No. 07-

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

PETITION FOR A WRIT OF CERTIORARI

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

211217

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

QUESTIONS PRESENTED

(1) Whether police officers' acts are "objectively reasonable" and therefore do not violate the Fourth Amendment right to be free from unlawful "seizure" of a felony suspect when the officers make split-second decisions to protect the lives of multiple fellow officers and multiple at-risk bystanders because it reasonably appears to the officers the suspect is about to drive in a manner which puts them at serious risk?

(2) When at the time of this incident, neither this Court nor any circuit court had ruled the Fourth Amendment is violated when an officer uses deadly force to protect innocent persons from the risk of dangerous vehicular flight by a felony suspect, was the law "clearly established" and thus the officer properly denied qualified immunity from civil rights liability?

PARTIES

The parties to the proceeding in the court whose judgment is the subject of this petition include:

Petitioners: Officers Tom Robinson and Robert Tygard, who are City of Reno police officers, were defendants/appellee's in the Ninth Circuit.

Respondent: Candace Lehman as administrator of the Estate of Josha Lehman, Deceased, is respondent herein and was plaintiff/appellant below.

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Statutes:

Cited Authorities

Officer Tom Robinson and Officer Robert Tygard respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The Ninth Circuit Court of Appeal's memorandum opinion is unpublished. It was filed on April 16, 2007, and is found in the Appendix to this Petition ("App.") at App. A, 1a – 7a. The Ninth Circuit's Order Denying Rehearing was filed on July 5, 2007, and is found at App. D, 66a – 67a. The order of the United States District Court for the District of Nevada denying defendants' motion for summary judgment appears at App. B, 8a – 11a. The District Court read its decision in court and a transcript of the decision appears at App. C, 12a – 65a.

JURISDICTION

The opinion of the Ninth Circuit was entered on April 16, 2007. App. A, 1a – 7a. A timely motion for rehearing and rehearing en banc was filed on April 30, 2007. The motion for rehearing and rehearing en banc was denied on July 5, 2007. App. D, 66a – 67a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Candace Lehman as administrator of the Estate of Josha Lehman initiated this action as a civil rights claim for damages under 42 U.S.C. § 1983.

The Fourth Amendment to the U.S. Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

This is a Fourth Amendment civil rights use of force case involving two police officers' attempts to control a desperate subject driving a motor vehicle who appeared intent upon deliberately harming officers, escaping at even the cost of lives, or suicidely provoking police fire. The Ninth Circuit opinion is completely at odds with every other circuit court that has considered this Fourth Amendment issue. The opinion below illustrates how the Ninth Circuit continues to undermine this Court's consistent holdings relating to qualified immunity in Sec. 1983 civil rights cases.

By declining to rehear this case en banc, the court has failed to recognize the immunity that law enforcement officers rightfully deserve to protect them when they make reasonable split-second life and death decisions in the field. In doing so, the court does grave injustice to police officers in our circuit like Officer Robinson and Officer Tygard, who have been wrongfully denied qualified immunity from suit after they employed escalating force to stop a desperate and dangerous suspect who nearly killed multiple officers in the course of his escapades. Under this decision's precedent, an officer is apparently forced to face trial unless the suspect *actually* harms someone. The Ninth Circuit ignored the subject's felonious acts and, in violation of a

recent Supreme Court directive, ignored a videotape clearly establishing that officers could reasonably believe the subject was not contained and was a danger to officers and bystanders.

This incident occurred during rush hour on April 24, 2002, when Josha Lehman ("Lehman") was shot and killed by defendants, Reno Police Department (RPD) Officers Tom Robinson and Robert Tygard. Immediately prior to this incident, Lehman twice rammed a vehicle shielding two Sheriff's Deputies, attempted head-on crashes with two other officers, stabbed at more officers with a knife, and suddenly backed into a vehicle in an apparent and ongoing effort to escape, thereby nearly crushing another officer and threatening the lives of the many officers on the scene and the hundreds of rush hour commuters blocked in the immediate vicinity, some of whom exited their vehicles. The defendants believed if Lehman were not stopped, his escape route would seriously endanger and likely result in the death or injury of one or more of the many officers and dozens to hundreds of rush hour commuters and gawkers in the escape paths.

The incident began when Washoe County Sheriff's Deputies Klier and Duncan responded to a report of a possible suicidal subject (later identified as Lehman) on Paddlewheel Drive, which is a street south of Reno off of U.S. Highway 395, a major thoroughfare between Reno and Carson City, Nevada. The caller reported he had tried to disable the subject's vehicle by removing a fuse. Lehman was replacing the fuse when Dep. Klier ordered him out. Lehman refused and Dep. Klier

sprayed Lehman in the face with OC pepper spray, to no effect, in an effort to stop him from driving off.

Lehman rolled up the window and started the truck. Klier broke the window trying to gain access, then joined Duncan behind Duncan's vehicle, which was blocking Lehman's pickup in the driveway. Lehman then backed his truck into Duncan's sedan while the Deputies were behind it. Lehman's truck ran up onto the top of the sedan. Lehman moved forward about 20 feet, then accelerated rapidly back again, striking the sedan, pushing it at least 15 feet, and disabling it. Klier and Duncan reasonably believed their lives were endangered. This constituted probable cause of an assault with a deadly weapon, a felony, as well as resisting an officer.

Duncan fired twenty-two times at the engine and tires, flattening the tires but not disabling the vehicle. Klier fired once at the engine in an unsuccessful attempt to stop the truck. Duncan reported a 10-78, shots fired, which was re-broadcast by dispatch over multiple law enforcement radio channels. Duncan and Klier then pursued Lehman down Paddlewheel and Andrews Lane in Klier's Ford Explorer at approximately 20 miles per hour. The vehicle was still moving and dangerous even with four tires blown out.

Nevada Highway Patrol (NHP) Trooper Sean Giurlani responded to the call for help. He stopped on Andrews Lane and stood next to the door in the oncoming lane. Lehman accelerated to 20-25 miles per hour and came directly at Giurlani, who thought he was going to be struck. Giurlani fired his hand weapon at Lehman, but the bullet struck the windshield beneath

the driver's side windshield wiper and deflected. Giurlani had to jump into the driver's seat to avoid being struck by Lehman's vehicle. This constitutes probable cause of a third felony assault on an officer with a deadly weapon.

Nevada Division of Investigation (NDI) Det. Sgt. Slobe responded to the 10-78 shots fired, officer needs assistance, call on Paddlewheel. Slobe was driving an unmarked Buick Regal. He went Code 3, activating his lights and siren, and turned from U.S. Highway 395 onto Andrews Lane towards Paddlewheel. He heard the description of Lehman's pickup truck on the radio at about the same time he saw the pickup. Lehman moved into the center lane and headed directly toward Slobe's vehicle in what Slobe believed was an attempt to hit Slobe head on. Slobe was forced to swerve onto the dirt on the side of the road to avoid being struck by Lehman's vehicle. Slobe's impression at the time was that Lehman was in a fight mode, not merely a flight mode, and was attempting to hit Slobe. This constitutes probable cause of reckless driving and a fourth felony assault with a deadly weapon.

Dep. Klier tried to "PIT stop"[1] Lehman on Paddlewheel, because he did not want Lehman to get onto U.S. Highway 395. However, Klier's Explorer was too light and had no effect on Lehman's pickup. Klier stated he attempted this maneuver because Lehman had already demonstrated a willingness to intentionally run into others, including himself, Duncan, Giurlani, and Slobe. This also constituted probable cause of resisting

[1] PIT is an abbreviation for "Police (sometimes also referred to as "Precision") Intervention Tactic". The pursuing officer's vehicle nudges the rear of the fleeing vehicle to one side, hopefully causing that vehicle to spin to a stop.

arrest. On U.S. Highway 395, Klier hand signaled Trooper Giurlani to PIT stop Lehman's vehicle.

Lehman turned north onto U.S. Highway 395, running the stop sign during rush hour traffic as he did so. Giurlani radioed for and received permission to PIT stop Lehman. The maneuver was partially successful in that Lehman was stopped. However, the maneuver caused Lehman to cross into oncoming traffic where he nearly collided with a southbound motorcycle. Giurlani stopped his Expedition about four feet behind Lehman's pickup with both vehicles at right angles to the road. The front of Lehman's vehicle was even with the curb, but a videotape clearly shows a mildly sloping embankment with plenty of room for a vehicle to escape to the North or to the South. Dep. Stahl also stopped to the South of and slightly behind Lehman's vehicle. Lehman immediately left his vehicle with his knife hand raised and approached to within 6 to 10 feet of Deputy Stahl and Giurlani. This constituted probable cause of a fifth felony assault with a deadly weapon. Lehman was warned he would be shot if he continued. Lehman returned to the vehicle. Giurlani approached Lehman's vehicle, and Lehman lunged at Giurlani with a knife, forcing Giurlani to jump backward. This constituted probable cause of a sixth felony assault with a deadly weapon. Giurlani and Deputy Stahl attempted to talk Lehman into dropping the knife and giving himself up. Lehman remained in his pickup, which was still operable, and never surrendered the knife.

Soon, numerous officers from several law enforcement agencies arrived, mostly from the north (Reno), including Defendant Officers Robinson and Tygard. Attempts to talk Lehman down were

unsuccessful. RPD Officer Bruton deployed a Taser through the broken window, but one prong hit the pickup. WCS Dep. Wright fired a Taser and employed a 5 second burst. RPD Officer Magee deployed another Taser. Very close on the heals and possibly concurrently with the deployment of Tasers, several RPD Officers tried to break the passenger side window, planning to Taser Lehman from that side and away from the knife. As they attempted to break the window, Lehman's vehicle roared to life and hurtled backward with tires spinning. RPD Officer Martin was behind the vehicle and forced to jump out of the way as the pickup smashed into the Expedition at an angle, knocking it backwards. This constitutes a seventh felony assault with a deadly weapon. Almost immediately, less than two seconds after impact and while all four wheels were still spinning full speed, Defendant Officers Robinson and Tygard fired their cover rifles, four shots, each in a matter of a second or two, immediately killing Lehman.

Tygard initially heard Reno Police dispatch alert tones, which are used for serious calls. Dispatch advised of a Washoe County Sheriff's 10-78, Paddlewheel Road, shots fired. A Washoe Sheriff's vehicle had been rammed. (ER 388). The vehicle was fleeing the area and tried to ram an NHP trooper or vehicle, with more shots fired. There was a pursuit northbound on U. S. Highway 395. The suspect was armed with a fixed-bladed hunting knife that he waived around. Officer Tygard heard a radio report that Lehman had a gun and he was under the impression Lehman had shot at officers. Lehman was repeatedly ordered to drop the knife, put it on the dash, and come out, yet he continually failed to comply. Tygard heard Lehman might be suicidal, although he may have learned that after the incident. The vehicle was obviously

forced to a stop because of its position. The subject had not been stopped by shooting out the tires, but had to be PIT stopped as evidenced by the tire marks and position of the vehicle. Officer Tygard saw Lehman look all around, including backward and at him and the officers around him, apparently seeking to escape. Tygard had determined that Lehman did have an escape route along the side of the road northbound. Tygard was aware that there were many rush hour vehicles stopped, with civilians standing alongside the road in the escape path. There were also 10 to 15 persons along the west side of the highway near and to the north of the scene, presumably from nearby vehicles boxed in by events.

Tygard believed that the unsuccessful but painful deployment of the Tasers exacerbated the situation and made Lehman more of a threat in his escape efforts.[2] This increased Tygard's fear of what Lehman would do in his escape efforts. Officer Tygard saw Lehman reach up, shift the vehicle in reverse, stand on the accelerator, turn the steering wheel, and ram the Expedition Tygard was standing next to. Tygard was initially in harm's way and he was aware of multiple officers around Lehman's vehicle. Tygard believed Lehman was still accelerating and the NHP vehicle was still being moved, apparently endangering those behind him and creating an escape route in that direction when he fired. Tygard believed the only way he could stop Lehman was to discharge his weapon to incapacitate him.

[2] Once the Tasers were applied, Tygard and Robinson could only react to Lehman's actions as they existed. *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002)(bad tactics leading to escalated need for force do not create a constitutional violation for those reacting to the escalated need).

The NHP vehicle bounced back on impact and was being pushed slowly backward by Lehman's vehicle, tires spinning and engine fully revved, when Officer Tygard stepped forward to the side of Lehman's window, and fired in a downward direction into the chest area. The downward direction provided some protection against an errant shot hitting an officer or bystander. This protection would be absent once Lehman broke free to the rear or moved forward. At no time did Lehman cease his escape attempt prior to the shots being fired.

When Tygard stepped forward and fired, he knew Lehman had made extreme efforts to escape before, ramming vehicles and endangering officers to such an extent that they had fired at Lehman. Tygard reasonably believed Lehman intended to seek to escape either continuing backward or driving forward and turning north along the west side of U.S. Highway 395, that he had little regard for the lives of officers, that he had used his vehicle in a potentially lethal manner several times already, that prior efforts to stop Lehman's vehicle with bullets had been unsuccessful and a PIT stop, if available, would be extremely dangerous with the large number of civilians and officers in any pathway Lehman chose. The officers and bystanders faced a serious risk of being killed or injured by Lehman's escape efforts. Tygard did not believe the three NHP officers to the north would have any capability of protecting the people in that area. Tygard reasonably believed shooting Lehman was the only way to safely stop him.

When Officer Robinson fired, he reasonably believed that Lehman posed a lethal threat to officers and civilians in the immediate area. Robinson mistakenly, but

reasonably, believed Lehman had fired shots at officers, who had called for emergency assistance. He knew Lehman had not stopped despite his vehicle's tires being shot out. He was aware of a lengthy chase that ended only when Lehman was forced into oncoming traffic. He saw Lehman chop his knife toward officers and disobey orders to exit. Robinson had seen officers immediately behind Lehman's vehicle. Robinson saw Lehman look around and believed Lehman knew officers were immediately behind him and was assessing whether he could hit them. Robinson was in front and to the right of Lehman's pickup when he saw Lehman stand on the accelerator in reverse.

Robinson could see Lehman had escape paths to the front along the highway shoulder. Robinson believed Lehman was trying to kill the officers behind him because he accelerated at full speed toward the officers behind him rather than using the easier escape path forward. Almost simultaneous with firing his weapon, Officer Robinson saw one officer barely escape being crushed by jumping out from between Lehman's pickup and the Expedition. Robinson knew other officers were nearby and believed additional officers might be immediately behind Lehman's vehicle, possibly already crushed between the two vehicles while the pickup's wheels were still spinning. Robinson fired in an attempt to protect those officers.

Robinson was also aware of officers and pedestrians immediately behind the Expedition and he was aware of at least three pedestrians nearby to the front. Robinson believed Lehman was trying to escape to the rear or would then drive forward and to the North. Because of

Lehman's efforts to harm the officers behind him, Robinson believed the lives of the persons in these escape paths were also in danger. Because of crossfire issues, Robinson believed he was the only person in a position to fire since he could fire somewhat downward from close range, and believed shooting Lehman was the only way to stop him.

In addition to the clear evidence of the videotape, officers Giurlani, Slobe, McMillin, Almaraz, Bruton, Wright, Scichilone, Robinson, and Tygard believed Lehman had one or more escape paths forward or to the rear. A number of officers on the scene also believed the use of lethal force was reasonable under the circumstances, including officers Giurlani, Slobe, Almaraz, Martin, Bruton, Stahl (50-50 chance he would fire), Robinson and Tygard.

Officer Robinson and Officer Tygard petition this Court for review of the Ninth Circuit's decision denying them qualified immunity.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition because the Ninth Circuit decision in this case disregards this Court's holdings in *Brosseau v. Haugen*, 543 U.S. 194 (2004), and furthers a split among the circuits that have considered the underlying constitutional question of whether a police officer violates a subject's Fourth Amendment rights by using deadly force to prevent a dangerous vehicular escape where the suspect has exhibited a pattern of potentially lethal conduct. Also, the lower court's decision conflicts with decisions of other circuits

and this Court that have held that qualified immunity protects officers from liability for Fourth Amendment violations unless a reasonable officer would have know his actions violated a suspects rights. The case also conflicts with this Court's recent directive in *Scott v. Harris*, 549 U.S. __, 127 S. Ct. 1769 (2007), that courts not use speculative witness testimony to create a jury trial issue where there is clear videotape evidence contradicting the witness testimony. Finally, this case has significant public policy implications because it promotes an apparent unarticulated policy that Fourth Amendment use of deadly force cases will proceed to jury trials in the Ninth Circuit. Finally, the decision fails to address objective reasonableness from the officer's perspective, as required by other circuits.

I. The Ninth Circuit Decision Creates a Split of Authority Among Circuits and Disregards this Court's Directives Regarding an Officer's Decision to Shoot Under the Facts of This Case and Not to Create Issues of Fact Where Videotape Evidence Establishes the Facts.

Every other Circuit and this Court have held that when an officer reasonably perceives that a subject who has shown himself capable of multiple life endangering acts with an automobile and who is engaged in attempting to flee where there are multiple officers and bystanders who might be hurt is entitled to use deadly force to protect himself and others. The lower court's decision conflicts with this clear authority.

Under *Saucier v. Katz*, 533 U.S. 194, 200 (2001), the court makes two inquiries in a qualified immunity

challenge. First, whether a constitutional right was violated. Second, assuming the violation could be proved, whether the right was "clearly established" under the law at the time.

Addressing the first question, the inquiry is whether the force used was excessive or was objectively reasonable. The test is one of "objective reasonableness under the circumstances." *Graham v. Connor*, 490 U.S. 386, 399 (1989). The court must weigh "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396. The court may consider factors such as: 1) the severity of the crime at issue, 2) whether 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, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 399; *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). In *Scott v. Harris, supra*, the court noted these factors are not set in stone and that the ultimate test is always one of reasonableness. *Id.*, 127 S. Ct. at 1778. *Scott* added additional factors, including the numbers of lives at risk and the relative culpability of the plaintiff to those at risk. *Id.*, at 1778. "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." *Garner*, 471 U.S. at 11.

In weighing the factors, the Supreme Court has cautioned that "the reasonableness of the officer's belief as to the appropriate level of force should be judged from

that on-scene perspective. We set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Saucier*, 533 U.S. at 204-05 (citing *Graham v. Connor*). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The court must review the facts in the light most favorable to Lehman. However, this must be done from the perspective of the officer on the scene, not from the perspective of ultimate truths. *Saucier*, 533 U.S. at 204-05; *Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005) ("Though the facts must be taken in the light most favorable to Robinson, the determination of reasonableness must be made from the perspective of the officer.") (*Cert. denied* 546 U.S. 1109 (2006)).

The Ninth Circuit failed to apply this well established standard. It created questions of fact about what actually happened, rather than asking what a reasonable officer on the scene could perceive and reasonably do. The Ninth Circuit noted: "When viewed in the light most favorable to Lehman, the record suggests that Lehman had no readily available avenue of escape and was contained." App. 4a. Later, the Ninth Circuit stated: "In light of all the facts, construed in the light most favorable to Lehman, when the defendants shot and killed Lehman the situation did not require lethal force as confirmed by the testimony of multiple officers on the scene." App. 5a. The correct standard

would have been; when viewed in the light most favorable to Lehman, could a reasonable officer in the positions of Robinson and Tygard have perceived that Lehman had a readily available avenue of escape, was not contained and that lethal force was reasonable? The answer is unequivocally yes.

Here, experts and officers had differing views regarding whether lethal force was warranted. However, this does not render the defendant officer's actions unreasonable to defeat summary judgment. *Reynolds v. County of San Diego*, 84 F.3d 1162, 1169-70 (9th Cir. 1996) (*Overruled on other grounds*). Rather, the court must decide as a matter of law "whether a reasonable officer could have believed that his conduct was justified." *Id.*; *Billington v. Smith*, 292 F.3d 1177, 1188-89 (9th Cir. 2002). If a reasonable officer could have believed that his actions were justified, the officer is entitled to qualified immunity, notwithstanding that reasonable officers could disagree on this issue. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 872 (9th Cir. 1993).

The lower court extracted most of its findings from statements of officers at the scene. However, many of those statements related to the time frame before Tasers were used. The situation facing the officers changed dramatically once the Tasers were applied, and this is clearly visible on a videotape. Yet the decision the officers had to make was the one facing them *after* the Tasers were applied. The Ninth Circuit's decision appears to be an attempt to make *these* defendants pay for the decision of other officers to apply Tasers. This is improper in several respects. First, it second guesses the tactics of the officers on the scene. If the Tasers had

been effective, the situation could have been quickly resolved. Second, this approach runs contrary to *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), where the Ninth Circuit held that bad tactics leading to escalated need for force do not create a constitutional violation for those reacting to the escalated need. Finally, it is contrary to *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-695 (1978), which held respondeat superior or vicarious liability will not attach under § 1983.

Another problem with the Ninth Circuit's analysis is that it runs afoul of *Scott v. Harris, supra.* In *Scott*, this Court noted that where a videotape presents clear evidence contrary to that of witnesses, "[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id.*, at 1776. In the instant case, the unequivocal evidence of the two videos (they are condensed onto one tape as evidence)[3] utterly undermines the Ninth Circuit's reliance on the witnesses' testimony, which in any event is largely taken out of time sequence, i.e., before the Tasering altered the dynamics on the scene.

The videotapes unequivocally show that a officer on the scene could reasonably perceive the following. That when the Tasers were applied and officers attempted to break the driver's side window, the vehicle suddenly accelerated backward with tires spinning at full speed, slamming into the Expedition. That the tires continued

[3] Petitioners invite the Court to request the videotape to assist in assessing this Petition.

to spin at full speed. That at that moment, Lehman was far from compliant (he was never compliant in that he disobeyed many orders earlier and never obeyed the orders to drop the knife and exit the vehicle). That when Officer Martin (not visible) jumped from between the vehicles, the shots were fired less than two seconds later. That Lehman might get past the Expedition given the angle of the vehicles and the power of Lehman's pickup. That there were avenues to maneuver among vehicles in that direction. (Defendants were also aware there were officers amongst those vehicles who might be struck, and some are seen in the videotape). That there were avenues of escape forward along the highway shoulder to the north and south. That Lehman's vehicle was not blocked from using them if he chose to drive forward. That there were many officers on scene, a few spectators nearby (uncontradicted witnesses note about 15 bystanders perhaps 50 yards away along the bank to the north), and scores of rush hour vehicles stopped immediately north and within about a hundred yards to the south. The video shows that the incident occurred too quickly for there to be any time for reflection or "cooling off". It places in extreme doubt whether there was any opportunity to give a warning or that any warning would be heeded. (The District Court also found little likelihood that a warning would do any good. Also, the display of the weapons presented an extremely graphic warning that would be hard to misinterpret). That Lehman was not in the least subdued by pepper spray administered at least 15-20 minutes earlier or by the Tasers, but was rather driven to violent conduct by the Tasers and the officers' actions. In short, the videotape conclusively shows that an officer could reasonably believe: 1) that Lehman was attempting to

escape confinement, 2) that Lehman had the ability to actually escape, and 3) that probable cause existed to believe numerous officers and bystanders faced a substantial risk of death or serious bodily injury if immediate action were not taken to stop Lehman.

In addition to ignoring the clear evidence of the videotape, the Ninth Circuit inexplicably found Lehman presented little risk because he "was not suspected or accused of any crime". App. 4a. It is true that Lehman was not suspected of a crime when the Wahoe County Sheriff's officers first arrived. However, Lehman's subsequent unjustified conduct unquestionably created probable cause to believe Lehman committed multiple instances of numerous crimes, including but not limited to assault with a deadly weapon (motor vehicle, knife) and assault on an officer in the performance of his duty, both felonies (NRS 200.471); attempted murder or manslaughter, felonies (NRS 200.010, NRS 200.040 and NRS 193.330); resisting a police officer with a deadly weapon, a felony, (NRS 199.280); running a stop sign; and reckless driving (NRS 484.377). Under the Ninth Circuit's flawed reasoning, if Lehman shot or ran over someone during a pursuit, the police could not consider this in their assessment of the level of force necessary because the perpetrator was not initially suspected of a crime.

The Sixth, Eighth, and Eleventh Circuits have held that officers may use deadly force when a fleeing suspect appears likely to drive in a manner that places the officer or others at risk. *Scott v. Clay County, Tenn.*, 205 F.3d 867, 877 (6th Cir. 2000) (after fleeing car crashed into a

guardrail, officer shot into car as it began to resume a high speed flight); *Smith v. Freland,* 954 F.2d 343, 347-48 (6th Cir. 1992) (officer shot suspect after brief stop where suspect had appeared "trapped" at end of street: "In an instant Officer Schulcz had to decide whether to allow his suspect to escape. He decided to stop him, and no rational jury could say he acted unreasonably."); *Cole v. Bone,* 993 F.2d 1328, 1330-33 (8th Cir. 1993) (decision to shoot driver of speeding tractor-trailer truck who had made multiple dangerous maneuvers toward officers and other motorists did not violate the Fourth Amendment); and *Robinson v. Arrugueta,* 415 F.3d 1252 (11th Cir. 2005) (no constitutional violation where subject fatally shot while vehicle moving 1-2 mph toward officer despite estate's claim the officer could have moved away); *McLenagan v. Karnes,* 27 F.3d 1002, 1007-08 (4th Cir. 1994) (justifying the use of deadly force against an unarmed, handcuffed suspect when an officer reasonably believed that a fellow officer had seen a gun in the suspect's hands, in large part because the officer "had no time to consider anything at all.").

In *Pace v. Capobianco,* 283 F.3d 1275 (11th Cir. 2002), an officer fired several seconds after a suspect stopped. The court held the officer's conduct was not unreasonable or unconstitutional because the officer shot before he had time to "cool off" and because "reasonable police officers could have believed that the chase was not over" based on suspect's conduct during the previous chase. The Ninth Circuit and District Court failed to analyze or distinguish *Pace.* In the instant case, the chase indeed appeared to be on again and the officers fired less than two seconds after the vehicle collided with the NHP

Expedition and while the wheels were still spinning at maximum speed in an ongoing escape effort.

An example of the Ninth Circuit's discrepancy with other Circuits is the Eleventh Circuit case of *Troupe v. Sarasota County, Florida*, 419 F.3d 1160 (11th Cir. 2005), *cert. denied*, 547 U.S. 1112.[4] There, SWAT Officers surrounded the decedent's vehicle in his driveway and other SWAT officers blocked all of the surrounding streets. The decedent, wanted for murder, moved his car forward and backward, making a way to escape the immediate containment. One officer fired at the vehicle in an unsuccessful attempt to stop the vehicle. Another officer fired twice, hitting the driver once, while successfully moving to the side to avoid being hit. The Eleventh Circuit affirmed the lower courts finding that no constitutional violation occurred. Plaintiffs argued there was no need for deadly force because the officers were able to get out of the way before shots were fired, there were no officers immediately in front of the vehicle when the shots were fired, and the decedent was contained by the roadblocks. The court found this unpersuasive. It noted there were officers nearby who the defendant could reasonably believe might be injured. Further, if Hart's escape had been successful, his path of flight "could have posed" a threat of death or serious injury to the public or to other members of the SWAT Team". *Id.* In response to plaintiff's argument that the

[4] Compare *Vaughan v. Cox*, 343 F.3d 1323, 1329-30 (11th Cir. 2003), where the risk of injury was less since there was no history of the driver significantly endangering others beyond slight excessive speeding, with *Troupe* and the instant case where a pattern of life endangering conduct lead up to the shooting.

mere possibility of escape and harm was insufficient and that witnesses said there was no one in the decedent's immediate path, the court stated:

> Although the facts must be taken in the light most favorable to the plaintiffs, the determination of reasonableness must be made from the perspective of the officer: "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight ... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." (Quoting *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994), quoting *Graham*, 490 U.S. at 396-97).

Troupe, 419 F.3d at 1168.

Significantly, the court in *Troupe* noted the officers had only 3-5 seconds to make their decision. In the instant case, there was even less time. The court also noted, as in the instant case, that several officers on the scene believed lethal force was necessary. As the court stated, "[e]ven 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 footnote 8, the *Troupe* court observed:

> In *Brosseau*, citizens and other officers were in the immediate area and were at a high risk of harm if the suspect had escaped. *Id.* In the present case, the streets were blocked, which created less possibility of harm to innocent citizens. Nonetheless, the Oldsmobile was surrounded by Officers who were at risk and the car did end up breaking out of the driveway and getting onto a main road. Bauer [the defendant in *Troupe*] was aware at the time of the shooting that other surveillance officers were only a short distance away. He also knew that citizens could be on the main street and could be harmed. Thus, Bauer believed there was an immediate risk of harm to the general public.

Troupe, 419 F.3d at 1169, n 8.

In *Troupe*, the court noted the general requirement that a warning be given, if feasible. No warning was given before the officers shot. While the warning if feasible requirement was not directly addressed, the court noted in the discussion of facts that the decedent had disobeyed orders to exit the vehicle and surrender.

In the instant case, the lower court dismissed the defendant officers' concerns that Lehman may have been attempting to harm officers and was in the process of escaping when he slammed backward full throttle nearly crushing an officer. The Ninth Circuit apparently

requires that the officer be sure the suspect not only almost crushed someone, is attempting escape, has escape routes, and is doing so in the presence of dozens to hundreds of persons in the escape path, but must be virtually certain someone will be hurt or killed, before an officer may shoot to protect himself or others without fear of civil rights liability. By the time an officer can justifiably shoot in the Ninth Circuit, it may well be too late to prevent harm. Here, numerous bullets had not stopped the vehicle and officers testified PIT stops are very dangerous, particularly where, as here, there are many people and vehicles nearby.

Lehman exhibited a pattern of reckless conduct endangering the lives and safety of numerous officers on multiple occasions. Lehman was temporarily quieter, but never compliant. Once the Tasers were administered, Lehman immediately exhibited the previous life-endangering pattern. He almost crushed an officer and crashed into an Expedition with wheels turning full throttle when the shots were fired. Reasonable officers could believe Lehman had reverted to his previous pattern of engaging in desperate, life-endangering acts and would not stop until incapacitated.

Obviously, the officers' intent was to stop Lehman *before* his driving could injure or kill someone. The Ninth Circuit's analysis is tantamount to a conclusion that because the situation ended without injury to a third person, Lehman did not present a risk when the officers made the decision to shoot—a time when the outcome was far from certain.

The lower court notes that if Lehman did escape, there were other officers who might have stopped Lehman. This ignores a reasonable officer's concern that once Lehman sets off, it will be much more dangerous to stop him in the "target rich" environment created by this rush hour incident. Three distinct possibilities existed; 1) bullets aimed at longer range and not downward could strike someone, 2) Lehman could deliberately or recklessly strike someone, 3) a PIT stop could shove Lehman's vehicle into someone.

The lower court evinces a policy preference that police officers allow potentially dangerous felons to escape. There may be circumstances when allowing escape is preferable; but if the escape itself puts others at risk, as it did and would continue to do in this case, reasonable police officers can, and should, use force to protect themselves and others from harm. Officers are charged with a duty to apprehend criminal suspects and to protect the public. The public is innocent, while Lehman chose his course of conduct and is culpable in his threat to officers and the public. Under such circumstances, this Court has had little difficulty in concluding officers are entitled to act with deadly force. *Scott v. Harris*, 127 S. Ct. at 1778.

Numerous officers believed the use of lethal force was necessary because Lehman was trying to strike officers and/or attempting escape and presented a significant risk to officers and bystanders of death or serious injury. Numerous officers on the scene believed that Lehman had escape routes to the rear and forward along the shoulder either north or south and was attempting to use them. Yet the lower court cited a couple

instances of other officers expressing a contrary opinion.[5] The objective reasonableness standard does not require that all observers come to identical conclusions. If this were true, few cases, would merit summary judgment based on qualified immunity, but rather would routinely proceed for a jury's after-the-fact determination of what it thinks the officer could have done. The Ninth Circuit decision effectively holds that unless no reasonable officer would have *failed* to perceive the situation and act as Robinson and Tygard did, a jury trial is required.

This Court has repeatedly rejected the Ninth Circuit's approach in circumstances similar to this case. In *Hunter v. Bryant,* 502 U.S. 224, 228 (1991) (*per curiam*), the Court reversed a Ninth Circuit decision in another Fourth Amendment § 1983 case, disagreeing with the proposition that summary judgment would be inappropriate to decide probable cause unless "there is *only one reasonable conclusion* a jury could reach." (emphasis added) This Court noted that the statement was "wrong" for two reasons—because it "routinely place[d] the question of immunity in the hands of the jury" and because "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.*" (emphasis supplied). *See also, Saucier v. Katz, supra,* 533 U.S. at

[5] The testimony of the dissenting officers was also equivocal in that they acknowledged they were either not in a position to judge the defendants' actions or had not yet assessed the situation sufficiently, or their attention was distracted at the critical moment.

200 (Supreme Court criticized "leaving the whole matter [of reasonableness] to the jury."). The opinion in the case at bar invites second-guessing officers' choices and substituting the purportedly "more reasonable" choice Lehman claims the defendant officers should have made. Robinson and Tygard did not act unreasonably. Lehman's constitutional rights were not violated.

II. The Ninth Circuit Refused to Apply This Court's Qualified Immunity Rules and Is Contrary to Every Other Circuit Court that Has Considered its Application on Similar Facts.

The most blatantly-incorrect aspect of the Ninth Circuit's opinion is its inexplicable result in the second step of the qualified immunity analysis. This step entails a determination whether the law was so "clearly established" at the time of the incident that any competent officer would know he was violating a person's rights. The qualified immunity doctrine shields government officials from liability even if their conduct is ruled constitutionally impermissible, as long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

Reasonable mistakes are entitled to immunity. If "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Other circuits that addressed the same legal issue on similar facts have uniformly applied the doctrine to the officer's conduct. *See, Scott v. Clay County, Tenn., supra,* at 877;

Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994); *Smith v. Freland, supra; Cole v. Bone, supra; Pace v. Capobianco, supra.* In fact, at the time of this occurrence every court that had considered this question had ruled that a police officer does not violate a suspect's Fourth Amendment rights in this situation.

Qualified immunity shields an officer from suit when he makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he confronted. *Saucier*, 533 U.S., at 206 (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'"). Because the focus is on whether the officer had fair notice that his conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The inquiry must be undertaken in light of the specific context of the case. The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense. The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Id.*, at 198-199. Plaintiffs thus must shoulder a heavy burden, and appropriately so because qualified immunity is "designed to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Ninth Circuit relied upon *Acosta v. San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996), *cert. denied*, *Yawczak v. Acosta*, 519 U.S. 1009 (1996), and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) *cert. denied*, *Rutherford v. Deorle*, 536 U.S. 958 (2002), as providing notice to Robinson and Tygard that their conduct was allegedly unconstitutional. The Ninth Circuit noted *Acosta* established that an officer shooting at the driver of a slow moving car was not entitled to qualified immunity, especially when a reasonable officer would have recognized he could avoid being injured by simply stepping to the side. *Acosta*, however, provided no guidance to the officers in the instant case. In *Acosta*, an off duty officer heard screams from a woman and saw two men run to their vehicle carrying a purse. The officer stood in front of the vehicle and shot the driver while he was moving slowly toward him rather than stepping to the side. *Acosta* presented no history of life endangering conduct. Lehman presented a history of noncompliance, life endangering conduct and dire efforts to avoid capture. Unlike *Acosta* where the only threat was to the officer who stepped in front of the plaintiff, here there were threats to the officers immediately behind the vehicle and to many officers and civilians ranging from a few feet away to the scores of vehicles stopped on the highway in both directions. Unlike *Acosta*, Lehman nearly crushed an officer seconds before the shots were fired, apparently deliberately attempted to kill or injure multiple officers, and drove in such a reckless and unyielding manner as to endanger motorists. Lehman presented a far more serious risk of immediate harm to officers, bystanders and motorists.

The Ninth Circuit also cited *Deorle, supra,* as providing notice. The Ninth Circuit specifically cited *Deorle* for three factors; 1) the presence of a large number of police officers, 2) the lack of a specific warning he would be shot if he did not stop, and 3) a greater standard of deference being required for a mentally disturbed individual who had "'committed no serious offense"'. Memorandum, App. A, 6a, quoting *Deorle* at 1285-86.

Deorle noted the following facts:

> Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California, who was walking at a "steady gait" in his direction. He did so although Deorle was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense. Rutherford did not warn Deorle that he would be shot if he physically crossed an undisclosed line or order him to halt. Rutherford simply fired at Deorle when he arrived at a spot Rutherford had predetermined.

Deorle, 272 F.3d at 1275.

The Ninth Circuit found that the officer's actions were constitutionally unreasonable. The court noted the governmental interest in using force is diminished where the suspect is mentally or emotionally disturbed, but

declined to adopt a per se rule. *Id.* at 1283. *Deorle* was clarified in *Blanford v. Sacramento County,* 406 F.3d 1110, 1117 (9th Cir. 2005). There, a sword bearing person appeared unstable. An officer shot him when he appeared headed into a residence for fear of the safety of possible occupants. While the court noted the possibility of the suspect being mental disturbed was a factor, the subject "was armed with a dangerous weapon and it was not objectively unreasonable for them to consider that securing the sword was a priority." *Id.* at 1117.

Even if Lehman was suicidal, he had exhibited a previous and reinitiated pattern of potentially lethal illegal conduct in an area where there were many potential victims. An officer or bystander killed by a suicidally disturbed person is still dead. Paraphrasing *Blanford,* "securing the [vehicle] was a priority". *Id. Deorle* presented no prior pattern of recklessly dangerous conduct and provides no relevant guidance to Officers Robinson and Tygard.

While the presence of many officers may create a safe situation, their presence is also a factor in assessing whether their safety is at risk. For instance, in *Brosseau,* the officer shot because she anticipated officers would be responding in the general area of Haugen's escape path and could then be at risk. *Brosseau,* 543 U.S. at 196-197. Also, in *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992), the court noted that where a subject had rammed a police vehicle while escaping from a dead end street, shooting him was reasonable even though he was headed toward a road block, based on concern for the safety of those manning the road block.

In *Deorle*, the court noted there was ample time to give a warning and no reason whatsoever not to do so. *Id.*, at 1284. The instant case is again clearly distinguishable. Deorle was *walking* toward the officer with a can or bottle. Lehman was standing on his accelerator and appeared bent on escape to the officers on the scene. The officers had to react before there was time for deliberation. Once Lehman freed himself, as he had before and had the apparent opportunity to do here, the officers reasonably believed the opportunity to stop him without injury to others would be gone. Robinson further believed an officer might be between the vehicles. There was essentially no reaction time. Even the District Court conceded requiring a warning was unreasonable. App. C, 38a.

The *Brosseau* court took note of *Scott v. Clay County, Tenn.*, 205 F.3d 867 (6th Cir. 2000), but did not address it because it was decided after the shooting in *Brosseau*. However, *Scott* was decided before the shooting in the instant case. Nevertheless, the lower courts failed to address it. This is significant because once again, an officer fired on a vehicle which moments before had begun accelerating, this time toward nearby approaching patrol vehicles. The court noted the suspect was unlikely to escape. Nevertheless, the court found no constitutional violation. In each of these cases, whether escape would ultimately be possible was, like the court found in the instant case, an unknown. However, the subject's "pattern of wanton misdeeds posed a serious and imminent threat of death or other dire irreparable consequences, which necessitated an immediate and decisive counteraction." *Scott v. Clay County, Tenn.*, 205 F.3d at 873, n. 7. The instant case

presents an even more egregious history of prior bad acts, along with the ongoing escape effort and a reasonable perception of escape likely to cause death or serious harm in the process.

The Ninth Circuit attempted to distinguish *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), and other cases relied on by the defendants on the basis that they involved high speed chases and, in *Smith*, the driver may have had a gun, whereas Lehman's tires were shot out and he had a knife, not a gun. The Ninth Circuit apparently believes this case is more like *Acosta* where the vehicle was barely moving. However, the court improperly ignored Lehman's pattern of intentionally attempting to use his powerful pickup truck to seriously endanger numerous officers, including immediately moments before shots were fired, as well as civilians, even with his tires shot out. While speed was involved in many cases, the essence of the holdings was that lethal force is justified where the vehicle was being operated as a deadly weapon and continued to present a serious threat.

Further, although Smith had been engaged in prior high speed incidents, he was not traveling at high speed when he was shot. An officer blocked Smith's vehicle in a dead-end street. Smith smashed into the vehicle, backed up and went around the vehicle, and was shot as he passed by. The court noted a vehicle is a deadly weapon and even though there was another roadblock at the end of the street and Smith likely could not escape, the court found no constitutional violation. The court noted that the suspect, like Lehman, had escaped previously, and that he also posed a major threat to the

officers manning the roadblock. *Smith*, 954 F.2d at 347. This point was found significant by the Supreme Court. *Brosseau*, 543 U.S. at 200. Neither *Smith* nor *Brosseau* can be distinguished from the instant case sufficiently to say that *Acosta* and *Deorle* were the guiding authority. The law was not sufficiently clearly established to let Officers Robinson and Tygard know their conduct was unconstitutional.

After reviewing potentially guiding cases, the *Brosseau* opinion noted that the cases:

> "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."' *Saucier v. Katz, supra,* at 206, 121 S. Ct. 2151. The cases by no means "*clearly establish*" that Brosseau's conduct violated the Fourth Amendment."

Brosseau, 543 U.S. at 201.

The forgoing cases clearly demonstrate that Officer Robinson and Officer Tygard acted reasonably and did not violate Lehman's constitutional rights. At the very least, the cases failed to provide fair notice to Robinson and Tygard that their actions were unconstitutional. As a matter of law, their conduct fell within the "hazy border between excessive and acceptable force." *Brosseau*, 543 U.S. at 201. The Ninth Circuit decision is clearly not in accord with other circuits or with this Court's holdings in *Brosseau* or *Scott v. Harris.*

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 for Petitioners

* *Counsel of Record*