SUPREME COURT OF THE UNITED STATES

ROCHELLE BROSSEAU *v.* KENNETH J. HAUGEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1261. Decided December 13, 2004

JUSTICE STEVENS, 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.

I

Law enforcement officers should never be subject to damages liability for failing to anticipate novel developments in constitutional law. Accordingly, whenever a suit against an officer is based on the alleged violation of a constitutional right that has not been clearly established, the qualified immunity defense is available. *Harlow* v. *Fitzgerald,* 457 U. S. 800, 818 (1982). Prompt dismissal of such actions protects officers from unnecessary litigation and accords with this Court's wise "policy of avoiding the unnecessary adjudication of constitutional questions." *County of Sacramento* v. *Lewis,* 523 U. S. 833, 859 (1998) (STEVENS, J., concurring in judgment). When, however, the applicable constitutional rule is well settled, "we should address the constitutional question at the outset." *Ibid.;* see also *Siegert* v. *Gilley,* 500 U. S. 226 (1991). The constitutional limits on the use of deadly force have been

clearly established for almost two decades.

In 1985, we held that the killing of an unarmed burglar to prevent his escape was an unconstitutional seizure. *Tennessee* v. *Garner,* 471 U. S. 1. We considered, and rejected, the State's contention that the Fourth Amendment's prohibition against unreasonable seizures should be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effectuate the arrest of a fleeing felon. *Id.,* at 12–13. We recognized that the common-law rule had been fashioned "when virtually all felonies were punishable by death" and long before guns were available to the police, and noted that modern police departments in a majority of large cities allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. *Id.,* at 13–19. We concluded that "changes in the legal and technological context" had made the old rule obsolete. *Id.,* at 15.

Unlike most "excessive force" cases in which the degree of permissible force varies widely from case to case, the only issue in a "deadly force" case is whether the facts apparent to the officer justify a decision to kill a suspect in order to prevent his escape.

In *Garner* we stated the governing rule:

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . .
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> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm,

> either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, 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." *Id.,* at 11–12.

The most common justifications for the use of deadly force are plainly inapplicable to this case. Respondent Haugen had not threatened anyone with a weapon, and petitioner Brosseau did not shoot in order to defend herself.[1] Haugen was not a person who had committed a violent crime; nor was there any reason to believe he would do so if permitted to escape. Indeed, there is nothing in the record to suggest he intended to harm anyone.[2] The "threat of serious physical harm, either to the officer or to others," *ibid.,* that provides the sole justification for Brosseau's use of deadly force was the risk that while

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[1] Although Brosseau attested that she believed Haugen may have been attempting to retrieve a weapon from the floorboard of his vehicle sometime during the struggle, a fact which Haugen hotly contests, there is no evidence in the record to suggest that, at the time the shot was fired, Brosseau believed, or any reasonable officer would have thought, that Haugen had access to a weapon at that moment.

[2] At the time of the shooting, Brosseau had the following facts at her disposal. Haugen had a felony no-bail warrant for a nonviolent drug offense, was suspected in a nonviolent burglary, and had been fleeing from law enforcement on foot for approximately 30 to 45 minutes without incident. At the behest of Brosseau, the private individuals on the scene were inside their respective vehicles. Haugen's girlfriend and daughter were in a small car approximately four feet in front and slightly to the right of Haugen's Jeep; Glen Tamburello and Matt Atwood were inside a pickup truck on the street blocking the driveway, approximately 20 to 30 feet from Haugen's Jeep. The only two police officers on foot at the scene were last seen in a neighbor's backyard, two houses down and to the right of the driveway.

fleeing in his vehicle Haugen would accidentally collide with a pedestrian or another vehicle. Whether Brosseau's shot enhanced or minimized that risk is debatable, but the risk of such an accident surely did not justify an attempt to kill the fugitive.[3] Thus, I have no difficulty in endorsing the Court's assumption that Brosseau's conduct violated the Constitution.

II

An officer is entitled to qualified immunity, despite having engaged in constitutionally deficient conduct, if, in doing so, she did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U. S., at 818. The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed. See *Hope* v. *Pelzer,* 536 U. S. 730, 739 (2002). Accordingly, we have recognized that "general statements of the law are not inherently incapable of giving fair and clear warning," *United States* v. *Lanier,* 520 U. S. 259, 271 (1997), and have firmly rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson* v. *Creighton,* 483 U. S. 635, 640 (1987).

Thus, the Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill-advised. See *Hope*, 536 U. S., at 741 ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion

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[3] The evidence supporting Haugen's allegation that Brosseau did "willfully fire her weapon with the intent to murder me," 1 Record, Doc. No. 1, includes a statement by a defense expert that Brosseau had "clearly articulated her intention to use deadly force," *id.,* Doc. No. 24. Moreover, the report of the Puyallup, Washington, Police Department Firearms Review Board stated that Brosseau "chose to use deadly force to stop Haugen," 2 *id.,* Doc. No. 27, Exh. H.

that the law is clearly established, they are not necessary to such a finding"); see also *Lanier*, 520 U. S., at 269. Indeed, the cases the majority relies on are inapposite and, in fact, only serve to illuminate the patent unreasonableness of Brosseau's actions.[4]

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." Cf. *Anderson,* 483 U. S., at 641. Although it is preferable to resolve the qualified immunity question at the earliest possible stage of

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[4] In *Cole* v. *Bone*, 993 F. 2d 1328 (CA8 1993), an 18-wheel tractor-trailer sped through a tollbooth and engaged the police in a high-speed pursuit in excess of 90 miles per hour on a high-traffic interstate during the holiday season. During the course of the pursuit, the driver passed traffic on both shoulders of the interstate, repeatedly attempted to ram several police cars, drove more than 100 passenger vehicles off the road, ran through several roadblocks, and continued driving after the officer shot out the wheels of the fugitive's truck. *Id.,* at 1330–1331. Only then did the officer finally resort to deadly force to disable the driver. Similarly, in *Smith* v. *Freland*, 954 F. 2d 343 (CA6 1992), the suspect led a police officer on a high-speed chase, reaching speeds in excess of 90 miles per hour. When the officer initially cornered the suspect in a field, the driver repeatedly swerved directly toward the police car, forcing the officer to move out of the way and allowing the suspect to continue the chase. *Id.,* at 344. Only after additional officers cornered the suspect for a second time, and after the suspect smashed directly into an unoccupied police car and began to flee again, did the officer finally shoot the driver. *Ibid.*

In stark contrast, at the time Brosseau shot Haugen, the Jeep was immobile, or at best, had just started moving. Haugen had not driven at excess speeds; nor had he rammed, or attempted to ram, nearby police cars or passenger vehicles. In sum, there was no ongoing or prior high-speed car chase to inform the probable cause analysis.

litigation, this preference does not give judges license to take inherently factual questions away from the jury. See *Hunter* v. *Bryant,* 502 U. S. 224, 229 (1991) *(per curiam)* (SCALIA, J., concurring in judgment); *id.,* at 233 (STEVENS, J., dissenting) (quoting *Bryant* v. *U. S. Treasury Dept., Secret Service,* 903 F. 2d 717, 720 (CA9 1990) ("Whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a §1983 action based on [the] lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach")). 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.

III

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.[5] 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. See R. Stern, E. Gressman, & S.

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[5]The Court's recitation of the facts that led up to the shooting obscures the undisputed point that no one contends Haugen was the kind of dangerous person—perhaps a terrorist or an escaped convict on a crime spree—who would have been a danger to the community if he had been allowed to escape. The factual issues relate only to the danger that he posed while in the act of escaping.

Shapiro, Supreme Court Practice 281 (6th ed. 1986).

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.

For these reasons, I respectfully dissent.