No. 09- 09-697 DEC 11 2009

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

226860

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

Blank Page

QUESTIONS PRESENTED

(1) Viewed in a light most favorable to plaintiff, was it objectively reasonable for defendant officers to believe the lethal risks presented by Lehman justified deadly force where Lehman nearly killed several officers in a pursuit, was non-compliant once stopped by a dangerous PIT maneuver, slashed at officers with a knife and backed up at full throttle nearly crushing an officer in an apparent attempt to hit the officer and escape while numerous law enforcement officers were around Lehman and rush hour traffic was stopped in both directions on a major highway?

(2) Were the defendant officers improperly denied qualified immunity 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 significant risk of highly dangerous vehicular flight?

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/appellants in the Ninth Circuit. Petitioners are individuals, thus no disclosures are required by Supreme Court Rule 29.6.

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

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF APENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	12
I. The Ninth Circuit Decision is Contrary to and so far Departs from the Accepted and Usual Standards Applied by This, and Other Courts, that this Court's Supervisory Power is Called for on the Issue of Whether a Constitutional Violation Occurred.	13

Contents

Page

II. The Ninth Circuit Decision so far Departs from the Accepted and Usual Standards Applied by This, and Other Courts, that this Court's Supervisory Power is Called for on the Second Prong of Qualified Immunity. 26

CONCLUSION 34

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Filed September 16, 2009 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed April 16, 2007 ..... 3a

Appendix C — Minutes Of Continued Hearing Motion For Summary Judgment Of The United States District Court For The District Of Nevada, Reno, Nevada Entered March 16, 2005 ..... 10a

Appendix D — Excerpts Of Transcript Of Motion For Summary Judgment Dated March 12, 2005 ..... 14a

Appendix E — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed July 5, 2007 ..... 68a

TABLE OF CITED AUTHORITIES

Cases: *Page*

Acosta v. San Francisco, 83 F.3d 1143 (9th Cir. 1996), *cert.* denied, *Yawczak v. Acosta*, 519 U.S. 1009 (1996) 27, 29

Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993) 15

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002) 17

Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005) 27, 28

Brosseau v. Haugen, 543 U.S. 194 (2004) 12, 28, 31, 32, 33, 34

Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993) 30

Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009) 18, 19

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) *cert.* denied, *Rutherford v. Deorle*, 536 U.S. 958 (2002) 27, 28, 29

Graham v. Connor, 490 U.S. 386 (1989) ... 14, 17, 20

Long v. Slayton, 508 F.3d 576 (11th Cir. 2007), *cert.* denied, 129 S. Ct. 725 (2008) 19

Cited Authorities

Page

Lytle v. Bexar County Tex., 560 F.3d 404 (5th Cir. 2009) 23, 24

Marion v. City of Corydon, 559 F.3d 700 (7th Cir. 2009) 24, 25

McCollough v. Deleon, 559 F.3d 1201 (11th Cir. 2009) 25, 26

Monell v. Dep't of Social Services, 436 U.S. 658 (1978) 17

Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002) 20, 30, 31, 33

Pearson v. Callahan, 129 S. Ct. 808 (2009) 12

Robinson v. Arrugueta, 415 F.3d 1252 (11th Cir. 2005) *cert.* denied 546 U.S. 1109 (2006) .. 14, 15, 25

Robinson v. Lehman, 552 U.S. 1172 (2008) 1

Saucier v. Katz, 533 U.S. 194 (2001) 12, 26, 27

Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000) 30

Scott v. Harris, 550 U.S. 372 (2007) 3, 12, 13, 14, 15, 16, 34

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) 29, 30

Cited Authorities

Page

Tennessee v. Garner, 471 U.S. 1 (1985) 13

Troupe v. Sarasota County, Florida, 419 F.3d 1160 (11th Cir. 2005), *cert.* denied 547 U.S. 1112 (2006) 20, 21

Williams v. City of Grosse Pointe Park, 496 F.3d 482 (6th Cir. 2007) 22, 23

United States Constitution:

Fourth Amendment ..... i, 2, 13

Statutes:

28 U.S.C. Sec. 1254(1) 1

42 U.S.C. Sec. 1983 2

Nevada Revised Statutes:

Sec. 193.330 16
Sec. 199.280 16
Sec. 200.040 16
Sec. 200.010 16
Sec. 200.471 16
Sec. 484.278 16
Sec. 484.377 16

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 U.S. Supreme Court's order remanding the case to the Ninth Circuit for reconsideration is cited as *Robinson v. Lehman*, 552 U.S. 1172 (2008)(Supreme Court Docket No. 07-470). The order appealed from is the Ninth Circuit Court of Appeal's unpublished September 16, 2009 Memorandum order which appears in the Appendix to this Petition ("App.") at App. A, 1a – 2a, affirming its previous decision of April 16, 2007. The Ninth Circuit Court of Appeal's April 16, 2007 Memorandum opinion is unpublished and is found at App. B, 3a – 9a. The Minutes of the United States District Court for the District of Nevada denying, in part, defendants' motion for summary judgment appears at App. C, 10a – 13a. The District Court read its decision in open court and a transcript of the decision follows the Minutes at App. D, 14a – 67a. The Ninth Circuit's unpublished Order Denying Rehearing following the original appeal denial was filed on July 5, 2007, and is found at App. E, 68a – 69a.

JURISDICTION

The opinion of the Ninth Circuit was entered on September 16, 2009. App. A, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 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. Sec. 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 deadly force case involving two police officers who shot and killed a driver to protect officers and prevent the driver's escape. The driver deliberately tried to run over officers, ran a stop sign onto a busy highway, nearly hit a motorcyclist when PIT stopped, and slashed a knife at officers. Negotiations failed to extricate the driver or his knife from the vehicle. Officers Tasered the driver and attempted to break his passenger window. He accelerated full throttle backward into an Expedition, almost crushing an officer when the defendants both fired shots killing him to protect officers they believed were likely between the vehicles and to prevent the driver's escape where he represented a serious risk of death or serious injury to any officer in his way and to the many rush hour motorists stopped nearby.

The Ninth Circuit upheld the District Court's denial of qualified immunity on summary judgment. App. B, 3a. The U.S. Supreme Court remanded in light of

Scott v. Harris, 550 U.S. 372 (2007). The Ninth Circuit reaffirmed its previous decision, but provided no analysis, merely stating that its viewing of the videotape did not change its mind and referring to its previous decision. App. A, 1a.

The opinion below illustrates how the Ninth Circuit continues to undermine this Court's consistent holdings relating to qualified immunity in civil rights cases. By improperly denying qualified immunity, courts deprive law enforcement officers of the protection they require to make reasonable split-second life and death decisions in the field.

This unfortunate incident occurred at 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. The incident began when Washoe County Sheriff's ("WCS") Deputies Klier and Duncan responded to a report of a possible suicidal subject (later identified as Lehman) on Paddlewheel Drive. Paddlewheel connects to Andrews Lane, which in turn connects to 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 stop him from driving off, but to no effect.

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 four wheel drive pickup in the driveway. Lehman backed into Duncan's sedan. Lehman then drove forward 20 feet, reversed, and accelerated rapidly backward into the sedan pushing it at least 15 feet and disabling it.

Klier and Duncan believed their lives were endangered and fired 23 rounds at the engine and tires, flattening the tires but not disabling the vehicle. Bullets struck surrounding homes. Duncan reported a 10-78, shots fired, officer needs assistance, which was re-broadcast by dispatch over multiple law enforcement radio channels. Duncan and Klier then pursued Lehman in Klier's Ford Explorer at approximately 20 miles per hour.

Nevada Highway Patrol (NHP) Trooper Sean Giurlani responded to the call for help. He stopped in the middle of Andrews Lane and stood next to the door. Lehman accelerated to 20-25 miles per hour and came directly at Giurlani, who thought he was going to be struck. Giurlani fired his handgun at Lehman, but the bullet struck the windshield wiper and deflected. Giurlani jumped into his vehicle to avoid being struck by Lehman's vehicle.

Nevada Division of Investigation (NDI) Det. Sgt. Slobe responded to the 10-78 call on Paddlewheel in an unmarked Buick Regal. He went Code 3, activating his lights and siren, and turned from U.S. 395 onto Andrews Lane. He heard the description of Lehman's pickup just as he saw it. Lehman headed directly toward Slobe's vehicle in what Slobe believed was an attempt to hit him head-on. Slobe was forced to swerve off the road to avoid

being struck by Lehman's vehicle. Slobe's impression was that Lehman was in a fight mode, not merely a flight mode, and was attempting to hit him.

Dep. Klier tried a Precision Intervention Tactic or "PIT" stop on Paddlewheel, whereby the officer nudges the rear of a fleeing vehicle to one side, hopefully causing the vehicle to spin to a stop. 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, and he wanted to prevent Lehman's access to U.S. 395.

Lehman turned north onto U.S. 395, running the stop sign during rush hour traffic. Klier hand signaled Trooper Giurlani to PIT stop Lehman's vehicle in Giurlani's heavier Expedition. Giurlani received permission by radio to PIT stop Lehman. The maneuver was partially successful in that Lehman was stopped. However, it caused Lehman to cross into oncoming traffic where he nearly collided with a southbound motorcycle visible on videotape.

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 near the curb. Dep. Stahl stopped his vehicle to the South of and slightly behind Lehman's vehicle a few feet away. Significantly, a hand held videotape taken immediately after the incident shows a mildly sloping embankment in front of Lehman's vehicle with sufficient room for Lehman's vehicle to drive forward onto the embankment and escape to the north or to the south.

Lehman immediately left his vehicle and approached to within 6 to 10 feet of Stahl and Giurlani with a raised knife in hand. 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. 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 with the motor running, and never surrendered the knife.

Soon after the PIT stop, numerous officers arrived from several law enforcement agencies, including Defendant Officers Tygard and then Robinson. In addition to escape routes forward and north or south, the videotape shows gaps around the vehicles immediately north and east of Lehman that Lehman might have maneuvered through once he pushed the Expedition out of the way or went forward and then backward around it. From there, Lehman could resume his previous desperate escape attempt.

Attempts to talk Lehman down were ongoing, but unsuccessful. He did not exit, turn off his motor, or throw out his knife. Eventually, RPD Officer Bruton deployed a Taser through the broken driver's 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 to avoid the knife. As they attempted to break the window, Lehman's vehicle roared to life and hurtled backward with all tires spinning.

RPD Officer Martin was positioned behind Lehman's vehicle and was forced to jump out of the way to avoid being hit or crushed as Lehman's pickup smashed into the Expedition behind it at an angle, knocking the Expedition backwards. Defendant Officers Robinson and Tygard were providing cover from positions in front of and behind Lehman's vehicle, respectively. 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 rifles, four shots each, in a matter of a second or two, immediately killing Lehman.

Officer 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. 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. 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 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 bank 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.[1] 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. When Tygard fired, he 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, too. Tygard believed the only way he could stop Lehman was to discharge his weapon to incapacitate him.

Lehman's tires were still 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

1. Tygard and Robinson were not involved in the decision to use Tasers. Once the Tasers were employed, Tygard and Robinson could only react to Lehman's actions as they existed.

or bystander. Tygard was concerned that 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, including ramming vehicles and endangering officers to such an extent that officers 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 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 from harming others.

When Officer Robinson fired, he reasonably believed that Lehman posed a lethal threat to officers and civilians in the immediate area. From radio traffic, 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 in front of him 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.

The videotape was presented as Exhibit "A" to Defendants' Motion for Summary Judgment. Defendants ask this Court to request and review the exhibit. The one exhibit actually includes two separate videotapings, one following the other. The first videotaping was from a camera mounted in front of a highway patrol officer's vehicle. The second videotaping on the exhibit was taken by NDI Det. Sgt. Slobe using a handheld camera. It depicts most of the events following the PIT stop, including the Tasering, window breaking efforts and Lehman's acceleration. The shooting is not depicted because Slobe ducked in obvious anticipation of gunshots. Swope walked around Lehman's vehicle after the shooting with his video camera. This segment depicts routes an objective officer could reasonably believe constitute escape routes: forward onto the road bank and then either north or south along the embankment to the highway; or backward through several cars onto the east lanes of the highway, and then either north or south along the highway. The two videos also depict neighbors in the yards, officers amongst the cars, and numerous vehicles stopped in the southbound lanes near the scene, and in the north bound lanes a hundred yards or so to the south of the scene.

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 have fired, too), Robinson and Tygard.

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

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision departs so significantly from the standards of this Court that this Court's supervisory authority is required. The Ninth Circuit failed to apply the objective officer standard, ignored clear evidence in a videotape regarding the existence of what an objective officer could reasonably believe were escape routes, and on the issue of whether cases then in existence provided fair notice of the constitutional standard, the Ninth Circuit relied on cases with significantly dissimilar facts and ignored cases with very similar facts. The Ninth Circuit's decision conflicts with decisions of other circuits and with this Court's decisions in *Harris*, *supra*, and *Brosseau v. Haugen*, 543 U.S. 194 (2004), as discussed below.

In *Haugen*, this Court suggested a need for more judicial guidance in this heavily fact dependent area to help officers and the courts find the "'hazy border between excessive and acceptable force.'" *Haugan*, 543 U.S. at 201, quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001).[2] This case involves videotape evidence, a partially

2. This Court could also proceed directly to the second prong of the qualified immunity analysis. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

disabled but still lethal vehicle, a possibly suicidal subject, a history of reckless endangerment without a high speed chase, whether the "split-second" decision making standard is appropriate after negotiations commence when the subject is Tasered and suddenly accelerates, and other facts which provide a setting for this Court to provide guidance as to the weighing of these factors.

Finally, this case has significant public policy implications for law enforcement officers because it promotes an apparent unarticulated policy[3] in the Ninth Circuit that Fourth Amendment use of deadly force pursuit cases will proceed to jury trials despite the policy considerations underlying qualified immunity.

I. The Ninth Circuit Decision is Contrary to and so far Departs from the Accepted and Usual Standards Applied by This, and Other Courts, that this Court's Supervisory Power is Called for on the Issue of Whether a Constitutional Violation Occurred.

This Court remanded this case for reconsideration in light of *Scott v. Harris*, 550 U.S. 372 (2007). *Harris* held the test is reasonableness and the *Tennessee v. Garner*, 471 U.S. 1 (1985) standard merely recited factors. Additional factors include culpability and the number of persons at risk. Police need not let a subject

---

3. The *Lehman v. Robinson* decision is not officially published. However, it is still available for law enforcement and their legal council on Lexis and presumably Westlaw. *See* 228 Fed. Appx. 697; 2007 U.S. App. LEXIS 8978.

continue his dangerous behavior in hopes he will stop, as this practice will encourage reckless conduct. *Harris*, at 384-85. *Harris* also held that an issue of fact cannot be created where a videotape clearly establishes a point. *Id.*, at 380.

The most critical factual issue in this case is whether an objective officer in the defendants' positions could reasonably believe Lehman was not contained and could have escaped by several routes if not immediately stopped. The Ninth Circuit found:

> Several other officers present testified that they had Lehman "boxed in" when he was shot. One officer said: "[m]y immediate response was just to contain the situation, which we did." *When viewed in the light most favorable to Lehman*, the record suggests that Lehman had no readily available avenue of escape and was contained. (Emphasis added).

App. B, 6a.

The Ninth Circuit erred twice. First, it found no escape route existed *in fact*. The Ninth Circuit failed to consider that, while the evidence must be viewed in a light most favorable to Lehman, it also must also be viewed from the standard of what an objective officer could reasonably believe. *Graham v. Connor*, 490 U.S. 386, 399 (1989) (the test is "objective reasonableness"); *Saucier v. Katz*, 533 U.S. 194, 204 05 (2001); *Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005)("the determination of reasonableness must be made from the

perspective of the officer.")(*Cert.* denied 546 U.S. 1109 (2006)). If a reasonable officer could believe 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). Both defendants and many more officers believed Lehman was trying to escape when he backed up. The Ninth Circuit failed to consider whether an objective officer could reasonably believe Lehman was not contained as escape routes existed and all prior efforts to stop him by shooting at the vehicle and tires had been ineffective. Robinson also believed Lehman was trying to crush officers he believed were behind the vehicle. One was and there might have been others.

The Ninth Circuit compounded its error by failing to make any finding upon viewing the videotape of whether or not the videotape unequivocally establishes that a reasonable officer could believe escape routes existed. Defendants submit that if this Honorable Court takes the time to review the second segment of the videotape following the shooting, the video will establish that an objective officer could reasonably believe escape routes existed for Lehman. The assessment of the videotape is supported by the testimony of defendants and multiple other officers on scene that Lehman was not contained and had escape routes, and they would have shot, too.

Harris holds that officers are not required to let a dangerous suspect simply drive away in hopes that they will stop their reckless endangerment. "We think the police need not have taken that chance and hoped for

the best." *Harris*, at 385. As *Harris* discussed, there could be no certainty Lehman would stop his efforts to escape. The risk presented by Lehman was far greater than that presented in *Harris* where this Court stated the constitutional question was "easily decided". *Harris*, at 378, n. 4.

The Ninth Circuit ignored *Harris* when it stated: "Lehman was not suspected or accused of any crime." App. B, 6a. In *Harris*, it was not the initial speeding (73 in a 55 mph zone) that justified lethal force, it was Harris' subsequent actions during the chase. Here, deputies were lawfully investigating a suicide threat when Lehman engaged in a course of conduct that created probable cause to believe Lehman had committed multiple serious crimes and that if he were allowed back onto the highway, he would continue to engage in highly reckless conduct that would create a serous risk of death or serious bodily injury to pursuing officers, pedestrians and motorists.

These crimes included, at a minimum: assault with a deadly weapon (motor vehicle, knife) and assault on an officer in the performance of his duty, both felonies (Nevada Revised Statutes (NRS) Sec. 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 (NRS 484.278); and reckless driving (NRS 484.377). The Ninth Circuit's decision essentially directs officers to ignore conduct during pursuit if the initial stop did not involve a serious crime. This creates a dangerous precedent and is contrary to *Harris*.

The Ninth Circuit found it significant that because two officers had begun a dialogue with Lehman, deadly force was unreasonable. App. B, 6a – 7a. This focus on a dialogue ignores several points in the defendants' legitimate risk assessment. First, Lehman was non-compliant; despite orders, he had not thrown out the knife, stopped the engine, or exited the vehicle and accelerated backward toward an officer in an apparent escape attempt. Second, the analysis must focus on the officers' knowledge at the time the shooting occurred. Dialogue was over. Lehman had just been Tasered twice and officers were attempting to break through the passenger side window.[4] Lehman looked around and behind him and accelerated backwards almost striking an officer. Lehman's tires were still spinning full speed when the shots were fired. The lower court's analysis focuses on the irrelevant and ignores the suddenly escalating conduct and risk. In *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), the court noted:

> 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

4. These defendants did not participate in making or carrying out the decision to Taser Lehman or to break the passenger window. Accordingly, they cannot be held liable for that conduct and must react to the situation that now faced them; one in which they believed the Tasering made Lehman more dangerous. *See 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); *Monell v. Dep't of Social Services*, 436 U.S. 658, 693 (1978) (no *respondeat superior* liability).

> 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.

On remand, the Ninth Circuit was to balance the risk of nearly certain death by shooting against the risk of death or serious bodily injury to officers and others, including their relative culpability and the number of persons at risk. The Ninth Circuit failed to provide any meaningful analysis. Here, Lehman recklessly endangered numerous officers and by running the stop sign and spinning into oncoming traffic during the PIT stop, he recklessly endangered the lives and limbs of numerous members of the public, all of whom were innocent. Lehman was almost completely non-compliant. While his vehicle was slowed by shot-out tires, Lehman nevertheless nearly killed or seriously injured Trooper Giurlani, NDI Det. Swobe, a motorcyclist during the PIT stop, and Officer Martin. Officers testified PIT stops are inherently dangerous, and this case almost proved that when Lehman narrowly missed a motorcycle visible in the video. The defendants and other officers reasonably believed the only way to stop Lehman from hitting officers nearby or going back onto the highway and risking further deadly incidents was to shoot him.

The Ninth Circuit's decision is contrary to the holdings of other circuits. In *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), an officer fired from close range as the driver passed by him. There were no motorists in the immediate vicinity, yet the court found the driver's

previous recklessness likely justified the lethal use of force, in part because of a perceived risk to pursuing officers. Cordova drove a large vehicle which the court thought presented a high level of risk. Here, a reasonable officer could believe Lehman's powerful four-wheel drive truck presented a heightened risk, despite its lack of high speed. Events had already proven that, plus there were large numbers of officers and motorists on the road. While the *Aragon* court came just short of finding no constitutional violation, it did grant qualified immunity:

> The law in our circuit and elsewhere has been vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death. Given that our precedent does authorize the use of deadly force when a fleeing suspect poses a threat of serious harm to others, Officer Aragon was not unreasonable in believing that a potential threat to third parties would justify such a level of force.

Aragon, at 1193.

In *Long v. Slayton*, 508 F.3d 576 (11th Cir. 2007), *cert.* denied, 129 S. Ct. 725 (2008), 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.*, at 581, quoting *Pace v. Capobianco*, 283 F.3d 1275, 1280 n.12 (11th Cir. 2002).

In *Troupe v. Sarasota County, Florida*, 419 F.3d 1160 (11th Cir. 2005), *cert.* denied 547 U.S. 1112 (2006), SWAT Officers surrounded the decedent's vehicle in his driveway and other SWAT officers blocked 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 found no constitutional violation. 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.*, at 1168. Citing *Graham*, 490 U.S. at 396-97, the court found unpersuasive plaintiff's argument that the mere possibility of harm was insufficient and that witnesses

said there was no one in the decedent's immediate path. *Troupe*, 419 F.3d at 1168.

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." *Id.* 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.

Williams v. City of Grosse Pointe Park, 496 F.3d 482 (6th Cir. 2007), did not involve a high speed chase. Nevertheless, the court found no constitutional violation. Two police vehicles boxed in a suspected car thief. The driver accelerated backward into a cruiser. An officer left his vehicle and placed a gun to the driver's head. The driver accelerated forward onto the sidewalk to go around the vehicle in front of him, knocking down the officer with the gun. The remaining officer then fired several times as the vehicle tried to drive away. *Id.*, at 484. The court noted:

> From Miller's perspective, Williams: (1) was undeterred by having a weapon pointed at his head; (2) acted without regard for Hoshaw's safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture. *Miller had no way of knowing whether Williams might reverse the Shadow, possibly backing over Hoshaw, or cause injury to other drivers or pedestrians in the area.* As a consequence, Miller elected to fire his weapon in order to prevent Williams's potentially causing someone injury. That Williams may not have *intended* to injure Hoshaw or anyone else is immaterial. From Miller's viewpoint, Williams was a danger, and he acted accordingly.
>
> . . . While there are no pedestrians or vehicles in the immediate field of view of the camera in Miller's cruiser, there can be no question that Williams's reckless disregard for the

> safety of those around him in attempting to escape posed a threat to anyone within the vicinity. Finally, Williams was actively avoiding arrest, apparently doing all he could to evade capture by the police. While the suspected crime was a nonviolent property offense, the immediate threat Williams posed to Hoshaw and other drivers and pedestrians and the fact that Williams elected to flee both suggest that Miller's chosen use of force to apprehend Williams was reasonable. (Emphasis added).

Williams, at 487.

In *Lytle v. Bexar County Tex.*, 560 F.3d 404 (5th Cir. 2009), qualified immunity was denied following a high speed chase. *Lytle* is distinguishable and instructive. The officer began following a suspected armed car thief who accelerated to 65 in a 30 zone, turned too wide on a corner and crashed into a vehicle. The suspect backed toward the officer's car, then accelerated forward in an un-crowded area. The court noted that if the officer fired while the vehicle was backing toward him *or immediately afterward*, he would be entitled to qualified immunity. *Id.*, at 412. In the instant case, the officers fired within 2 seconds of Lehman's movement; a movement which objective officers could reasonably believe was an attempt to injure officers or to escape.[5] This leaves no time for reflection or cooling off and renders the officers' firing reasonable.

---

5. Plaintiff argued the Tasers may have caused Lehman's muscles to spasm. This is irrelevant since it is the officers' reasonable interpretations which are the measure.

The officer in *Lytle* fired at the vehicle when it was 3-4 houses down the block, killing a passenger. In denying qualified immunity, the court found the pre-shooting conduct did not indicate sufficient depravity, when coupled with the lack of traffic or bystanders, to make the driver a sufficient risk to warrant shooting once the driver was several houses away. This was especially true since the risk of hitting innocent persons was greatly enhanced by the distance at the time of shooting.

In the instant case, if officers had waited until Lehman was roaming the highway once again, then the concerns of the *Lytle* court (and the officers testifying in this case) come into play that efforts to stop the danger become themselves more dangerous to the very public they are trying to protect. The defendant officers took this into account. Lehman exhibited a much greater level of depravity than the *Lytle* suspect, having deliberately tried to hit multiple officers and vehicles and slashing a knife at one officer. U.S. 395 at rush hour also presented a much greater risk than the quiet road in *Lytle*.

In *Marion v. City of Corydon*, 559 F.3d 700 (7th Cir. 2009), stop sticks deflated 3 tires during a high speed chase, reducing the speed to 40 miles per hour. The driver tried to cross a muddy highway meridian and lost substantial traction. Numerous officers closed in on the driver, and shot at him when he moved forward, and again when he moved backward in their direction. It was unknown which shots struck him. The plaintiff contended Marion no longer constituted a danger because his tires were flat, his vehicle overheating,

officers surrounded him, and he was essentially stuck in the mud.

Despite plaintiff's contentions, it was reasonable for the officers to determine that Marion did actually pose a threat to the safety of officers and of innocent bystanders. Marion drove on three flat tires at fairly high speeds for a significant stretch of time. Even after he entered the median and officers on foot surrounded his vehicle, the video evidence shows that Marion's vehicle continued to move forward, and then backward. A reasonable officer could have concluded that, absent police intervention, Marion had the capability to run over officers and/or to reach the eastbound lanes of the highway and that if he did reach the eastbound lanes, there was a significant possibility that Marion would have rammed one or more bystander's vehicles or caused an accident between bystanders' vehicles, injuring or killing them. *Marion*, at 705-706. The court did not require the officers to wait and see if Marion could escape from the mud and meridian before firing.

In *Robinson v. Arrugueta*, 415 F.3d 1252 (11th Cir. 2005), no constitutional violation was found where the subject was fatally shot while the vehicle was moving 1-2 mph toward an officer despite the estate's claim the officer could have moved away.

In *McCollough v. Deleon*, 559 F.3d 1201 (11th Cir. 2009), the court stated:

> McCullough's initial attempts to evade police, his failure to heed police warning of the potential use of deadly force, his later attempt

> to drive a truck towards an officer on foot, and his still later apparent attempt to drive away from the officers toward the exit of the parking lot provided the officers with sufficient reason to believe the use of deadly force was necessary.

Id., at 1208.

In summary, the risk Lehman presented to an objective officer, given Lehman's relative culpability and the target rich environment of officers and motorists around him and the demonstrated inability to safely stop Lehman by any other means, an objective officer could reasonably believe the force used was reasonable. Officer Robinson also believed there were one or more officers between Lehman's vehicle and the Expedition it crashed into and had no cooling off time as Martin dove aside. No constitutional violation occurred and the defendants are entitled to qualified immunity under the first prong. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

II. The Ninth Circuit Decision so far Departs from the Accepted and Usual Standards Applied by This, and Other Courts, that this Court's Supervisory Power is Called for on the Second Prong of Qualified Immunity.

The second prong of qualified immunity requires the court to determine whether the law was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The cases must provide fair notice of what conduct was required. "The relevant, dispositive inquiry in determining

whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*, at 202.

The Ninth Circuit cited two cases in finding the law was clearly established, *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). Neither of these cases provided defendants with reasonable notice their conduct was unconstitutional, as required to avoid qualified immunity.

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 toward him so slowly that he could easily have stepped aside. In assessing risk, *Acosta* presented no history of life endangering conduct similar to this case, no history of noncompliance, and no other officers or third persons whose lives were endangered. These facts provided no relevant guidance to Officers Robinson and Tygard.

Deorle provided even less guidance. It did not involve a motor vehicle. There was no immediate history of conduct endangering officers or citizens. An unarmed emotionally disturbed[6] person walked slowly toward an

---

6. 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. *Deorle* at 1283. *Deorle* was clarified in *Blanford v. Sacramento County*, 406 F.3d

(Cont'd)

officer armed with a beanbag round who was secure behind a tree and could easily withdraw. Numerous other officers were present, although not close to the subject or threatened. The officer gave no warning[7] and fired when an undisclosed imaginary line was crossed, hitting the subject in the eye. This case and *Deorle* involve completely dissimilar facts and risk assessments.

While the presence of many officers may create a safe situation in some circumstances, their tools were unavailing here. Pepper spray and Tasers were unsuccessful. Shooting the vehicle and its tires was unsuccessful. PIT stopping Lehman endangered motorists and officers. Officers testified shooting Lehman at level or from a distance endangered officers and motorists. In *Haugen*, 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. *Haugen*, 543 U.S. at 196-197.

(Cont'd)

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. Securing Lehman's car was a similar priority.

7. The District Court found it unlikely that any warning could have been given as events occurred too quickly. App. D, 40a. Further, Lehman had been fired at by three officers already. Since weapons were pointed at Lehman, any reasonable officer could believe no more warnings were necessary.

Acosta and *Deorle* provide no guidance or notice that the actions of Officers Robinson and Tygard were unreasonable. However, other cases existed that strongly supported the reasonableness of Officer Robinson and Officer Tygard's actions.

In *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), Officer Schulcz saw Smith run a stop sign and the chase was on at speeds exceeding 90 mph. Smith became temporarily stuck in rough terrain and Officer Schulcz attempted to block him. Smith maneuvered around Schulcz' and resumed flight, once swerving toward Schulcz's police car. Smith turned down a dead-end street. At the end of it, he tried to turn around by going into a yard. Officer Schulcz placed his vehicle nose to nose to block Smith and exited to apprehend Smith. Smith backed up, then drove forward, smashing into Schulcz's car, backed up again, and drove around Schulcz's car. Officer Schulcz, not in personal danger, shot and killed Smith as he drove by. Evidence existed that when he fired, Officer Schulcz was aware the dead end street had been blocked by other law enforcement vehicles. Significantly, the court rejected the argument that since Smith was surrounded, he no longer presented a risk sufficient to justify deadly force. "Even if there were a roadblock at the end of Woodbine Avenue, Officer Schulcz could reasonably believe that Mr. Smith could escape the roadblock, as he had escaped several times previously." *Id.*, at 347. "Had he proceeded unmolested down Woodbine Avenue, he posed a major threat to the officers manning the roadblock. *Even unarmed*, he was not harmless; a car can be a deadly weapon." (Emphasis supplied). *Id.*, at 347.

The Ninth Circuit tried to distinguish *Freland* because it involved high speed and because police believed the driver may have a gun. App. B, 9a. The Ninth Circuit erred. There is no indication in *Freland* that the police believe the driver was armed. To the contrary, it stated: "Even unarmed, he was not harmless . . ." *Freland*, at 347. Further, any reasonable officer could believe Lehman's vehicle presented a very high risk of harm given the facts leading up to this incident and the number of people in the near vicinity and on the road.

In *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000), no constitutional violation was found where, after a fleeing car crashed into a guardrail, the officer shot into the car as it began to resume flight.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), no constitutional violation was found where officers shot the driver of a speeding tractor-trailer truck who had made multiple dangerous maneuvers toward officers and other motorists.

In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir., 2002), like here, the suspect was unfazed by pepper spray. The suspect avoided one police barricade by driving at an officer's vehicle. The officer moved out of the way to avoid being struck. Four police vehicles blocked the sides and back of the suspect's vehicle when he entered a cul-de-sac and kept the motor running. Three officers exited their vehicles, shouted get out of the car and fired 11 rounds within moments of arrival. The court stated:

> Given the facts in the light most favorable to Plaintiff, reasonable police officers could have

> believed that the chase was not over when the police fired on Davis. Even when we accept the Hedge affidavit as true that Davis's car, in the cul-de-sac, did not try to run over the deputies and that Davis, in the cul-de-sac, did not aim the car at the deputies, Davis's car was stopped for, at most, a very few seconds when shots were fired: no cooling time had passed for the officers in hot pursuit.

Pace, at 1282.

In the instant case, defendants were entitled to believe the chase was just beginning. Two seconds cooling off was insufficient to fully assess the situation and allow second guessing by the Ninth Circuit, especially in light of existing case law.

Brosseau v. Haugen, 543 U.S. 194 (2004) assessed existing case law at a point in time close to this incident. In *Haugen*, an officer received reports of and observed a fight. She directed two suspects into one vehicle and the witness and her daughter into another vehicle, both vehicles being generally toward the front of a jeep. Haugen ran into the jeep. Officer Brosseau broke the window and a brief struggle ensued. Haugen started the jeep and drove forward trying to escape. Brosseau jumped back and while not in danger, fired, striking Haugen in the back, who nevertheless negotiated through the narrowly spaced vehicles, through a lawn, and out to the street. Officer Brosseau fired because she was "fearful for the other officers[8] on foot who [she]

8. Two other officers and a canine were at the scene, although Haugen did not know their location.

believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area." *Haugen*, 543 U.S. at 197.

The Ninth Circuit adopted the District Court's analysis to distinguish *Haugen*. App. B, 9a. The District Court cited a number of factors as distinguishing *Haugen*. App. D, 47a to 48a. One supposed distinction was its finding that, in a light most favorable to plaintiff, Lehman was contained. As with the Ninth Circuit, the District Court failed to consider whether a reasonable officer could believe escape routs existed and that Lehman was not contained. The videotape shows a reasonable officer could believe Lehman could escape.

Other factors relied upon by the District Court noted hereafter also fail to adequately distinguish *Haugen*: 1) The District Court said Haugen had an outstanding felony warrant. However, Officer Brosseau was not aware of the warrant. 2) Many officers were present with Lehman. However, this indicates the risk to officers was virtually nill in *Haugen*, whereas while attempting to get back to the road and, if allowed to do so, Lehman represented a very high risk to officers and others. Officers' previous attempts to physically stop and restrain Lehman were unsuccessful. Robinson also thought officers were between Lehman and the Expedition. 3) Haugen's tires were not shot out. However, in *Haugen* there were no bystanders or other vehicles threatened other than those in the two vehicles Haugen avoided. The first was only 4 feet away, so it would have been avoided already when Brosseau fired. Further, Lehman's vehicle was still deadly. 4) Brosseau

only fired one shot. However, no then-existing case gave notice the number of shots is relevant where there has been no change in circumstances justifying the first shot. 5) Haugen was not suicidal. However, even someone suicidal may kill people. What the District Court ignored is that Haugen did not engage in a pattern of life threatening conduct like Lehman did. The risk to officers and the innocent public was far greater from Lehman than from Haugen.

The facts in *Haugen* occurred on February 20, 1999.[9] The only case this writer found between then and this incident on April 24, 2002, is *Pace v. Capobianco*, discussed above, which provides support for qualified immunity. The law existing at the time of this incident strongly supported the notion that Officers Robinson and Tygard acted constitutionally. No case gave them fair notice otherwise. Under these circumstances, defendants are entitled to qualified immunity. As the court stated in *Haugen*, at 201:

> These three cases taken together 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, 533 U.S. at 206, 150 L. Ed. 2d 272, 121 S. Ct. 2151.* The cases by no means "clearly establish" that Brosseau's conduct violated the *Fourth Amendment.*

---

9. See *Haugen v. Brosseau*, 339 F.3d 857, 859 (9th Cir. 2003).

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." *Haugen*, 543 U.S. at 201. The Ninth Circuit decision is clearly not in accord with other circuits or with this Court's holdings in *Haugen* or *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*