No. 07-470

IN THE

Supreme Court of the United States

TOM ROBINSON and ROBERT TYGARD,

Petitioners,

v.

CANDACE LEHMAN, Administrator of the Estate of Joshua Lehman,

Respondent.

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

REPLY BRIEF

JOHN J. KADLIC*
Reno City Attorney
CREIG SKAU
Deputy City Attorney
Post Office Box 1900
Reno, Nevada 89505
(775) 334-2050

**Counsel of Record*

Counsel for Petitioners

213046

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

REASONS FOR GRANTING THE PETITION

This case presents issues where guidance is needed. In *Scott v. Harris*, 549 U.S. __, 127 S. Ct. 1769 (2007), the court held that witness testimony that clearly was contrary to an uncontested videotape cannot be used to create a genuine issue of material fact. Respondent notes both lower courts viewed the videotape. However, both lower courts found containment based upon statements of a couple of officers, which was in stark contrast to the statements of most officers who testified that several escape routes existed. Significantly, both lower courts failed to address what the videotape showed. Yet the issue of containment, so pivotal to this case, was clearly depicted on the videotapes. This error to specifically address the videotape was compounded by the Ninth Circuit in that the newly decided *Scott* case was presented to the Ninth Circuit as a basis for reconsideration after its initial decision and before its decision on Appellants' motion for reconsideration. Yet the Ninth Circuit denied the motion without even addressing a *Scott* analysis.

Appellants submit that where a party presents videotapes clearly depicting the points in question (for example in this case, the existence of clear escape routes[1]), before the lower court can find a question of

[1] The videotape established many other facts, too, such as the presence of many officers in the immediate area and large numbers of vehicles stopped on the highway in obvious risk once Lehman left the immediate area, all of whom where at significant risk of serious harm if Lehman had not been stopped from pursuing his flight. The Petition discusses other aspects depicted on the videotape at pages 16-18. The lower courts' decisions failed to address the facts conclusively established by the videotape.

fact exists as to such a point, it must at least address the videotape before finding an issue of fact exists. In this case, the point is truly brought home because the testimony of a couple of officers wrapped up in the moment was contradicted by numerous officers who stated that several escape routes existed. Further, the videotape presented clear evidence deciding the issue.[2] Whether or not they looked at it, the lower courts simply failed to address what the video depicted. Courts should be directed to make findings on whether the videotape forecloses the issue where a party, as here, strenuously asserts that position. The lower courts erred by relying on witness testimony in the face of the video.

Another reason for granting the petition is that the lower courts incorrectly stated the applicable law, and in doing so, greatly exacerbated the error of failing to address the videotape. Addressing the first prong of the qualified immunity test, the lower court applied the standard summary judgment standard to determine if questions of fact exist. However, they failed to do so from the point of view of what a reasonable officer on the scene could believe the facts to be. Instead, the lower courts looked at whether there were questions of fact about what actually happened. More to the point, the courts found there were questions of fact as to whether Lehman was in fact contained, rather than whether questions of fact existed as to whether a reasonable officer could believe Lehman was not contained. The lower courts' error places officers in the impossible position of having to guarantee their split second decisions are correct in

[2] The videotape did not even have to establish an escape route. It only had to establish that a reasonable officer on the scene could believe an escape route existed.

fact, thereby totally obviating the lesser standard imposed by the Fourth Amendment of reasonableness.

Supreme Court guidance to lower courts is also needed in this area for another reason. *Brosseau v. Haugen*, 543 U.S. 194 (2002), noted the cases: "undoubtedly show that this area is one in which the result depends very much on the facts of each case." *Id.*, at 201. Because each case is largely fact specific, our peace officers and our citizens deserve guidance on these life and death issues. The Ninth Circuit passed on the opportunity to provide guidance in that the case was not selected for publication.[3] This case involves a number of little addressed circumstances combining into a totally unique situation, resolution of which would provide substantial guidance to the lower courts. Here, the lower court implicitly found two seconds to be sufficient cooling off time, where other courts have recognized humans require longer periods to cool off or reassess a situation. The lower court discounted multiple life threatening acts because Lehman was not wanted when the series of incidents began. Other circuits have not made such a leap. The lower court discounted the lethality of the vehicle where its tires were shot out, yet it still nearly ran into numerous vehicles and at least two officers on foot. Other courts have not addressed this. Lehman was shot after reacting to Tasers. Other courts have not addressed this factor. These and the many other factors

[3] In once sense, since this decision was not published, it is difficult to argue it creates a conflict with other circuits. However, this argument would permit lower courts to avoid Supreme Court oversight. Furthermore, since this is a very fact specific area of the law, courts should be encouraged to publish and thereby provide guidance; not encouraged to refrain from publication.

noted in the Petition make this case a unique opportunity to address this important area of the law.

The lower courts showed little concern for the safety of the public in the form of hundreds of vehicles stopped along the highway, even though Lehman might be dangerously suicidal, and had exhibited a pattern of endangering the lives of numerous persons in vehicles and on foot. Other circuits and this Court have given far greater weight to these factors in other settings. *See Scott, supra.* In *Long v. Slayton*, __ F.3d __, 2007 WL 3407680 (11th Cir., November 16, 2007), no constitutional violation was found where a potentially psychotic person, having exhibited no violence, ran from an officer into the officer's marked vehicle, was warned to get out or be fired upon, and was fatally shot as he tried to drive off. The court recognized the government has a strong interest in protecting the innocent public and found flight in a marked police vehicle increased this risk sufficiently to make use of deadly force reasonable, even though there was no direct immediate threat to anyone and backup officers were en route. As the court noted: "the threat of danger to be assessed is not just the threat to officers at the moment, but also to the officers and other persons if the chase went on." *Id.*, quoting *Pace v. Capobianco,* 283 F.3d 1275, 1280 n.12 (11th Cir., 2002).

Surely the risk of injury to the public was far more likely, immediate and significant in the instant case than in *Long*. Police officers live in a world of instantaneous life and death decisions. Both the police and the people they serve and may potentially have to make life and death decisions about are entitled to guidance from this honorable Court. This case provides an excellent

opportunity to provide such guidance, to uphold the underpinnings of qualified immunity, and to overturn a clear injustice.

CONCLUSION

For the reasons stated herein, Officer Tom Robinson and Officer Robert Tygard respectfully request that the Petition for Writ of *Certiorari* be granted.

Respectfully submitted,

JOHN J. KADLIC*
Reno City Attorney
CREIG SKAU
Deputy City Attorney
Post Office Box 1900
Reno, Nevada 89505
(775) 334-2050

* *Counsel of Record* *Counsel for Petitioners*