United States Court of Appeals

FIFTH CIRCUIT
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January 08, 2018

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No. 16-60561 Rogers Vann v. City of Southaven, et al
USDC No. 3:15-CV-63

Dear Mr. Giles, Mr. Helfand, Ms. Smith,

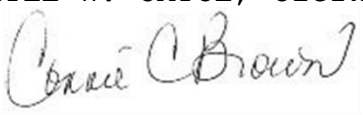
The court has granted your motion to file an amicus brief in support of the petition for rehearing en banc in the above referenced case.

You must submit the paper copies of your amicus brief within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

The paper copies of your brief/record excerpts must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief/record excerpts filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief/record excerpts directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk



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No. 16-60561

In the
United States Court of Appeals
for the Fifth Circuit

ROGERS VANN, as Personal Representative and on Behalf of the Wrongful Death Beneficiaries of Jeremy W. Vann,

Plaintiff—Appellant,

v.

CITY OF SOUTHAVEN, MISSISSIPPI; LIEUTENANT JORDAN JONES, Individually and in His Official Capacity as a Police Officer; SERGEANT BRETT YOAKUM, Individually and in His Official Capacity as a Police Officer; POLICE CHIEF TOM LONG, Individually and in His Official Capacity as a Police Officer and Chief of Police; SERGEANT JEFF LOGAN, Individually and in His Official Capacity as a Police Officer,

Defendants—Appellees.

On Appeal from the United States District Court
for the Northern District of Mississippi
Case No. 3:15-cv-00063

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MISSISSIPPI MUNICIPAL LEAGUE, TEXAS MUNICIPAL LEAGUE, LOUISIANA MUNICIPAL ASSOCIATION, AND TEXAS CITY ATTORNEYS ASSOCIATION SUPPORTING PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

So that the judges of this Court may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case. In addition to the persons and entities Appellees' identified, the undersigned counsel of record certifies that the following persons and entities also have an interest in the outcome of this case.

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1. National Association of Police Organizations;
2. Mississippi Municipal League;
3. Texas Municipal League;
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AMICI CURIAE HAVE SUBSTANTIAL INTERESTS IN THIS CASE THAT HAS BROAD-RANGING IMPLICATIONS THROUGHOUT THE CIRCUIT

The National Association of Police Organizations ("NAPO") is a coalition of organizations across the United States organized for advancing interests of law enforcement officers. NAPO was founded in 1978 and is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn officers, and more than 100,000 citizens who share a dedication to fair and effective law enforcement.

The Mississippi Municipal League is a non-profit corporation organized to advance interests and welfare of its members, most municipalities in Mississippi.

The Louisiana Municipal Association is an association of 305 governmental entities throughout Louisiana (303 cities, towns, and villages, and 2 parishes), formed in 1926 for protection and promotion of interests of its member entities and their citizens, to improve efficiency and effectiveness of government. Through its subsidiary Risk Management, Inc., the LMA provides inter-local risk management indemnity programs, including police liability.

The Texas Municipal League is a governmental entity established to advance interests and general welfare of its member-cities, which are substantially all municipalities and some special purpose districts within Texas.

Over the last decade, between 10 and 18 law enforcement officers have died annually being struck by a vehicle, constituting approximately 8% of line-of-duty

deaths. (*http://www.nleomf.org/facts/officer-fatalities-data/causes.html*). Many other officers sustained non-fatal injuries inflicted by vehicles used as weapons or driven recklessly. The FBI Uniform Crime Reports (*https://ucr.fbi.gov/leoka*) provide detailed information showing vehicles kill officers, both when used as weapons and in accidents. Vehicles present risks of serious injury or death to officers, regardless of whether used with felonious intent or recklessly. In either case, the potential harm is serious.

Amici have substantial interests in protecting officers from injury, assuring officers have the opportunity to effectively perform their public duties, and in protecting officers and governmental employers from unreasonable burdens of litigation. Accordingly, Amici submit this brief because the panel majority deviated from controlling jurisprudence of the Supreme Court and this Court in enunciating a standard for qualified immunity that is legally incorrect and potentially dangerous in its application. This error has broad-ranging consequences throughout the Fifth Circuit.

The Supreme Court has consistently held that police may act to stop, with lethal force when reasonably necessary, criminals engaged in dangerous vehicular operation and flight. This Court, in accord, has consistently held that, when an objective officer could reasonably believe his life or the life of another innocent person is in serious danger, an officer may use lethal force to stop the threat.

Because the majority opinion rejected controlling precedent, correcting the Court's decision is necessary to protect officers and preserve uniformity of this Court's decisions.

NO PARTY'S COUNSEL AUTHORED THIS BRIEF

No party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person, other than amici curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

ARGUMENT

I. The Supreme Court has rejected the majority opinion's misconception of the clearly established legal standard.

The majority opinion suffers the infirmities the Supreme Court identified and corrected in *Mullenix v. Luna*, 136 S. Ct. 305 (2015). Here, the majority failed to analyze or appropriately identify clearly established law at the degree of particularity required by precedent. As in *Mullenix*, 135 S. Ct. at 308-09, "[i]n this case, the Fifth Circuit held that [Sgt. Logan] violated the clearly established rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'" *See Vann v. City of Southaven*, 876 F.3d 133, 2017 U.S. App. LEXIS 23663 **8-10 (5th Cir. 2017). "Yet [the Supreme Court] has previously considered – and rejected – almost that

exact formulation of the qualified immunity question in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 309.

The panel majority, relying on *Lytle v. Bexar County*, 560 F.3d 404, 417-18 (5th Cir. 2009),[1] mistakenly used a general test the Supreme Court has rejected. *Mullenix*, 136 S. Ct. at 308-12. The majority mistakenly relied on the erroneous rationale, "[t]his court has held, however, that [*Tennessee v.*] *Garner's* [471 U.S. 1 (1985)] proposition 'holds as **both a general matter and** in the **more specific context of shooting a suspect fleeing in a motor vehicle**.'" *Vann* *10 (emphasis added) (quoting *Lytle*, 560 F.3d at 417-18 (citations omitted).

The Supreme Court "repeatedly told courts" this is improper. *See Mullenix*, 136 S. Ct. at 308. The majority merely mentioned precedent demands particularity and specificity and nonetheless "proceeded to find fair warning in the general tests set out in *Graham* [*v. Conner*, 490 U.S. 386 (1989)] and *Garner*." *See Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 589-90 (2004). This is error.

Moreover, *Lytle* "turned on" the factual assertion the fleeing vehicle was three or four houses down the block moving away from officers when the officer fired. *Mullenix*, 136 S. Ct. at 311. Unlike *Lytle*, Vann's vehicle catapulted Sgt. Logan onto its hood, *after* Sgt. Logan shot Vann, and Vann's tire rolled over Sgt.

[1] The Fifth Circuit panel that decided *Luna v. Mullenix*, 773 F.3d 712, 719-25 (5th Cir. 2014), also based its errant decision primarily on *Lytle supra*.

Logan's arm after he fell off the hood onto the pavement.[2] *See Vann* at **3-4. As in *Mullenix supra*, "*Lytle* does not clearly dictate the conclusion that [the officer] was unjustified in perceiving grave danger and responding accordingly []." *Id*.; *Compare Scott*, 550 U.S. at 385 (officer not expected to cease pursuit and hope for the best)[3] and *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1206-11 (10th Cir. 2017) (Officer who stepped in front of plaintiff's vehicle "not required to stand down and hope for the best").

The Supreme Court has acknowledged the dangers officers encounter when a criminal utilizes a vehicle to avoid arrest. Like Officer Brosseau, Sgt. Logan encountered a situation where a criminal, committed to vehicular flight, drove through a path "when persons in the immediate area [we]re at risk from that flight." *Brosseau*, 543 U.S. at 200. Pre-existing law did not inform every reasonable officer in either Officer Brosseau's or Sgt. Logan's circumstances, that firing was clearly unlawful because the "actions fell in the 'hazy border between excessive and acceptable force.'" *Brosseau*, 543 U.S. at 201. Sgt. Logan "could not know that" his particular actions would be misconstrued to violate clearly established law. *See City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015). Supreme

[2] In assessing the reasonableness of Sgt. Logan's actions, it appropriate to take into account the relative culpability of his actions compared to Vann's. *See Scott v. Harris*, 550 U.S. 372, 378 (2007); *Thompson v. Mercer*, 762 F.3d 433, 438 (5th Cir. 2014).

[3] In *Scott*, the Supreme Court rejected Appellant's argument that police should stand down and merely *hope* a criminal fleeing in a vehicle does not harm innocent people.

Court authority did not clearly establish that every objective officer would have been on notice Sgt. Logan's act of firing was clearly unlawful in the circumstances he encountered. *See Reichle v. Howards*, 566 U.S. 658, 664-65 (2012).

II. The majority opinion of clearly established law conflicts with the relevant precedents of this Court.

"It has long been a rule of this court that no panel of this circuit can overrule a decision previously made by another," *Ryals v. Estelle*, 661 F.2d 904, 906 (5th Cir. 1981), but the majority opinion conflicts with the precedent of this Court. *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992), and its progeny,[4] established the relevant source of clearly established law for deciding immunity in this case.[5] While driving an unmarked car, plain-clothes officer Lowery shot Fraire while he used a vehicle to avoid arrest. *See Fraire*, 957 F.2d at 1270-72. A witness inside Fraire's truck testified Lowery did not identify himself as an officer. *Id*. at 1270-71. Lowery yelled "stop," but Fraire continued to drive his truck so Lowery fired and jumped out of the truck's path. *Id*. at 1271-72. The Arlington police department investigated and found the force justified but

[4] *Fraire's* rationale, including the requirement to disregard pre-seizure conduct that may have increased the risk to officers *or even contributed to the need for force* extends beyond the 5th Circuit. *See, e.g.*, *Drewitt v. Pratt*, 999 F.2d 774, 779-80 (4th Cir. 1993); *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995); *Salim v. Prouix*, 93 F.3d 86, 91-92 (2d Cir. 1996); and *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007).

[5] Sgt. Logan has no burden beyond asserting immunity and he satisfied that burden by moving for summary judgment based on immunity. *See Orr v. Copeland*, 844 484, 490-91 (5th Cir.2016).

"there were tactical errors that might have possibly effected [sic] the outcome of the incident." *Id.* at 1272. Arlington concluded Officer Lowery need not have exited his vehicle and, when he did, "he invited the truck to aim for him." *Id.* Fraire's successors argued Lowery "manufactured the circumstances that gave rise to the fatal shooting," *Id.* at 1275, a refrain the majority panel found dispositive of Sgt. Logan's immunity. The panel majority's holding directly conflicts with *Fraire,* and unreasonably subjects officers to danger.

As the Eighth Circuit Court explained in *Cole v. Bone,* 993 F.2d 1328 (8th Cir. 1993), "we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment. *Id.* at 1333. "[P]re-seizure conduct is not subject to Fourth Amendment scrutiny." *Carter v. Buscher,* 973 F.2d 1328, 1332 (7th Cir. 1992). Thus, evidence that any officer(s) created the need to use force by their actions before the seizure is irrelevant to the question of the constitutionality of the seizure undertaken in self-defense. *Schulz supra.*

This rationale, made clear in *Fraire* does not stand alone in this Circuit. "Regardless of what had transpired up until the shooting itself, [the suspect's] movements [in *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir.1985)] gave the officer reason to believe, at that moment, that there was a threat of physical harm." *Fraire* at 1276. "The constitutional right to be free from unreasonable seizure has never been equated by th[is] Court with the right to be free from a negligently

executed stop or arrest." *Id*. Because this Court held that Officer Lowery, in circumstances closely analogous to Sgt. Logan's, could have reasonably believed firing was permitted to prevent his own death and to prevent Fraire's escape, Officer Lowery was entitled to qualified immunity. *Id*. at 1276-77; *Accord Martinez v. Maverick County*, 507 Fed. Appx. 446 (5th Cir. 2013) (PER CURIAM).

Further supporting *Fraire's* application is the limited time Sgt. Logan had to respond to the threat posed by Vann's vehicle. *See Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007).[6] "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." *Id*. at 322. As in *Hathaway*, 507 F.3d at 322, which found no 4th Amendment violation, the evidence Vann relies upon "is at best, a scintilla of evidence, for the theory" Sgt. Logan stepped into the path of Vann's vehicle, which is not even a constitutional violation.

The majority failed to apply *Hathaway's 's* proximity and temporal factors as would a reasonable officer on the scene, (ROA. 179-80, 415, 394, 424-25, 427-28), in accordance with police training regarding the scientific facts of action and reaction, *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 384 (5th Cir. 2009), and the

[6] *Hathaway* and the other authorities cited in this brief pre-dated the *Vann* panel decision and establish that Appellant cannot carry his burden of showing a 4th Amendment violation or violation of clearly established law. *See Hathaway*, 507 F.3d at 321.

majority failed to reasonably analyze this claim in appropriate segments, *C.f., Livermore v. Lubelan,* 476 F.3d 397, 406-07 (6th Cir. 2007) (collecting cases).

Rather, the panel mischaracterized Sgt. Logan's "intent behind certain events" as disputed material facts, *Vann* at *3, in accord with Appellant's contention "the disputed central fact" is "whether [Sgt.] Logan ran to the opening and shot Vann **to prevent him from fleeing** or whether, instead, Logan was **hit as he ran out of the way** of Vann's car." *Vann* at **4-6. (emphasis added). This approach improperly focuses on irrelevant conduct prior to reasonable police force that is not material to whether a violation of the 4th Amendment or clearly established law occurred at the moment Sgt. Logan fired.

Moreover, the majority's impractical opinion in this regard is further flawed because it is premised on a subjective standard rejected in *Graham*, 490 U.S. at 397 and *Fraire*, 957 F.2d at 1273. "Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law." *Fraire*, 957 F.2d at 1273. Immaterial disputes about Sgt. Logan's individual intent, including his personal motivation for placing his body where he did, or even his subjective reason for firing, are not proper measures of the objective legal reasonableness of actions an objective officer on the scene could have believed lawful under *Graham*, *Fraire*, and interpretive jurisprudence, particularly when the evidence proves that Sgt.

Logan fired at a moment when he was in peril atop Vann's vehicle. *See Fraire*, 957 F.2d at 1273-77.

The controlling objective standard, the panel majority rejected, has proven practically "workable" and questions regarding what subjectively motivated Sgt. Logan during the tense, uncertain, and rapidly evolving events he encountered performing police duty are simply not material to resolution of immunity under the precedents of the Supreme Court or this Court. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015); *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987); *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987).

Immediately before, and certainly when, Vann's vehicle struck Sgt. Logan, an objective officer on the scene could have reasonably believed firing was permissible under the law and necessary under the facts. *See Fraire* at 1276. This Court has never before judged police force in the manner the panel majority has. Instead, this Court has led other circuits in eschewing the panel majority's insupportable approach.

CONCLUSION

Besides deviating from controlling precedent, the majority opinion is premised on an unworkable, after-the-fact, subjective standard that undermines the core of immunity and compromises safety. This Court should rehear this case *en*

banc, reverse the panel's decision, and reinforce this Court's jurisprudence that an officer who is in danger is permitted to protect his life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that January 4, 2018, the foregoing Brief and a motion for leave to file the brief were filed electronically using the Court's CM/ECF system, which will give notice of the filing to counsel for the Appellant, including:

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(A) because this motion contains 2,456 words.

2. This petition complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

This the 4th day of January, 2018.

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