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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: Martin J. Mayer, Esq.

SUPREME COURT GRANTS QUALIFIED IMMUNITY TO OFFICER WHO FIRES AT FLEEING SUSPECT IN A CAR

On November 9, 2015, the United States Supreme Court, in a 8 -1 decision held in the case of *Mullenix v. Luna*, that an officer who fired at a fleeing suspect's car, killing the suspect, was entitled to qualified immunity from civil liability. Initially, the federal district court denied the officer's motion for summary judgment holding that "[t]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances."

The Fifth Circuit U.S. Court of Appeal agreed with the lower court and stated that the "immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonable as a matter of law." The U.S. Supreme Court reversed.

Facts

Following an attempt by Tulia, Texas Police Sgt. Randy Baker to arrest Leija on an outstanding warrant, Leija fled in his vehicle. "Baker gave chase and was quickly joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety (DPS). Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers."

"As Baker and Rodriguez maintained their pursuit, other law enforcement officers set up tire spikes at three locations. Officer Troy Ducheneaux of the Canyon Police Department manned the spike strip at the first location Leija was expected to reach, beneath the overpass at Cemetery Road."

"Mullenix also responded. He drove to the Cemetery Road overpass, initially intending to set up a spike strip there. Upon learning of the other spike strip positions, however, Mullenix began to consider another tactic: shooting at Leija's car in order to disable it. Mullenix had not received training in this tactic and had not attempted it before . . . ." He asked dispatch to contact his supervisor to see if he agreed with the plan. "Before receiving [a] response, Mullenix exited his vehicle and, armed with his

service rifle, took a shooting position on the overpass," above the freeway.

As Leija approached the overpass, Mullenix fired six shots before it reached the spike strip. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block."

Discussion

Respondents sued Mullenix under 42 U.S.C. §1983, alleging that he had violated the Fourth Amendment by using excessive force against Leija and the case, as set forth above, ultimately wound up in the U.S. Supreme Court. The Court stated that "(w)e address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place, and now reverse."

The Court stated that the "doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"

The Court, in citing to its previous decision in *Brosseau* v. *Haugen*, 543 U. S. 194 (2004), discussed the standard to be followed: "'We have repeatedly told courts . . . not to define clearly established law at a high level of generality.' The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.' This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"

"In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances 'beyond debate.' The general principle that deadly force requires a sufficient threat hardly settles this matter."

"This Court has considered excessive force claims in connection with high-speed chases on only two occasions since *Brosseau*. In *Scott* v. *Harris*, 550 U. S. 372, the Court held that an officer did not violate the Fourth Amendment by ramming the car of a fugitive whose reckless driving 'posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.' And in *Plumhoff* v. *Rickard*, 572 U. S. ___ (2014), the Court reaffirmed *Scott* by holding that an officer acted reasonably when he fatally shot a fugitive who was 'intent on resuming' a chase that 'pose[d] a deadly threat for others on the road.' The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."

The Court addressed several prior decisions involving use of deadly force and, in particular, force involving fleeing vehicles. "Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. In *Brosseau* itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered 'other officers on foot who [she] *believed* were in the immediate area,' 'the occupied vehicles in [his] path,' and 'any other citizens who *might* be in the area.' The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location."

"(T)he dissent argues, there was no governmental interest that justified acting before Leija's car hit the spikes. Mullenix explained, however, that he feared Leija might attempt to shoot at or run over the officers manning the spike strips. Mullenix also feared that even if Leija hit the spike strips, he might still be able to continue driving in the direction of other officers. The dissent ignores these interests by suggesting that there was no 'possible marginal gain in shooting at the car over using the spike strips already in place.' In fact, Mullenix hoped his actions would stop the car in a manner that avoided the risks to other officers and other drivers that relying on spike strips would entail."

In conclusion the Court stated that "(u)ltimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'"

Furthermore, said the Court, the dissent "defines the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fails to consider that question in 'the specific context of the case.'"

HOW THIS AFFECTS YOUR AGENCY

This case involves whether or not qualified immunity should have been granted in this particular case. It is a decision based on specific facts and the Court concluded that, *based on these facts, at the time of the incident,* the law was not clearly established that the use of deadly force was improper. As such, the officer was granted qualified immunity from civil liability.

The Court noted that "respondents argue that the danger Leija represented was less substantial than the threats that courts have found sufficient to justify deadly force. But the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether *such force was reasonable in the circumstances here*." (Emphasis added.)

"The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'"

However, it is important to note that the analysis of the level of force used will always be viewed in terms of what is, at that time, clearly established law. The Court *did not* conclude that the use of deadly force is always appropriate to stop fleeing suspects. As such, providing law enforcement with current information regarding legal decisions is of utmost importance.

As in all matters involving the law, it is imperative that you confer with and receive advice and guidance from your agency's legal counsel. As always, if you wish to discuss this case in greater detail please feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

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