

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OFFICER VAN PLUMHOFF, :

4 ET AL., :

5 Petitioner, : No. 12-1117

6 v. :

7 WHITNE RICKARD, A MINOR :

8 CHILD, INDIVIDUALLY, AND AS :

9 SURVIVING DAUGHTER OF :

10 DONALD RICKARD, DECEASED, :

11 BY AND THROUGH HER :

12 MOTHER SAMANTHA :

13 RICKARD AS PARENT AND :

14 NEXT FRIEND. :

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16 Washington, D.C.

17 Tuesday, March 4, 2014

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19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States
21 at 10:14 a.m.

22 APPEARANCES:

23 MICHAEL MOSLEY, ESQ., North Little Rock, Arkansas; on
24 behalf of Petitioners.

25 JOHN F. BASH, ESQ., Assistant to the Solicitor General,

1 Department of Justice, Washington, D.C.; for United
2 States, as amicus curiae, supporting Petitioners.

3 GARY K. SMITH, ESQ., Memphis, Tennessee; on behalf of
4 Respondent.

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1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 12-1117, Plumhoff v. Rickard.

5 Mr. Mosley.

6 ORAL ARGUMENT OF MICHAEL MOSLEY

7 ON BEHALF OF THE PETITIONERS

8 MR. MOSLEY: Mr. Chief Justice, and may it
9 please the Court:

10 The Sixth Circuit completely failed to
11 analyze the second prong of a qualified immunity defense
12 in this case, and that is whether the law was clearly
13 established at the time of the incident in question,
14 such that every reasonable officer would know whether or
15 not the action was constitutional or not. Therefore,
16 the petitioners were not given fair warning that the use
17 of force in this case, if it was prohibited, was
18 prohibited, and they retain immunity, and the Sixth
19 Circuit must be reversed.

20 This is the argument we -- we wish to
21 emphasize today relating to the second prong, what was
22 traditionally the second prong before Saucier, of
23 course, the rigid order of battle was changed.

24 Had the Sixth Circuit reviewed its own cases
25 as of 2004, it should have concluded that Petitioners

1 were entitled to qualified immunity.

2 JUSTICE SCALIA: I thought it said -- did it
3 not say in its opinion that there was room for
4 disagreement or whether this was reasonable or not? Did
5 they have some such statement?

6 MR. MOSLEY: They could not conclude that it
7 was reasonable as a matter of law is the statement I
8 recall, Justice Scalia. And -- and in that regard,
9 that's a legal question. It had to answer that
10 question, but it didn't do so with reference to prior
11 case law of 2004. If anything, it looked at Scott v.
12 Harris from 2007 and said that there was a factual
13 distinction between Scott, and the devil was in the
14 details; and, therefore, it affirmed the district court,
15 which, I submit, made the same mistake because the
16 district court was looking at Smith v. Cupp from the
17 Sixth Circuit, which was a 2005 opinion, to determine
18 whether or not the officers violated clearly established
19 law.

20 JUSTICE GINSBURG: Would the court, in your
21 view, ever have an occasion to decide whether conduct of
22 this nature violates the Fourth Amendment? If you --
23 you were right about clearly -- clearly established,
24 then could this -- could the underlying constitutional
25 question ever be, what would be the posture of the case

1 in which it could be decided?

2 MR. MOSLEY: Well, I mean, we've argued, of
3 course, in our briefs, Justice Ginsburg, that it should
4 be decided in this case, although today we're
5 emphasizing the second prong. But what would be the
6 posture of such a case? The United States has suggested
7 that there's factual complexities in this case that make
8 it difficult for the Court to rule whether or not, on
9 the merits, there was a constitutional violation.

10 And I'm not -- of course, we -- we differ
11 with that to the extent that we've argued there was not
12 a constitutional violation. But as in Pearson where the
13 issue of whether the law was clearly established can be
14 resolved relatively easily, I submit that -- that in
15 this case, that is the case, and the Court should rule
16 that Petitioners were entitled to qualified immunity.

17 JUSTICE ALITO: Isn't it the case that the
18 court has discretion to reach the second prong if it
19 wants to? The court could say it wasn't reasonably --
20 it wasn't clearly established, but it was an
21 unreasonable seizure. It could do that, couldn't it?

22 MR. MOSLEY: The way I read Pearson, Justice
23 Alito, no. The way I read Pearson, they -- Pearson's
24 dictate is that they must proceed to the second prong if
25 they conclude there was sufficient facts to conclude

1 that there was a constitutional violation. They still
2 have to decide -- one is a question of --

3 JUSTICE ALITO: No, that wasn't my question.
4 The -- the court has to, ruling on qualified immunity,
5 it has to decide whether there -- whether the law was
6 reasonably -- the rule that's being applied was
7 reasonably -- was clearly established. But having done
8 that, even if it says it was and, therefore, the
9 defendant is entitled to qualified immunity, doesn't
10 Pearson say that the court has discretion about whether
11 to go on to the second prong?

12 MR. MOSLEY: Oh. This is in relation to
13 Justice Ginsburg's question. I think so, yes. The
14 court certainly has the power to -- to make a ruling on
15 the merits question. And in this case, if the court
16 found it wise to do so, we've argued that on the merits
17 this was a constitutional use of force under the Fourth
18 Amendment, because it was dangerous. The -- the chase
19 exceeded speeds of 100 miles an hour. There was weaving
20 in and out of traffic. There was a time when a
21 particular person pulling a boat was -- was cut off.
22 Even in the parking lot, the Respondents' decedent never
23 threw his hands up, never indicated surrender,
24 maneuvered his car in such a manner that a reasonable
25 officer could conclude that he was in a threat of

1 serious harm to himself.

2 In any event, every reasonable officer could
3 not -- it is not correct that every reasonable officer
4 would not conclude that it was unconstitutional.

5 CHIEF JUSTICE ROBERTS: Is there -- is there
6 any situation in which the application of lethal force
7 during a high-speed case in your view would not be
8 justified?

9 MR. MOSLEY: Yes, Your Honor.

10 CHIEF JUSTICE ROBERTS: Give me an example?
11 Talking about a high-speed chase, not unlike this one.
12 Is there -- is there any situation in which it would --
13 would violate clearly established constitutional law for
14 the police to use lethal force?

15 MR. MOSLEY: Well, I'll give you one
16 circumstance. If -- if this Court had a case where it
17 ruled where there was a prior ruling, of course, that
18 given conduct violated the Constitution. But as far as
19 me coming up with a -- a particular event, I suspect
20 that somebody fleeing at the speed limit, not
21 endangering other drivers. I hate to use television as
22 an example, but perhaps the way the white Ford Bronco
23 fled in the early '90s that everybody saw on TV. That
24 seemed to be relatively non-dangerous or at least not a
25 danger of serious physical injury.

1 In this case, however, there was a danger of
2 serious physical injury, given the undisputed events in
3 this case. In fact, the Respondents below argued that
4 the speed exceeded 100 miles an hour. They argued this
5 was a dangerous chase On page 16 of their memorandum in
6 response to our motion for summary judgment.

7 So, you know, of course, there's a
8 jurisdictional issue here that I'd like to briefly talk
9 about.

10 JUSTICE SCALIA: Yes, I'd like you to talk
11 about that.

12 MR. MOSLEY: Well, the -- below in the Sixth
13 Circuit, the Petitioners were willing to concede any
14 alleged factual disputes, not legal dispute, but factual
15 dispute, in the light most favorable to the Respondent.
16 We're still willing to do that. For purposes of
17 argument's sake, any alleged disputes should be
18 construed, which is proper under Scott v. Harris, to
19 determine the -- the historical facts in the light most
20 favorable --

21 JUSTICE SCALIA: And is that -- is that how
22 you think the jurisdictional question should be
23 resolved, that whenever -- as you know, there's --
24 there's a disagreement in the courts of appeals as to
25 what you do when there are claims that there are factual

1 disputes. Some courts -- well, we've held that where
2 the only issue raised is a factual dispute, there's no
3 jurisdiction. Some courts say that so long as you
4 assert a claim to qualified immunity, there is
5 jurisdiction, okay.

6 Let's assume that that's the rule. What do
7 we do with factual disputes? Is it your position that
8 you -- you simply assume them to be in the -- in the
9 Respondents's favor?

10 MR. MOSLEY: Only to the extent supportable
11 by the record, as Your Honor held -- as this Court held,
12 rather, in Footnote A of Scott v. Harris. So yes, I do
13 think that there are cases where --

14 JUSTICE SCALIA: Well, you would say genuine
15 factual disputes. I mean, if -- if there's something
16 that is not at all frivolous. I mean, it's not
17 supported by the record, I wouldn't call that a genuine
18 factual dispute.

19 MR. MOSLEY: I think it wastes judicial
20 resources if there is not true genuineness with respect
21 to a particular fact, if there is no support for it in
22 the record and clearly established, the argument has
23 been raised for the court not to go ahead, assume
24 jurisdiction and assume the facts in the light most
25 favorable to the extent supportable by the record, Your

1 Honor.

2 JUSTICE SCALIA: And -- and how does that
3 work out here?

4 MR. MOSLEY: In this case, I --
5 respectfully, I don't think it's very important. I
6 think that there are maybe a couple of alleged factual
7 disputes that, even if you assume them in the light most
8 favorable to the Respondent, they do not affect this
9 Court's analysis under the second prong of qualified
10 immunity because this was indisputably a dangerous car
11 chase and indisputably the Respondent never gave up
12 before force was used.

13 JUSTICE SCALIA: You would say that it
14 doesn't really matter whether he bumped the police
15 cruisers when he was finally cornered, whether he tried
16 to back up into one of the officers, that all of that is
17 just excrescences, that it was enough to justify the
18 shooting that he was driving at 100 miles an hour,
19 swerving around the road, endangering human life and
20 would likely continue that if they let him to get away?

21 MR. MOSLEY: Two responses, Your Honor.
22 First of all, I do not concede that those facts are in
23 dispute. Rather, if you look at the second volume of
24 the Joint Appendix towards the end, the Respondent had
25 admitted those in the Supreme Court -- in the summary

1 judgment record below, that there was some
2 qualifications that these are legal disputes.

3 JUSTICE SCALIA: Had admitted what?

4 MR. MOSLEY: Had admitted that Officer
5 Gardner's car was, in fact, bumped by Respondent
6 decedent's car, that the cars were rocking back and
7 forth, that the front wheels were spinning. That
8 occurred. That was indisputably occurred. That
9 indisputably shows on Unit 286, which is Galtelli's
10 video. And then, it is indisputable that Officer Ellis
11 had to step out of the way when Mr. Rickard backed up.
12 Those things were not in dispute.

13 So, you know, as that goes, I wouldn't say
14 that those things have to be assumed in the
15 Respondents's favor because those things happened and
16 the Respondent doesn't take issue with those things.

17 JUSTICE SCALIA: Well, he does in his -- in
18 his briefing here.

19 MR. MOSLEY: He -- he takes issue with
20 characterizations. And what I -- I submit is that we've
21 characterized facts in this case, no doubt. They've
22 characterized facts in this case. Just as in Scott v.
23 Harris, the videos in many ways speaks for itself. The
24 video in many ways -- in every way, in my opinion, shows
25 that this was dangerous. It continued to be dangerous

1 and Mr. Rickard never relented and never gave up.

2 And one important fact that is also
3 undisputed is that at the time that that contact,
4 however you characterize it, was made between the
5 Galtelli car and Mr. Rickard's car, Officer -- I mean,
6 Gardner's car and Rickard's car, Officer Gardner was
7 exiting his patrol car. So there was much made about
8 the fact that Officer Plumhoff was to the side, the
9 front side of the car. Well, Officer Gardner was not to
10 the front side of the car. Officer Gardner was exiting
11 the car that was being contacted and approaching in
12 front. That is a danger -- at least a reasonable
13 officer on the scene without the benefit of hindsight,
14 without -- out of the quiet of the courtroom could
15 conclude that he was in danger of serious injury.

16 JUSTICE KENNEDY: Assuming -- assuming that
17 at some point in this case, either now or on remand,
18 it's appropriate and necessary for us to state -- set
19 forth what the rule ought to be, what effect, if any, do
20 you give to the fact that there was a passenger in the
21 car, a passenger who apparently was not involved in any
22 illegal activity?

23 MR. MOSLEY: The passenger did not make
24 Mr. Rickard less dangerous. However, I know of no legal
25 framework as of 2004 -- I do understand your question is

1 about the merits.

2 JUSTICE KENNEDY: But it makes the police
3 reaction more dangerous.

4 MR. MOSLEY: It does. But we still look at
5 the relative culpability of the driver. We look at
6 the -- I do think under the totality of the
7 circumstances, you consider the fact that there is a
8 passenger, but you also consider the -- the rights of
9 the innocent public. And it did not make Mr. Rickard
10 less dangerous. I agree with you.

11 JUSTICE SCALIA: I could see how the
12 passenger could complain, but -- but I can't see how
13 the -- how the -- the criminal fleeing felon who put the
14 passenger in danger can say, you shouldn't have shot
15 because you -- oh, you hurt my passenger. Isn't there
16 some problem of his standing to complain about that
17 problem.

18 MR. MOSLEY: Precisely. And -- and we've,
19 of course, argued that it -- it defies logic to me for
20 Mr. Rickard to have put Miss Allen in danger and then
21 invoke her safety as a reason why he -- he should be
22 free from the use of force when he is endangering the
23 innocent public.

24 JUSTICE KENNEDY: Did Allen bring a suit?

25 MR. MOSLEY: Yes, Your Honor.

1 JUSTICE KENNEDY: And was that settled out
2 of court or something?

3 MR. MOSLEY: No, Your Honor. That remains
4 in the Western District of Tennessee.

5 JUSTICE KENNEDY: Oh, it remains.

6 MR. MOSLEY: And the issue there, of course,
7 is under the Fourth Amendment, the "shocks the
8 conscience" standard.

9 But as of 2004 in the Sixth Circuit -- go
10 back to what I'm emphasizing here today in the second
11 prong -- there wasn't a -- a case that suggested that
12 the driver could invoke the passenger's safety as some
13 means to suggest that the force was excessive.

14 JUSTICE KENNEDY: Yes. I understand that.
15 Although we're going beyond the necessities of the case,
16 is the rule that the passenger can have a "shock of the
17 conscience" test and it's not limited to the Fourth
18 Amendment, even if the driver is? Is that the way it
19 works?

20 MR. MOSLEY: Well, it's interesting. The
21 circuits go various ways. The Sixth Circuit has
22 vacillated on the issue of whether there's a Fourth
23 Amendment claim of an un -- of an unintentional
24 unreasonable seizure, which to me defies logic. But
25 there is clearly a "shocks the conscience" standard

1 in -- under Lewis v. Sacramento the "intent to harm"
2 standard under the Fourteenth Amendment.

3 We were granted summary judgment -- the
4 Petitioners were granted summary judgment as to
5 Miss Allen's claim, estate's claim, in that regard, but
6 the court is now reconsidering in the Western District
7 of Arkansas the Fourth Amendment -- of Tennessee, the --
8 the Fourth Amendment claim.

9 The Respondent -- for the Respondents' part,
10 they haven't shown clearly established law violated in
11 this case by Petitioners' actions. And it's important
12 that, if not stopped in this case, I think reasonable
13 officers could conclude that Rickard would continue to
14 pose a risk.

15 Now, what's important about the prior case
16 law to 2004 in -- in the Sixth Circuit is that those
17 cases -- Smith v. Freland, Scott v. Clay County, in the
18 Eighth Circuit the case of Cole v. Bone -- those
19 officers at that time didn't shoot when somebody was
20 about to run over someone else. There was not an
21 immediate threat that somebody was -- just like in Scott
22 v. Harris. Officers often wait for a time to take
23 action when they don't see civilians around. And to
24 suggest that, you know, somebody has to almost be run
25 over before deadly force can be used in a situation

1 where serious harm or injury has been threatened would
2 throw law enforcement into chaos and I respectfully
3 submit it would probably weaken law enforcement in this
4 country.

5 I'd like to reserve the remainder of my
6 time.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Mosley.

9 Mr. Bash.

10 ORAL ARGUMENT OF JOHN F. BASH

11 ON BEHALF OF THE UNITED STATES

12 AS AMICUS CURIAE, SUPPORTING PETITIONERS

13 MR. BASH: Mr. Chief Justice, and may it
14 please the Court:

15 I think the correct disposition of this case
16 follows from two propositions: One, there is some level
17 of reckless driving in response to a police pursuit that
18 authorizes the use of deadly force, some level, at a --
19 in a high-speed chase. Second, it was not beyond debate
20 in 2004 in the relevant circuits here that the driving
21 that the undisputed facts show in this case would have
22 authorized deadly force. It might have been wrong as a
23 matter of the Fourth Amendment, but it was not clearly
24 established. Respondents have not pointed to a single
25 circuit case that would have given officers clear notice

1 that the undisputed conduct here would not authorize the
2 use of deadly force.

3 JUSTICE KAGAN: Mr. Bash, could I go back to
4 Justice Ginsburg's question, because this is an area in
5 which there's no alternative way really to develop legal
6 standards other than by doing it in these kinds of
7 cases. So if we only focus on the clearly established
8 upon case after case after case, we don't make much
9 progress in actually telling police officers where the
10 line is. So how do we do that? Why shouldn't we do it
11 here? When should we do it?

12 MR. BASH: I think the general point is
13 correct, and as we say in our brief, it would hinder the
14 development of constitutional law if courts never
15 reached the merits question. And as the Department of
16 Justice, we have an interest in that, because we
17 prosecute State officials for civil rights violations
18 and there's a similar standard of "clearly established"
19 in the criminal context.

20 Our only point here is not that courts
21 should never reach the merits in these cases; it's that
22 this is a particularly bad vehicle, particularly for
23 this Court, which even in -- in nonqualified immunity
24 cases often lets difficult constitutional issues
25 percolate among lower courts. One, the lower courts and

1 really the parties didn't distinguish between the
2 different officers here. Three officers didn't fire
3 their weapons. Maybe they're the easy case. But two
4 officers, although it might be disputed whether assaults
5 occurred, heard over the radio that assaults occurred.
6 That's what they say in their affidavits. That's at 213
7 through 225 of the JA. And you can here on the Galtelli
8 video, which is 286, that he heard the report of the
9 assaults.

10 That's a wrinkle in the constitutional
11 analysis that really hasn't been explored by the lower
12 court opinions in this case and by the briefs in this
13 case.

14 CHIEF JUSTICE ROBERTS: Mr. Bash, that
15 question about the development of the underlying law,
16 that's an issue that we faced and decided when we
17 overturned the prior rule that there was a particular
18 order of battle and you had to decide the Constitutional
19 issue first, isn't it?

20 MR. BASH: That's true, Mr. Chief Justice.
21 But what Pearson said is that, as Justice Alito said
22 earlier, it's discretionary. And one of the factors
23 Pearson urged lower courts to consider in deciding
24 whether to reach the merits question was whether this is
25 the sort of issue that doesn't often arise in a context

1 other than where qualified immunity is available, and I
2 think that's what Justice Kagan's question was getting
3 at. It can arise in some other contexts. For example,
4 if there's a policy, a municipal policy that authorizes
5 the use of force, you can oftentimes sue the
6 municipality and they're not entitled to qualified
7 immunity.

8 CHIEF JUSTICE ROBERTS: They -- they have in
9 fact sued the municipality in this case, haven't they?

10 MR. BASH: They -- they have. I believe
11 that -- well, they sued the chief of police. I think
12 they sued the municipality, too. But I don't think this
13 was pursuant to an explicit policy. In fact, some of
14 the policies at issue here -- they're in the JA at 398
15 through 412 -- I think might have been violated. So I
16 don't know this is going to be the case where they can
17 reach the merits because of municipal liability.

18 One other point on this question of the
19 development of the law. I mean, Justice Kennedy noted
20 in his dissent in *Camreta v. Greene*, even clearly
21 established cases sometimes can -- can sort of more
22 incrementally develop the law because certain principles
23 are discussed in the cases --

24 JUSTICE SOTOMAYOR: Could I ask -- could I
25 go back to a question the Chief asked earlier, which is,

1 is the use of deadly force always permitted in a
2 high-speed chase?

3 MR. BASH: We don't --

4 JUSTICE SOTOMAYOR: Let's assume a set of
5 facts that's different from here, that they had
6 surrounded the car and it had not moved. Could they
7 have done what the police officer did here, fire into
8 the car to get the guy to open up the door?

9 MR. BASH: Well, the use of deadly force is
10 justified to protect injury to the public or to the
11 officers. And if the circumstances of the case show
12 that he has, the suspect, has no means of escaping and
13 getting back on the road based on where the cars are at
14 the time of the stop --

15 JUSTICE SOTOMAYOR: Could have been in a
16 ditch or something?

17 MR. BASH: -- and there's no argument that
18 the officers were in danger -- or maybe the vehicle is
19 disabled -- no. It's not punishment for having engaged
20 in a high-speed pursuit. It's to protect people on the
21 road.

22 This case, it's pretty -- it's very clear on
23 the video that he was aiming to get back on the road.
24 The district court found that. It's undisputed. And he
25 could have kept driving if the officers hadn't fired

1 shots. Now, maybe, even taking all that into account,
2 maybe it violated the Fourth Amendment here. Maybe his
3 conduct just wasn't dangerous enough. But I don't think
4 it would have been beyond debate that it violated the
5 Fourth Amendment in 2004 in these circuits.

6 JUSTICE SCALIA: Mr. Bash, what's the
7 government's position on the jurisdictional question?

8 MR. BASH: We think there is subject matter
9 jurisdiction in this case. And let me explain both how
10 I see the Johnson framework generally and then how I
11 think it applies here. Johnson said that on an
12 interlocutory appeal in a qualified immunity case,
13 appellate courts do not have jurisdiction to review
14 questions of evidentiary sufficiency. In other words,
15 does the summary judgment record permit a jury to find a
16 certain fact?

17 I think there's two qualifications or -- or
18 caveats to that. One, in *Scott v. Harris*, although the
19 Court didn't review Johnson, it said if the facts found
20 to be disputed by the district court to be genuinely
21 disputed is blatantly contradicted by the record, in
22 particular, their video evidence like we have here, the
23 court doesn't have to credit that.

24 Second, I think there are certain sorts of
25 issues that are in this context understood to be legal

1 issues, not factual issues. So the factual issues are
2 the historical facts, how fast was he driving, what was
3 he doing, that kind of thing. But the question of what
4 level threat he posed to the public or to officers I
5 don't think --

6 JUSTICE SCALIA: Yes. I understand that.
7 But what -- what about a dispute as to the purely
8 factual issues, if there is a dispute about that? Does
9 that mean the court can't -- can't take the case?

10 MR. BASH: As I understood Johnson v.
11 Jones, it said that. Now, Johnson v. Jones was based on
12 practical considerations about conserving judicial
13 resources and the nature of the question at issue. I
14 think as you'll see -- as you see in this case and as
15 the State amicus brief in this case makes clear, lower
16 courts have struggled with that issue and it --

17 JUSTICE SCALIA: I know that. How would you
18 resolve this struggle is what I'm asking you.

19 MR. BASH: Well, like you said in Johnson v.
20 Jones, we think that Johnson adopted the incorrect
21 position, and if it was properly presented in a case, we
22 would ask that the Court reconsider the precedent. But
23 that hasn't -- that hasn't been raised here, but
24 obviously, it's within the Court's power to do so.

25 JUSTICE KENNEDY: Is your point that if

1 Johnson -- is your point that if Johnson remains on the
2 book, there's no jurisdiction?

3 MR. BASH: No, there is jurisdiction in this
4 case, because on the undisputed facts it was not clearly
5 established in 2004 in the relevant circuits that these
6 officers could not use deadly force. It's not necessary
7 to reconsider Johnson to decide this case. The
8 undisputed facts, and I'm happy to go through them, make
9 clear that it was not clearly established in 2004 in
10 this case. I took Justice Scalia to be asking a broader
11 question about how Johnson has worked in practice in the
12 lower courts.

13 JUSTICE SCALIA: Yes, but Johnson involved
14 only disputed facts. They asked this Court to resolve
15 the factual question, period. I understood Johnson to
16 say of course you can't take that. But we have here a
17 case where, although there may be disputed facts, the
18 other side would say -- or your side would say that they
19 are irrelevant.

20 MR. BASH: If the Court were to hold that on
21 a core sort of qualified immunity appeal that actually
22 raises the question about clearly established, that
23 appellate courts have jurisdiction to consider
24 subsidiary factual questions of the sort that I think
25 you're referring to, we would agree with that position.

1 JUSTICE SCALIA: Okay. And you would agree
2 that we should resolve them in the Respondent's favor to
3 the extent that the record supports that?

4 MR. BASH: Correct. It would be the normal
5 summary judgment standard. We don't -- we don't think
6 there are facts resolved in the Respondent's favor here
7 that are necessary for the outcome in the context of
8 this case.

9 JUSTICE KAGAN: Mr. Bash, could I ask you a
10 question? Putting aside the "clearly-established" prong
11 and if you were just looking at the reasonableness of
12 this conduct straight, the Fourth Amendment violation,
13 two factors, and tell me how the government thinks they
14 both play. One is the degree of force involved, the
15 fact that 15 point-blank shots were fired, and the other
16 is what Justice Kennedy referred to before, the
17 passenger in the car. So how do those two factors play
18 in the Fourth Amendment question?

19 MR. BASH: Let me start with the latter. I
20 think that the -- you can see arguments both ways on how
21 the passenger fits in. On the one hand, Scott talked
22 about the number of lives at risk and the relatively
23 culpability of people being put at risk. And so you can
24 see how the officer's actions are putting an innocent
25 person at risk. Maybe that plays in. But on the other

1 hand, as Justice Scalia said, it's a little bit weird as
2 a constitutional rule to say that the suspect put
3 somebody else's life in danger and gets a greater
4 immunity from suit.

5 JUSTICE KAGAN: It is a little bit weird.
6 But as I understand the way the lower courts have done
7 this is to say that the passenger actually doesn't have
8 a Fourth Amendment claim, so there is a "shock the
9 conscience" test, which is, of course, a very high
10 standard.

11 MR. BASH: That's true. And it's only the
12 district court so far that has ruled on the passenger's
13 Fourth Amendment claim here, and she may have an
14 argument on appeal under *Brenlan v. California* that she
15 was seized. *Brenlan* says if you pull over -- you know,
16 not through the use of force, through just an ordinary
17 stop, pull over everybody in the car, if the passengers
18 feel like they are not free to leave, they are seized as
19 well constitutionally.

20 We haven't evaluated it on the facts of this
21 case and how that applies to the sort of force used
22 here, but she may have a Fourth Amendment claim, and it
23 may make sense to filter those sorts of concerns about
24 the innocent passenger through her claim rather than
25 giving the suspect who actually put her in danger a

1 greater immunity from the use of force.

2 And I think the other question you asked me
3 about was --

4 JUSTICE KAGAN: The degree of force.

5 MR. BASH: -- the degree of force. And I
6 think that's part of the reasonableness analysis in the
7 sense that officers generally should use only as much
8 force as is necessary to end the threat, and sometimes a
9 lesser degree of force will be sufficient. But in this
10 case, at least as a matter of what the law was -- in
11 this case, the suspect probably would have gotten away
12 before the police could use less force.

13 I'll end there.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bash.
15 Mr. Smith.

16 ORAL ARGUMENT OF GARY K. SMITH

17 ON BEHALF OF THE RESPONDENT

18 MR. SMITH: Chief Justice Roberts, may it
19 please the Court:

20 This case is a classic jury question. There
21 are, contrary to the Petitioners' and amicus position,
22 several genuine material issues of fact that are
23 absolutely in dispute, and I would like to recite a few
24 of those to set the preface to respond to some of the
25 questions that have already been raised.

1 We start with the fact that there was no
2 chase at the time that these shots were fired. The
3 chase had stopped. This situation was a controlled
4 environment, not perfectly controlled,
5 but --

6 JUSTICE SOTOMAYOR: I'm sorry. I did see
7 the film, and most of the -- there were the three
8 initial shots and then the shots after the car was
9 moving away from the police officers. How could you say
10 most of those 15 shots were in a stopped, controlled
11 position?

12 MR. SMITH: The last 12.

13 JUSTICE SOTOMAYOR: The last 12. Let's --

14 MR. SMITH: The first --

15 JUSTICE SOTOMAYOR: -- divide it --

16 MR. SMITH: -- the first three were.

17 JUSTICE SOTOMAYOR: -- between 3 and 12.

18 MR. SMITH: And that's one of the points I
19 would like to make, Justice Sotomayor, is that we have
20 to separate the shooting sequences in this case.
21 Officer Plumhoff fired the initial three shots while the
22 car is stopped and is blocked on three sides.

23 JUSTICE SOTOMAYOR: So why do we have all
24 these other officers in here? They didn't fire any
25 shots, Forthman, Ellis, and Evans.

1 MR. SMITH: And that issue has not been
2 asked at the district court. It has never been raised
3 by the Petitioners in this case that they should be
4 treated separately. The Sixth Circuit -- the Sixth
5 Circuit recognized that in the footnote. And that is an
6 issue that should be presented to the district court, I
7 would submit. But if we separate --

8 JUSTICE SOTOMAYOR: Go back to -- let's take
9 the sequences. What was wrong with the 12 shots fired
10 at the car as it was driving away?

11 MR. SMITH: Okay. That's the first point of
12 what was wrong, is that there was no danger at that
13 point to the officers, and the only, the only excuse or
14 justification that the officers could utilize at that
15 time, because they were shot as the car was driving away
16 and going down the street, the danger at that point that
17 is being created by shooting is to the general public.

18 JUSTICE ALITO: Well, what do you think the
19 officers should have done at that point? What should a
20 reasonable officer do when there has been a high-speed
21 chase and the car spins out of control? And forget
22 about whether there was any attempt to ram anybody or to
23 hit to anybody with the car. The car spins out of
24 control. It's eventually surrounded by officers with
25 guns pointed at the driver demanding that he get out,

1 that he put up his hands, stop driving. They are
2 pounding on the -- on the windows of the car. And the
3 driver then begins to drive away.

4 What does a -- what do reasonable officers
5 do? Maybe they -- what they should do is to continue
6 the chase indefinitely. I don't know. What do you
7 think?

8 MR. SMITH: The first part of your question
9 brings in the first sequence when Officer Plumhoff
10 shoots the first three shots, and you reference, Justice
11 Alito, the statement that he is trying to get him to get
12 out of the car, show his hands, etcetera. The video
13 shows that that could not have happened. Officer
14 Plumhoff gets out of his car drawing his weapon and goes
15 to the car and immediately shoots. No delay, period.
16 He immediately begins to shoot.

17 JUSTICE SCALIA: The car is still trying to
18 escape. The car is not stopped and, you know, the
19 driver with his hands up. The car is still trying to
20 get out of this encirclement by the other police cars,
21 right?

22 MR. SMITH: That --

23 JUSTICE SCALIA: Is he trying to get away at
24 that point or not?

25 MR. SMITH: You can't tell because he is up

1 -- he is bumper to bumper with the Gardner car. It is
2 true that the wheels spin forward.

3 JUSTICE KENNEDY: What do you mean? He is
4 going to the police station?

5 MR. SMITH: Well, we don't know. He wasn't
6 given the opportunity. What we do know is this: There
7 is evidence in this record from which a reasonable jury
8 could conclude that he may have been trying to give up,
9 because Officer Forthman, who was the one that struck
10 him and spun him out, says that once he turned onto
11 Jackson Avenue he hit his brakes hard. Now, he didn't
12 hit his brakes hard in order to get away from him. And
13 at that point, Officer Forthman says that caused him to
14 hit him and spin him out. And at that point, the
15 momentum of his car caused the light contact between he
16 and Plumhoff, who was moving toward him, as well.

17 CHIEF JUSTICE ROBERTS: He had just -- he
18 had just exited the interstate.

19 MR. SMITH: Yes.

20 CHIEF JUSTICE ROBERTS: And so isn't that a
21 good reason for putting your brakes on? He is not going
22 to be going 100 miles an hour down the side street, is
23 he?

24 MR. SMITH: No, no, no. He is well off the
25 interstate. He has made at least four and maybe five

1 turns since he left the interstate, and he is turning
2 from north Danny Thomas to northeast on Jackson Avenue,
3 which sort of borders into it. He has already made the
4 turn before those brakes come on, according to Officer
5 Forthman. Now --

6 JUSTICE SCALIA: Mr. Smith, I was -- I was
7 surprised to read what you said in your -- in your brief
8 on page 25: At a minimum, reasonable minds could differ
9 on the issue of the Petitioners' objective
10 reasonableness. And that -- isn't that enough to decide
11 this case?

12 MR. SMITH: I respectfully submit no,
13 Justice Scalia.

14 JUSTICE SCALIA: You say that, even though
15 what they did was arguably reasonable, right --

16 MR. SMITH: That is --

17 JUSTICE SCALIA: -- immunity does not apply?

18 MR. SMITH: That statement, not prefaced
19 correctly and perhaps inartfully, is simply saying this:
20 That if you use the Rule 56 standard to view the facts
21 in the light most favorable and thus you creat a jury
22 question, reasonable minds can differ with the jury.
23 They could find for us, they could find against us. But
24 it is not to say --

25 JUSTICE SCALIA: We don't it to the jury

1 about whether, you know, whether the police officers
2 violated the Fourth Amendment or not. The rule is if --
3 if indeed there is no clear violation on their part, if
4 they had no reason to know that what they were doing
5 violated the Fourth Amendment, they are entitled to the
6 immunity. And here you have that statement at a
7 minimum, reasonable minds could differ on the issue of
8 their objective reasonableness. Do you still believe
9 that, that reasonable minds could differ on the issue of
10 their objective reasonableness?

11 MR. SMITH: It says at a minimum. And
12 I --

13 JUSTICE SCALIA: At a minimum. At a
14 minimum. I mean it could be even worse.

15 MR. SMITH: That's addressing the
16 constitutional issue, not the clearly established issue.

17 JUSTICE SCALIA: I don't care what it's
18 addressing. It's addressing a state of facts, that
19 reasonable minds could differ on the issue of
20 Petitioners' -- do you want to take that back?

21 MR. SMITH: And it -- no. Because any --

22 JUSTICE SCALIA: I think you ought to take
23 it back.

24 MR. SMITH: -- any time there is an issue,
25 any time that there is a genuine issue of material fact,

1 it can be resolved either way.

2 JUSTICE KENNEDY: Well, objective
3 reasonableness is a -- is at least a mixed issue of law
4 and fact, and it seems to me Justice Scalia is correct.
5 You -- you have the burden to show that this was a
6 clearly established standard, and you say that at a
7 minimum, reasonable minds could differ on the issue of
8 reasonableness.

9 MR. SMITH: That's not what that was
10 intended to convey. It's clearly not what that was
11 intended to convey as you can see from the entirety of
12 the brief. If I can get back now to -- to the material
13 genuine issues of fact that are in dispute, keep in
14 mind, Officer Plumhoff, who shot those first three
15 shots, did not do it to prevent the car from leaving
16 again. He said the only reason that he fired those
17 three shots was because he was standing directly in
18 front of the path of that car and he thought he was
19 going to be killed; and the video 100 percent shows that
20 that is not true.

21 JUSTICE ALITO: But I thought the
22 reasonableness of a Fourth Amendment seizure was an
23 objective question, not a subjective question.

24 MR. SMITH: It is an objective question.

25 JUSTICE ALITO: So why does it matter what

1 reason he subjectively had?

2 MR. SMITH: He has to have some
3 justification of danger under objective reasonableness
4 to make the decision to use deadly force. And he says
5 that it was because he was standing in the path of the
6 car. He wasn't. That car was bumper to bumper against
7 the Gardner car.

8 JUSTICE ALITO: Well, I know. But if he --
9 he says I did it because I thought he was going to run
10 me over. But an objective officer looking at the
11 situation would say that the use of deadly force is
12 necessary here to prevent this chase from continuing on
13 the interstate and endangering other motorists and their
14 passengers. So if that were the situation, wouldn't
15 that mean that was a reasonable seizure?

16 MR. SMITH: I believe it would not be.

17 JUSTICE ALITO: Initiated by the fact by the
18 officer who used the force had a different motive?

19 MR. SMITH: No. I'd respectfully submit,
20 Justice Alito, that it would not because if that's all
21 there was, there were other alternate methods to stop
22 that car from leaving. It wasn't the reason that he did
23 it; but if you assume that you can analyze it on that
24 basis, there were several alternate ways to prevent that
25 car from leaving.

1 JUSTICE SCALIA: Such as? What?

2 MR. SMITH: You're standing right there
3 beside the car, you can -- you can disable the car with
4 the gun. You can shoot the tires. You have --

5 CHIEF JUSTICE ROBERTS: Are officers -- are
6 officers trained to use their weapons to shoot tires?

7 MR. SMITH: They're trained to -- they are
8 trained to use weapons and they are trained to use --
9 these officers trained to use all safer alternatives
10 before using deadly force.

11 CHIEF JUSTICE ROBERTS: Well, are they
12 trained -- are they trained to use their weapons to
13 shoot out the tires of fleeing cars? My understanding
14 is that that's not appropriate police behavior.

15 MR. SMITH: It is more appropriate, I would
16 submit, than -- than shooting the person. But they also
17 have other alternatives here. He's blocked on three
18 sides. The only thing he can do is back up. There are
19 four cars to his left -- I mean, excuse me, to his
20 right. They have the ability to block him from the
21 rear. There were -- there were alternative means. They
22 could have done --

23 JUSTICE KAGAN: Mr. Smith --

24 JUSTICE SCALIA: They didn't block him. He
25 got away. How can you say they had the ability to block

1 him? He got away, didn't he --

2 MR. SMITH: But they -- my point is they
3 could have. The other thing they could have done is
4 they could have done Scott V. Harris -- at low speed,
5 you've got four cars to his right, two of them occupied;
6 simply move into the car and hit it. There were other
7 ways to stop --

8 JUSTICE BREYER: I mean, when I look at the
9 film, I thought well, sure, he's going back to the
10 highway. You say we want to show that the policeman
11 knew he wasn't -- knew he wasn't. I didn't see any
12 evidence showing that preferred or otherwise. Though
13 what you said is there; it doesn't show he knew that the
14 guy wasn't going back to the car.

15 Your second question you raised, which I
16 think is a very good question, why didn't they shoot the
17 tires out? And my answer to that is I don't know. I
18 don't know.

19 I've heard the same thing that Chief Justice
20 has heard, and we've also seen the thing, and I -- of
21 course, it raises just the question you say. But since
22 I don't know the answer, and since there's no evidence
23 in the answer, and since there are no cases dealing with
24 the answer, I begin to think I don't see how, you know,
25 you can say it was clearly established that they had to

1 shoot the tires out. It's a question I don't know the
2 answer to. What am I supposed to do?

3 MR. SMITH: Well, it is clearly established
4 that the danger itself has to be the justification for
5 the deadly force. That implies alternative --

6 JUSTICE SCALIA: That's too general a rule,
7 and our cases hold that you cannot appeal to a very
8 general rule to say the law is clear. You have to show
9 that the law as applied to these circumstances was
10 clear. And there's nothing about shooting out tires
11 that I know of.

12 MR. SMITH: Well, shooting out fires,
13 blocking, PIT maneuver as was discussed in Scott v.
14 Harris, police are trained in alternative methods.

15 JUSTICE BREYER: Is there -- what is there
16 in the record? When I saw the film, I saw your point.
17 You have a point. But what I can't quite see is how it
18 was a clearly established one. Maybe this is the case
19 where you ought to go, and if you're suing somebody else
20 and introduce a lot of evidence that shows that they
21 should shoot the tires out; and then there could be a
22 decision on that. It comes up every so often. But am I
23 right in thinking so far, there just hasn't been a case
24 on it? There hasn't been an effort to do that. There
25 hasn't -- so I'm left in this uncertainty, which

1 unfortunately for you means it wasn't clearly
2 established.

3 MR. SMITH: Well, the issue still -- the
4 threshold issue is the choice of using deadly force
5 based on the danger. In the first sequence, the danger
6 is not established with that officer because he is
7 standing beside that car. And remember this: Before
8 Officer Plumhoff gets to that car, Officer Evans is
9 already there. He didn't see the danger. He's got his
10 gun pulled; he has hit it against the windshield; and he
11 didn't see the need to shoot and he had an opportunity
12 before Officer Plumhoff did, and he never shot.

13 CHIEF JUSTICE ROBERTS: Let's say there's
14 only one police officer chasing this fellow. The same
15 thing happens. You know, he turns off the interstate
16 after the 100-mile-an-hour chase on the highway and
17 stops; the officer gets out of the car; he starts taking
18 away again. Would it be appropriate for that officer to
19 apply lethal force to prevent the vehicle from resuming
20 the high-speed chase?

21 MR. SMITH: It is going to depend, as this
22 Court has said and other courts have said many times, on
23 the factual context at that time and --

24 CHIEF JUSTICE ROBERTS: I've given you all
25 the facts. I've given you all the pertinent facts. Is

1 it appropriate for that officer to apply lethal force?

2 MR. SMITH: The one fact that we haven't
3 talked about is where he is at the time. Are we on an
4 isolated country road? Are we at a dead end where he's
5 got him surrounded?

6 CHIEF JUSTICE ROBERTS: We're at the --
7 let's start with the same place that he was at in this
8 case.

9 MR. SMITH: And -- and the scenario is, as I
10 understand it, we've had the same chase --

11 CHIEF JUSTICE ROBERTS: Everything is the
12 same except there's one police officer and he goes off
13 the interstate at that point; the same thing happens,
14 but there's only one. And either -- the officer gets
15 out of the car and at that point, the fellow takes off
16 again resuming the chase, endangering the -- the public
17 by -- by doing so. Is -- at that point, can the officer
18 apply lethal force?

19 MR. SMITH: And since we've got two
20 sequences here, I'm assuming we're talking about the
21 second sequence, and the answer would clearly be no,
22 because --

23 CHIEF JUSTICE ROBERTS: Not two sequences
24 whatever. Just as I explained. Both cars are stopped;
25 the officer gets out of the car; at that point, the

1 driver that led the chase takes off again. That's all
2 the facts you need to know.

3 MR. SMITH: In this case, the first three
4 shots occurred --

5 CHIEF JUSTICE ROBERTS: No, no. Not this
6 case. The case that I have hypothesized.

7 MR. SMITH: But in the -- in the
8 hypothetical case, if you assume that he takes off, the
9 answer would still be no --

10 CHIEF JUSTICE ROBERTS: No.

11 MR. SMITH: -- because in order to shoot
12 him, you are shooting at a heavily populated residential
13 area, at oncoming traffic and you're endangering way
14 more people by the ballistics of 15 shots and the
15 potential for killing the driver who can do damage with
16 the vehicle.

17 CHIEF JUSTICE ROBERTS: Is there any
18 circumstance in which lethal force is appropriate once
19 the officer has stopped the car?

20 MR. SMITH: Certainly.

21 CHIEF JUSTICE ROBERTS: Well, when?

22 MR. SMITH: Well, if the person is armed.
23 If they've brandished a --

24 CHIEF JUSTICE ROBERTS: No. Doesn't
25 know --

1 MR. SMITH: If they drive straight at the
2 officer. There's any number of circumstances where
3 clearly, lethal force would be appropriate. No question
4 about that.

5 JUSTICE ALITO: What if the situation is
6 that the officer has -- has this choice. After a
7 high-speed chase, after attempting to persuade the
8 driver to get out of the car, the officer has one -- has
9 these choices: Allow the chase to continue or use
10 lethal force.

11 MR. SMITH: It's going --

12 JUSTICE ALITO: Your answer is they have to
13 let the -- they -- they can use lethal force? They have
14 to allow the chase to continue? What? Which?

15 MR. SMITH: Depends on the context of the
16 circumstances and whether the danger is sufficient to
17 justify the use of deadly force.

18 JUSTICE SCALIA: The danger is he is going
19 to be going 100 miles an hour, okay, that the chase up
20 to now has been the way your client's chase was, in
21 which he endangered a lot of other people, forced cars
22 off the road, and so forth. That's -- that's the --
23 that's the hypothetical. Okay. That person is about to
24 drive away and continue that kind of public-endangering
25 behavior. Can the policeman shoot or not.

1 MR. SMITH: You could not as he is driving
2 away because now you're endangering -- you're actually
3 endangering the people that you say you're trying to
4 protect.

5 JUSTICE SCALIA: No, no. There's nobody
6 around, just -- just him.

7 MR. SMITH: If there is nobody around --

8 JUSTICE SCALIA: There is nobody around.
9 Can -- can they shoot at him to stop him from
10 endangering the public again?

11 MR. SMITH: Under Scott v. Harris, I would
12 say that -- that -- that you could because in Scott they
13 had the road clear, blocked --

14 JUSTICE SCALIA: Of course, we -- you
15 know --

16 MR. SMITH: -- and they weren't going to
17 endanger anyone else.

18 JUSTICE SCALIA: You're just not willing to
19 give answers.

20 But we've been discussing this as though
21 that's the question, what should the policeman do? But
22 that's not the question. The question is, was there
23 clearly established law that made it apparent that this
24 was improper police conduct? That's the question. Not
25 what is proper police conduct, but was there clearly

1 established law that this was not proper police conduct?

2 What's your best case for that?

3 MR. SMITH: Smith v. Cupp, McKaslin v.
4 Wilkins, going back to Garner, and all of the case --

5 JUSTICE SCALIA: So some of --

6 JUSTICE SOTOMAYOR: How do you distinguish
7 Brosseau?

8 MR. SMITH: In several ways. In Brosseau,
9 which held, by the way --

10 JUSTICE SOTOMAYOR: This is the single --

11 MR. SMITH: And -- and -- and --

12 JUSTICE SOTOMAYOR: This is a single police
13 officer trying to stop a fleeing suspect whose only
14 activity was a reported fight in a residential
15 neighborhood.

16 MR. SMITH: Yes. And it's distinguishable
17 in several ways, and it emphasizes the need for an
18 imminent threat of harm to other people who were in the
19 path, which happened to be four people in two cars that
20 the officers placed there and other officers also in the
21 path of the egress.

22 Also that officer had tried alternate means.
23 She tried to get the keys. She tried to arrest him.
24 She actually hit the guy with a gun before she shot --

25 JUSTICE SOTOMAYOR: But that goes back --

1 MR. SMITH: -- and there was no passenger.

2 JUSTICE SOTOMAYOR: That goes back to my
3 12-shot sequence, which I still have a problem with.

4 In answering Justice Alito's question, he
5 has already gone 100 miles an hour when he -- the car
6 moved away, even though that part of the street was
7 deserted. Why would a reasonable officer not be
8 suspicious that more reckless driving is going to
9 occur --

10 MR. SMITH: Well, he --

11 JUSTICE SOTOMAYOR: -- to escape them when
12 they finally get back into their cars?

13 MR. SMITH: It -- it may be more suspicious,
14 but the decision at that point is going to endanger the
15 life of the passenger, and those bullets did not
16 discriminate. Those shots with the passenger in the car
17 have to be viewed in terms of the officer's judgment,
18 not Mr. Rickard being able to take advantage of the fact
19 that they occurred.

20 But when you see that video, those 12 shots
21 are fired, one, after he has been shot three times, but
22 also they were fired where the ballistic circumstance
23 could bring the bullets to civilians, residents. That's
24 a heavily populated area and a heavily traveled street.

25 JUSTICE SCALIA: Was she trying to get out

1 of the car when -- when he was trapped there and, you
2 know, surrounded by the police car?

3 MR. SMITH: No indication of that.

4 JUSTICE SCALIA: She didn't try to get out
5 of the car.

6 I mean, for all the police knew, she --
7 he -- she was a -- a cohort of his. He fled. Why was
8 he fleeing, by the way? He just didn't want to --
9 didn't want to get a ticket for the broken headlight?

10 MR. SMITH: Yeah, there is no record about
11 that.

12 JUSTICE SCALIA: No -- I thought that there
13 was some indication that he had drugs.

14 MR. SMITH: There was contraband in the car.
15 There was contraband in the car.

16 JUSTICE SCALIA: Yes. So that's probably
17 why he was fleeing.

18 MR. SMITH: Well --

19 JUSTICE SCALIA: And she might have been a
20 cohort of that. Do -- do -- are the police supposed to
21 know that? She made no effort to get out of the car.

22 MR. SMITH: I don't know that she had in the
23 four seconds' time to get out of the car before the
24 shooting began, but --

25 JUSTICE SCALIA: Well, I'd think you'd think

1 pretty quick in a situation like that, where this guy
2 has been driving you on the highway at 100 miles an
3 hour, swerving into and away from police cars. Boy, I
4 would get out of that car so fast.

5 CHIEF JUSTICE ROBERTS: What -- what is the
6 legal significance of the number of shots? Is -- is
7 this case any different because 15 shots were fired as
8 opposed to one or two?

9 MR. SMITH: I think primarily only because
10 on that second sequence, you're shooting at the public
11 just as much as you're shooting at the driver of that
12 car.

13 JUSTICE KENNEDY: But I'm not clear how that
14 works either. Suppose the police are very good shots,
15 it doesn't hit the public, it just hits the assailant.
16 Is it still unreasonable because it wasn't a public
17 place? And does that mean that the fleeing felon is
18 much better off if he goes to a public place?

19 MR. SMITH: I think all --

20 JUSTICE KENNEDY: I -- I don't understand
21 how -- how this bears on -- on the -- on the question of
22 whether or not -- as to the reasonableness as to the
23 driver.

24 MR. SMITH: The cases that have sustained
25 qualified immunity have done so in part, and in many

1 cases large part, because of the propriety of the
2 decision based on the protection of innocent people.

3 But the converse of that has to be true as
4 well, that you can't make a judgment to shoot just to
5 stop someone fleeing when you may be endangering the
6 lives of the innocents who, in this case, could be
7 injured or killed, not only by the bullets, but also by
8 the car.

9 If you --

10 CHIEF JUSTICE ROBERTS: But even -- well,
11 again, what standing does the driver have to complain
12 about the threat to civilians who are in the area?

13 MR. SMITH: It -- it -- the question is
14 different than that, Chief Justice Roberts. The
15 question is, when the officers know that there is a,
16 quote, "innocent" or another person in the car, that
17 should affect their judgment. That should be a factor
18 in the determination of whether or not to start pulling
19 that trigger.

20 It's not -- it's not that Mr. Rickard gets
21 the advantage of it. It's that it should affect the
22 officer's judgment.

23 JUSTICE SCALIA: Of course it's a factor,
24 but is it a factor that your clients can take advantage
25 of? That's the issue.

1 I mean, maybe you -- you can demote the
2 policeman who did that. Maybe even a lawsuit by --
3 by -- by the colleague in the car would be successful.

4 But the issue is whether your client has any
5 reason to complain about that, your client who caused
6 the whole thing, who caused the shooting in the last
7 analysis.

8 MR. SMITH: There is no question that
9 Mr. Rickard's conduct was unreasonable and he has
10 culpability, but the issue is not him taking advantage
11 of it. But the threshold issue is should they have used
12 deadly force in that circumstance. And that passenger
13 is there. We can't take away the fact that that
14 passenger is there. And it should have been a factor in
15 the reasonable officer's judgment about whether or not
16 to initiate deadly force.

17 JUSTICE GINSBURG: What do you say clearly
18 establishes that? You -- you say the passenger is
19 there. What case tells a police officer when there is a
20 passenger no lethal weapon?

21 MR. SMITH: There is no case that says
22 specifically if there is a passenger there don't use a
23 weapon. But virtually every case talks about the -- the
24 impact of using lethal force to do it or not to do it
25 when relative to innocents, third parties.

1 It is just -- that is an obvious part of the
2 judgment that should be made, is that you don't endanger
3 those other than the suspect, and you don't shoot or use
4 deadly force on the suspect if it is going to endanger
5 others.

6 JUSTICE ALITO: As to the number of shots,
7 even with all the shots that were fired, Mr. Rickard
8 still was able to drive away for a short distance.

9 MR. SMITH: Yes.

10 JUSTICE ALITO: Isn't that right?

11 MR. SMITH: Correct.

12 JUSTICE ALITO: So what does that do to the
13 argument that too many shots were fired?

14 MR. SMITH: It's not so much that it was too
15 many. It is that second phase of shots that are -- if
16 they do what they are intended to do, and by the way
17 they did, then you would have created a moving missile
18 by the car because you're going to have the dead driver
19 that can endanger other people, and you're shooting in
20 the direction of other people. Both those factors
21 should have militated against the second phase of shots.

22 CHIEF JUSTICE ROBERTS: There are two ways
23 in which the public is endangered. You're -- the point
24 you're making is that if the police are firing somebody
25 in the public might get hit fired by a bullet. The

1 point the officers make, that if you allow him to escape
2 and -- and continue a high-speed chase, there are other
3 people, innocent people, who might get injured or killed
4 by the car.

5 Now, how were the officers supposed to
6 decide on the spot whether there is a greater danger
7 that people are going to get hit by a stray bullet or
8 there is a greater danger that people are going to get
9 hit by the car?

10 MR. SMITH: Or, Chief Justice Roberts, a
11 greater danger by a car driving down the road with a
12 dead driver behind the wheel, totally out of control,
13 and that almost happened in this case, as you see in the
14 video. There was an oncoming car just before he veered
15 off to the left and hit that house.

16 CHIEF JUSTICE ROBERTS: So you're saying
17 they can't apply lethal force because they may not be
18 successful in -- in killing the driver?

19 MR. SMITH: Using it on a moving car in a
20 circumstance like that is --

21 CHIEF JUSTICE ROBERTS: I thought the car
22 wasn't moving when the shots were first fired?

23 MR. SMITH: On the second -- in the second
24 sequence, the car is moving.

25 JUSTICE SCALIA: Okay. This -- this is a

1 new principle. You think it is clearly established law,
2 clearly established law, that you cannot shoot to kill a
3 driver whose -- whose car is moving? Is that it?

4 MR. SMITH: If --

5 JUSTICE SCALIA: Is that the principle you
6 say is clearly established?

7 MR. SMITH: If doing so --

8 JUSTICE SCALIA: My goodness, they do it all
9 the time. You watch the movies about bank robberies,
10 you know, it happens all the time. Are these movies
11 unrealistic? You cannot shoot to kill somebody in a
12 moving car.

13 MR. SMITH: In a --

14 JUSTICE SCALIA: And that is -- that is not
15 just your view. It is, you say, clearly established
16 law.

17 MR. SMITH: That was even referenced from --
18 in the Scott case. A distinction between using the type
19 of force used in Scott, to ram the vehicle to take it
20 off the road versus shooting somebody --

21 JUSTICE SCALIA: And that's what Scott
22 holds, that you can --

23 MR. SMITH: It doesn't hold that, but it
24 references that distinction in Vaughan v. Cox.

25 JUSTICE SCALIA: What does hold it?

1 Sir, you are arguing that the law is clearly
2 established. That's the case you have to make. You
3 can't just get up here and say you shouldn't shoot at
4 somebody in a moving car to kill. Maybe you shouldn't.
5 What is the clearly established law that -- that
6 policemen should have known?

7 MR. SMITH: Vaughan v. Cox talks about not
8 shooting someone in a moving car and that is re --

9 JUSTICE SCALIA: Talks about it?

10 MR. SMITH: And Scott.

11 JUSTICE SCALIA: Talks about it?

12 MR. SMITH: And that's -- which brings up a
13 good point. I mean, the -- the cases have uniformly
14 held that the officers are not held to the standard of
15 reading constitutional law, which invites the inquiry
16 well, how are they going to know what's clearly
17 established law? That has to be from training; and in
18 this case, the policy and procedures, which are in the
19 Joint Appendix, which closely tracks Graham. Closely
20 tracks Garner. Closely tracks any number of other
21 cases, including from their own circuit, McCaslin, which
22 held that qualified immunity did not apply in a
23 situation where the officer felt they why justified in
24 shooting to avoid another escape.

25 And those are the policies and procedures

1 that are applicable of the state of knowledge of these
2 officers when we look at clearly established law and all
3 of those authorities which support the fact that
4 qualified immunity should not attach in this case under
5 these circumstances.

6 JUSTICE GINSBURG: What about the statement
7 that there was a police manual that says once you
8 authorize to shoot, you can continue shooting until the
9 job is done?

10 MR. SMITH: I don't quarrel with that except
11 to the extent, in this case, in that second sequence,
12 you're endangering other people other than the person
13 that you're trying to stop. That's -- that's the
14 distinction.

15 Before my time is through, I do want to go
16 back to the jurisdictional question, because in the end
17 in this case, the interlocutory was taking nothing more
18 than a challenge to the evidentiary sufficiency, the
19 facts necessary to consider both prongs. The
20 constitutional prong and the clearly established prong
21 are the same facts. There is a blending, though the
22 consideration may have to be different.

23 JUSTICE SCALIA: What facts do you contest
24 and we'll just subtract them from the facts that we
25 consider. Which facts do you contest? That he was

1 driving 100 miles an hour, swerving on the road, swerved
2 towards police cars, almost cause another car to go --
3 that's -- you don't contest that.

4 MR. SMITH: We challenge that the car was a
5 danger at the time the shooting stopped. We challenge
6 that there is any danger --

7 JUSTICE SCALIA: That's not a fact.
8 That's -- that's a conclusion. Whether the car was a --
9 was a danger is a legal conclusion, not a fact. What
10 facts do you -- do you say are contested?

11 MR. SMITH: If we talk first about the chase
12 part before the stop --

13 JUSTICE SCALIA: Right.

14 MR. SMITH: -- then there is contested facts
15 about whether or not there were assaults because the
16 video does not confirm that, and the officer's own
17 testimony was --

18 JUSTICE SCALIA: Okay. We'll assume no
19 assaults. What else?

20 MR. SMITH: Then when we get to the stop,
21 they say that he rammed the cars three times. We
22 clearly contest that.

23 JUSTICE SCALIA: All right. We'll eliminate
24 the ramming. What else?

25 MR. SMITH: They -- they contend that

1 Officer Ellis was in danger and that that was a
2 justification for the shooting. Officer Ellis --

3 JUSTICE SCALIA: Let's assume -- we'll
4 assume he was not in danger. Okay.

5 MR. SMITH: Officer -- we contest that
6 Officer --

7 JUSTICE SCALIA: But we -- we are still left
8 with a very dangerous man careening down the road, who
9 is surrounded by police cars and still tries to get away
10 to continue his careening. You can eliminate all those
11 minor facts that you're contesting and it's still a very
12 dangerous situation.

13 MR. SMITH: And he didn't? He did not make
14 the move to get away until after he'd been shot three
15 times.

16 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
17 Mr. Mosley, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF MICHAEL MOSLEY

19 ON BEHALF OF THE PETITIONERS

20 MR. MOSLEY: Very briefly.

21 JUSTICE SOTOMAYOR: Just to clarify one
22 thing, Mr. Mosley. When were the three shots fired?
23 When he had moved backwards?

24 MR. MOSLEY: The three shots were fired, if
25 you look at dash-cam Unit 286, at 12:17:42 is where the

1 strikes of the car begin and the the shot begins -- the
2 first shot of the three begins at 12:17:45, three
3 seconds after the first contact was made.

4 JUSTICE SOTOMAYOR: I'm sorry. I don't know
5 that you answered my question.

6 MR. MOSLEY: I'd like to.

7 JUSTICE SCALIA: We don't care about the
8 seconds.

9 MR. MOSLEY: Okay.

10 JUSTICE SCALIA: Place it in the context.

11 JUSTICE SOTOMAYOR: Yes. I don't care about
12 the seconds. I just asked the car -- I thought the
13 shots were fired after he had moved backwards away from
14 where the officers had initially stopped him.

15 MR. MOSLEY: That's correct, Your Honor.
16 And then he moved backwards. He was next to the
17 building. He goes forward briefly three times. You can
18 characterize it however you want to. Unit 286 shows it
19 very clearly. Then shots are fired after the beginning
20 of that and then he backs out and more shots are fired
21 as he backs out and drives away.

22 JUSTICE SOTOMAYOR: Got it.

23 MR. MOSLEY: The Petitioners did raise in
24 their brief in support below that Officers Forthman,
25 Officers Ellis and Officers Evans did not use deadly

1 force. We clearly raised it in our brief in support and
2 it was not addressed and it was not addressed at the
3 Sixth Circuit either, and it's fantastical to suggest
4 otherwise.

5 Cole v. Bone, Justice Breyer, does show that
6 shooting tires doesn't work. It only creates more
7 dangerous -- a more dangerous situation. In that case,
8 they did shoot out the tires, in the Eighth Circuit, and
9 the -- the vehicle kept careening on. It can create
10 a -- a ricochet. Now, that's not in the record, but
11 Cole v. Bone is certainly cited in our brief.

12 Otherwise, unless there's any further
13 questions --

14 JUSTICE KAGAN: Mr. Mosley, just out of
15 curiosity, does -- does this police department actually
16 have rules for what a police officer is supposed to do
17 when there's a fleeing vehicle? Were they -- were they
18 acting in accordance or not in accordance with certain
19 rules that the police department had?

20 MR. MOSLEY: Justice Kagan, at Volume II of
21 the -- the Joint Appendix, there are such rules. I
22 submit to you that they were acting substantially in
23 compliance with those rules.

24 JUSTICE KAGAN: What were they? I mean, I
25 don't know, and I --

1 MR. MOSLEY: Well, they're fairly -- fairly
2 lengthy. But there's very specific rules on engaging in
3 high-speed pursuits, very specific rules in using -- in
4 the use of deadly force. And I submit that given the
5 rapidly-evolving circumstance in this case, these
6 officers did the best they could and were compliant with
7 those rules, although those rules do not set a
8 constitutional standard. This Court does.

9 If there's no further questions, I'd like to
10 rest.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Counsel, the case is submitted.

13 (Whereupon, at 11:16 a.m., the case in the
14 above-entitled matter was submitted.)

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