement officers have an independent duty to exercise their professional judgment and can be brought to book for objectively unreasonable mistakes regardless of whether another government official (say, a prosecutor or a magistrate) happens to compound the error. . . The officer's own role is also pertinent. If he knowingly withholds material facts from the prosecutor, his reliance on the latter's opinion would not be reasonable. . . In this case, the advice that Hainey received from the assistant district attorney was of the kind that an objectively reasonable officer would be free to consider reliable. The undisputed facts indicate that the two reviewed the available evidence fully and had a frank discussion about it. This discussion culminated in the prosecutor's statement that he believed Hainey had probable cause to arrest the appellant. And, finally, there is nothing to suggest that the prosecutor was operating in bad faith. We conclude, therefore, that an objectively reasonable officer would have taken the prosecutor's opinion into account in deciding whether to make the arrest. Thus, the district court appropriately considered that opinion in assessing the objective reasonableness of Hainey's actions and, ultimately, in granting him qualified immunity."); ***Davis v. Zirkelbach***, 149 F.3d 614, 620 (7th Cir. 1998) ("[O]fficers were objectively reasonable in their reliance on [counsel's] advice. A contrary conclusion on these facts would create

perverse incentives for police officers faced with an unusual problem: if they sought advice of counsel that turned out to be wrong, they would be liable, but if they maintained a deliberate ignorance, they might be able to get away with arguing that no reasonable officer would have known that the rule applied to their particular situation."); ***V-1 Oil Co. v. Wyoming Dep't of Envtl. Quality***, 902 F.2d 1482, 1488-89 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990) (collecting cases and identifying four factors that determine when extraordinary circumstances exist in the context of reliance on counsel); ***Pate v. Village of Hampshire***, 2007 WL 3223360, at *14, *15 (N.D.Ill. Oct. 25, 2007) ("Chief Atchison and Mayor Magnussen further argue that their actions are protected by the 'extraordinary circumstances' exception to the lack of immunity based on their reliance of counsel's advice before terminating Pate's and Stroyan's employment. If an immunity defense fails because the law was clearly established and a reasonably competent public official should have known the law governing the conduct, the public official may still be immune from suit if extraordinary circumstances exist, such as relying on the advice of counsel in making the disputed decision. *See Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir.1998) (*Davis*). Factors included in determining whether immunity may be granted based on this extraordinary circumstance include: (1) whether the advice of counsel was unequivocal, (2) whether the advice of counsel was specifically tailored to the particular facts giving rise to the controversy, (3) whether complete information was provided to the advising counsel, (4) the prominence and competence of the advising counsel, and (5) the time span after the advice was received and the disputed action was taken. . . In the instant case, the undisputed facts before the Court are insufficient to determine if the extraordinary circumstances defense applies to Chief Atchison's and Mayor Magnussen's decisions to terminate Pate's and Stroyan's employment based on advice from McGuire. . . . Accordingly, summary judgment based on qualified immunity and the extraordinary circumstance defense is denied."); ***Schroeder v. City of Vassar***, 371 F.Supp.2d 882, 897 (E.D. Mich. 2005) ("The evidence shows that the legal counsel unequivocally approved the termination, the information Adkins provided to the attorney included the draft letter, the attorney consulted was competent to serve as the city's counsel, and that the action took place immediately after receiving the advice. The Court finds that Adkins is entitled to qualified immunity under the circumstances of this case.").

But see ***Sornberger v. City of Knoxville***, 434 F.3d 1006, 1016 (7th Cir.2006) ("This record cannot establish that Officer Clauge and Chief Pesci simply made a good-faith mistake as to the existence of probable cause. We have held that, when an officer presents his case in good-faith to a prosecutor and seeks that official's advice

about the existence of probable cause, his subsequent action, based on the prosecutor's advice that probable cause exists, is powerful evidence that the officer's reliance was in good faith and deserving of qualified immunity. . . Here, however, the record, as it comes to us, hardly establishes such a good-faith seeking of legal advice. Rather, the record is susceptible to the view that the officers themselves realized the weakness of their case, and therefore manipulated the available evidence to mislead the state prosecutor into authorizing Scott's arrest. . . This conduct, as alleged, creates serious factual issues as to whether the officers reasonably relied on the prosecutor's advice. On this record, neither Chief Pesci nor Officer Clauge can be entitled to qualified immunity. . . . In the present case, the officers had obtained a warrant for the search of the Sornbergers' parents' computer, which would have allowed the investigators to confirm the couple's alibi. Rather than waiting to obtain this critical information, the officers arrested Scott while the search of his parents' home was taking place. On this record, given that the lynchpin of a probable cause determination was on the verge of being obtained, the officers' arrest of Scott before reviewing the results of the computer search appears to have been unreasonably premature."); ***Putnam v. Keller,*** 332 F.3d 541, 545 n.3 (8th Cir. 2003) (rejecting college officials' "argument that they are insulated from liability due to 'extraordinary circumstances'--that is, their reliance on the advice of their attorney."); ***Roska v. Peterson,*** 328 F.3d 1230, 1254 (10th Cir. 2003) (*Roska I*) ("In this case, the district court alternatively concluded that the defendants were entitled to qualified immunity based on their reliance on advice of counsel. For the reasons set forth below, we reverse and remand. First, the district court again based its decision on Utah Code § 78-3a- 301, which, as discussed *supra,* does not authorize removal without pre-deprivation procedures. Second, based on the record before us, we cannot determine whether the district court was correct in concluding that Petersen's advice related specifically to the conduct in question: removing Rusty from his home without any pre-deprivation procedures. Finally, although the district court concluded that the advice 'was specifically tailored to the facts giving rise to this controversy,' neither the district court opinion nor the record indicate the specific facts upon which Defendant Peterson relied in approving removal."[footnotes omitted]); ***Charfauros v. Board of Elections***, 249 F.3d 941, 954 (9th Cir. 2001) (reliance on advice of counsel does not establish that a reasonable elections official would not know that his or her conduct violated the Equal Protection Clause); ***Wadkins v. Arnold***, 214 F.3d 535, 542 (4th Cir. 2000) ("[T]he mere fact that Detective Arnold acted upon the Commonwealth's Attorney's authorization in applying for the warrants does not automatically cloak Arnold with the shield of qualified immunity. However, this authorization--by the elected chief law

enforcement officer of Washington County--is compelling evidence and should appropriately be taken into account in assessing the reasonableness of Arnold's actions."); ***Woodwind Estates, Ltd. v. Gretkowski***, 205 F.3d 118, 125 (3d Cir. 2000) ("[T]he supervisor defendants contend that their Rule 50(a) motion should be upheld on the alternative ground that they are entitled to qualified immunity for their decision to deny Woodwind's application for subdivision approval. According to the supervisors, they are entitled to qualified immunity simply because they were relying upon the recommendation of the planning commission and the township solicitor. We disagree. . . . Under the local ordinance, the Woodwind plan as submitted must have been approved as a subdivision because it satisfied all of the objective criteria. Yet the supervisor defendants denied approval for the subdivision plan. The supervisor defendants have not shown that their interpretation or understanding of the ordinance was reasonable or that Pennsylvania law on the subject was unclear. Accordingly, the defense of qualified immunity is not available to the supervisor defendants in the instant matter."); ***Gilbrook v. City of Westminster***, 177 F.3d 839, 870 (9th Cir. 1999) ("Both Demonaco and Huntley testified that they consulted with counsel before discharging Garrison because of his press release. Huntley even went so far as to read a Supreme Court opinion himself, before determining that Garrison had exceeded the permissible bounds of protected public-employee speech. Although such efforts are laudable, standing alone they do not bestow on public officials the shield of qualified immunity. . . Were we to rule that reliance on the advice of counsel is sufficient to confer qualified immunity, no matter what the outcome of the *Pickering* balance, we would be abdicating to individual lawyers our collective judicial responsibility to evaluate the merits of First Amendment retaliation claims and providing an incentive for lawyers to tell public-employer clients that they have immunity even when other factors suggest the absence of immunity. In summary, on the record before us, we conclude that the *Pickering* balance so clearly weighs in favor of Garrison that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech."); ***Pattee v. Georgia Ports Authority***, 477 F.Supp.2d 1253, 1268 (S.D. Ga. 2006) ("Finally, the defendants argue that they are entitled to qualified immunity because they relied on an attorney's advice that terminating Pattee for lying would not violate his constitutional rights. . . . Defendants point to no Eleventh Circuit case applying the 'extraordinary circumstances' exception, nor any case granting a defendant qualified immunity for relying on the advice of private counsel. Furthermore, even were the Court to find *V-1* persuasive, the legal advice in that case was extraordinary--from a high-ranking government attorney and regarding an untested statute--not the run-of-the-mill advice defendants received from their attorney in this case. Thus, the defense does not apply

here."); ***Masonoff v. Dubois***, 336 F.Supp.2d 54, 64, 65 (D. Mass. 2004) ("The First Circuit and courts in other jurisdictions have held that a state law sanctioning the conduct at issue can keep a reasonable official from knowing the relevant constitutional standard. . . Similarly, courts have also deemed reliance on advice of counsel reasonable under certain circumstances. . . Ultimately, the question here boils down to whether it was objectively reasonable for these defendants to believe, based upon *Langton* and advice of counsel, that their conduct conformed to law. . . . I conclude that *Langton* gave the defendants more than 'fair notice' that the portable toilets and slop sinks must be kept clean and well-maintained in order to pass constitutional muster. . . . In other words, it would not be reasonable for the defendants to rely on *Langton*--or advice of counsel--for the proposition that the conditions at SECC would always be constitutional, especially in the face of the court's warning in *Langton* and its prophylactic order regarding cleaning and maintenance of the portable toilets.").

See also ***In re County of Erie***, 546 F.3d 222, 225, 229, 230 (2d Cir. 2008) ("After reviewing the submissions of the parties in regard to the Petition, we first determined that the writ was an appropriate device to review the discovery order in this case because the Petitioner presented an important issue of first impression: whether communications passing between a government attorney without policy-making authority and a public official are protected by the attorney-client privilege when the communications evaluate the policies' legality and propose alternatives. . . . An analysis of the attorney-client privilege in the government context and its application to the factual background of this case led us to conclude that each of the ten disputed e-mails was sent for the predominant purpose of soliciting or rendering legal advice. They convey to the public officials responsible for formulating, implementing and monitoring Erie County's corrections policies, a lawyer's assessment of Fourth Amendment requirements, and provide guidance in crafting and implementing alternative policies for compliance. This advice--particularly when viewed in the context in which it was solicited and rendered--does not constitute general policy or political advice unprotected by the privilege. . . We therefore granted the writ and directed the District Court to enter an order preserving the confidentiality of the e-mails in question. . . . .We hold that a party must *rely* on privileged advice from his counsel to make his claim or defense. We decline to specify or speculate as to what degree of reliance is required because Petitioners here do not rely upon the advice of counsel in the assertion of their defense in this action. Although the District Court held, *inter alia*, that the qualified immunity defense asserted by Petitioners placed the privileged communications

between the County Attorney's Office and the Sheriff's personnel at issue, this is not so. . . . The question of whether a right is 'clearly established'is determined by reference to the case law extant at the time of the violation. . . This is an objective, not a subjective, test, and reliance upon advice of counsel therefore cannot be used to support the defense of qualified immunity. Petitioners do not claim a good faith or state of mind defense. They maintain only that their actions were lawful or that any rights violated were not clearly established. In view of the litigation circumstances, any legal advice rendered by the County Attorney's Office is irrelevant to any defense so far raised by Petitioners. . . . The Petition for Mandamus is granted. The District Court's order to produce the ten e-mails is vacated, and the District Court is directed to enter an order protecting the confidentiality of those privileged communications. Respondents shall have leave to reargue forfeiture of the privilege before the District Court should the Petitioners rely upon an advice-of-counsel or good-faith defense at trial."); ***Ross v. City of Memphis***, 423 F.3d 596, 597, 598 (6th Cir. 2005) ("Regardless of the way this case is captioned, the real dispute is between the City of Memphis (the 'City') and its former police director, Walter Crews, who has also been sued in his individual capacity. The City asserts the attorney-client privilege as to the content of conversations between Crews, while he was police director, and various attorneys employed by the City. However, in the present lawsuit, Crews has raised the advice of counsel as the basis of his qualified immunity defense. Thus, we are asked to determine whether Crews's invocation of the advice of counsel impliedly waives the attorney-client privilege held by the City. To answer this question, we must first decide whether a municipality can hold the attorney-client privilege. Holding that a municipality can maintain the privilege and that Crews's litigation choices cannot waive the City's privilege, we reverse the district court and remand for further proceedings.").

2. Reliance on Statutes, Ordinances, Regulations

See, e.g., ***Humphries v. County of Los Angeles***, 547 F.3d 1117, 1147, 1148 (9th Cir. 2008) ("Although the district court did not reach the issue of qualified immunity we may do so where it is clear from the record before us. . . . We have held that 'an officer who acts in reliance on a duly-enacted statute ... is ordinarily entitled to qualified immunity'" which is lost only if it is 'so obviously unconstitutional as to require a reasonable officer to refuse to enforce it.' *Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir.1994). The California system, which denied the Humphries their procedural due process rights was not so obviously unconstitutional as to suggest to Detective Wilson that he ought not abide by CANRA's [Child Abuse

and Neglect Reporting Act] provisions and report the Humphries for listing on the CACI. A procedural due process analysis that requires a complicated balancing test is sufficiently unpredictable that it was not unreasonable for Detective Wilson to comply with the duly-enacted CANRA provisions."); ***Kloch v. Kohl***, 545 F.3d 603, 609 (8th Cir. 2008) ("Even if we were to conclude that Dr. Kloch properly alleged a constitutional violation, we are satisfied that Bruning is entitled to qualified immunity under the second prong of our analysis: whether the right at issue was so clearly established that a reasonable official would have known that his conduct was unconstitutional. . . Qualified immunity protects public officials who act in good faith while performing discretionary duties that they are obligated to undertake. . . Bruning had a statutory obligation to enforce the laws of his state. . . His decision to enforce a law of arguable constitutional validity falls within the ambit of protected official discretion."); ***Hancock v. Baker***, 263 Fed. Appx. 416, 2008 WL 268267, at *2, *3 (5th Cir. 2008) ("[D]ismissal of Hancock for refusing to take a polygraph that required her to waive her Fifth Amendment rights was a violation of clearly established law. . . . Considering the clearly established law, a reasonable official should not have fired an employee under those circumstances. A reasonable official would have understood that a waiver of rights required by an officer from a different agency could have voided his promise that the investigation was administrative. The Supreme Court has clearly established that regardless of the ultimate effectiveness of the waiver, the coercion to waive the right violates the Fifth Amendment. . . . The fact that Fincher's requirement that Hancock waive her rights was a 'matter of procedure' does not make Baker's actions reasonable. That Fincher was blindly following a blanket procedure does not excuse Baker's violation of a clearly established constitutional right."); ***Kay v. Bemis,*** 500 F.3d 1214, 1221 n.6 (10th Cir. 2007) ("The question also remains whether the prison officials are entitled to qualified immunity in applying prison regulations to Kay's religious practices. Kay must show at the time of his challenged action it was clearly established that any regulation was unconstitutional. . . We have recognized that an officer's 'reliance on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question' may absolve the officer from knowing that his conduct was unlawful. . . The exception to this rule is that 'where a statute authorizes conduct that is "patently violative of fundamental constitutional principles," reliance on the statute does not immunize the officer's conduct."); ***Boles v. Neet***, 486 F.3d 1177, 1183, 1184 & n.6 (10th Cir. 2007) ("The parties' disagreement about how broadly to define the constitutional right is understandable. As we have previously noted, striking the right balance is crucial to the qualified immunity analysis. . . . Our task is to evaluate Warden Neet's assertion of qualified immunity in the context of the circumstances

that he faced without being too constrained by the particular facts of the case. . . . In support of his summary judgment motion, Warden Neet argued that his decision to deny Boles's request to wear religious garments during transport was based solely on prison regulations in effect at the time. . . . We appreciate Warden Neet's position that he did not intend to violate Boles's constitutional rights, but he is not immune from liability simply because he acted in accordance with prison regulations. . . . Warden Neet's actions were reasonable and he is entitled to qualified immunity only if the regulation that he relied on was reasonably related to a legitimate penological interest. Since, as we have already held, there is nothing in the record to indicate as much, he has not established the defense of qualified immunity. . . . We recognize that one of the relevant factors in evaluating the reasonableness of Warden Neet's actions is whether he relied on a regulation or official policy that explicitly sanctioned his conduct. . . But the regulation at issue here, AR 300-37 RD, at most only implicitly sanctioned his conduct. It states that inmates are to be transported in orange jumpsuits and transport shoes. In our view, whether it implicitly forbids the wearing of other items depends on the purpose behind the regulation."); ***Field Day v. County of Suffolk***, 463 F.3d 167, 192 (2d Cir. 2006) ("In support of their assertion that no clearly established right has been pleaded in this case, the Suffolk County Employees make two related arguments. First, they argue that the Mass Gathering Law 'withstood a constitutional challenge in the New York State Court system,'. . . . Second, citing *Vives v. City of New York*, 405 F.3d 115 (2d Cir.2005), the Suffolk County Employees argue that because the Mass Gathering Law had never been declared unconstitutional they were entitled to rely on it as presumptively valid, and thus were without 'prior notice of an alleged constitutional infirmity.' These related arguments suffer from the same defect: They confuse and conflate the facial constitutionality of a statute with the unconstitutional application of that same statute. . . .*Vives* has no application to the issue presented here."); ***Way v. County of Ventura***, 445 F.3d 1157, 1166 (9th Cir. 2006) (Wardlaw, J., concurring) ("In this case, the Ventura County Sheriff's Department policy authorized the conduct in question. Officers Brooks and Hanson complied with that policy. In addition, California Penal Code § 4030(f) specifically exempts those arrested on misdemeanor 'weapons, controlled substances or violence' charges from the general prohibition on strip and body cavity searches of persons arrested for misdemeanors. Because the policy and the state statute had not fallen into desuetude, *Grossman,* 33 F.3d at 1209 n. 19, nor were they 'patently violative of fundamental constitutional principles,' *id.* at 1209, it was objectively reasonable for officers Brooks and Hanson to rely on the policy and the state statute in performing the strip search on Way. I therefore concur with the majority in finding that the officers are entitled to qualified immunity.");

Roska v. Sneddon, 437 F.3d 964, 971, 972, 978 (10th Cir. 2006) ("In *Roska I*, this court held that Defendants' removal of Rusty without a warrant or pre-deprivation hearing deprived Plaintiffs of their clearly established constitutional right to maintain a family relationship. . . Usually, if the law is clearly established at the time of defendant's conduct, a qualified immunity defense will fail. . . 'Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.'. . Reliance on a state statute is one extraordinary circumstance which may render an official's conduct objectively reasonable. . . Reliance on a statute does not, however, make an official's conduct *per se* reasonable. . . Rather, it is one factor 'which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.' . . Relevant factors in determining whether reliance on a statute rendered an official's conduct objectively reasonable include: (1) the degree of specificity with which the statute authorized the conduct; (2) whether the official in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the official could have reasonably concluded the statute was constitutional. . . Defendants bear the burden of proving their conduct was objectively reasonable in light of a state statute. . . Utah Code Ann. S 62A-4a-202.1 (1998) [In footnote court points out that "Utah child protection laws were amended after the events that gave rise to this litigation. The amended statute, which took effect in July 2002, requires exigent circumstances before DCFS can remove a child without a warrant. Utah Code Ann. S 62A-4a-202.1(1) (2000 & Supp.2005)"] authorized DCFS to take a child into protective custody without obtaining a warrant if: (1) a caseworker had substantial cause to believe any of the factors in Utah Code Ann. S 78- 3a-301 existed, and (2) the caseworker provided the child's parents or child with services that would eliminate the need for removal, if those services were reasonably available and consistent with the child's safety and welfare. Utah Code Ann. S 62A-4a-202.2 provided for post-deprivation procedures that had to be in place before DCFS could remove a child without a warrant pursuant to Utah Code Ann. S 62A-4a-202.1. The parties agree that these statutory provisions had not fallen into desuetude at the time of Defendants' actions. Further, Defendants could have reasonably concluded the statute was constitutional. . . . Applying the factors this court articulated in *Roska I*, Defendants could have reasonably concluded Utah Code Ann. SS 62A-4a-202.1 and -202.2 were constitutional and had not fallen into desuetude. Defendants, however, failed to actually comply with the statute upon which they purportedly relied. While only one of the Roska I factors weighs against concluding Defendants' actions were objectively reasonable, it is an important factor and, in this case, it is dispositive. . . . [B]y failing to offer or provide preventive

services that were reasonably available when faced with the opinion of the main treating physician that removal might harm Rusty more than allowing him to remain in the home, Defendants failed to properly consider and balance the parents' interest. In light of the balancing required by the statute and the Constitution, this failure was objectively unreasonable. Defendants are therefore not entitled to qualified immunity."); ***Cooper v. Dillon,*** 403 F.3d 1208, 1211, 1220 (11th Cir. 2005) ("This appeal requires us to determine the constitutionality under the First Amendment of a Florida statutory provision which makes it a misdemeanor for a participant in an internal investigation of a law enforcement officer to disclose any information obtained pursuant to the investigation before it becomes public record. . . .Now that we have determined that Fla. Stat. ch. 112.533(4) is unconstitutional, we turn to Cooper's claims that Dillon's enforcement of the statute subjected him to liability under § 1983 . . . in his individual and official capacities. At the time of Cooper's arrest, the statute had not been declared unconstitutional, and therefore it could not have been apparent to Dillon that he was violating Cooper's constitutional rights. . . While Cooper argues that the unconstitutionality of the pre-1990 version of the statute and Supreme Court precedent gave Dillon 'fair warning' that the new version would also be constitutionally deficient, such an argument is not persuasive. The legislative history reveals that the current version of the statute was designed to correct the constitutional problems within the pre-1990 statute, . . . and Dillon was entitled to assume that the current version was free of constitutional flaws."); ***Mimics v. Village of Angel Fire***, 394 F.3d 836, 846, 847 (10th Cir. 2005) ("Reliance on a statute does not make an official's conduct per se reasonable. . . It is, however, 'one factor to consider in determining whether the officer's actions were objectively reasonable, keeping in mind that the overarching inquiry is one of fair notice.' . . Determining whether reliance on a statute makes an official's conduct objectively reasonable, despite violating the plaintiff's clearly established rights, depends on '(1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional.' . . Reliance on a statute or regulation will not make an official's conduct objectively reasonable if the statute or regulation is obviously unconstitutional or if the officer 'unlawfully enforces [such] ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance.' . . To the extent Hasford is interpreting the Village ordinance and New Mexico statutes to permit nonconsensual warrantless entries at any time and under any circumstance, his understanding is not objectively reasonable. It has long been the rule that such warrantless nonconsensual

entries into commercial property not open to the public violate the Fourth Amendment. . . More importantly, Hasford's reliance on the statue and regulations does not make his conduct objectively reasonable because there is evidence that Hasford did not comply with the terms of the statute and regulations.");***Connecticut ex rel. Blumenthal v. Crotty***, 346 F.3d 84, 104 (2d Cir. 2003) ("Common sense dictates that reasonable public officials are far less likely to conclude that their actions violate clearly established rights when they are enforcing a statute on the books with no transparent constitutional problems. Thus, in the realm of objective reasonableness, we hold that enforcement of a presumptively valid statute creates a heavy presumption in favor of qualified immunity. The question, then, becomes whether the Nonresident Lobster Law was so plainly unconstitutional and its enforcement so clearly unlawful, in light of all facts and circumstances, that the presumption in favor of qualified immunity is overcome, whereby Appellants should be held personally liable for monetary damages. We think not . . . ."); ***Buonocore v. Harris***, 134 F.3d 245, 253 (4th Cir. 1998) ("[A]lthough reliance on counsel's advice may indeed be a factor to be considered in deciding whether a defendant has demonstrated an 'extraordinary circumstance,' reliance on legal advice alone does not, in and of itself, constitute an 'extraordinary circumstance' sufficient to prove entitlement to the exception to the general *Harlow* rule."); ***McNally v. Eve***, No. 8:06-CV-2310-T-23EAJ, 2008 WL 1931317, at *10 n.18 (M.D. Fla. May 2, 2008) ("Defendants . . . argue that Eve is entitled to qualified immunity because the Sheriff's internal use of force policy governed Eve's taser use and the level of force used was consistent with the Sheriff's general order. Defendants submit expert opinion evidence that the Sheriff's taser policy 'is consistent with the recommended guidelines, practices, and procedures of professional law enforcement agencies and their use of force models.' . . . Defendants cite no authority to support the proposition that compliance with an internal policy acts as a complete shield to liability and entitles an officer to qualified immunity."); ***Copar Pumice Co., Inc. v. Morris***, No. CIV 07-79 JB/ACT, 2008 WL 2323488, at *28 (D.N.M. March 21, 2008) ("Copar Pumice had a right not to be inspected without a search warrant, unless the state officials conducted their search pursuant to and in compliance with the substitute for a warrant--the statute and the permit. Furthermore, no extraordinary circumstances appear to have existed justifying the Defendants' failure to comply with state law or to secure a warrant. Nothing appears to have prevented the Defendants from knowing the law and following it. Additionally, reliance on a statute or regulation, such as the statute in this case, will not make an official's conduct objectively reasonable if the official 'unlawfully enforces [such] ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the

ordinance.' [citing *Mimics, Inc.*] The plain language of the statute and of the permit told Morris and Yantos what needed to be done. A reasonable officer would realize that, to comply with the statute and come within the warrantless exception, he or she must follow the statute. Morris and Yantos did not comply with the plain language of the statute or the permit. There is no basis to excuse the Defendants' violation of a well-established constitutional right on the basis of extraordinary circumstances. The Court will thus deny Defendants' motion for summary judgment on the basis of qualified immunity in regards to Morris and Yantos' search."); ***Wares v. Simmons***, 524 F.Supp.2d 1313, 1325, 1326 (D. Kan. 2007) ("In considering the 'objective legal reasonableness' of the state officer's actions, one relevant factor is whether the defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question. . . Of course, an officer's reliance on an authorizing statute does not render the conduct *per se* reasonable. . . Rather, 'the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.' . . . Here, it is uncontested that defendants removed the desired religious books as a disciplinary measure in reliance upon and in accordance with the requirements of the property restrictions found in the relevant policies, which were official policies of the KDOC. These policies are not obviously unconstitutional, and no reason has been shown why defendants should have believed they were acting unconstitutionally in removing the books. This is particularly so since during the course of plaintiff's grievance about defendants' seizure of the books, defendants consulted with and relied upon the opinion of one considered to be an expert in the matter--a Jewish rabbi. When asked about the specific application of their policies to the religious books desired by plaintiff, the rabbi unequivocally confirmed that neither the 'Tanya' nor the 'Tehillim' was essential for the practice of plaintiff's faith. Although plaintiff now implies that the rabbi may have lacked knowledge about the details of plaintiff's particular branch of Judaism, defendants' reliance upon the rabbi's opinion was nonetheless objectively reasonable. Defendants had no reason to believe that the rabbi was uninformed or that their policy, which at all times preserved the inmate's right to possess the primary texts of his religion and to practice his religion, was unconstitutional. Accordingly, defendants are entitled to qualified immunity."); ***Steele v. City of Bemidji,*** 242 F. Supp.2d 624, 627, 628 (D.Minn. 2003) ("Defendants correctly note that the City's ordinances had not been ruled unconstitutional in 1998. They further point to the Magistrate's ruling, upheld by the District Court, finding the ordinances constitutional. . . From this, the City defendants argue that while the ordinances may have been found unconstitutional on appeal, their infringement on the First Amendment was not clearly established at the

time of the incidents about which Steele complains. This argument is not without some persuasive force. The Court can hardly expect police officers to know better than judges that a duly-enacted city law violated the Constitution. Thus, the Court finds the police officers, who relied on the advice given to them by the City Attorney, are entitled to qualified immunity in this case. But this determination does not end the Court's inquiry. In the words of the Eighth Circuit, viewing the facts in the light most favorable to Steele, the City Attorney sought to apply these ordinances to Mr. Steele 'whether or not he attempt[ed] to sell his newspapers and whether or not he place[d] them on City property.' . . Therefore, although the ordinances' unconstitutionality may not have been clearly established for all parties in August, 1998, the Court sees no basis on which the City Attorney could presume they were in conformity with the Constitution when Steele simply gave the Herald away, without charge, on the sidewalk outside the Post Office. The Court finds that the contours of the First Amendment are such that a reasonable city attorney would recognize this constitutional infirmity.").

But see ***Guillemard-Ginorio v. Contreras-Gomez***, 490 F.3d 31, 38-41(1st Cir. 2007) ("With respect to Contreras, Defendants argue that he is entitled to qualified immunity because he was acting pursuant to a presumptively constitutional statute. Defendants point out that the Puerto Rico Insurance Code authorizes the Insurance Commissioner to 'suspend, revoke or refuse to renew a license' by issuing an 'order ... to licensee not less than fifteen days prior to the effective date thereof, subject to the right of the licensee to have a hearing,' and provides that 'pending such hearing, the license shall be suspended.' P.R. Laws Ann. tit. 26, § 947(2)(a). . . . [T]o the extent Contreras or Juarbe acted in reliance on section 947(2)(a), enacted in 1957, we find such reliance unreasonable because that statute is no longer in effect, having been superseded by the Puerto Rico Uniform Administrative Procedure Act, P.R. Laws Ann. tit. 3, § 2101 *et seq.* (the "Puerto Rico APA"). . . . Neither party disputes that the Puerto Rico APA provides for pre-deprivation hearings at all agency levels. . . . The Supreme Court of Puerto Rico has held that the Puerto Rico APA expressly supersedes any conflicting statutes. . . . Given the Puerto Rico APA's pre-deprivation hearing requirement, any claimed reliance on section 947's summary-revocation provision is unreasonable as a matter of law. . . . We also find reliance on section 947(2)(a) unreasonable because the statute is patently unconstitutional. Although state officials are ordinarily entitled to rely on presumptively valid state statutes, courts have held such reliance unreasonable where the relevant law is 'so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.' . . . Section 947(2)(a) is patently unconstitutional because it

specifically provides for the suspension of a professional license before a hearing is provided, without limitation. . . . . Thus, we find that Defendants are not entitled to rely on section 947(2)(a)'s allowance for pre-hearing deprivations because a reasonable official in their position would have known that it violates the Due Process Clause.").

Compare ***Lawrence v. Reed***, 406 F.3d 1224, 1230-36 (10th Cir. 2005) ("The only question on appeal, then, is whether 'extraordinary circumstances' excused [Sheriff] Reed from knowing the clearly established law. Mr. Reed points to two reasons why he neither knew nor should have known that the seizure of Mrs. Lawrence's vehicles violated clearly established law: his consultation with the city attorney, and his reliance on the derelict vehicle ordinance. . . . In this case, we find particularly significant the fact that Mr. Reed and City Attorney Lewis never once discussed the applicable constitutional law governing Mr. Reed's conduct. Mr. Reed concedes that a warrant or notice-and-hearing are required before depriving a citizen of their property; he also concedes that these constitutional requirements were clearly established and that he violated them. Yet he now argues that his consultation with the city attorney--who never once mentioned the requirement of a warrant or notice-and-hearing-- somehow prevented him from knowing that these procedures were constitutionally required. This cannot be the case. What Mr. Reed really wants us to conclude is that it is generally reasonable to rely on the city attorney's advice--that it is the attorney's job, not the police officer's, to point out when a statutorily authorized course of conduct violates the Constitution. But this is an argument that officers should not be held responsible for knowing the law in the first place, not that consultation with the city attorney somehow interfered with that knowledge. Given Mr. Reed's concession that his conduct violated Mrs. Lawrence's clearly established rights, and given the Supreme Court's admonishment that 'a reasonably competent public official should know the law governing his conduct,' . . . Mr. Reed must point to something in his consultation with the city attorney that prevented him from knowing the law. This he has not done. The district court therefore erred by granting Mr. Reed immunity on the basis of his consultation with the city attorney. . . . Alternatively, Mr. Reed argues that he should not be held responsible for knowing the unlawfulness of his conduct because his conduct was authorized by the Rawlins derelict vehicle ordinance. . . . Thus, officers can rely on statutes that authorize their conduct--but not if the statute is obviously unconstitutional. Again, the overarching inquiry is whether, in spite of the existence of the statute, a reasonable officer should have known that his conduct was unlawful. . . . Just as we do not require officials to predict novel constitutional rulings, we do

not require them to predict novel statutory rulings. Instead, the focus of the qualified immunity inquiry is on what a reasonable officer should have known. Here, Mrs. Lawrence concedes that the derelict vehicle ordinance applies on its face to her property; but she argues that the 1982 Settlement Agreement carved out an exception for her industrially zoned property. What she has failed to produce, however, is any evidence that Mr. Reed knew or should have known about the 1982 Settlement Agreement. Absent such evidence, we cannot conclude that the agreement rendered unreasonable Mr. Reed's conclusion that the derelict vehicle ordinance authorized his conduct. . . But this does not end our inquiry. Another important consideration is whether Mr. Reed could reasonably have concluded that the statute was constitutional. . . . Mr. Reed should have known that the ordinance was unconstitutional. Had the derelict vehicle ordinance provided some form of pre-or post-deprivation hearing--even a constitutionally inadequate one--we would not necessarily expect a reasonable officer to know that it was unconstitutional. For once the ordinance provides a hearing, its constitutionality turns on a court's resolution of the *Mathews* balancing test, which, in the absence of case law directly on point, is not something we would require officers to predict. Here, however, the ordinance provides no hearing whatsoever; an officer need not understand the niceties of *Mathews* to know that it is unconstitutional. Our decisions, and those of other circuits, have made abundantly clear that when the state deprives an individual of property--for example, by impounding an individual's vehicle--it must provide the individual with notice and a hearing. . . This is especially true where, as here, the state not only impounds the vehicles but permanently disposes of them. . . In sum, a hearing is '[t]he fundamental requirement of due process,' . . . and the Rawlins derelict vehicle ordinance does not even pretend to provide one. This is a sufficiently obvious constitutional violation that Mr. Reed should have known about. Mr. Reed, therefore, was not entitled to rely on the ordinance, and qualified immunity is inappropriate. . . . In spite of the layers of complexity built up around the doctrine of qualified immunity, the fundamental inquiry is fairly simple: should the officer have known that his conduct was unlawful? For the reasons set forth above, we find that Mr. Reed should have known that his conduct was unlawful, and we therefore REVERSE the district court's grant of immunity and its dismissal of Mrs. Lawrence's claims, and REMAND for further proceedings.") *with* ***Lawrence v. Reed***, 406 F.3d 1224, 1236-39 (10th Cir. 2005) (Hartz, J., dissenting) ("I respectfully dissent. The Supreme Court opinion providing for qualified immunity in 'extraordinary circumstances' despite the violation of clearly established law, *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), gives little guidance on what circumstances are 'extraordinary.' The majority may well have construed the term correctly. But the

very concerns expressed in *Harlow* suggest to me that Sheriff Reed is entitled to qualified immunity. . . . Given the complexities of the law today, it should not be surprising to find intelligent, conscientious, well-trained public servants who do not know all the clearly established law governing their conduct. The statement in *Harlow* that reasonably competent public officials know clearly established law, . . . is a legal fiction. Nevertheless, the objective test, and the legal fiction it embraces, can advance the policies behind qualified immunity if the extraordinary-circumstances exception is properly understood. The extraordinary-circumstances exception should encompass those situations in which the legal fiction does not make sense and applying that fiction would create problems that qualified immunity is intended to avert. In my view, this goal can be advanced by including as an extraordinary circumstance the official's reliance on specific advice by a nonsubordinate attorney of sufficient stature regarding the specific challenged action. Although, as I previously stated, it is doubtful that reasonably competent public officials actually know all the clearly established law governing their conduct, it is largely true that reasonably competent public officials are sufficiently versed in the law that they know not to take certain actions without seeking proper legal advice. If they violate clearly established law without having sought legal advice, holding them liable makes good sense. But there is little sense in holding officials liable for unlawful action that received the imprimatur of properly sought legal advice. The *Harlow* legal fiction should not be extended to say that reasonably competent public officials know when the legal advice they receive is contrary to clearly established law. . . . Thus, in my view, incorrect legal advice is an extraordinary circumstance cloaking an official with qualified immunity when, as here, it comes from the highest level nonsubordinate attorney with whom the official is to consult and the attorney is fully informed of the planned action and the surrounding circumstances. . . . In the present case Sheriff Reed fully informed the City Attorney of the relevant surrounding circumstances and how he intended to proceed. The City Attorney gave his imprimatur. It would be contrary to Harlow's underlying concern about 'dampen[ing] the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties,' . . . to tell officials like the sheriff that they cannot rely on their chief nonsubordinate government attorneys but must postpone action (to conduct their own research or call a professor at the nearest law school?) or risk being sued.").

Compare ***Leonard v. Robinson***, 477 F.3d 347,355, 356, 361 (6th Cir. 2007) ("Probable cause is clearly relevant to Leonard's First Amendment retaliation claims. *See Hartman v. Moore*, 126 S.Ct. 1695, 1699 (2006). In *Hartman*, the Supreme

Court determined that probable cause is an element of a malicious prosecution charge brought as constitutional tort under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). . . Although there are differences between wrongful arrest and malicious prosecution, . . . there is an obvious similarity in that 'the significance of probable cause or the lack of it looms large,' . . . .*Hartman*, therefore, calls into question our cases holding that 'probable cause is not determinative of the [First Amendment] constitutional question.' . . Yet, we need not decide whether *Hartman* adds another element to every First Amendment claim brought pursuant to §1983 because, when viewed in the light most favorable to the plaintiff, we find that the facts of this case demonstrate an absence of probable cause. In sum then, both Leonard's claims . . . and Robinson's defenses turn on the laws that Leonard allegedly violated and their validity as applied in the context of a democratic assembly. Again, when the facts are viewed in a light most favorable to Leonard, we believe that First Amendment freedoms, clearly established for a generation, preclude a finding of probable cause because the laws cited by Robinson are either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct) at a democratic assembly where the speaker is not out of order. . . . We therefore hold that no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly. . . . Therefore, because Leonard's arrest was not supported by probable cause, it was error for the district court to grant Robinson qualified immunity on the Fourth Amendment claims.") *with* ***Leonard v. Robinson***, 477 F.3d 347, 363-67 (6th Cir. 2007) (Sutton, J., concurring in part and dissenting in part) ("Put yourself in the shoes of Officer Robinson when it comes to enforcing just one of these statutes, S 750.170 ("Disturbance of lawful meetings"), on the evening of October 15, 2002. Let us assume (improbably) that Robinson had looked at the statute before attending the meeting. Let us assume (even more improbably) that Robinson had looked at judicial interpretations of the statute before the meeting. And let us assume (most improbably) that Robinson had read *Cohen v. California*, 403 U.S. 15 (1971), before the meeting. The statute, he would have learned, says that '[a]ny person who shall make or excite any disturbance ... at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor.' Nothing about the case law enforcing the provision would have tipped him off that he was clearly forbidden from applying it here. . . .Even had Robinson been equipped with this uncommonly extensive knowledge of Michigan and federal law, indeed even had Robinson carried a laptop equipped with Westlaw and Lexis/Nexis to the meeting, I am hard pressed to

understand how he would have known that it was 'clearly established' that he could not enforce this law in this setting. . . . To my knowledge, the Supreme Court has never rejected a claim of qualified immunity to a police officer who enforced a statute that had not been declared unconstitutional at the time of the citizen-police encounter. While [*Michigan v.*] *DeFillippo*[, 443 U.S. 31 (1979)] acknowledges 'the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws, . . . the exception remains just that--a theoretical possibility, one that can be imagined but that the Court has never enforced. Adhering to *DeFillippo's* guidance that the combination of legislative action and judicial inaction generally 'forecloses speculation by enforcement officers concerning [a statute's] constitutionality,' 443 U.S. at 38, the Sixth Circuit has resisted imposing liability on police officers and other officials who fail to anticipate each twist and turn of judicial review. [collecting Sixth Circuit cases] The other courts of appeals have taken the same path. [collecting cases] . . . . In the end, Leonard not only asks us to take a road less traveled but one never traveled. It is one thing to credit police officers with knowledge of all statutory and constitutional rulings potentially bearing on all statutes they enforce; but this necessary requirement needlessly loses any connection with reality when we hold police officers to the standard of anticipating a court's later invalidation of a statute that was duly enacted by legislators sworn to uphold the Constitution, that is presumed constitutional, that has been on the books for 75 years and that has withstood two constitutional challenges. The First Amendment properly protected Leonard from being prosecuted for his unruly speech and conduct--and for now that is enough. To expose Robinson to money damages for enforcing these laws not only seems unfair (absolute immunity protects the legislature from similar risks, *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998)) but also risks placing him in the push-me-pull-me predicament of having to decide which duly enacted laws to enforce and which ones not to enforce on the pain of losing either way--because he is charged with dereliction of duty when he opts not to enforce the law and because he is charged with money damages when he does enforce the law. . . . Leonard fares no better under his free-speech retaliation claim. Because probable cause existed to arrest Leonard, as has been shown, our case law forecloses this claim as a matter of law.")

See also ***Sampson v. City of Schenectady***, 160 F. Supp.2d 336, 350 (N.D.N.Y. 2001) ("In this Court's view, even if the Officers' assertions were given full credit and borne out by discovery, their claims of negligent training and unlawful policy do not create the type of 'extraordinary circumstances' needed to invoke the exception to the general *Harlow* rule. This is so because municipal liability for

negligent training and unlawful policies are typically incorporated into section 1983 claims of the type found here. If the Court were to conclude that a claim for negligent training or an unlawful policy on the part of a municipality entitled an official to avoid liability even if their actions violated clearly established constitutional rights, the 'extraordinary circumstances' exception to *Harlow* would become nullified as any officer could claim the exception to the rule simply because a Plaintiff filed suit against the municipality as well as the individual officer. Moreover, given the clarity of existing case law and the flagrancy with which the Officers violated it, the Court will not allow their city policy and negligent training claims to cloak their unlawful conduct with the veil of objective reasonableness.").

F. Supervisory Officials vs. "Line" Officers

See ***Hunt v. Tomplait***, No. 08-40491, 2008 WL 5129642, at *4 (5th Cir. Dec. 8, 2008) ("The reasoning in *Ramirez* is persuasive. Deputy Tomplait was not a mere bystander in the execution of the search warrant. . . He actively led the search team at Chief Hunter's request to the only 'Hunt residence' that he was aware of, without reading the search warrant or pursuing additional information about the residence described in the search warrant. The fact that Deputy Tomplait did not enter the house does not relieve him of liability as a matter of law; his identification of the Hunt residence as the residence to be searched--and subsequent leadership of the search team to the residence--was a direct cause of the Fourth Amendment violation. . . . Because Deputy Tomplait took the lead in identifying the residence without inquiring beyond the name of the family that lived there, he cannot contend that he did not effectuate the violation because he did not physically enter the incorrect residence."); ***Killmon v. City of Miami***, 199 Fed. Appx.796, 2006 WL 2769526, at *3 (11th Cir. Sept. 27, 2006) ("When an officer is present with a fellow officer and both observe the same course of events, it is unreasonable for an officer to rely upon the fellow-officer rule to determine that probable cause exists. Florida courts apply the fellow-officer rule when the arresting officer was absent for a significant portion of the events that gave rise to probable cause. . . . It is reasonable for an officer in that situation to rely upon his fellow officer's judgment about probable cause. The rule typically requires that the fellow officer actually communicate to the arresting officer the basis for probable cause. . . When the arresting officer observed the same events as his fellow officer, the fellow-officer rule does not apply. As the district court acknowledged and we have explained, 'the "just following orders" defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a "reason why any of them should question the

validity of that order."'); ***KRL v. Moore***, 384 F.3d 1105, 1117 (9th Cir. 2004) ("The district court properly denied qualified immunity to Hall on Plaintiffs' claim that he unreasonably relied on the search warrant and that he seized documents predating 1990 during the January 13 search. Assuming he was the lead investigator, Hall would have greater responsibility for ensuring that the warrant was not defective. . . . Even if probable cause existed to believe KRL was 'permeated with fraud' since 1995, no reasonable officer could conclude that the discovery of a 1990 ledger and several checks showed that KRL had been primarily engaged in fraudulent activity since 1990. . .The fact that a judge and a prosecutor had approved the warrant does not make Hall's reliance on it reasonable. . .Regarding the claim of overbroad execution, the law is clearly established that a search may not exceed the scope of the search warrant, and the warrant here was limited to documents created after 1990. . . . Thus, Hall is not entitled to qualified immunity on Plaintiffs' claim that he seized documents predating 1990."); ***Penn v. United States,*** 335 F.3d 786, 790 (8th Cir.2003) ("We recognize that the *ex parte* nature of the order, its county-wide scope, and its thirty-day pre-hearing duration raise legitimate questions about its legality. A determination of whether an order is unlawful, however, is an inquiry distinct from whether it is facially valid. Penn does not complain about the manner in which Captain Vettleson and Sheriff Landeis served and executed the order--her complaint is that they carried it out at all. Given the circumstances, we will not subject the officers to the difficult choice 'between disobeying the court order or being haled into court to answer for damages.'"); ***Evett v. DETNTFF* (*Texas Narcotics Trafficking Task Force*)**, 330 F.3d 681, 690 (5th Cir. 2003) ("We believe that, based on the facts of this case, requiring Mendiola, as the supervising officer at the scene of the raid, to personally seek out all available information from all participating law enforcement officers before approving an arrest would not have been practicable. As a result, we find that Mendiola did not act with deliberate indifference by ultimately giving his approval of Evett's arrest. As noted above, Mendiola cannot be held liable for unintentional oversights; particularly when the evidence indicates Mendiola could not have consciously believed his actions, based on the information made available to him, would lead to a violation of Evett's constitutional rights. We, therefore, reverse the district court and hold that Mendiola is entitled to qualified immunity as a matter of law."); ***Sorensen v. City of New York,*** No. 00-9366, 2002 WL 1758432, at * (2d Cir. July 30, 2002) (unpublished disposition) ("Although it is true that low-level employees have been granted qualified immunity where they followed orders promulgated by their superiors, immunity has been granted only when the orders were facially valid. [citing cases] The strip-search policy at issue here, however, had twice been declared unconstitutional by this court, and so was not

facially valid. . . . Appellants thus cannot establish that it was objectively reasonable for them to believe under the circumstances that strip-searching Sorensen was constitutional."); ***Lawrence v. Bowersox,*** 297 F.3d 727, 733 (8th Cir. 2002) (not inconsistent for jury to find excessive force was used, but not maliciously and sadistically by person following orders; fact that lower-level officer was found not liable did not establish that supervisor was entitled to qualified immunity; "Orchestrating an unnecessary pepper spray shower violated clearly established rights of which a reasonable person should have known."); ***Ramirez v. Butte Silver Bow County,*** 298 F.3d 1022, 1027, 1028 (9th Cir. 2002) ("Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions result in a constitutional violation. . . What's reasonable for a particular officer depends on his role in the search. . . . The officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions. A key aspect of this responsibility is making sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct. The leaders of the expedition may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way. . . . Line officers, on the other hand, are required to do much less. They do not have to actually read or even see the warrant; they may accept the word of their superiors that they have a warrant and that it is valid. . . .The line officers here acted reasonably: They were told that a warrant had been obtained and learned through an advance briefing what items could be seized. . . Because they were not required to read the warrant, the line officers conducting this search cannot reasonably have been expected to know that it was defective."), *aff'd by* ***Groh v. Ramirez***, 124 S. Ct. 1284, 1293, 1294 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case--perhaps just a simple glance--would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal."); ***Liu v. Phillips***, 234 F.3d 55, 57, 58 (1st Cir. 2000) ("[T]his case primarily presents the question whether and when an officer who participates in an arrest . . . may reasonably rely on a fellow officer or agent who does (or by position should) know the substantive law and the facts and who (based on that knowledge) asserts that an offense has been committed. Police officers without complete knowledge of the facts regularly participate in arrests ordered or authorized by superiors or by fellow officers. Where the authorizing officer has made a factual mistake but the mistake is not apparent, immunity for the officer who

reasonably assisted is well settled. . . The outcome should not be different where the agent who directs or authorizes the arrest has made a mistake of law equally invisible to the assisting officer. . . . In the few pertinent cases we could find, officers who reasonably relied on superior officers have been held to be entitled to qualified immunity even if the officer who gave the direction acted on a misapprehension as to the law. *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir.2000); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1348 (7th Cir.1985)."); ***Battiste v. Lamberti***, 571 F.Supp.2d 1286, 1297, 1298 (S.D. Fla. 2008) ("Here, the arresting deputies argue that they arrested Plaintiffs because they were ordered to--that when they heard the call for an arrest team, they followed that order and arrested the first individuals they saw on the railroad tracks. . . They also testified that they did not see Plaintiffs committing any crime, except for trespassing and failing to disperse. . . Viewing the facts in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether the arresting deputies should have known not to follow the order to make arrests on the railroad tracks. The Court has already held there is a genuine issue as to whether the arresting deputies had arguable probable cause to arrest Plaintiffs for trespassing, based on whether the arresting deputies knew or should have known that Plaintiffs were not on the tracks willfully. It follows that if the arresting deputies knew or should have known Plaintiffs were not on the tracks willfully, they would have had a reason to question the validity of an order to arrest them (given that no arguable probable cause existed to arrest Plaintiffs for any other crime). Thus, the arresting deputies are not entitled to qualified immunity on the basis of their 'following orders' argument."); ***Rauen v. City of Miami***, 2007 WL 686609, at *20, *21 (S.D. Fla. Mar. 2, 2007) ("Brooks also argues, and other Individual Defendants incorporate his argument by reference, that because he was following the orders of his superior officers, he is entitled to qualified immunity unless Plaintiffs can establish that a reasonable officer in Brooks' position would have had fair notice that his carrying out of orders given by high-ranking Miami police officers would violate clearly established federal law. . . Officers following the orders of their superiors are entitled to qualified immunity unless they 'acted unreasonably in following [their superior's] lead, or ... they knew or should have known that their conduct might result in a violation of the plaintiff's rights.' *Hartsfield v. LeMacks*, 50 F.3d 950, 956 (11th Cir.1995). Qualified immunity has been afforded to officers following superiors' orders where, for example, an officer is ordered to search a person previously questioned by the officer's superior (such that the officer reasonably believes that there is individualized suspicion supporting the search). . . This case is not a case of that type. The Individual Defendants asserting this argument here had no reason to believe that an order from high-ranking Miami

police officers to suppress legal protest on a wholesale basis with allegedly no justification would not result in a violation of clearly established federal law. Thus, the Individual Defendants who have asserted this argument are not entitled to qualified immunity on the basis that they were following orders."); ***Hunt v. County of Whitman***, 2006 WL 2096068, at *7 (E.D. Wash. July 26, 2006) ("While the Ninth Circuit has decided that a supervisor is not entitled to qualified immunity where a jury issue exists with respect to whether his subordinate violated clearly established law, *Watkins*, 145 F.3d at 1093, the Ninth Circuit does not appear to have decided whether a supervisor is entitled to qualified immunity where, as here, his subordinates did not violate clearly established law. Nevertheless, there is every reason to think the Ninth Circuit will follow its sister circuits' lead. One of the objectives of the qualified-immunity doctrine is to enable public servants to effectively perform their duties by freeing them from the fear of harassing litigation. . . This objective can be accomplished only if public servants 'reasonably can anticipate when their conduct may give rise to liability for damages [.]' . . . As other circuits have recognized, granting a supervisor qualified immunity when his subordinate has not violated clearly established law 'comports with [this] core principle of qualified immunity by protecting supervisory officials from suit when they could not reasonably anticipate liability.' *Camilo-Robles*, 151 F.3d at 6. Assuming, then, that the Ninth Circuit will follow its sister circuits' lead, Sheriff Tomson is entitled to qualified immunity because Deputy Reavis, Sergeant Kelley, and Deputy McNannay did not violate clearly established law."); ***DeToledo v. County of Suffolk***, 379 F.Supp.2d 138, 148, 149 (D. Mass. 2005) ("That *Swain* settled the strip search issue in this Circuit with respect to pretrial detainees, as Judge Gertner thought in *Ford,* is thrown into doubt by subsequent First Circuit cases. The arrestee in *Swain* was held in isolation in a temporary holding facility where there was no risk of contact with other prisoners. That fact, and the difference in magnitude between security concerns in a holding cell and those in a prison, led an equally divided *en banc* Court in *Savard* to conclude that neither *Swain* (nor *Arruda*) gave definitive guidance with respect to pretrial detainees. . . . *Savard* left standing a district court grant of qualified immunity to defendants who had implemented a policy mandating strip and visual body cavity searches of all persons admitted to a facility housing pretrial detainees, convicts in protective custody, and newly sentenced felons. I will assume without deciding that by July 26, 1998, the law was reasonably clear in banning strip searches in a case like this one (although *Swain* did not address the issue of the reasonableness of a policy mandating strip searches of persons like Williams who are arrested for serious non-violent felonies). Thus, the remaining step in the *Saucier* analysis requires a determination of whether a

reasonable corrections officer in the position of Thomas (or Sinclair) would have known that her actions in carrying out a strip search in accordance with institutional policy would violate Williams' Fourth Amendment rights. At the time, the women officers were acting pursuant to a written directive promulgated by the general counsel of the Suffolk County Sheriff's Department on behalf of their ultimate superior, the Sheriff. The policy had been in place in one form or another since at least 1991. . . Neither woman held a policymaking position or was imbued with the discretionary authority to dispense with the strip search of a prisoner, even had the policy permitted the exercise of such discretion. Under the circumstances, it would be unreasonable to conclude that a similarly situated line officer would have believed that compliance with a long-established policy directive emanating from the leadership of the Department involved a violation of a prisoner's constitutional rights. That the defendants are excused from liability by virtue of 'following orders' is not intuitively appealing, but also not shocking in a correctional environment strongly influenced by military values of hierarchy and obedience to orders. A ruling encouraging low-ranking officers to second-guess the constitutionality of policies and procedures mandated by their superiors would appear neither constitutionally wise nor institutionally desirable. Nor does elemental fairness counsel holding rank-and-file officers liable while letting those who formulated and implemented an unconstitutional policy go scot free. Consequently, both Sinclair and Thomas are entitled to a grant of qualified immunity." [footnotes omitted]); ***Leonard v. Compton***, 2005 WL 1460165, at *6 (N.D. Ohio June 17, 2005) (not reported) ("Even assuming that Lieutenant Seroka explicitly told Officer Compton that he could violate Ms. Leonard's clearly established constitutional rights by arresting her in her home without a warrant, that advice does not insulate Officer Compton from liability. . .Although supervisors may be liable under Section 1983 for the misconduct of an official he or she supervises if the supervisor condoned, encouraged, authorized, approved, or knowingly acquiesced to the unconstitutional conduct, . . . defendants have not identified a single case to support their proposition that reliance on a supervisor's advice absolves subordinates from liability for their own misconduct. Just as an official policy does 'not make reasonable a belief that was contrary to a decided body of case law,'. . police officers cannot obtain a license to violate clearly established constitutional rights from their superior officers. . . Accordingly, even if Officer Compton was relying on the advice of his superior officer in effectuating the warrantless arrest of Ms. Leonard in her home, his conduct was nonetheless objectively unreasonable in light of clearly established constitutional law."); ***Anoushiravani v. Fishel***, 2004 WL 1630240, at *14 (D.Or. July 19, 2004) (not reported) ("In sum, plaintiff fails to show a reasonable front line Customs official

would understand that the actions of defendant Fishel illegally deprived plaintiff of property without due process of law. While plaintiff alleges facts to support a possible constitutional violation, the case law, as set forth by plaintiff and defendants, is not so clear that a reasonable front line Customs official should be able to understand its nuances and consistently apply its teachings. . . . Unlike defendant Fishel, a front line Customs official, defendants Stilwell and Goldfarb are trained in the law, trained in its jargon and sometimes subtle distinctions. Furthermore, as lawyers for a federal law enforcement agency, an agency on the front lines of the inevitable conflict between government action and individual rights, they are expected to be well versed in core due process jurisprudence.").

See also ***KRL v. Estate of Moore***, 512 F.3d 1184, 1191, 1192 (9th Cir. 2008) ("Faced with an assessment of probable cause upon which reasonable minds could disagree, defendants properly sought review by District Attorney Riebe and approval by a neutral and detached magistrate. . .These acts are sufficient to establish objectively reasonable behavior. . .We also reject Plaintiffs' argument that Moore, Irey and Hall, as lead investigators, held a greater responsibility than Riebe, who was minimally involved, for ensuring that the warrants were not defective. Interpreting the vague language in our prior opinion, the district court was led to assume that we had denied Hall qualified immunity for both the January 11 and January 13 warrants. Based on this assumption, it held that Riebe acted reasonably when he reviewed the January 11 warrant, but Hall acted unreasonably when he reviewed and relied on the same warrant. The district court reconciled this disparity by concluding that, under *Ramirez*, lead investigators have a greater responsibility than reviewing attorneys to ensure that warrants are supported by probable cause. . . . To alleviate any confusion caused by the admittedly ambiguous wording of our prior opinion, we stress that the liability of government attorneys reviewing a warrant for probable cause is not comparable to that of line officers executing a warrant under *Ramirez*. In *Ramirez*, we distinguished between lead and line officers in the context of the execution of a search warrant, when a few officers are typically in charge and other law enforcement personnel assist in defined roles. . . The rule from *Ramirez*, however, should not be used to distinguish between officers and government attorneys when the sole issue is whether the supporting affidavit provides sufficient facts to show probable cause. A rule requiring officers to question reasonable assessments of probable cause by government attorneys and magistrates would 'cause an undesirable delay in the execution of warrants' and 'would also mean that lay officers must at their own risk second-guess the legal assessments of trained lawyers.'. . Such a rule is not required by the Constitution, nor is it supported by a fair reading of *Ramirez*.")

KRL v. Estate of Moore, 512 F.3d 1184, 1192, 1193 (9th Cir. 2008)("Despite the January 13 warrant's obvious lack of probable cause, Hall argues that he reasonably relied on the warrant as a 'line officer' during the actual search. . . We reject Hall's argument, as well as his wishful reading of *Ramirez*. When analyzing qualified immunity , our underlying inquiry is the reasonableness of the officer's conduct.. . We recognized in *Ramirez* that 'officers' roles can vary widely' during a search. . . The distinction between lead and line officers lends itself well to cases with facts similar to *Ramirez*, in which some officers plan and direct the search, and other officers merely assist in its execution. . . However, the 'lead officer' and 'line officer' designations should not be treated as inflexible categories, nor should they obscure our underlying inquiry into the reasonableness of an officer's conduct in a particular case.In this case, Hall's role in the January 13 search defies easy classification. On the one hand, Hall correctly points out that his involvement in the actual search was dissimilar to that of the search leader in *Ramirez*. Hall did not draft the affidavit and warrant; he did not appear before the magistrate; and there is no evidence that he conducted the pre-search briefing or supervised the search. . . On the other hand, it would be inaccurate to classify Hall as a line officer at the January 13 search. Hall's involvement in the criminal investigation was not confined to assisting as part of the search warrant entry team. Rather, the record shows that Hall played an integral role in the overall investigation. . . . Although Hall's participation differed from that of the search leader in Ramirez, his activities with respect to the January 13 search place him on the 'lead' side of the lead-line distinction. . . . Thus, when analyzing Hall's role pursuant to the January 13 warrant, it is most useful to ask the question posed in *Saucier*: 'whether it would be clear to a reasonable officer [in Hall's position] that his conduct was unlawful in the situation he confronted.' . . . Given his leadership role in the overall investigation, Hall acted unreasonably when he relied on the January 13 warrant without first ensuring that the warrant was facially valid. As we previously concluded, any reasonable officer making such an inquiry would conclude that the discovery of a ledger and several checks predating the allegedly fraudulent activity by five years did not provide sufficient probable cause to search for documents dating back to 1990. . . . We affirm the district court's denial of qualified immunity to Hall to the extent that he relied on the January 13 warrant, which was so lacking in indicia of probable cause as to render official belief in its existence unreasonable.")

G. Constitutional-Question-First Analysis Required by *Wilson/ Saucier*

In ***Siegert v. Gilley***, 500 U.S. 226 (1991), plaintiff, a clinical psychologist, brought a ***Bivens*** action against his supervisor, claiming impairment of future employment prospects due to the sending of a defamatory letter of reference. The Court of Appeals for the District of Columbia had dismissed on grounds that plaintiff had not overcome respondent's claim of qualified immunity under the "heightened pleading standard."

The Supreme Court held that the claim failed at an analytically earlier stage. The plaintiff did not state a constitutional claim. Under ***Paul v. Davis***, 424 U.S. 693 (1976), there was no constitutional protection for one's interest in his reputation, even if facts sufficient to establish malice were pleaded.

Chief Justice Rehnquist set out the "...analytical structure under which a claim of qualified immunity should be addressed." The first inquiry is whether the plaintiff has alleged the violation of a clearly established constitutional right. This question is a purely legal question. "Once a defendant pleads a defense of qualified immunity, '[o]n summary judgment, the judge . . . may determine not only currently applicable law, but whether the law was clearly established at the time," and until this threshold immunity question is resolved, there should be no discovery.

In ***County of Sacramento v. Lewis***, 523 U.S. 833 (1998), a majority of the Court reinforced the view that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *Id.* at 841 n.5. Justice Souter, writing for the majority, explained:

> [T]he generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing

> more, provides no clear standard, constitutional or non-constitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. . . But these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity.

Id. Justice Stevens would limit *Siegert's* analytical approach to cases where the constitutional issue is clear. Where the question is difficult and unresolved, he would prefer its resolution in a context where municipal liability is raised and the case cannot be disposed of on qualified immunity grounds. *Id.* at 859 (Stevens, J., concurring in the judgment). Justice Breyer wrote separately in *County of Sacramento* to express his agreement with Justice Stevens' view that *Siegert* "should not be read to deny lower courts the flexibility, in appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented." *Id*. at 858, 859 (Breyer, J., concurring).

See also ***Conn v. Gabbert***, 526 U.S. 286, 290 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.").

In ***Wilson v. Layne***, 526 U.S. 603 (1999), the Supreme Court resolved a split among the Circuits as to the availability of qualified immunity for law enforcement officers who invite the media to "ride along" to observe and record the activities of the officers while executing a warrant in a private home. The Court of Appeals for the Fourth Circuit, in a divided en banc opinion, had granted the officers qualified immunity on the ground that, at the time of the challenged conduct, no court had held that the bringing of media into a private residence in conjunction with the execution of a warrant was a violation of the Fourth Amendment. Finding that the law was not clearly established at the time, the Fourth Circuit did not address the "merits" question of whether such media ride-alongs, involving entry into a private residence, constituted a violation of the Fourth Amendment**.** 526 U.S. at 608.

The Supreme Court affirmed the grant of qualified immunity, but did so by adopting the analytical approach it had established in *Siegert, County of Sacramento*, and *Conn.* Before addressing whether the law was clearly established at the time of the alleged violation, the court must first determine whether the plaintiff has alleged the violation of a constitutional right at all. 526 U.S. at 609. A unanimous Court concluded that such media ride-alongs violated the Fourth Amendment. "We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Id.* at 614. *Wilson* not only strongly reinforces (requires?) the merits-first approach to the qualified immunity analysis, but also clarifies that this approach is not reserved for those cases in which the court determines that the constitutional right does *not* exist.

With only Justice Stevens dissenting, the Court went on to conclude that, despite the finding of a constitutional violation by a unanimous Court, the law was not clearly established at the time of the officers' conduct such that a reasonable officer would have known that the conduct violated the Fourth Amendment. The Court framed the issue as the objective question of "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.**"** *Id.* at 615. The Court concluded general Fourth Amendment principles did not apply with obvious clarity to the officers' conduct in this case. *Id.* Furthermore, "[p]etitioners [had] not brought to [the Court's] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 616. Finally, the Court gave considerable weight to the fact that the federal and local law enforcement departments involved in the incident had ride-along policies which "explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests," or "did not expressly prohibit media entry into private homes." *Id.* at 617.

Justice Stevens took the position that "[t]he absence of judicial opinions expressly holding that police violate the Fourth Amendment if they bring media representatives into private homes provides scant support for the conclusion that in 1992 a competent officer could reasonably believe that it would be lawful to do so.

Prior to our decision in *United States v. Lanier*, . . . no judicial opinion specifically held that it was unconstitutional for a state judge to use his official power to extort sexual favors from a potential litigant. Yet, we unanimously concluded that the defendant had fair warning that he was violating his victim's constitutional rights." *Id.* at 621. (Stevens, J., concurring in part and dissenting in part).

See also ***Hanlon v. Berger***, 526 U.S. 808, 810 (1999) (per curiam) ("Petitioners maintain that even though they may have violated the Fourth Amendment rights of respondents, they are entitled to the defense of qualified immunity. We agree. Our holding in *Wilson* makes clear that this right was not clearly established in 1992. The parties have not called our attention to any decisions which would have made the state of the law any clearer a year later--at the time of the search in this case. We therefore vacate the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.").

In ***Saucier v.Katz,*** 121 S. Ct. 2151, 2156 (U.S. 2001), the Court reinforced this analytical approach as follows:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. [citing *Siegert*] In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

NOTE: In a denial of certiorari and dissent from the denial, some members of the Court have commented on problems caused by the "constitutional-question-first rule."

Bunting v. Mellen, 124 S. Ct. 1750, 1751 (2004) (Stevens, J., joined by Ginsburg J., and Breyer, J., respecting the denial of certiorari) ("The 'perceived procedural tangle' described by Justice SCALIA's dissent. . . is a byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity. Justice BREYER and I both questioned the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues when the Court adopted it. See *County of Sacramento v. Lewis,* 523 U.S. 833, 858, 859 (1998). Relaxing that rule could solve the problem that Justice SCALIA addresses in his dissent. Justice SCALIA is quite wrong, however, when he states that the 'procedural tangle' created by our constitutional-question- first procedure explains our denial of certiorari in this case. Indeed, it is only one of three reasons for not granting review.")

Bunting v. Mellen, 124 S. Ct. 1750, 1754, 1755 (2004) (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("The Fourth Circuit's determination that a state military college's grace before meals violates the Establishment Clause, creating a conflict with Circuits upholding state-university prayers, would normally make this case a strong candidate for certiorari. But it is questionable whether Bunting's request for review can be entertained, since he *won judgment* in the court below. For although the statute governing our certiorari jurisdiction permits application by 'any party' to a case in a federal court of appeals, 28 U.S.C. § 1254(1), our practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed. . . . . I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases. . . . Not only is the denial of review unfair to the litigant (and to the institution that the litigant represents) but it undermines the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without undue delay. . . This problem has attracted the attention of lower courts. Two Circuits have noticed

that if the constitutional determination remains locked inside a § 1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then "government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts." *Horne v. Coughlin,* 191 F.3d 244, 247 (C.A.2 1999) (quoted in *Kalka v. Hawk,* 215 F.3d 90, 96 (C.A.D.C.2000)); see *Horne, supra,* at 247, n. 1 (concluding that this Court could not have reviewed the judgment in *County of Sacramento v. Lewis, supra,* if the Ninth Circuit had not believed the right clearly established). As both Circuits recognized, the mess up here is replicated below. See *Horne, supra,* at 247 (noting the parallel between unreviewability of district court and court of appeals decisions); *Kalka,* 215 F.3d, at 96, and n. 9 (similar). This understandable concern has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory. See *id.,* at 96, 98; *Horne, supra,* at 247, 250; see also *Pearson v. Ramos,* 237 F.3d 881, 884 (C.A.7 2001) (doubting that the *Saucier* rule is "absolute," for the reasons given in *Kalka* and *Horne*). The perception of unreviewability undermines adherence to the sequencing rule we have created. . . . This situation should not be prolonged. We should either make clear that constitutional determinations are *not* insulated from our review (for which purpose this case would be an appropriate vehicle), or else drop any pretense at requiring the ordering in every case.").

See also:

Morse v. Frederick, 127 S. Ct. 2618, 2624 & n.1 (2007) ("We granted *certiorari* on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. . . We resolve the first question against Frederick, and therefore have no occasion to reach the second. . . . Justice BREYER would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is the rather significant one that it is inadequate to decide the case before us. Qualified immunity shields public officials from money damages only. . . In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief.")

Morse v. Frederick, 127 S. Ct. 2618, 2638, 2639 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (" This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary

damages and say no more. . . Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. . . .[R]egardless of the outcome of the constitutional determination, a decision on the underlying First Amendment issue is both difficult and unusually portentous. And that is a reason for us not to decide the issue unless we must. In some instances, it is appropriate to decide a constitutional issue in order to provide 'guidance' for the future. But I cannot find much guidance in today's decision. . . . In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of 'qualified immunity.'. . . The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid 'order of battle' decisionmaking requirement that this Court imposed upon lower courts in *Saucier* . . . . In resolving the underlying constitutional question, we produce several differing opinions. It is utterly unnecessary to do so. Were we to decide this case on the ground of qualified immunity , our decision would be unanimous, for the dissent concedes that Morse should not be held liable in damages for confiscating Frederick's banner. . . .While *Saucier* justified its rule by contending that it was necessary to permit constitutional law to develop, . . . this concern is overstated because overruling *Saucier* would not mean that the law prohibited judges from passing on constitutional questions, only that it did not require them to do so. . . . I would end the failed Saucier experiment now.")

Wilkie v. Robbins, 127 S. Ct. 2588, 2617 n. 10 (2007) (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part) ("As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry.").

Brosseau v. Haugen, 125 S. Ct. 596, 598 n.3 (2004) (per curiam) (" We have no occasion in this case to reconsider our instruction in *Saucier*. . . that lower courts decide the constitutional question prior to deciding the qualified immunity question.")

Brosseau v. Haugen, 125 S. Ct. 596, 598, 600-01(2004) (per curiam) (Breyer, J., joined by Scalia, J., and Ginsburg, J., concurring) ("I join the Court's opinion but write separately to express my concern about the matter to which the Court refers in footnote 3, namely, the way in which lower courts are required to evaluate claims of qualified immunity under the Court's decision in *Saucier v. Katz*. . . . As the Court notes, . . . *Saucier* requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question. I am concerned that the current rule

rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.,* qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review, see *Bunting v. Mellen,* 541 U.S. 1019, 1025 (2004) (SCALIA, J., dissenting from denial of certiorari). For these reasons, I think we should reconsider this issue.").

Scott v. Harris, 127 S. Ct. 1769, 1774 n.4 (2007) ("Prior to this Court's announcement of *Saucier's* 'rigid "order of battle,"' . . . we had described this order of inquiry as the 'better approach,' . . . though not one that was required in all cases. . . There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. . . . We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is . . . easily decided. Deciding that question first is thus the 'better approach,' . . . regardless of whether it is required.").

Scott v. Harris, 127 S. Ct. 1769, 1780, 1781 (2007) (Breyer, J., concurring) ("[T]he video makes clear the highly fact-dependent nature of this constitutional determination. And that fact-dependency supports the argument that we should overrule the requirement, announced in *Saucier v. Katz* . . . that lower courts must first decide the 'constitutional question' before they turn to the 'qualified immunity question.' . . Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case, I believe that in order to lift the burden from lower courts we can and should reconsider *Saucier*'s requirement as well. Sometimes (e.g., where a defendant is clearly entitled to qualified immunity) *Saucier* 's fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (e.g., where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'. . In a sharp departure from this counsel, *Saucier*

requires courts to embrace unnecessary constitutional questions not to avoid them. It is not surprising that commentators, judges, and, in this case, 28 States in an amicus brief, have invited us to reconsider *Saucier*'s requirement. . . I would accept that invitation. While this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here. . . . The order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.").

Los Angeles County, California v. Rettele, 127 S. Ct. 1989, 1994 (2007) (Stevens, J., joined by Ginsburg, J., concurring in the judgment) ("This case presents two separate questions: (1) whether the four circumstances identified in the Court of Appeals' unpublished opinion established a genuine issue of material fact as to whether the seizure violated respondents' Fourth Amendment rights . . . (2) whether the officers were nevertheless entitled to qualified immunity because the right was not clearly established. The fact that the judges on the Court of Appeals disagreed on both questions convinces me that they should not have announced their decision in an unpublished opinion. In answering the first question, the Ninth Circuit majority relied primarily on *Franklin v. Foxworth*, 31 F.3d 873 (C.A.9 1994). As Judge Cowen's discussion of *Franklin* demonstrates, that case surely does not clearly establish the unconstitutionality of the officers' conduct. . . Consequently, regardless of the proper answer to the constitutional question, the defendants were entitled to qualified immunity. I would reverse on that ground and disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so.").

*** ***Callahan v. Millard County***, 494 F.3d 891, 898 (10th Cir. 2007) ("[W]e hold that entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, the task force officers violated Mr. Callahan's constitutional rights under the Fourth Amendment. . . The district court held that the right was not clearly established because other circuits have approved of the 'consent-once-removed' doctrine. From the district court's perspective, this gave the officers a 'reasonable argument' that their actions were justified until this Circuit or the Supreme Court rejected the 'consent-once-removed' doctrine. This approach misreads a plaintiff's burden in showing that a right is clearly established. While case law from other circuits is relevant in the analysis, it relates to whether 'the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains.' *Cortez,* 478 F.3d at 1114-15. Here, the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant

requirement are consent and exigent circumstances. The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. Moreover, at the time of these events only the Seventh Circuit had applied the 'consent-once-removed' doctrine to a civilian informant. . . The precedent of one circuit cannot rebut that the 'clearly established weight of authority' is as the Tenth Circuit and the Supreme Court have addressed it. . . . Although other circuits might disagree, Tenth Circuit law governed the reasonableness of the officers' beliefs in this case. The officers are not protected by qualified immunity."), *cert. granted sub nom* ***Pearson v. Callahan****,* 128 S. Ct. 170 (2008). **NOTE: In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Court's decision in *Saucier v. Katz*, 533 U. S. 194 (2001) should be overruled?'**

II. HEIGHTENED PLEADING REQUIREMENT

A. The *Leatherman* Decision

Although the majority in ***Siegert*** disposed of the case on grounds that the plaintiff stated no claim for relief, four Justices who did confront the question, approved of the "heightened pleading standard" where the state of mind of the defendant is an essential component of the underlying constitutional claim, but rejected the District of Columbia Circuit's "direct evidence" requirement, instead requiring nonconclusory allegations of subjective motivation supported by *either* direct *or* circumstantial evidence. If this threshold is satisfied, then limited discovery may be allowed.

Plaintiffs attempting to impose **Monell** liability upon a governmental unit had been required, in some circuits, to plead with particularity the existence of an official policy or custom which could be causally linked to the claimed underlying violation. *See, e.g.,* ***Strauss v. City of Chicago***, 760 F.2d 765 (7th Cir. 1985).

In ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 113 S. Ct. 1160 (1993), the Supreme Court unanimously rejected the "heightened pleading standard" in cases alleging municipal liability. The Fifth Circuit had upheld the dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. "While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts

with respect to the adequacy (or inadequacy) of the police training." 954 F.2d 1054, 1058 (5th Cir. 1992).

While leaving open the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials," the Supreme Court refused to equate a municipality's freedom from *respondeat superior* liability with immunity from suit. 113 S. Ct. at 1162.

Finding it "impossible to square the 'heightened pleading requirement' . . . with the liberal system of 'notice pleading' set up by the Federal Rules[,]" the Court suggested that Federal Rules 8 and 9(b) would have to be rewritten to incorporate such a "heightened pleading standard." The Court concluded that "[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id*. at 1163.

B. *Crawford-El v. Britton*

In ***Crawford-El v. Britton***, 118 S. Ct. 1584 (1998), the Court addressed the "broad question [of] whether the courts of appeals may craft special procedural rules" for cases in which a plaintiff's substantive constitutional claim requires proof of improper motive and "the more specific question [of] whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment." *Id.* at 1587. In striking down the D.C. Circuit's "clear and convincing" burden of proof requirement in such cases, a five-member majority of the Court, in an opinion written by Justice Stevens, clarified that the Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 731 (1982), that "bare allegations of malice" cannot overcome the qualified immunity defense, "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." 118 S. Ct. at 1592. The Court noted that "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." *Id*. The Court explained that the subjective component of the qualified immunity defense that was jettisoned in *Harlow* "permitted an open-ended inquiry into subjective motivation [with the] primary focus . . . on any possible animus directed at the plaintiff." *Id.* at 1594. Such an open-ended inquiry precluded

summary judgment in many cases where officials had not violated clearly established constitutional rights. "When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff . . . or to deter public comment on a specific issue of public importance." *Id*.

Sensitive to the concerns about subjecting public officials to discovery and trial in cases involving insubstantial claims, the Court noted that existing substantive law "already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial[,]" and "various procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . . ." *Id*.

First, under the substantive law on which plaintiff relies, there may be some doubt as to the whether the defendant's conduct was unlawful. The Court gave as an example the question of whether the plaintiff's speech was on a matter of public concern. Second, where plaintiff must establish both motive and causation, a defendant may still prevail at summary judgment by, for example, showing that defendant would have made the same decision in the absence of the protected conduct. *Id.*

The Court noted two procedural devices available to trial judges that could be used prior to any discovery. First, the district court may order a reply under Fed. R. Civ. P. 7(a), or grant a defendant's motion for a more definite statement under Rule 12(e). As the Court noted, this option of ordering the plaintiff to come forward with "specific, nonconclusory factual allegations" of improper motive exists whether or not the defendant raises the qualified immunity defense. 118 S. Ct. at 1596-97. Second, where the defendant does raise qualified immunity, the district court should resolve the threshold question before discovery.

> To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. [footnote omitted] Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives

> these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery. Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.

Id. at 1597.

The majority opinion concluded that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.* at 1595. Instead of the categorical rule established by the Court of Appeals, the Court endorsed broad discretion on the part of trial judges in the management of the factfinding process. *Id*. at 1598.

Chief Justice Rehnquist dissented, and formulated the following test for motive-based constitutional claims:

> [W]hen a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

Id. at 1600 (Rehnquist, C.J., joined by O'Connor, J., dissenting).

Justice Scalia, joined by Justice Thomas, dissented and proposed the adoption of a test that would impose "a more severe restriction upon ‘intent-based' constitutional torts." *Id.* at 1604. (Scalia, J., joined by Thomas, J., dissenting). Under Justice Scalia's proposed test,

> [O]nce the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican).

Id.

C. *Swierkiewicz v. Sorema / Hill v. McDonough*

Swierkiewicz v. Sorema, 122 S. Ct. 992, 998 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. [footnote omitted] This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U.S.C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).").

See also ***Hill v. McDonough***, 126 S. Ct. 2096, 2103 (2006) ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.").

D. *Jones v. Bock*

Jones v. Bock, 127 S. Ct. 910, 918, 919, 921, 926 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. . . What is less clear is whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense. The minority rule, adopted by the Sixth Circuit, places the burden of pleading exhaustion in a case covered by the PLRA on the prisoner; most courts view failure to exhaust as an affirmative defense. . . We think petitioners, and the majority of courts to consider the question, have the better of the argument. Federal Rule of Civil Procedure 8(a) requires simply a 'short and plain statement of the claim' in a complaint, while Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response. The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are typically brought under 42 U. S. C. §1983, which does not require exhaustion at all, see *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 516 (1982). Petitioners assert that courts typically regard exhaustion as an affirmative defense in other contexts. . . . and respondents do not seriously dispute the general proposition. . . The PLRA dealt extensively with the subject of exhaustion, see 42 U. S. C. §§1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. In a series of recent cases, we have explained that courts

should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. [citing *Leatherman, Swierkiewicz* and *Hill*] . . . . We think that the PLRA's screening requirement does not--explicitly or implicitly--justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself . . . . We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints. We understand the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context, but that effort cannot fairly be viewed as an interpretation of the PLRA. 'Whatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute--not to make it better.". . . We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however--as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*--that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.")

Jones v. Bock, 127 S. Ct. 910, 922, 923 (2007) ("The PLRA requires exhaustion of 'such administrative remedies as are available,' 42 U. S. C. §1997e(a), but nothing in the statute imposes a 'name all defendants' requirement along the lines of the Sixth Circuit's judicially created rule. . . . . Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to 'properly exhaust.' The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion. As the MDOC's procedures make no mention of naming particular officials, the Sixth Circuit's rule imposing such a prerequisite to proper exhaustion is unwarranted.")

Jones v. Bock, 127 S. Ct. 910, 924 (2007) ("As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad. '[O]nly the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none.'")

E. *Bell Atlantic Corp. v. Twombly*

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968, 1969, 1974 (2007) ("Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'. . This 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard . . . . On such a focused and literal reading of *Conley 's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. . . . [A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. [citing cases and commentators] We could go on, but there is no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . .*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. . . . [W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1978, 1988, 1989 (2007) (Stevens, J., joined by Ginsburg, J., except as to Part IV, dissenting) ("If *Conley* 's 'no set of facts' language is to be interred, let it not be without a eulogy. . . . Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil

procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process--a rulemaking process--for revisions of that order. . . . Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.")

F. *Erickson v. Pardus*

Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) ("It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program. . . . The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life.' . .It alleged this medication was withheld 'shortly after' petitioner had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment. . . This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings. The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel.")

G. Cases in the Circuits

FIRST CIRCUIT

Thomas v. Rhode Island, 542 F.3d 944, 949 (1st Cir. 2008) ("[E]ven if the probable cause theory of the appellants were properly before us, we would reject it. The vague references in the complaint to acts of the defendants that 'are illegal; and 'without lawful authority' were insufficient to apprise defendants that the appellants were asserting a more particular claim that there was a lack of probable cause for the arrests. As we have stated, '[n]otice pleading rules do not relieve a plaintiff of responsibility for identifying the nature of her claim.'. . Our precedent is clear that

courts 'must always exhibit awareness of the defendant's inalienable right to know in advance the nature of the cause of action being asserted against him,' because such notice is '[a] fundamental purpose of pleadings under the Federal Rules of Civil Procedure.'. . Here, the generality of the complaint's language did not afford defendants such notice with respect to the probable cause claim.").

SECOND CIRCUIT

Iqbal v. Hasty, 490 F.3d 143, 153, 155-58, 170 (2d Cir. 2007) ("The pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this Circuit. Four Supreme Court opinions provide guidance, although the guidance they provide is not readily harmonized. . . . Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955 (2007). . . . Some of [the] signals point toward a new and heightened pleading standard. . . . On the other hand, some of the Court's linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on competitors' parallel conduct. . . .These conflicting signals create some uncertainty as to the intended scope of the Court's decision. . . . After careful consideration of the Court's opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*. . . . Absent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic,* reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson,* we conclude that a heightened pleading rule may not be imposed. However, in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic,* a conclusory allegation concerning some elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. . . . .Applying the standards for supervisory liability, . . . the Plaintiff's allegations, on a notice pleading standard, . . . suffice to state a claim of supervisory liability for the use of excessive force against the Plaintiff. . . . The plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty's knowledge because it is at least plausible that a warden would

know of mistreatment inflicted by those under his command. Whether such knowledge can be proven must await further proceedings."), *cert. granted sub nom Ashcroft v. Iqbal,* 128 S. Ct. 2931 (2008).

THIRD CIRCUIT

Phillips v. County of Allegheny, 515 F.3d 224, 230-34 (3rd Cir. 2008) ("What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new 'plausibility' paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley's* 'no set of facts' language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. . . . In determining how *Twombly* has changed this standard, we start with what *Twombly* expressly leaves intact. The Supreme Court reaffirmed that Fed.R.Civ.P. 8 ' "requires only a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests,"' and that this standard does not require 'detailed factual allegations.' . . . [T]he *Twombly* decision focuses our attention on the 'context' of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case--some complaints will require at least some factual allegations to make out a 'showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' *Twombly,* 127 S.Ct. at 1964. Indeed, taking *Twombly* and the Court's contemporaneous opinion in *Erickson v. Pardus,* 127 S.Ct. 2197 (2007), together, we understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8. . . . The second important concept we take from the *Twombly* opinion is the rejection of *Conley's* 'no set of facts' language. In rejecting the *Conley* language, the Supreme Court was careful to base its analysis in pre-existing principles. . .The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. . . Indeed, the Court cited *Twombly* just days later as authority for traditional Rule 8 and 12(b)(6) principles. *See Erickson,* 127 S.Ct. at 2200. Thus, under our reading, the notice pleading standard of Rule 8(a)(2) remains intact, and courts may generally state and apply the Rule 12(b)(6) standard, attentive to context and an showing that 'the pleader is entitled to relief, in order to give the defendant fair notice of what the ...

claim is and the grounds upon which it rests.' *Twombly,* 127 S.Ct. at 1964. . . . The more difficult question raised by *Twombly* is whether the Supreme Court imposed a new 'plausibility' requirement at the pleading stage that materially alters the notice pleading regime. . . The answer to this question is difficult to divine. Numerous references to 'plausibility' in *Twombly* seem to counsel reliance on the concept as a standard for notice pleading. . . . Yet, the *Twombly* decision repeatedly indicated that the Court was not adopting or applying a 'heightened pleading standard.'. . . The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come. Therefore, we decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context. Reading *Twombly* to impose a 'plausibility' requirement outside the § 1 context, however, leaves us with the question of what it might mean. 'Plausibility' is related to the requirement of a Rule 8 'showing.' In its general discussion, the Supreme Court explained that the concept of a 'showing' requires only notice of a claim and its grounds, and distinguished such a showing from 'a pleader's "bare averment that he wants relief and is entitled to it."' *Twombly,* 127 S.Ct. at 1965 n. 3. . . . The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. *Id.* This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element. . . . That is to say, there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation. The complaint at issue in this case clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of Phillips' claims.")**.**

FOURTH CIRCUIT

Ray v. Amelia County Sheriff's Office, Nos. 07-2051, 08-1425, 2008 WL 5155257, at *1 (4th Cir. Dec. 9, 2008) ("The district court erred in dismissing Ray's ADEA claim based upon its finding that her own complaint produced a legitimate, non-discriminatory reason for the defendants' termination of her employment that rebutted her prima facie case, while failing to demonstrate that the reasons stated in her own complaint were a pretext for discrimination. Ray was not required to plead specific facts establishing a prima facie case of discrimination in her complaint, let alone to plead facts showing that the non-discriminatory reason for termination suggested by her own complaint was pretextual. Ray was required only to state her claim so as to give the defendants fair notice of its nature and the grounds upon which it rests, with

enough factual allegations to state a claim to relief that is plausible, not merely speculative. Ray alleges in her complaint that she is a member of a protected class (she is forty-five years old), she suffered an adverse employment action (her employment was terminated), and she was replaced by a substantially younger employee who is less qualified for the position than Ray. Ray states several possible reasons for the termination of her employment that are related to her age: Sheriff Jimmy E. Weaver's desire to have younger-looking employees at the front of the Amelia County Sheriff's Office; Weaver's desire to hire a replacement who was less familiar with official policies and procedures; and a problem with Ray's desire to utilize her accrued annual leave benefits. Taken together, these allegations provide the defendants with fair notice of the nature of her claim and the grounds upon which it rests, and state a claim to relief that is plausible, not merely speculative. Although Ray's complaint indicates that there were other ostensible reasons why her employment was terminated, the inclusion of those stated reasons in her complaint does not establish at the pleadings stage that she is not entitled to relief on her stated discrimination claim.").

In re Mills, Nos. 08-1024, 08-1032, 2008 WL 2937850, at *6 (4th Cir. July 29, 2008) ("Mills' argument on appeal is simply that the allegations in the complaint, even if taken as true, are too vague and conclusory to demonstrate the violation of constitutional rights. . . We disagree. A complaint need only give 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed.R.Civ.P. 8(a)(2). . . There is no heightened pleading standard for qualified-immunity cases.")**.**

Giarratano v. Johnson, 521 F.2d 298, 304, 305 (4th Cir. 2008) ("Giarratano's complaint alleges that '[t]he exclusion of inmates from the protections of the Freedom of Information Act is not rationally related to any legitimate government interest.' This conclusory assertion is insufficient to overcome the presumption of rationality that applies to the VFOIA prisoner exclusion. . . Thus, the district court's dismissal of the facial challenge was appropriate. The conclusion that dismissal is appropriate comports with *Twombly*, 127 S.Ct. 1955 (2007), which requires pleading 'enough facts to state a claim to relief that is plausible on its face.'. . In *Twombly*, the Supreme Court, noting that 'a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do,' *id*. at 1964-65, upheld the dismissal of a complaint where the plaintiffs did not 'nudge [ ] their claims across the line from conceivable to plausible.'. . Here, Giarratano's conclusory allegation about the lack of a rational relationship between VFOIA's prisoner exclusion and any

legitimate state interest is insufficient . . . to plausibly state a claim for relief in light of the strong presumption in favor of the legislation's rationality and the readily apparent justification for the legislation. . . . In holding that Giarratano could not meet his burden, the district court cited a variety of rational reasons for the VFOIA prisoner exclusion. . . . Giarratano, on the other hand, failed to allege any set of facts that would indicate the classification at issue violated any fundamental rights, was irrational, or otherwise failed to serve a legitimate state interest. Simply put, Giarratano has alleged no facts to support a claim much less a 'plausible' claim.").

SIXTH CIRCUIT

Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, No. 07-4115, 2008 WL 5273309, at *3 n.2 (6th Cir. Dec. 22, 2008) ("This Court has cited the heightened pleading of *Twombly* in a wide variety of cases, not simply limiting its applicability to antitrust actions. *See, e.g., Tucker v. ,Middleburg-Legacy Place,* 539 F.3d 545 (6th Cir.2008) (Family & Medical Leave Act); *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426 (6th Cir.2008) (antitrust); *McKnight v. Gates,* 282 F. App'x 394 (6th Cir.2008) (age discrimination); *Gilles v. Garland,* 281 F. App'x 501 (6th Cir.2008) (violation of First and Fourteenth Amendment rights); *B. & V. Distrib. Co., Inc. v. Dottore Cos., L.L. C.,* 278 F. App'x 480 (6th Cir.2008) (breach of contract); *Ferron v. Zoomego, Inc.,* 276 F. App'x 473 (6th Cir.2008) (violation of Ohio Consumer Sales Act); *Bishop v. Lucent Tech., Inc.,* 520 F.3d 516 (6th Cir.2008) (breach of fiduciary duty in ERISA context); *Eidson v. Tenn. Dep't of Children's Servs.,* 510 F.3d 631 (6th Cir.2007) (42 U.S.C. § 1983); *NicSand, Inc. v. 3M Co.,* 507 F.3d 442 (6th Cir.2007) (antitrust); *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523 (6th Cir.2007) (equal protection). However, some cases have questioned the scope of *Twombly. See, e.g., United States v. Ford Motor Co.,* 532 F.3d 496, 503 n. 6 (6th Cir.2008);1827;1827; *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291 (6th Cir.2008); *Midwest Media Prop., L.L.C. v. Symmes Twp.,* 512 F.3d 338, 341 (6th Cir.2007) (Martin, Moore, Cole, Clay, JJ., dissenting from denial of request for *en banc* hearing). For an exhaustive collection and analysis of over 3,000 district court decisions applying *Twombly,* see Note, *Much Ado About* Twombly, 83 NOTRE DAME L.REV. 1811 (2008).")**.**

Midwest Media Property, L.L.C. v. Symmes Tp., Ohio, 503 F.3d 456, *472 & n.3 (6th Cir. 2007) ("Admittedly, the notice pleading requirement was amended slightly by the Supreme Court's recent decision in *Bell Atlantic Co. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which held that 'a plaintiff's obligation to

provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do....' . . . *Twombly* does not apply here, however, because Plaintiff has coupled its allegations with facts which suggest that Defendant has deprived it of its alleged right to post signs. . . . *Twombly* involved a claim under § 1 of the Sherman Antitrust Act, which requires the plaintiff to prove that the defendants engaged in a 'contract, combination ... or conspiracy, in restraint of trade or commerce.'. . Rather than alleging that such collusion existed, however, the *Twombly* plaintiff merely alleged that the defendants were operating their businesses in a manner which is consistent with collusion, and then invited the courts to conclude that a conspiracy must follow from this circumstantial evidence. . . . The Supreme Court held that, under § 1 of the Sherman Act, a 'bare assertion of conspiracy' is not sufficient to state a claim. . . Instead, the *Twombly* plaintiff was also required to plead facts which 'raise[ ] a suggestion' of actual collusion. . . In other words, *Twombly* was a case where the plaintiff invoked a statute banning collusion, but failed to actually state any facts suggesting collusion. This stands in stark contrast to the instant case. Here, Plaintiff alleges a violation of the First Amendment's Free Speech Clause, and supports its allegation with specific examples of instances where the challenged regulations denied it the ability to speak freely. Plaintiff expressly states that it has been unable to post signs '[a]s a result of the Township's enforcement of its Sign Regulations.'. . It cites nine specific examples where it was denied its alleged rights as a direct result of the Township's denial of Plaintiff's applications to post signs.").

SEVENTH CIRCUIT

Tamayo v. Blagojevich, 526 F.3d 1074, 1082, 1083, 1085, 1090, 1091 (7th Cir. 2008) ("Since *Bell Atlantic*, we cautiously have attempted neither to over-read nor to under-read its holding. We have stated that the Supreme Court in *Bell Atlantic* 'retooled federal pleading standards,' and retired 'the oft-quoted *Conley* formulation.'. . We also have cautioned, however, that *Bell Atlantic* 'must not be overread.'. . Although the opinion contains some language that could be read to suggest otherwise, the Court in *Bell Atlantic* made clear that it did not, in fact, supplant the basic notice-pleading standard. . . . The task of applying *Bell Atlantic* to the different types of cases that come before us continues. In each context, we must determine what allegations are necessary to show that recovery is 'plausible.'. . For complaints involving complex litigation--for example, antitrust or RICO claims--a fuller set of factual allegations may be necessary to show that relief is plausible. . . The Court in *Bell Atlantic* wished to avoid the 'in terrorem' effect of allowing a

plaintiff with a 'largely groundless claim' to force defendants into either costly discovery or an increased settlement value. . . . [W]e conclude that Ms. Tamayo's complaint included enough facts in support of a claim of sex discrimination under Title VII and the Equal Pay Act to survive dismissal at this stage of the proceedings. . . . Similarly, we conclude that Ms. Tamayo's complaint alleged enough facts to state a claim for retaliation. . . .The pleading standard is no different simply because qualified immunity may be raised as an affirmative defense. . . . In any event, the right to be free from sex discrimination is clearly established. Taking all facts pleaded in Ms. Tamayo's complaint as true, the defendants violated a clearly established constitutional right; therefore, a grant of qualified immunity is inappropriate at this point in the proceedings.")**.**

EIGHTH CIRCUIT

Doe v. Cassel, 403 F.3d 986, 988, 989 (8th Cir. 2005) ("Following *Leatherman*, this Circuit continued to require heightened pleading in §1983 suits against individual defendants, reasoning that particularity in pleadings facilitated the individual government officials' ability to mount a qualified immunity defense early in the litigation. . . We now recognize *Edginton's* heightened pleading requirement in §1983 suits against individual defendants has been abrogated. The only permissible heightened pleading requirements in civil suits are those contained in the Federal Rules of Civil Procedure or those in federal statutes enacted by Congress. . . . In rejecting a heightened pleading requirement, however, we do not leave government officials and the district courts 'at the mercy of overly aggressive plaintiffs.' . . The district courts retain all tools available under the Federal Rules of Civil Procedure to eliminate meritless claims early in the litigation process. . . . As discussed *supra*, there are no common law heightened pleading requirements in §1983 suits. Accordingly, the district court's dismissal of Doe's Third Amended Complaint for failure to satisfy a heightened pleading requirement was an error of law. However, we affirm the district court's judgment based on its alternative ruling that Doe failed to comply with the district court's reasonable orders to delineate Defendants and identify their respective acts or omissions. We note with particular interest that the district court did not apply the harsh medicine of dismissal with prejudice to Doe's initial complaint, but to her fourth.").

NINTH CIRCUIT

Alvarez v. Hill, 518 F.3d 1152, 1159 (9th Cir. 2008) ("Appellees' rigid insistence that RLUIPA claims must be specifically pled in the plaintiff's complaint is without support in our precedent and frankly puzzling in view of the lenience traditionally afforded *pro se* pleadings and of RLUIPA's manifest purpose of protecting 'institutionalized persons who are unable freely to attend to their religious needs.' . . The 'simplified pleading standard applies to all civil actions, with limited exceptions' provided for by rule or by statute. . . Accordingly, we hold that RLUIPA claims need satisfy only the ordinary requirements of notice pleading , and that a complaint's failure to cite RLUIPA does not preclude the plaintiff from subsequently asserting a claim based on that statute. Under this pleading standard, it is sufficient that the complaint, alone or supplemented by any subsequent filings before summary judgment, provide the defendant fair notice that the plaintiff is claiming relief under RLUIPA as well as the First Amendment.")**.**

Empress LLC v. City and County of San Francisco, 419 F.3d 1052, 1056 (9th Cir. 2005) ("Although we did not reach the question of whether a heightened pleading standard should be applied in other contexts in *Galbraith*, the logical conclusion of *Leatherman*, *Crawford-El*, and *Swierkiewicz* dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require.").

TENTH CIRCUIT

Choate v. Lemmings, Nos. 07-7099, 07-7100, 08-7010, 2008 WL 4291199, at *5 (10th Cir. Sept. 22, 2008) ("The Supreme Court made clear in *Gomez* that there is no basis for imposing on a § 1983 plaintiff the obligation to anticipate and plead around the qualified immunity defense. . . More recently, in the wake of *Crawford-El v.. Britton*, 523 U.S. 574 (1998), this court specifically rejected a heightened pleading standard for civil rights plaintiffs facing the immunity defense. *See Currier v. Doran*, 242 F.3d 905, 916-917 (10th Cir.2001). A § 1983 complaint needs but two allegations to state a cause of action: (1) that the plaintiff was deprived of a federal right; and (2) that the person who deprived him acted under color of state law. . . Moreover, these allegations need not be pled with specificity. All that is required are 'sufficient facts, that when taken as true, provide plausible grounds that discovery will reveal evidence to support plaintiff's allegations.'").

Robbins v. Oklahoma, 519 F.3d 1242, 1247-50 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid. *See Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir.2007) (referring to the 'conflicting signals' in the *Twombly* opinion); *Phillips v. County of Allegheny*, 2008 WL 305025, at *3 (3d Cir. Feb. 5, 2008) (calling the opinion 'confusing'). As best we understand it, however, the opinion seeks to find a middle ground between 'heightened fact pleading ,' which is expressly rejected . . . and allowing complaints that are no more than 'labels and conclusions'or 'a formulaic recitation of the elements of a cause of action,' which the Court stated 'will not do.' . . The most difficult question in interpreting *Twombly* is what the Court means by 'plausibility.' The Court states that the complaint must contain 'enough facts to state a claim to relief that is plausible on its face.' . . But it reiterates the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven. . . . Thus, 'plausible' cannot mean 'likely to be true.' Rather, 'plausibility' in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.' . . The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief. . . This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them. 'Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.' . . . The *Twombly* Court was particularly critical of complaints that 'mentioned no specific time, place, or person involved in the alleged conspiracies.' . . . The Third Circuit has noted, and we agree, that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context: 'Context matters in notice pleading . Fair notice under Rule 8(a)(2) depends on the type of case....' [citing *Phillips*] . . . . The context of this case is a claim of qualified immunity by state officials or employees who were sued for damages in their personal capacity for injuries to a child inflicted by a third party. . . .To 'nudge their claims across the line from conceivable to plausible,' *Twombly*, 127 S.Ct. at 1974, in this context, plaintiffs must allege facts sufficient to show (assuming they are true) that the defendants plausibly violated their constitutional rights, and that those rights were clearly established at the time. . . . Although we apply 'the same standard in evaluating dismissals in qualified immunity cases as to dismissals generally,'. . . complaints in

§ 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants. The *Twombly* standard may have greater bite in such contexts, appropriately reflecting the special interest in resolving the affirmative defense of qualified immunity 'at the earliest possible stage of a litigation.'. . . Given the complaint's use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed. . . . In addition to the failure of Count I to satisfy the standard of fair notice required by Rule 8, the plaintiffs do not allege facts sufficient to render their [state-created-danger and equal protection] claim[s] plausible.").

ELEVENTH CIRCUIT

A.P. ex rel. Bazerman v. Feaver, No. 04-15645, 2008 WL 3870697, at *10 (11th Cir. Aug. 21, 2008) ("While Rule 8 allows a plaintiff a great deal of latitude in the manner in which a complaint presents a claim, . . .this court has implemented more stringent pleading requirements in § 1983 actions in which qualified immunity is likely to be raised as a defense. . . . This heightened specificity is necessary so that the court has sufficient factual allegations to allow it to assess whether a defendant's actions violated a clearly established right. . . If it is impossible to make this determination from the face of the plaintiff's complaint, the purpose of the qualified immunity defense-- shielding government officials from the demands of defending oneself from damages suits--may well be frustrated.").

III. ROLE OF THE JUDGE/JURY

In ***Hunter v. Bryant***, 502 U.S. 224, 228 (1991) (Per Curiam), the Supreme Court reversed a judgment of the Ninth Circuit denying qualified immunity to federal agents who had arrested, without probable cause, someone they suspected of threatening the President's life. In criticizing the approach taken by the Ninth Circuit, the Court noted:

> The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment...based

> on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' . . . This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial.... Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Scott v. Harris, 127 S. Ct. 1769, 1776 & n.8 (2007) ("The question we need to answer is whether Scott's actions were objectively reasonable. . . . JUSTICE STEVENS incorrectly declares this to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' . . At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, . . . the reasonableness of Scott's actions--or, in JUSTICE STEVENS' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' . . . is a pure question of law.") (emphasis original).

Scott v. Harris, 127 S. Ct. 1769, 1784, 1785 (2007) (Stevens, J., dissenting) ("Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. . . Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. . . .In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.").

Brosseau v. Haugen,125 S. Ct. 596, 598, 601-04 (2004) (per curiam) (Stevens, J., dissenting) (" In my judgment, the answer to the constitutional question presented by this case is clear: Under the Fourth Amendment, it was objectively unreasonable for Officer Brosseau to use deadly force against Kenneth Haugen in an attempt to prevent his escape. What is not clear is whether Brosseau is nonetheless entitled to qualified immunity because it might not have been apparent to a reasonably well trained officer in Brosseau's shoes that killing Haugen to prevent his escape was unconstitutional. In my opinion that question should be answered by a jury. . . .[T]he Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill-advised. [citing *Hope* and *Lanier*] Indeed,

the cases the majority relies on are inapposite and, in fact, only serve to illuminate the patent unreasonableness of Brosseau's actions. Rather than uncertainty about the law, it is uncertainty about the likely consequences of Haugen's flight--or, more precisely, uncertainty about how a reasonable officer making the split-second decision to use deadly force would have assessed the foreseeability of a serious accident--that prevents me from answering the question of qualified immunity that this case presents. This is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law.' . . .Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury. . . The bizarre scenario described in the record of this case convinces me that reasonable jurors could well disagree about the answer to the qualified immunity issue. My conclusion is strongly reinforced by the differing opinions expressed by the Circuit Judges who have reviewed the record. . . .The Court's attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral argument is woefully unpersuasive. If Brosseau had deliberately shot Haugen in the head and killed him, the legal issues would have been the same as those resulting from the nonfatal wound. I seriously doubt that my colleagues would be so confident about the result as to decide the case without the benefit of briefs or argument on such facts. . . At a minimum, the Ninth Circuit's decision was not clearly erroneous, and the extraordinary remedy of summary reversal is not warranted on these facts. . . . In sum, the constitutional limits on an officer's use of deadly force have been well settled in this Court's jurisprudence for nearly two decades, and, in this case, Officer Brosseau acted outside of those clearly delineated bounds. Nonetheless, in my judgment, there is a genuine factual question as to whether a reasonably well-trained officer standing in Brosseau's shoes could have concluded otherwise, and that question plainly falls with the purview of the jury.").

D.C. CIRCUIT

Pitt v. District of Columbia, 491 F.3d 494, 509, 510 (D.C. Cir. 2007) ("We reverse the district court's order insofar as it grants the defendants' motion for judgment as a matter of law on the plaintiff's claim for arrest without probable cause under § 1983. In this case, the district court erred by considering the jury verdict from the common law false arrest claims in its qualified immunity analysis. As explained above, whether a right is 'clearly established'--that is, whether an objectively reasonable officer would have believed his conduct to be lawful, in light of clearly

established law--is a question of law that must be resolved by the court, not the jury. We reverse the district court on this issue and remand for a determination of whether the defendants are entitled to qualified immunity on the § 1983 false arrest claims.").

FIRST CIRCUIT

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 83, 84 (1st Cir. 2006) ("An official is entitled to qualified immunity unless (1) 'the plaintiffs' allegations, if true, establish a constitutional violation,' (2) 'the right was clearly established at the time of the alleged violation,' and (3) 'a reasonable [official], similarly situated, would understand that the challenged conduct violated that established right.' . . The first two prongs of this test are questions of law for the court to decide. . . The third prong is also a question of law, but factual questions, to the extent they are antecedent to this determination, must be determined by a jury. . . While preliminary factual questions regarding qualified immunity are sent to the jury, the legal question of the availability of qualified immunity is 'ultimately committed to the court's judgment.' . . Defendants first contend that the district court erred in failing to instruct the jury on qualified immunity. Defendants, however, are not entitled to a jury instruction regarding qualified immunity, since it is a legal question for the court to decide. . . Defendants are entitled to have a jury determine any preliminary factual questions, but defendants have not stated, either at trial or on appeal, precisely what factual questions would need to be resolved before the court could determine the legal issue of the official's reasonableness. In finding that defendants politically discriminated against plaintiffs, the jury found that defendants intentionally violated plaintiffs' constitutional rights. Thus, it appears that any factual finding the jury could make would not benefit defendants. We find no error.")**.**

SECOND CIRCUIT

Higazy v. Templeton, 505 F.3d 161, 170 (2d Cir. 2007) ("The matter of whether a right was clearly established at the pertinent time is a question of law. In contrast, the matter of whether a defendant official's conduct was objectively reasonable, i.e., whether a reasonable official would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact. . . . Moreover, '[a]lthough a conclusion that the defendant official's conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the material historical facts, if there is such a dispute, the factual questions must be resolved by the factfinder.' . . 'Though "immunity ordinarily should be decided by

the court," that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required....' *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir.1994)."**).**

Zellner v. Summerlin, 494 F.3d 344, 368 (2d Cir. 2007) ("Once the jury has resolved any disputed facts that are material to the qualified immunity issue, the ultimate determination of whether the officer's conduct was objectively reasonable is to be made by the court. . . . To the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question.").

Cowan ex rel Estate of Cooper v. Breen, 352 F.3d 756, 764, 765 (2d Cir. 2003) ("As the case proceeds to trial, it should be noted that although the factual disputes in the instant case that must be resolved by the jury go both to the excessive force and to the qualified immunity questions, the qualified immunity issue is 'a question of law better left for the court to decide,' *Warren*, 906 F.2d at 76. Thus, if the jury finds that Breen used excessive force against Cooper, the court should then decide whether Breen is entitled to qualified immunity. *Stephenson*, 332 F.3d at 80. Because this determination relies on the resolution of questions of fact, we recommend, as we did in *Stephenson,* that interrogatories on the key factual disputes be presented to the jury. . . Answers to questions such as whether Cooper drove her car towards Breen, whether Breen was in the zone of danger, and if so, whether he safely could have gotten out of the way, may not only help focus the jury's attention on the excessive force aspect of the inquiry, but also may help the court resolve the ultimate question of whether it would be clear to a reasonable officer in Breen's position that his conduct was unlawful in the situation he confronted.").

Manganiello v. Agostini, No. 07 Civ. 3644(HB), 2008 WL 5159776, at *7, *8 (S.D.N.Y. Dec. 9, 2008) ("Here, the defendants' counsel failed to make such a request, *i.e.,* that the jury be asked specific *factual* questions to enable the Court to make a determination as to qualified immunity, despite the Court's having noted on the record that the defendants' counsel should do so. [fn.3 The defendants' counsel only requested that the Court ask the jury directly, on the verdict sheet, whether each defendant should be granted qualified immunity. This was not a *factual* question. As the Court may not ask the jury to decide the *legal* issue of qualified immunity, but must make that determination itself, the defendants' request was denied.] Nonetheless, despite counsel's failure, the Court presented the jury with a special

interrogatory, so that the Court could base its decision on the factual findings made by the jury. The jury found that Agostini misrepresented the evidence to prosecutors, or failed to provide the prosecutor with material evidence or information, or gave testimony to the grand jury that was false or contained material omissions, *and* knew that he was making a material misrepresentation or omission or giving false testimony. Based on the jury's factual finding, I had to determine 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . The right to be free from malicious prosecution in the absence of probable cause is a well-established constitutional right.").

THIRD CIRCUIT

Curley v. Klem, 499 F.3d 199, 208-11 & n.12 (3rd Cir. 2007) (***Curley II***) ('The point of immunity is to protect someone from the burden imposed by litigation itself. It is supposed to be 'an *immunity from suit* rather than a mere defense to liability....' . . . Hence, the Supreme Court has instructed that '[i]mmunity ordinarily should be decided by the court long before trial.'. . .That is well and good when there are no factual issues in a case, but often the facts are intensely disputed, and our precedent makes clear that such disputes must be resolved by a jury after a trial. . . . The fundamental challenge lies in the nature of the questions that compose the test. Since they are mixed questions of law and fact, one is left to ask who should answer them. As we noted in *Curley I,* '[a] disparity of opinion exists among our sister circuits as to whether a judge or jury should make the ultimate immunity determination.'. . The First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court. The Fifth, Sixth, Ninth, and Tenth Circuits have permitted the question to go to juries. Precedent from the Second and Eighth Circuits can be viewed as being on both sides of the issue, with the evolution being toward reserving the question for the court. . . . . Our precedents too have evolved. Our recent precedents say that the court, not a jury, should decide whether there is immunity in any given case. . . . [T]he *Carswell* approach, despite its limitations, . . . appears to have taken root and to represent the pattern and practice both in our Circuit and much of the rest of the country. We therefore take the opportunity to reiterate and clarify a central message from that case: whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury. . . When a district court submits that question of law to a jury, it commits reversible error. . . . When the ultimate question of the objective reasonableness of an officer's behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a

jury in an advisory capacity, . . . but responsibility for answering that ultimate question remains with the court." [footnotes omitted])

Carswell v. Borough of Homestead, 381 F.3d 235, 242, 243 (3d Cir. 2004) ("The importance of the factual background raises the question of whether the decision as to the applicability of qualified immunity is a matter for the court or jury. The Courts of Appeals are not in agreement on this point. We held in *Doe v. Groody*, 361 F.3d 232, 238 (3d Cir.2004), that qualified immunity is an objective question to be decided by the court as a matter of law. . . The jury, however, determines disputed historical facts material to the qualified immunity question. *See Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir.1997). District Courts may use special interrogatories to allow juries to perform this function. *See, e.g., Curley*, 298 F.3d at 279. The court must make the ultimate determination on the availability of qualified immunity as a matter of law. . . Several other Courts of Appeals have adopted a standard similar to ours. [footnote citing cases] In contrast, other Courts of Appeals have held that District Courts may submit the issue of qualified immunity to the jury.[footnote citing cases]").

Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002) (***Curley I***) ("We note that the federal courts of appeals are divided on the question of whether the judge or jury should decide the ultimate question of objective reasonableness once all the relevant factual issues have been resolved. . . . . We addressed the issue in *Sharrar*, in which we observed that the "reasonableness of the officers' beliefs or actions is not a jury question," 128 F.3d at 828, but qualified that observation by later noting that a jury can evaluate objective reasonableness when relevant factual issues are in dispute, *id.* at 830-31. This is not to say, however, that it would be inappropriate for a judge to decide the objective reasonableness issue once all the historical facts are no longer in dispute. A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity.").

FOURTH CIRCUIT

International Ground Transportation v. Mayor and City Council of Ocean City, 475 F.3d 214, 219, 220 n.3 (4th Cir. 2007) ("[D]espite the general bar to municipal liability set out in *Heller*, a situation may arise in which a finding of no liability on the part of the individual municipal actors can co-exist with a finding of liability on the part of the municipality. Namely, such a verdict could result when the individual

defendants successfully assert a qualified immunity defense. This case presents exactly this situation.. . . We hold, therefore, that when a jury, which has been instructed on a qualified immunity defense as to the individual defendants, returns a general verdict in favor of the individual defendants but against the municipality, the verdict is consistent and liability will lie against the municipality (assuming the verdict is proper in all other respects). . . We do not intend our holding here to approve the submission of qualified immunity to juries. Entitlement to qualified immunity is a legal question to be decided to the court, although factual issues underlying the qualified immunity analysis may be submitted to a jury. . . Nonetheless, we find it necessary to hold as we do here because the parties do not maintain that the district court erred in submitting qualified immunity to the jury.").

FIFTH CIRCUIT

Mesa v. Prejean, 543 F.3d 264, 269 (5th Cir. 2008) ("The issue of qualified immunity is a question of law, but in certain circumstances where 'there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.' *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir.1993).").

McCoy v. Hernandez, 203 F.3d 371, 376 (5th Cir. 2000) ("McCoy argues that the district court erred when it submitted the question of whether the officers were entitled to qualified immunity to the jury. McCoy contends that only the court may decide the qualified immunity issue. However, we have previously held that while qualified immunity ordinarily should be decided by the court long before trial, if the issue is not decided until trial the defense goes to the jury which must then determine the objective legal reasonableness of the officers' conduct.").

SIXTH CIRCUIT

Phillips v. Roane County, Tenn., 534 F.3d 531, 539 (6th Cir. 2008) ("The district court concluded that the first step of the qualified immunity inquiry--whether the Estate had shown a constitutional violation--and the merits of Phillips's deliberate indifference claims were identical, since both concerned the reasonableness of the correctional officers' conduct in light of the circumstances the officers faced. On this basis, the district court found summary judgment based on qualified immunity inappropriate. . . But we believe that the district court erred in deferring the qualified

immunity analysis to the jury. . . . [I]n a suit against government officials for an alleged violation of a constitutional right, the court--not the jury--must consider the 'threshold question' of whether 'the facts alleged show the officer's conduct violated a constitutional right.' . . We review *de novo* whether those facts as alleged by the Estate establish a prima facie case of deliberate indifference to serious medical needs, and whether that right was clearly established.")

Carpenter v. Bowling, No. 07-3100, 2008 WL 1931360, at *5 (6th Cir. May 2, 2008) ("The resolution of Carpenter's excessive-force claim in the end turns on several genuine issues of material fact, including at a minimum these: Was Carpenter walking toward, cursing at or otherwise threatening Kirby at the time of her arrest? Did the officers repeatedly body slam or crush Carpenter against the van and jerk back unreasonably hard on her arms? And did Carpenter resist the arrest or the officers' attempt to handcuff her? '[W]hen the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of a claim of immunity.' *Bouggess v. Mattingly*, 482 F.3d 886, 888 (6th Cir.2007) (internal quotation marks and alteration omitted).").

Humphrey v. Mabry, 482 F.3d 840, 846 (6th Cir. 2007) ("The issue of qualified immunity may be submitted to a jury only if 'the legal question of immunity is completely dependent upon which view of the [disputed] facts is accepted by the jury.'").

SEVENTH CIRCUIT

Purtell v. Mason, 527 F.3d 615, 622, 623, 626 (7th Cir. 2008) ("The district judge declined to decide whether Officer Mason was entitled to qualified immunity on the First Amendment claim because she thought 'there [was] a genuine issue of material fact as to whether [the officer] acted in an objectively reasonable manner when he asked Jeffrey Purtell to take down the tombstones.' This was error. The historical facts were undisputed. Whether Officer Mason's actions were reasonable is the second half of the qualified-immunity inquiry. Whether the facts established a constitutional violation (the first half of the immunity inquiry) requires a determination and application of the proper legal standard for fighting words. These were questions for the court, not the jury. . . . Officer Mason's mistake in thinking he could constitutionally order Purtell to dismantle the tombstone display on pain of arrest was one a reasonable officer might make in this situation. Although the fighting-words doctrine has been with us for decades, it has not been entirely clear

(as we have explained) whether speech that injures but does not incite an immediate breach of the peace is protected or unprotected. And Officer Mason reasonably may have misunderstood the immediacy requirement of the fighting-words doctrine in the context of this case. He did have a fight on his hands, and he reasonably believed he had the authority to force the removal of the irritant in order to keep the peace. In misapprehending the constitutionally protected status of the Purtells' tombstone speech, Officer Mason did not violate clearly established rights. . .First Amendment line-drawing is often difficult, even in hindsight. Officer Mason's on-the-street judgment, though mistaken, is entitled to qualified immunity.")

EIGHTH CIRCUIT

Richmond v. City of Brooklyn Center, 490 F.3d 1002, 1007 n.5 (8th Cir. 2007) ("In ruling on Officer Bruce's motion for judgment as a matter of law based on qualified immunity , the district court stated that 'the record ... contains evidence sufficient for a jury to conclude that the law prohibiting unreasonable searches--determined by the search's scope, manner, justification, and location--was clearly established at the time of the search, and that the law's application to Defendant's actions was evident.' The district court should have analyzed this question as a matter of law without regard to the jury's verdict.")**.**

Littrell v. Franklin, 388 F.3d 578, 581-87 (8th Cir. 2004) ("Officer Franklin did not raise the issue [of qualified immunity] until trial, when he asserted it as a defense. The district court presented the qualified immunity question to the jury in the form of an interrogatory. The verdict form posed four questions. The first asked, 'Do you find, from a preponderance of the evidence, that defendant Franklin used excessive force when he arrested plaintiff on February 9, 2001?' The jury responded, 'Yes.' The second interrogatory asked, 'Do you find, from a preponderance of the evidence, that defendant Franklin reasonably believed that his conduct on February 9, 2001, with respect to the plaintiff, was objectively reasonable in light of the legal rules clearly established at that time?' Again, the jury responded, 'Yes.' Because of its affirmative response to the second interrogatory, the jury was instructed not to answer the third and fourth questions on the verdict form, which pertained to damages. In accordance with the jury's response to the second interrogatory, the district court entered judgment in favor of Officer Franklin, finding that he was entitled to judgment as a matter of law on the basis of qualified immunity. . . .In Ms. Littrell's appeal, [footnote omitted] she argues that the district court's submission of the second interrogatory to the jury was erroneous because the reasonableness of an officer's

actions in light of clearly established law is a question of law for the court, and not the jury, to determine. . . .The district court properly submitted the issue of excessive force to the jury, and the jury found that Officer Franklin violated Ms. Littrell's constitutional right to be free from excessive force. . . . After the jury found that Officer Franklin used excessive force when he apprehended Ms. Littrell, it found (in the form of its response to interrogatory number two) that he reasonably believed his actions were objectively reasonable in light of clearly established law. Ms. Littrell contends that the district court erroneously submitted this second question to the jury because the court--not the jury--is charged with determining whether a defendant is entitled to qualified immunity. Ms. Littrell does not contend that the second interrogatory misstated the law of qualified immunity. Rather, she argues merely that the district court itself should have made the qualified immunity ruling. Ms. Littrell is correct. The law of our circuit is clear. The issue of qualified immunity is a question of law for the court, rather than the jury, to decide . . . . The issue of qualified immunity, however, is frequently intertwined with unresolved factual questions. Where, as in this case, factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories specific to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to make its own qualified immunity ruling. . . . On the facts of this case, special interrogatories should have asked (1) whether Ms. Littrell resisted arrest before Officer Franklin forcibly restrained her and (2) whether Officer Franklin knew Ms. Littrel was injured when he continued to handcuff and forcibly place her in the car. Specific findings on these questions of fact would have enabled the district court to address the legal issue of qualified immunity through reference to excessive force standards that are clearly established. . . . In short, where questions of historical fact exist, the jury must resolve those questions so that the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law. . . . The specific contours of a plaintiff's rights may be established through reference to prior cases. Carefully drafted interrogatories allow jurors to decide factual issues and preserve the ultimate legal determination for the court. It is error, however, to submit the ultimate question of qualified immunity to the jury. Our inquiry, however, does not end here. The district court relied on Fifth Circuit precedent when it submitted the qualified immunity question to the jury. . . . Ms. Littrell objected to neither this practice nor the content of the second interrogatory submitted to the jury. She does not argue that she offered alternate instructions that the district court rejected. We, therefore, review the district court's judgment only for plain error. . . . Submission of the qualified immunity issue to the jury was wholly

consistent with the practice of the Fifth Circuit. Although different from our own practice, we do not think the Fifth Circuit's practice is fundamentally unfair or in any way threatens the integrity of the judicial process. Importantly, the Supreme Court has not censured the Fifth Circuit's practice. This is true even though there exists a split among the circuits as to the proper apportionment of responsibility between juries and judges in this context. [footnote omitted] Against this backdrop, we do not find that reliance on the practice of the Fifth Circuit resulted in the sort of error that we may properly characterize as plain error.").

NINTH CIRCUIT

Bollinger v. Oregon, No. 07-35038 2008 WL 5213433, at *1 (9th Cir. Dec. 11, 2008) ("The district court did not err in submitting the issue of qualified immunity ;523;523to the jury. That defense was not precluded under the law of the case doctrine and Bollinger did not move for judgment as a matter of law (JMOL) at the close of evidence. . . .The district court did not err in precluding Bollinger's proposed witnesses from testifying about whether the law was clearly established. *See Act Up!/ Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir.1993) ('The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court.').").

Torres v. City of Los Angeles, No. 06-55817, 2008 WL 4878904, at **9-11 (9th Cir. Nov. 13, 2008) ("As Defendants argue, qualified immunity is a question of law, not a question of fact. . . But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to Torres, they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated Torres' constitutional right, and the right at issue was clearly established. Plaintiffs here appeal the grant of a Rule 50(a) motion made after completion of the trial but before a jury verdict. While the Supreme Court has encouraged resolution of the qualified immunity issue early on in the lawsuit, such as at the summary judgment stage, . . . Defendants chose not to move for summary judgment on qualified immunity grounds, acknowledging that 'triable issues of material fact exist regarding probable cause for Plaintiff's arrest.' Thus, the case proceeded to trial before a jury. However, the same issues of material fact also prevent the court from granting the officers' motion for judgment as a matter of law . . . Indeed, we have explained that 'sending the factual issues to the jury but reserving to the judge the ultimate "reasonable officer" determination leads to serious logistical difficulties.'

. . . [I]n this case historical facts material to the qualified immunity determination are in dispute.").

Ortega v. O'Connor, 146 F.3d 1149, 1155-56 (9th Cir. 1998) ("Although the district court declared that it would not instruct the jury on qualified immunity, the plaintiff and the defendants jointly proposed to the district court, and the court accepted, a jury instruction that applied a 'reasonableness' test not, as the district court had suggested, to the search itself, but instead to the defendants' beliefs regarding the search. More important, that instruction stated that the reasonableness inquiry as to public officials' beliefs is determined under an objective standard --whether a reasonable officer would have believed he had a reasonable basis for the search. . . . The instruction, in fact, provided a classic qualified immunity instruction. . . . Here, the district court's "extra" reasonableness test. . . constituted an appropriate and proper instruction to the jury on the second prong of the defendants' qualified immunity defense--whether a reasonable state official could have believed his conduct was lawful--the prong as to which the existence of factual disputes requires the jury's determination.").

TENTH CIRCUIT

Keylon v. City of Albuquerque, 535 F.3d 1210, 1217, 1218, 1220 (10th Cir. 2008) ("Because there were no disputed issues of material fact the question of qualified immunity should not have been submitted to the jury. Qualified immunity issues are almost always questions of law, decided by a court prior to trial. . . Many of our sister circuits have held that qualified immunity is never a question for the jury. . . However, we have recognized that '*in exceptional circumstances* historical facts may be so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated that right.' . . . Because any factual dispute in this case does not go to the question of the objective reasonableness of Officer Barnard's actions, this case is not an 'exceptional circumstance,' and the qualified immunity question should not have been submitted to the jury.").

ELEVENTH CIRCUIT

Chaney v. City of Orlando, No. 07-14169, 2008 WL 3906838, at *2, *5 (11th Cir. Aug. 26, 2008) (appeal after remand) ("Although a qualified immunity defense is typically considered early in a case, the qualified immunity issue may proceed to trial if the evidence, viewed in the light most favorable to the plaintiff, indicates that there

are facts that do not support a qualified immunity defense. . . Through the use of special interrogatories, a jury 'decides the issues of historical fact that are determinative of the qualified immunity defense.'. . The court then has a duty and responsibility to 'apply the jury's factual determinations to the law and enter a post-trial decision' on a defendant's Rule 50(a) motion regarding a qualified immunity defense. . . . The determination of whether an officer is entitled to qualified immunity is one of law to be made by the court and not submitted to a jury.").

Cottrell v. Caldwell, 85 F.3d 1480, 1487-88 (11th Cir. 1996) ("Where the defendant's pretrial motions are denied because there are genuine issues of fact that are determinative of the qualified immunity issue, special jury interrogatories may be used to resolve those factual issues. . . Because a public official who is put to trial is entitled to have the true facts underlying his qualified immunity defense decided, a timely request for jury interrogatories directed toward such factual issues should be granted. Denial of such a request would be error, because it would deprive the defendant who is forced to trial of his right to have the factual issues underlying his defense decided by the jury. We do not mean to imply, of course, that district courts should submit the issue of whether a defendant is entitled to qualified immunity to the jury. Qualified immunity is a legal issue to be decided by the court, and the jury interrogatories should not even mention the term. . . Instead, the jury interrogatories should be restricted to the who-what-when- where- why type of historical fact issues.").

IV. QUALIFIED IMMUNITY AND FOURTH AMENDMENT CLAIMS

In ***Anderson v. Creighton,*** 483 U.S. 635 (1987), the Supreme Court held that the language of the Fourth Amendment proscribing "unreasonable" searches and seizures did not preclude the possibility that an officer can act in an objectively reasonable fashion even though in violation of the Fourth Amendment. The Court noted that determinations of probable cause are often quite difficult and officials should be held liable in damages only where their conduct was clearly proscribed. In the wake of *Anderson,* a number of circuits employ the concept of "arguable probable cause" in Fourth Amendment qualified immunity analysis. *See, e.g.,* ***Escalera v. Lunn,*** 361 F.3d 737 (2d Cir. 2004) (*infra*); ***Storck v. City of Coral Springs,*** 354 F.3d 1307, 1317 & n.5 (11th Cir. 2003) (*infra*).

Does *Anderson* control in Fourth Amendment Excessive Force Cases?

A. *Saucier v. Katz*

In ***Saucier v. Katz,*** 121 S. Ct. 2151 (2001), a majority of the Supreme Court held that in a Fourth Amendment excessive force case, the qualified immunity issue and the constitutional violation issue are not so intertwined that they "should be treated as one question, to be decided by the trier of fact." *Id.* at 2154. The Court determined that the analysis set out in *Anderson v. Creighton,* 483 U.S. 635 (1987) is not affected by the Court's decision in *Graham v. Connor,* 490 U.S. 386 (1989), and that "[t]he inquiries for qualified immunity and excessive force remain distinct, even after *Graham*." 121 S. Ct. at 2158 . *Graham* protects an officer who reasonably, but mistakenly, believed the circumstances justified using more force than in fact was needed. "The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.*

The respondent in *Saucier,* a sixty-year-old animals' rights advocate, filed a *Bivens* action in federal court, claiming that a military policeman used excessive force in arresting him when he attempted to unfurl a protest banner during a speech given by Vice President Gore at the Presidio Army Base in San Francisco. *Id.* at 2154. Because the district court had concluded there was a material issue of fact as to the reasonableness of the force used, and because the merits inquiry on the excessive force claim was considered to be identical to the immunity inquiry, summary judgment was denied. On interlocutory appeal, the Ninth Circuit affirmed the denial of qualified immunity to the officer, holding that the law on excessive force was clearly established by *Graham,* and that the question of objective reasonableness essential to the merits of the Fourth Amendment claim was identical to the question of objective reasonableness presented by the claim of qualified immunity. A determination of the reasonableness issue by the jury would resolve both the merits and the immunity questions. *Id.* at 2155.

In reversing the Ninth Circuit, Justice Kennedy, writing for the majority, reinforced, but did not apply, the Court's "instruction to the district courts and courts of appeal to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found

. . . ." 121 S. Ct. at 2159. Constrained by the limited question on which the Court had granted review and expressing doubt that a constitutional violation did occur, the Court "assume[d] a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force. . . ." *Id.*

Assuming a constitutional violation, the next question that must be asked is whether the right was clearly established. On this question, the Court explained that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. The Court admonished that consideration of the question of whether the right was clearly established must be on a "more specific level" than that recognized by the Ninth Circuit. *Id.* at 2155. On the other hand, the Court observed:

> This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard. Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.

Id. at 2157.

The Court concluded that given the circumstances confronting Officer Saucier and, given the lack of "any case demonstrating a clearly established rule prohibiting the officer from acting as he did," the officer was entitled to qualified immunity. *Id.* at 2160.

Justice Ginsburg, joined by Justice Stevens and Justice Breyer, concurred in the judgment but disagreed with the "complex route the Court lays out for lower courts." *Id.* at 2160 (Ginsburg, J., joined by Stevens and Breyer, JJ., concurring in the judgment). For the concurring Justices, application of the *Graham* objective reasonableness standard was both necessary and sufficient to resolve the case. The only inquiry necessary was "whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully." *Id.* at 2161. Applying the *Graham* standard, Justice Ginsburg concluded that

respondent Katz "tendered no triable excessive force claim against Saucier." *Id.* at 2162.

The concurring Justices did not share the majority's fears that eliminating the qualified immunity inquiry in excessive force claims would lead to jury trials in all Fourth Amendment excessive force cases. *Id.* at 2163. Justice Ginsburg noted the not uncommon granting of summary judgment in excessive force cases where courts have found the challenged conduct to be objectively reasonable based on relevant undisputed facts. Where the determination of reasonableness depends on which of two conflicting stories is believed, however, there must be a trial. Once a jury finds, under the *Graham* standard, that an officer's use of force was objectively unreasonable, the concurrence concludes that "there is simply no work for a qualified immunity inquiry to do." *Id.* at 2164.

Justice Kennedy wrote for the majority and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas. Justice Souter joined in Parts I and II of the majority opinion but would have remanded the case for application of the qualified immunity standard. Justice Ginsburg wrote the opinion concurring in the judgment. She was joined by Justices Stevens and Breyer.

B. *Brosseau v. Haugen*

Brosseau v. Haugen, 125 S. Ct. 596, 598, 599 (2004) (per curiam) ("We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity. . . *Graham* and *Garner,* following the lead of the Fourth Amendment's text, are cast at a high level of generality. . . . Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law. [citing *Hope v. Pelzer*]. . . . The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision. . . . We therefore turn to ask whether, at the time of Brosseau's actions, it was ' "clearly established"' in this more ' "particularized"' sense that she was violating Haugen's Fourth Amendment right. . . The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. . . .These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that

Brosseau's actions fell in the ‘ “hazy border between excessive and acceptable force.”’ . . The cases by no means ‘clearly establish’ that Brosseau's conduct violated the Fourth Amendment.”).

D. Post-*Brosseau* Case Law

D.C. CIRCUIT

Arrington v. United States, 473 F.3d 329, 339, 340 (D.C. Cir. 2006) (“Appellant makes the claim, supported by sworn testimony, that he was disarmed, thrown to the ground, handcuffed, and severely beaten by appellees for ten minutes. Appellees maintain, also by sworn testimony, that in order to disarm appellant, who they believed had just shot a USPP officer in the face, it was necessary to hold him down and beat him for ten minutes, using their fists, a telescopic baton, and the grip of a handgun, and then instruct a patrol dog to bite his leg. If all of the evidence is viewed in the light most favorable to appellant, as required by Rule 56(c), appellees surely are not entitled to judgment as a matter of law. . . . Our dissenting colleague may or may not be right in her characterization of the facts. But fact finding is not the role of the appellate court. That the dissent strains mightily in this misplaced fact finding effort serves only to highlight the existence of a genuine issue of material fact. It is also noteworthy that three criminal juries have deadlocked on counts charging Arrington with attempting to murder a federal officer and discharging a firearm during a crime of violence. . . Obviously, the testimony of the police officers is not as clear cut as the dissent would have it. In any event, the trier of fact in this civil case will have an opportunity to sort this out.”).

Barham v. Ramsey, 434 F.3d 565, 572-75, 577 (D.C. Cir. 2006) (“In this case, it is clear that the ‘threshold question’ for evaluating Newsham's claim to qualified immunity must be answered in the affirmative, because ‘the facts alleged show the officer's conduct violated a constitutional right,’. . . . The essence of plaintiffs' claim is that a diverse assemblage of people--including many who were engaging in political speech protected by the First Amendment and others who were merely there as observers or passersby--was caught in a mass arrest that was devoid of probable cause. . . . We have no trouble in concluding that plaintiffs' Fourth Amendment rights were clearly established in the circumstances of the mass arrest. No reasonable officer in Newsham's position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park. . . . While we have no reason to doubt that unlawful activity might have occurred in the course of the

protest--with some individuals engaging in disorderly conduct, for example--the simple, dispositive fact here is that appellants have proffered no facts capable of supporting the proposition that Newsham had reasonable, particularized grounds to believe every one of the 386 people arrested was observed committing a crime. . . . Our case law addressing large-scale demonstration scenarios does not suspend-- or even qualify--the normal operation of the Fourth Amendment's probable cause requirements. Rather, this case law merely amplifies one essential premise that has a bearing on the case at hand: when compelling circumstances are present, the police may be justified in detaining an undifferentiated crowd of protestors, but only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order. . . . Having found that the mass arrest Newsham ordered violated clearly established constitutional rights, we now examine whether Chief Ramsey's involvement with the arrest deprives him of qualified immunity. Ramsey's participation in the arrests is distinct from Newsham's in a critical respect: he denies knowing that the park had not been cleared of law-abiding bystanders. If this claim is validated, Ramsey might be entitled to maintain his qualified immunity. The record assembled for summary judgment, however, does not permit a definitive resolution of this factual question. Thus, under the Supreme Court's holding in *Johnson*, 515 U.S. at 307, the District Court's decision denying Ramsey's motion for summary judgment is not appealable.").

FIRST CIRCUIT

Asociacion de Periodistas de Puerto Rico v. Mueller, 529 F.3d 52, 60-62 (1st Cir. 2008) ("The facts on the record, taken most favorably to the plaintiffs, reveal that without provocation, the defendants beat and applied pepper spray into the faces of the non-threatening plaintiffs to force them to exit the gated area. Thus, our proper inquiry is whether prior law makes clear that the use of such force against a group of non-threatening individuals was excessive. . . .Based on the plaintiffs' account of the events, this case falls within that category of obvious violations. . . According to the plaintiffs' account, the agents never gave them an opportunity to exit the area, but simply began hitting them and then, without warning, pepper sprayed them. Indeed, as discussed earlier, some of the individual plaintiffs were sprayed in the face, at close range, even after they had fallen down on the ground. Based on both a 'consensus of cases of persuasive authority,'. . . and the general prohibition against excessive force, we conclude that, according to the facts on this present record, the defendants should have been on notice that the actions attributed to them by the plaintiffs were in violation of the Fourth Amendment. . . . The defendants contend

that they reasonably believed that the use of force was appropriate in view of the crowd's provocations and the escalating situation outside of the condominium complex. . . . One could imagine that even if a reasonable officer would have believed it appropriate to use pepper spray in response to an unruly mob (and thus be entitled to immunity), applying pepper spray into the face of an unthreatening journalist lying on the ground might well not be protected under the mantle of qualified immunity . *The appropriate analysis therefore requires an individualized inquiry of each plaintiff's circumstances.* Given this evidentiary gap, the district court's entry of summary judgment for the defendants on qualified immunity grounds was premature. However, this is not to say that qualified immunity should not be considered later, on a more fully developed record. Thus, we vacate the entry of qualified immunity for the defendants on the individual plaintiffs' claims and remand.").

Berube v. Conley, 506 F.3d 79, 85 (1st Cir. 2007) ("The undisputed facts demonstrate that the circumstances in which the officers found themselves were 'tense, uncertain, and rapidly evolving.'. . Conley was confronted by a much larger man charging her with what he has conceded was a dangerous weapon in his hand. We cannot say that any reasonable officer, confronted with the necessity to subdue an apparent attacker, would not have made the same choice. While one might regret Conley's failure to stop shooting as soon as Berube went down, immunity encompasses 'mistaken judgments.'. . Syphers and Vierling also faced a tense and uncertain situation when they rushed from the station to assist a fellow officer calling for help. They had heard firing from unidentified weapons and saw Berube rolling on the ground, refusing to obey their orders and potentially preparing to fire at them. Although Berube points to the Boren affidavit to dispute Syphers and Vierling's testimony that Berube's actions appeared to present a threat, there is no dispute that Berube did not obey the officers' commands to show his hands. Faced with the necessity of making a split-second judgment on a rainy night about how to neutralize the threat they perceived from Berube, the officers' actions cannot be said to have been 'plainly incompetent.'. . We conclude that on the undisputed facts, the conduct of the three officers 'can[not] be deemed egregious enough to submit the matter to a jury .'").

Jennings v. Jones, 499 F.3d 2, 17(1st Cir. 2007) (on rehearing) ("[W]e conclude that Jones' conduct was such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful. Indeed, even

in *Smith*, which was decided six years before the incident at issue here, the court concluded that the law was clearly established against the use of increased force on a suspect no longer offering resistance because 'the unlawfulness of the conduct is readily apparent even without clarifying caselaw.'. . Other circuits have rejected qualified immunity without a prior case exactly on point. . . . When an individual has been forcibly restrained by several officers, has ceased resisting arrest for several seconds, and has advised the officers that the force they are already using is hurting a previously injured ankle, we cannot think of any basis for increasing the force used to such a degree that a broken ankle results. At the time of Jones' action, both existing caselaw and general Fourth Amendment principles had clearly established that this use of force was excessive in violation of the Constitution.").

Jennings v. Jones, 499 F.3d 2, 18, 19 (1st Cir. 2007) (on rehearing) ("The final prong of the qualified immunity analysis is 'whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.' . . . At first glance, this inquiry appears indistinguishable from that in the first prong. Both involve the reasonableness of the officer's conduct. However, the key distinction is that prong one deals with whether the officer's conduct was objectively unreasonable, whereas prong three deals with whether an objectively reasonable officer would have believed the conduct was unreasonable. . . . The third prong analysis seems nonsensical at first blush because, in effect, officers receive protection if they acted reasonably in exercising unreasonable force. In *Anderson v. Creighton*, 483 U.S. 635, 643, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court acknowledged the argument made by the appellant in that case that '[i]t is not possible ... to say that one "reasonably" acted unreasonably.' However, the Court excused this apparent contradiction as merely linguistic . . . . Thus, qualified immunity affords protection to officers who reasonably, yet mistakenly, employ excessive force in violation of the Fourth Amendment. . . . We find that an objectively reasonable officer in Jones' circumstances would not have believed that it was lawful to increase the amount of force that he used after Jennings ceased resisting and stated that Jones was hurting him. . . Because the first and third prongs of the qualified immunity analysis are so closely related in these Fourth Amendment excessive force cases, the evidence that supports our conclusion on the first prong, that a reasonable jury could have found that the force Jones used was unreasonable, is likewise relevant here, on the third prong, to demonstrate that an objectively reasonable officer in Jones' position would have believed that the force used was unreasonable.").

Whitfield v. Melendez-Rivera, 431 F.3d 1, 8 (1st Cir. 2005) ("Although the Supreme Court has cautioned that in many cases the generalized holdings of *Garner* and *Graham* will not provide sufficient notice to police officers, the Court has also acknowledged that, in the obvious case, the standards announced in those decisions alone are sufficient to ' "clearly establish" the answer.'. . Viewing the facts in the light most favorable to the verdict, the district court correctly concluded that a reasonable officer, similarly situated, would understand that his or her conduct violated the rights clearly established in *Garner* and *Graham*. This is especially true given the factual similarity between *Garner* and the present case. . . .Because the jury rejected the defendants' contention that Whitfield appeared threatening, the district court correctly concluded that Lebron and Mangome were not entitled to qualified immunity.").

Wilson v. City of Boston, 421 F.3d 45, 57-59 (1st Cir. 2005) ("We conclude that pre-1999 case law gave police officers ample warning that arresting and detaining someone incorrectly swept up in a mass arrest sting aimed at individuals with outstanding arrest warrants would violate her Fourth Amendment rights. While the parties have not identified any cases in which this issue has arisen in the context of an entirely innocent person who unwittingly was caught in a planned mass arrest, courts have addressed two closely related situations. First, it has been clearly established for decades that if one officer instructs another officer to make an arrest, the arrest violates the Fourth Amendment if the first officer lacked probable cause, regardless of how reasonable the second officer's reliance was. . . . Second, it was well established in other federal courts and in Massachusetts state court, if not in this circuit, that an arrest made on the basis of a facially valid warrant which turns out to have been cleared before the arrest violates the Fourth Amendment. . . . If it was clearly established that the Fourth Amendment proscribes an arrest based on a warrant that was once valid but has since been cleared, then *a fortiori* it was clearly established that the amendment proscribes an arrest based on a warrant that never existed in the first place. Taken together, the two principles cited above--that an arrest based on a request by another officer is lawful only if the first officer had probable cause, and that an arrest based on a facially valid, but actually recalled, warrant violates the Fourth Amendment--gave unmistakable warning to Massachusetts police that the Fourth Amendment prohibits arresting someone solely on the basis of a nonexistent warrant. We therefore conclude that the second prong has been satisfied. . . . The final prong of the qualified immunity analysis, often the most difficult one for the plaintiff to prevail upon, is 'whether an objectively reasonable official would have believed that the action taken violated that clearly

established constitutional right.'. . Section 1983 actions 'frequently turn on the third prong of the qualified immunity inquiry, which channels the analysis from abstract principles to the specific facts of a given case.'. . . After confirming Wilson's identity and her lack of a warrant, Dunford ordered the officers to release her; subsequent delay arose from routine paperwork and time waiting for a 'cuff cutter' to arrive. Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . The delay in effecting Wilson's release, while undoubtedly exasperating to her, was due to simple administrative inefficiency, not plain incompetence or knowing violation of the law. Consequently, we affirm the district court's judgment in favor of Dunford.")

Ray v. Donovan, Civil No. 05-239-P-H, 2006 WL 3741914, at *20 & n.33 (D. Me. Dec. 14, 2006) ("Prior to the issuance of *Calvi* the question of whether, drawing reasonable inferences in Ray's favor, there was a constitutional violation was a more difficult call. . . In the aftermath of *Calvi*, with its parenthetical reliance on *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir.2001), I conclude that Ray's claim does not survive summary judgment on the question of whether there was a constitutional violation apropos his handcuffing by Bergquist. . . . My lingering concern vis-a-vis this conclusion pertains only as to the question of whether Ray's assertion that he continued to complain to Bergquist about the handcuffs on his lengthy transport to the jail crosses a dividing line between constitutional handcuffing like that in *Calvi* and handcuffing that amounts to excessive force. However, the defendants have also asserted that they are entitled to qualified immunity. . . . . [E]ven if *Calvi* had not issued during the time that this motion was under consideration, given the state of the law in the First Circuit and the District of Maine concerning handcuffing a defendant during an arrest and for purposes of transport, Bergquist, who was principally responsible for the handcuffing and the transport, would be entitled to qualified immunity on Ray's excessive force claim.").

Young v. City of Providence, 396 F.Supp.2d 125, 133-36 (D.R.I. 2005) ("The second prong of the qualified immunity analysis 'deals with fair warning; it asks whether the law was clearly established at the time of the constitutional violation.'. . In the supervisory liability context, this prong divides into two distinct queries. As the Court of Appeals noted, this Court must determine 'whether both the underlying constitutional violation of Solitro and the basis for liability of the various supervisors were clearly established[.]'. . . First, this Court must discern if the constitutional right violated in prong one, by the subordinate Solitro, was a clearly established constitutional right. . . This right must have been clearly established at the time

Cornel was shot. . . Only if the answer is yes, does the Court move on to the second inquiry regarding whether it was clearly established that a supervisor could be held liable for the failure to train officers in how to avoid such situations. Although their arguments are not entirely clear on this point, . . . Defendants collectively seem to suggest that the initial question must be framed narrowly to ask whether there is a clearly established right to be free from friendly fire in on-duty/off-duty confrontations arising out of always armed/always on-duty policies. By narrowing the inquiries in this way, Defendants hope to raise the bar so high that Young will fail to clear it. . . . .[T]he fatal shooting of Cornel, in January of 2000, was a violation of a clearly established constitutional right, the right to be free from unreasonable seizure by police use of deadly force. The second inquiry within the clearly established prong asks whether 'it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in [this] context.'. . . [T]his Court must ascertain whether, at the time Cornel was shot, a reasonable police supervisor would have understood that his alleged conduct--the failure to provide adequate training regarding on-duty/off-duty confrontations where the City has an always armed/always on-duty policy--could subject him to liability for an unconstitutional seizure by his subordinate. Defendants argue that Young's failure to cite to a 'a single case involving so-called friendly fire where supervisory liability was imposed under §1983 as a result of an alleged failure to train' demonstrates that a reasonable supervisor could not have been aware that his own conduct was 'clearly unlawful.'. . . Defendants' argument concerning the dearth of specific cases involving friendly fire is flawed both legally and logically. First, the Supreme Court has made 'clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances' and further has 'expressly rejected a requirement that previous cases be "fundamentally similar."'. . Second, the contention that the absence of other friendly fire cases insulates Defendants from liability implies that the only cases capable of surviving under the clearly established prong are ones involving the exact same conduct litigated in a previous case. Not only does this argument contradict *Anderson*,. . . but the logical flaw in this argument is also obvious. If this were the law, then a plaintiff would face the heavy burden of having to cite to prior cases involving that supervisor's exact conduct to defeat a claim of qualified immunity, a nearly impossible task. . . . Therefore, when Cornel was shot, it was clearly established that supervisors may be held liable for failing to adequately train officers on avoiding misidentifications in on-duty/off-duty armed confrontations, when an officer's conduct results in an unconstitutional seizure. Accordingly, Young has met her burden under the second prong of the qualified immunity analysis.")

SECOND CIRCUIT

Gilles v. Repicky, 511 F.3d 239, 247 (2d Cir. 2007) ("The district court found 'arguable probable cause' based on 'the awareness of a high level of terrorism alert, and the report that the license plate was stolen, together with his observation of fifty-five gallon drums covered with a blanket in an overweight vehicle headed towards New York City.' *Gilles*, 2006 WL 360171 at *4. The district court noted additionally the fact that Gilles slowed down to the posted speed limit when a marked patrol car approached. . . The problem with the district court's analysis is that these factors supported the initial stop and a brief investigative detention. Repicky himself did not believe that he had probable cause based on the facts known to him at the point Gilles was released from handcuffs and then asked or told to go to the police station. . . . Once the factors giving rise to the stop were investigated, and produced no reason to conclude that Gilles had committed a crime (other than speeding), the most Repicky retained were suspicions. No reasonable officer could conclude that he had probable cause to arrest Gilles at that point, and accordingly Repicky is not immune from suit on this basis.").

Green v. City of New York, 465 F.3d 65, 83, 84 (2d Cir. 2006) ("We hold that it was clearly established at the time of the incident under review that a competent adult could not be seized and transported for treatment unless she presented a danger to herself or others. . . . [T]he jury could conclude that, based on information readily available to Giblin, no reasonable officer would have concluded that Walter was incompetent to make decisions concerning his treatment or a threat to himself or others. . . We conclude that there are factual issues relevant to qualified immunity on Walter's Fourth Amendment seizure claim against Giblin and therefore reverse the district court's dismissal of this claim.")**.**

Jones v. Parmley, 465 F.3d 46, 61-63 (2d Cir. 2006) ("The court below appears to have extrapolated from *Atkins* the legal proposition that 'unless State Defendants had probable cause for the arrests that they made, any force that they used in making those arrests was excessive.' . . . The *Atkins* court clearly did not intend to create or substitute a new standard for arrests lacking probable cause, and the reasonableness test established in *Graham* remains the applicable test for determining when excessive force has been used, including those cases where officers allegedly lack probable cause to arrest. This Court has remanded cases where a district court failed to reach an issue of qualified immunity, . . . but we have also addressed the merits of the issue itself on appeal, especially 'where the record plainly reveals the existence

of genuine issues of material fact relating to the qualified immunity defense.'. . Because the extensive factual record reveals that material issues already exist concerning the excessive force claims which the district court did not dismiss, . . . we see no reason to remand this issue here, where as a matter of law, defendants would not be entitled to qualified immunity on the facts as alleged by plaintiffs. . . . In sum, after conducting a de novo review, we hold that the district court's ultimate determination in denying defendants' motion for summary judgment on the excessive force claims was correct despite its understandable reliance on dicta in *Atkins*.").

Lonegan v. Hasty, 436 F.Supp.2d 419, 432, 433 (E.D.N.Y. 2006) ("In addition to the Wiretap Act itself and the cases discussed above, the federal regulation prohibiting prison officers from monitoring attorney-client meetings except under narrow circumstances not present here would have put a reasonable officer in Hasty's position on further notice that surreptitious recording of plaintiffs' meetings with Detainees was unlawful. . . .The December 18, 2001 memorandum, advising wardens that audio-taping attorney meetings with Detainees was prohibited, would have provided a reasonable warden with additional notice that recording plaintiffs' communications with Detainees was beyond the legitimate scope of his or her duties. In sum, on the face of the complaint, no reasonable officer in Hasty's position could have believed that recording plaintiffs' communications with Detainees without prior judicial authorization was permitted by the Wiretap Act. Accordingly, Hasty is not entitled to qualified immunity with respect to plaintiffs' Wiretap Act claims.")

Lonegan v. Hasty, 436 F.Supp.2d 419, 439 (E.D.N.Y. 2006) ("In sum, at the time of the events at issue in this case, it was clearly established in this Circuit that plaintiffs had a constitutionally protected reasonable expectation of privacy in their communications with Detainees. A reasonable warden in Hasty's position would have been aware of the policies and regulations of his or her own agency prohibiting prison officers from recording attorney-client communications except under narrow circumstances not present here. A reasonable warden would also have been aware of the Wiretap Act's prohibition on the interception of oral communications, created, in part, to comply with the requirements of the Fourth Amendment, and the case law discussed above confirming that the Wiretap Act applies within the prison setting. And he or she would have been aware not only of the decisions in *Berger*, *Katz*, *Keith*, and *Mitchell*, but also of the decisions in *State Police Litigation*, which serve to eliminate any possible doubt that the act of recording conversations that took place in the Visiting Area between plaintiffs and Detainees violated the Fourth Amendment. Accordingly, on the facts alleged in the complaint, Hasty is not entitled

to qualified immunity with respect to plaintiffs' Fourth Amendment claims.")

Cipes v. Graham, 386 F.Supp.2d 34, 41, 42 (D. Conn. 2005) ("Having found the defendant's conduct as alleged to be unconstitutional, the next inquiry is whether the law was 'clearly established,' which must be determined in the specific context of the case, not as a broad, general proposition. . . .The defendant points to the absence of any controlling case in which it has been held unreasonable to serve a misdemeanor warrant on a suspect at night, while plaintiff argues that the qualified immunity test is not limited to whether a case specifically addresses the facts of the case at bar, otherwise 'public officers [could] commit statutory violations so outlandish that they never have been the subject of a published appellate decision.' . . In some rare cases where the constitutional violation is patently obvious, plaintiff argues, it is unnecessary to identify judicial precedent to defeat qualified immunity. Plaintiff contends that midnight warrant executions are 'so rare' that this is such a case. The Court disagrees. . . . The violation alleged here clearly is not as obviously unconstitutional as the use of the hitching post in *Hope*. While police 'rousting' Cipes out of bed may have been frightening and degrading, it comes nowhere near the egregious conduct of the guards in *Hope*, which subjected the inmate to physical pain and extreme loss of dignity for hours. Moreover, the law applicable to this case is far from 'clearly established.' No Supreme Court or Second Circuit case exists which presents a circumstance similar or analogous to a nighttime execution of a misdemeanor arrest warrant with no exigent circumstances and no statutory or regulatory restrictions. Nor can it be concluded that reasonable police officers in defendant's position would have clearly understood from the existing law that their conduct was unlawful. In the absence of any controlling caselaw bearing on similar circumstances so as to have framed this issue with sufficient precision to put reasonable law enforcement officials on notice of the constitutional infirmity of such a nighttime misdemeanor warrant execution, the defendant is entitled to qualified immunity.").

THIRD CIRCUIT

Gilles v. Davis, 427 F.3d 197, 206, 207 (3d Cir. 2005) ("Taking account of the entire episode and the information Davis possessed at the time, we hold Davis is entitled to qualified immunity because it would not have been clear to a reasonable officer that Gilles did not engage in disorderly conduct. . .While the Court of Common Pleas held Gilles' speech was insufficient to constitute disorderly conduct, it does not necessarily follow that the arresting officers are civilly liable for the arrest. Qualified

immunity encompasses mistaken judgments that are not plainly incompetent. . . Under qualified immunity, police officers are entitled to a certain amount of deference for decisions they make in the field. They must make 'split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving.'").

Harvey v. Plains Township Police Department, 421 F.3d 185, 193, 194 (3d Cir. 2005) ("Our dissenting colleague argues that our conclusion runs afoul of *Anderson v. Creighton* . . . because Dombroski 'could have believed that his conduct was lawful in light of the information in his possession.' We certainly agree, as we must, that *Creighton* requires a particularized inquiry, involving consideration of both the law as clearly established at the time of the conduct in question and the information within the officer's possession at that time. However, we part ways when considering whether the information in Dombroski's possession could reasonably have supported the belief that his actions were constitutional. As an initial note, there is no need to 'particularize' the Fourth Amendment right implicated here beyond 'the basic rule, well established by [Supreme Court] cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.' . . . As in *Groh*, there was no exigency here, and the *Groh* Court rejected, over a dissent, the notion that 'ample room' must be made for mistaken judgments of law or fact in cases in which no exigency exists. . . Thus, the simple question we are faced with is whether it was reasonable for Dombroski to infer consent from the knowledge in his possession. Our dissenting colleague notes that 'there is a presumption that a properly mailed item is received by the addressee.' However, we do not see how Dombroski could reasonably infer from the presumption of mailing that Harvey consented to anybody entering her apartment.'. . Our colleague seems to question what Dombroski should have done 'at what he understood to be a long prearranged appointment.' He should have done exactly what he was dispatched to do-keep the peace-and not affirmatively aid in the removal of property from Harvey's apartment. We stress that, at this stage, we must take for a fact that the officer ordered the landlord to open the door. This, and only this, is the action we find to be unreasonable, and clearly so.").

Bennett v. Murphy, 120 Fed. Appx. 914, 2005 WL 78581, at **3- 6 (3d Cir. Jan. 14, 2005) ("At the outset we recognize that there is a degree of 'duplication inherent in [*Saucier' s*] two-part scheme' as applied to excessive force cases. . . That is, the question whether the amount of force an officer used was unreasonable and violated the Fourth Amendment may be viewed as blending somewhat into the question whether the officer reasonably believed that the amount of force he used was lawful.

But *Saucier* makes clear that the two inquiries are distinct: Even where an officer's actions are unreasonable under *Graham*'s constitutional standard (as *Bennett II* held was true of Murphy's conduct), that officer is still entitled to immunity if he or she has a reasonable 'mistaken understanding as to whether a particular amount of force is legal' in a given factual situation . . . Murphy thus asserts that even assuming his actions were constitutionally unreasonable, he made a reasonable mistake as to the legality of those actions. To support that assertion he puts forth two related arguments. First, he contends that *Garner*'s 'immediate threat' standard, while clearly established, offered no guidance in the particular situation he faced. In that respect we are of course mindful of the principle, which the Supreme Court recently reaffirmed in *Brosseau v. Haugen* . . . that the inquiry whether an injured party's constitutional right was clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' Applying that principle, *Brosseau* . . . stated that *Graham* and *Garner* 'are cast at a high level of generality' and provided little guidance as applied to the situation confronting the officer in that case: 'whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.' We agree of course that *Graham* and *Garner* set out a standard that is general in nature in the context addressed in *Brosseau*. And we also agree with the District Court that there are circumstances, such as those in *Brosseau*, in which the 'immediate threat' standard may be 'subject to differing interpretations in practice' . . . . But we cannot say that the *Graham* and *Garner* 'immediate threat' standard is lacking in adequate substantive content as applied to the very different situation that Murphy addressed in Bennett's factual scenario: whether to shoot an armed distraught man who, although refusing to drop his weapon over the course of an hour-long standoff, had never pointed his single-shot shotgun at anyone but himself and who was not in flight at the time he was shot . . . As *United States v. Lanier*, 520 U.S. 259, 271 (1997) teaches, 'general statements of the law are not inherently incapable of giving fair and clear warning' to public servants that their conduct is unlawful. And because (as we held in *Bennett II*) the facts alleged by Bennett disclose no basis from which to conclude that David posed an immediate threat to anyone but himself, we conclude that this case is one in which the 'general constitutional rule already identified in decisional law ... appl[ies] with obvious clarity to the specific conduct in question' . . . Murphy's second and related argument is that in light of what he terms 'similar' cases involving deadly force, his mistaken application of the 'immediate threat' standard was reasonable. Murphy cites two of those cases, *Montoute* and *Leong*, in support of the proposition that he reasonably believed David could lawfully be shot because he had a weapon and refused to put it down. But in

reality neither of those cases calls into question the rule, recognized as clearly established prior to this incident by the Ninth Circuit *in Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.1997), that under *Graham* and *Garner* '[l]aw enforcement officers may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.' . . . Murphy cites a number of other cases in his brief in attempted support of his contention that he could not reasonably understand what the law required in the circumstances he faced. To the contrary, the contrast between the situations confronting the officers in those cases . . . and the scenario in this case actually point in the opposite direction. On the facts as we must credit them, Murphy acted precipitately at a time and under circumstances totally lacking in the urgency posed by all of those cases: More than an hour had passed during the standoff with David, a period throughout which he had threatened to harm no one but himself; and when Murphy chose that instant to shoot to kill, David was at a standstill 20 to 25 yards from the nearest officer and fully 80 yards from Murphy himself. Surely Murphy cannot rely on such cases, all of them involving suspects who unquestionably posed an immediate threat of physical harm to police, in support of the contention that he reasonably believed it was lawful to shoot David, who posed no such threat. To be sure, those other cases may illustrate that the concept of excessive force 'is one in which the result depends very much on the facts of each case' [citing *Brosseau*] But as we have already explained, the facts alleged by Bennett, which we take as true for purposes of the qualified immunity inquiry, are such that any reasonable officer would understand, without reference to any other case law, that *Graham* and *Garner* prohibited shooting David. For that reason we conclude that Murphy is not entitled to qualified immunity.").

Morais v. City of Philadelphia, No. 06-582, 2007 WL 853811, at *7, *8 (E.D. Pa. Mar. 19, 2007) ("Plaintiff's primary contention, however, is that Defendants' actions in breaching the apartment unreasonably created the need for the use of deadly force. Although, Defendant [sic] has potentially stated a Fourth Amendment violation for the shooting, the court will decline to decide whether such a claim can be successful, because such a right was not clearly established. . . . Assuming Plaintiff could establish a violation of the Fourth Amendment under the theory that the officers' actions unreasonablely created the need for deadly force, such a theory was not clearly established law. In arguing that Defendants' reckless actions and violations of police policy created the need for deadly force, Plaintiff attempts to blend his Fourth Amendment excessive force analysis with a claim under the Fourteenth Amendment state-created danger doctrine. The Third Circuit has deferred deciding 'for another day' whether a police officer's actions that create the need for deadly

force may establish a Fourth Amendment violation. . . The Circuits that have addressed this issue have reached different conclusions. . . . Thus, as the Third Circuit has not yet adopted this approach, and other circuits have disagreed about its application, it cannot be said the officers violated a clearly established constitutional right.")

FOURTH CIRCUIT

Orem v. Rephann, 523 F.3d 442, 447, 448 (4th Cir. 2008) ("While we recognize that 'not every push or shove, even if it may later seem unnecessary' is serious enough to entail a deprivation of a constitutional right, . . . the facts, here, when viewed in a light most favorable to Orem, evidence that Deputy Rephann's use of the taser gun was wanton, sadistic, and not a good faith effort to restore discipline. Orem's behavior without question was reprehensible, but Deputy Rephann's use of the taser was an 'unnecessary and wanton infliction of pain.'. . . Nevertheless, Deputy Rephann argues that summary judgment is proper because Orem only suffered *de minimus* injury. Although *de minimus* injury can foreclose a Fourteenth Amendment claim, the district court properly recognized that Orem's injury consisted of far more than the resulting sunburn-like scar. . . . While Deputy Rephann makes much of the fact that the taser was only applied for 1.5 seconds, Orem did experience electric shock, pain, and developed a scar. . . . Because the facts, taken in a light most favorable to Orem, show that Deputy Rephann inflicted unnecessary and wanton pain and suffering, Orem has alleged a violation of her Fourteenth Amendment right to be free from excessive force. . . . Notwithstanding the qualified immunity standard's ample room for mistaken judgments, there is evidence bearing heavily against Deputy Rephann that, in these circumstances, the taser gun was not used for a legitimate purpose; such as protecting the officers, protecting Orem, or preventing Orem's escape. . . . Rather, Deputy Rephann used the taser to punish or intimidate Orem--a use that is not objectively reasonable, is contrary to clearly established law, and not protected by qualified immunity.").

Ingle v. Yelton, 2008 WL 398327, at *4, *5 (4th Cir. Feb. 14, 2008) ("The record reveals the following undisputed facts. The defendants knew that: (1) Christopher was suspected in a domestic shooting; (2) Christopher had fled arrest and engaged in a high speed chase; (3) moments earlier, Christopher had pointed his shotgun at an officer and refused to surrender; (4) finally, and crucially, all available evidence indicates that Christopher was lowering or pointing his shotgun at the officers when they began firing; none of Ingle's evidence suggests otherwise. A reasonable officer

at the scene would have had probable cause to believe that Christopher posed a threat of serious physical harm. Even if the car window was closed and did interfere with his aim, '[t]he car window was no guarantee of safety when the pointed gun and the officers at whom it was aimed were in such close proximity.' *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir.1996). Because no constitutional violation occurred, the defendants are entitled to qualified immunity and summary judgment.")

Estate of Rodgers v. Smith, No. 05-1382, 2006 WL 1843435, at *7 (4th Cir. June 26, 2006) (not published) ("Even if the second volley of shots were unconstitutional, that unconstitutionality was by no means clearly established as of April 15, 2002. *Waterman* required us to decide whether it was clearly established in November 2000 that an officer may not use deadly force in the seconds after a serious threat had abated. . . We concluded that although other circuits had reached this conclusion prior to the relevant time, the Fourth Circuit had not. . . In light of the uncertainty of the law existing at the time of the incident, we held that the unconstitutionality of the use of force in the seconds after a threat has abated was not clearly established. . . Because the law on this point did not become clear until 2004, when *Waterman* was decided, we conclude that even if Officer Waters had violated the Constitution, he would be entitled to qualified immunity on the basis that the unconstitutionality of his actions was not clearly established at the time of the incident.").

McKinney v. Richland County Sheriff's Dep't., 431 F.3d 415, 418 n.2, 419 (4th Cir. 2005) ("The district court erroneously concluded that '[t]he assessment of whether the officer's conduct violated a constitutional right requires the court to determine whether an objective law officer could reasonably have believed probable cause to exist, not whether probable cause for the warrant did in fact exist.' . . The question at stage one of the qualified immunity analysis is not whether the officer was reasonable, but whether a constitutional right was violated. If the warrant was supported by probable cause, then McKinney's Fourth Amendment rights were not violated, regardless of whether Livingston's belief that there was probable cause was reasonable. . . . Even if we were to conclude that the warrant was not supported by probable cause, Livingston would nonetheless be entitled to qualified immunity because the absence of probable cause would not have been evident to an objectively reasonable officer in these circumstances. . . Both a prosecutor and a neutral and detached magistrate independently reviewed the evidence and concluded that there was probable cause. A reasonable officer would not second-guess these determinations unless probable cause was plainly lacking, which it was not.").

Turmon v. Jordan, 405 F.3d 202, 208 (4th Cir. 2005) ("We conclude that on March 10, 2001, it would have been clear to a reasonable officer that he could not point his gun at an individual's face, jerk him from his room, and handcuff him when there was no reasonable suspicion that any crime had been committed, no indication that the individual posed a threat to the officer, and no indication that the individual was attempting to resist or evade detention. The contours of the Fourth Amendment right to be free from excessive force during a seizure were set forth sixteen years ago by the Supreme Court in *Graham,* 490 U.S. at 396-97, 109 S.Ct. 1865. In addition, over the years this court has addressed the propriety of the use of force comparable to that used by Deputy Jordan, and we have consistently found such force to be proper only in situations in which there was at least reasonable suspicion to believe criminal activity was afoot. . . Because the facts alleged show that Jordan violated Turmon's Fourth Amendment right to be free from seizures carried out by excessive force and because that right was clearly established at the time, Jordan is not entitled to qualified immunity on the excessive force claim.")

Waterman v. Batton, 393 F.3d 471, 480-83 (4th Cir. 2005) ("In sum, the officers here were faced with a suspect well positioned to seriously injure or kill one or more of them with his vehicle--possibly within a fraction of a second--if they did not employ deadly force. According to the best information available, the suspect had used his vehicle as a weapon against another officer just minutes before. Based on this information and the other factors discussed, we hold as a matter of law that a reasonable officer could have believed at the instant of acceleration that Waterman presented a threat of serious physical harm. Appellants thus were entitled to qualified immunity regarding the initial group of shots. . . The Estate maintains that even if the initial shots were justifiable, the same was not true of the shots fired after Waterman's vehicle passed the officers and the officers were out of danger (the subsequent shots). . . . We . . . hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated. . . .Applying this principle here, we conclude that the record, viewed in the light most favorable to the Estate, shows that once Waterman's vehicle passed the officers, the threat to their safety was eliminated and thus could not justify the subsequent shots. A factfinder could reasonably conclude that as the officers pursued Waterman's vehicle, they knew or should have known that Waterman had passed them without veering in their direction. Under these circumstances, a reasonable factfinder could determine that any belief that the officers continued at that point to face an imminent threat of serious physical harm would be unreasonable. . . Having determined that the record, when viewed in the light most favorable to the Estate, shows that the

subsequent shots were unconstitutional, we now consider whether that unconstitutionality was clearly established on November 28, 2000, when the shooting occurred. We conclude that it was not and thus that Appellants were entitled to qualified immunity for the subsequent shots as well. . . . There is no relevant distinction between the facts in *Pittman* and those here. In both cases, the officers employing deadly force had information that the suspect had recently assaulted an officer with his vehicle. Also, both cases presented tense, rapidly changing situations, where the threat justifying the use of deadly force ended only seconds before the shots in question were fired. In light of our holding that Nelms' use of deadly force was not excessive under law that was clearly established in May 1992, the same must be true of the subsequent shots here. . . . The question thus becomes whether the excessiveness of the force employed here, although unclear in May 1992, was nonetheless clarified prior to November 28, 2000. We conclude that it was not. We have already noted that other circuits decided during this period that a passing risk to an officer does not authorize him to employ deadly force moments after he should have recognized the passing of the risk. [citing cases] However, this circuit did not. Indeed, as we have discussed, we issued a decision, *Rowland,* that was susceptible to the reading that an application of force that extends for but a few seconds cannot be parsed into temporal segments for the purpose of reviewing each act in light of the information the officer had at that moment. . . Considering the uncertainty created by *Pittman* and *Rowland* regarding whether an officer may legally employ deadly force in response to a threat of serious harm moments after he should have known that the threat had been eliminated, we hold that the unconstitutionality of the subsequent shots was not clearly established in Maryland in November 2000.").

Waterman v. Batton, 393 F.3d 471, 483, 484 (4th Cir. 2005) (Motz, J., dissenting) ("The hazards of police work simply do not authorize officers to engage in the unbridled use of force. No matter how exasperated an officer becomes, the Constitution does not permit him to shoot a motorist for speeding--unless a reasonable officer in the same position would have had probable cause to believe it necessary to protect himself or others from 'a threat of serious physical harm.'") . . . In this case, Officers Michael Batton, Kenneth Keel, and Christopher Heisey fired nine rounds of ammunition at a car driven by Josh Waterman, who sustained five gunshot wounds and died rapidly from those injuries. Ten minutes before the shooting, Josh Waterman had driven 51 m.p.h. in a 25 m.p.h. zone and failed to stop when signaled to do so by officers in squad cars, which may well have exasperated them. However, by the time of the shooting, Josh Waterman was neither speeding nor driving erratically--rather, he was passing through a toll plaza at 11 to 15 m.p.h.; and

several eyewitnesses have sworn that none of the law enforcement officers at the toll plaza were in danger of being hit by Josh Waterman's car. The video of the shooting could well be interpreted as supporting or, at the very least, not definitively negating these accounts. A jury could, nonetheless, conclude that a reasonable police officer, confronted with the situation facing Officers Batton, Keel, and Heisey, would have acted as they did or would not have realized that shooting Josh Waterman violated the Constitution. [citing *Saucier*] But so finding would require resolution of several genuine disputes of material fact, which we can no more resolve on interlocutory appeal than the district court could when ruling on the officers' motion for summary judgment.").

FIFTH CIRCUIT

Hathaway v. Bazany, 507 F.3d 312, 322 (5th Cir. 2007) ("The evidence before us--and the lack of specific facts to the contrary--requires a conclusion that Bazany fired his weapon and was struck by the Mustang in near contemporaneity. The only remaining question, then, is whether an officer would be justified in firing his weapon when threatened by a nearby accelerating vehicle, even if, owing to the limited time available to respond, the shot was fired when or immediately after the officer was hit. . . The evidence indicates that Bazany was in close proximity to a car that he had asked to pull over that then accelerated towards him, making perception of a serious threat reasonable. Given the extremely brief period of time an officer has to react to a perceived threat like this one, it is reasonable to do so with deadly force. . . It is this brevity, and the coordinate rapid response that it demanded from Bazany, that is the distinguishing factor in this case. This is not an instance, as in *Waterman*, where an officer fired after the perception of new information indicating the threat was past. Instead, the entirety of the officer's actions were predicated on responding to a serious threat quickly and decisively. That his decision is now subject to second-guessing--even legitimate second-guessing--does not make his actions objectively unreasonable given the particular circumstances of the shooting. . . . Because Bazany's actions were objectively reasonable, we conclude that he did not violate Jon-Eric Hathaway's Fourth Amendment rights.")

Mack v. City of Abiline, 461 F.3d 547, 555, 556 (5th Cir. 2006) ("Appellees' search of a car in an open parking lot without a search warrant, without probable cause, without a concern for officer safety, and without consent violates clearly established law. A reasonable officer would not think the Constitution allows a random search of a vehicle where none of the above justifications apply.").

Martinez-Aguero v. Gonzalez, 459 F.3d 618, 626, 627 (5th Cir. 2006) ("Gonzalez could argue that Martinez-Aguero's Fourth Amendment rights were not clearly established because courts have split on the precedential value of *Verdugo-Urquidez*; because it is uncertain how the Court intended the 'substantial connections' test to be applied; and because the Court seemed explicitly to reserve the question whether illegal aliens would have Fourth Amendment rights on U.S. soil. . . But, decisions pre-dating *Verdugo-Urquidez*, including cases from this circuit, state unequivocally that aliens are entitled to Fourth Amendment protection. . . Also, the inquiry into whether rights are clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' . . If Martinez-Aguero deserves any Fourth Amendment or due process protection at all, it surely must extend to the right to be free of entirely meritless arrests and the excessive use of force. *Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez-Aguero alleges.The logic of *Lynch* applies equally to arresting an alien without cause . . . .This reasoning is particularly compelling when an alien has made a good-faith effort to comply with federal requirements for obtaining a temporary visa and has made frequent use of a border-crossing card to visit the country in the past. On these facts, no officer would reasonably conclude that Martinez-Aguero lacked protection against suspicionless arrest.").

Pasco v. Knoblauch, No. 1:03CV179, 2008 WL 660430, at **4-8 (N.D. Miss. Mar. 6, 2008) ("Regardless of whether Defendant is procedurally precluded from asserting qualified immunity, the Court notes that the Defendant would not be protected by this defense even if it was timely made. Taking the facts in the light most favorable to the non-movant, as we must, if Knoblauch did bump Pasco off the roadway, the law was clearly established, as of the date of the accident in 2000, that it was a constitutional violation for an officer to use his car to effectuate deadly force for a traffic violation. . . . Because the incident at issue here occurred in 2000, we must analyze Officer Knoblauch's qualified immunity in light of the law in the year 2000. . . . The law regarding the reasonableness of police seizures for the year 2000 can be stated in this way: the use of deadly force may not be used to seize a fleeing felon 'unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' . . Furthermore, the Court concluded that 'the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.'. . Here, Knoblauch was chasing Pasco on the belief that Pasco was

intoxicated and ran a stop light. These facts are not sufficient to prove that the suspect posed a significant threat of death or serious physical injury to the officer or others. Under an objective view of the facts of this case, little dispute exists that the ramming of Pasco's car could constitute a use of 'deadly force' and that a jury could so reasonably conclude. Moreover, Knoblauch was expressly told to terminate the pursuit by his supervising officer and was outside the bounds of his jurisdiction. . . . Accordingly, the ramming of Pasco's car into an embankment cannot be said to be objectively reasonable in light of the clearly established Supreme Court precedence holding that using a police car to run a suspect off the road in order to seize that person is unconstitutional and unreasonable. . . . Here, the Defendant asserts that the United States Supreme Court case, *Scott v. Harris*, establishes that bumping a suspect's car off the road does not constitute a violation of the Fourth Amendment where the police are attempting to end the chase in order to protect public safety. . . Accordingly, we summarize *Scott* below and compare the facts *sub judice* with that seminal case. . . . The case *sub judice* is clearly distinguishable from the factual situation in *Scott* in a most important way: Officer Knoblauch's supervising officer terminated the pursuit prior to Pasco's accident. The officer in *Scott* had direct permission from his supervisor to continue the chase and perform a maneuver to stop the suspect from fleeing. Assuming the facts asserted by the Plaintiff are true as required for the summary judgment standard, if Knoblauch did cause this accident, it was in direct violation of his supervising officer's orders. Therefore, Officer Knoblauch, in not terminating the pursuit, was acting contrary to police department protocol, whereas, the deputy in *Scott* had full authority to take actions necessary to end the high speed chase. As Officer Knoblauch does not have the protection of qualified immunity for the reasons set forth above, he does not have the benefit of the *Scott v. Harris* ruling.")**.**

Broussard v. Louisiana State Police, CIV A 05-0574, 2006 WL 3375398, at *6 & n.4 (W.D. La. Nov. 20, 2006) ("Defendants contend that they are entitled to qualified immunity because McFarland was in danger of death or serious bodily injury, and it was certainly not 'clear to a reasonable officer that [the] conduct [of Woodard] was unlawful in the situation [he] faced.' Defendants point out that Plaintiff's vehicle was in such close proximity to McFarland's vehicle, a fragment of glass from his headlight landed on the hood of McFarland's car after Woodard's first shot. While Plaintiff has testified by affidavit that he did not intend to hit any vehicle and that he did not point his vehicle at any of the officers' vehicles, Defendants argue that his testimony cannot raise a genuine issue of material fact when he was admittedly high on crack cocaine at the time of the pursuit. In support of their argument, Defendants

have cited to *Brosseau* and suggested that, like the officer in that case, it was not clear to Woodard that he was violating Plaintiff's constitutional rights. The Court disagrees. First, as pointed out by Plaintiff, this case is distinguishable from *Brosseau* because there are disputed issues of fact. At the summary judgment stage, even under the qualified immunity standard, the Court is required to view those facts in the light most favorable to Plaintiff. . . . If a jury were to believe Plaintiff's version of events, then Woodard was faced with the following situation: whether to use deadly force to seize a suspect who had possibly committed a misdemeanor traffic offense by having an expired temporary tag, fled from an officer in a chase that did not exceed the speed limit, was not endangering any civilians at the time of the shooting, was not endangering any officers, and with no information that the suspect was armed or otherwise dangerous. Under these circumstances, it is clear, under *Garner* and *Graham*, that Woodard's decision to use deadly force was a violation of Plaintiff's constitutional rights, and he is not entitled to summary judgment on the basis of qualified immunity. . . . Even if *Brosseau* were applied, the facts in this case are distinguishable from the 'hazy' situation faced by officer Brosseau: (1) officers had no knowledge that Plaintiff was a convicted or 'disturbed' felon or had any outstanding warrants, (2) officers did not believe Plaintiff to be armed (and he was not), (3) no civilians were present or in potential danger, and (4) no officers were on foot or unaccounted for. Similarly, if this case required particularized review, the Court's consideration of the case law available at the time of the incident shows that Woodard's actions were a clear violation of Plaintiff's Fourth Amendment right. *See, e.g.*, *Vaughn v. Cox*, 343 F.3d 1323 (11th Cir.2003); *Abraham v. Raso*, 183 F.3d 279 (3rd Cir.1999); *McCaslin v. Wilkins*, 183 F.3d 775 (6th Cir.1999). In each of these cases, the circuit courts denied summary judgment, and, at least in *Vaughn* and *McCaslin*, the suspect's conduct was more egregious than that of Plaintiff. In reaching this conclusion, the Court expresses no opinion as to whether Plaintiff's version of events will be found credible by the jury, only that Plaintiff has raised sufficient issues of fact for trial. Defendants' Motion for Summary Judgment on the Section 1983 claims against Woodard is DENIED.").

Brown v. Faison, No. Civ.A. 6:04-CV-016-C, 2005 WL 473681, at *6, *7 & n.12 (N.D. Tex. Mar. 1, 2005) (not reported) ("The greater the uncertainties of the situation, the greater the tolerance the general standard allows for reasonable mistakes about what is lawful. However, 'qualified immunity is not appropriate when the *Graham* analysis yields an answer that is clear beyond all reasonable doubt.'. . This Court is of the opinion that this general standard alone, without greater particularity, is sufficient to put a reasonable officer on notice that he may not use

anything greater than minimal force to arrest an individual for a minor crime, where that individual is not resisting arrest and poses no threat of danger to the officer or anyone else at the time the force is applied. . . Under these circumstances and in a situation that is not otherwise 'tense, uncertain, and rapidly evolving,' which describes the facts of the instant case when viewed in the light most favorable to Plaintiff, no factor exists that would move the calculus of reasonableness into the hazy border area between excessive and acceptable force. . . Rather, in such a situation the general standard is sufficient to give fair and clear warning that the only appropriate level of force is none at all or a very minimal degree at most. Even though Faison's actions were within the bounds of reasonable conduct when he reached into Plaintiff's car and placed his hands on her to effect the arrest, no reasonable officer could possibly believe that, under the circumstances alleged, he possessed the lawful authority to hit her in the face, kick her leg, and grab her arms tight enough to cause bruising. If we accept Plaintiff's allegations regarding Faison's use of force in the face of no resistance, then this Court must conclude that Faison's actions were not those that a reasonable officer would have believed were lawful. . . . Despite Faison's contention that 'in the heat of the moment,' Plaintiff could have reached for a concealed weapon (even though one did not exist), nothing in the situation as even he alleges it developed would indicate that it was objectively reasonable to believe such an occurrence was likely. From the perspective of Plaintiff's allegations, the tenseness of the situation appears to be largely Faison's creation, and not the result of her actions. While this Court is not crediting Plaintiff's allegations for any purpose other than the creation of a material fact issue, the Court is reluctant to throw the mantle of qualified immunity over an officer's actions, where those actions may be the unilateral cause of a 'tense, uncertain, and rapidly evolving' situation. Based on Plaintiff's allegations, the situation was far from that 'hazy border' where reasonable officers might disagree about the line between excessive and necessary force or about what particular force might be lawful under clearly established case law. . . . However, this Court does not need to rest its opinion on the general standard alone. At the level of greater particularity, the Fifth Circuit has sustained a jury's determination that an officer acted unreasonably and with excessive force against a woman who did not resist and did not pose any threat, when, after pursuing and stopping her for avoiding a checkpoint, the officer injured the woman by grabbing her by the arm, yanking her from her car, and spinning her around, causing her injury. *Brown v. Bryan County, Okla.*, 67 F.3d 1174, 1179-80 (5th Cir.1995), *vacated on municipal liability but not qualified immunity grounds*, *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). . . Other circuit courts had reached similar conclusions at

the time Faison is alleged to have acted unreasonably. [citing cases] Quite simply, the general standard regarding reasonable force, as well as the particular holdings of cases from this and other circuits, was sufficient at the time of the alleged incident to put Faison on notice that his conduct, when viewed in the light most favorable to Plaintiff, was not lawful.").

Barlow v. Owens, No. Civ.A. G-04-557, 2005 WL 1719699, at **4-6 (S.D. Tex. July 22, 2005) ("Although the Court believes that Defendants are entitled to qualified immunity, in part because of the difficult standard a plaintiff must meet to overcome that immunity, the Court does respectfully note two serious systemic apprehensions about this case. First, the Court has noticed an escalating series of allegations in both the press and the filings in this Court revolving around claims of local police brutality and insensitivity. The Court certainly cannot decide this case on that basis, but as the local federal tribunal, the Court feels that it is important to bring to the attention of the Galveston Police Department the need for sensitivity and training in these areas. . . . Should it become evident that a widespread pattern of abuse of the power to effect warrantless arrests for misdemeanors exists, that would undermine part of the factual basis for the *Lago Vista* decision. . . . The Court's second concern is a broader apprehension about the rapidly burgeoning judicial sanction of warrantless searches and seizures. . . This is only the Court's respectful opinion, because the Court understands that unlike the Courts of Appeal or Congress, it is not a policy-making organ. However, the Court wants to note that judicial sanction of searches and seizures based entirely on a perceived need for strict law enforcement, rather than on constitutional principles, is the first step down the slippery slope to a police state, and this is especially true in circumstances of wide apprehensions arising from acts of terror. Precedent is often created by cases in which police have had to deal with obnoxious and genuinely criminal citizens, but by deciding these cases without reference to the broader picture of a generally law-abiding populace deserving of constitutional protection creates an environment in which real abuse can occur. We live in a seriously troubled world, and the easy response to threats of violence and crime is to erode rights in an attempt to find safety. In the end, however, a heavy-handed approach only results in our loss of both. This case is a good illustration of the Court's concerns. By looking at the events step by step, the Court can trace the chain of legal (or at least arguably legal) behavior by Defendants, and this is all that is required to establish qualified immunity. At first glance, though, it seems absurd that a neighbor's report of some obnoxious but non-violent behavior by a teenage boy would result in such a violent arrest. . . Defendants have not pointed to any fact showing that they believed Moncebaiz constituted a genuine physical

danger to themselves or others, at least until they tried to arrest him. Moncebaiz retreated to what was, for him, his home-he had nowhere else to go. A community needs police officers who zealously pursue criminals and suspected criminals. However, those officers should remember that the Constitution is the supreme law of the land; it is their duty to uphold that law as much as it is their duty to uphold laws against trespassing and disturbing the peace. If they fail to obey the law set forth in the Constitution, they are no better than the criminals they pursue. . . . The public must be able to trust the police to abide by the law and to respect the constitutional rights of all citizens. The Bill of Rights is no safeguard if the government and its agents choose to ignore it. Therefore, while the Court finds that Defendants are entitled to qualified immunity on Plaintiff's § 1983 claims, the Court urges Defendants and the Galveston Police Department to give thoughtful consideration to their ever-present obligation to uphold the Constitution and to protect the rights of all citizens.")

Ham v. Tucker, No. SA-01-CA-0837-RF, 2005 WL 356836, at *3, *5 (W.D. Tex. Jan. 31, 2005)(not reported) ("The incident before this Court occurred in September 1999, but the state of case law regarding excessive force was virtually identical to that which the Supreme Court had found to be unclear. As a result, this Court's earlier resolution of the qualified immunity question before it on Defendants' motion for summary judgment reflected this lack of clarity. Since 'the focus [in qualified immunity] is on whether the officer had fair notice that her conduct was unlawful,'. . . the Supreme Court's decision in *Brosseau* warrants a second review of Defendant Tucker's motion for summary judgment. . . . Under *Brosseau* then, it was not clearly established at the time of the incident in question that Deputy Tucker's conduct violated the Fourth Amendment. Since the focus is on whether Tucker had fair notice that his conduct was unlawful and the existing case law did not provide this notice, the Court is constrained to conclude that he did not have notice that his conduct violated the Constitution. . . The defense of qualified immunity thus shields Deputy Tucker from suit under the Fourth Amendment because he made a decision that, even if constitutionally deficient, reasonably misapprehended the law governing the situation with Ham that confronted him on the day in question. . . As a result, Deputy Tucker is entitled to a defense of qualified immunity and the Court hereby reconsiders its earlier denial of summary judgment on this point. As a result, the Court will grant Defendant's motion for summary judgment as to Plaintiff's Fourth Amendment claims against Deputy Tucker.").

SIXTH CIRCUIT

Dunn v. Matatall, No. 08-1094, 2008 WL 5046912, at **2-4 (6th Cir. Dec. 1, 2008) ("Although conceding that the videotape is an accurate account of the events surrounding the arrest, Dunn argues that the district court erred in granting summary judgment to the Officers because the question of whether the Officers used excessive force should be answered by a jury. . . . The Supreme Court recently clarified the summary-judgment standard for excessive-force claims, rejecting the argument that the question of objective reasonableness is 'a question of fact best reserved for a jury.' . . . Dunn does not contest the events as seen on the video, and, in fact, asserted at oral argument that the video must control. Instead, Dunn argues that a jury must watch the video and decide whether the Officers used excessive force. This argument, however, is directly contradicted by *Scott,* which instructs us to determine as a matter of law whether the events depicted on the video, taken in the light most favorable to Dunn, show that the Officers' conduct was objectively reasonable. . . .Considering the *Graham* factors, from the Officers' perspectives on the scene and not using hindsight, we conclude that the video shows that the Officers acted reasonably in attempting to neutralize a perceived threat by physically removing Dunn from his vehicle after he led Officer Matatall on a car chase and then appeared to refuse the Officers' commands to exit the car. . . . Overall, given the heightened suspicion and danger brought about by the car chase and the fact that an officer could not know what other dangers may have been in the car, forcibly removing Dunn from the car to contain those potential threats was objectively reasonable. Contrary to Dunn's suggestion, nothing in our opinion today gives officers carte blanche to use unjustified force every time a suspect flees. Officers may use only an amount of force that is objectively reasonable under the circumstances, and there is no indication that the Officers did anything other than just that.")

Vance v. Wade No. 07-5930, 2008 WL 4899239, at *8, *9 (6th Cir. Nov. 17, 2008) ("Although the facts in this case and those in *Saucier* are similar, this case involves a substantial difference: Vance asserts that Wade escorted him to a police vehicle, left that scene for several minutes, and *then* returned to Vance and forcibly crammed him into the floorboard of the vehicle. Further, although both cases involved a degree of tension and concern for keeping order, the level of tension and danger in this case was considerably lower. *Saucier* involved a demonstrator protesting a speech by the Vice President, whereas in this case a large crowd of approximately fifty people were standing outside a restaurant where officers were executing a search warrant for illegal gambling machines. The time delay between Wade escorting Vance to the car

and Wade's later actions in cramming Vance into car is the decisive factor that renders this case substantially different than *Saucier*. . . . Wade had secured the situation by the time that he handcuffed Vance and escorted him to the police vehicle. Consequently, when Wade returned to the vehicle several minutes later, it was objectively unreasonable for him to believe that any further force was necessary to maintain order because it would have been 'clear to a reasonable officer that [Wade's] conduct was unlawful in the situation he confronted.' . . . [A]ccording to Vance's allegations, Vance had been cooperatively sitting handcuffed in the back of a police vehicle for several minutes when Wade returned and used force.. . We therefore hold that Wade is not entitled to qualified immunity from Vance's claim that Wade used excessive force in cramming him into the back of a police vehicle.")

Landis v. Baker, Nos. 07-2360, 07-2361, 2008 WL 4613547, at *10 (6th Cir. Oct. 16, 2008) ("The district court correctly concluded that the officers should have known that the gratuitous or excessive use of a taser would violate a clearly established constitutional right. . . . The defendant officers should have known that the use of a taser in stun mode, in rapid succession on a suspect who is surrounded by officers, in a prone position in a muddy swamp, who has only one arm beneath him, and who has just been struck several times with a baton would be a violation of a constitutional right. The fact that only Deputy Lynch pulled the trigger on the taser does not absolve Baker and Galarneau of liability.").

Kirby v. Duva, 530 F.3d 475, 482-84 (6th Cir. 2008) ("The plaintiffs' version of the events, relied upon by the district court, supports a holding that defendants violated Kirby's Fourth Amendment right to be free from excessive force. Under that version, the Ranger was moving slowly and in a non-aggressive manner, could not have hit any of the officers, and was stationary at the time of the shooting. Consequently, reasonable police officers in defendants' positions would not have believed that Kirby 'pose[d] a threat of serious physical harm, either to the officer[s] or to others.' . . . In fact, under Moore's testimony, it was Buckley who placed himself in potential danger by moving towards the rolling Ranger instead of fleeing or simply remaining where he was. . . . Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive. . . .Finally, and critically, defendants had sufficient time under plaintiffs' account to assess the situation before firing several rounds at Kirby. . . . Even if defendants were in close proximity to the Ranger and were thus unable to determine initially that Kirby did not pose a risk, each had an adequate opportunity to realize before shooting that the Ranger had stopped moving and that no one was in its path. . . . At the time of the shooting, it

was clearly established under *Tennessee v. Garner* . . . that police officers may not fire at non-dangerous fleeing felons such as Kirby. . . . Although *Garner* did not, as defendants point out, involve the roadside execution of a search warrant, its holding was clear enough to have placed defendants on notice that their conduct was unconstitutional. *Garner* made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone. That rule applies here, where reasonable police officers in defendants' positions would not have perceived a threat. This conclusion is not changed by the fact that the seizure occurred on a roadside or in an attempt to execute a search warrant. . . . Finally, *Brosseau v. Haugen* . . . upon which defendants rely heavily, does not require a contrary result. . . . Kirby not having presented a risk under the factual version on appeal, *Brosseau* does not preclude a finding that the right at issue was clearly established.").

Ryan v. Park, No. 07-1659, 2008 WL 2130370, at *3, *4 (6th Cir. May 22, 2008) ("In this case, Ryan was fleeing, resisting, and obstructing police officers. She led three police cruisers on a chase that lasted almost eight minutes. As Ryan points out, this was not a high-speed chase, and the testimony and police reports from the defendants indicate that Ryan was driving at or below the speed limit during the chase. However, a chase need not be high-speed to be dangerous, and the record indicates that Ryan disobeyed traffic signals and stop signs. . . . The three factors highlighted by the Supreme Court in *Graham* weigh in favor of the reasonableness of the officers' use of force. First, although Ryan's initial crime was merely a traffic violation--swerving abruptly from one lane to another--Ryan ultimately committed the felony offenses of fleeing and eluding and assaulting, resisting, or obstructing an officer. This Court has held that officials are entitled to qualified immunity in the face of excessive force allegations even when the plaintiff 'was suspected of relatively minor crimes' if the plaintiff resisted and the officials responded with force. *See Wysong v. City of Heath*, 2008 WL 185798 at *6-7 (6th Cir. Jan. 22, 2008) (slip opinion) (discussing such cases). Second, Ryan posed an immediate threat to herself and the officers. She refused to place her vehicle in park, and it continued to push against Clark's cruiser even after the chase ended. Once she exited the vehicle, she was on a busy street and the officers wished to quickly place her in custody. Third, Ryan actively resisted arrest and attempted to evade arrest. If a reasonable officer would have recognized Ryan's condition and understood that her non-responsiveness was beyond her control, this analysis might be different. However, under the circumstances, the officers could not be expected know that

Ryan's non-responsiveness might be due to a seizure. Thus we find that, under the totality of the circumstances, the officers' actions were objectively reasonable.”)**.**

Davenport v. Causey, 521 F.3d 544, 553, 554 (6th Cir. 2008) (“While neither Officer Pugh nor Officer Causey had been knocked unconscious, the situation here was similar enough to allow the use of deadly force without violating the Constitution. The officers were facing a large, violent, and angry individual who was unwilling to be brought under control by the officers. Mr. Davenport had already knocked Officer Causey to the ground and was delivering blows in rapid succession to Officer Pugh's head. Indeed, Mr. Davenport was more dangerous than the defendant in *Colston* because Mr. Davenport never broke off his attack and there was no indication that he would. Even though when looking in retrospect ‘in the peace of a judge's chambers’ it may seem that serious physical injury or death was not imminent, we cannot say that a reasonable officer on the scene facing such a suspect and having to decide very quickly could not have reasonably believed it was. . . Our analysis is not changed by the assumed fact that, when viewing the facts most favorably to the plaintiffs, the off-camera blow did not occur and Officer Causey did not see the whites of Officer Pugh's eyes. While both would bolster Officer Causey's decision to use deadly force, the circumstances provided sufficient cause for deadly force absent these two facts. Even though Officer Causey did cite the fact that Officer Pugh's eyes rolled to their whites as a reason he decided to use deadly force, it was still reasonable for him to shoot Mr. Davenport under the circumstances. Again, as detailed above, Mr. Davenport was a large, violent, and angry man who was unwilling to comply with direction from the police and who had attacked two police officers in quick succession, with only four seconds having elapsed while he delivered at least five blows to the two officers. In those four seconds Mr. Davenport had struck Officer Causey at least twice and knocked him to the ground, and had struck Officer Pugh in the head three times, strikes which Officer Causey had observed. At the time he was shot, Mr. Davenport was preparing to strike Officer Pugh on the top of his head with his fist for a fourth time. As conceded by the plaintiffs, Mr. Davenport had given no indication that he planned on retreating, and, if the fight were scored on points, Mr. Davenport was winning. While Officer Causey may have been mistaken in deciding that deadly force was required and that there was no time to warn Mr. Davenport, we cannot say that, given the rapidly evolving circumstances, his decision was unreasonable.”).

Floyd v. City of Detroit, 518 F.3d 398, 409 (6th Cir. 2008) (“According to the facts that we must consider at this stage of the proceedings, the officers ran around the

corner of the house with their guns drawn, spotted Floyd in the diminished light, and shot him without (1) announcing themselves as police officers, (2) ordering him to surrender, or (3) pausing to determine whether he was actually armed. Based upon the facts as construed in the light most favorable to Floyd, we conclude that his right to be free from such excessive force was clearly established on the date in question. Neither officer is therefore entitled to qualified immunity as a matter of law.").

Green v. Taylor, 239 Fed. Appx. 952, 2007 WL 2478663, at *8 (6th Cir. Aug. 30, 2007) ("The present situation is an 'obvious case' in which the standards articulated in *Garner* and *Yates* ' "clearly establish"the answer, even without a body of relevant case law.'[*citing Brosseau*] The district court correctly determined that a reasonable jury could conclude under Green's version of the facts that Taylor had no reason to believe that the suspects posed an immediate risk to the officers or anyone else if the vehicle was not backing up or being used as a weapon.").

Murray-Ruhl v. Passinault, 2007 WL 2478584, at *8 (6th Cir. Aug. 29, 2007) ("When the suspect poses no immediate risk of death or serious danger, *Brosseau* does not control and *Tennessee v. Garner* provides a 'clearly established' right that fulfills the second prong of the qualified immunity analysis.").

Williams v. City of Grosse Pointe Park, 496 F.3d 482, 487, 488 (6th Cir. 2007) ("The dissent relies upon *Sigley v. City of Parma Heights,* 437 F.3d 527 (6th Cir.2006), and *Smith v. Cupp,* 430 F.3d 766 (6th Cir.2005), in support of its contention that the facts, when viewed in the light most favorable to the plaintiffs, demonstrate that Miller acted unreasonably. We respectfully disagree. The *Sigley* and *Cupp* courts were both presented with a factual dispute regarding the events that gave rise to the officers' use of deadly force. . . In contrast, the facts of this case are undisputed, and while the dissent takes a different view of the events depicted on the video, we do not believe that any rational trier of fact could conclude that Miller acted unreasonably. Both *Sigley* and *Cupp* concluded that the plaintiffs' version of the facts *could* support a finding that the defendants acted unreasonably, and we have no difficulty with those conclusions. *Sigley* and *Cupp* are inapplicable to the facts of this case because the events depicted on the video demonstrate that Miller reasonably believed that Williams posed a threat of serious harm and acted in accordance with that belief. The dissent's assertion that *Smith* and *Cupp* should control the outcome of this case depends upon its view of the facts of this case--purportedly after viewing the evidence in the light most favorable to the plaintiffs--for which we find no support in the record.").

Bouggess v. Mattingly, 482 F.3d 886, 894, 895 (6th Cir. 2007) ("The question in this case, therefore, is whether Mattingly reasonably could have thought that he had probable cause to believe that Newby posed a serious danger to Mattingly or to others. Under the facts viewed in the light most favorable to Bouggess, Newby was (a) present at a crack deal; (b) uttered no threatening remarks toward Mattingly or anybody else; (c) never drew a weapon; (d) struggled with Mattingly in order to flee; (e) did not reach for Mattingly's gun; (f) did not fire Mattingly's gun at Mattingly's foot; (g) broke free from Mattingly and ran away, facing away from Mattingly; and (h) was shot three times in the back. Viewing the facts that way, no reasonable officer could have thought he had probable cause to use deadly force against Newby. . . . Certainly, *Garner*'s statement of the governing law may be applied differently in particular sets of circumstances, and reasonable minds can disagree over precisely which circumstances justify the use of deadly force. Nevertheless, the Supreme Court has recognized that there are obvious cases in which an officer should have been on notice that his conduct violated constitutional rights, despite the generalized nature of that Court's pronouncements of constitutional standards. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Our circuit and others have held that some cases can be so obvious under *Garner* and governing circuit precedent that officers should be presumed to have been aware that their conduct violated constitutional standards. . . . This is such an obvious case.").

Humphrey v. Mabry, 482 F.3d 840, 847, 848, 851 (6th Cir. 2007) ("In a situation such as the present one where the constitutional violations are based on the collective knowledge of a number of police officers, it is important to recognize that an individual officer is still entitled to qualified immunity if an objectively reasonable officer in the same position could have reasonably believed that he or she was acting lawfully. . . More specifically, where individual police officers, acting in good faith and in reliance on the reports of other officers, have a sufficient factual basis for believing that they are in compliance with the law, qualified immunity is warranted, notwithstanding the fact that an action may be illegal when viewed under the totality of the circumstances. . . . Accordingly, in a case such as this where one officer's claim to qualified immunity from the consequences of a constitutional violation rests on his asserted good faith reliance on the report of other officers, we consider: (1) what information was clear or should have been clear to the individual officer at the time of the incident; and (2) what information that officer was reasonably entitled to rely on in deciding how to act, based on an objective reading of the information. . . . . We agree with our dissenting colleague that the complaint alleges an unconstitutionally intrusive seizure and use of force. We also agree that if several police mistakes had

not occurred, Humphrey would have been spared his brief ordeal. . . However, all three defendant officers' individual mistakes were reasonable mistakes understandably committed in good faith while performing their job in a potentially dangerous situation. They are entitled to qualified immunity for those mistakes.").

Griffith v. Coburn, 473 F.3d 650, 659, 660 (6th Cir. 2007) ("*Brosseau* is fundamentally distinct from the present case. In *Brosseau* there was no factual dispute about the reasonableness of the officer's belief that the suspect posed risk to others. . . . When the facts in this case are viewed in the light most favorable to the plaintiff, it is clear that Partee posed no threat to the officers or anyone else. It follows that the use of the neck restraint in such circumstances violates a clearly established constitutional right to be free from gratuitous violence during arrest and is obviously inconsistent with a general prohibition on excessive force. . . .[I]f the jury concludes that Officer Sutherland used the neck restraint without an objectively reasonable belief that Partee posed a threat of serious bodily injury, then it is obvious to us that 'no reasonable officer could believe that such [use of force] would not violate another's constitutional rights.'")

Pigram v. Chaudoin, No. 05-6660, 2006 WL 2860773, at *3 (6th Cir. Oct. 5, 2006) (not published) ("Although the 'right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,' the officers' interest justifies only the amount of force that a reasonable officer in the heat of the moment could have believed was needed to effectuate the arrest. In the present case, the slap cannot reasonably be construed as a means of subduing Pigram, especially given that Chaudoin's justification for the slap was not to protect himself, other officers, or the public, but rather was because Pigram had a 'smart-ass mouth.'. . . On the facts as we must take them, there was simply no governmental interest in slapping Pigram after he had been handcuffed, nor could a reasonable officer have thought there was. This Court's case law supports Pigram's right not to be slapped gratuitously. Specifically, cases in this circuit clearly establish the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest. [citing cases] Therefore, qualified immunity is not available for lack of a 'clearly established' right.")

Smoak v. Hall, 460 F.3d 768, 782 (6th Cir. 2006) ("In balancing the THP troopers' suspicion--based on an unsupported dispatch alerting the troopers to a 'possible robbery'--against the intrusiveness of the seizure, we conclude that the seizure of the Smoaks violated their Fourth Amendment rights because it became an arrest without

probable cause.The Smoaks have not, however, met their burden of demonstrating that the THP troopers on the scene should have known that the unreasonable seizure was in violation of the Smoaks' constitutional rights. . . Caselaw from this circuit has endorsed the use of guns and handcuffs during a felony stop, even if only as part of an investigatory seizure. . . Although the use of guns and handcuffs in the present case was unreasonably intrusive, prior decisions had not made this clear. We are also faced with the question of whether the approximately nine minutes that the Smoaks spent in handcuffs after the THP troopers were informed that no robberies had occurred is enough to deny the troopers qualified immunity. The law is clear that '[o]nce the purposes of the initial traffic stop [are] completed, there is no doubt that the officer [can] not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the reasonable suspicion to justify a further detention.' . . As a result, the traffic stop morphed into an arrest. But the THP troopers were still in the process of sorting out the disconnect between why they had pulled over the Smoaks in the first place and the new information received from the dispatchers. The Smoaks were also justifiably agitated and upset over the loss of their dog, and the troopers wanted to diffuse the situation. In this confusing factual scenario, we believe that the few extra minutes that the troopers took to release the Smoaks was not so unreasonable as to deny them the protection of qualified immunity.").

Bing v. City of Whitehall, Ohio, 456 F.3d 555, 570, 571 (6th Cir. 2006) ("Throwing a flashbang device into a house with knowledge that the dwelling will likely catch fire thus constitutes unreasonable force in these circumstances even assuming (without deciding) that the police would have been justified in using deadly force. Bing's right not to endure a second flashbang device in these circumstances, however, was not 'clearly established.' The Supreme Court has not clearly established such a right, nor has this court or other circuits. . . None of the cases concerning flashbang devices to which the parties refer involve policemen who knew that such devices would likely ignite flammable materials and thereby cause a fire. . . Given the lack of any case similar to this case finding a Fourth Amendment violation, it would not have been clear to a reasonable officer in the circumstances at issue that employing the second flashbang device violated the Constitution.")

Bing v. City of Whitehall, Ohio, 456 F.3d 555, 571, 572 (6th Cir. 2006) ("This set of facts assumed by the district court, if true, constitutes a violation of Bing's Fourth Amendment right against the use of deadly force. If, indeed, Bing did not have the gun after the police entered the house and posed no safety threat to anyone when he

was shot to death in the back, then the danger he had once posed had abated. Under these assumptions, the officers had no legitimate interest in using deadly force that could counterbalance Bing's fundamental interest in his life. Therefore, under these assumptions, the *Graham* balancing test compels the conclusion that Bing's rights would have been violated. . . Moreover, the right allegedly violated is clearly established under the Supreme Court's ruling in *Tennessee v. Garner*. . . . No reasonable officer could fail to see that shooting an unarmed man in the back who has ceased to present a danger violates *Garner.* The district court therefore properly denied summary judgment to the officers with respect to the police-shooting deadly force claim.").

Alkhateeb v. Charter Township of Waterford, No. 05-1856, 2006 WL 1889240, at *9 (6th Cir. July 10, 2006) (not published) ("In our opinion, the unlawfulness of holding a gun to a suspect's head while berating him about his nationality is apparent. No reasonable officer in Lemos' position would think that what he was alleged to have done would be lawful. . . Moreover, in this Circuit, the law is clearly established that an officer may not use additional gratuitous force once a suspect has been neutralized. . . . Thus, with the facts viewed in the light most favorable to Basim, the officers inflicted force that was gratuitous and would have been recognized by a reasonable officer as excessive. Officers are and have been on notice that the use of gratuitous force against a detained and passive or non-resisting suspect violates the Constitution. No reasonable officer would have believed that he could kick, kneel upon a suspect's neck, or hold a gun to a suspect's head when that suspect has shown no sign of resistance, no sign of being armed or dangerous, and is already subdued.").

Sigley v. City of Parma Heights, 437 F.3d 527, 536, 537 (6th Cir. 2006) ("The conflicting views of the facts demonstrate that there are unresolved factual issues regarding whether Mockler was chasing after Davis' car or the car was turning into him when he fired. Additionally, it is not clear whether Mockler had probable cause to believe that Davis posed a significant threat of death or serious physical injury to others. Viewing the evidence in a light most favorable to the Plaintiff, these are disputed factual issues that preclude the granting of summary judgment. . . . On appeal, Defendants argue, and the dissent asserts, that even if a constitutional violation occurred, Officer Mockler is entitled to qualified immunity. We disagree. Although, the district court did not address this issue because qualified immunity presents a purely legal issue we will discuss this issue. Viewing the facts in a light most favorable to the plaintiff, Mockler should not be granted qualified immunity.

. . . The primary issue is whether the constitutional right allegedly violated was defined at the appropriate level of specificity to be clearly established. This is a legal issue. The contours of the right must be clear enough to put an officer on notice that the actions he is taking are unlawful. At the time of the shooting, '[u]se of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.'. . . Viewing the facts in a light most favorable to the plaintiff, the situation confronting Mockler was whether to shoot Davis, who did not intentionally create any harm to anyone on the scene, while attempting to flee.The dissent relies on *Brosseau* to support the granting of summary judgment based on qualified immunity. In *Brosseau*, the Court stated that the material facts taken in a light most favorable to the plaintiff showed that the shooting officer believed the suspect had a gun and was fearful for officers in the immediate area. . . The Court held that when the material facts identify official conduct within the 'hazy border' between excessive and acceptable force, the qualified immunity privilege applies. . . . . Accordingly, viewing the facts in a light most favorable to the Plaintiff, Mockler was running behind Davis' car, out of danger, and Davis drove in a manner to avoid others on the scene in an attempt to flee. Accepting these facts as true, Mockler would have fair notice that shooting Davis in the back when he did not pose an immediate threat to other officers was unlawful.").

Sigley v. City of Parma Heights, 437 F.3d 527, 538, 539 (6th Cir. 2006) (Batchelder, J., dissenting) ("I respectfully dissent. I would affirm summary judgment in favor of Officer Mockler because he was entitled to qualified immunity. Qualified immunity protects an officer from suit when the officer 'makes a decision that, even of constitutionally deficient, misapprehends the circumstances she confronted.' [citing *Brosseau*] In *Saucier v. Katz*, the Supreme Court held that a lower court faced with a qualified immunity defense must first determine whether the plaintiff has asserted the violation of a constitutional right. . . Sigley clearly has done so. '[T]he next, sequential step is to ask whether the right was clearly established.' . . . Officer Mockler could not have known that his conduct was unlawful. Under *Tennessee v. Garner*, the use of deadly force is reasonable when an 'officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'. . The Supreme Court has addressed the question of when a suspect escaping in a vehicle poses such a threat. In *Brosseau v. Haugen*, the court held that an officer who fatally shot a suspect fleeing in a Jeep was entitled to qualified immunity. . . .Because the law did not clearly establish a Fourth Amendment right in favor of a 'disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight,' the

officer was entitled to qualified immunity. . . This case is analogous to *Brosseau*. The defendants in this case have produced uncontroverted evidence that Davis posed a significant threat to the officers on the scene.").

Tallman v. Elizabethtown Police Dep't., No. 04-5723, 2006 WL 166610, at *6, *7 (6th Cir. Jan. 23, 2006) (unpublished) ("In sum, the *Graham* factors raise no genuine questions about the reasonableness of Bland's actions. At the moment of the incident, it was not unreasonable for Bland to perceive that Lee posed a serious threat to his safety. Therefore, Lee's constitutional rights were not violated and Bland is entitled to qualified immunity. . . . Furthermore, even if Bland's actions had violated Lee's Fourth Amendment rights, the right in question was not clearly established so as to preclude the application of qualified immunity. The cases cited by the parties demonstrate that 'this area is one in which the result depends very much on the facts of each case.... The cases by no means "clearly establish" that [Bland's] conduct violated the Fourth Amendment.'[citing *Brosseau*]").

Tallman v. Elizabethtown Police Dep't., No. 04-5723, 2006 WL 166610, at **11-14 (6th Cir. Jan. 23, 2006) (Clay, J., dissenting) (unpublished) ("The key issue in this case is not whether it was reasonable for Officer Bland to chase Babb and Lee at high speeds; nor whether it was reasonable for him to have his gun drawn as he exited his car once the chase was over. The key issue in the case--the one that warrants a trial and the one the majority entirely ignores--is whether it was reasonable for Bland to charge full-speed at Lee with his gun drawn, giving Lee no meaningful chance to submit to his authority, and to continue at full-speed upon arriving at the passenger window, plunging into the passenger compartment, gun still in hand. After reading the majority opinion, one would not imagine that this is in fact what occurred. The only reason I am able to recount the event as it actually happened is because I have seen the videotape that recorded it for posterity--a videotape no jury will see. The majority has treated this case so cavalierly that justice has escaped. I therefore dissent. . . . I am firmly of the view that a reasonable jury could conclude Officer Bland's decisions to charge Lee with his gun drawn, without giving Lee a meaningful opportunity to comply with his instructions, and reach into the passenger compartment while still aiming the gun at Lee's head, were objectively unreasonable, indeed reckless. . . . Furthermore, on this record a reasonable jury could conclude that Bland's conduct went beyond mere negligence, i.e., beyond objective unreasonableness, such that application of the qualified immunity doctrine would be improper. . . . The majority has dissociated itself with the remarkable facts of this case. As I have endeavored to explain, genuine issues of material fact abound. Was

it reasonable for Bland to charge at Lee with his gun drawn, giving Lee no meaningful chance to submit to Bland's authority? To allow only 2.5 seconds for Lee to consider the instruction to exit the car and, moreover, to force Lee to consider this instruction while facing an advancing policeman with a gun trained directly at him? To continue full-speed upon arriving at Babb's car and to plunge through the passenger window with the gun still in hand and his finger pressing on the trigger? The case law and the record suggest some or all of these decisions may not have been reasonable under the circumstances of this case and, furthermore, that a reasonable officer would have known it. A trial is required. I therefore dissent.").

Ciminillo v. Streicher, 434 F.3d 461, 467-69 (6th Cir. 2006) ("Although the factors articulated in *Graham* each militate against a finding that Knight's conduct was reasonable, we must consider the totality of the circumstances. It is undisputed that Knight shot Ciminillo during the course of a riot. However, the fact that the shooting took place during a riot does not automatically render Knight's conduct reasonable. . . Taking the facts in the light most favorable to Ciminillo, it was objectively unreasonable for Knight to shoot Ciminillo as he attempted to leave the scene of the riot. The use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable. . . . Even though Ciminillo alleges facts that, if true, would constitute a violation of his Fourth Amendment rights, Knight may still be entitled to qualified immunity unless those rights were 'clearly established' at the time of the shooting. . . . Thus, we must determine whether it would have been clear to a reasonable officer in Knight's position that shooting Ciminillo with a beanbag propellant was unreasonable. It was clearly established law in this Circuit at the time of the underlying events that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others. . . Although Knight did not use deadly force in shooting Ciminillo, that fact cannot insulate him from liability. At the time of the underlying events, this Court had previously held that the use of less-than-deadly force, including pepper spray, may be excessive. . . . Thus, in this Circuit, it was clearly established that individuals had a general right to be free from the unreasonable use of non-lethal force. Furthermore, Knight was on notice that it is unreasonable to use beanbag propellants against individuals who pose no immediate risk to officer safety. In *Deorle*, the Ninth Circuit held that the use of beanbag propellants against an unarmed man who posed no immediate threat was not objectively reasonable. . . . Given *Yates*, *Adams*, and *Deorle*, it was clearly established that shooting Ciminillo with a beanbag was objectively unreasonable. Thus, Knight is not entitled to qualified immunity.").

Smith v. Cupp, 430 F.3d 766, 771, 773-77(6th Cir. 2005) ("The plaintiffs have put forward sufficient evidence to show that Dunn's actions violated Smith's constitutional rights. According to the plaintiffs' evidence, Dunn shot Smith after the police cruiser was past Dunn and there was no immediate danger to anyone in the vicinity. Dunn's use of force was made even more unreasonable by the fact that Smith had been cooperative up to this point, and was arrested for the nonviolent offence of making harassing phone calls. Although there was some danger to the public from Smith's driving off in a stolen police car, the danger presented by Smith was not so grave as to justify the use of deadly force. . . . Thus although events developed rapidly, under plaintiffs' version of the facts this is not a case where a dangerous situation evolved quickly to a safe one before the police officer had a chance to realize the change. . . Instead, this is a case where a jury could conclude that Officer Dunn was not in any danger in the first place. The fact that this was a rapidly evolving situation does not, by itself, permit him to use deadly force. Although this circuit's previous cases give substantial deference to an officer's decision to shoot a unarmed suspect in a car chase, the officer must have reason to believe that the car presents an imminent danger.[discussing cases] Though Smith could have used the police cruiser to injure or kill Officer Dunn, under the plaintiffs' version of the facts he was not doing so when Dunn shot him or even before Dunn shot him. Although Smith had possession of a dangerous 'weapon,' he was not threatening the lives of those around him with it when he was fatally shot. . . . It is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head. . . *Brosseau v. Haugen* does not preclude this court from finding the right at issue was clearly established because the *Brosseau* Court said that undisputed facts showed that the shooting officer believed the suspect had a gun and was fearful for officers in the immediate area. . . *Brosseau* is instructive on what makes law 'clearly established' in a case where an officer shoots a suspect fleeing in a car. *Brosseau* held that the two major excessive force cases, *Tennessee v. Garner* and *Graham v. Connor* . . . did not clearly establish the existence of the right alleged to have been violated in *Brosseau*. . . The *Brosseau* Court reasoned that the rule from *Tennessee v. Garner* did not apply because of the substantial risk of danger. . . . In this case, the plaintiff's facts show there was no danger. The absence of any *Garner* preconditions to the use of deadly force makes this an 'obvious' case and distinguishes it from *Brosseau*. . . . The facts in *Brosseau* are not comparable to those in this case. In the light most favorable to Smith, there is no comparable evidence that Dunn had cause to believe that Smith posed an immediate risk of death or serious danger to Dunn, Rutherford, or nearby citizens. Smith was being arrested for a making harassing phone calls, not a crime involving the infliction or threatened

infliction of serious physical harm. . . Unlike the situation in *Brosseau*, Smith and Dunn never struggled, Smith never displayed any violent tendencies, and the facts support a finding that a reasonable officer in Dunn's position would not have perceived danger to anyone at the scene. The fact that this case is very different from *Brosseau* permits the conclusion that *Garner*, by itself, clearly establishes the right at issue. . . . *Garner* and *Graham* clearly establish that a suspect fleeing in a car that has never posed a danger to anyone has the clearly established right not to be seized with deadly force. Because, *Garner* and its progeny clearly establish that Dunn violated Smith's constitutional rights by shooting him when the facts support a finding that a reasonable officer in Dunn's position would not have perceived Smith endangered anyone at the scene, we affirm the district court's denial of qualified immunity.").

Bultema v. Benzie County, No. 04-1772, 2005 WL 1993429, at *8, *9 (6th Cir. Aug. 17, 2005) (not published) ("It has long been held in this circuit that the right to be free from the use of excessive force under the Fourth Amendment is clearly established. . . More specifically, in the context of the police's use of chemical spray to subdue a suspect, we held that it was clearly established in 1999 that a police officer's use of pepper spray against a suspect after he was handcuffed and hobbled constituted excessive force. . . With regard to Ketz's alleged blow to Bultema's head, we have also held for more than twenty years that it is clearly established in this circuit that 'a totally gratuitous blow' to a suspect who is handcuffed and offering no resistance violates the Fourth Amendment. . . Thus, applying these precedents to this case, we conclude that Ketz's actions as described by Stariha violated a clearly established constitutional right. Furthermore, we hold that Ketz's alleged actions were objectively unreasonable in light of this clearly established constitutional right. Ketz argues in his brief that 'a reasonable officer in Deputy Ketz's position would not necessarily have known that it might be unlawful to use pepper spray or force on a plaintiff who assaulted him and who was actively resisting him.' . . . [C]ontrary to Ketz's argument, regardless of what the suspect may have done to the police officer prior to the arrest, the police officer is constitutionally prohibited from exacting retribution once the suspect has been subdued. Accordingly, we have repeatedly upheld limits upon police action against those already restrained. . . . Therefore, we hold that under the facts as described by Stariha, no reasonable police officer in Ketz's situation would use pepper spray on Bultema or strike him in the head after he had already been placed in handcuffs.").

Myers v. Potter, 422 F.3d 347, 356, 357 (6th Cir. 2005) ("The particularized inquiry we employ to determine whether Hutchins should be entitled to qualified immunity is whether it would have been clear to a reasonable officer in Hutchins's position that the 'consent' obtained from Myers and his mother was legally insufficient to justify Raymond's seizure and detention. It is, we think, indisputable that a reasonable officer would have known that it was unlawful to take Myers into custody by using false representations as to the location and expected duration of the interrogation in order to obtain his consent and that of his mother. And no reasonable officer would have believed that Myers's detention was consensual after he made repeated requests to go home within hours of his detainment. . . . We hold that a reasonable officer in Hutchins's position would have known that, in light of Myers's detainment without probable cause or judicial authorization, the false representations made to him and to his mother to obtain their 'consent' to his detainment, and his repeated requests to be released, Raymond's clearly established constitutional rights were being violated. Accordingly, the district court erred in concluding that Officer Hutchins is entitled to qualified immunity.").

Lyons v. City of Xenia, 417 F.3d 565, 579 (6th Cir. 2005) ("*Brosseau* leaves open two paths for showing that officers were on notice that they were violating a 'clearly established' constitutional right--where the violation was sufficiently 'obvious' under the general standards of constitutional care that the plaintiff need not show 'a body' of 'materially similar' case law, *id.*, and where the violation is shown by the failure to adhere to a 'particularized' body of precedent that 'squarely govern [s] the case here,' *id*. at 599-600. Lyons has not satisfied either requirement for showing the violation of a 'clearly established' constitutional right. First, the constitutional violation, if any, was by no means an 'obvious' one that the 'general [excessive-force] tests set out in *Garner* and *Graham* ... can 'clearly establish' ... even without a body of relevant case law.' . . Even accepting all of Lyons' factual allegations as true, there is nothing 'obvious' about what Officer Foubert should have done upon entering a house from which a fellow officer had just placed a distressed call for backup help and in which he could see immediately upon entering that the officer and resident were in close proximity to each other and in the middle of some form of confrontation. . . . . Second, no precedent 'squarely governs the case here.'. . As the cases that we have canvassed fairly indicate, the standards governing the constitutionality of Lyons' excessive-force tackling claim 'depend[ ] very much on the facts of each case.' . . To that end, we have been unable to identify a single case predating the conduct at issue that prohibits tackling in a materially similar context. 'Because the focus is on whether the officer had fair notice that her conduct was

unlawful,' . . . and because Officer Foubert's actions, as in *Brosseau*, at best 'fell in the "hazy border between excessive and acceptable force,"'. . . Lyons has failed to show the violation of a clearly established right in this more 'particularized' sense.").

Lyons v. City of Xenia, 417 F.3d 565, 589, 590 (6th Cir. 2005) (Tarnow, District Judge, dissenting) ("I do not read *Brosseau* to require that, for notice purposes, prior case law must be factually identical to the case sub judice. . . . [T]he issue is not whether prior case law presents identical, or even substantially similar, facts, but whether those cases would have put a reasonable officer on notice that his conduct would violate a constitutional right. In *Brosseau*, the Supreme Court left open one avenue by which a plaintiff may circumvent the notice requirement. In an 'obvious' case, a constitutional violation can be clearly established even without a body of relevant case law. . . I conclude that the law was sufficient to place Officer Foubert on notice that his action would violate Lyons's constitutional rights and that this is an obvious case in which a body of case law is not necessary. The events in question occurred in August 1998. At that time, it was clearly established that, before tackling a suspect to the ground, an officer should give the suspect an opportunity to voluntarily surrender. . . . Regardless of the status of the law in August 1998, I believe that reasonable officers would know, even without specific guidance from the courts, that tackling a woman who is merely resisting an unlawful arrest in her own home, without giving her fair warning, is unconstitutional. Thus, I place this case under the 'obvious' rubric established by the Supreme Court in *Brosseau* and conclude that a body of relevant case law is not necessary.").

St. John v. Hickey, 411 F.3d 762, 774 (6th Cir. 2005) ("[W]e conclude the right of a nonviolent arrestee to be free from unnecessary pain knowingly inflicted during an arrest was clearly established as of November 9, 2000, the day the defendants arrested St. John. Consequently, the defendants are not entitled to qualified immunity on St. John's claim that they violated his Fourth Amendment rights by attempting to place him in the back seat of the police cruiser after he specifically explained that his legs would not bend on account of his muscular dystrophy. Under these circumstances, a reasonable officer would have known that the manner of the arrest was clearly unlawful.").

Sample v. Bailey, 409 F.3d 689, 698-700 (6th Cir. 2005) ("In denying qualified immunity, the district court held that since the *Garner* decision in 1985, it has been clearly established that the use of deadly force is only constitutionally reasonable if 'the officer has probable cause to believe that the suspect poses a threat of serious

physical harm, either to the officer or to others.' . . Bailey argues in his brief that this generalized statement is not particular enough to put a reasonable officer on notice in the specific factual context of this case. Instead, Bailey argues that the absence of a factually similar precedent case requires this court to find that the constitutional right is not clearly established. Put another way, Bailey claims that a reasonable officer would be unaware that he could not use deadly force to seize a burglary suspect, who was unarmed but found hiding in a building at night. We disagree. In *Brosseau v. Haugen*, 125 S.Ct. 596, 599 (2004), the United States Supreme Court recently stated that *'Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality' and therefore may be insufficient to give a police officer fair warning of the constitutional parameters regarding the use of deadly force in a specific factual context. In *Brosseau*, the police officer was faced with the situation of 'whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.'. . The Court cited three cases, including one from this court, which reached different conclusions on whether a police officer in such a situation would be justified in using deadly force. As a result, the Court held that a reasonable officer who fully understood *Garner* 's general constitutional command nevertheless would not know whether the use of deadly force was permissible in that situation. Because a reasonable officer at that time would not have had fair warning that his conduct violated the Fourth Amendment, the Court held that the law was not clearly established and therefore, the officer was entitled to qualified immunity. . .By contrast, the Court recognized that 'in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law.' . . As the Supreme Court has noted, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . When a general constitutional principle 'is not tied to particularized facts,' the principle 'can clearly establish law applicable in the future to different sets of detailed facts.' . . The determinative issue is whether the officer had 'fair warning that his conduct deprived [the plaintiff] of a constitutional right.'. . We hold that this case is 'an obvious case' because it does not present a novel factual circumstance such that a police officer would be unaware of the constitutional parameters of his actions. We have held that it has been clearly established in this circuit for the last twenty years that a criminal suspect 'ha[s] a right not to be shot unless he [is] perceived to pose a threat to the pursuing officers or to others during flight.' . . This articulation of the *Garner* rule is clearly established even in situations with diverse factual distinctions. . . . Though a factually similar precedent case may not have existed at the time these cases were decided, we held that the rule established in *Robinson* was particular enough to give

a reasonable officer fair notice of his unconstitutional conduct. Thus, regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a perceived threat of serious physical harm to the officer or others. These factual distinctions between the cases do not alter the certainty about the law itself. Similarly, we conclude that the factual context of this case--the darkness, the unfamiliar building, Sample's intoxication and unresponsiveness--is sufficiently similar to our body of case law applying the *Robinson* rule so as to give Bailey fair warning that shooting a suspect who was not perceived as posing a serious threat to the officers or to others is unconstitutional.").

McKinley v. City of Mansfield, 404 F.3d 418, 440-42 (6th Cir. 2005) ("We decline to adopt the view of qualified immunity advanced by Defendants and the district court, namely, that since 'there is no federal case on point,' . . . Defendants are immune from suit. The Supreme Court's response to this argument is well-suited to the circumstances of this case: 'This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'. . In cases where courts have dismissed Fifth Amendment suits against state employers on qualified immunity grounds, they have done so because the complaining employees did not allege that they had been subjected to the kind of compulsion and subsequent prosecution proscribed by *Garrity* and its progeny. . . . In stark contrast to these cases, McKinley presents sufficient evidence for summary judgment purposes to suggest that he was compelled to incriminate himself in precisely the manner held unlawful by the Supreme Court in *Garrity*. The Court's holding in that case bears repeating: 'We now hold that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic .'. . Particularly in light of the defendants' obvious familiarity with *Garrity*, . . . we take issue with the district court's representation that 'there is no federal case on point' because it is hard to imagine a case that could be more on point--in view of the facts before us-- than *Garrity* itself. We conclude, therefore, that Defendant Fortney is not entitled to qualified immunity . . . . Finally, we address the criticisms of our dissenting colleague. The dissent suggests that Officer Fortney should be entitled to qualified immunity because we have established a *'*new right of action.*'* We are unclear how, but it makes no difference since in no sense is

McKinley's right to sue Fortney 'new.' The dissent cannot mean that the use at a criminal proceeding requirement is new. In *Chavez*, the Court was asked whether the Fifth Amendment right against self-incrimination was truly as broad as the Ninth Circuit had interpreted it, which is to say, as a right not only against the use of one's self-incriminating statements in a criminal case but a right against being coercively questioned in the first instance. . . *Chavez* established a new rule of law only in the sense that it limited the right to sue for Fifth Amendment violations to only those cases in which such suits were already permissible under clearly established law, i.e., cases in which the plaintiff's incriminating statements had been used in a prior criminal proceeding. If the dissent means that our holding is *'*new*'* because we have sustained, at the summary judgment stage, a §1983 action against a police officer on the allegation that he compelled the plaintiff to incriminate himself, we can only conclude the dissent misapprehends the nature of qualified immunity. The doctrine of qualified immunity does not mean that a state actor is qualifiedly immune unless the plaintiff can point to a prior case in which judgment was entered against the same type of state actor on the same facts. . .As we said recently: *'*Officials do not enjoy qualified immunity simply because the exact action in question has not previously been held unlawful by a court, but "in light of pre-existing law the unlawfulness must be apparent." ' . . With regard to the present case, pre-existing law makes apparent the unlawfulness of compelling someone to make incriminating statements that are later used against him at trial. . . . Accordingly, we hold that a reasonable officer would understand that what Fortney and his colleagues are alleged to have done violates the Fifth Amendment right against self-incrimination.").

Beard v. Whitmore Lake School District, 402 F.3d 598, 603, 607, 608 (6th Cir. 2005) ("In this case, the searches performed by the defendants were unconstitutional; however, at the time that the searches occurred, the law did not clearly establish the unlawfulness of the defendants' actions. We accordingly do not reach the third prong of the test--whether the plaintiff has offered sufficient evidence that the defendants' actions were unreasonable in light of clearly established law. . . . In this case, approximately twenty male students were searched, in the absence of individualized suspicion and without consent, in the hopes of locating missing money. Approximately five female students were searched under similar circumstances, but were also required to remove their clothes in the presence of one another. Under these circumstances, the searches were a violation of the Fourth Amendment. Assuming arguendo that Officer Mayrand was aware of these circumstances when ordering the female students to be searched, his conduct was also unlawful. As explained by the Supreme Court in *New Jersey v. T.L.O.*,. . . a school search violates

the Fourth Amendment when the school undertakes a search of a student that is unreasonable. . . . . At the time of the search at issue, the prior law involving strip searches of students did not clearly establish that the defendants' actions in this case were unconstitutional. The Supreme Court cases on school searches, *T.L.O.* and *Vernonia*, set forth basic principles of law relating to school searches, yet do not offer the guidance necessary to conclude that the officials here were, or should have been, on notice that the searches performed in this case were unreasonable. . . . The Supreme Court has recently instructed that, for purposes of the 'clearly established' inquiry, the analysis ' 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' ' [citing *Brosseau*] Accordingly, cases'cast at a high level of generality,' will only be sufficient to clearly establish the unlawfulness of the defendants' actions where the conduct at issue is 'obviously' a violation based on the prior cases. . . This is not such an obvious case. In *T.L.O.*, the Court announced that school searches should be subject to a reasonableness standard. . . In determining whether a particular search is reasonable, the Court announced a two-pronged, multi-factor test that weighs the students' interest in privacy against the school's interest in maintaining a safe learning environment. . . Yet, the Court did little to explain how the factors should be applied in the wide variety of factual circumstances facing school officials today. Accordingly, *T.L.O.* is useful in 'guiding us in determining the law in many different kinds of circumstances'; but is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case. . . . Given the lack of a factual context similar to that of this case, *T.L.O.* and *Vernonia* could not have 'truly compelled' the defendants to realize that they were acting illegally when they participated in the searches of the students in this case. The Sixth Circuit cases involving student strip searches also do not clearly establish the unconstitutionality of the searches in the instant case. Indeed, in *Williams*, 936 F.2d 881, and *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir.1984), strip searches of students were found to be reasonable. Although the officials in each of those cases possessed individualized suspicion as to the particular student searched, the cases do not clearly state that such individualized suspicion is absolutely necessary to justify such a search. . . . The Sixth Circuit cases thus simply do not 'truly compel' the conclusion that the searches in this case were not reasonable. Finally, we recognize that, at the time the searches were conducted, the Seventh Circuit had held that the strip search of a student in particular circumstances was not reasonable. . . In addition, some district courts in other circuits have held student strip searches to be unreasonable in cases more closely analogous to the instant case. [citing cases] These cases were not sufficient to establish clearly the unlawfulness of the defendants' actions in this case. In the 'rare instance' where it is

proper to seek guidance from outside this circuit, the law will only be clearly established where the cases from outside this circuit 'both point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.' . . The cases dealing with school strip searches from courts in other circuits are not 'clearly foreshadowed by applicable direct authority,' and therefore do not clearly establish that the searches in this case were unreasonable.").

Pirolozzi v. Stanbro, No. 5:07-CV-798, 2008 WL 1977504, at *6, *7 (N.D. Ohio Apr. 28, 2008) ("Construing the facts in the light most favorable to the Plaintiff means that the Court must assume that the Defendant Officers applied substantial force to the head, neck, torso, and legs of Pirolozzi, a mentally ill individual who was no longer resisting arrest or posing a threat to anyone in the vicinity, to keep him motionless on the ground in a prone position for several minutes with his hands handcuffed behind his back. The Court also must assume that the Defendants used a taser device, brachial stuns, kicks, punches, and physical force against the decedent while he was on the ground. Thus, the plaintiff alleges, and shows cognizable evidence demonstrating, sufficient facts to show a constitutional violation that is actionable under § 1983. . . . The Plaintiff offers sufficient evidence to show a constitutional violation of the decedent's clearly established right to be free from excessive force. These individual defendants are not therefore entitled to qualified immunity in this case.")**.**

Edwards v. City of Martins Ferry, No. C2-06-0789, 2008 WL 1766893, at *9 (S.D. Ohio Apr. 14, 2008) ("In the instant case, Plaintiffs claim that the force used in effecting Mr. Edwards' arrest was unreasonable. Specifically, Plaintiffs assert that Officer Dojack's use of the taser on Mr. Edwards, who was 82 years old and suffering from Alzheimer's, was unconstitutionally excessive. . . The Court disagrees. . . . Plaintiffs concede that Officer Dojack had probable cause to stop Mr. Edwards and probable cause to arrest him, therefore, the only question is whether the use of the taser constitutes excessive force. . . . Plaintiffs argue that Mr. Edwards never threatened, attempted to hit or verbally abused Officer Dojack. But absent from this description is that Mr. Edwards refused to comply with Officer Dojack's initial orders. . . .Plaintiffs primary argument for why Officer Dojack's use of the taser was unreasonable is because Mr. Edwards was 82 years old and suffering from Alzheimer's. However, there is no caselaw provided in support of this argument that Mr. Edwards' age precludes use of the taser. Officer Dojack, at first, was merely

trying to talk to Mr. Edwards, but soon realized that was not possible. Then, Officer Dojack attempted to grab him, but Mr. Edwards continued to pull away. Officer Dojack then attempted to restrain Mr. Edwards. Regardless of Mr. Edwards' age and the fact that he had Alzheimer's, he was not cooperating with Officer Dojack, and his actions could be construed as resisting arrest. . . . Even if the Court were to have found that Defendants did violate Plaintiffs' clearly established constitutional rights, Plaintiffs cannot establish that an objectively reasonable officer faced with the same circumstances as Officer Dojack would have recognized that the conduct violated a clearly established constitutional right. The final test for qualified immunity is whether an objectively reasonable officer under the circumstances would have known that the officer's conduct violated the constitution in light of the preexisting law. Considering the circumstances in this case, that Mr. Edwards refused to answer Officer Dojack's simple questions and refused to comply with his initial orders, and then backed away and drew his hands up, a reasonable officer would attempt to secure the arrest of the suspect. Then, when the suspect continued to resist arrest while the officer was trying to place handcuffs on him, a reasonable officer would take the use of force to the next level on the continuum to the taser. Therefore, such use of force under these circumstances was not a violation of Mr. Edward's constitutional rights. Accordingly, Defendant Officer Dojack is entitled to qualified immunity.").

Michaels v. City of Vermillion, 539 F.Supp.2d 975, 983, 986, 987, 989, 990 (N.D. Ohio 2008) ("[T]he *Saucier* directive to construe the evidence in the light most favorable to the plaintiff has particular significance when (1) there are disputed issues of fact and, (2) whether a constitutional violation occurred hinges on which version of the facts is accepted. That is, when the plaintiff's evidence, viewed in the most favorable light, amounts to a constitutional violation, prong one of the *Saucier* test is satisfied *even if the facts pertinent to the alleged constitutional violation are disputed*. . . . Focusing on the tasing--the specific conduct alleged to constitute excessive force--the *Graham* factors favor finding that, taking the facts as alleged by the Plaintiffs, a jury could find that a constitutional violation occurred. In other words, the discrepancy between the parties' accounts of the tasing constitutes a material issue of fact and, under the first prong of the *Saucier* test, the Plaintiffs' version of the facts rises to the level of a constitutional violation. . . . The same construction of the facts necessarily applies to prong two as well; the question is whether the constitutional right that Officer Grassnig arguably violated under the prong one analysis is clearly established. . . . As discussed above in connection with prong one, construing the facts in the light most favorable to the Plaintiffs, a

reasonable jury could conclude that Officer Grassnig tased Michaels gratuitously and unreasonably. Therefore, based on the well-established line of authority prohibiting the gratuitous use of nonlethal, temporarily incapacitating force, it would be clear to a reasonable officer that the manner in which Officer Grassnig allegedly used the taser on Michaels was unlawful under the circumstances. The 'clearly established' prong of the *Saucier* test is thus satisfied.").

Morrison v. Board of Trustees of Green Tp., 2007 WL 4246277, at *17, *18 (S.D.Ohio Nov. 29, 2007) ("There are two paths for showing that an officer was on notice that his or her actions violated a constitutional right: (1) where the violation was 'obvious' under the standards, even in the absence of a body of relevant case law, and (2) where the violation is shown by a failure to adhere to a body of precedent that 'squarely governs" the case. . . .The manner in which Officer Celender tackled Amanda was not objectively reasonable under the circumstances. However the constitutional violation cannot be said to be an obvious one, that standard being satisfied by acts such as the use of deadly force to stop a fleeing suspect who posed no immediate threat to the officer and no threat to others. . . . Neither is the Court aware of any precedent that squarely governs the case here, namely, the level of force appropriate to effect a mental health seizure when the person posed a non-immediate but substantial risk of harm to herself. . . Thus, it cannot be said that Officer Celender 'had fair notice that [his] conduct [of tackling her as she walked away from him] was unlawful.' . . . The same cannot be said, however, with respect to the allegations that Officer Celender refused to loosen Amanda Morrison's handcuffs even after she and her mother complained that they were too tight. . . . As plainly put by the Sixth Circuit Court of Appeals, '[o]ur precedents allow the plaintiff to get to a jury upon a showing that officers handcuffed the plaintiff excessively and unnecessarily tightly and ignored the plaintiff's peals that the handcuffs were too tight.' . . . Likewise, Officer Celender's pushing Amanda Morrison's head into the ground when she was handcuffed and not posing any threat to anyone was an unreasonable use of force. An officer's use of force after a suspect has been incapacitated is excessive as a matter of law. . . More particularly, it was clearly established at the time of the occurrence that pushing a handcuffed person's head into the ground constituted an unreasonable use of force.")**.**

McGee v. City of Cincinnati Police Dept., No. 1:06-CV-726, 2007 WL 1169374, at *6 (S.D. Ohio Apr. 18, 2007) ("[S]ituations such as that at issue in the instant case, where an officer tases an individual who fails to comply with the officer's orders and who the officer has reason to believe is armed, fall into a grey area about which there

does not appear to be clearly established law regarding the appropriate use of force. Indeed, Plaintiff does not cite one case in which a court has found the use of a taser unconstitutional under similar circumstances. Accordingly, Defendants are entitled to qualified immunity as to Plaintiff's excessive force claim.").

Carter v. Colerain Township, No. 105-CV-163, 2007 WL 869727, at *15 (S.D. Ohio Mar. 20, 2007) ("Generally speaking, individuals have a clearly established right to be free from the unreasonable use of non-lethal force. Defendants cite *Russo*, 953 F.2d at 1044-45, for the proposition that the use of a taser in order to obviate the need for greater force does not violate clearly established law. However, *Russo* involved a situation in which officers were faced with a potentially homicidal and suicidal suspect, armed with two knives, who had made threatening remarks to the officers. *Russo*, therefore, is not controlling in this case. Indeed, courts have found that under certain circumstances, such as where the suspect did not pose the level of threat described in *Russo*, the unreasonable use of a taser to subdue the suspect violates the suspect's clearly established right to be free from excessive force. [collecting cases]")

Glaeser v. Cheatham County Sheriff's Dept., No. 3:05cv1043, 2006 WL 3805660, at *6 (M.D. Tenn. Dec. 21, 2006) ("Using deadly force against a speeding or even a reckless driver will not always be objectively reasonable. Because it is not clear that a reasonable officer in the defendants' situation would not have known that engaging in the conduct alleged by Mr. Glaeser was violative of his clearly established right to be free from excessive force, Defendants' Rule 12(b)(6) motion on the basis of qualified immunity must be denied at this stage in the proceedings. *Cf. Hayes v. Wickert*, No. C06-5402RJB, 2006 U.S. Dist. LEXIS 84316, at *13-*14 (W.D.Wash. Nov. 20, 2006) (holding that material issues of fact precluded summary judgment on defendant police officer's qualified immunity defense, even where it was undisputed that the plaintiff had run a stop sign, was speeding, was driving without headlights at night, was driving into oncoming lanes to avoid having to take curves, and had committed the felony of evading arrest, because it was not clear whether the plaintiff posed an "immediate threat to the safety" of the officer or others at the time the officer actually used deadly force).")**.**

Hoover v. Isaacson, No. 04-CV-70654, 2005 WL 1682051, at *5 (E.D. Mich. July 15, 2005) ("As discussed in the recent Sixth Circuit case of *Sample v. Bailey,* 409 F.3d 689, 2005 WL 1283517 (6th Cir. May 9, 2005), 'it has been clearly established in this circuit for the last twenty years that a criminal suspect "ha[s] a right not to be shot unless he [is] perceived to pose a threat to the pursuing officers or to others

during flight."'. . The question this case turns on, then, is whether or not the defendant *could have reasonably believed* that Sommers' attempt to escape posed a threat of death or serious physical injury to himself or others. After considering the evidence offered in the case to date, it is the court's determination that it cannot rule on the question of qualified immunity as a matter of law. In a defendant's motion for summary judgment based on qualified immunity, the plaintiff is required to identify a clearly established right that was violated, and establish that a reasonable officer in the defendant's situation should have known that deadly force violated that right. . . However, where the question of qualified immunity 'is completely dependent upon which view of the facts is accepted by the jury,' a district court cannot grant qualified immunity to an officer on a claim such as this. . . In the instant case, defendant has testified that he was afraid of being struck by the vehicle. . . and about his general fear for his and other officers' safety at the time of the fatal shooting . . . However, plaintiff points out that defendant shot Sommers through the side passenger window, rather than the front windshield, and that he in fact admitted that he did not fire the shots until the vehicle was moving past him. . . Indeed, Isaacson concedes he was at the side of the vehicle at the time of the shooting . . . and did testify at deposition that he fired the shots 'knowing the guy just tried to run me over.' . . As plaintiff emphasizes, this testimony may indicate, to some extent, a retaliatory motive on the part of Isaacson. Furthermore, the court's repeated viewing of the videotapes confirms that Sommers' vehicle was significantly disabled, and that no specified individual was at an immediate risk of being hit by the vehicle at the time of the fatal shooting. Finally, the court notes that witnesses at the scene have offered varying depictions of the events. . . The court further notes it is not clear from the evidence, including the videotapes offered by defendant, exactly how disabled the van appeared to be at the time, what Sommers was doing inside the van, or whether in fact Sommers threatened to turn the van sharply in the officers' direction prior to the shooting, as asserted by defendant, and as testified to by defendant and Officer Bonacorsi. Thus, it is the court's determination that whether an officer in defendant's position would have found the use of deadly force reasonable under the circumstances depends on certain findings of fact which are in dispute in this case. Because defendant's entitlement to qualified immunity turns on the events unfolding in those moments before the fatal gunshots, which require the careful assessment of a fact finder, this is a case where disputed material facts require the court to deny defendant's motion for summary judgment on the basis of qualified immunity.").

Armstrong v. U.S. Bank, No. C-1-02-701, 2005 WL 1705023, at *5 (S.D. Ohio July 20, 2005) ("In determining whether a right was clearly established, the Court

may consider whether officers should be on notice from either the specific facts of particular prior cases or the general reasoning of such cases. . . Both *Greene* and *Hickey* are instructive here. In *Greene*, the Sixth Circuit held that a reasonable officer would not necessarily know that it was unlawful to use an eye irritant when a suspect was actively resisting arrest and the officer was following police procedure for restraining non-cooperative arrestees. . . In *Hickey*, by contrast, the Sixth Circuit held that a reasonable officer would have known that inflicting unnecessary pain on a nonviolent arrestee violated a clearly established constitutional right. . . In this case, under the facts alleged, while Armstrong did resist being handcuffed, Defendant Officers already had one of her wrists handcuffed before they used mace. Moreover, though Armstrong resisted arrest, she did not do so violently, but rather by backing away while crying. Considering the alleged facts in light of the general reasoning of cases involving similar facts, the Court holds that a reasonable officer would have known that, because Armstrong was not violent, inflicting unnecessary pain on her by spraying her with mace, throwing her up against the car, and roughing her up violated her clearly established constitutional rights. Likewise, given that Armstrong has alleged that Defendant Officers maced and threw against a car a mentally disabled woman whose resistance was limited to tearfully backing away, the Court finds Defendant Officers' actions were objectively unreasonable.").

Kaylor v. Rankin, 356 F.Supp.2d 839, 851, 852 (N.D. Ohio 2005) ("Kaylor's supposed crime, obstruction of official business, was not severe, and had not involved physical acts on his part. He was not threatening anyone's safety or attempting to flee. Once the officers undertook to arrest him, however, he actively resisted arrest, did so in an aggressive and physical manner, and continued to do so until finally subdued. During the scuffle, Officer Radde used pepper spray to subdue Kaylor. Although the Sixth Circuit recognizes circumstances in which the use of pepper spray by police officers will not be considered to be excessive force, those cases are, so far, limited to situations where either the defendant is armed or the officers fear for the arrestee's own safety. . . Kaylor was unarmed and presented no danger to himself. Therefore, under these circumstances, the use of pepper spray may have constituted excessive force in violation of the Fourth Amendment. . . Under the *Saucier* analysis, however, I cannot find that it would have been clear to a reasonable officer in Officer Radde's position that it would be unlawful for him to use pepper spray on an arrestee who was actively and aggressively resisting arrest. . . Because I cannot find that the right to be free from the level of force used here was clearly established, Officers Rankin and Radde are entitled to qualified immunity on plaintiff's unreasonable use of force claim.").

SEVENTH CIRCUIT

Viilo v. Eyre, 547 F.3d 707, 710 (7th Cir. 2008) ("While *Brown* and *Hells Angels* clearly establish that it is unreasonable for officers to kill a person's pet unnecessarily, these decisions are not essential to reaching this conclusion. . . In 2001, we held that domestic animals are 'effects' within the meaning of the Fourth Amendment. . . The *Siebert* decision is enough to give police officers reasonable notice that unnecessarily killing a person's pet offends the Fourth Amendment.").

Holmes v. Village of Hoffman Estate, 511 F.3d 673, 687 (7th Cir. 2007) ("At the time of Holmes's arrest, it was of course clearly established that a police officer may not use excessive force in arresting an individual. Teipel claims that he was not on notice that the types of force Holmes alleges he employed were impermissible under the circumstances. However, accepting as true Holmes's contention that he did not physically resist the officers, we cannot say that Teipel could have reasonably thought the types of gratuitous force Holmes has described were justified. No reasonable officer could have thought that it was permissible to slam Holmes's head against the car simply because his fellow officer deemed him a 'smart ass,' for example, nor could the officer have thought it proper to continually grind his knee into the face of an unresisting arrestee.")

Duran v. Sirgedas, 2007 WL 1259059, at *6, *14 *15 (7th Cir. May 1, 2007) (not published) ("[T]he reasonableness of directing and holding partygoers inside the house is not the issue; rather, the issue is whether, in seizing the plaintiffs inside the house, Officers DeCianni and Peslak used excessive force by spraying pepper spray into the house. . . . Assaulting citizens who are safely detained without any provocation violates clearly established constitutional principles. . . . [U]nlike the plaintiffs inside the house, these plaintiffs [standing in yard] were not 'seized' within the meaning of the Fourth Amendment. Accordingly, their claim is analyzed under the due process clause of the Fourteenth Amendment. Conduct that violates the Fourteenth Amendment's guarantee of substantive due process must be so arbitrary that it 'shocks the conscience.' . . . In this case, the facts as set forth by the district court were that Sergeant Krummick and Officer DeCianni sprayed pepper spray at Amada Duran and her children, and Officer DeCianni also used excessive force by spraying Amada's niece, all while they were standing in the back yard. The district court did not find any evidence that these plaintiffs were refusing to follow a police order or were resisting arrest in any way. Nor did the district court conclude that the record evidence indicated that the officers were spraying pepper spray more broadly

to disperse the crowd. Given these limited facts, we agree with the district court that a reasonable officer would know that spraying individuals (who allegedly were not resisting arrest, refusing to obey a lawful order to disperse, or otherwise interfering with official business) with pepper spray without justification could support a jury verdict based on the Fourteenth Amendment's 'shocks the conscience' standard, as it could be found to be 'conduct intended to injure in some way unjustifiable by any government interest.' *Lewis,* 523 U.S. at 840. Accordingly, based on the facts set forth by the district court, we conclude that at this stage Sergeant Krummick and Officer DeCianni were not entitled to qualified immunity on these claims.").

Sallenger v. Oakes, 473 F.3d 731, 741, 742 (7th Cir. 2007) ("The officers argue that the use of the hobble was not clearly established as unconstitutional since there are no cases from this circuit which have called the use of hobbles into question. Moreover, the defendants cite authority from our sister circuits holding that the use of a hobble was not clearly established as constitutionally infirm so as to deny police officers qualified immunity. *See, e.g ., Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir.2004); *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir.2001). Although the cases relied on by the defendants do suggest that the mere use of a hobble was not clearly established as constitutionally suspect, this does not speak to the totality of circumstances surrounding the use of the hobble on Andrew. Here, the alleged excessive force does not solely, or perhaps even primarily, involve the use of the hobble. Rather, here, the officers repeatedly struck Andrew with closed-fist blows and blows with a flashlight after he was handcuffed; they continued to strike him after he had stopped moving and placed him in a hobble; and, they failed to put him immediately on his side after they hobbled him. The question is not whether Andrew's right to be free from the officers' use of the hobble was clearly established; rather, the issue is whether Andrew's right to be free from the whole range of excessive force as described by the district court was clearly established. In the first part of our inquiry, we determined that the officers' use of force was objectively unreasonable. We further conclude that Andrew's right to be free from the excessive force inflicted on him by the officers was 'sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.'. . Viewing the facts in the light most favorable to the plaintiff, a reasonable officer would have known that administering closed-fist punches and flashlight blows, including ones to the head, after the arrestee was handcuffed, continuing to strike him after he had stopped resisting arrest and failing to place him in the proper position after hobbling him violated the individual's Fourth Amendment right to be free from excessive force.")**.**

Graham v. Hildebrand, No. 06-2169, 2006 WL 3102351, at *4, *5 (7th Cir. Oct. 26, 2006) (not published) ("Although we have not specifically addressed a qualified immunity defense in a case involving the use of pepper spray, other circuits have found an officer's use of pepper spray reasonable when the individual sprayed was either resisting arrest or refusing reasonable police requests. [citing cases] Viewing the facts in the light most favorable to the Grahams, they were not resisting arrest or otherwise interfering with the officers at the point when they were shot with pepper spray. And while they were not entirely 'passive' or 'incapacitated'--they were pushing other persons in the crowd-- Officer Bennett has never asserted that he dispersed the pepper spray to stop them from fighting with others rather than because they were resisting him. Morever, by the Grahams' account, Bennett never gave them an opportunity to comply peacefully with his orders; he simply shot pepper spray without warning at the targets of an angry and potentially violent mob--the precise individuals, if the Grahams are telling the truth, that he should have been protecting. Because a jury could find that a reasonable officer in Bennett's position would have known, under the Grahams' version of events, that dispersing pepper spray in their faces was an excessive use of force, we vacate the grant of summary judgment on the excessive-force claim as to Bennett.").

Jones v. Wilhelm, 425 F.3d 455, 463-65 (7th Cir. 2005) ("By his own admission, . . . Wilhelm knew before he executed the warrant that the phrase 'upstairs apartment on the right' would lead him to a different apartment depending on which staircase taken. Where a warrant is open to more than one interpretation, the warrant is ambiguous and invalid on its face and, therefore, cannot be legally executed by a person who knows the warrant to be ambiguous. . . We must emphasize that the Joneses' clearly-established rights were not violated because the warrant turned out to be ambiguous. Rather, the Joneses' rights were violated because Wilhelm knew the warrant did not particularly describe the place to be searched based on his prior surveillance of the building. . . Wilhelm recognized the warrant as ambiguous before the execution of the warrant, but failed to immediately stop execution and seek the necessary clarification of a warrant in order to make certain the warrant particularly described the place to be search as called for by the Fourth Amendment. . . . Wilhelm had prior knowledge of the building's layout before executing the warrant. As a result, he does not qualify for any good-faith exception. Where an officer executing a warrant knows or should have known that a warrant, which was valid when issued, now lacks the necessary particularity, then that officer cannot legally execute the warrant. . .Furthermore, if an officer obtains information while executing a warrant that puts him on notice of a risk that he could be targeting the wrong

location, then the officer must terminate his search. . . . For all the reasons discussed, we find that the undisputed facts of this case establish that Wilhelm's actions violated the Joneses' clearly established rights because he (1) executed a validly issued warrant he knew to be facially ambiguous prior to the execution of the warrant; and (2) circumvented the magistrate judge and resolved the warrant's ambiguity based on information he should have disclosed to the magistrate who issued the warrant. Since Wilhelm's undisputed actions represent a violation of clearly-established, constitutional rights, we find that Wilhelm enjoys no qualified immunity as to the Joneses' warrant claim.").

Abdullahi v. City of Madison, 423 F.3d 763, 774, 775 (7th Cir. 2005) ("As a last-ditch effort to win the day, defendants argue (in just three pages of their appellate brief) that they are entitled to qualified immunity. . . . Here the plaintiff has certainly alleged violation of a valid constitutional right--if defendant Brooks applied deadly force to Mohamed while he was lying prone on the ground with his arms behind him, this would violate Mohamed's Fourth Amendment rights, as would an unjustifiable failure by the other officers to intervene. However, whether it would have been clear to a reasonable officer that Brooks' actions constituted unreasonable force under the circumstances--thus triggering the duty to intervene--is obviously a more difficult question. Presumably, if it would have been apparent to the other officers, just by watching, that Brooks was applying potentially deadly pressure to Mohamed while he was lying prone, then the officers would not be entitled to qualified immunity. Again, no one contends that deadly force was warranted in this case. However, it may have been difficult to tell how much force Brooks was applying, and at least one or two of the officers (those attempting to restrain Mohamed's legs) had their back to Brooks during the encounter. Additionally, this Court's 1997 decision in *Estate of Phillips* ruled that a similar takedown--during which one officer put a knee in Phillips' back for about one minute--was not unreasonable under the circumstances. . . However, since the very nature of Brooks' conduct remains undetermined, one can only speculate as to how visually obvious any violation of Mohammed's rights might have been. In other words, without knowing what Brooks did or how his conduct appeared to onlookers, it would be difficult to say that, as a matter of law, a reasonable officer could not have known that Brooks' conduct violated Mohamed's constitutional rights. A jury should decide whether Brooks' actions would have made it clear to a reasonable officer that intervention was warranted, and, if so, whether Grady, Mueller and Murphy had a realistic opportunity to intervene.").

Green v. Butler, 420 F.3d 689, 701(7th Cir. 2005) ("[A]t the time of the incident at issue here, a reasonable agent would have known that a critical component of a reasonable entry under the Fourth Amendment was the knock and announce requirement. There was no reason for an agent to believe, under these facts, that dispensing with the requirement was justified by any exigency or futility. Nor was there any basis for a belief that the parolee's consent to search justified dispensing entirely with the knock and announce rule. Indeed, when an officer enters a home without knocking and announcing his identity and purpose, and without a manifest exigency or demonstration that compliance would be futile, the Fourth Amendment violation 'is so obvious that a reasonable state actor would know that what he is doing violates the Constitution.'").

Hosty v. Carter, 412 F.3d 731, 738, 739 (7th Cir. 2005) ("The district court held that any reasonable college administrator should have known that (a) the approach of *Hazelwood* does not apply to colleges; and (b) only speech that is part of the curriculum is subject to supervision. We have held that neither of these propositions is correct--that *Hazelwood's* framework is generally applicable and depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities. But even if student newspapers at high schools and colleges operate under different constitutional frameworks, as both the district judge and our panel thought, it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule. . . . Many aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply . . . . 'Qualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.' *Brosseau,* 125 S.Ct. at 599. That description is as apt here as it was in *Brosseau.* Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved. Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator's* printing bills violated the first amendment. She therefore is entitled to qualified immunity from liability in damages.").

Overton v. Hicks, No. 1:06-cv-1513-DFH-JMS, 2008 WL 2518229, at *6, *7 (S.D. Ind. June 17, 2008) ("Defendants are entitled to summary judgment for the use of the dog and the taser while Overton was in his car after warning him to comply. Those actions were objectively reasonable responses to a driver who was revving the engine

of a car surrounded by police. Officer Hicks reported that Overton continued to rev the car's engine even after the dog bit him. . . Moving cars can be deadly weapons, warranting use of deadly force under certain circumstances. . . . There is no indication that deadly force would have been reasonable here, particularly given Officer Parker's testimony that he did not believe that Overton could have dislodged his car from the curb. . . But some force was warranted to prevent an attempt to escape, including the reasonable use of a police dog and a taser. . . . This finding of reasonableness is based only on the undisputed evidence that Overton was revving his car's engine and fumbling with the steering column-before the officers had any indication that Overton might have been in diabetic shock. Had Overton merely been passively resisting the officers' commands to get out of the car and show his hands, their use of a dog and a taser would have presented a closer question. . . . Perhaps the officers violated the department's policy by not using an arm-lock or other less intrusive method, but the court's inquiry under the Fourth Amendment is whether the force used was reasonable under the circumstances, not whether it was the least forceful means possible.")**.**

Estate of Fields v. Nawotka, No. 03-CV-1450, 2008 WL 746704, at *6, *7 (E.D. Wis. Mar. 18, 2008) ("Under the plaintiffs' version of the facts which this court must credit, Nawotka was never in the direct path of Justin's vehicle, Nawotka fired his weapon as the vehicle was already traveling away from him, the vehicle was driving away at low speeds, and the vehicle was significantly damaged and had a flat tire. Under the plaintiffs' version of the facts, nobody in the immediate vicinity was in imminent danger of death or serious bodily injury when Nawotka fired his weapon. Under these facts and in light of clearly established law, a reasonable officer in Nawotka's position would not have believed that exercising deadly force was lawful. . . . Also, unlike the officers in *Scott* [*v. Edinberg*, 346 F.3d 752, 755 (7th Cir.2003)] and *Brosseau*, Nawotka does not claim that there were bystanders in the immediate vicinity that faced death or serious bodily injury at the time that he fired his weapon, and the record in this case does not reveal that anybody was in the vicinity of the vehicle's path when Nawotka fired his weapon. . . Moreover, when Nawotka fired his weapon, Justin's vehicle was badly damaged, traveling slowly, and had a flat tire. Even if there were people standing in the vicinity of the vehicle's path, a reasonable officer may not have concluded that they were in imminent danger.")**.**

Montgomery v. Morgan County, No. 1:06-cv-0915-RLY-TAB, 2008 WL 596068, at *9, *11(S.D. Ind. Feb. 29, 2008) ("Plaintiff contends that the 'totality of circumstances' measurement would encompass the decision of the deputies to force

their way into the house with tasers and a gun drawn, despite the fact that they testified in deposition that before they entered the house they were in no fear of imminent danger. Defendants want the court to focus on the situation that existed when Hoffman fired his gun. As much as Plaintiff would like the question to be whether it was a good choice to enter the home, the answer to that question provides no basis for holding any of the officers liable. Even under a due process analysis, neither negligence nor gross negligence suffice to support liability under § 1983. . . . In short, it was constitutionally permissible for the deputies to go into the house and attempt to execute on the order of apprehension. Once they entered and Montgomery became hostile, attacking an officer in a manner that could inflict serious bodily harm, there is no doubt that it was reasonable for Hoffman to use his gun to stop Montgomery from swinging the pipe at Beaver. This is especially true in light of the deputies' efforts to first use less than lethal force, the Tasers, to subdue him. It would have been better for all if Worth or Beaver had successfully utilized the Tasers, but their efforts were stymied by Montgomery's own violence and no liability is created by an inaccurate Taser shot.")

Duran v. Town of Cicero, No. 01 C 6858, 2005 WL 2563023, at *12 (N.D. Ill. Oct. 7, 2005) ("First, we are analyzing plaintiffs' claim under the Fourth Amendment, not the Fourteenth, so defendants' conduct is evaluated for objective reasonableness. Moreover, defendants' framing of the 'clearly established law' inquiry is much too narrow. . . .At the time of the events in this case, it was clearly established that 'police officers do not have the right to shove, push, or otherwise assault innocent citizens without any provocation whatsoever.'. .Pepper-spraying is a type of 'assault.' A clearly-established constitutional right can be demonstrated not only by pointing to a closely analogous case that established a right to be free from the type of force the police officers used on plaintiffs, but also by 'showing that the force was so plainly excessive that, as an objective matter, the police officers would have been on notice that they were violating the Fourth Amendment.' . . Here, the facts could support a finding that defendants used plainly excessive force by assaulting plaintiffs with pepper spray without justification (when those plaintiffs were confined in the house and not provoking the officers). Under the facts, there was no reason for the officers to believe that spraying into the house was justified. We therefore conclude that Officers DeCianni and Peslak are not shielded by qualified immunity from the Group I plaintiffs' claim of excessive force in spraying into the Durans' house.").

DeSalvo v. City of Collinsville, No. 04-CV-0718-MJR, 2005 WL 2487829, at *4, *5 (S.D. Ill. Oct. 7, 2005) (not reported) ("Krug does argue, however, that a citizen's

right to be free from being tased is not a clearly established right, in that there is no clearly analogous case specifically establishing a right to be free from tasing. While this may or may not be the case, this Court finds that Krug's argument implicitly asserts a definition of DeSalvo's right that exceeds the appropriate level of specificity. . . DeSalvo's right in this case, defined at an appropriate level of specificity, poses to the Court a broader question: does a restrained person have a right to be free from a significantly violent level of force if he is, while perhaps not fully compliant with an officer's orders, acting in an otherwise peaceable manner? In answering this question, the Court finds the fact that Krug used a taser to inflict pain upon DeSalvo, rather than some other weapon, is of diminished importance. A taser is capable of inflicting a great deal of pain upon a person--shocking, burning, and even rendering numb its target--and is, in this sense, little different than a nightstick, mace, or any other weapon that a police officer might use against an adversary. A reasonable officer in the situation Krug confronted would have known that it would be unlawful to deliver a swift blow with a night stick to the back of DeSalvo's neck as he stood handcuffed at the rear of the squad car. A reasonable officer would also have known that spraying mace in the face of DeSalvo under the circumstances would be unlawful. So too, then, this Court finds, a reasonable officer in Krug's position would have known that it would be unlawful to tase DeSalvo under the circumstances of this case. Accordingly, the Court concludes that the rights of DeSalvo that Krug allegedly violated were 'clearly established' at the time of DeSalvo's arrest. Therefore, the Court rejects Krug's qualified immunity argument.").

EIGHTH CIRCUIT

Engleman v. Murray, 546 F.3d 944, 951 (8th Cir. 2008) ("Even though Deputy Murray lacked the authority to execute the valid Arkansas arrest warrant in Oklahoma, we conclude that, taking the facts in the light most favorable to Engleman, Deputy Murray's belief that he was arresting Engleman in Arkansas was objectively reasonable. Therefore, we conclude Deputy Murray did not violate the Fourth Amendment and is entitled to qualified immunity.")

Engleman v. Murray, 546 F.3d 944, 951, 952 (8th Cir. 2008) (Bye, J., dissenting) ("I believe an out-of-state arrest by a police officer violates the clearly-established Fourth Amendment rights of the arrestee. I also believe genuine questions of material fact remain in dispute about whether it was objectively reasonable for an officer in Deputy Murray's position to have believed he was arresting Stephen Engleman in Arkansas rather than Oklahoma. I therefore respectfully dissent. First, I take issue

with the Court's suggestion in footnote five that Engleman's arrest did not violate a clearly established constitutional right. The Fourth Amendment guarantees the right to be free from unreasonable seizures. And, that right is clearly established in the specific context of this case, because the recognition of the jurisdictional limits of an officer executing a warrant dates back to English common law, as the Court itself notes. This is not a situation where a peace officer licensed in the state of Arkansas merely crossed a municipal or county line. Rather, the officer executed an arrest warrant in a state where he knew he was unlicensed and had no authority. Would it comport with the Fourth Amendment for an Arkansas police officer to execute a warrant in, for example, the state of Maine? No. For the same reason, an arrest by an Arkansas officer in Oklahoma violates the Fourth Amendment's prohibition on unreasonable seizures.")

Moore v. Indehar, 514 F.3d 756, 763 (8th Cir. 2008) ("On the facts we are required to assume at this point in the case, Moore posed no threat to Officers Indehar and Hafstad or to any other person; Officer Indehar admitted as much in his deposition and in his responses to Moore's interrogatories. When Officer Indehar arrived on the scene, shots had been fired, however he specifically noted that Moore was not holding a firearm and the only action Moore took was to flee the scene. Thus, a reasonable officer would have known shooting Moore was a violation of Moore's constitutional rights; as such, a right to be free from the use of excessive force in Moore's situation was clearly established.").

***Kenyon v. Edwards*,** 502 F.3d 722, 724-28 (8th Cir. 2007) (*denial of pet. for reh'g and reh'g en banc*) (Beam, J., joined by Riley, J., dissenting) ("While it is not entirely clear what the district court purported to do, it is perfectly clear what it did not do. It did not follow the requirements of either *Schatz* or *Saucier.* The district court appears to have ruled that if a jury (or other undisclosed fact-finder) gives Kenyon's allegations their best factual gloss, Edwards violated Kenyon's constitutional right to be free from the use of excessive force. The district court does not appear to have dealt with *Saucier*'s second question at all. If the district court's cryptic order means that there are facts yet to be determined at this second step, this would constitute an even more egregious violation of both Supreme Court and circuit precedent. In reality, then, as earlier indicated, the district court ignored both *Schatz* and *Saucier* but the *en banc* panel now affirms this procedure through misuse of the evenly divided court affirmance rule. *Schatz* and the equally divided court rule aside, the district court apparently attempted to follow the route taken by the Ninth Circuit in *Saucier,* a pathway that was specifically and soundly rejected by the Supreme

Court. . . . In summary, giving plaintiff Kenyon's allegations the most charitable reading possible, the district court tentatively determined that Officer Edwards possibly violated Kenyon's constitutional right to be free from excessive force. On this tenuous basis alone, and without ruling on Edwards' contention that a reasonable officer under the specific facts of this situation would not have known he was violating Kenyon's rights, the district court denied Edwards qualified immunity and set the underlying dispute for trial. At the previous trial, as also earlier noted, some number of the members of the jury rejected Kenyon's factual allegations. On appeal to a three-judge panel, two members of the panel rejected Kenyon's constitutional and reasonable knowledge claims. On appeal to a twelve-member *en banc* panel, six members of the *en banc* court would have granted Edwards immunity on one or both of his *Saucier* claims. So, although Kenyon has not mustered a necessary majority vote on any of the underlying or interlocutory claims at any point in this dispute, Officer Edwards is headed back to a jury trial on the excessive force claim through the unfortunate misapplication of the so-called equally divided court rule. We should never condone police brutality. Neither should we disregard the difficulties inherent in the work of our police community. The people of Searcy, Arkansas, sent Officer Edwards into a dicey situation in which he was forced to encounter plaintiff Kenyon, a less than cooperative individual based on undisputed portions of the record before us. Although Edwards handled his duties in a totally lawful manner in the view of some jurors and at least two (or perhaps more) of the circuit judges reviewing the matter, he now finds his time, reputation and personal assets in jeopardy at a jury trial that should not be allowed to occur. From this result I dissent. And if a majority of the *en banc* panel insists on pursuing this course of action, I urge Officer Edwards to seek relief through writ of *certiorari* to the United States Supreme Court.").

Ngo v. Storlie, 495 F.3d 597, 604 (8th Cir. 2007) ("[W]e agree with the district court that genuine issues of material fact exist as to whether a reasonable officer faced with these circumstances would have believed that his conduct was legal. Storlie exited his squad car and opened fire with a semi-automatic machine gun on a kneeling, unarmed man. He fired within a 'split-second' of exiting the squad car, without giving any warnings or attempting to determine whether Ngo was, in fact, the suspect described on the radio transmission. Further, Storlie knew there was a plainclothes officer somewhere in the area. Thus, it was unreasonable for Storlie to fire on the first person he saw without first making the determination of who that person was.").

Richmond v. City of Brooklyn Center, 490 F.3d 1002, 1007, 1009 (8th Cir. 2007) The defendants do not dispute on appeal the jury's finding that Officer Bruce

conducted the strip search in an unreasonable manner in violation of Richmond's Fourth Amendment rights. Therefore, we proceed directly to the second prong of the qualified immunity analysis, which asks whether the asserted constitutional right was clearly established. . . . In this case, the officers had reasonable suspicion that Richmond was concealing evidence on his person and were in a position to conduct a private, hygienic and non-abusive strip search on the spot, rather than risk Richmond disposing of the evidence during the course of his transportation to the police station. . . . No clearly established legal standards would have put a reasonable officer on notice that, in these particular circumstances, it was objectively unreasonable to lower the handcuffed arrestee's pants and boxer shorts to accomplish the strip search, rather than to risk loss of evidence by waiting until the arrestee was in an environment where handcuffs were not required.").

McVay ex rel Estate of McVay v. Sisters of Mercy Health System, 399 F.3d 904, 908 (8th Cir. 2005) ("Here, we need not inquire beyond the first step of the *Saucier* analysis. We hold, taking the facts alleged in the light most favorable to McVay, that there was no constitutional violation. McVay argues Sears violated her son's Fourth Amendment right to be free from an unreasonable seizure by employing excessive force in stopping him from exiting the hospital. . . . Given the circumstances in this case, including the fact that McVay was disoriented and exhibiting signs of lacking mental control, that he was barreling toward glass doors that Sears knew would not open, and the rapid pace of events as Sears raced to reach McVay before McVay reached the locked doors, even if Sears forced McVay to the floor in a 'tackle,' doing so was not an excessive use of force.").

Craighead v. Lee, 399 F.3d 954, 962 & n.4, 963 (8th Cir. 2005) ("Although the first question is one of objective reasonableness and the second question is also one of reasonableness, the Supreme Court emphasized in *Saucier* that the two questions are not duplicative and must be addressed separately. The key distinction between the two questions is that the right allegedly violated must be defined at the appropriate level of specificity before a court can determine whether it was clearly established. [citing *Brosseau*] Neither party has cited a case with facts substantially similar to those we are required to assume on this appeal, nor have we found one. Nonetheless, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances .' [citing *Hope*]'Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.' . . Hence, the issue is not whether prior cases present facts substantially similar to the present

case but whether prior cases would have put a reasonable officer on notice that the use of deadly force in these circumstances would violate Craighead's right not to be seized by the use of excessive force. At least since *Garner* was decided nearly 20 years ago, officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others. On the facts we are required to assume, Craighead did not pose a significant threat of death or serious physical injury to Lee at the time Lee fired the shotgun because the pistol was continuously over Craighead's head, pointed upward, as Craighead was keeping it from the smaller Scott. Even if Lee thought that Craighead posed a significant threat of death or serious physical injury to Scott, the facts we are required to assume show that Lee fired the shotgun in circumstances in which he knew or should have known that he would hit both Craighead and Scott, so he cannot have fired the shot to protect Scott. Nor does Lee claim that he fired to protect Scott. The facts we are required to assume show that a warning was feasible but not given. Moreover, Craighead was grappling with Scott; he was not fleeing when Lee fired the shot. . . . Unlike *Brosseau*, which the Supreme Court decided on December 13, 2004, the facts we must assume show that Lee gave no commands and made no attempt to use less-than-deadly force; nor, as mentioned, was Craighead fleeing when Lee fired. . . Before December 3, 2001, this Court had denied qualified immunity in at least four cases in which the plaintiff presented evidence to show that the officer used deadly force under circumstances in which the officer should have known that the person did not present an immediate threat of serious physical injury or death. [citing cases] Those cases, along with *Garner*, put officers on notice before December 3, 2001, that they may not use deadly force under circumstances in which they should know that the suspect does not present an immediate threat of serious physical injury or harm. Craighead's right not to be seized by deadly force was clearly established with sufficient specificity to meet the second prong of *Saucier*.").

Brown v. City of Golden Valley, 534 F.Supp.2d 984, 994, 995 (D. Minn. 2008) ("The Eighth Circuit has not specifically addressed the constitutionality of taser use in a case factually analogous to this case. . . However, the lack of an Eighth Circuit case addressing these specific facts involving a taser does not mean that Zarrett did not violate clearly established law. . . . The Court notes that, under Plaintiff's version of the facts, Zarrett never even asked her to take off her seatbelt or get out [of] the car. He simply tasered her, without warning, for failure to end her 9-1-1 call. At the time of this incident, it was clearly established that it was unreasonable to, without warning, taser a nonviolent passenger who was not fleeing or resisting arrest and was

suspected of a minor, nonviolent crime, because she had disobeyed two orders to get off of the telephone with a 9-1-1 operator.")

Nunn v. City of Woodbury, Civil No. 05-632 ADM/JSM, 2006 WL 3759748, at *9 (D. Minn. Dec. 21, 2006) ("As is discussed above, Officer Gort's conduct did not violate Plaintiffs' constitutional rights. Even if it did, the right at issue is not clearly established. It is true that from a generalized perspective, the right to be free from unreasonable seizures under the Fourth Amendment is clearly established. However, when viewed in a more particularized sense, it would not be clear to a reasonable officer that Gort's actions were unlawful in the situation he confronted. From Officer Gort's objective perspective, Nunn was fleeing from police after receiving a disorderly conduct citation and engaging in a course of conduct in which he followed police squad cars at a very close distance, flashed his bright lights, and honked his horn. Nunn appeared aggressive, angry, and uncontrollable. Nunn had already stopped his vehicle once after sliding into a snow bank, only to reverse out of it and continue driving away from the police. Gort ended the pursuit by ramming his squad car into Nunn's car at a speed of approximately twenty miles per hour. It cannot be said that no reasonably competent officer, making a split-second judgment in this tense, uncertain, and rapidly evolving situation, would have taken the same action that Officer Gort did. Accordingly, the Officer Defendants are entitled to qualified immunity.")

NINTH CIRCUIT

Gregory v. County of Maui, 523 F.3d 1103, 1108, 1109 (9th Cir. 2008) ("*Drummond* is distinguishable from this case, even accepting that the officers here should have recognized that Gregory was 'emotionally distraught.' Unlike the police in *Drummond*, the officers here did not immediately use force upon encountering Gregory, but rather first attempted verbally to coax him into dropping the pen. Moreover, the officers had reason to believe that Gregory posed a threat to them, because he refused their requests, acted in an aggressive manner, and had already assaulted Finazzo. Further, Gregory had committed an underlying offense, a trespass. . . Finally, unlike *Drummond*, Gregory resisted the officers throughout the encounter, and the officers in this case ceased using force once Gregory was handcuffed. . . . Thus, even though 'the governmental interest in using such force is diminished by the fact that the officers [were] confronted ... with a mentally ill individual,' the undisputed facts show that the officers in this case reasonably used the minimal force

necessary to disarm and to restrain Gregory, and that they ceased such force once the threat was neutralized.").

Long v. City and County of Honolulu, 511 F.3d 901, 906, 907 (9th Cir. 2007) ("We hold that Officer Sterling's conduct meets the objective reasonableness standard. Prior to taking the fatal shot, Sterling had observed Long's agitated behavior, heard him threaten to shoot the police, observed him carrying a .22 caliber rifle, and knew that he had previously shot at a car full of people and wounded two people therein earlier that night. Under these circumstances, when fellow officers radioed that Long was yelling threats at them and then radioed that Long was shooting at them, Sterling had probable cause to believe that Long posed an immediate danger to these officers. In the exigent circumstances of the night, Sterling acted in an objectively reasonable manner.We are mindful that we must be wary of self-serving accounts by police officers when the only non-police eyewitness is dead. . . We note, however, that here, unlike the situation in *Scott*, we have the benefit of multiple eye witnesses and a CAD report that fairly accurately recorded the SWAT team's activities on the night of Long's death. Ms. Long's claims of factual error in the police accounts do not change our analysis. From the perspective of a reasonable officer in Sterling's position, it is immaterial whether Marini and Cannella jumped into the ditch at 4:47 or 4:52 a.m. Though a closer question, whether Long actually fired his rifle at these officers is also immaterial. It is enough that Sterling heard the radio transmission and observed Long point the rifle in the officers' direction. Accordingly, we hold that Officer Sterling did not violate Long's Fourth Amendment rights and that he is entitled to qualified immunity.")

Tekle ex rel Tekle v. United States, 511 F.3d 839, 850 (9th Cir. 2007) (*amended opinion on reh'g*) ("The totality of the circumstances supports the conclusion that not only was Tekle's detention unreasonable, but a reasonable officer would have known that an eleven-year-old child who was unarmed, barefoot, vastly outnumbered, and was not resisting arrest or attempting to flee should not have been kept in handcuffs for fifteen to twenty additional minutes.").

Wakefield v. City of Escondido, 2007 WL 2141457, at *1 (9th Cir. July 26, 2007) ("[W]hen viewed in the light most favorable to Wakefield, evidence at trial showed that Parker repeatedly and without warning deployed taser shots against an unarmed individual who was partially restrained, who had committed no serious offense, who was in the throes of a claustrophobic attack, and who pleaded with Parker not to shoot him. . . Under those facts, 'closely analogous pre-existing case law' is not

required to put Parker on notice that his conduct was unlawful.")

Blankenhorn v. City of Orange, 485 F.3d 463, 481 (9th Cir. 2007) ("In assessing the state of the law at the time of Blankenhorn's arrest, we need look no further than *Graham's* holding that force is only justified when there is a need for force. We conclude that this clear principle would have put a prudent officer on notice that gang-tackling without first attempting a less violent means of arresting a relatively calm trespass suspect--especially one who had been cooperative in the past and was at the moment not actively resisting arrest--was a violation of that person's Fourth Amendment rights. This same principle would also adequately put a reasonable officer on notice that punching Blankenhorn to free his arms when, in fact, he was not manipulating his arms in an attempt to avoid being handcuffed, was also a Fourth Amendment violation. Finally, we hold that no reasonable officer would have believed that hobble restraints on his wrists and ankles, in addition to handcuffs, were necessary to maintain control of him and prevent possible danger to passersby. Therefore, we conclude that the state of the law was 'clearly established' at the time of Blankenhorn's arrest and gave the arresting officers sufficiently fair notice that their conduct could have been unconstitutional.").

Winterrowd v. Nelson, 480 F.3d 1181, 1186 (9th Cir. 2007) ("An officer may not use force solely because a suspect tells him he is incapable of complying with a request during the course of an ordinary pat-down. The officers here admit that they could have patted Winterrowd down without forcing his arm behind his back. They have shown no justification for pushing him onto the hood of the police car and yanking his arm. While the officers tell a different story, we must accept Winterrowd's version of the event. Because the facts, if resolved in Winterrowd's favor, would show the officers violated his clearly established constitutional rights, the district court did not err in denying the motion for summary judgment on grounds of qualified immunity.").

Davis v. City of Las Vegas, 478 F.3d 1048, 1057 (9th Cir. 2007) ("Any reasonable officer in Officer Miller's position would have known, in light of the *Graham* factors discussed *supra* and our case law interpreting them, that swinging a handcuffed man into a wall head-first multiple times and then punching him in the face while he lay face-down on the ground, and breaking his neck as a result, was unnecessary and excessive.")**.**

Adams v. Speers, 473 F.3d 989, 993, 994 (9th Cir. 2007) ("Reviewing *de novo* the district court's denial, we find its judgment impeccable. On the facts presented by the Adamses and the disciplinary report of the CHP itself, a jury could find Speers to be an officer off on a mission of his own creation, abandoning his assignment, picking up a buddy for no apparent reason except the excitement of the chase, barging in ahead of the police already engaged in pursuit, once attempting to use force against Alan and twice doing so, creating each time a serious hazard for himself as well as Alan, and finally stepping out of his patrol car and, without warning and without the need to defend himself or the other officers, killing Alan. Shooting of this sort was established as unconstitutional by *Tennessee v. Garner*, *supra*, almost twenty years ago. *See Vaughan v. Cox*, 343 F.3d 1323 (11th Cir.2003), *on remand from* 536 U.S. 953 (2002). No officer acting reasonably in these circumstances could have believed that he could use deadly force to apprehend Alan. . . . Accepting the Adamses' facts as true, this case falls within the obvious: the absence of warning and the lack of danger to the shooter or others distinguish the case from *Cole*, *Smith*, and *Brosseau*. On these facts, Officer Speers was not entitled to qualified immunity.").

Harveston v. Cunningham, 216 Fed. Appx. 682, 685 (9th Cir. 2007) (not published) ("When Officer Cunningham sprayed Harveston, Harveston was already handcuffed, and even under Officer Cunningham's account, Harveston was merely trying to roll over and stand up. Viewed in the light most favorable to Harveston, these facts could suggest the use of pepper spray was objectively unreasonable in violation of Harveston's constitutional rights. However, we find that the right was not clearly established at the time of this incident. . . Despite the fact that Harveston was handcuffed, he was not completely subdued, and he continued to resist the officers until Officer Cunningham finally used the pepper spray. Under these circumstances, a reasonable officer could conclude that the use of the pepper spray was lawful, and Harveston fails to identify persuasive authority to the contrary. Thus, because the right was not clearly established, Officer Cunningham is entitled to qualified immunity and summary judgment was proper on the excessive force claim for use of the pepper spray.").

Randall v. Williamson, No. 05-35112, 2006 WL 3390397, at * 1 (9th Cir. Nov. 22, 2006) (unpublished) ("Under *Tennessee v. Garner*, 471 U.S. 1 (1985), deadly force violates the Fourth Amendment where 'the suspect poses no immediate threat to the officer and no threat to others.' . . If the van had come to a complete stop, as plaintiff contends, there was no cause to believe that Vent was a danger to Williamson or to anyone else when Williamson shot him. Unlike the plaintiff in *Brosseau v. Haugen*,

543 U.S. 194 (2004) (per curiam), Vent was not suspected of a crime of violence. At the time Williamson fired, the officer knew only that Vent was suspected of traffic violations and had failed to pull over when ordered to do so earlier that evening. . . And, assuming that Vent had stopped the van, he was not attempting to flee the scene--unlike the suspect in *Brosseau*. Perhaps the record at trial will reveal more, in which case Williamson may renew his claim of qualified immunity. But at this stage of the proceedings, defendant has shown insufficient undisputed facts to justify the use of deadly force under *Garner*. We take seriously the Court's statement in *Saucier v. Katz*, 533 U.S. 194, 205 (2001), that a material factual dispute should not always defeat summary judgment in qualified immunity cases. What the Court was saying, though, is that even if there is a disputed issue of material fact, summary judgment may nonetheless be appropriate on qualified immunity grounds--if the facts, taken in a light most favorable to the injured party, do not show a constitutional violation. *Saucier* says nothing to suggest that we can affirm summary judgment where there are material disputed facts, and where the injured party's version of those facts show a rights violation that would be clear to a reasonable officer.")

Randall v. Williamson, No. 05-35112, 2006 WL 3390397, at *3, *5 (9th Cir. Nov. 22, 2006) (unpublished) (Tallman, J., dissenting) ("Neither Supreme Court nor circuit precedent would have put a reasonable officer in Officer Williamson's position on notice that using deadly force to stop Vent from committing further dangerous crimes would violate Vent's Fourth Amendment rights. We must view what happened from the objective perspective of a reasonable police officer facing the specific uncontested events that took place on the afternoon of October 29, 2000. . .First, Vent erratically tore through the streets of Fairbanks as he fled from several officers, including Officer Williamson who chased Vent earlier in the pursuit, in what became almost an hour-long chase. He recklessly wove through traffic, sped through busy parking lots full of Sunday shoppers, and ran at least seven red lights and three stop signs. Then, Vent drove through two rows of stopped cars, scraping at least one on the way, to avoid stopping at Officer Williamson's solitary road block, despite Officer Williamson's obvious demands that he do so. That he endangered other citizens and pursuing officers by his behavior cannot seriously be questioned. And, finally, Vent employed his van as a deadly weapon when he assaulted and struck Officer Williamson on his shins with the van because the officer would not retreat from discharging his duty to arrest the felon. . . . In sum, Officer Williamson reasonably believed Vent posed a significant threat of great bodily injury or harm to himself and others, and no case with the requisite level of specificity establishes otherwise. The law permits an officer to employ deadly force to preserve public

safety. *See Brosseau*, 543 U.S. at 197-98. Accordingly, I would AFFIRM the district court's order granting qualified immunity to Officer Williamson.").

***Motley v. Parks*,** 432 F.3d 1072, 1083, 1085, 1088 (9th Cir. 2005) (*en banc*) ("The touchstone of the Fourth Amendment is reasonableness. Aside from that well-settled principle, though, the law concerning what level of suspicion officers had to have before conducting a parole search--if any--was in 'disarray' when appellees searched Motley's apartment. . . . Of course, the lack of a Supreme Court decision does not prevent a finding that a right is clearly established. Naturally, our decisions relating to the legality of searches of probationers and parolees are binding on law enforcement officers in this circuit. But our caselaw provides no clearer a picture of what was constitutionally required when the officers searched Motley's apartment. . . . Against that backdrop, we simply cannot say that the contours of when officers could conduct parole-related searches was 'sufficiently clear' so that appellees understood that their warrantless and suspicionless search of Motley's apartment violated her rights. . . . In summary, the officers are entitled to qualified immunity for their search of Motley's apartment because, first, they had probable cause to believe that parolee Jamerson was living there; and second, it was not clearly established that a particularized suspicion of wrong doing on Jamerson's part was required as a prerequisite to the search of his residence.")

***Motley v. Parks*,** 432 F.3d 1072, 1089 (9th Cir. 2005) (*en banc*) ("In this case, as in *McDonald*, none of the factors justifying the use of force toward Juan exists. While it may have been reasonable for Kading to have drawn his firearm during the initial sweep of a known gang member's house, his keeping the weapon trained on the infant, as he was alleged to have done, falls outside the Fourth Amendment's objective reasonableness standard. Motley has stated a constitutional violation. . .Having determined that Motley's factual allegations, if true, establish a constitutional violation, we turn our attention to evaluating whether the law was clearly established such that a reasonable officer would have known that the conduct was unlawful. To be clearly established for qualified immunity purposes, the contours of the asserted right must be 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . . Viewing the evidence in the light most favorable to Motley, the conduct engaged in by Officer Kading was objectively unreasonable given the absence of danger posed by Juan to Kading or any of the other officers at the scene. The use of any force was unwarranted under these circumstances. Any reasonable officer should have known that holding an infant at gunpoint constituted excessive force. 'Although there is no prior case prohibiting the use of this specific

type of force in precisely the circumstances here involved, that is insufficient to entitle [Officer Kading] to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established.'").

Moreno v. Baca, 431 F.3d 633, 642 (9th Cir. 2005) ("Appellants' first assertion--that the parole search condition stripped Moreno of 'a normal scope of Fourth Amendment protection'--does not justify the suspicionless search and seizure. While Moreno's parole status may have rendered it unclear what level of suspicion was required to conduct such a warrantless search, if Appellants had known of the parole condition at the time of the search and seizure, it is uncontested that this fact was unknown to Appellants at the time of their actions and was not a fact on which Appellants relied. Because the Deputies did not know of Moreno's parole status and his outstanding arrest warrant at the time they searched and seized him, those circumstances cannot justify their conduct. At the time of the incident in this case, it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted. . . Appellants' other argument--that the officers reasonably believed that the facts known to them constituted 'reasonable suspicion'--is also unpersuasive. It was well-established at the time of Moreno's detention that nervousness in a high crime area, without more, did not create reasonable suspicion to detain an individual.")

Blanford v. Sacramento County, 406 F.3d 1110, 1119 (9th Cir. 2005) ("In sum, Blanford was armed with a dangerous weapon, was told to stop and drop it, was warned that he would be shot if he didn't comply, appeared to flaunt the deputies' commands by raising the sword and grunting, refused to let go of the sword, and was intent upon trying to get inside a private residence or its backyard with the sword in hand. The tragedy is that he persisted even after he admitted seeing the deputies and hearing them order him to drop the sword, resulting in a terrible injury. However, that this happened does not make the deputies' actions objectively unreasonable, or unconstitutional. . . It follows that the deputies are entitled to qualified immunity. Even if we have misjudged the constitutional issue, neither Supreme Court nor circuit precedent in existence as of November 13, 2000 would have put a reasonable officer in the deputies' position on notice that using deadly force in the particular circumstances would violate his Fourth Amendment rights. While they certainly would have known from *Garner* and *Graham* that shooting Blanford required probable cause (supported by objectively reasonable facts) to believe that he posed

a threat of serious physical harm to themselves or to others, the deputies would not have found fair warning in *Garner*, *Graham*, or any other Supreme Court or circuit precedent at the time that they could not use deadly force to prevent someone with an edged sword, which they had repeatedly commanded him to drop and whom they had repeatedly warned would otherwise be shot, from accessing a private residence where they or people in the house or yard might be seriously harmed. In this they may have been mistaken, but reasonably so.").

Blanford v. Sacramento County, 406 F.3d 1110, 1120 (9th Cir. 2005) (Noonan, J., dissenting) ("Having examined the objective circumstances that *Graham* directs us to, I find no crime, no immediate threat to the officers, no resistance to arrest, and a pathetic if possible attempt to evade arrest. The court says that the case is 'difficult.' It is indeed difficult to say that a reasonable officer would not have known that he violated Matthew Blanford's constitutional right to life and constitutional right to be free of police violence when the officer gunned him down at short range. Let me add one further circumstance mentioned in *Garner* that might justify the use of lethal force: probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others. As glossed by *Graham*, the significant threat must also be immediate. The officers have not been able to name a single human being who was significantly or immediately threatened by Matthew Blanford. What the officers have supplied is speculation: someone might have been in the house, although no one answered the door; someone might have been in a neighbor's backyard if Blanford could have gotten there; Blanford might have entered the house through the garage, although no one knows whether the garage opened into the house. Not only is there no evidence that any human person was in significant or immediate danger. The officers knew that Blanford had been walking the streets for some time without harming or endangering anyone. They also knew that a bizarre sword-carrier had been seen before in the neighborhood and had disappeared into it without harm or threat to anyone. So why did they need to use deadly force to restrain Blanford at his parents' doorstep? If imagined persons and imagined emergencies constitute reason to shoot, no community is safe from officers too quickly frustrated and angered by being ignored. The case is one that demands judgment by the citizens of Sacramento County assembled as a jury, not immunity for the injury-inflicting police.")

San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 977, 978 & n. 17 (9th Cir.2005) ("While the governmental interest of safety might have provided a sound justification for the intrusion had the officers

been surprised by the presence of the dogs, the same reasoning is less convincing given the undisputed fact that the officers knew about the dogs a week before they served the search warrants. The officers had substantial time to develop strategies for immobilizing the dogs. They knew or should reasonably have known that the Fourth Amendment requires officers to avoid intruding more than is necessary to enforce a search warrant. . . As the district court explained, the officers 'created an entry plan designed to bring them into proximity of the dogs without providing themselves with any non-lethal means for controlling the dogs. The officers, in effect, left themselves without any option but to kill the dogs in the event they--quite predictably--attempted to guard the home from invasion.' Having determined that the officers violated the plaintiffs' Fourth Amendment rights for purposes of the first step in the qualified immunity analysis, the second step asks whether the constitutional right was clearly established. As the Supreme Court has cautioned, it is not enough that there is a generally established proposition that excessive use of force is unlawful. . . '[T]he right that the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' . . However, 'it is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendant's actions] was apparent in light of pre-existing law.' . . . Both parties concede that the ultimate question is whether the state of the law at the time was clear enough to provide reasonable officers with sufficient notice that their conduct was unlawful. Prior to the events at issue in this case, we had held that unnecessary destruction of property in the course of executing a warrant is unconstitutional. . . We also had held that the killing of a person's dog constitutes an unconstitutional destruction of property absent a sufficiently compelling public interest. . . We also had recognized that in assessing reasonableness under the Fourth Amendment an appropriate factor is whether the officer considered alternatives before undertaking intrusive activity implicating constitutional concerns. . . These cases should have alerted any reasonable officer that the Fourth Amendment forbids the killing of a person's dog, or the destruction of a person's property, when that destruction is unnecessary--i.e., when less intrusive, or less destructive, alternatives exist. A reasonable o fficer should have known that to create a plan to enter the perimeter of a person's property, knowing all the while about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them, would violate the Fourth Amendment. . . . Finally, this case is not the kind where the officer was reacting to a sudden unexpected situation, where the officers were confronted with exigent circumstances. The Fourth Amendment allows officers to use a certain

amount of force because they are 'often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving....' . . . In this case, however, the SJPOs were given a week to plan the entry. Other than the officers' interest in preserving evidence, the officers were not presented with exigent circumstances that necessitated killing the dogs. Accordingly, the failure to develop any realistic non-lethal plan for dealing with the dogs is simply not the type of reasonable mistake in judgment to which a court should give deference in determining whether the officers are entitled to qualified immunity. . . . The police officers' opportunity to plan ahead distinguishes this case from the recent Supreme Court decision, *Brousseau v. Haugen*,. . . In this case, there was no element of surprise coloring the officers' judgment.").

Watts v. McKinney, 394 F.3d 710, 711, 712 (9th Cir. 2005) ("A lawyer must be zealous on behalf of his client. But zeal needs to be tempered by commonsense. The Supreme Court in *Hudson* proscribed the use of force for the malicious and sadistic purpose of causing harm. Watts' declaration, describing the vengeful acts of a frustrated investigator, identifies the unconstitutional purpose and deeds. To suppose that any reasonable person, let alone a trained prison officer, would not know that kicking a helpless prisoner's genitals was cruel and unusual conduct is beyond belief. The Supreme Court did not need to create a catalogue of all the acts by which cruel and sadistic purpose to harm another would be manifest; but if it had, such act would be near the top of the list. The case must go to trial.").

Williams v. Kitsap County, No. 08-05430-RBL, 2008 WL 5156319, at *5 (W.D. Wash. Dec. 8, 2008) ("In this case, like in *Doerle,* the suspect's erratic behavior indicated that he may be emotionally disturbed, and there was little effort on behalf of the officers to "talk him down." The deputies testified that they yelled at Williams to drop his machete, but they did not testify that they warned him that they would shoot if he did not comply. Most importantly, Williams did not pose a threat of death or serious bodily injury to the deputies, as the Court in *Garner* requires, if he was not holding the machete before he was shot. Defendants cite *Blanford v. Sacramento County,* 406 F.3d 1110 (9th Cir.2005), in support of their argument that even if the deputies violated the Fourth Amendment, it was not clearly established that the deputies' use of deadly force was unconstitutional. In that case, the court held that the police officers, who shot a suspect armed with a sword, were entitled to qualified immunity. . . . This case, however, is distinguishable from *Blanford* because there is a question of fact as to whether Williams was actually armed at the moment the deputies opened fire. Additionally, unlike in *Blanford,* there is no evidence in this

case that the deputies warned Williams that they would shoot if him if he did not drop his machete, and there is evidence that he stood still, or nearly still, before he was shot.").

Kaady v. City of Sandy, No. CV. 06-1269-PK, 2008 WL 5111101, at *21 (D. Ore. Nov. 26, 2008) ("After reviewing the case law, I conclude that, as of September 2005 when Bergin used his Taser on Kaady, police officers had reasonable notice that they may not use a Taser against an individual suspect who does not pose a threat and has merely failed to comply with commands. I therefore deny Bergin's motion for summary judgment on plaintiffs' First Claim for Relief, which alleges that the Taser constituted excessive force. On the other hand, because Willard used his Taser after Kaady posed a threat, I find that Willard is entitled to qualified immunity. I . . . grant Willard's motion for summary judgment on plaintiff's First Claim for Relief.").

Neal-Lomax ex rel. Lomax v. Las Vegas Metropolitan Police Dept., 574 F.Supp.2d 1170, 1187 (D.Nev. 2008) ("Even if a genuine issue of fact remained that Rader violated Lomax's rights by using the Taser on Lomax five times in quick succession while Lomax was on the gurney, Rader's belief that he used an appropriate amount of force was reasonable. Rader was faced with a resisting individual who would not obey commands, who was struggling against all forms of restraint, and who needed prompt medical care. His use of the Taser was effective in gaining momentary compliance and assisting the housing security officers and medical personnel in making progress in restraining Lomax. Efforts at using lesser means of force, such as verbal commands and physical restraining of his limbs by the security officers, were insufficient to gain control over Lomax to permit medical personnel to assist him. Plaintiffs point to no clearly established law that multiple Taser applications in short succession on a struggling suspect constitute excessive force such that a reasonable officer in Rader's position would know Rader's conduct was unlawful. Although Plaintiffs point to Rader's alleged failure to conform to departmental policy and his training, Rader's conduct was not directly contrary to his training and LVMPD policy such that a reasonable officer would know his conduct was not only contrary to policy and training, but also unconstitutional.").

Hayes v. Wickert, No. C06-5402RJB, 2006 WL 3373051, at **4-6 (W.D. Wash. Nov. 20, 2006) ("The severity of the crimes at issue here weighs against holding that shooting Plaintiff was reasonable. The undisputed facts indicate that Plaintiff violated various traffic laws: he ran a stop sign, was speeding, was driving without his lights at night in an apparently unpopulated area, and was driving into the oncoming lanes

to avoid having to take curves, as well as the felony of eluding a police officer. The next factor to consider in determining whether an officer's use of force was reasonable is examining whether the suspect posed an 'immediate threat to the safety' to Officer Wickert or others. Officer Wickert argues that he opened fire because he felt Plaintiff was attempting to hit him when he backed the car up after losing control on the gravel road. However, there are issues of fact as to whether Officer Wickert's safety was threatened. In the Plaintiff's version of events, he had already backed the car up before Officer Wickert arrived at the gravel road. Because the Court must 'take the facts in the light most favorable to the party asserting the injury,' *Saucier* at 201, Officer Wickert is unable, for the purposes of this motion, to establish that his use of force was reasonable because he feared serious injury or death. Officer Wickert also argues that his use of force was reasonable because he feared for the safety of others based on Plaintiff's speeding, driving without lights at night, and his driving into oncoming lanes of traffic (reckless driving). Considering all the facts and circumstances, Officer Wickert is unable, for the purposes of this motion, to establish that his use of force was reasonable because he feared an 'immediate threat' to the safety of others. *Graham* at 396. The record is silent on whether there were any people nearby. The record does indicate that these events took place at night. Officer Wickert points to *Brosseau v. Haugen,* 543 U.S. 194 (2004) in support of his position that his use of force was reasonable because he was concerned about the safety of others. . . In *Brosseau,* the Supreme Court affirmed this Court's judgment, and found that a police officer was entitled to qualified immunity because prior case law did not 'clearly establish' that the police officer's conduct violated the Fourth Amendment. *Id.* at 201. However, at this stage in the inquiry the Court is examining whether a constitutional violation occurred, not whether the violated right was clearly established. The Supreme Court did not address the first factor under *Saucier,* whether Haugen's constitutional rights had been violated, in that case. In any event, the factual setting in *Brosseau* was different then in the instant case. There, police were called to neighborhood during day to respond to a fight between Haugen and two other men at Haugen's mother's house. *Id.* at 196. When the police arrived Haugen fled. *Id.* After a search, Haugen ran back to his mother's front yard and jumped into a Jeep, parked in the driveway, which was facing an occupied car, also parked in the driveway. *Id.,* at 196. There was another occupied vehicle parked behind the car. *Id.* An officer ran up to the Jeep, pulled her gun and ordered Haugen out of the vehicle. *Id.* The police officer broke the driver's side window and tried, but failed, to get the keys. *Id.* As the Jeep started, or shortly after it began to move, the officer jumped back and to the left and fired on shot at Haugen. *Id.* at 196- 197. The officer there explained that she shot Haugen because

she was 'fearful for the other officers on foot who she believed were in the immediate area, for the occupied vehicles in Haugen's path, and for any other citizens who might be in the area.' *Id.* at 197. Here, unlike in *Brosseau,* there is no evidence that there were other people in the area, much less that there was an 'immediate' threat to their safety. Accordingly, this factor, at this stage in the case, weighs against a finding that Officer Wickert's use of force was reasonable here. At least, there are material issues of fact. The final factor in considering whether Officer Wickert's use of force was reasonable is a consideration of whether the suspect was 'actively resisting arrest or attempting to evade arrest by flight.' *Graham* at 396. Here, viewing the facts in a light most favorable to the Plaintiff, Plaintiff was not actively resisting arrest. He was attempting to evade arrest, and he alleges that Officer Wickert's shot entered his shoulder as he was accelerating away. This factor also weighs against a finding that Officer Wickert's use of deadly force reasonable. . . . The next step under *Saucier* in determining if Officer Wickert is protected by qualified immunity, is to ascertain if Plaintiff's constitutional right was clearly established at the time of the injury. . . . Under the circumstances alleged, a reasonable officer would have had fair notice that shooting an individual suspected of violating traffic laws and eluding police was unlawful. There are issues of fact as to when Plaintiff began backing his car, and if Plaintiff version of events is believed, Officer Wickert jumped out of his patrol car and immediately began firing shots. Under those circumstances, Officer Wickert could not reasonably have believed his safety was endangered, and would have fair notice that shooting Plaintiff was unlawful. Moreover, unlike in *Brosseau,* or the other cases cited by Officer Wickert, the record does not contain evidence that there were others in the area who's safety was immediately threatened. A reasonable officer, under the facts alleged by Plaintiff, would have reasonable fair notice that shooting the Plaintiff here was unlawful.")

Hunt v. County of Whitman, No. CS-03-119-FVS, 2006 WL 2096068, at *6, *7 (E.D. Wash. July 26, 2006) ("Even though a jury question exists with respect to whether the deputies violated the Fourth Amendment by opening fire, they are entitled to qualified immunity unless Mr. Hunt's right to be free from deadly force was clearly established on December 7, 2000. . . .The plaintiff characterizes this as a case in which the deputies shot an emotionally distraught man who, although armed, had not committed a serious crime prior to their arrival, was not attempting to flee, and who had turned his back toward the deputies whom he allegedly was threatening. . . .Significantly, the plaintiff has failed to cite a single case, much less a case decided before December 7, 2000, in which a law enforcement officer has been held to violate the Fourth Amendment by shooting an armed man who is aware

of the officer's presence, who is capable of shooting the officer, who has ignored repeated instructions to put his firearm down, and who has given credible indications that he is contemplating a violent resolution of the standoff. As a result, it would not have been clear to a reasonable law enforcement officer that it was unlawful to shoot Chester Hunt even assuming he did not verbally threaten the officers or point his handgun at them as he stood in the bed of the pickup. Rather, this is a situation in which, even if the plaintiff's account is correct, the officers' decision to shoot fell within the hazy border between ' "excessive and acceptable force."").

Tungwarara v. United States, 400 F.Supp.2d 1213, 1220, 1221 (N.D. Cal. 2005) ("The Court therefore concludes that some level of suspicion is required under the Fourth Amendment to conduct strip searches of non-admitted aliens. . . Indeed, this Court concludes that this right is now clearly established in light of the reasoning employed by the Ninth Circuit in *Wong*, which applies analogously to the right to be free from non-routine searches absent some level of suspicion. . . . The more difficult issue is whether Tungwarara's Fourth Amendment right to be free from a strip search absent suspicion that she was concealing weapons or contraband was clearly established in 2002. As the court in *Wong* recognized, prior to its decision in that case the law was unsettled regarding the extent to which non-admitted aliens enjoyed substantive constitutional rights. . . . The strip search here was an unwarranted and painful affront to Plaintiff's privacy and dignity, and this Court has concluded that it was unconstitutional. At the same time, the pat-down search here did not constitute the kind of 'gross physical abuse,' 'reckless indifference to safety,' or 'torture' that was more clearly forbidden by the case law as of 2002. . . This is not a case where the official's actions were so egregious that the Court can conclude that Tungwarara's right was clearly established absent clearly applicable contemporaneous decisional law. [citing *Brosseau*]. . . . Accordingly, although this Court concludes that a non-invasive strip search of a non-admitted adult alien at the border without any suspicion of any kind is unconstitutional, the Court cannot conclude that this right was clearly established at the time of the incident. If the same search had occurred later after the Ninth Circuit's decision in *Wong*, or had been more invasive or abusive at the time, the Plaintiff's 'clearly established' rights would likely have been violated. On the uncontested facts of the search here, however, Ludwigs is entitled to qualified immunity.").

McCartor v. City of Kent, No. C05-0032Z, 2005 WL 2600421, at *9, *10 (W.D. Wash. Oct. 12, 2005) ("Given a possible constitutional violation, the next inquiry is whether Mr. McCartor's constitutional right to be free of the use of deadly force

under the circumstances was 'clearly established' at the time of the incident. The short answer is 'no.' Plaintiffs argue that Mr. McCartor's flight in the car is analogous to the burglar's flight on foot in *Garner*, the United States Supreme Court case in which the Court held that it is unlawful to use deadly force on an apparently unarmed suspected felon. . . .The case before the Court, however, involves a suspect who was 'armed'--with his vehicle. Even Plaintiffs admit, albeit in a different part of their case, that a car can be a deadly weapon. . . Not only was Mr. McCartor armed, but also he demonstrated a repeated willingness to use his car to thwart the police's efforts to arrest him and to endanger Officer Buck's safety. These differences between the facts of the case before the Court and the *Garner* case precludes the use of *Garner* as binding precedent to show that Mr. McCartor's right to be free of Officer Gagner's use of deadly force was 'clearly established' at the time of the incident. At oral argument, Plaintiffs argued that Officer Gagner should have been on notice that his conduct was unlawful because of the Sixth Circuit case of *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir.2000). In that case, a police officer shot at a vehicle that was driving towards him, injuring the passenger of the vehicle. . . The Sixth Circuit affirmed the District Court's judgment upholding a jury verdict finding the officer liable for the passenger's injuries. . . Although the jury must have found the officer's shooting to be 'objectively unreasonable' in order to find him liable, the case law does not explain the jury's rationale (nor could it have explained it). . .Without any Fourth Amendment analysis, and because of the different fact patterns of the cases, *Fisher* cannot be said to have 'clearly established' the unreasonableness of Officer Gagner's use of deadly force. . .Plaintiffs have failed to locate a single case, binding or otherwise, holding that it is unlawful to use deadly force against a suspect who threatens the safety of others and who refuses to yield to police officers despite the officers' repeated attempts to stop him through the use of non-deadly force.")**.**

Logan v. City of Pullman, 392 F.Supp.2d 1246, 1265-68 (E.D. Wash. 2005) ("Neither party can point the Court to controlling case law in the United States Supreme Court or this Circuit dealing with the use of pepper spray under the circumstances confronted by the Defendant Officers. However, the parties point the Court to a handful of relevant cases, which certainly define some of the acceptable limits of the use of pepper spray. . . . In light of the existing law, the Court determines it would be clear to a reasonable officer that the use of O.C. must be preceded by a warning when the officer's safety is not threatened and the officer is not trying to overcome resistance to arrest. Further, in light of *LaLonde* and *Headwaters*, a reasonable officer would know he has an obligation to render assistance after using O.C. and alleviate the symptoms of those individuals who were affected by the O.C.

If the facts alleged by Plaintiffs are proven, the Defendant Officers used O.C. in a situation where a reasonable officer would have known it was clearly unlawful and did not render the necessary assistance they were obligated to provide under the Fourth Amendment. Accordingly, the Defendant Officers are denied qualified immunity with respect to Plaintiffs' Fourth Amendment claims. . . . In conclusion, under the second prong of the *Saucier* analysis, the Court determines the law was clearly established such that a reasonable officer would know (1) his refusal to assist and calm individuals who were suffering from affects of O.C.; (2) taking efforts to keep individuals inside a building where O.C. was sprayed; and (3) preventing others from helping those individuals harmed by the O.C. would result in a violation of the individuals' Fourteenth Amendment rights. Accordingly, the Defendant Officers are not entitled to qualified immunity with respect to the Plaintiffs' Fourteenth Amendment claims.")

Crowe v. County of San Diego, 359 F.Supp.2d 994, 1003, 1004 (S.D. Cal. 2005) ("It is important to note that courts of appeal have been tempted to meld the two prongs of the qualified immunity test, particularly in the Fourth Amendment context. The argument is that it is inappropriate to give qualified immunity to officials who have violated the Fourth Amendment by unreasonably searching or seizing because qualified immunity is intended to protect reasonable official action. In other words, the argument is that '[i]t is not possible ... to say that one "reasonably" acted unreasonably.' . . However, such an argument has been squarely rejected by the Supreme Court. . . Most recently, in *Brosseau v. Haugen*,. . . the Supreme Court reversed the Ninth Circuit's opinion denying qualified immunity to an officer who shot a fleeing suspect in the back. The Court criticized the Ninth Circuit for finding that the law was clearly established based on the very general test of *Graham v. Connor* that 'use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.'. . The Court explained that although such a general test may 'in an obvious case' clearly establish that an officer's conduct was unlawful, such a general standard is not sufficient to clearly establish the law where the case is not one involving run-of-the-mill facts. . . The Court went on to consider the 'handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.' . . The Court concluded that the 'cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case.'. . Noting that none of the cases squarely governed but did suggest that Brosseau's actions 'fell in the "hazy border between excessive and acceptable force,'" the Court concluded that these

cases did not 'clearly establish' that Brosseau's act of shooting the plaintiff in the back violated the Fourth Amendment. . . Keeping in mind this analytical framework, the court now turns to the claims that are the subject of defendants' motions.").

Crowe v. County of San Diego, 359 F.Supp.2d 994, 1037, 1038 (S.D. Cal. 2005) ("[A]s explained by the Supreme Court most recently in *Brosseau*, in a case such as this, a plaintiff cannot defeat a summary judgment motion on qualified immunity grounds simply by pointing to case law clearly establishing a general proposition such as the proposition that police conduct that shocks the conscience violates substantive due process. . . Rather, the inquiry is whether it was clearly established that it shocks the conscience, and therefore violates substantive due process, to interrogate a juvenile in the manner in which Michael was interrogated. The court concludes that a reasonable officer in defendants' position would not necessarily have known that the police conduct here would meet that standard. Plaintiffs have failed to identify any relevant case law addressing the issue of when the interrogation of a juvenile crosses the constitutional line and 'shocks the conscience' for substantive due process purposes. . . . Because the aggravating circumstances in *Cooper* are simply not present here, the facts of *Cooper* would not necessarily put a reasonable officer on notice that the conduct in the present case was so egregious as to 'shock the conscience' in a constitutional sense. Moreover, although *Chavez* had not been decided at the time of Michael's interrogation, even if it had, it would not have clearly established that the manner of Michael's interrogation violated substantive due process. . . . Because the police conduct in the present case was far less egregious than the conduct in *Chavez*, and because four Supreme Court justices in *Chavez* concluded that the conduct in *Chavez* was not shocking to the conscience, one must conclude that, even after *Chavez*, a reasonable officer could believe that the conduct in the present case did not shock the conscience.").

Escobedo v. City of Redwood City, No. C 03-3204-MJJ, 2005 WL 226158, at *9 (N.D. Cal. Jan. 28, 2005) (not reported) ("Neither Defendants nor Plaintiffs cite cases to support their respective positions regarding whether a reasonable police officer would know that the officers' specific conduct here--the continued use of nunchucks after initial use proved ineffective, the use of nunchucks on an already-handcuffed detainee, and the officers' full weight on the already handcuffed and prone suspect's back and neck--violated Escobedo's clearly-established Fourth Amendment right regarding excessive force. However, the Court's review of excessive force cases in which specific aspects of conduct were assessed under *Saucier* reveals that a reasonable officer would have known that these actions, if they occurred as claimed

by Plaintiffs, were constitutionally excessive. For example, in *Drummond*, the Ninth Circuit found that a reasonable officer would have 'fair warning' that the pressure applied to the detainee in that case--two officers leaning their weight on the detainee's neck and torso for a substantial period of time--was unconstitutional. The instant case is distinguishable from the facts of *Drummond* in that the officers claim not to have been specifically aware that Escobedo was having trouble breathing and in that Escobedo was struggling with the officers fairly fiercely. However, neither of those distinctions alter the Court's conclusion here. First, the evidence indicates that Escobedo was screaming for help; whether or not he specifically said he could not breathe is not particularly significant in light of the force exerted by the officers. Second, although Escobedo was struggling with the officers, he was face-down, being held by six police officers, and handcuffed. The officers' continued pressure on his back (and possibly his neck) and their continued use of nunchucks in these circumstances, if true, was excessive and a reasonable officer would have known that. The *Billington* case cited by Defendants is distinguishable on its facts because the detainee in question physically attacked the officer and tried to turn the officer's gun on him. . . Escobedo did not pose that type of threat to the six police officers on top of him, particularly after he was handcuffed. The defendant officers are not entitled to qualified immunity here.").

TENTH CIRCUIT

Buck v. City of Albuquerque, No. 07-2118, 2008 WL 5147474, at *17, *18 (10th Cir. Dec. 9, 2008) ("Having determined that the Excessive Force Plaintiffs have sufficiently alleged a constitutional violation, we now turn to the second prong of the qualified immunity analysis, asking whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights. . . The law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if 'a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct' at issue. . .Here, Capt. Gonzales cabins his argument to the authorization of 'the limited deployment of tear gas, pepper spray and non-lethal projectiles,'. . . urging that clearly established law did not prohibit these actions in this particular situation. He contends that the district court did not define the right allegedly violated with the appropriate level of specificity . . . . [W]e have little difficulty in holding that the law was clearly established at the time of the alleged infraction. *See Fogarty,* 523 F.3d at 1162 ('Considering that under [the plaintiff's] version of events each of the *Graham* factors lines up in his favor, this case is not so close that our precedents

would fail to portend the constitutional unreasonableness of defendants' alleged actions.').")

Weigel v. Broad, 544 F.3d 1143, 1153, 1154 (10th Cir. 2008) ("The district court compared the facts of *Cruz*, where the decedent was hog-tied, to the facts of this case and concluded there was no clearly established law prohibiting the troopers' actions because of the dissimilarity between the factual scenarios. . . . Although we held there was not clearly established law prohibiting the officers' actions at the time they encountered Mr. Cruz, we also made clear that similar future conduct was prohibited. Specifically, we stated, 'officers may not apply th[e hog-tie] technique when an individual's diminished capacity is apparent.'. . . The district court believed that the type of restraint used in *Cruz* was sufficiently different from that employed on Mr. Weigel that *Cruz* did not clearly establish the unconstitutionality of defendants' alleged actions. But our analysis in this case of the constitutionality of the restraint of Mr. Weigel does not require us to compare the facts of *Cruz* to the allegations here. It is based on more general principles. The Fourth Amendment prohibits unreasonable seizures. We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself. . . . If *Cruz* had not been handed down, perhaps Wyoming troopers would not have received training on positional asphyxia and would be uninformed about the danger. But the reasonableness of an officer's actions must be assessed in light of the officer's training. The defendants' training informed them that the force they used upon Mr. Weigel produced a substantial risk of death. Because it is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself, the defendants' unnecessary use of deadly force violated clearly established law.").

Weigel v. Broad, 544 F.3d 1143, 1170, 1171 (10th Cir. 2008) (O'Brien, J., dissenting) ("No Supreme Court case is directly on point and the only relevant opinion from this circuit is *Cruz*. However, by its express terms *Cruz* applies only to hog-tying individuals with apparent diminished capacity. . .A hog-tie is a restraint technique whereby a person's hands are cuffed behind his back, his feet are bound together, drawn up behind his back and attached to the handcuffs. It results in his ankles being bound to his handcuffed wrists behind his back with twelve inches or less of separation. . . A similar technique is referred to as hobbling. . . The only difference between the two techniques is the distance between ankles and handcuffed wrists; a separation of twelve inches or less is a hog-tie, a greater distance is a

hobble. . . . In *Cruz* we expressly did not forbid all hog-ties let alone the less restrictive hobble. Our discussion would lead any reader to think the distinction significant and the reach of the decision limited. It gives no warning that it should be read expansively to address lesser forms of positional restraint. This is not a hog-tie case; it is not even a hobble case. No attempt was made to pull Weigel's ankles behind him in any way, let alone tie them to his handcuffed wrists. The majority relies on *Hope* for the proposition that a prior case need not address the very action in question in order to clearly establish the law. . . . To be useful to officers in the field (or in a fight) the warning imparted must be crisp and clear; specific and simple. A 'spotted dog' case provides that warning, generalized musings do not. Three judges have carefully read, even parsed, the language of *Cruz*. With the luxury of time and the benefit of briefing and argument from counsel, we take away dramatically different views of its holding. The troopers did not have that luxury, yet even in the aftermath of a desperate fight they knew hog-tying was prohibited and did not do it or anything like it. To expect them to have coaxed from *Cruz* anything akin to the majority's holding is contrived.").

Vondrak v. City of Las Cruces, 535 F.3d 1198, 1207 (10th Cir. 2008) ("Admittedly, this is a close case. McCants' only factual basis for conducting the field sobriety tests was Vondrak's admission to drinking one beer several hours earlier, and the specificity of Vondrak's statement makes it less suspicious than in many of the cases cited above. Nevertheless, given that Vondrak admitted consuming alcohol, McCants had the reasonable suspicion necessary to perform the field sobriety tests--or, at the very least, the arguable reasonable suspicion entitling her to qualified immunity.").

Vondrak v. City of Las Cruces, 535 F.3d 1198, 1208, 1209 (10th Cir. 2008) ("The district court correctly concluded that McCants and Krause were not entitled to qualified immunity on Vondrak's excessive force claim for unduly tight handcuffing. Although the officers claim to have been unaware that Vondrak's handcuffs were tight, Vondrak has presented evidence that the officers 'ignored [his] timely complaints (or [were] otherwise made aware) that the handcuffs were too tight.'").

Fogarty v. Gallegos, 523 F.3d 1147, 1158, 1159 (10th Cir. 2008) ("The defendants' arguments that the police had probable cause to arrest Fogarty rest only on characterizations of the protest in general, and not on evidence of Fogarty's individual actions. The Fourth Amendment plainly requires probable cause to arrest Fogarty as an individual, not as a member of a large basket containing a few bad eggs. In other words, that Fogarty was a participant in an antiwar protest where some individuals

may have broken the law is not enough to justify his arrest. . . . Under Fogarty's version of events--that he was peacefully drumming a samba at a reasonable volume--well-settled constitutional and state-law precedent would have put reasonable officers on notice that they lacked probable cause to effectuate an arrest. . . . We underscore that these conclusions regarding probable cause are compelled by our constrained jurisdiction and our view of the facts in the light most favorable to Fogarty. Most of the deposed officers denied even witnessing Fogarty's arrest, and none admitted to physically arresting him. Their depositions therefore contain little that might contradict Fogarty's account of his own behavior. If defendants demonstrate at trial that the arresting officers had objective reason, even if mistaken, for believing that Fogarty's drumming tended to disturb the peace by increasing the potential for violence or public alarm as defined by the New Mexico courts, they may well be entitled to qualified immunity . But on the record before us, we cannot at this juncture reach such a conclusion as a matter of law.").

Fogarty v. Gallegos, 523 F.3d 1147, 1161, 1162 (10th Cir. 2008) ("Although the general factors outlined in *Graham* are insufficiently specific to render every novel use of excessive force unreasonable, '[w]e cannot find qualified immunity wherever we have a new fact pattern.'. . Thus, our circuit uses a sliding scale to determine when law is clearly established. . . Under this approach, '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'. . Relevant here, '*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest.'. . With respect to the use of pepper balls and tear gas, we acknowledge that our precedential opinions have not directly addressed the Fourth Amendment implications of what defendants call 'less lethal' munitions. Nevertheless, a reasonable officer would have been on notice that the *Graham* inquiry applies to the use of these methods just as with any other type of pain-inflicting compliance technique. We find it persuasive that, in prior cases, we have assumed that the use of mace and pepper spray could constitute excessive force. [citing cases] Considering that under Fogarty's version of events each of the *Graham* factors lines up in his favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions. We likewise conclude that it would be apparent to a reasonable officer that the use of force adequate to tear a tendon is unreasonable against a fully restrained arrestee. . . . Viewing the facts in the light most favorable to Fogarty, we conclude that defendants cannot avail themselves of qualified immunity at this stage of the litigation.").

Chidester v. Utah County, No. 06-4255, 2008 WL 635361, at *10 (10th Cir. Mar. 6, 2008) ("While we have determined it was objectively unreasonable for Deputy Parker to tackle Mr. Chidester given Deputy Parker already had a weapon aimed at him, we note the extreme exigency of the situation. The situation is unlike other cases where the suspect person was already identified and then under the officer's total physical control for the purpose of preventing him or her from fleeing, using a weapon, or otherwise becoming a threat. We have not found a case, nor have plaintiffs directed us to one, that would put Deputy Parker on notice his split-second decision to tackle Mr. Chidester under the circumstances presented was clearly unlawful. Thus, we cannot say it was unreasonable for Deputy Parker to mistakenly believe the law allowed a greater level of force for the purpose of obtaining the requisite safety needed during the exigent circumstance presented.").

Casey v. City of Federal Heights, 509 F.3d 1278, 1284-86 (10th Cir. 2007) ("In 1992, we held that *Graham* itself was enough to constitute clearly established law in an excessive force case. *Mick*, 76 F.3d at 1135. More recently, however, the Supreme Court has held that *Graham's* 'general proposition ... is not enough' to turn *all* uses of excessive force into violations of clearly established law. . . . In other words, the fact that it is clear that any unreasonable use of force is unconstitutional does not mean that it is always clear *which* uses of force are unreasonable. 'Ordinarily,' we say that for a rule to be clearly established 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.' . . However, because excessive force jurisprudence requires an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case,' *Graham*, 490 U .S. at 396, there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern. . . . We have therefore adopted a sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.' . . . We have located no case in which a citizen peacefully attempting to return to the courthouse with a file he should not have removed has had his shirt torn, and then been tackled, Tasered, knocked to the ground by a bevy of police officers, beaten, and Tasered again, all without warning or explanation. But we need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as Officer Sweet allegedly did. *Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest. . . . Officer Lor

gave Mr. Casey no opportunity to comply with her wishes before firing her Taser. While we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate, we think a reasonable jury could decide that Officer Lor was not entitled under these circumstances to shoot first and ask questions later. Cases in our Circuit and others that have considered the reasonable use of Tasers confirm this conclusion. . . . We have located no published decision in which an officer's use of a Taser has been upheld in circumstances this troubling. Officer Lor testified that the policy of the Federal Heights police department is that a Taser can appropriately be used to 'control' a target. . . However, it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force--or a verbal command--could not exact compliance. Because a reasonable jury could find that Officer Lor lacked any such reason, she is not entitled to summary judgment on the constitutional violation. . . . On the summary judgment record--which of course may be disputed at trial--Officer Lor's use of the Taser was without any legitimate justification in light of *Graham*. We do not know of any circuit that has upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey. Therefore, Officer Lor is not entitled to qualified immunity from this excessive force suit.").

Walker v. City of Orem, 451 F.3d 1139, 1150, 1151 (10th Cir. 2006) ("In sum, based on the facts recited in plaintiffs' complaint, the lengthy detention alleged in this case was unreasonable and was not justified by either the need for investigation of a crime or control of a crime scene. Having concluded that plaintiffs have adequately alleged a violation of their Fourth Amendment rights, we turn to whether the legal rule protecting those rights allegedly violated by defendants was 'clearly established' at the time of the events in question. . . . While there were certainly some suggestions in the law prior to *Lidster* that the interrogation of witnesses was subject to Fourth Amendment constraints at least as stringent as those involving detention of suspects, we have found no pertinent Supreme Court or Tenth Circuit decision prior to the events in question, and no clearly established weight of authority from other courts, that would have made the unlawfulness of the officers' conduct apparent to them. In sum, '[t]he contours of the right [were not] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.' [citing *Brosseau*]").

Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006) ("We conclude that plaintiff's version of the facts presented on summary judgment support a claim of a violation of David Walker's Fourth Amendment right to be free from excessive force. Plaintiff's version of events suggests that Officer Peterson acted precipitously in

shooting David, who posed a danger only to himself. The crimes at issue (theft of the vehicle, eluding the officers) were not particularly severe. David did not pose an immediate threat to the safety of the officers or others. He had made no threats and was not advancing on anyone with the small knife. He was holding the knife to his own wrist. While Officer Peterson stated that he believed David was pointing a gun at him, this belief was not reasonable, if plaintiff's version of events is accepted, and she is given the benefit of every reasonable inference. The angle of David's hands and the amount of light on the scene should have permitted Officer Peterson to ascertain that he was not holding a gun in a shooting stance. Finally, David was not actively resisting arrest, and there was no need to use deadly force to prevent him from fleeing and possibly harming others. The right to be free from excessive force was well established in this circuit at the time of the events in question. . . It was specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect. [citing *Zuchel*] Plaintiff's version of the facts therefore shows the violation of a clearly-established constitutional right. We must therefore affirm the district court's order denying qualified immunity to Officer Peterson. . . Much of what has already been said about the circumstances surrounding Officer Peterson's actions also applies to Officer Clayton's conduct. At the time he fired at David, Officer Clayton was behind the cover of his vehicle, fifty-eight feet away from David. David was not advancing on him and had not threatened him in any way, other than allegedly pointing his hands in Officer Clayton's direction in what Officer Clayton interpreted as a 'classic shooting stance.' Officer Clayton had not seen a gun in David's hands. Whether he reasonably believed from the shots he heard, and the fact that Officer Peterson had ducked behind the Subaru, and the position of David's body and hands, that he or others were in danger from David, is a factual question that remains to be resolved. When reviewing the denial of a motion for summary judgment based on qualified immunity, we are not only required to accept plaintiff's version of events; we are also required to draw all reasonable inferences in favor of the non-moving party. . . We conclude that, given all reasonable inferences, plaintiff's version of the facts shows the violation of a constitutional right. That right is also clearly established. We must therefore affirm the district court's denial of qualified immunity to Officer Clayton.")

Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1204, 1205, 1206 n.4 (10th Cir. 2006) ("No court has ruled that an otherwise unreasonable seizure becomes reasonable when the officers intend it as a prank. We will not do so here. When law

enforcement officers acting under color of state law seize non-consenting private citizens, they must act in furtherance of legitimate law enforcement interests and on the basis of sufficient facts. . . . Fuerschbach's allegations, if true, establish that Hoppe and Martinez seized her without any legitimate justification. Therefore, Fuerschbach's Fourth Amendment claim survives the first prong of the qualified immunity analysis. . . Because Fuerschbach's allegations demonstrate that the officers violated clearly established constitutional rights of which a reasonable person would have known, her claims clear the second hurdle of the qualified immunity analysis as well. . . . We conclude that it would have been clear to a reasonable officer in Hoppe and Martinez's shoes that seizing a private citizen without any legitimate basis was unlawful. Nor would an officer's perception of the seizure as a prank have made the legal standard less clear. . . .[T]he officers are not entitled to qualified immunity simply because no previous court has rejected a prank exception to the Fourth Amendment.").

Blossom v. Yarbrough, 429 F.3d 963, 968 (10th Cir. 2005) (granting qualified immunity on first prong; "This case is readily distinguishable from *Carr* upon which the district court relied. In that case, the plaintiff relied on testimony that the officers fired eleven shots at the suspect after he had dropped a piece of concrete that the officers claimed was a possible weapon. All eleven shots struck the decedent in the back! . . . The court in *Carr,* viewing the facts in the light most favorable to the plaintiff, determined that there was some evidence the officers shot an unarmed man who was not advancing on them. . . In this case, the evidence indicates uncertainty in the mind of Deputy Yarbrough as to whether Mr. Pickup was armed. Mr. Pickup advanced on Yarbrough in what reasonably appears to be an effort to get his weapon. Under these circumstances, Mr. Pickup posed an immediate threat to the safety of the officer, and the use of deadly force, while tragic, was reasonable.")

Jones v. Hunt, 410 F.3d 1221, 1229-31 (10th Cir. 2005) ("Without doubt, it was clearly established by January 2003 that a seizure must be reasonable. . . In *Terry*, decided in 1968, the Court instituted the rule that, at minimum, a seizure must be 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.' . . . It was also clearly established by the date of the seizure that the Fourth Amendment's strictures apply to social workers. . . Indeed, in 1994 we applied the *Terry* standard to a social worker's seizure of a child at a public school. . . Our conclusion is based on clearly and narrowly articulated Fourth Amendment principles. . . . In *Brosseau v. Haugen*, 543 U.S. ---- (2004), the Supreme Court considered how factually related existing precedent must

be to an alleged violation to render a rule of law 'clearly established.' The Court concluded that the standard established in *Graham*. . . was 'cast at a high level of generality' and therefore did not clearly establish a Fourth Amendment violation. . . . The tests enunciated in *Hill* and *Terry* are far more specific than the general standard set forth in *Graham*. Furthermore, the Court's recent qualified immunity jurisprudence does not allow public officials such as Haberman, who are alleged to have committed blatant Fourth Amendment violations, to obtain immunity from suit. The *Brosseau* Court acknowledged that even with regard to highly general standards, 'in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law.'. . Implicit in the Court's reasoning is the recognition that officials committing outrageous, yet *sui generis*, constitutional violations ought not to shield their behavior behind qualified immunity simply because another official has not previously had the audacity to commit a similar transgression. We conclude that the Fourth Amendment violation as alleged in this case is both obvious and outrageous, and that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . A social worker who lacks any legitimate justification for seizing a child, but nonetheless seizes the child and demands, in direct contravention of a court order, that she enter the custody of her abusive father, would clearly know that his conduct is unconstitutional.").

Cordova v. Aragon, No. 07-cv-00879-EWN-CBS, 2008 WL 2120505, at *16 -*19 (D. Colo. May 20, 2008) ("I find that Officer Aragon's actions in using deadly force to terminate the police chase were objectively reasonable in light of all the facts and circumstances confronting him. . . First, with respect to the 'severity of the crime at issue,'. . . in addition to apparently stealing the skid-steer loader, Mr. Cordova had committed multiple traffic offenses that put himself, the pursuing officers, and the public at risk, including: (1) refusing to stop while being pursued by multiple police vehicles with their lights and sirens activated; (2) running through at least two red lights; (3) driving off the road at least twice to avoid officers' deployment of stop sticks; (4) allegedly . . . attempting to ram Officers Rubino's and Aragon's patrol cars, and driving toward Officer Nance as he stood on the median; and (5) most importantly and obviously, driving the wrong way down I-76, an interstate highway. . . Second, with respect to whether Mr. Cordova posed 'an immediate threat to the safety of the officers and others,' . . . I note that-- irrespective of whether Officer Aragon was in immediate personal danger at the moment he fired--Mr. Cordova was proceeding the wrong way down I-76, and thus posed a serious threat to any innocent motorist who was or could have been proceeding in the opposite direction, and who thus risked a head-on collision with a truck hauling a skid-steer loader. Moreover,

even if this threat cannot properly be termed 'immediate' because no evidence suggests that westbound traffic was immediately approaching when Officer Aragon fired, the Supreme Court in *Harris* contemplated the weighing of foreseeable danger to third-parties in deciding whether the use of deadly force to terminate a police chase was objectively reasonable. . . . In the instant case, I find that the probability of Mr. Cordova eventually injuring or killing either a police officer or a civilian motorist had Mr. Cordova continued to elude police was significant . . . . In addition, I note that any officers or motorists who could foreseeably have been injured or killed in an accident with Mr. Cordova were completely innocent. . . Accordingly, as viewed from the perspective of a reasonable officer forced to make a 'split-second judgment[ ],' . . . as to the relative risk Mr. Cordova posed to officers and the general public versus the risk that shooting him posed to his Fourth Amendment interest to be free from the use of excessive force, I find that Officer Aragon's decision to fire at Mr. Cordova's truck was objectively reasonable. . . . Lastly, I note that there is no factual dispute as to whether Mr. Cordova was 'actively resisting arrest or attempting to evade arrest by flight,'. . . and thus find that this factor additionally militates in favor of finding Officer Aragon's actions objectively reasonable. . . . Alternatively, I find that Plaintiffs have failed to show that Officer Aragon violated clearly established law at the time of his alleged constitutional violation. . . . The Court in *Harris* moreover rejected the respondent's contention in that *Garner* established specific 'preconditions' on the use of deadly force: . . . [G]iven the Supreme Court's clear direction to lower courts to assess the objective reasonableness of the use of deadly under the traditional 'totality of the circumstances' approach, and given the Court's implicit suggestion that *Garner* is utterly unpersuasive authority on the reasonableness of the use of deadly force in terminating a police chase, I find Plaintiffs' unelaborated allusion to *Garner* insufficient to demonstrate that Officer Aragon violated clearly established law at the time of his alleged constitutional violation.").

ELEVENTH CIRCUIT

Galvez v. Bruce, No. 08-10531, 2008 WL 5246102, at *5, *6 (11th Cir. Dec. 18, 2008) ("Galvez does not contend that any federal statute or constitutional provision is specific enough to clearly establish that Bruce's conduct was unlawful. Thus, Galvez must demonstrate that caselaw existing at the time of Bruce's actions either establishes a broad, applicable principle of law or has materially similar facts such that it would put Bruce on notice that his actions were unlawful. Galvez argues that *Slicker v. Jackson,* 215 F.3d 1225 (11th Cir.2000), and *Lee v. Ferraro,* 284 F.3d 1188

(11th Cir.2002), are materially similar cases to his and that these cases establish and apply the principle that fully secured arrestees cannot be subjected to force like that inflicted on him by Bruce. . . . As discussed above, under Galvez's version of the facts, he was a fully-secured, cooperative, misdemeanor arrestee at the time Bruce slammed him into the wall. . . .Under these circumstances, we agree with Galvez that our decisions in *Slicker* and *Lee* should have put Bruce on notice that he would be violating Galvez's constitutional rights by repeatedly slamming Galvez's body into the corner of a concrete wall with force sufficient to break his ribs and cause a leaking aneurysm. The lesson of *Slicker* and *Lee* is that qualified immunity is not available to officers who subject arrestees to significant force after 'the arrest ha[s] been fully effected, the arrestee completely secured, and all danger vitiated.'. . . Under Galvez's version of the facts, Bruce should have considered his use of force similar to that in *Slicker* and *Lee.* Given the state of the law in 2004, it should have been clear to Bruce that repeatedly slamming a fully secured and compliant Galvez against the corner of a concrete wall, with force sufficient to break Galvez's ribs and cause a leaking aneurysm, was unlawful.").

Shepard v. Davis, No. 07-11307, 2008 WL 4997142, at *8, *9 (11th Cir. Nov. 25, 2008) ("[O]n August 5, 2002, the preexisting case law from the Supreme Court, this circuit, and the Supreme Court of Florida clearly established that (1) in the absence of consent or exigent circumstances, a warrantless arrest made within a suspect's home is unreasonable under the Fourth Amendment; and (2) a person does not consent to being pushed back into his home and arrested in his living room by merely opening the front door in response to a knock and announcement by law enforcement officers, especially when that person immediately asks if the officers have a warrant. Applying this clearly-established law to the facts of this case, a reasonable officer would have had 'fair and clear warning' that he could not go to a suspect's home, knock on his front door, wait for him to answer, and without hearing anything else besides, 'May I help you ... I am Dwayne Shepard,' or 'Do you have a warrant,' grab the suspect's arm, push him six feet into his living room, and arrest him on his couch, all without a warrant of any kind. At this juncture, there is nothing in Shepard's amended complaint that places him in the threshold or inside the doorway. Simply put, Shepard's arrest was not a 'threshold' arrest. Accordingly, because Officer Budnick violated Shepard's clearly-established Fourth Amendment rights by arresting Shepard in his home without a warrant, consent, or exigent circumstances, we find that he is not entitled to qualified immunity on Shepard's unlawful arrest claim. . . . This case is entirely different from *McClish*. According to Shepard, he was arrested six feet inside of his house. *McClish*, on the other hand, was pulled outside of his

house, where he then was arrested. . . As the aforementioned cases make clear, and *McClish* reaffirmed, at the time of Shepard's arrest, the law was clearly established that a warrantless arrest could not be made within the home absent consent or exigent circumstances. Officer Budnick had fair warning that his conduct violated the Fourth Amendment, and he therefore is not entitled to qualified immunity.")

Buckley v. Haddock, No. 07-10988, 2008 WL 4140297, at *7 (11th Cir. Sept. 9, 2008) ("Plaintiff resisted arrest. Given this circumstance in the context of all the other facts, Deputy Rackard's gradual use of force, culminating with his repeated (but limited) use of a taser, to move Plaintiff to the patrol car was not unconstitutionally excessive. In addition, even if Plaintiff could establish that some of the deputy's use of force violated the Fourth Amendment, the deputy still would be entitled to qualified immunity because the applicable law at the time did not clearly establish that the deputy's conduct--given the circumstances--was unconstitutional.").

Buckley v. Haddock, No. 07-10988, 2008 WL 4140297, at *7, *9, *10, *12 (11th Cir. Sept. 9, 2008) (Martin, J. dissenting) ("I respectfully dissent from the judgment in this case. I write to express my view that the Fourth Amendment forbids an officer from discharging repeated bursts of electricity into an already handcuffed misdemeanant--who is sitting still beside a rural road and unwilling to move--simply to goad him into standing up. I also conclude that at the time of the incident, Deputy Rackard was on fair notice that his conduct was unconstitutional. Not only did Deputy Rackard unnecessarily discharge his taser gun against Mr. Buckley three times, but each time he did so, he repeatedly prodded Mr. Buckley's body with the stun gun's live electrodes--inflicting additional pain and leaving Mr. Buckley with sixteen burn scars. Because our law clearly establishes such conduct as unconstitutional, I would affirm the district court's denial of qualified immunity and allow this action to proceed. . . . This is not a case about whether an officer may use a taser gun to subdue an unruly or dangerous individual. . . . Rather, the question in the case is whether a taser gun may be used repeatedly against a peaceful individual as a pain-compliance device--that is, as an electric prod--to force him to comply with an order to move. . . . Like the district court below, I conclude that the repeated and sustained use of the taser gun for the sole purpose of coercing Mr. Buckley to move was unreasonable under the circumstances and thus violated the Fourth Amendment. . . . Although the Eleventh Circuit has not spoken in terms of 'pain compliance,' at the very least, the Fourth Amendment prohibits the infliction of gratuitous pain and injury as a means to coerce compliance. . . . I would also find, under the second prong of *Saucier*, that the law was clearly established at the time of the incident that Deputy

Rackard's conduct was unconstitutional. Whatever the debatability of employing a single, controlled electric shock against a non-compliant individual to coerce him into movement, in this case Deputy Rackard repeatedly prodded Mr. Buckley's body which maximized the level of pain he experienced. In light of the repeated and continuous nature of the force used against Mr. Buckley, the substantial pain and bodily injury that resulted, and the absence of any arguable justification, I have no difficulty in concluding that no particularized preexisting case law was necessary for it to be clearly established that Deputy Rackard's conduct was unconstitutional. Deputy Rackard's use of force was so grossly disproportionate to the need for force that no reasonable officer would have believed such conduct was legal.").

Chaney v. City of Orlando, No. 07-14169, 2008 WL 3906838, at *5, *6 (11th Cir. Aug. 26, 2008) ("In a claim of excessive force, there are two ways to to show that the law clearly established that the particular amount of force used was excessive. . . The first of those ways is to show that, in a materially similar factual situation, the law has held that the officer's conduct was unlawful. . . Where the case law is not materially similar, we look to the second way and consider whether other case law has provided sufficient notice to 'every' reasonable officer that such force is unlawful. . . .Chaney is unable to show that Cute's conduct violated any clearly established right. There was no evidence at trial indicating that Cute's conduct of physically grabbing Chaney, pulling him out of his car, throwing him to the pavement, handcuffing him, using his Taser on Chaney's back, or putting his foot on Chaney's head was so obviously wrong that he would have known that it was unlawful and Chaney has cited no case law that would have provided Cute with such notice. There was no Eleventh Circuit case law at the time of the incident which would have provided Cute with notice that use of a Taser constituted unreasonable or excessive force, . . . or notice that the use of force was unlawful to prevent Chaney from communicating with what Cute perceived to be a hostile crowd. . . . . The facts in this case also foreclose it from the narrow exception to qualified immunity available if the plaintiff can show that the officer's conduct was so outrageous as to be unconstitutional 'even without caselaw on point.'. . Trial testimony clearly indicated that, as an officer of the Orlando Police Department, Cute was allowed, in the face of passive resistance, to use a Taser and, in the face of active resistance, higher levels of force to gain compliance from a suspect. . . Based on the lack of sufficient evidence supporting the jury verdict regarding excessive force, and the sufficient evidence supporting Cute's entitlement to qualified immunity, the district court correctly granted Cute judgment as a matter of law on the use of force claim.").

Moretta v. Abbott, No. 07-10795, 2008 WL 2229757, at *1-*2 (11th Cir. June 2, 2008) ('The complaint filed on behalf of Allen, a minor, alleged that the two officers shot Allen with a taser gun causing 50,000 volts of electricity to enter the body of Allen, a 6-year old, 53-pound child. Allen convulsed violently and vomited as his body was shocked with the 50,000 volts. The officers handcuffed Allen as he vomited. The complaint also alleged that the tasering caused severe, significant and permanent injury to Allen, including extreme mental and physical suffering and loss of bodily function, and has resulted in large doctors and hospital bills. . . . [T]he district court concluded that the reasonable inferences from the complaint were that: '[F]rom the moment the police officers arrived on the scene, through the time the officers deployed a taser into Allen's body and handcuffed him, Allen posed no threat to anyone's safety, including himself.'. . On these alleged facts and in this Rule 12(b)(6) posture, we agree with the district court that plaintiffs have alleged excessive force that violated the constitutional rights of Allen, . . . and we agree with the district court that the officers are not entitled to qualified immunity because their conduct violated the clearly established rights of Allen. Even in the absence of factually similar case law, an officer can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases. . . We conclude that, at the time of this incident in August of 2003, every reasonable officer would have known that the taser force used under these circumstances was unlawful. The conduct at issue here lies so obviously at the very core of what the Fourth Amendment prohibits, that the unlawfulness of the conduct was readily apparent to an official in the shoes of these officers.")**.**

Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008) ("It is beyond question that the law was 'clearly established' so as to give the defendants fair warning that their actions in such circumstances violated Reese's Fourth Amendment rights. No particularized, preexisting case law was needed to inform them that an officer is not entitled to qualified immunity where his conduct goes 'so far beyond the hazy border between excessive and acceptable force that [he knows that he is] violating the Constitution.' . . Reese's version of the facts demonstrates a beating that 'falls within "the core of what the Fourth Amendment prohibits": a severe beating of a restrained, non-resisting suspect.'. . Accordingly, defendants are not entitled to summary judgment on the ground of qualified immunity.").

Hadley v. Gutierrez, 526 F.3d 1324, 1333, 1334 (11th Cir. 2008) ("We hold that a handcuffed, non-resisting defendant's right to be free from excessive force was clearly established in February 2002. In *Lee,* 284 F.3d 1188, we concluded that

slamming a non-resisting criminal suspect's head onto hood of a car constituted excessive force. Along those same lines, we proclaimed in *Skrtich*, 280 F.3d at 1303, that '[b]y 1998, our precedent clearly established that government officials may not use gratuitous force against a prisoner who has been already subdued....' Applying 'the excessive force standard would inevitably lead every reasonable officer ... to conclude that the force' used here--punching a non-resisting criminal suspect for no apparent reason other than malice--is not protected by our constitution.").

Nicarry v. Cannaday, 260 Fed. Appx. 166, 170 (11th Cir. 2007) ("The evidence, even viewed in the light most favorable to Nicarry, shows that Cannaday's use of force was objectively reasonable because Cannaday had probable cause to believe that Nicarry posed a threat of serious physical harm to Cannaday and his fellow officers on the scene. Nicarry led police on a night-time motor vehicle pursuit and then a foot chase through a quiet residential neighborhood. During the chase, Nicarry refused to pull over and had fled from officers, first in his van and then on foot. Cannaday and the other officers found Nicarry hiding in a dark shed in the backyard of a residence. As the officers arrived, they formed a rough semi-circle between ten and fifteen feet from the shed door. Nicarry was commanded to come out of the shed, but did not do so. Within seconds of being commanded a second time to come out of the shed, Nicarry, a very large man, charged from the shed at full speed while holding a screwdriver and ran in the general direction of at least some of the officers. Nicarry admitted not only that he was running full speed, but that he leapt off a lawnmower as he charged out. Although Cannaday had his gun drawn, he did not fire until he saw the metal object in Nicarry's hand and heard someone call out a warning about a screwdriver. We stress that, even under Nicarry's version of events, the entire episode after the second command lasted only a few seconds and only a few feet separated Nicarry and the officers who were trying to apprehend him. Given the split-second, rapidly escalating nature of the situation, we conclude that a reasonable officer in Cannaday's shoes could have perceived that Nicarry posed an immediate threat of serious physical harm to himself and his fellow officers. Specifically, it was reasonable, under the circumstances of Nicarry's earlier flight in his van and on foot and his refusal to come out of the shed when first ordered to do so, to believe that Nicarry intended to evade capture and flee and to use the screwdriver as a weapon against any of the officers clustered around the shed that got in his way.")

Walker v. City of Riviera Beach, 212 Fed. Appx. 835, 2006 WL 3772005, at *2 (11th Cir. Dec. 22, 2006) ("The district court ruled that summary judgment could not be granted in favor of Officer Patterson on the basis of qualified immunity because

'genuine issues of material fact' existed as to whether Officer Patterson's conduct was unconstitutional. This application of the summary judgment standard was mistaken because--in resolving qualified immunity issues--a 'material issue of fact' never exists. 'When conducting a qualified immunity analysis, district courts must take the facts in the light most favorable to the party asserting the injury.' *Robinson v. Arrugueta*, 415 F.3d 1252, 1257 (11th Cir.2005). Consideration of the record in this light eliminates all issues of fact.")**.**

Walker v. City of Riviera Beach, 212 Fed. Appx. 835, 2006 WL 3772005, at *3 (11th Cir. Dec. 22, 2006) ("We have no 'controlling and materially similar case' declaring Officer Patterson's strike to Walker's head with the gun unconstitutional. But we accept that Officer Patterson's supposed conduct is obviously unconstitutional, notwithstanding the lack of precedent. Officer Patterson first pursued Walker for speeding, and Walker did not immediately pull over when Officer Patterson flashed his lights and shouted for Walker to yield. Walker eventually pulled into a parking lot, and Officer Patterson approached the vehicle on foot with gun drawn. Walker turned off the car and did not resist arrest or attempt to flee again. Nevertheless, Officer Patterson unnecessarily 'slammed' his pistol into Walker's head. Viewing the evidence in the light most favorable to Walker, 'no particularized preexisting case law was necessary for it to be clearly established that what [Officer Patterson] did violated [Walker's] constitutional right to be free from the excessive use of force.'. . Such an unwarranted pistol whip lies at the core of what the Fourth Amendment prohibits.")**.**

Gray ex rel Alexander v. Bostic, 458 F.3d 1295, 1306, 1307 (11th Cir. 2006) ("Gray does not cite and we cannot locate a case addressing before today when it may be reasonable to use handcuffs in an investigatory stop absent a safety rationale. Thus, no factually similar pre-existing case law put Deputy Bostic on notice that his use of handcuffs to discipline Gray was objectively unreasonable for Fourth Amendment purposes. However, our inquiry does not end here. Even in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases. . . . We. . . conclude that Deputy Bostic's conduct in handcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights. . . . Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable. We emphasize that the Court is not saying that the use of

handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case.").

Baltimore v. City of Albany, Georgia, No. 02-00125 CV-WLS-1-1, 2006 WL 1582044, at **5-7 (11th Cir. June 9, 2006) (not published) ("The Supreme Court reasoned in *Brosseau* that if an officer has probable cause to believe that a 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,' and therefore the officer is immune from suit for using deadly force. . . . Notably, there is a dearth of case law in this circuit to support the proposition that the use of a flashlight to strike an arrestee over the head necessarily constitutes deadly force. . . . Nonetheless, in the cases that have specifically addressed the issue, there appears to be agreement that striking a suspect in the head with a heavy flashlight or other blunt instrument at least poses a 'substantial risk of serious bodily injury,' if not death. We adopt this conclusion and find that such action constitutes deadly force under our definition of that term.. . .Viewing the record in the light most favorable to Baltimore, we conclude that it was not objectively reasonable for Officer Long to strike Baltimore on the head with a heavy flashlight, apparently knocking him to the ground and causing a serious wound. . . . The next inquiry under *Saucier* is whether, at the moment Long acted, 'every objectively reasonable police officer would have realized the act[ ] violated already clearly established federal law.' . . . Although *Garner* and *Graham* are themselves too general to provide the 'clearly established law' that would have given Officer Long 'fair warning' that his conduct would violate Baltimore's constitutional rights, . . . we find that this case is 'obvious' enough for the standards set forth in *Garner* and *Graham* to provide the necessary 'particularized' guidance for reasonable officers. . . . Even under the chaotic circumstances of the moment, the fact remains that four officers were engaged in arresting Baltimore for violating a city ordinance. Although a hostile crowd tried to abort the arrest, there is no indication that Baltimore was going to escape the grasp of the officers. Reasonable officers in Long's situation would not have violently struck a misdemeanor suspect, who was being subdued by several officers, in the head with a blunt object to effectuate an arrest for violating the city's open container ordinance. This is a case where a 'general constitutional rule already identified in the decisional law ... appl[ied] with obvious clarity' to Long's conduct, as use of force that could cause death or serious harm to effectuate a misdemeanor arrest was excessive under these circumstances.")

Troupe v. Sarasota County, 419 F.3d 1160, 1168, 1169 (11th Cir. 2005) ("Here, the SWAT Team surrounded the Oldsmobile, and Hart was disobeying their clear orders to put his hands up and surrender. The Oldsmobile suddenly moved forward and backward and the Officers had to make split-second decisions of whether they could escape before anyone suffered serious injury. In their briefing earlier, they were told that Hart was dangerous and had tried to escape from police before and would likely be carrying a weapon. Additionally, the three officers surrounding Hart's car, and a fourth in the yard all separately concluded that deadly force was needed and appropriate to stop Hart, but they did not shoot because they did not have a clear shot and were worried about a cross-fire situation. Bauer was directly in Hart's path as the Oldsmobile accelerated toward him. He had only 3-5 seconds to assess the situation before shooting. Even if in hindsight the facts show that the SWAT Team could have escaped unharmed, a reasonable officer could have perceived that Hart posed a threat of serious physical harm. In *Brosseau* . . . the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others. In *Brosseau*, like the present case, the Officer fired through the driver's side window and the bullet entered the driver's back. . . Here, Gooding and Bauer perceived that Hart was attempting to escape and could potentially endanger more lives and thus, Bauer shot through the driver's side window and hit Hart in the back. Because the *Brosseau* Court held that it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening to escape and cause harm to others, and because of the similarities of these two cases, [footnote distinguishing *Harris v. Coweta County*, 406 F.3d 1307 (11th Cir.2005)] the district court did not err in finding that the officers' conduct did not violate a constitutional right and that Gooding and Bauer were entitled to qualified immunity. . . Finally, because our inquiry ends at the first step, we need not determine whether the law was clearly established at the time of the incident.").

Robinson v. Arrugueta, 415 F.3d 1252, 1256 (11th Cir. 2005) ("Here, Arrugueta was standing in a narrow space between the two vehicles, Walters was disobeying Arrugueta's orders to put his hands up, the Escort was suddenly moving forward and Arrugueta had to make a split-second decision of whether he could escape before he got crushed. At the most, Arrugueta had only 2.72 seconds to react to what he perceived as a threat of serious physical harm from Walters. . . . Even if in hindsight the facts show that Arrugueta perhaps could have escaped unharmed, we conclude that a reasonable officer could have perceived that Walters was using the Escort as a deadly weapon. Arrugueta had probable cause to believe that Walters posed a

threat of serious physical harm. In the case of *Brosseau v. Haugen*, . . . the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others. Here, Arrugueta perceived that Walters was attempting to crush him and endanger his life. Because it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening escape and possible harm to others, it is also constitutionally reasonable for an officer to use deadly force when he has probable cause to believe that his own life is in peril. . . Thus, we conclude that Arrugueta is entitled to qualified immunity under the first step of the Saucier analysis. . . . Even though our inquiry ends at the first step of the analysis, we note that the district court was correct in finding that, under the second step, the law was not clearly established, and thus, Arrugueta is entitled to qualified immunity under this step as well.").

Evans v. Stephens, 407 F.3d 1272, 1279-83 (11th Cir. 2005) (en banc) ("[T]his case provides no opportunity to decide the question of when jailers--for security and safety purposes--may lawfully conduct strip searches of persons about to become inmates in the general jail population. This case raises no questions about the necessities of jail administration. . . This case involves a different kind of search altogether: a post-arrest investigatory strip search by the police looking for evidence (and not weapons). Officer Stephens--who was not a jailer--testified (without contradiction from others) that he strip-searched Plaintiffs because he (as the arresting officer) believed them to be in possession of illegal drugs: the search was part of a criminal investigation looking for evidence. Never has the Supreme Court explicitly addressed the standard applied to determine if a post-arrest investigatory strip search (away from the complicated context of the nation's borders) violates the Fourth Amendment. . . . [W]e are confident that an officer must have at least a reasonable suspicion that the strip search is necessary for evidentiary reasons. . . Perhaps the actual standard is higher than reasonable suspicion, especially where, as here, the search includes touching genitalia and penetrating anuses. But because Officer Stephens--in the light of the supposed facts--did not meet even the minimum possible standard of reasonable suspicion, we need not decide if the actual standard is something even higher to decide whether Officer Stephens failed to comply with the Constitution. . . . We also conclude the manner in which Officer Stephens conducted the strip search violated Plaintiffs' constitutional rights. . . . [T]he totality of the circumstances--for example, the physical force, anal penetration, unsanitariness of the process, terrifying language, and lack of privacy--collectively establish a constitutional violation, especially when the search was being made in the absence

of exigent circumstances requiring the kind of immediate action that might make otherwise questionable police conduct, at least arguably, reasonable. . . . A post-arrest investigatory strip search did not obviously violate the Fourth Amendment on its face in 1999. In addition, in 1999, no applicable cases provided a police officer with fair notice that he must have, at least, a reasonable suspicion to conduct a post-arrest investigatory strip search of an adult and with fair notice that the facts before Officer Stephens were insufficient to make his suspicion reasonable for the search. . . The law was not settled for what standard applied to post-arrest investigatory strip searches, and Supreme Court precedent was very deferential to post-arrest investigations. . . *Justice v. Peachtree City,* 961 F.2d 188, 192-93 (11th Cir.1992), could not squarely govern this case: it addressed a strip search of a juvenile arrested for minor offenses (loitering and truancy), and it acknowledged that unique concerns arise with strip searching youngsters. *See generally, Brosseau v. Haugen,* 543 U.S. ----, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). And *United States v. Boyce,* 351 F.3d 1102, 1109 (11th Cir.2003), was decided four years after the incident in question. So, Officer Stephens is protected by qualified immunity insofar as the claim is one for conducting a strip search at all. Qualified immunity, however, does not shield Stephens from Plaintiffs' separate claim that the manner of the strip search violated their rights under the Fourth Amendment. No preexisting case law established this violation or made it obviously clear. *Justice* and *Bell* were the only applicable cases to address strip searches, and they could not squarely govern this case. Both were materially different from this case, and both upheld strip searches. But the text of the Fourth Amendment prohibits 'unreasonable' searches. Seldom does a general standard such as 'to act reasonably' put officers on notice that certain conduct will violate federal law given the precise circumstances before them: Fourth Amendment law is intensely fact specific. But we conclude the supposed facts of this case take the manner of the searches well beyond the 'hazy border' that sometimes separates lawful conduct from unlawful conduct. *See generally, Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir.2000). The violation was obvious. Every objectively reasonable officer would have known that, when conducting a strip search, it is unreasonable to do so in the manner demonstrated by the sum of the facts alleged by Plaintiffs. The totality of the facts alleged here made this violation--on the day of the search--clear from the terms of the Constitution itself: No objectively reasonable policeman could have believed that the degrading and forceful manner of this strip search (especially in the light of the complete lack of circumstances that might have called for immediate action to conduct a search without the time for cool and calm thought about how to proceed) was 'reasonable' in the constitutional sense.").

Evans v. Stephens, 407 F.3d 1272, 1296, 1297 (11th Cir. 2005) (en banc) (Barkett, J., concurring in part and dissenting in part) ("[T]he law was clearly established through *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and *United States v. Himmelwright,* 551 F.2d 991 (5th Cir.1977), that the initiation of a strip search without reasonable suspicion was unconstitutional. Thus, Stephens was not entitled to qualified immunity for either the initiation of the search or the manner in which it was conducted. . . . If, before 1999, the Fourth Amendment imposed a reasonable suspicion requirement on *border* strip searches, where authority to search is less constrained than it is in an ordinary domestic search incident to arrest, it is unquestionable that *at least* the same degree of suspicion was required to conduct the strip searches in this case. *Schmerber* and *Himmelwright* clearly established before 1999 that reasonable suspicion was required to conduct an investigatory strip search. Based on the facts of this case, no reasonable officer could have believed that a strip search was justified simply because the arrestees were nervous when stopped by the police and claimed to be lost.").

Mercado v. City of Orlando, 407 F.3d 1152, 1158-61 (11th Cir. 2005) ("Even though Padilla violated Mercado's constitutional rights, he could still be afforded qualified immunity provided that Mercado's rights were not clearly established at the time of the incident. Mercado can demonstrate that his right was clearly established in a number of ways. First, he can show that a materially similar case has already been decided, giving notice to the police. . .He could also show that a broader, clearly established principle should control the novel facts in this situation. . . . Finally, he could show that this case fits within the exception of conduct which so obviously violates that constitution that prior case law is unnecessary. . .To make this showing, Mercado must point to law as interpreted by the Supreme Court, the Eleventh Circuit, or the Supreme Court of Florida. . . . Mercado, however, can point to no controlling case law from the Supreme Court or this Circuit dealing with the Sage Launcher. Although there are some cases dealing with 'less lethal' weapons, such as pepper spray, none of them is 'materially similar' to the facts in this case or 'truly compels' the conclusion that Mercado had a right established under federal law. . . If there is no case law directly on point, '[g]eneral statements of the law contained within the Constitution, statute, or caselaw may sometimes provide "fair warning" of unlawful conduct.' . . These principles may give notice to officers, provided that the decisions clearly apply to the situation at hand. The 'reasoning, though not the holding' of prior cases can also send 'the same message to reasonable officers' in novel factual situations. . . The general principle of law must be specific enough to give the officers notice of the clearly established right. Indeed, the principle that officers may

not use excessive force to apprehend a suspect is too broad a concept to give officers notice of unacceptable conduct. . . Mercado, however, relies on the principle that deadly force cannot be employed in a situation that requires less-than-lethal force. . . Because the Fourth Amendment protects citizens from. 'unreasonable' seizures, the use of deadly force must be reasonable under the circumstances. . . Using deadly force in a situation that clearly would not justify its use is unreasonable under the Fourth Amendment. Under Florida law, 'deadly force' means any 'force that is likely to cause death or great bodily harm,' but does not include 'the discharge of a firearm by a law enforcement officer or correctional officer during and within the scope of his or her official duties which is loaded with a "less lethal munition."' . . . 'Less-lethal munition' is, in turn, defined as 'a projectile that is designed to stun, temporarily incapacitate, or cause temporary discomfort to a person without penetrating the person's body.'. . According to Orlando policies, the Sage Launcher is defined as a 'less lethal' munition; however, they also recognize that some uses of the weapon should only be employed in deadly force situations. Shooting a suspect in the head is specifically forbidden unless the situation requires deadly force. As noted above, for the purposes of summary judgment, we must assume that Padilla intended to shoot Mercado in the head based on Mercado's injuries and the proven accuracy of Padilla's weapon. Because shooting a subject in the head with a Sage Launcher employs force 'likely to cause death or great bodily harm,' this action can be considered 'deadly force.' Both Padilla and Rouse were aware that police policy forbade them from utilizing this magnitude of force under the facts at bar. Because this situation was clearly not a deadly force situation, and because the officers utilized deadly force to subdue Mercado, they violated the clearly established principle that deadly force cannot be used in non-deadly situations. Furthermore, this is one of the cases that lie 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.' . . The facts in this case are also 'so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.' . . We have repeatedly held that police officers cannot use force that is 'wholly unnecessary to any legitimate law enforcement purpose.' . . Officer Padilla should not have needed case law to know that by intentionally shooting Mercado in the head, he was violating Mercado's Fourth Amendment rights. When the officers entered the apartment, they found Mercado crying on the floor of his kitchen with a loose cord around his neck and a kitchen knife placed up to, but not poking into, his chest. From a distance of about six feet away, Padilla twice shouted for Mercado to drop his knife, and then discharged the Sage Launcher, hitting Mercado in the head

from short range. Assuming that Padilla was aiming at Mercado's head intentionally, his use of force was clearly excessive.").

Purcell ex rel. Estate of Morgan v. Toombs County, 400 F.3d 1313, 1324 n.25 (11th Cir. 2005) ("Unlike *Hope*, the preexisting case law here varied enough from the material facts of this case that a reasonable jailer could believe that the factual differences could make the situation at this Jail lawful even when circumstances in the earlier cases were determined to be unlawful under federal law: the precedents do not 'squarely govern' the case here.[citing *Brosseau*]").

Oliver v. City of Orlando, No. 6:06-cv-1671-Orl-31DAB, 2008 WL 3889733, at *6 (M.D. Fla. Aug. 20, 2008) ("While there is no case law directly on point, this Court finds that no reasonable police officer could have believed such behavior to be permissible under the constitution. Other courts in this circuit addressing whether the use of a taser was reasonably proportionate to the need for force in light of *Draper* have examined factors such as the severity of the crime, the immediate threat to the officer, the number of times the officer deployed the taser, the injury sustained by the arrestee, and whether the officer warned the arrestee of the potential use of the taser. . . .Oliver had committed no crime and was considered a danger only to himself. Fiorino's taser was employed numerous times without warning and with no intervening attempt to use conventional means of physical restraint. Under these circumstances, any reasonable officer would have known that the amount of force used against Oliver was excessive and, therefore, unconstitutional.").

Franks v. Devane, No. 1:06-CV-173 (WLS), 2008 WL 794814, at * 4 (M.D. Ga. Mar. 21, 2008) ("As with the Plaintiff in *Besher*[*s*], Plaintiff in the case at bar intentionally endangered himself and the public. The chase by the officers involved county, city, and state patrol officers. It spanned two counties and 14 miles. Plaintiff was clocked on more than one occasion doing more than 120 mph. He had passed numerous vehicles over the double yellow line and driven in the wrong lane of traffic. There is some evidence that Plaintiff even taunted his pursuers by stopping and waiting for them to catch up. By the time, officers determined to set up a roadblock, Devane had determined that the chase may eventually lead into a highly congested school zone. Based on the facts and the controlling case law, if Devane's actions were intentional, they were objectively reasonable under the circumstances.")

Lewis v. City of West Palm Beach, No. 06-81139-CIV, 2008 WL 763250, at *6, *8 (S.D. Fla. Mar. 19, 2008) ("Given the conflicting nature of the record evidence,

particularly the testimony of the two experts, both the cause of Lewis' death and the role of the officers in it, if any, remains unclear. But in any event, regardless of whether the actions of the officers caused Lewis' death, a reasonable juror could find that the officers used constitutionally excessive force under the circumstances. After Lewis was already handcuffed and effectively immobilized, there was simply no need for the officers to kneel on Lewis' upper back and neck. Nor was there a need for Officer Shaw to pick up and shove Lewis' legs down toward his awkwardly contorted body. The officers were attempting to either further restrain Lewis, or to place him in a seated position. Officer Shaw's actions, combined with Officer Root's and Officer Luke's knees on Lewis' back, did not help achieve either of these possible goals. Therefore, there is a genuine issue of material fact as to whether Officer Shaw, Officer Root, and Officer Luke violated Lewis'rights under the Fourth Amendment. . . . When considered all together, the differences between *Mercado* and the instant case are too great for the court to conclude that any 'broad principle' created or referenced in *Meracado* was enough to give the officers in this case fair warning that their conduct violated the Constitution. Unlike this case, *Meracado* involved force known to the officer to be lethal, and a victim located in his own apartment, rather than on the street. Whatever the precise contours of the broad principle that *Meracado* may fairly be said to represent, it does not control this case. Thus, *Meracado* is insufficient to clearly establish the right allegedly violated in this case. Finally, plaintiff argues that the officers' conduct was so egregiously excessive that any reasonable officer would have understood it to be unconstitutional, even in the absence of any relevant case law. . . The court disagrees. This is precisely the kind of case in which the Eleventh Circuit has repeatedly cautioned district courts against second-guessing the decisions of police officers confronted with 'circumstances that are tense, uncertain, and rapidly evolving.'. . . The officers here were confronted by an agitated and uncooperative man with only a tenuous grasp on reality. Although the force used to restrain him may have been constitutionally excessive, the court cannot say that it was so obviously unconstitutional that, even in the absence of relevant case law, qualified immunity is inappropriate.")**.**

Mancha v. Immigration and Customs Enforcement, 2007 WL 3144012, at *6(N.D.Ga. Oct. 24, 2007) ("Nothing about my decision today should reflect the view that immigration officials are authorized to stop and interrogate drivers on the road simply because they happen to be driving near a caravan of immigration officials. Here, based on these specific facts, there was an objective basis for a brief and limited stop. The officers are entitled to qualified immunity. Their actions did not violate the Fourth Amendment, let alone clearly established law, as they had

'arguable reasonable suspicion' to conduct a limited stop. . . There was no obvious and flagrant violation of Morales's Fourth Amendment rights. The Defendant should prevail on his claim of qualified immunity.")

Scheuerman v. City of Huntsville*, *AL, 499 F.Supp.2d 1205, 1220 (N.D.Ala July 23, 2007) ("This is *not* a case where a uniformed officer uses potentially deadly force by crashing into the driver to prevent harm to others, after activating his blue lights and siren, and chasing a car whose driver is fleeing and driving recklessly in the dead of night. *See Scott v. Harris ,* 127 S.Ct. 1769 (2007).This is *not* a case where a uniformed officer, attempting to apprehend a drug trafficker, identifies himself and uses deadly force in self-defense of a moving car. *See Robinson v. Arrugueta,* 415 F.3d 1252 (11th Cir.2005).This is not a case where a uniformed officer uses deadly force on a suspected felon after he avoids an investigatory pat-down, flees in a car, and engages in a highspeed reckless chase with multiple police cars in tow, and refuses to get out of his car once it had been blocked on three sides and told by police to exit his vehicle. *See Pace v. Capobianco,* 283 F.3d 1275 (11th Cir.2002).Instead, this is a case in which an off-duty investigator, who was not in uniform, exited his unmarked vehicle to confront an individual, and drew his weapon when there was no reasonable suspicion that a crime had even been committed. It is undisputed that plaintiff did not see Weaber exit his vehicle, and was not aware that Weaber was walking toward plaintiff's automobile, until Weaber's arm, with his hand holding a gun, appeared through his front window. Viewing the totality of the circumstances, it was not objectively reasonable for Weaber to use deadly force on the plaintiff. . . . The parties agree that the encounter at issue lasted only three to five seconds. Under these peculiar circumstances, the court finds it was objectively unreasonable for Weaber to approach plaintiff's vehicle unannounced, grab onto plaintiff's car as it was being placed in reverse, and then start shooting plaintiff's midsection to make plaintiff stop."), *aff'd,* 2008 WL 656080 (11th Cir. Mar. 12, 2008).

Stephens v. City of Butler, Ala, 2007 WL 1834898, at *11, *12 (S.D. Ala. June 23, 2007) ("The instant case presents an issue closer to *Vinyard* than to *Draper,* in that the plaintiff was under more control of the three officers than the plaintiff in *Draper*. Nonetheless, even if the court were to accept that a single application of the taser would have been appropriate under *Draper*, the issue before the court is the repeated use--at least four separate trigger pulls by Lovette followed by one use by Jackson--of a taser in such an instance. The repeated use of a taser on an unarmed arrestee who had made no effort to escape, no movement that could be deemed an attack or threat to any officer, who was in custody, in the jail, and was surrounded by three officers,

would be objectively unreasonable and excessive, particularly where the use of force was over something as minor as being verbally unruly and refusing to don jail garb. This determination applies with equal force to defendant Jackson, who applied his taser to the plaintiff after defendant Lovette had already repeatedly done so. The plaintiff's facts support a reasonable inference that Jackson simply 'piled on' with full knowledge of the facts as stated above. . . . [T]he state of the law at the time of the incident at issue gave defendants Lovette and Jackson fair warning that the repeated use of tasers on a non-violent arrestee in circumstances similar to those presented in this case was excessive.")

Harrell v. Campbell, 482 F.Supp.2d 1368, 1372 & n.4, 1373 (N.D. Fla. 2007) ("*Brosseau*, *Robinson*, and *Troupe* do not undermine the conclusion that, under *Vaughan,* Deputy Goodman is not entitled to summary judgment. The distinction is the risk of serious physical harm; there was a greater risk in *Brosseau*, *Robinson*, and *Troupe* than in *Vaughan*, and a greater risk in *Vaughan* than in the case at bar. . . . Any argument that *Vaughan* did not survive *Brosseau* cannot succeed, at least in this court. *Robinson* and *Troupe*, which were decided after *Brosseau*, cited and quoted *Vaughan* at length without casting the slightest doubt on its continued validity. A district court in this circuit must continue to treat *Vaughan* as good law. And there is no reason to defer issuance of this order pending the Supreme Court's decision on review of *Harris v. Coweta County*, *Georgia*, 433 F.3d 807 (11th Cir.2005), *cert. granted sub nom. Scott v. Harris*, 127 S.Ct. 468, 166 L.Ed.2d 333 (Oct. 27, 2006). Any change that may result from the Supreme Court's decision in that case can be addressed in due course. . . . A juror could conclude that a reasonable officer in a modern patrol car would know that without resorting to lethal force he could thwart the escape of a known suspect driving a Volkswagen with a flat tire. And if, as the Eleventh Circuit said in *Vaughan*, giving a warning was feasible there, it may also have been feasible here. For these reasons, and especially in light of *Vaughan*, Deputy Goodman is not entitled to summary judgment."), *aff'd. by Harrell v. Goodman*, 250 Fed.Appx. 284 (11th Cir. 2007).

Rauen v. City of Miami, No. 06-21182-CIV, 2007 WL 686609, at *21, *22 (S.D. Fla. Mar. 2, 2007) ("As discussed elsewhere in this Order, Defendants argued that the conduct of officers in 'herding' the Plaintiffs did not constitute a seizure within the meaning of the Fourth Amendment. The undersigned has resolved this issue in favor of Plaintiffs, finding that the allegations support a claim that the officers' conduct did, in fact, result in a seizure. Nevertheless, the discussion of that issue, and the competing case law on that issue, demonstrates that the actions of the officers, and

thus, the Individual Defendants' directing of those actions, did not violate 'clearly established' federal law. In addition, because it was not clear at the time of the officers' actions that those actions would result in a seizure of Plaintiffs, it cannot be said that it was clearly established that the use of force, even excessive force, in herding the Plaintiffs would result in a violation of the Fourth Amendment, which is only implicated where there is, in fact, a seizure. Each of the Individual Defendants is thus entitled to qualified immunity with respect to Counts Eight, Ten, Twelve, and Fourteen of the TAC. . . . While the parties agree that a cause of action for failure to intervene to prevent Fourth Amendment violations does exist, the Individual Defendants are entitled to qualified immunity on these claims because, again, the law was not clearly established that the officers' conduct in herding the Plaintiffs and using force against them implicated the Fourth Amendment. In other words, at the time that the skirmish line was allegedly herding the Plaintiffs, the Individual Defendants were not aware that any seizure was occurring and, thus, were not aware that the Fourth Amendment was (allegedly) being violated. It cannot be said, therefore, that the law was 'clearly established' that the Individual Defendants' failure to intervene to prevent the officers' actions would result in a violation of Plaintiffs' Fourth Amendment rights. Each of the Individual Defendants is entitled to qualified immunity with respect to Counts Sixteen, Eighteen, and Twenty of the TAC.").

N.A. by and through Ainsworth v. Inabinett, No. 2:05-CV-740-B, 2006 WL 297222, at *7, *8 (M.D. Ala. Feb. 7, 2006) ("Having found that Deputy Inabinett violated N.A.'s Fourth Amendment right to be free from a gratuitous, unprovoked beating with fists followed by a taser gun assault--absent any provocation, resistance, legitimate law enforcement or other reasonably necessary purpose--the court addresses the second prong of the qualified immunity inquiry: was this constitutional right clearly established at the time of the deputy's encounter with N.A.? . . . . Defendant Inabinett is correct that 'the Plaintiffs have not cited ... any case containing materially similar facts' and plaintiffs' counsel conceded at oral argument that he can not identify such a case. However, the court concurs with Plaintiff that the Fourth Amendment's prohibition on excessive force is sufficiently clear so that no reasonable officer would believe it appropriate to make an unprovoked physical assault--consisting of beating with his fists and then firing a taser gun weapon--on a reportedly suicidal minor who was then not engaged in any criminal activity or other resistance which made reasonably necessary the use of any force at all. The Eleventh Circuit has found obvious clarity in the Fourth Amendment's prohibition against excessive force sufficiently to deny qualified immunity to officers using more than de minimis force against offenders or suspects after they have been restrained

sufficiently to cease the acts which triggered the need for force at the outset. . . Thus, on facts alleging no need for force at all, fair notice surely derives from the same source.").

Fitch v. Scott, No. 2:03-CV-465-FTM29DNF, 2005 WL 1925028, at *7 (M.D. Fla. Aug. 10, 2005) (not reported) ("Taking the facts in the light most favorable to plaintiffs, an objectively reasonable officer in Deputy Edwards' position could not have believed that he was entitled to use deadly force. While Deputy Edwards argues that plaintiffs have not identified any case law on point, this is not dispositive under the facts of this case. Officers have been on notice since 1985 that deadly force would be justified only by a reasonable belief that they or the public were in imminent danger. . . . It is hardly surprising after *Garner* that there are few reported assertions that shooting a suspect who is surrendering is not excessive. Indeed, the Eleventh Circuit and others circuits have noted that even pepper spraying an arrestee who is surrendering constitutes excessive force. . . The Court finds that under plaintiffs' version of the facts an objectively reasonable officer in Deputy Edwards' position could not have reasonably believed that he was entitled to shoot Fitch at the time he did so.").

Maiorano v. Santiago, No. 6:05CV107ORL-19KRS, 2005 WL 1200882, at *8 (M.D. Fla. May 19, 2005) (not reported) ("The Court's research reveals no case with facts materially similar to the case at hand. Considering Plaintiff's allegations, no factually particularized, preexisting case law was necessary for it to be obvious to an objectively reasonable officer facing Santiago's situation that his conduct violated Plaintiff's right to be free from the use of excessive force. In other words based on the bare allegations of the Amended Complaint, it cannot be said that an objectively reasonable officer could believe that it would be reasonable to use a taser against Plaintiff, without advance warning or a verbal command to desist, because of Plaintiff's action of engaging in an unspecified type of physical altercation with another student.").

Reed v. City of Lavonia, 390 F.Supp.2d 1347, 1362, 1363 (M.D. Ga. 2005) ("In this case, even though Reed was not handcuffed, the facts, when viewed in the light most favorable to him, show that Reed was not attempting to flee, was not offering any resistance, and was not belligerent or uncooperative and that he attempted to comply with the officers commands. If these facts are true, existing case law served as a clear and fair warning to Defendants Masionet and Carlisle that the use of force in such circumstances would violate an arrestee's Fourth Amendment rights. Even assuming

that existing case law did not provide Defendants with clear and fair notice that their acts, as alleged by Plaintiff, would violate Reed's Fourth Amendment right to be free of excessive force during arrest, the Court further finds that such decisional law is not necessarily required in this case. As stated above, materially similar case law is not necessary if the officers' alleged conduct lies 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent ... notwithstanding the lack of case law.'. . Here, as discussed above, Reed was allegedly passive, compliant and cooperative when Officers Masionet and Carlisle arrived on scene, sprayed him with pepper spray, physically attacked him, and began beating him with the baton. He was not intoxicated, did not possess (or appear to possess) a weapon, and made no attempt to flee or resist arrest. According to Reed, he surrendered to the officers' authority when they arrived and made every attempt to comply with the officers' commands. Even when Reed was on the ground, as the officers commanded, Masionet continued to beat him as Carlisle held him in a choke-hold, restricting his airflow and restraining his movement. In these circumstances, 'no particularized preexisting case law was necessary for it to be clearly established that what [Defendants Masionet and Carlisle allegedly] did violated [Reed's] constitutional right to be free from excessive force.'").

V. *SCOTT v. HARRIS* : IMPLICATIONS FOR FOURTH AMENDMENT DEADLY FORCE CASES

A. Reliance on the Video

For eight of the Justices, the videotape, submitted as part of the record, dictated a finding that Harris drove in a reckless and dangerous manner, presenting a real threat to bystanders and other drivers on the road. No reasonable juror could conclude otherwise. The Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 1776.

Cases in the Circuits:

Landis v. Phalen, No. 07-4262, 2008 WL 4601941, at *5 (6th Cir. Oct. 15, 2008) ("The Sixth Circuit has twice relied on *Scott* to overturn denials of qualified immunity in excessive force cases. *See Wysong*, 260 Fed. App'x. 848; *Marvin v. City of Taylor*, 509 F.3d 234 (6th Cir.2007). . . . The present case does not fit the mold of

Scott, *Wysong*, or *Marvin*. Unlike *Scott* and *Marvin*, there is no *irrefutable* evidence (such as video) establishing that Plaintiff resisted arrest at the cruiser and on the ground. And unlike *Wysong*, Plaintiff was not unconscious throughout his arrest. Rather, he remained conscious through much of it and testified only as to what he actually remembered. . . In particular, he *specifically* recalled being choked against the cruiser and, once on the ground, having his face smashed into the gravel--all while not resisting. . . Although Plaintiff's testimony is disputed by that of the arresting officer (Deputy Storts) and, to a lesser extent, by that of an onlooker (Nutter), it cannot be described as 'blatantly contradicted' and 'utterly discredited' so that 'no reasonable jury could believe it.'").

Carter v. City of Wyoming, No. 07-2296, 2008 WL 4425986, at *2 (6th Cir. Oct. 1, 2008) ("In addition to challenging the district court's assessment of the proper factual inferences that can be drawn from the record, Officer Lopez invokes what appears to be a slight modification of the *Johnson* rule. Relying on the Supreme Court's recent decision in *Scott*, he argues that a videotape of the incident and an MRI 'blatantly contradict' Carter's factual allegations. One premise of this argument appears to be correct. Appellate judges are free to trust their eyes when a videotape unequivocally shows what happened during an encounter with the police and unequivocally contradicts the claimant's version of events. . . . While *Scott* did not discuss *Johnson*, it held that a videotape 'quite clearly contradict[ed]' the plaintiff's story about whether excessive force was used during a police chase, then proceeded to grant qualified immunity to the officer defendant in the course of resolving the interlocutory appeal before it. . . Since *Scott*, we have agreed with the Third Circuit 'that *Scott* represents "the outer limit of the principle of *Johnson v. Jones*[:] where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review."'. . . As we concluded in *Wysong*, the Third Circuit's approach represents a 'principled way to read *Johnson* and *Scott* together and to correct the rare 'blatan[t] and demonstrabl[e]' error without allowing *Scott* to swallow *Johnson.*' . . The problem for Officer Lopez is that his record-supported evidence, including the videotape, does not 'blatantly contradict' Carter's description of what happened inside the store. And it does not even purport to cover, much less contradict, the excessive-force allegations regarding activities outside of the store. Once it is established that this evidence does not 'blatantly contradict' Carter's version of the facts, that leaves Officer Lopez only with quibbles over the district court's reading of the summary-judgment record, which we do not have authority to second guess.").

Ramirez v. Knoulton, 542 F.3d 124, 128 (5th Cir. 2008) ("The magistrate judge in this case stated that a genuine issue of material fact exists regarding whether a constitutional violation occurred in this case. However, the parties do not dispute any of the facts underlying Ramirez's claims, which are memorialized by video. . . The only dispute in this case, as the magistrate judge notes, is whether Knoulton acted reasonably in these circumstances. . . '[T]he ultimate determination of Fourth Amendment objective reasonableness is a question of law.' *White v. Balderama*, 153 F.3d 237, 241 (5th Cir.1998).")

Price-Cornelison v. Brooks, 524 F.3d 1103, 1119 n.1 (10th Cir. 2008) (O'Brien, J., dissenting in part, concurring in part, concurring with the result in part) ("The majority cites *Cortez*, 478 F.3d at 1120 n. 16, for the proposition that we lack jurisdiction to review a sufficiency of the evidence determination in the context of a defendant's appeal from the denial of summary judgment based on qualified immunity. This proposition, which stems from *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995), may be a dead letter in light of *Scott v. Harris* , 127 S.Ct. 1769 (2007). In *Scott*, an appeal from the denial of summary judgment based on qualified immunity, the Court held the court of appeals erred in crediting respondent's version of the events (which was credited by the district court) because it 'is so utterly discredited by the record that no reasonable jury could have believed him.' . . Thus, it appears we would have jurisdiction to review a district court's conclusion that the evidence is sufficient to survive summary judgment in the qualified immunity context. . . if the issue was properly raised.").

Lawler v. City of Taylor, Nos. 07-1329, 07-1442, 2008 WL 624770, at *2 (6th Cir. Mar. 5, 2008) ("The videotape also undermines Toro's claim that his use of force, after he threw Lawler to the floor, was reasonable. A jury could fairly conclude that, once Toro was kneeling on Lawler's back, it was gratuitous to knee him in the back twice and to hit him once with his elbow. Though Toro disputes some of Lawler's account, the video of the altercation would permit a jury to conclude that Lawler never posed a threat to Toro and that Toro used objectively unreasonable force in reaction to Lawler's continued pleas for leniency, verbal insults and drunken resistance. *See generally Scott v. Harris*, 127 S.Ct. 1769, 1775-76 (2007) (relying on a videotape in assessing summary-judgment evidence).").

Marvin v. City of Taylor, 509 F.3d 234, 246 n.6, 248 (6th Cir. 2007) ("The *St. John* court noted the passive resistance, but ultimately concluded that '[e]ven if there was evidence of resistance, it would be improper to determine whether the resistance

justified the officers' actions because such a determination is for a jury in the first instance.' However, the standard articulated by the Supreme Court in *Scott* clearly dictates that it is a pure question of law for the court to determine whether, viewing the facts in the light most favorable to the plaintiff, the officers' actions were objectively reasonable under the circumstances. . . As such, the *St. John* court's determination that such a determination is for a jury in the first instance is directly contrary to subsequent Supreme Court authority. . . Therefore, this Court will take the resistance into account in analyzing the Defendants' actions. . . .[I]t is clearly established that handcuffing an arrestee in an objectively unreasonable manner is a Fourth Amendment violation. However, it is important to keep in mind that simply because the right not to be handcuffed in an objectively unreasonable manner was clearly established, it does not necessarily follow that the Defendants in the instant matter actually behaved in an objectively unreasonable manner. Again, the value of *Walton* and similarly situated cases is strictly limited to the 'clearly established' prong of the qualified immunity analysis because *Walton* did not perform the objective reasonableness analysis as announced by the Supreme Court in *Saucier* and recently re-articulated in *Scott*. But, we reiterate, to get to the clearly established prong, there must first be a constitutional violation. In any event, to the extent that the facts of *Walton* might be so similar as to presuppose a denial of qualified immunity here, those facts are distinguishable. The *Walton* court credited the suspect's claim that she told the officers that she had an injured shoulder and could not put her hands behind her back. . . Similarly, Marvin claimed he was physically unable to put his hands behind his back. In *Walton*, the officer responded to the suspect's refusal by saying '[w]e can do this the easy way or the hard way.' . . Similarly, Officer Minard told Marvin '[p]ut your arm[s] behind you or we'll put them behind you for you.'. . In *Walton*, the suspect obeyed the officer's command, put her hands behind her back, and allowed the officer to handcuff her. And herein lies the critical difference between the two cases: Marvin did not obey the officers' command, but instead resisted. Note also that the suspect in *Walton* was not intoxicated, whereas the officers who were confronted with Marvin observed a person who was obviously intoxicated.")

Marvin v. City of Taylor, 509 F.3d 234, 253 (6th Cir. 2007)(Daughtrey, J., dissenting) ("The majority's decision to reverse the district court's denial of qualified immunity is apparently based not just on the 12 video files that were before the district court, but also on six additional video files that clearly were not before the district court. The majority justifies its consideration of this extraneous evidence on the basis of our authority to exercise de novo review of a district court's ruling on a

motion for summary judgment. That review, however, does not allow us to resolve disputes of fact that are, as here, material to the outcome of the case, nor to consider evidence not introduced below or to find facts not found by the district court. Indeed, nothing in Federal Rule of Appellate Procedure 10, governing the record on appeal, permits the introduction--or, presumably, the consideration--of new evidence in the courts of appeal. For this reason, I would remand the case to the district court with a direction to identify the 12 files submitted into evidence below or, alternatively, to view all 18 files and reconsider its ruling on the defendants' motion for summary judgment in light of the intervening case of *Scott v. Harris* , 127 S.Ct. 1769 (2007). That recent Supreme Court opinion, released after the district court's decision was issued in this case, holds that in ruling on a motion for summary judgment, a district court need not view the facts in the light most favorable to the nonmoving party if that party's version of events is 'blatantly contradicted by the record, so that no reasonable jury could believe it.' . . As in this case, the record in *Scott* included videotapes that arguably conflicted with the non-moving party's version of events in a section 1983 action charging law enforcement officers with the use of excessive force. Whether or not *Scott* is applicable retroactively to this case in its current posture, clearly it would be both relevant and applicable to a new ruling by the district court on the motion for summary judgment.").

Wysong v. City of Heath, 260 Fed. Appx. 848, 853, 854 (6th Cir. 2008) ("Neither the majority nor Justice Stevens's lone dissent in *Scott* mentioned *Johnson v. Jones*, or addressed the question of jurisdiction, but logic dictates that *Scott* must have modified *Johnson*'s language about jurisdiction in order to reach the result it did. In *Blaylock*, the Third Circuit reconciled *Scott* and *Johnson* by saying that *Scott* represents 'the outer limit of the principle of *Johnson v. Jones*--where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review.' *Blaylock*, 504 F.3d at 414. We agree with, and follow, the Third Circuit's view as a principled way to read *Johnson* and *Scott* together and to correct the rare 'blatan[t] and demonstrabl[e]' error without allowing *Scott* to swallow *Johnson*. Here, Wysong himself admitted in a deposition that no factual dispute exists, so we are comfortable in saying that any determination to the contrary is 'blatantly and demonstrably contradicted by the record,'. . . and that we have jurisdiction 'to say so, even on interlocutory review.' *Blaylock*, 504 F.3d at 414.").

Blaylock v. City of Philadelphia, 504 F.3d 405, 414 (3d Cir. 2007) ("In *Scott*, although the District Court held that Harris's conduct during the chase (other than his

speeding) was a fact subject to reasonable dispute, the Supreme Court disagreed. *Scott* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over the District Court's determination that the degree of resemblance between Andre and Dana's accomplice is subject to reasonable dispute. In *Scott*, however, the District Court was charged with determining whether the defendants' conduct was reasonable under the circumstances, and the Court had before it a videotape of undisputed authenticity depicting all of the defendant's conduct and all of the necessary context that would allow the Court to assess the reasonableness of that conduct. Moreover, as the Supreme Court held, the videotape clearly supported Scott's version of events, and 'blatantly contradicted' Harris's. Such a scenario may represent the outer limit of the principle of *Johnson v. Jones*--where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review. Here, by contrast, we have only two police photographs, and an argument by the defendants not that the two men depicted are similar in appearance, but that one of the men depicted in the photographs must be similar in appearance to a third person whose picture we do not have. As the District Court noted, the photographs show little more than that 'both Omar and Andre Blaylock are young black men who had short hair at the time their police photographs were taken,'. . .and, other than the officers' affidavits stating that they thought they were observing Omar selling drugs with Dana, there is 'no evidence relating to the physical characteristics of [Dana's accomplice].' Moreover, as Andre's counsel noted at argument, the photographs do not depict Andre's or Omar's height, weight, or build. Thus, unlike *Scott v. Harris*, we do not have a situation in which 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it.' Even if we assume that the photographs are so similar to each other that a police officer could reasonably mistake one photograph for the other, that does not establish that no reasonable jury could find that Andre did not resemble Dana's accomplice (who is undisputedly not Omar).Because the officers make no arguments regarding the false arrest claim that do not ask us to contradict the District Court's determination of which facts are subject to genuine dispute, we will dismiss that portion of their appeal for lack of jurisdiction under *Johnson v. Jones*.")**.**

Williams v. City of Grosse Pointe Park, 496 F.3d 482, 486 (6th Cir. 2007) (affirming grant of summary judgment where the district court "relied almost exclusively on the video captured by the camera in Miller's cruiser for its determination that Miller's conduct was objectively reasonable.").

Beshers v. Harrison, 495 F.3d 1260, 1262 n.1 (11th Cir. 2007) (rejecting the plaintiff's factual allegations where inconsistent with the majority's interpretation of two videotapes taken from patrol cars involved in pursuit).

But see ***Beshers***, 495 F.3d at 1268-71 (Presnell, J., concurring) (offering a much different interpretation of the videos than that perceived by the majority); ***Williams***, 496 F.3d at 494 (Aldrich, J., dissenting) ("Although the majority asserts that the video demonstrates that Miller reasonably believed that Williams posed a threat of serious harm, the video and the record as a whole do not demonstrate, beyond dispute, that Williams posed an immediate threat of serious harm to Miller, Hoshaw, or to the public.").

See also

McDowell v. Sherrer, No. 04-6089 (KSH), 2008 WL 4542475, at *1, *12 (D.N.J. Oct. 7, 2008) ("If a picture is worth a thousand words, two live-action videos are good for at least a million. . . . McDowell argues that when the officers were on top of him on the tier, any punch or nightstick jab was *ipso facto* a constitutional violation simply because McDowell had already been secured. To be sure, the officers used significant force in subduing McDowell and Cruz, and the videotape shows that they continued to use force after McDowell was shackled and handcuffed. But the officers were maintaining order in the maximum security facility in the course of, and after, an incident in which McDowell and Cruz, as revealed by the videos, had visibly taunted corrections officers, flouted prison rules and disobeyed commands, shielded themselves from pepper spray, and had further invited a violent confrontation. The Court declines to engage in a freeze-frame constitutional analysis and second-guess every individual movement of each defendant without considering the attendant circumstances. Instead, the proper inquiry focuses the Court's scrutiny on the continuum of events as they unfolded from the beginning of the incident to the end. Viewed thus, in context and under the totality of the circumstances, defendants' actions were reasonable and taken in good faith. The videos 'blatantly contradict' the story spun by McDowell--that the officers maliciously and sadistically used force in extracting him.").

White v. Briley, No. 04 C 5112, 2008 WL 4425437, at *5, *6 (N.D. Ill. Sept. 26, 2008) ("The videotape of the extraction, which the Supreme Court has held supersedes the parties' recollection of events, see *Scott v. Harris* , --- U.S. ----, 127 S.Ct. 1769, 1776 (2007), does not capture all of the events inside the cell. However,

it does show that (1) plaintiff repeatedly tried to stab the officers as they tried to wrest the mattress from his cell door; (2) when they finally entered the cell, they repeatedly ordered plaintiff to give up his knife; (3) the officers struggled with plaintiff for about two minutes; (5) after plaintiff was subdued and removed from the cell, he asked the officers to loosen his hand cuffs an summon a CMT, both of which they did. Taken together, the videotape and the other undisputed facts establish that defendants: (1) employed force only because plaintiff repeatedly refused their orders to cuff up; (2) escalated the force in response to plaintiff's attempts to stab them and his refusal to relinquish the mattress and knife; (3) struggled very briefly with plaintiff when they could finally enter his cell; (4) used a headlock on plaintiff, but only to get him out of the cell and downstairs to the shower; (5) gave plaintiff a chance to rinse off the chemical agent; (6) loosened his handcuffs when he said they were too tight; and (7) summoned a CMT at his request. Given all of theses undisputed facts, no rational jury could find that a reasonable correctional officer in the same situation would use less force to transfer plaintiff from his cell to segregation than defendants employed. Thus, King, Calmes, Turner, Artl, Grubbs, Langston and Thompson are, as a matter of law, entitled to qualified immunity on plaintiff's excessive force claim.")

Kettering v. Larimer County Detention Center, 2008 WL 4426168, 19 (D. Colo. Sept. 2, 2008) ("Quite simply, there are two versions of these events--County Defendants' version and Plaintiff's version--and each are supported by affidavit or other evidence. The video, while tending to support County Defendants' version regarding the initial extraction, does not address what occurred while Plaintiff was secured to the restraint chair in the booking cell. As such, conflicting evidence creates a question of credibility and interpretation which should be resolved.")

Marion v. City of Corydon, Ind., No. 4:07-cv-0003-DFH-WGH, 2008 WL 763211, at *1 & n.1, *6, *7 (S.D. Ind. Mar. 20, 2008) ("[T]he Supreme Court recently instructed that when a court analyzes a summary judgment motion, the court can and should accept as true the facts depicted by unchallenged video recordings where a reasonable jury could not reject that evidence. . . . The court does not mean to suggest that video evidence always, or ever, stands beyond any possible contradiction, impeachment, or explanation. Any video recording reflects a particular point of view and has its limitations. These basic elements of hermeneutic theory, however, do not undermine the force of the uncontradicted video evidence in this case. As in any case on summary judgment, the court must consider the evidence that would be presented to the jury and decide whether a jury could reasonably disagree in its evaluation of the material facts. . . . The court concludes that the undisputed facts show it was

reasonable for the officers to fire their weapons as Marion was still revving the engine, moving the Explorer, and trying to gain traction to continue his flight, especially when officers stood in or near the paths of possible escape with the vehicle. The defense affidavits and unchallenged video evidence from the police vehicles allow this court to reach its conclusion with confidence. . . The court should not be understood as endorsing a broad rule that police officers are entitled to fire their weapons at a fleeing driver under any and all circumstances. . . . In this case, however, by the time the chase of Marion reached the highway median, the objective circumstances the officers were facing, shown by undisputed evidence, weighed heavily in favor of allowing lethal force with respect to all three of the principal factors under *Graham v. Connor*. Those factors--severity of the crime at issue, immediate threat to safety of officers or others, and active attempts to evade arrest by flight-- all blended together in this case. What had started out as a shoplifting case in Louisville, as plaintiff repeatedly points out, had become a much more serious and dangerous matter by the time Marion turned into the median. For more than thirty minutes and over twenty miles of public streets and highways, Marion had attempted to escape arrest. He had assaulted officers in Louisville. In the high speed chase that he had started and prolonged, he had taken repeated actions that threatened the safety of the public and law enforcement officers. Repeated, less dangerous means to stop Marion's flight--the lights and sirens themselves, the stop-sticks, the rolling roadblock, and even shots at the vehicle--had been unsuccessful. The Indiana officers had been informed, rightly or wrongly, that the suspect was armed. Marion then drove into a highway median, became stuck for a moment, and then attempted to regain traction and drive toward police officers who had surrounded his vehicle and toward the eastbound lanes of the highway. Other civilians were present there, and it was not beyond reasonable possibility, from the officers' perspective, that the suspect they believed was armed could have commandeered an undamaged vehicle from among those nearby and continued his flight. . . . The court recognizes that the Supreme Court in *Scott* was addressing not an officer's use of his weapon but his use of a police vehicle to try to cause the fleeing car to lose control. . . This case, however, fits the *dicta* in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985): 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.'").

Ashbrook v. Boudinot, 2007 WL 4270658, at *3, *8 (S.D. Ohio Dec. 3, 2007) ("Where there is authentic and uncontroverted video evidence that utterly discredits

a litigants' version of events such that there is no *genuine* issue of material fact, the Court should view the facts in the light depicted by the videotape. *Scott v. Harris* , --- U.S. ----, 127 S.Ct. 1769, 1776 (2007). . . .The video evidence confirms that the officers applied a reasonable amount of force in arresting, detaining, and transporting Ashbrook. Because the Court does not find a constitutional violation, it is unnecessary to determine whether Ashbrook's rights were clearly established.")

See also ***Martinez v. City of Auburn***, No. C06-0447, 2007 WL 2005584, at *1 (W.D. Wash. July 9, 2007), *aff'd,* 2008 WL 5110831 (9th Cir. Dec. 1, 2008); ***Miller v. Jensen***, No. 06-CV-0328, 2007 WL 1574761, at *4 (N.D. Okla. May 29, 2007).

B. "Objective Reasonableness" is "Pure Question of Law"

In *Scott*, once the Court decided that the videotape eliminated any genuine issue of material fact as to the threat presented by Harris' driving, the question of the objective reasonableness of Scott's use of force was a "pure question of law." 127 S. Ct. at 1776 n. 8.

See, e.g., ***Dunn v. Matatall***, No. 08-1094, 2008 WL 5046912, at **2-4 (6th Cir. Dec. 1, 2008) ("Although conceding that the videotape is an accurate account of the events surrounding the arrest, Dunn argues that the district court erred in granting summary judgment to the Officers because the question of whether the Officers used excessive force should be answered by a jury. . . . The Supreme Court recently clarified the summary-judgment standard for excessive-force claims, rejecting the argument that the question of objective reasonableness is 'a question of fact best reserved for a jury.' . . . Dunn does not contest the events as seen on the video, and, in fact, asserted at oral argument that the video must control. Instead, Dunn argues that a jury must watch the video and decide whether the Officers used excessive force. This argument, however, is directly contradicted by *Scott,* which instructs us to determine as a matter of law whether the events depicted on the video, taken in the light most favorable to Dunn, show that the Officers' conduct was objectively reasonable. . . .Considering the *Graham* factors, from the Officers' perspectives on the scene and not using hindsight, we conclude that the video shows that the Officers acted reasonably in attempting to neutralize a perceived threat by physically removing Dunn from his vehicle after he led Officer Matatall on a car chase and then appeared to refuse the Officers' commands to exit the car. . . . Overall, given the heightened suspicion and danger brought about by the car chase and the fact that an officer could not know what other dangers may have been in the car, forcibly

removing Dunn from the car to contain those potential threats was objectively reasonable. Contrary to Dunn's suggestion, nothing in our opinion today gives officers carte blanche to use unjustified force every time a suspect flees. Officers may use only an amount of force that is objectively reasonable under the circumstances, and there is no indication that the Officers did anything other than just that.")

Harris v. Green, No. 4:04CV02299 SWW, 2008 WL 5000172, at *5 n.9 (E.D. Ark. Nov. 17, 2008) ("Harris cites *Duncan v. Storie*, 869 F.2d 1100 (8th Cir.1989), for the proposition that the alleged use of excessive force is generally an issue of fact. The undersigned does not disagree. However, in *Scott v. Harris* . . . the Supreme Court noted that at the summary judgment stage, once a court has determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of a police officer's actions is 'a pure question of law.'").

Sharp v. Fisher, 2007 WL 2177123, at *7 n.2 (S.D. Ga. July 26, 2007) ("*Vaughan* is no longer good law after *Scott.* Under *Vaughan,* the issue of reasonableness is a jury issue. 343 F.3d at 1330 ("We conclude that a reasonable jury could find, under Vaughan's version of the facts, that Deputy Cox's use of deadly force to apprehend Vaughan and Rayson was unconstitutional"). That is no longer true."), *aff'd,* 532 F.3d 1180 (11th Cir. 2008).

C. *Garner* Does Not Establish "Magical On/Off Switch"

Respondent in *Scott* argued "that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) the suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning." 127 S. Ct. at 1777.

Justice Scalia, writing for the majority, rejected the argument. He observed that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation." 127 S. Ct. at 1777.

Implications for *Garner* Jury Instructions

Acosta v. Hill, 504 F.3d 1323, 1324 (9th Cir. 2007) ("We had previously held that '[a]n excessive force instruction is not a substitute for a . . . deadly force instruction.' *Monroe v. City of Phoenix*, 248 F.3d 851, 859 (9th Cir. 2001). We reached this conclusion based on the observation that 'the Supreme Court . . . established a special rule concerning deadly force.' *Id.* at 860. *Scott* explicitly contradicts that observation. *Scott* controls because it is 'intervening Supreme Court authority' that is 'clearly irreconcilable with our prior circuit authority.' *Monroe*'s holding that an excessive force instruction based on the Fourth Amendment's reasonableness standard is not a substitute for a deadly force instruction is therefore overruled.")

Wisler v. City of Fresno, Nos. 06-5034, 06-5144, 07-1668, 2008 WL 2880442, at *6 (E.D. Cal. Sept. 18, 2008) ("Consistent with *Acosta*, the Ninth Circuit model excessive force instruction indicates that it is to be used for both deadly and non-deadly force cases, does not include a definition of 'deadly force,' and does not even contain the term 'deadly force' in its body. *See* Ninth Circuit Model Instruction 9.22. Ninth Circuit Model Instruction 9.23, which was the 'deadly force' instruction, has been withdrawn in light of Acosta and *Scott*. *See* Commentary to Ninth Circuit Model Instruction 9.22. Since the 'deadly force' instruction is no longer part of the Ninth Circuit models, and since the focus of the inquiry is 'reasonableness,' using the term 'deadly force' would be unduly and unnecessarily confusing to the jury. See Fed.R.Evid. 403. Clark will be precluded from characterizing Long's punches as 'deadly force.'").

See also ***Blake v. City of New York***, No. 05 Cv. 6652(BSJ), 2007 WL 1975570, at *3, *4 (S.D.N.Y. July 6, 2007) ("[n]o separate legal standard applies to cases involving uses of deadly force[,]" and the court "the Court need only craft a charge which will help a jury decide whether the force used in this case was reasonable under all the circumstances.").

Implications for Deadly Force Policies:

See Price v. Sery, 513 F.3d 962, 981(9th Cir. 2008) (Fisher, J., concurring in part, dissenting in part and concurring in the judgment) ("The majority's reading of the Supreme Court's most recent pronouncement on the use of deadly force in *Scott v. Harris*, --- U.S. ----, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), however, introduces some uncertainty about this longstanding emphasis on the special nature of the use of deadly force. . . . I am troubled by the majority's special emphasis on the phrase: 'all that matters is whether [the officer's] actions were reasonable.' By emphasizing

this one passage, the majority risks being read as incorrectly expanding the Court's holding in *Scott,* and removing from the reasonableness equation in deadly force cases the well-established requirement that the suspect must reasonably be thought to pose a threat of death or serious injury. . . . There can be no doubt that *Scott* was not abandoning *Garner*'s prescription that a critical component of the reasonableness standard in deadly force situations is whether the officer has "an objective belief that an imminent threat of death or serious physical harm " exists. . . . It is important that this fundamental prerequisite to the use of deadly force not be watered down or made ambiguous. Police officers need to have clear guidelines about the use of deadly force, as this case illustrates. In the aftermath of a fatal shooting, a court or jury must "slosh through the factbound morass of reasonableness." Id. at 1778. However, the officer in the field must have a clear set of guidelines that he or she can be taught to invoke instinctively when confronted with a potentially dangerous situation, when the awful decision of whether to shoot someone dead might have to be made in split seconds that do not allow for much, if any, "sloshing" and where the wrong choice can result in the death of an actually harmless, even innocent suspect. For this reason, I underscore *Scott*'s emphasis in its reasonableness analysis on the nature of the danger that justified deadly force in that case. And I concur in my colleagues' articulation of the objective reasonableness standard with the understanding that it continues to incorporate this dangerousness element.").

D. Post-*Scott* Cases

THIRD CIRCUIT

Hill v. Nigro, 266 Fed. Appx. 219, 2008 WL 510474, at *2 (3rd Cir. Feb. 27, 2008) ("Even assuming arguendo that a genuine issue of material fact exists with respect to whether Hill attempted to run over Officer Nigro, the record is clear that a reasonable officer could have reasonably believed that Hill posed a significant threat of death or serious physical injury to others. During his guilty plea, Hill conceded that the police asked him to pull over, but that he refused and drove away at a speed high enough to cause the death or serious injury of anyone he hit. Indeed, while attempting to elude arrest, Hill crashed into another car and its driver had to be taken to the hospital for injuries he sustained. Under these circumstances, we conclude that summary judgment was properly entered in favor of Officer Nigro.").

FOURTH CIRCUIT

Abney v. Coe, 493 F.3d 412, 418 (4th Cir. 2007)("The fact that, unlike Scott, Abney did not accelerate to 85 miles-per-hour is not dispositive . . . . The fact that Abney was driving during the day and Harris 'in the dead of the night,'. . . means only that Abney had the opportunity to scare more motorists to death. Similarly, the fact that Abney was driving a motorcycle, rather than a car, does not require a different result since the probability that a motorist will be harmed by a Precision Intervention Technique is high in either circumstance. . . . In accordance with *Scott v. Harris*, . . we hold that Deputy Coe's 'attempt to terminate a dangerous ... car chase that threaten[ed] the lives of innocent bystanders d[id] not violate the Fourth Amendment, even [though] it place[d] the fleeing motorist at risk of serious injury or death.'. . Because we hold that Deputy Coe's conduct was reasonable, plaintiff cannot prevail,. . . and we need not address whether Deputy Coe was entitled to qualified immunity for a constitutional violation.").

FIFTH CIRCUIT

Hudspeth v. City of Shreveport, 270 Fed. Appx. 332, 2008 WL 749547, at *5, *6 (5th Cir. Mar. 19, 2008) ("At issue, then, is whether Hudspeth 'posed a threat so serious as to justify a reasonable officer in [the defendant Officers'] position to respond with deadly force'. . . Of course, on summary judgment, the objective-reasonableness inquiry is a question of law; in other words, it cannot be decided if material fact issues exist. . . . [I]n the light of the videotape evidence, the Officers' actions were objectively reasonable. That Hudspeth pointed a cell phone in the Officers' direction, resisted interaction with them, tussled with Officer Ramsey, turned suddenly toward the Officers, and attempted to flee is shown by the videotapes and undisputed. The Officers had an articulable basis to believe Hudspeth was armed and could reasonably have perceived him as posing a threat of serious bodily harm.. . Therefore, no genuine issue of material fact exists; and, as a matter of law, their actions were objectively reasonable. Plaintiffs' contentions to the contrary are unavailing. That Hudspeth was unarmed is also irrelevant. . . That Hudspeth had his back to the Officers at the instant deadly force was used is also irrelevant. . . Moreover, as stated, the proper inquiry is an objective one. . . . Despite Appellants' contentions, the alleged inconsistencies in Officer Hawthorn's testimony regarding why he fired at Hudspeth, or whether Hudspeth was aiming at Officer Hawthorn, or just pointing the cell phone in his general direction, for this reason, fail to create a genuine issue of material fact on the *objective* reasonableness of the Officers' actions.

Along that line, also irrelevant are the Officers' *subjective* beliefs provided by testimony but not shown by the videotapes, namely whether any of the Officers truly thought: Hudspeth had a gun; their lives were in danger; or, Hudpseth was pointing the device (whether gun or cell phone) *at* an Officer. Further, the fact that Officer Ramsey stated over the radio that Hudspeth appeared to be talking on a cell phone while driving does not make summary judgment inappropriate. Obviously, Hudpseth's doing so during the high-speed pursuit did not preclude his having a weapon on exiting his vehicle. In asserting this radio-transmission raises a material-fact issue, Appellants gloss over the fact that Hudspeth, after exiting his vehicle and being approached by the Officer, pointed his cell phone, as most guns are held shortly before they are fired, at an Officer. Appellants have not carried their burden to show the Officers acted objectively unreasonably. Accordingly, as the district court held, the Officers are entitled to qualified immunity.")**.**

SIXTH CIRCUIT

Knight v. Canter, No. C2-07-0599, 2008 WL 5188165, at *6 (S.D. Ohio Dec. 10, 2008) ("In the instant case, Plaintiff's Complaint alleges that the force Officers Canter and Komisarek used on him was excessive. Specifically, Plaintiff alleges the asphalt he was pushed down on was well over 100 degrees and burned his skin, that there was broken glass on the street that had to be removed from his face, he was hogtied, slammed into the floor of the PTV, and generally that he was taunted and tortured. Despite Plaintiff's allegations in his Complaint regarding the use of force Defendants used on him, he fails to admit that he refused to comply with the officers' orders. Construing the facts in favor of the Plaintiff is difficult because there are major inconsistencies between Plaintiffs' Complaint and Defendants' affidavits. . . The Court finds that Plaintiff's actions were reasonably construed by the officers as resisting arrest thereby justifying the use of force to restrain him. The officers even had to call for back-up officers to be able to restrain Plaintiff. . . . In circumstances such as these, the *Scott* Court instructed: 'When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.' *Scott,* 127 S.Ct. at 1776.")

NINTH CIRCUIT

Lehman v. Robinson, 228 Fed.Appx. 697, 699, 700 (9th Cir. 2007) ("Construed in the light most favorable to Lehman, the facts alleged are that defendant officers

Robinson and Tygard shot and killed Lehman as he sat in his car, with all the tires shot out, surrounded by at least ten armed police officers and numerous police vehicles. Other officers on the scene had instructed all present to hold their fire, and defendants knew Lehman was not armed with a gun. Defendant Tygard testified that he knew Lehman did not have a gun, but only a pocket knife. Another officer present described the knife as 'a little folding knife.'. . . When viewed in the light most favorable to Lehman, the record suggests that Lehman had no readily available avenue of escape and was contained. Lehman was not suspected or accused of any crime. . . . When told to drop his knife and get back in his pickup truck, Lehman partially obeyed, by reentering the vehicle, but not dropping the knife. . . . At the point of the shooting, Lehman had been pepper sprayed and tasered, and at least partially subdued. The area had also been cleared of pedestrians. . . . In light of all of the facts, construed in the light most favorable to Lehman, when defendants shot and killed Lehman the situation did not require lethal force as confirmed by the testimony of multiple officers on the scene. Therefore, we conclude that defendants' use of force against Lehman was unreasonable and violated his Fourth Amendment right to be free of lethal force unless others' lives and safety are under immediate threat. In accordance with the second step of the Saucier framework, we consider whether the Fourth Amendment right prohibiting the use of deadly force except when the lives and safety of others are seriously imperiled was clearly established in 2002 when defendants shot and killed Lehman. . . . The cases cited by the defendant officers are all distinguishable in this respect. Unlike the suspect in *Smith v. Freland*, 954 F.2d 343, 344 (6th Cir.1992), who led police on a chase at speeds in excess of ninety miles per hour and who police believed may have been armed with a gun, Lehman could not travel anywhere quickly, as any reasonable officer could tell from the state of Lehman's completely flattened tires, and the officers had engaged in sufficient verbal negotiations to discern Lehman was armed only with a small knife. The district court distinguished in detail *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), another case on which defendants rely; we agree with the district court's analysis and do not repeat it here. The district court's denial of qualified immunity to defendants Robinson and Tygard is AFFIRMED."), *cert. granted,* 128 S. Ct. 1219 (2008) (*vacating and remanding in light of Scott v. Harris*).

McMillian v. Gem County, Idaho, No. CIV 07-078-S-EJL, 2008 WL 5069094, at *7 (D. Idaho Nov. 25, 2008) ("While Plaintiff maintains the use of the taser was excessive force, the Court disagrees. The use of the taser was an appropriate level of force for Plaintiff's non-compliance. The effects of a taser are generally temporary and a taser is considered to inflict less pain than other forms of force. . . Under the

circumstances of a non-compliant person who has been told he is under arrest, the actions of the Plaintiff moving towards his house would be perceived by a reasonable officer as a substantial risk to the officer's safety. While it may have been possible for the Deputy to have used less force, that is not the relevant inquiry. The officer need not use the least intrusive force available, but must use reasonable force based on the circumstances presented. . . Therefore, based on the actual circumstances presented in the video and audio tape, the Court finds the actions of Deputy Hoodman were reasonable as evaluated under the factors set forth in *Billington.* . . Having found the firing of the non-lethal taser was reasonable, the Court finds there was not a constitutional violation of unlawful seizure and excessive force and the qualified immunity analysis ends. . . . Moreover, had the Court found it necessary to determine the immunity question, it would have concluded that Deputy Hoodman's use of force did not violate Plaintiff's clearly established rights.").

ELEVENTH CIRCUIT

Sharp v. Fisher, 532 F.3d 1180, 1184 (11th Cir. 2008) ("Applying *Scott* to the facts of this case, we conclude that Fisher's conduct in attempting the PIT maneuver to the Sharp vehicle was reasonable. When Fisher acted, he knew Sharp was fleeing from law enforcement officials, she was traveling at a high rate of speed, law enforcement officials had chased her at least 20 miles, the high speed chase had crossed state lines, numerous law enforcement officials from multiple jurisdictions had been involved in the chase, she had failed to respond to blue lights and sirens and had given no indication of stopping the pursuit or slowing down, there were several civilian vehicles on the Interstate during the pursuit, and she was driving erratically. It was Katie Sharp who intentionally placed herself, her passenger, and the public in danger by engaging in the high speed chase and fleeing from the officers which ultimately produced the choice between two evils that Fisher confronted. . . We conclude that the car chase Katie Sharp initiated posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Fisher's attempt to terminate the chase through the use of the PIT maneuver was objectively reasonable. Therefore, no Fourth Amendment violation occurred, and Fisher is entitled to summary judgment.").

Long v. Slaton, 508 F.3d. 576, 584, 585 (11th Cir. 2007) ("To demonstrate that the law at the time clearly established that Defendants' conduct would violate the Constitution, Plaintiffs might point to either (1) earlier case law from the Supreme Court, this Court, or the highest court of the pertinent state that is materially similar

to the current case and therefore provided clear notice of the violation or (2) general rules of law from a federal constitutional or statutory provision or earlier case law that applied with 'obvious clarity' to the circumstances, establishing clearly the unlawfulness of Defendants' conduct. . . And 'where the applicable legal standard is a highly general one, such as "reasonableness," preexisting case law that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law.' *Thomas v. Roberts,* 323 F.3d 950, 954 (11th Cir.2003). Plaintiffs have failed to cite controlling and materially similar case law that would establish that Deputy Slaton's use of deadly force was clearly unlawful. Plaintiffs cite *Vaughan*, 343 F.3d 1323, as a materially similar case. But it is factually too different. We do not read *Vaughan* as capable of putting every objectively reasonable officer on notice that deadly force could not be used in the circumstances presented in this case. In *Vaughan*, this Court concluded that an officer used unreasonable force when he, without warning, discharged his firearm at suspects fleeing in a stolen truck. . . The present case has, at least, three additional facts not present in *Vaughan* and that an objectively reasonable police officer could believe 'might make a difference' for whether the conduct in the present instance would violate federal law. . . In this case, unlike *Vaughan*, the fleeing driver was in an unstable frame of mind, had taken possession of a marked police cruiser, and had been warned that deadly force would be used if he did not leave the cruiser. Therefore, we believe that the situation in *Vaughan* is too different from this case to cause every objectively reasonable officer to know that the use of deadly force in the circumstances of this case must violate federal law. Plaintiffs also attempt to rely on *Garner*, 105 S.Ct. 1694, as having clearly established broad principles that cover the contours of this case with obvious clarity. As the Supreme Court recently pointed out, however, '[w]hatever *Garner* said about the factors that might have justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts.'. . [citing *Scott v. Harris*] . . . . Simply put, the Supreme Court's decision in *Garner*--which does not involve a fleeing motor vehicle--offered little insight on whether an officer, consistently with the Fourth Amendment, may use deadly force to stop a man who has stolen a police cruiser and has been given clear warnings about the use of deadly force. *Garner* does not apply to the circumstances of this case with obvious clarity.Nor does this case present otherwise an obvious violation of Long's rights under the Fourth Amendment. We do not believe that every objectively reasonable officer in Deputy Slaton's position must have known that firing his weapon at the police cruiser under these circumstances would be an unconstitutional application of force. Results in these kinds of cases-- involving reasonableness and

balancing--are extremely fact dependent; at worst, Deputy Slaton's acts fell within the 'hazy border between excessive and acceptable force.' . . Therefore, because preexisting law did not provide fair warning that shooting at Long in this situation would violate federal law, Defendants are entitled to qualified immunity.")

Long v. Slaton, 508 F.3d. 576, 586 (11th Cir. 2007) (Forrester, J., sitting by designation, concurring in part and dissenting in part) ("I respectfully dissent from the opinion of the majority in the action against Deputy Slaton. To the recitation of the facts by the majority, I would add that Deputy Slaton had dealt with the deceased before without any major problem and that the shooting occurred in a fairly rural area several miles from Florence, Alabama. As I understand the law, the use of deadly force is reasonable only where there is a serious threat of imminent or immediate physical harm to the officer or others. . . I can find no arguable probable cause for such a belief in this case. To be sure, with the deceased in possession of a patrol car, the outcome of these events is uncertain, but the possibility that a nonviolent fleeing felon will later pose a threat of physical harm to others is remote and highly speculative. I do not believe that this officer is entitled to qualified immunity either. *Vaughan* provides notice that seizing a fleeing felon in a vehicle by shooting him is unreasonable. Although there are differences between that case and this, *Vaughan* is not 'fairly distinguishable.'. . In *Vaughan*, the truck was northbound on I-85 between Newnan and Atlanta traveling at speeds exceeding eighty miles per hour. At one point it rammed a police vehicle which was attempting a rolling roadblock. These facts present circumstances more fraught with immediate threat than those in the instant case, and this court determined that a jury could find that the officers in *Vaughan* violated the suspect's Fourth Amendment rights and were not entitled to qualified immunity.").

Beshers v. Harrison, 495 F.3d 1260, 1268 (11th Cir. 2007) ("When we apply *Harris* to the facts of this case, we have no doubt that Harrison's alleged use of deadly force to stop Beshers did not violate the Fourth Amendment. . . . From Harrison's perspective, he had reason to believe Beshers was a danger to the pursuing officers and others and was driving under the influence of alcohol. Harrison observed Beshers weaving in and out of traffic, crossing the double yellow center line, driving on the wrong side of the road, and forcing others off the road. He witnessed Beshers crash into Ms. Lyon's vehicle and was rammed several times by Beshers' truck while traveling between 55 and 65 mph on Highway 145. As in *Harris*, Beshers 'intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight.'. . He ignored the '[m]ultiple police cars, with blue lights

flashing and sirens blaring' that had been chasing him for nearly 15 minutes. . . Based on these circumstances, we conclude that if Harrison intentionally used deadly force to seize Beshers, the use of such force was reasonable.)

Beshers v. Harrison, 495 F.3d 1260, 1272 (11th Cir. 2007) (Presnell, J., sitting by designation, concurring) ("For all of its talk of a balancing test, the *Harris* court has, in effect, established a *per se* rule: Unless the chase occurs below the speed limit on a deserted highway, the use of deadly force to end a motor vehicle pursuit is always a reasonable seizure. . . . As a practical matter, a police officer's qualified immunity to use deadly force in a car chase situation is now virtually unqualified. Harris and this opinion allow a police officer to use deadly force with constitutional impunity if the fleeing suspect poses any danger to the public. In my humble opinion, I believe we will live to regret this precedent. If a balancing test is to have any real meaning, a jury ought to be deciding whether the risk posed by the fleeing suspect is too minimal, or the suspected crime too minor, to make killing him a reasonable way to halt the chase. Nevertheless, based on my reading of Harris, that decision has been taken away from the jury where, as here, the fleeing suspect has endangered others. I therefore reluctantly concur in the result reached by the majority.").

Dukes v. Miami-Dade County, 232 Fed. Appx. 907, 2007 WL 1373176, at *4 & n.8 (11th Cir. May 10, 2007) ("Here, the pleadings sufficiently alleged a constitutional violation that is clearly established. . . . The recent Supreme Court case *Scott v. Harris* does not undermine our conclusion. . . . As noted above, the Plaintiffs' Original Complaint alleged that Defendant Goldberg shot Dukes after Dukes began to drive away from the blockade. In the Amended Complaint, the Plaintiffs alleged that Defendant Goldberg shot Dukes before the Plaintiffs' car began to move after being boxed in. Although the Original Complaint alleges facts that are more likely to justify the use of deadly force than the Amended Complaint, the differences in allegations do not effect [sic] the outcome of our analysis here.").