

# THE QUALIFIED IMMUNITY DEFENSE IN THE ELEVENTH CIRCUIT AND ITS APPLICATION TO EXCESSIVE FORCE CLAIMS

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## I. INTRODUCTION

On or about June 11, 1993, at approximately 7:00 p.m., defendant, while in pursuit on foot of plaintiff, commanded plaintiff to stop and lie down on the ground. Plaintiff raised his hands and complied. Defendant then approached plaintiff and brutally assaulted and severely beat plaintiff with defendant's fists and/or some weapon or instrument, the exact nature of which is unknown to plaintiff. At the time of the beating, plaintiff was unarmed, was not the physical equivalent of defendant and did not use, or threaten to use, force upon defendant. As a result, the brutal force used upon plaintiff was unnecessary to effect his detention, was unreasonable and totally without justification.

Typically, factual allegations of this sort are followed in a Complaint by claims for damages under 42 U.S.C. § 1983, 42 U.S.C. § 1981 and state tort law. As evidenced by the "Rodney King" case, which concluded with a judgment for the plaintiff in the amount of \$3,816,535,<sup>1</sup> multi-million dollar verdicts are quite possible, perhaps explaining the surge in the filing of both meritorious and obviously frivolous claims of this type.

Fortunately for law enforcement officers, there are several defenses available that can be used to defeat excessive force claims. One "powerful" defense to section 1983 and section 1981

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1. *King v. City of Los Angeles*, 1994 WL 847571 (T.D. Cal. Jury).

claims generally is the doctrine of qualified immunity.<sup>2</sup> Qualified immunity protects all government officials and employees, including police officers, who are being sued under section 1983 or section 1981 in their individual, not official, capacities for actions within the scope of their discretionary authority taken while acting under color of state law.<sup>3</sup> It applies to monetary damages relief—including claims for costs, expenses of litigation and attorney fees,<sup>4</sup>—but not to declaratory and equitable relief.<sup>5</sup>

The underlying policies and purposes of the qualified immunity defense have been described by the Eleventh Circuit's chief

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2. *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372 (11th Cir. 1997) (applying defense to § 1981 and § 1983 claims, but not § 1985(3) claims); *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989). *See also* *Heggs v. Grant*, 73 F.3d 317, 319 n.5 (11th Cir. 1996) (holding that the defense does not apply to state law claims); *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996) (referring to the defense as a "strong shield"); *D'Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995) (same); *Bates v. Hunt*, 3 F.3d 374, 379 (11th Cir. 1993) (stating that "[t]he qualified immunity defense tightly constrains causes of action under Section 1983"); *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 793 (11th Cir. 1992) (holding that qualified immunity is not a defense to actions under § 1985(3)); *Andreu v. Sapp*, 919 F.2d 637, 640 (11th Cir. 1990) (same); *Hamm v. Powell*, 874 F.2d 766, 771 (11th Cir. 1989) (holding that qualified immunity applies to substantive due process claims based on excessive force); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1322 (11th Cir. 1989) (same).

3. *Harrell v. Decatur County*, 22 F.3d 1570, 1578 (11th Cir. 1994) (Dubina, J., dissenting), *vacated and dissent's reasoning approved on reh'g*, 41 F.3d 1494 (11th Cir. 1995); *Burrell*, 970 F.2d at 790 n.13 (stating that "only government officials acting under color of state law may assert qualified immunity"); *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1565 (11th Cir. 1992) (Edmondson, J., dissenting), *vacated and dissent's reasoning approved en banc*, 998 F.2d 923 (11th Cir. 1993). *See also* *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1185 n.16 (11th Cir. 1994) (noting that municipalities are not entitled to qualified immunity); *Rivas v. Freeman*, 940 F.2d 1491, 1494 (11th Cir. 1991) (same; holding qualified immunity defense not available); *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (same); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (holding that a suit against governmental actor in his "official capacity" is treated as a suit against the entity of which he is an agent); *Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (noting that municipalities are not entitled to qualified immunity).

4. *D'Aguanno*, 50 F.3d at 881.

5. *Rogers v. Miller*, 57 F.3d 986, 989 n.4 (11th Cir. 1995); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1524 n.9 (11th Cir. 1995); *Swint v. City of Wadley*, 51 F.3d 988, 1001 (11th Cir. 1995); *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir. 1993). *See also* *Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 348 n.7 (1st Cir. 1995) (citing cases indicating that § 1981 claims are also subject to the defense of qualified immunity).

architect of that defense, Judge Edmondson, as follows:

Claims for money damages against government officials in their individual capacity involve substantial costs not only for the individual official—who incidentally may be innocent—but for society in general. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”<sup>6</sup>

The qualified immunity defense is the public servant’s (and society’s) strong shield against these dangerous costs. Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.<sup>7</sup>

...

When public officials do their jobs, it is a good thing. Qualified immunity is a real-world doctrine designed to allow local officials to act (without always erring on the side of caution) when action is required to discharge the duties of public office.<sup>8</sup> For many public servants, a failure to act can have severe consequences for the citizenry. For example, if child welfare officials fail to act, the death or serious permanent injury of a child could be the result.

As we decide this case, we cannot forget the purpose of qualified immunity. The qualified immunity defense functions to prevent public officials from being intimidated—by the threat of lawsuits which jeopardize the official and his family’s welfare personally—from doing their jobs.<sup>9</sup>

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6. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted).

7. *Harlow*, 457 U.S. at 817-19.

8. See *Davis v. Scherer*, 468 U.S. 183, 196 (1984) (“[O]fficials should not err always on the side of caution.”).

9. *Foy v. Holston*, 94 F.3d 1528, 1532 and 1534 (11th Cir. 1996). See also *McMillian v. Johnson*, 88 F.3d 1554, 1562 (11th Cir. 1996) (noting that qualified immunity enhances job performance), *modified*, 101 F.3d 1363 (11th Cir. 1996); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1556 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994) (same); *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir. 1992) (same); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1235 (11th Cir. 1992) (same); *Ansley v. Heinrich*, 925 F.2d 1339, 1345

The immunity defense is especially important in the context of street-level police work, which frequently requires quick and decisive action in the face of volatile and changing circumstances<sup>10</sup> by those who are "irresistible targets for meritless lawsuits."<sup>11</sup>

A decision on qualified immunity is separate and distinct from the merits of the case. "Immunity contemplates exemption from liability that would otherwise exist on the merits."<sup>12</sup> Moreover, "[t]he public's strong interest in avoiding government disruption requires that qualified immunity be an immunity from [suit], not just immunity from liability."<sup>13</sup>

The expectation is that the government official will almost always win based on this defense. As the Eleventh Circuit has stated, "[t]hat qualified immunity protects government actors is the usual rule; only in *exceptional* cases will government actors have no shield against claims made against them in their individual capacities."<sup>14</sup> Furthermore, "qualified immunity protects 'all [government actors] but the plainly incompetent or those who knowingly violate the law."<sup>15</sup> This Article will dis-

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(11th Cir. 1991) (same); *Jones v. Preuit & Mauldin*, 851 F.2d 1321, 1325 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002 (1989) (same).

10. *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994) (Wilkinson, J., concurring) (citations omitted); *Harrell v. Decatur County*, 22 F.3d 1570, 1578 (11th Cir. 1994) (Dubina, J., dissenting), *vacated and dissent's reasoning adopted on reh'g*, 41 F.3d 1494 (11th Cir. 1995).

11. *Winfield v. Bass*, 106 F.3d 525, 541 (4th Cir. 1997).

12. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1151 (11th Cir. 1994) (en banc).

13. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (explaining that qualified immunity is "immunity from suit rather than a mere defense to liability"); *Post*, 7 F.3d at 1556.

14. *Lassiter*, 28 F.3d at 1149 n.2 (noting additionally that "qualified immunity *almost always* applies in damage claims against government actors") (emphasis added). *Accord* *Harris v. Board of Education of the City of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997) (stating that qualified immunity applies "[i]n all but the most exceptional cases"); *McMillian*, 88 F.3d at 1562 (same); *Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176, 1184 (11th Cir. 1994) (holding that "[q]ualified immunity *usually* protects government actors in their individual capacities from civil claims against them."); *Alexander v. University of North Florida*, 39 F.3d 290, 291 (11th Cir. 1994) (noting that "qualified immunity for government officials is the rule, liability and trials for liability the exception").

15. *Lassiter*, 28 F.3d at 1149 n.2 *See also* *Suissa v. Fulton County*, 74 F.3d 266,



cuss opinions of the United States Supreme Court and of the United States Court of Appeals for the Eleventh Circuit regarding the qualified immunity defense and its application to section 1983 excessive force claims based on the use of force in the course of an arrest, investigatory stop, or other seizure.

## II. SECTION 1983 AND THE CONSTITUTIONAL VIOLATION

The typical procedural vehicle for asserting claims of constitutionally excessive force is 42 U.S.C. § 1983, which states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>16</sup>

"[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"<sup>17</sup> To recover, a section 1983 plaintiff must prove two elements: (1) that the conduct complained of was committed by a person acting under state law; and (2) that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.<sup>18</sup>

In excessive force cases it is normally undisputed that the police officer acted under color of state law when using force against the plaintiff. Thus, these cases normally boil down to whether the conduct violated the Constitution and whether qualified immunity bars the plaintiff's claim.

The Fourth Amendment to the United States Constitution is the primary source of constitutional protection in the area of excessive force because it guarantees citizens the right "to be

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269 (11th Cir. 1996) (same) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

16. 42 U.S.C. § 1983 (1994).

17. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

18. *Almand v. DeKalb County*, 103 F.3d 1510, 1513 (11th Cir. 1997); *Skinner v. City of Miami*, 62 F.3d 344, 347 (11th Cir. 1995); *Whitehorn v. Harrelson*, 758 F.2d 1416, 1419 (11th Cir. 1985).

secure in their persons . . . against unreasonable . . . seizures" of the person.<sup>19</sup> This obviously does not prohibit law enforcement officials from ever using force in connection with a stop or an arrest. Instead, it permits the use of force depending on the circumstances and the degree of force that will be involved. The court-made rules to be applied in determining whether a constitutional violation has occurred currently differ in terms of their degree of specificity depending upon whether non-deadly force was used, or whether deadly force was used. As will be discussed in Part III, the viability of a qualified immunity defense, especially in cases involving non-deadly force, is directly related to this lack of specificity.

### A. *Non-Deadly Force Standards*

In *Graham v. Connor*,<sup>20</sup> the Supreme Court announced a vague "objective reasonableness" standard for determining when force is lawful in connection with claims that law enforcement officers have used excessive force in the course of arrests, investigatory stops or other seizures.<sup>21</sup> Under this standard, unreasonableness is determined by a case-by-case balancing of the state's interest against an individual's record.

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake.<sup>22</sup> Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. . . . Because "[t]he test of reasonableness under the Fourth

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19. U.S. CONST., amend. IV. See *Swint v. City of Wadley*, 51 F.3d 988, 1000 (11th Cir. 1995) (noting that a non-seizure Fourteenth Amendment substantive due process claim of excessive force also exists). See also *Wright v. Whiddon*, 951 F.2d 297, 300 (11th Cir. 1992) (noting that the Due Process Clause protects a pretrial detainee from the use of excessive force amounting to punishment).

20. 490 U.S. 386 (1989).

21. *Graham*, 490 U.S. at 396-97.

22. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

Amendment is not capable of precise definition or mechanical application," . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

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 Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.<sup>23</sup>

This is obviously no "bright line" test.<sup>24</sup> Because of the nature of this test, police officers are given little guidance in how to deal with the questions of when and how much force can be used in particular fact situations. Moreover, as will be discussed in Part V, neither the Supreme Court nor the Eleventh Circuit has rendered enough reported decisions applying the *Graham*

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23. *Graham*, 490 U.S. at 396-97 (internal citations omitted). *Accord* *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996); *Brown v. City of Hialeah*, 30 F.3d 1433, 1435-36 (11th Cir. 1994); *Ortega v. Schramm*, 922 F.2d 684, 694-95 (11th Cir. 1991).

24. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994).

test to clarify the rules or at least provide some rules of thumb in cases involving non-deadly force.

### B. Deadly Force Standards

"Deadly force" is force which, under the circumstances in which it is used, is "almost certain to cause death or great bodily harm."<sup>25</sup> Although the use of deadly force in this context is also governed by the same Fourth Amendment standard enunciated in *Graham*, a few general rules have emerged from the case law which attempt to illuminate the line between lawful deadly force and unlawful deadly force.

In *Tennessee v. Garner*,<sup>26</sup> the Supreme Court held that a police officer may not use deadly force solely to prevent the escape of a fleeing felon "[w]here the suspect poses no immediate threat to the officer and no threat to others."<sup>27</sup>

In dicta the Court stated that:

[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>28</sup>

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25. *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting) (distinguishing between force which is merely capable of causing death or great bodily harm and force which is certain to cause it), *vacated and dissent's reasoning approved en banc*, 998 F.2d 923 (11th Cir. 1993). *Accord* *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1480 n.10 (11th Cir. 1995) (quoting ALA. CODE § 13A-3-20(2) (1982) which defines deadly force as force which is "readily capable of causing death or serious physical injury"). At least in Alabama, this apparently requires the use of a weapon or some other inanimate object. *Ex parte Cobb*, 703 So. 2d 871, 878 (Ala. 1996) (finding that hands and fists are not deadly weapons).

26. 471 U.S. 1 (1985).

27. *Garner*, 471 U.S. at 11.

28. *Id.* at 11-12. *Accord* *Acoff v. Abston*, 762 F.2d 1543 (11th Cir. 1985); *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1510 (11th Cir. 1985) (Tjoflat, J., dissenting); *Harrell v. DeCatur County*, 22 F.3d 1570, 1579 (11th Cir. 1994) (Dubina, J.,

The Eleventh Circuit has applied this dicta to hold that if the suspect threatens the officer or others with a weapon, deadly force may be used,<sup>29</sup> but that a police officer may not shoot a suspect who is neither fleeing nor threatening the officer or others.<sup>30</sup>

### C. Summary Judgment Possibilities

Aside from these limited circumstances, however, the courts have not laid down any hard and fast rules regarding the use of non-deadly force or deadly force, leaving the law enforcement officer to be second-guessed if his split-second application of the *Graham* balancing test results in injury or death.

Nonetheless, despite the lack of clarity in the *Graham* standard, and assuming that material facts are not in dispute, summary judgments in favor of police officers in excessive force cases are possible even without the invocation of the qualified immunity defense.<sup>31</sup>

Indeed, courts have inferred that the Supreme Court intentionally opted for such a vague standard to achieve this result in most cases. For example, in *Roy v. Inhabitants of Lewiston*,<sup>32</sup> the court stated that "[w]hether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases."<sup>33</sup> As long as a police officer does not exceed this zone, he is enti-

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dissenting), *vacated and dissent's reasoning approved on reh'g*, 41 F.3d 1494 (11th Cir. 1995).

29. *Manuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994); *O'Neal v. DeKalb County*, 850 F.2d 653, 658 & n.7 (11th Cir. 1988) (rejecting the plaintiffs' argument that a police officer can only match deadly force with deadly force if the suspect is trying to escape).

30. *McKinney v. DeKalb County*, 997 F.2d 1440, 1443 (11th Cir. 1993); *Lundgren v. McDaniel*, 814 F.2d 600, 603 (11th Cir. 1987).

31. See, e.g., *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996) (adding that non-deadly force, in light of the facts, was reasonable as a matter of law); *Harrell*, 41 F.3d at 1494 (granting summary judgment where police officer's use of deadly force was held reasonable as a matter of law); *Manuel*, 25 F.3d at 997 (deadly force reasonable as a matter of law).

32. *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

33. *Roy*, 42 F.3d at 695 n.1.



tled to summary judgment.<sup>34</sup>

To avoid summary judgment, a plaintiff must designate *specific* facts showing that the police officer exceeded this zone.<sup>35</sup> The plaintiff cannot overcome summary judgment with generalized assertions that the police officer used excessive force.<sup>36</sup> Likewise, the plaintiff's burden cannot be carried simply by pointing to the seriousness of his injury.<sup>37</sup>

Instead, the plaintiff must, among other things, tender specific facts showing why the quantity of force used was objectively unreasonable in light of the facts and circumstances of the case as judged by a reasonable officer on the scene.<sup>38</sup> This burden is not carried by second-guessing the police officer and showing that he failed to use the least intrusive or lesser intrusive or violent means.<sup>39</sup>

Nonetheless, for several reasons, the likelihood of obtaining a summary judgment on the ground that no constitutional violation has occurred is small. Summary judgment is rarely granted in these cases because the plaintiff's version of the facts leading up to the use of force almost always differs in some material

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34. See, e.g., *Cottrell*, 85 F.3d at 1492 (holding that summary judgment should have been granted where police struggled with suspect who was placed under arrest, subdued him and placed him in handcuffs and leg restraints); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (affirming summary judgment even though police officer pushed handcuffed suspect into wall).

35. See generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (requiring the nonmoving party to designate specific facts which demonstrate that there is a genuine issue for trial).

36. See generally *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (holding that the plaintiff must present affirmative evidence to defeat a motion for summary judgment).

37. *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (noting that liability is determined exclusively by the facts possessed by the officer immediately prior to the injury).

38. *Edwards v. Giles*, 51 F.3d 155, 157 (8th Cir. 1995) (reversing for failure to grant summary judgment); *Roy*, 42 F.3d at 696 (affirming summary judgment); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (reversing for failure to grant summary judgment); *Dean v. City of Worcester*, 924 F.2d 364, 367 (1st Cir. 1991) (affirming summary judgment).

39. *Menuel v. City of Atlanta*, 25 F.3d 990, 996-97 (11th Cir. 1994) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1148-50 (7th Cir. 1994)); *Cole*, 993 F.2d at 1334; *Courson v. McMillian*, 939 F.2d 1479, 1491 (11th Cir. 1991) (quoting *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985)); *Clark v. Evans*, 840 F.2d 876, 881 (11th Cir. 1988).

respect from the police officer's version of the facts.<sup>40</sup>

By way of contrast, and as will be discussed below, the existence of factual disputes does not necessarily preclude summary judgment on the ground of qualified immunity.

### III. QUALIFIED IMMUNITY: HISTORICAL DEVELOPMENT

Government officials have long enjoyed a "good faith" or "qualified" immunity defense from individual liability under section 1983. As originally constituted, the defense had both subjective and objective components. The official was immune for acts within the scope of his discretionary authority as long as he reasonably believed that his actions were lawful (the objective component), and did not act with a malicious intent (the subjective component).<sup>41</sup>

The problem with the defense was that a claimant could rather easily defeat a summary judgment motion based on qualified immunity, even in cases where the claimant's claim was insubstantial, by arguing that the official's actions were motivated by malicious intent.<sup>42</sup> Many courts held that intent could normally not be determined on a motion for summary judgment. Therefore, government officials were forced to litigate and try these cases and, as a result, able citizens were deterred from accepting public office and vigorously exercising their official authority.

Three major Supreme Court decisions changed all of this. In order to permit the early resolution of frivolous claims, the Supreme Court, in *Harlow v. Fitzgerald*,<sup>43</sup> greatly simplified the nature of the inquiry by eliminating the subjective component and by holding that the objective criteria alone governs the applicability of the defense.<sup>44</sup> After *Harlow*, the government

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40. See, e.g., *Acoff v. Abston*, 762 F.2d 1543, 1547-48 (11th Cir. 1985) (reversing directed verdicts for defendants because material facts in dispute included whether a warning was feasible, whether defendant police officer believed that the plaintiff shot his partner, and whether deadly force was necessary to affect the arrest).

41. *Barker v. Norman*, 651 F.2d 1107, 1120-22 (5th Cir. 1981).

42. *Barnett v. Housing Auth. of Atlanta*, 707 F.2d 1571, 1581-82 (11th Cir. 1983).

43. 457 U.S. 800 (1982).

44. *Harlow*, 457 U.S. at 818-20 (citing *Pierson v. Ray*, 386 U.S. 547, 554

actor's subjective motivation is irrelevant,<sup>45</sup> unless intention or motivation is an essential element of the underlying constitutional violation.<sup>46</sup>

The pendulum continued to swing in favor of the government official in *Anderson v. Creighton*,<sup>47</sup> where the Court further inhibited a claimant's ability to defeat a qualified immunity defense by greatly restricting the definition of "clearly established law."<sup>48</sup>

[O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of preexisting law the unlawfulness must be apparent. . . .<sup>49</sup>

The third major Supreme Court decision was a huge procedural victory for government officials. In *Mitchell v. Forsyth*,<sup>50</sup> the Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."<sup>51</sup> Thus, if the government official loses a pretrial motion asserting the qualified immunity defense, he is no longer required to try the case before appealing.

By eliminating the subjective component of the defense, narrowing the definition of clearly established law, and allowing

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(1967)).

45. *Beauregard v. Olson*, 84 F.3d 1402, 1404 n.4 (11th Cir. 1996) (citing *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)).

46. *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1378-79 (11th Cir. 1997), *modified*, 14 F.3d 583 (11th Cir. 1994); *Foy v. Holston*, 94 F.3d 1528, 1533-35 (11th Cir. 1996); *McMillian v. Johnson*, 88 F.3d 1554, 1566 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996).

47. 483 U.S. 635 (1987).

48. *Anderson*, 483 U.S. at 640.

49. *Id.* at 639-42 (citations omitted) (emphasis added).

50. 472 U.S. 511 (1985).

51. *Mitchell*, 472 U.S. at 530.

government officials to appeal on an interlocutory basis the denial of pretrial motions based on qualified immunity, the Supreme Court made it much more difficult and expensive for claimants to get section 1983 claims against government officials to trial, much less prevail on those claims. These foundational cases are important to the practitioner because their language forms the basis of the various circuits' holdings. Before litigating the qualified immunity defense, it is imperative that these cases be carefully read.

#### IV. QUALIFIED IMMUNITY: ELEMENTS OF PROOF

##### A. *Exercise of Discretionary Authority*

To prevail on the qualified immunity defense, the government actor has the initial burden of proving that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.<sup>52</sup>

The Eleventh Circuit has broadly defined discretionary authority to include all acts undertaken pursuant to the performance of the official's duties which are within the scope of his authority, including ministerial acts.<sup>53</sup>

The test is not whether the government actor acted lawfully. Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties.<sup>54</sup>

With few exceptions, Defendants almost always carry their burden of proof on this issue,<sup>55</sup> and the Eleventh Circuit sometimes simply skips over the issue in its analysis.<sup>56</sup>

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52. *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988).

53. *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir. 1995); *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1185 n.17 (11th Cir. 1994) (same); *Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir. 1994) (same); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1236 (11th Cir. 1992) (same); *Stough v. Gallagher*, 967 F.2d 1523, 1526 (11th Cir. 1992) (same); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990) (same); *Rich*, 841 F.2d at 1564 (same).

54. *Sims*, 972 F.2d at 1236.

55. *But see Lenz v. Winburn*, 51 F.3d 1540, 1544-45 (11th Cir. 1995) (disallowing qualified immunity for lack of showing that the defendant was acting within his discretionary authority).

56. *See, e.g., Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996) ("Once the

### B. Clearly Established Law

Once the government actor carries his burden of proof on the discretionary authority issue, the Eleventh Circuit holds that the burden then shifts to the plaintiff to demonstrate that the official violated clearly established law.<sup>57</sup> The government actor bears no burden on this issue.<sup>58</sup> Whether the plaintiff has carried that burden is a question of law.<sup>59</sup>

If the law is *not* clearly established, the government actor is entitled to qualified immunity, regardless of factual disputes between the parties.<sup>60</sup>

*1. Current Established Law vs. Pre-existing Clearly Established Law.*—A threshold question under the clearly established law standard is whether the plaintiff has even asserted a violation of currently applicable law.<sup>61</sup> “Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time con-

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qualified immunity defense is raised, plaintiffs bear the burden of showing that the federal rights allegedly violated were clearly established.”)

57. *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). *Accord* *McMillian v. Johnson*, 88 F.3d 1554, 1562 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996); *Lenz*, 51 F.3d at 1551 (“The plaintiff’s burden is heavy”); *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir. 1995); *D’Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995); *McCoy*, 47 F.2d at 408; *Rodgers v. Horsley*, 39 F.3d 308, 310 (11th Cir. 1994); *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1150 (11th Cir. 1994); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1322 (11th Cir. 1989) (“On the contrary, it is plaintiff’s job to show ‘that the defendant’s actions violated clearly established constitutional law.’”); *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989); *Rich*, 841 F.2d at 1563-64.

58. *Adams v. St. Lucie County Sheriff’s Dept.*, 962 F.2d 1563, 1574 (11th Cir. 1992) (Edmondson, J., dissenting), *vacated and dissent’s reasoning approved en banc*, 998 F.2d 923 (11th Cir. 1993). *Compare* *Young v. Selsky*, 41 F.3d 47, 54 (2d Cir. 1994).

59. *Bailey v. Board of Comm’rs*, 956 F.2d 1112, 1126 (11th Cir. 1992).

60. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 787-88 (11th Cir. 1992). *Accord* *Courson v. McMillian*, 939 F.2d 1479, 1497 (11th Cir. 1991); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991); *McDaniel v. Woodard*, 886 F.2d 311, 313 (11th Cir. 1989); *Rich v. Dollar*, 841 F.2d 1558, 1564-65 (11th Cir. 1988).

61. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).



suming preparation to defend the suit on its merits."<sup>62</sup>

If the plaintiff is unsuccessful in demonstrating a violation of currently applicable law, the government actor is entitled to qualified immunity.<sup>63</sup>

On the other hand, if the conduct of the government actor violates currently applicable law, then the plaintiff must go further and demonstrate that such law which was "clearly established" prior to the incident in question.<sup>64</sup>

The "law" that the plaintiff must show was clearly established—and that disqualifies a government official from his entitlement to immunity—is limited to federal statutory<sup>65</sup> or constitutional law. A government actor will not lose his qualified immunity by violating federal regulations or state statutes and regulations.<sup>66</sup>

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62. *Siegert*, 500 U.S. at 232; *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994) ("[T]he absence of an underlying Fourth Amendment violation supersedes the issues of qualified immunity. . . .").

63. *Siegert*, 500 U.S. at 231-55. See, e.g., *Evans v. Hightower*, 117 F.3d 1318 (11th Cir. 1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (supporting the above proposition); *Lenz v. Winburn*, 51 F.3d 1540, 1550-51 (11th Cir. 1995) (same); *Wooten v. Campbell*, 49 F.3d 696, 699-701 (11th Cir. 1995); *Spivey v. Elliott*, 29 F.3d 1522, 1524 (11th Cir. 1994) (same); *Cummings v. DeKalb County*, 24 F.3d 1349, 1353-56 (11th Cir. 1994) (same); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1556-62 (11th Cir. 1993) (same), *modified*, 14 F.3d 583 (11th Cir. 1994).

64. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149-1150 (11th Cir. 1994). See also *Clark v. Evans*, 840 F.2d 876, 880 (11th Cir. 1988) ("On summary judgment, then, the judge must determine not only the currently applicable law but also whether that law was clearly established at the time the action arose.").

65. *Wu v. Thomas*, 996 F.2d 271 (11th Cir. 1993) (noting a statutory right against retaliation).

66. See *Davis v. Scherer*, 468 U.S. 183, 194-97 (1984). See also *Foy v. Holston*, 94 F.3d 1528, 1532 n.4 (11th Cir. 1996) (addressing and regulating state law); *Belcher v. City of Foley*, 30 F.3d 1390, 1399 (11th Cir. 1994) (holding that the National Commission on Correctional Health Care's "Standards for Health Services in Jails" and the requirements of the Commission on Accreditation for Law Enforcement Agencies were "non-legally enforceable standards" and could not clearly establish the law.); *Edwards v. Gilbert*, 867 F.2d 1271, 1276 (11th Cir. 1989) (explaining that literature in the social sciences and state statutes and regulations do not constitute "clearly established law"), *modified*, *Edwards v. Okaloosa County*, 23 F.3d 358 (11th Cir. 1994); *Childress v. Small Bus. Admin.*, 825 F.2d 1550, 1553 (11th Cir. 1987) ("It is clear that qualified immunity may not be denied simply because appellants violated the clear command of FmHA regulations."); *Casines v. Murchek*, 766 F.2d 1494, 1501 (11th Cir. 1985) ("The mere fact that Casines's state statutory rights were clearly established at the time of her dismissal is not, however, sufficient to deny appellants qualified immunity."). *But see McQueen v. Tabah*, 839 F.2d 1525, 1530 (11th Cir. 1988) (explaining that state regulations clearly created a liber-

The degree of clarity required before the law can be said to be "clearly established" has been the subject of much debate, and the Eleventh Circuit has applied several different standards.

2. *The Reasonable Government Official Standard.*—"The essence of qualified immunity is that it is unfair—and, as a matter of public policy, unwise—to impose personal liability on government officers *unless* the officers had *advance notice* that what they were doing was unlawful."<sup>67</sup> The Eleventh Circuit has noted that, "If objective observers cannot predict—at the time the official acts—whether the act was lawful or not, and the answer must await full adjudication in a district court years in the future, the official deserves immunity from liability for civil damages."<sup>68</sup> The goal of the "clearly established law" requirement is to assure that this advance notice is supplied.<sup>69</sup>

Because most government officials and employees are not trained in the law, the standard by which the sufficiency of that notice will be judged is not the same as would be applied to a lawyer or judge.<sup>70</sup> Thus, the fact that a "legal expert" would have concluded that the conduct was unlawful is not determinative.<sup>71</sup> Instead, the clarity of the law is judged from the standpoint of a reasonably competent, lay, government official

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ty interest which could not be deprived without due process).

67. *Lassiter*, 28 F.3d at 1152 (second emphasis added).

68. *Foy*, 94 F.3d at 1534.

69. *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1185 (11th Cir. 1994). See also *Dolihite v. Maughon*, 74 F.3d 1027, 1040 (11th Cir. 1996) ("Qualified immunity is intended to give officials the ability to anticipate when their conduct may give rise to liability for damages."), *cert. denied*, *Dolihite v. King*, 117 S. Ct. 185 (1996); *Spivey v. Elliott*, 29 F.3d 1522, 1527 (11th Cir. 1994) ("Potential defendants are on notice that conduct in violation of that right is unlawful").

70. *Lassiter*, 28 F.3d at 1150 n.8 (explaining that a government official is not required to be legal expert); *Leeks v. Cunningham*, 997 F.2d 1330, 1334 (11th Cir. 1993) (same); *Howe v. Baker*, 796 F.2d 1355, 1357-58 (11th Cir. 1986) ("A court must take care not to impute its knowledge of the current state of the law back to the official actors.").

71. See *Lassiter*, 28 F.3d at 1152 n.8. But see *Adams v. Brierton*, 752 F.2d 546, 548 (11th Cir. 1985) (showing the fact that the government official was being represented by legal counsel on related matters at the time of the allegedly unconstitutional conduct was used to undercut the official's claim that he was unaware of the law).

holding the same position and facing the same circumstances as the defendant.<sup>72</sup>

Therefore, broad legal truisms, general rules and propositions of law, and abstract rights—which might have some significance to courts and some attorneys—do not constitute clearly established law, and their citation will not discharge the plaintiff's burden in these cases.<sup>73</sup> Violation of this rule is the “most common error” committed in qualified immunity analysis.<sup>74</sup>

3. *The Bright Line Standard.*—Instead of general propositions, the Eleventh Circuit has held that the “clearly established” standard demands that a bright line be crossed before qualified immunity may be denied.<sup>75</sup> “If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.”<sup>76</sup> The “bright line” re-

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72. *Lassiter*, 28 F.3d at 1152 n.8.

73. *Dolihite*, 74 F.3d at 1040-41. See also *Hamilton v. Cannon*, 80 F.3d 1525, 1532 (11th Cir. 1996) (“In satisfying this burden, the plaintiff cannot point to sweeping propositions of law and simply posit that those propositions are applicable;”) *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989) (“The question in this case is not whether it is clearly established that unreasonable seizures are prohibited; they are.”); *Lassiter*, 28 F.3d at 1150 (“General propositions have little to do with the concept of qualified immunity.”) (quoting *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987)); *Pickens v. Hollowell*, 59 F.3d 1203, 1206 (11th Cir. 1995) (“Mere recitations of general rules or abstract rights do not demonstrate that the law was clearly established. . . .”); *Hartsfield v. Lemacks*, 50 F.3d 950, 954 (11th Cir. 1995) (“[P]laintiffs cannot discharge their burden simply by referring to general rules or abstract rights;”); *D’Aguanno v. Gallagher*, 50 F.3d 877, 880 (11th Cir. 1995) (“To overcome the qualified immunity defense, citing precedent which establishes a general right will not do.”); *Rodgers v. Horsley*, 39 F.3d 308, 311-12 (11th Cir. 1994) (holding that a case which announced a broad legal principle was insufficient to create a clearly established right); *Belcher v. City of Foley*, 30 F.3d 1390, 1395 (11th Cir. 1994) (noting that sweeping propositions of case law are insufficient to create a clearly established right); *Spivey*, 29 F.3d at 1527 (“But it is not enough to make ‘conclusory allegations of a constitutional violation’ or to state ‘broad legal truisms.’”) (quoting *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1322-23 (11th Cir. 1989)); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (supporting the above proposition), *modified*, 14 F.3d 583 (11th Cir. 1994); *Nicholson v. Georgia Dept. of Human Resources*, 918 F.2d 145, 147 (11th Cir. 1990) (“In satisfying this burden, the plaintiff cannot point to sweeping propositions of law and simply posit that those propositions are applicable.”).

74. *Suissa v. Fulton County*, 74 F.3d 266, 269 (11th Cir. 1996); *Lassiter*, 28 F.3d at 1150.

75. *Post*, 7 F.3d at 1557; *Adams*, 962 F.2d 1578.

76. *Id.* Accord *Hamilton v. Cannon*, 80 F.3d 1525, 1528 (11th Cir. 1996); *Suissa*, 74 F.2d at 269; *Williamson v. Mills*, 65 F.3d 155, 157 (11th Cir. 1995); *Pickens*, 59

ferred to is a factual line.<sup>77</sup>

4. *The "Spotted Dog" Standard.*<sup>78</sup>—In *Lassiter v. Alabama A & M University*,<sup>79</sup> the Eleventh Circuit, sitting *en banc*, further constricted the concept of "clearly established law" when it clarified just how bright this line must be:

For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.

...  
For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*.

...  
The line between lawful conduct and unlawful conduct is often vague and thin. The essence of qualified immunity is that it is unfair—and, as a matter of public policy, unwise—to impose personal liability on government officers *unless* the officers had advance notice that what they were doing was unlawful. Pre-existing law must supply this notice; the unlawfulness must be obvious, considering the circumstances confronting the officers.<sup>80</sup>

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F.3d at 1206; *Hartsfield*, 50 F.3d at 954; *Rodgers*, 39 F.3d at 311; *Kelly v. Curtis*, 21 F.3d 1544, 1550, 1554 (11th Cir. 1994); *Collins v. School Bd. of Dade County, Fla.*, 981 F.2d 1203, 1205 (11th Cir. 1993). See also *Spivey*, 29 F.3d at 1527 ("The right must be particularized so that potential defendants are on notice that conduct in violation of that right is unlawful").

77. *Post*, 7 F.3d at 1557.

78. See *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1390 n.2 (11th Cir. 1993) (noting that factually similar commanding precedent is labeled by different jurisdiction as a "red cow," "spotted dog," "spotted horse," "white horse," "white pony," or "goose" case).

79. 28 F.3d 1146 (11th Cir. 1994).

80. *Id.* at 1149-50, 1152 (citations omitted). Accord *McMillian v. Johnson*, 88 F.3d 1554, 1562 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996); *Beauregard v. Olson*, 84 F.3d 1402, 1404 (11th Cir. 1996), *modified*, 101 F.3d 1361 (11th Cir. 1996); *Dolihite v. Maughon*, 74 F.3d 1027, 1041 (11th Cir. 1996); *Suissa*,

In other words, "[t]he law which must be clearly established is that governing the specific factual situation confronting the government official in the particular case."<sup>81</sup>

To carry his burden in this regard, the Eleventh Circuit holds that a plaintiff cannot simply argue that a governmental actor's conduct is a "paradigmatic" constitutional violation, i.e., so patently violative that the government actor would know it even without guidance from the courts.<sup>82</sup> On this point the Eleventh Circuit diverges from many other circuits.<sup>83</sup>

Instead, many Eleventh Circuit decisions hold that the necessary bright line can only be established by: (1) a controlling decision, (2) which existed prior to the incident in question, (3) which involved facts materially similar to those in the case before the court, and (4) which held the conduct to constitute a constitutional violation.<sup>84</sup>

These cases hold that in order for the plaintiff to carry his burden of showing that the federal rights allegedly violated were "clearly established," he must actually *cite* one or more of these decisions.<sup>85</sup>

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74 F.3d at 270; *Williamson*, 65 F.3d at 157; *Pickens*, 59 F.3d at 1206; *Lenz v. Winburn*, 51 F.3d 1540, 1551 (11th Cir. 1995); *Hartsfield*, 50 F.3d at 954; *Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11th Cir. 1994); *Hansen v. Soldenwagner*, 19 F.3d 573, 575 (11th Cir. 1994).

81. *Harris v. Board of Educ.*, 105 F.3d 591, 596 (11th Cir. 1997).

82. *See Jenkins v. Talladega Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997) (en banc), *cert. denied*, *Jenkins v. Herring*, 118 S. Ct. 412 (1997); *Lenz*, 51 F.3d at 1551 ("As to the first weakness in their argument, the Lenzes contend that unwarranted entry into the home is a paradigmatic Fourth Amendment violation, and that the law was therefore clearly established even in the absence of factually similar case law. We are unpersuaded.")

83. *See, e.g., Spiegel v. City of Chicago*, 106 F.3d 209, 212 (7th Cir. 1997) ("Nor was it so shocking as to render precedent unnecessary."), *cert. denied*, 118 S. Ct. 65 (1997).

84. *See, e.g., Collins v. School Bd.*, 981 F.2d 1203, 1205 (11th Cir. 1993).

85. *See Riley v. Newton*, 94 F.3d 632, 636-37 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 955 (1997); *D'Aguzzo v. Gallagher*, 50 F.3d 877, 880 (11th Cir. 1995); *McCoy v. Webster*, 47 F.3d 404, 408 (11th Cir. 1995) ("*Lassiter* requires McCoy to point to a case in which similar conduct was held" unconstitutional); *Lenz*, 51 F.3d at 1551 ("The Lenzes have cited no case law that makes it sufficiently clear. . . ."); *Hansen*, 19 F.3d at 573 n.1 (requiring plaintiff to cite cases); *Kelly v. Curtis*, 21 F.3d 1544, 1553 (11th Cir. 1994) ("[N]either Kelly nor the district court points to any case. . . ."); *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993) ("The nonexistence of a decision specifically addressing the alleged right is a significant consideration in



Most Eleventh Circuit qualified immunity cases turn on whether the precedent cited by the plaintiff possesses the attributes necessary to clearly establish the law.

*a. Material Similarity*

The case or cases cited by the plaintiff need not be section 1983 cases.<sup>86</sup> However, they must be "materially similar" to the case being considered.<sup>87</sup>

The required degree of factual similarity is exemplified by the manner in which the question of clear establishment is sometimes framed by the Eleventh Circuit:

The question in this case is not whether, in general, involuntarily committed patients have a legally cognizable interest under the Fourteenth Amendment to safe conditions. They do. Instead, the question in this case, as in all qualified immunity cases, is fact specific: in May 1991, was it clearly established in this circuit that it was unconstitutional for a mental institution to fail to supervise a patient for fifteen minutes in the smoking room, when she was on close watch status for a health problem, when the institution had a history of some 'sexual contact' involving patients other than plaintiff but no history of rape for the past twelve years, where a previous patient who was to be similarly monitored disappeared, apparently escaped through a bathroom window, and fell to her death on a ledge below, and where the

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determining whether the right is clearly established."). *But see* *Nicholson v. Georgia Dept. of Human Resources*, 918 F.2d 145, 147 (11th Cir. 1990) ("Under this inquiry, the plaintiff need not point to one or more cases that resolved the precise factual issues at issue in his or her case."); *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990) (same).

86. *See* *McMillian v. Johnson*, 88 F.3d 1554 n.22 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996).

87. *See* *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994). *Accord* *Beauregard v. Olson*, 84 F.3d 1402, 1405 (11th Cir. 1996); *Hamilton v. Cannon*, 80 F.3d 1525, 1531 (11th Cir. 1996); *Dolihite v. Maughon*, 74 F.3d 1027, 1035 n.3 (11th Cir. 1996); *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995) (stating "much like the facts of this case"), *cert. denied*, 117 S. Ct. 359 (1996); *Suissa v. Fulton County*, 74 F.2d 266, 269-70 (11th Cir. 1996); *Pickens v. Hollowell*, 59 F.3d 1203, 1206 (11th Cir. 1995); *Hartsfield v. Lemacks*, 50 F.3d 950, 954 (11th Cir. 1995); *D'Aguzzo*, 50 F.3d at 880 n.3; *Belcher v. City of Foley*, 30 F.3d 1390, 1395-96 (11th Cir. 1994); *Edwards v. Gilbert*, 867 F.2d 1271, 1277 (11th Cir. 1989), *modified*, *Edwards v. Okaloosa County*, 23 F.3d 358 (11th Cir. 1994).

plaintiff had never before complained of unwanted sexual contact from either the patient accused, any other patient, or any member of the staff? The answer is 'NO.'<sup>88</sup>

If the facts of cases cited as precedent are different enough to "cloud the question" of whether the government actor's conduct was unlawful when he acted, qualified immunity should be afforded.<sup>89</sup> Conversely, denial of qualified immunity should occur "only when the actual conduct in which the defendant was alleged to have engaged violated clearly established federal law."<sup>90</sup>

Therefore, when searching for and comparing purported precedent, "it is necessary to identify precisely the acts and knowledge of the comparable actor"<sup>91</sup>—the government actor to which the defendant is being compared. If there are "constitutionally significant" factual distinctions between prior cases and the case at bar, or if the similarities are not apparent when viewed through the eyes of reasonable, objective government officials, those cases will not clearly establish the law.<sup>92</sup>

On the other hand, in *Anderson v. Creighton*,<sup>93</sup> the Su-

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88. *Rodgers v. Horsley*, 39 F.3d 308, 311 (11th Cir. 1994). See also *Nolen v. Jackson*, 102 F.3d 1187, 1190 (11th Cir. 1997); *Hansen*, 19 F.3d at 575; *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989).

89. See *Beauregard*, 84 F.3d at 1405 n.7.

90. *Haygood*, 70 F.3d at 94 (noting that Lassiter attempted to clarify the principles of qualified immunity on this issue).

91. *Dolihite*, 74 F.2d at 1035 n.3.

92. See *Jones v. City of Dothan*, 121 F.3d 1456, 1460-61 (11th Cir. 1997); *Nolen*, 102 F.3d at 1191; *Cofield v. Randolph County Comm'n*, 90 F.3d 468, 471 (11th Cir. 1996) (holding that the case on which the plaintiffs relied was "readily distinguishable"); *Haney v. City of Cumming*, 69 F.3d 1098, 1103 (11th Cir. 1995); *Wooten v. Campbell*, 49 F.3d 696, 698 n.2 (11th Cir. 1995); *Rodgers*, 39 F.3d at 311 (finding "materially dissimilar facts"); *Belcher*, 30 F.3d at 1398 (finding "materially different" and "distinguishable" facts); *Spivey v. Elliott*, 29 F.3d 1522, 1527 (11th Cir. 1994) ("Where there is so much room for differing interpretations, we cannot say the contours of the right were clearly established."); *Kelly v. Curtis*, 21 F.3d 1544, 1552 (11th Cir. 1994); *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1370 (11th Cir. 1992); *Wright v. Whiddon*, 951 F.2d 297, 300 (11th Cir. 1992); *Barts v. Joyner*, 865 F.2d 1187, 1191 (11th Cir. 1989) ("This case is too unlike *Dunaway* for *Dunaway* to have settled the applicable law."); *Daniel v. Taylor*, 808 F.2d 1401, 1403 (11th Cir. 1986) ("To be entitled to qualified immunity, defendants need only show that it is an unsettled question of law whether *Summers* would be extended to this case."); *Howe v. Baker*, 796 F.2d 1355, 1358 n.3 (11th Cir. 1986).

93. 483 U.S. 635, 640 (1987). *Accord* *McMillian v. Johnson*, 88 F.3d 1554, 1565 (11th Cir.), *modified*, 101 F.3d 1363 (11th Cir. 1996); *Hartsfield v. Lemacks*, 50 F.3d

preme Court stated that the lawfulness of the *precise* conduct in question need not have been decided. One pre-*Lassiter* Eleventh Circuit opinion even suggested that officials are required to "relate established law to analogous factual settings."<sup>94</sup>

More recently, however, the Eleventh Circuit has strongly and repeatedly emphasized that government officials are not obligated to be creative, imaginative or legal experts in drawing analogies from previously decided cases, and that unlawfulness must be apparent and obvious.<sup>95</sup> This is a highly elusive standard and the tension between requiring "material similarity" but not identity in facts causes the most problems in analyzing the qualified immunity issue.

### *b. Holding vs. Dicta*

Assuming the facts of a prior case are materially similar, a finding of unlawfulness must be the *ratio decidendi* of that case, because the law cannot be established by dicta.<sup>96</sup> Similarly,

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950, 955 (11th Cir. 1995); *Nicholson v. Georgia Dept. of Human Resources*, 918 F.2d 145, 147 (11th Cir. 1990).

94. *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1504 (11th Cir. 1990) (quoting *Waddell v. Forney*, 108 F.3d 889, 894-895 (8th Cir. 1987)). See also *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 148 (3d Cir. 1984) (noting similar requirements).

95. See *Lassiter*, 28 F.3d at 1150 n.8. Accord *Hamilton v. Cannon*, 80 F.3d 1525, 1532 (11th Cir. 1996); *Dolihite*, 74 F.3d at 1041; *Williamson v. Mills*, 65 F.3d 155, 157 (11th Cir. 1995); *Lenz v. Winburn*, 51 F.3d 1540, 1551 (11th Cir. 1995); *Hartsfield*, 50 F.3d at 955; *Rodgers*, 39 F.3d at 310-11; *Belcher*, 30 F.3d at 1396, 1398 ("Mrs. Belcher's contention requires too much of an inductive leap to defeat Chief Anderson's qualified immunity."); *Spivey*, 29 F.3d at 1527 ("While it is logical to extend the analysis in *Taylor* to these facts, we cannot say that the extension was so obvious as to put the defendants on notice of potential wrongdoing."); *Hansen v. Soldenwagner*, 19 F.3d 573, 575 (11th Cir. 1994); *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1573-75 (11th Cir. 1992) (Edmondson, J., dissenting), *vacated and dissent's reasoning approved en banc*, 998 F.2d 923 (11th Cir. 1993); *Leeks v. Cunningham*, 997 F.2d 1330, 1334 (11th Cir. 1993).

96. *Hamilton*, 80 F.3d, 1530; *Belcher*, 30 F.3d 1400 ("Law is clearly established by holdings, not by inferences from language in opinions."); *Adams*, 962 F.2d at 1575; *Bailey v. Board of County Comm'ns*, 956 F.2d 1112, 1124 n.13 (11th Cir. 1992).

"[r]emand cases . . . are of little use to the plaintiff . . . because such cases *do not hold that the government actor behaved unlawfully.*"<sup>97</sup>

### c. Controlling Decision

The cases relied on by the plaintiff must be from the United States Supreme Court, the Eleventh Circuit, the former Fifth Circuit, or the highest court of the state where the case arose.<sup>98</sup>

### d. Pre-Existing

Last, but certainly not least, cases cited by the plaintiff must have been decided *before* the conduct in question occurred.<sup>99</sup> Otherwise, they could not be said to have given the

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97. *Beauregard v. Olson*, 84 F.3d 1402, 1405 n.6 (11th Cir. 1996).

98. *McMillian*, 88 F.3d at 1596 n.18; *Hamilton*, 80 F.3d at 1532 n.7; *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995); *Swint v. City of Wadley*, 51 F.3d 988, 1001 (11th Cir. 1995) (finding a decision of Ninth Circuit insufficient to clearly establish the law in the Eleventh Circuit); *D'Aguanno v. Gallagher*, 50 F.3d 877, 880 n.5, 881 n.6 (11th Cir. 1995) (finding a district court decision from 11th Circuit insufficient); *Belcher*, 30 F.3d at 1400 (finding cases from other circuit are insufficient); *Hansen*, 19 F.3d at 578 n.6; *Kelly v. Curtis*, 21 F.3d 1544, 1551 n.6 (11th Cir. 1994); *Adams*, 962 F.2d at 1575 ("district courts cannot 'clearly establish' law" even if their opinion is affirmed without opinion) (Dubina, J., dissenting); *Green v. Brantley*, 941 F.2d 1146, 1147 n.2 (11th Cir. 1991) (finding district court decision insufficient); *James v. City of Douglas*, 941 F.2d 1539, 1543 n.7 (11th Cir. 1991) (finding former Fifth Circuit case was binding); *Lee v. Dugger*, 902 F.2d 822, 824 (11th Cir. 1990) (finding decision of intermediate appellate state court was insufficient); *Muhammad v. Wainwright*, 839 F.2d 1422, 1425 (11th Cir. 1987) (finding district court decision from another circuit was insufficient); *Hershey v. City of Clearwater*, 834 F.2d 937, 940 n.5 (11th Cir. 1987) (state trial court decision insufficient). *But see* *Foote v. Spiegel*, 118 F.3d 1416, 1424 (10th Cir. 1997) (noting that circuit cases can clearly establish the law); *Hartsfield*, 50 F.3d at 954 n.10 (noting a conflict in 11th Circuit case law on whether opinions of other courts of appeal are relevant); *Leeks*, 997 F.2d at 1333 ("[W]e consider the law originating in this Circuit, as well as the Supreme Court, the courts of appeals, and the district courts."); *Williams v. Bennett*, 689 F.2d 1370, 1380-81 (11th Cir. 1982) (noting that circuit cases can clearly establish the law); *Medina v. City and County of Denver*, 960 F.2d 1493, 1497-98 (10th Cir. 1992) (same).

99. *Cofield v. Randolph County Comm'n*, 90 F.3d 468, 471 n.5 (11th Cir. 1996); *Swint*, 51 F.3d at 1001; *Belcher*, 30 F.3d at 1400 n.9; *Hansen*, 19 F.3d at 578 n.6; *Adams*, 962 F.2d at 1575 n.5; *Bailey*, 956 F.2d at 1123; *Courson v. McMillian*, 939 F.2d 1479, 1497-98 n.32 (11th Cir. 1991); *Hamm v. Powell*, 874 F.2d 766, 771 (11th Cir. 1989); *Acoff v. Abston*, 762 F.2d 1543, 1549-50 (11th Cir. 1985).

government actor the requisite advance notice.

*e. Significance of Other Cases*

Although they may not be used by a plaintiff to demonstrate that the unlawfulness of conduct was clearly established, cases from other circuits and jurisdictions, dicta, factually dissimilar cases and cases post-dating the incident in question *are* relevant and can be used by the defendant to show that the law was *not* clearly established and that the actions complained of may have been lawful.<sup>100</sup>

The rationale is that in the absence of pre-existing, controlling decisions involving materially similar facts which expressly prohibit the government actor's conduct, why should that government actor be condemned if his conduct was consistent with conduct deemed lawful by any judge, all of whom are deemed reasonable and well-versed in the law. In other words, a court "cannot realistically expect that reasonable [government actors] know more than reasonable judges about the law."<sup>101</sup>

*5. Application in the Vague Standards Cases.*—It is axiomatic that the text of federal statutes and federal constitutional provisions supply few absolute "bright line tests," or per se rules which are specific enough to clearly establish the law applicable to particular circumstances.<sup>102</sup> Most are written in the abstract—"to act reasonably, to act with probable cause, and so forth. . . ."<sup>103</sup>

In many cases the determination of whether a constitutional violation has occurred requires a case-by-case, fact-intensive

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100. See *Harris v. Board of Educ.*, 105 F.3d 591, 596-97 (11th Cir. 1997); *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1183 (11th Cir. 1997); *Foy v. Holston*, 94 F.3d 1528, 1537 (11th Cir. 1996); *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996); *Pickens v. Hollowell*, 59 F.3d 1203, 1207-08 (11th Cir. 1995); *Rodgers*, 39 F.3d at 312; *Belcher*, 30 F.3d at 1400 (dicta); *Hansen*, 19 F.3d at 576 n.3; *Leeks*, 997 F.2d at 1334-35; *Wu v. Thomas*, 996 F.2d 271, 274 n.4 (11th Cir. 1993); *Adams*, 962 F.2d at 1575-78; *Barts v. Joyner*, 865 F.2d 1187, 1191-92 (11th Cir. 1989) (citing state court decisions determining that similar conduct was lawful).

101. *Barts*, 865 F.2d at 1193.

102. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 n.4 (11th Cir. 1994).

103. *Barts*, 865 F.2d at 1194.



application of a multi-factor balancing test or a hazy, indistinct or vague standard. As a result, "[t]he line between lawful conduct and unlawful conduct is often vague and thin,"<sup>104</sup> and a plaintiff's burden of showing that the law is clearly established is almost impossible to carry.

For example, although the law is clear in a general sense that the First Amendment prohibits a government employer from retaliating against a public employee for engaging in protected speech, the determination of whether a constitutional violation has occurred requires the analysis of several factors as well as the application of the vague and seemingly result-oriented balancing test enunciated in *Pickering v. Board of Education*.<sup>105</sup> Under this standard a plaintiff can prevail only under the following circumstances:

- 1) the employee's speech must involve a matter of public concern in order for it to be protected, 2) the employee's first amendment interests must outweigh the public employer's interest in efficiency (the *Pickering* balancing test), 3) the employee must have been disciplined, in substantial part, because of the protected speech, and 4) the public employer must not be able to prove by a preponderance of the evidence that it would have disciplined the employee even without the protected speech.<sup>106</sup>

The Eleventh Circuit has recognized that this is no bright line test.<sup>107</sup> Similarly, the law is equally "clear" in an abstract sense that under the Fourth Amendment, persons have the right not to be "seized" without "probable cause." Unfortunately, no bright line test has been enunciated to determine the existence of probable cause either.<sup>108</sup> The applicable standard is whether the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would

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104. *Lassiter*, 28 F.3d at 1152; accord *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994).

105. 391 U.S. 563, 568-69 (1968); *Edwards v. Gilbert*, 867 F.2d 1271, 1273 (11th Cir. 1989), *modified*, *Edwards v. Okaloosa County*, 23 F.3d 358 (11th Cir. 1994).

106. *Johnson v. Clifton*, 74 F.3d 1087, 1092 (11th Cir. 1996).

107. See *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989). Accord *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1183 (11th Cir. 1997); *Bartlett v. Fisher*, 972 F.2d 911, 916-917 (8th Cir. 1992).

108. See *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995) ("In reality, probable cause is not a precise concept.").

cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.<sup>109</sup>

Government officials might argue that qualified immunity should *always* apply in these instances because these vague standards do not give sufficiently clear advance notice to them. The Eleventh Circuit struggled with this dilemma for several years.

Beginning with *Dartland v. Metropolitan Dade County*,<sup>110</sup> the court began to hold that public officials sued in First Amendment retaliatory discharge cases were entitled to immunity "except in the extraordinary case where *Pickering* balancing would lead to the *inevitable conclusion* that the discharge of the employee was unlawful."<sup>111</sup> Beginning with *Von Stein v. Brescher*,<sup>112</sup> the Court applied a similar standard in search and seizure cases where the police officer had arguable probable cause.<sup>113</sup>

How does a governmental official conclude in advance that his or her intended conduct is not "arguably" legal, or is "inevitably" illegal, where the standards are vague? The rule which ultimately emerged, and which was enunciated for the first time

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109. *Von Stein v. Brescher*, 904 F.2d 572, 578 (11th Cir. 1990).

110. 866 F.2d 1321 (11th Cir. 1989).

111. *Dartland*, 866 F.2d at 1323 (emphasis added). *Accord Johnson*, 74 F.3d at 1092; *Rogers v. Miller*, 57 F.3d 986, 989-92 (11th Cir. 1995); *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237 (11th Cir. 1992); *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991); *McDaniel v. Woodard*, 886 F.2d 311, 315 (11th Cir. 1989).

112. 904 F.2d 572 (11th Cir. 1990).

113. *See id.* at 579. *Accord Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997) (finding arguable probable cause to arrest); *Lindsey v. Storey*, 936 F.2d 554, 559 (11th Cir. 1991) (applying this standard on question of reasonable suspicion to support Terry-type seizures); *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995) (finding "arguable probable cause to arrest"); *Pickens v. Hollowell*, 59 F.3d 1203, 1206 (11th Cir. 1995) (same); *Swint v. City of Wadley*, 51 F.3d 988, 996 (11th Cir. 1995) (finding that there was not "arguable probable cause" for search and seizure); *L.S.T., Inc., v. Crow*, 49 F.3d 679, 685 n.11 (11th Cir. 1995) (finding actual probable cause not necessary to arrest); *Eubanks v. Gerwen*, 40 F.3d 1157, 1160 (11th Cir. 1994) (finding actual probable cause for search and seizure); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1558 (11th Cir. 1993) (finding "arguable" probable cause to arrest), *modified*, 14 F.3d 583 (11th Cir. 1994); *Moore v. Gwinnett County*, 967 F.2d 1495 (11th Cir. 1992) (finding arguable probable cause for arrest); *Lowe v. Aldridge*, 958 F.2d 1565, 1570 (11th Cir. 1992) (same).

in *Lassiter*, is that

when "no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where [First Amendment case law] would lead to the inevitable conclusion that the [act taken against] the employee was unlawful."<sup>114</sup>

This holding was foreshadowed in *Hansen v. Soldenwagner*,<sup>115</sup> where the court noted that these types of cases "illustrate the importance of [the] requirement that plaintiffs cite cases with materially similar facts when asserting that 'clearly established' rights [have been] violated."<sup>116</sup>

Thus, the focus is, again, on pre-existing, materially similar, controlling cases which have applied the vague liability standard, rather than the application of standard itself, and before the government actor will be denied qualified immunity in a case governed by a vague standard, a pre-existing case or cases with "materially similar facts" must have held that his action was wrong.<sup>117</sup>

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114. *Lassiter v. Alabama A & M Univ.*, 28 F.3d, 1146, 1149 (11th Cir. 1994) (citing *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989)).

115. 19 F.3d 573 (11th Cir. 1994).

116. *Hansen*, 19 F.3d at 576 n.1.

117. See *Lassiter*, 28 F.3d at 1150. See, e.g., *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1183 (11th Cir. 1997) ("We have not been provided nor has our research revealed any case holding that a professor's in-house criticism of a particular text is constitutionally protected speech."); *Foy v. Holston*, 94 F.3d 1528, 1536 (11th Cir. 1996) ("Plaintiffs point us to no cases (and we have found none)"); *Hamilton v. Cannon*, 80 F.3d 1525, 1532 (11th Cir. 1996) ("There are no decisions clearly establishing that Tookes' alleged nonfeasance rises to the level of a constitutional violation."); *vacated in part*, 114 F.3d 172 (11th Cir. 1997); *Johnson*, 74 F.3d at 1093 ("We know of no case which might have clearly told Clifton that he could not take the disciplinary action indicated by an investigation which was initiated before he even knew about the allegedly protected speech, and in circumstances where the public concern implication was doubtful."); *Haygood v. Johnson*, 70 F.3d 92, 94-95 (11th Cir. 1995) (reaching the same conclusion in the probable cause context); *Williamson*, 65 F.3d at 158 (citing a factually similar case in the probable cause context); *Swint*, 51 F.3d at 997 (same); *D'Aguzzo v. Gallagher*, 50 F.3d 877, 880 (11th Cir. 1995) (finding no controlling authority in the right of privacy context); *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994) ("Unfortunately for Kelly, the difference between 'reckless' and merely 'negligent' disregard for the truth is not crystal clear; we have not staked out a bright line."); *Collins v. School Bd.*, 981 F.2d 1203, 1205 (11th Cir. 1993) ("no bright line test for when a delay [in hearing] would become a constitutional violation . . ." and "[n]o controlling decision involv[ing] facts materially similar"); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1506 (11th Cir.

Hence, although the fact that a bright line standard or rule has not been adopted to apply in all cases dealing with a particular constitutional right does not, by itself, mean that the government official is necessarily entitled to qualified immunity, it does unless a "spotted dog" case exists. If the case law is distinguishable on material points—and it usually is—the official will be immune. For this reason, the Eleventh Circuit has observed that government actors will "rarely act within 'clearly established' contours of law."<sup>118</sup>

The Eleventh Circuit has recently applied this principle in several Fourth Amendment cases. In *Lenz v. Winburn*,<sup>119</sup> the plaintiffs alleged that the defendants had committed a warrantless entry into their home in violation of the Fourth Amendment's prohibition of unreasonable searches. Noting that "[u]nreasonableness is determined by a case-by-case balancing of the state's interests against the individual's," and that there was no "factually similar case law," the Eleventh Circuit held that the defendant was, therefore, entitled to qualified immunity as a matter of law.<sup>120</sup> According to the court, the government actor is not required to predict how a court will resolve a balancing test.<sup>121</sup> If no factually similar case law has already made that decision, that government actor is not required to "err on the side of caution" and assume that his intended conduct is illegal.<sup>122</sup>

Similarly, in *D'Aguanno v. Gallagher*,<sup>123</sup> the plaintiffs alleged that in searching their persons and property without a

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1990) (noting that "there is Supreme Court precedent that is directly on point" in the first amendment context), *holding limited by* *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). *But see* *Stough v. Gallagher*, 967 F.2d 1523, 1528-29 (11th Cir. 1992) (pre-*Lassiter* case stating that "[w]e must decide only whether such a balancing result would be so clearly in favor of protecting Stough's right to speak that a reasonable official in Sheriff Gallagher's position would necessarily know that demoting Stough violated Stough's constitutional rights").

118. *Beauregard v. Olson*, 84 F.3d 1402, 1405 (11th Cir. 1996) (quoting *Hansen v. Soldenwagner*, 19 F.3d 573, 575 (11th Cir. 1994)).

119. 51 F.3d 1540 (11th Cir. 1995).

120. *Lenz*, 51 F.3d at 1551.

121. *See id.*

122. *Id.*

123. 50 F.3d 877 (11th Cir. 1995). *Accord* *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997).

warrant, the defendants violated the Fourth Amendment.<sup>124</sup> The court pointed out that to invoke the protection of that provision, the plaintiffs must show that they had a subjective expectation of privacy that society, at the time, was prepared to recognize as reasonable.<sup>125</sup> Because the plaintiffs cited no factually similar case law clearly establishing a reasonable expectation of privacy under the circumstances, the defendants were entitled to qualified immunity.<sup>126</sup>

### C. Violation

Proof that the law was clearly established does not end the inquiry and get the plaintiff to the jury. The government actor is still entitled to qualified immunity if his conduct did not violate that law.<sup>127</sup> For example, if his conduct complied with that clearly established law, the government actor is entitled to qualified immunity.<sup>128</sup> Again, the burden is on the plaintiff to demonstrate that the government actor committed such a violation.<sup>129</sup>

### D. Reasonable Belief of Lawfulness

"[P]laintiffs [also] have the burden of proving that a reasonable public official would not have believed that his actions were lawful, in light of clearly established law"<sup>130</sup> and the information possessed by the official.<sup>131</sup>

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124. *D'Aguanno*, 50 F.3d at 880.

125. *See id.*

126. *See id.*

127. *Swint v. City of Wadley*, 51 F.3d 988, 1000; *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1541 (11th Cir. 1994), *Harrell v. Decatur County*, 22 F.3d 1570, 1578 (11th Cir. 1994) (Dubina, J., dissenting), *vacated and dissent's reasoning approved on reh'g*, 41 F.3d 1494 (11th Cir. 1995); *Eubanks v. Gerwen*, 40 F.3d 1157, 1160-61 (11th Cir. 1994); *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994); *Courson v. McMillian*, 939 F.2d 1479, 1488 n.14, 1497 (11th Cir. 1991).

128. *See Harrell*, 22 F.3d at 1573.

129. *See id.*; *Nicholson v. Georgia Dep't of Human Resources*, 918 F.2d 145, 147 (11th Cir. 1990).

130. *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996).

131. *Dolihite v. Maughon*, 74 F.3d 1027, 1041 (11th Cir. 1996), *cert denied*, *Dolihite v. King*, 117 S. Ct 185 (1996); *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1540 (11th Cir. 1994); *Harris v. Coweta County*, 21 F.3d 388, 390 (11th



Therefore, if the government actor did violate clearly established law, he may still be entitled to qualified immunity if he reasonably misapprehended the law or the facts.

In *Harlow v. Fitzgerald*,<sup>132</sup> the Supreme Court stated that:

If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.<sup>133</sup>

Although the Eleventh Circuit and the former Fifth Circuit have recognized this principle, the parameters of extraordinary circumstances have never been articulated.<sup>134</sup> Reliance on advice of legal counsel has been held by several circuits to be an important factor in this inquiry.<sup>135</sup>

Eleventh Circuit case law suggests that a reasonable belief of lawfulness may also be based on a reasonable but mistaken belief or perception with respect to the facts under which the official is acting. For example, in *Post v. City of Fort Lauderdale*,<sup>136</sup> the defendants, after counting thirty-three persons in a restaurant, arrested the restaurant's owner for violating a city ordinance imposing a maximum occupancy cap for the restaurant of twenty-two. The plaintiff filed suit for false arrest and

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Cir. 1994); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1558 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994); *Nicholson v. Georgia Dep't of Human Resources*, 918 F.2d 145, 147 (11th Cir. 1990); *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989); *Harrell v. United States*, 875 F.2d 828, 830 (11th Cir. 1989); *Edwards v. Gilbert*, 867 F.2d 1271, 1273 (11th Cir. 1989), *modified*, *Edwards v. Okaloosa County*, 23 F.3d 358 (11th Cir. 1994); *Clark v. Evans*, 840 F.2d 876, 879 (11th Cir. 1988).

132. 457 U.S. 800, 818-19 (1982).

133. *Id.*

134. *See, e.g., Tindal*, 32 F.3d at 1540-41 (denying immunity for retaliatory firing after a court advised the defendant not to retaliate); *Trejo v. Perez*, 693 F.2d 482, 485 n.5 (5th Cir. 1982) (noting that the extraordinary circumstances requirement injects subjective factors).

135. *See, e.g., Kincade v. City of Blue Springs*, 64 F.3d 389, 399 (8th Cir. 1995). *But see Harden v. Adams*, 760 F.2d 1158, 1166 n.3 (11th Cir. 1985) (indicating that erroneous advice of legal counsel may not be a defense).

136. 7 F.3d 1552 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994).

presented evidence that there were actually only eighteen or nineteen persons in the restaurant at the time. The Eleventh Circuit held that despite this conflict in the evidence, the defendants were entitled to qualified immunity because, under the circumstances, "no reasonable fact-finder could find other than that a reasonable officer in the defendant's place could have thought the restaurant was over the max cap."<sup>137</sup>

#### V. APPLICATION IN NON-DEADLY FORCE CASES

Police officers are entitled to assert the defense of qualified immunity in excessive force cases in the Eleventh Circuit.<sup>138</sup>

The defense is extremely formidable in cases involving the use of non-deadly force.

Plaintiffs rarely contest the fact that the use of force was within a police officer's discretionary authority.<sup>139</sup> This may be because if they argued otherwise, they would substantially injure their claims against the law enforcement officer's employer. Moreover, the paucity of controlling non-deadly force case law, coupled with the lack of clear standards of liability, makes the burden of demonstrating that the law is "clearly established" exceedingly heavy, if not impossible for a plaintiff to carry.

Because of the inherent nature of balancing tests, the Eleventh Circuit has concluded that the *Graham v. Connor* Fourth Amendment reasonableness standard does not establish a "bright line" in cases involving non-deadly force.<sup>140</sup> As in other

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137. *Post*, 7 F.3d at 1558. See also *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (allowing a reasonable but mistaken belief that probable cause existed); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1234-35 (11th Cir. 1992) (holding that a reasonable officer could have acted lawfully considering the information he possessed and the clearly established law at that time); *Pepper v. Coates*, 887 F.2d 1493, 1498-99 (11th Cir. 1989) (holding that a reasonable person in Coates' supervisory position could reasonably not have known that he was violating the plaintiff's clearly established rights); *Clark v. Evans*, 840 F.2d 876, 881-82 (11th Cir. 1988) ("Under these circumstances it was objectively reasonable to believe that the escape could not be reasonably prevented in a less violent manner.").

138. See *Clark v. Beville*, 730 F.2d 739, 740 (11th Cir. 1984).

139. See, e.g., *Harrell v. Decatur County*, 22 F.3d 1570, 1574 (11th Cir. 1994) (Dubina, J., dissenting) ("Linda Harrell concedes that deputy Morris was acting within the scope of his discretionary authority when he attempted to arrest her husband following a routine traffic stop."), *vacated and dissent's reasoning approved on reh'g*, 41 F.3d 1494 (11th Cir. 1995).

140. *Post*, 7 F.3d at 1559. Accord *Gold v. City of Miami*, 121 F.3d 1442, 1446

Fourth Amendment cases involving vague standards, for this "inevitable conclusion" to be reached, and "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*."<sup>141</sup> If there is no controlling decision which existed prior to the incident in question, which involved facts materially similar to those in the case before the court, and which held the conduct complained of as unreasonable, the government actor is entitled to qualified immunity.<sup>142</sup>

Probably due to the fact that *Graham* was not decided until 1989, there are, at the present time, only a handful of controlling decisions which have applied its reasonableness standard in connection with the use of non-deadly force, and few of these have held that the use of such force was unlawful.<sup>143</sup> Moreover, most are readily distinguishable from each other such that even general rules and abstractions are difficult to ascertain.

In *Graham v. Connor*,<sup>144</sup> a police officer made an investigative stop of a vehicle he had seen leave a convenience store. The plaintiff, who was one of the occupants of the vehicle, disobeyed an order of the officer by getting out of the vehicle, at which time he "ran around it twice, and finally sat down on the curb, where he passed out briefly."<sup>145</sup> Other officers subsequently arrived at the scene, and one of them rolled the plaintiff over on the sidewalk, cuffing his hands tightly behind his back. He was then lifted up from behind and placed face down on the hood of

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(11th Cir. 1997); *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997).

141. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994).

142. *See, e.g., Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995) (involving warrantless entry into the plaintiff's home); *D'Aguanno v. Gallagher*, 50 F.3d 877 (11th Cir. 1995) (involving warrantless search of persons and property).

143. *See, e.g., Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996) (granting summary judgment for defendants because there was no constitutional violation); *Post*, 7 F.3d at 1558 (applying reasonableness standard to defendant's perception at the time of arrest). *But see Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (affirming denial of summary judgment because the *Graham* reasonableness test showed unlawful, excessive, non-deadly force); *Smith v. Mattox*, 127 F.3d 1416, 1420 (11th Cir. 1997) (same).

144. 490 U.S. 386 (1988).

145. *Graham*, 490 U.S. at 389.

a car. One of the officers shoved his face down against the hood of the car. Other officers then grabbed the plaintiff and threw him headfirst into a police car. At some point during the encounter, the plaintiff sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder. Thereafter, he developed a chronic loud ringing in his right ear. The trial court granted a directed verdict for the defendants, holding that their conduct did not amount to a constitutional violation.<sup>146</sup> The Fourth Circuit affirmed.<sup>147</sup> The Supreme Court vacated the judgment and remanded on the ground that the Fourth Circuit had analyzed the case utilizing the wrong legal standard.<sup>148</sup> The Court of Appeals was directed to reconsider the issue "under the proper Fourth Amendment standard."<sup>149</sup> The Supreme Court did not hold or even hint that the force used was unlawful.

In *Cottrell v. Caldwell*,<sup>150</sup> two police officers were dispatched to a residence following an emergency call. Upon arrival they learned from a woman on the scene that her grandson was suffering psychological problems and needed to be hospitalized. He was initially placed under arrest but a struggle ensued which lasted for approximately twenty minutes. During this struggle he struck the police officers, and one of them struck him. Other officers arrived and he was ultimately subdued and placed in handcuffs and leg restraints. Thereafter he was dragged out of his home and placed face down on the sidewalk. He was then placed in a police car with his feet on the rear seat and his head in the space between the front and rear seats. In this position he was unable to adequately inhale oxygen and died of "positional asphyxiation." The trial court denied the defendant police officer's motion for summary judgment.<sup>151</sup> The Court of Appeals reversed on the ground that these facts did not reveal a constitutional violation at all.<sup>152</sup>

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146. *Id.* at 390-91.

147. *Id.* at 391.

148. *Id.* at 399.

149. *Id.*

150. 85 F.3d 1480 (11th Cir. 1996).

151. *Cottrell*, 85 F.3d at 1484.

152. *Id.* 85 F.2d at 1492.

In *Brown v. City of Hialeah*,<sup>153</sup> the plaintiff filed suit alleging that the defendant police officers used excessive force in connection with his arrest for drug-related offenses following a "reverse sting" operation, during which the plaintiff and an accomplice pointed a gun at an undercover officer and an informant in an attempted "drug rip-off" and then tied them up and threatened to kill them. Other officers entered the building and rescued the officer and the informant. At trial the excessive force claims against all but three of the police officers were dismissed.<sup>154</sup> A jury ruled in favor of the remaining officers.<sup>155</sup> On appeal the plaintiff contended that errors in evidentiary rulings required a new trial.<sup>156</sup> The Eleventh Circuit agreed; significantly, however, it made no determination on the issue of liability or qualified immunity.<sup>157</sup>

In *Post v. City of Fort Lauderdale*,<sup>158</sup> a police officer arrested the owner of a restaurant for violating the city building code. While the officer was making the arrest, the plaintiff, who was the manager of the restaurant, began inciting bystanders and threatening the officer, and continued this after being instructed by the officer to be quiet. The officer then arrested the plaintiff for obstruction. He briefly placed the plaintiff in a choke hold, handcuffed him, took him outside the restaurant and pushed him against the wall. Again, the question of whether the force used was unlawful was never reached.<sup>159</sup> Instead, the Eleventh Circuit held that the officer was entitled to qualified immunity because the law was not clearly established that his conduct was unlawful.<sup>160</sup>

In *Courson v. McMillian*,<sup>161</sup> a deputy sheriff, who had been conducting surveillance of marijuana fields noticed a dark, four-wheel drive vehicle in the vicinity of these fields. He pulled over

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153. 30 F.3d 1433 (11th Cir. 1994).

154. *Brown*, 30 F.3d at 1435.

155. *Id.*

156. *Id.*

157. *Id.* at 1438.

158. 7 F.3d 1552 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994). *Accord* *Jones v. City of Dothan*, 121 F.3d 1456 (11th Cir. 1997).

159. *See Post*, 7 F.3d at 1561.

160. *See id.*

161. 939 F.2d 1479 (11th Cir. 1991).



a similar-looking vehicle in which the plaintiff was a passenger after it passed him in a no-passing zone while exceeding the speed limit. Because it was night, he requested that the plaintiff and two others exit the car, but they did not. He made a second request, but only the driver left the vehicle. He made a third request, at which time the plaintiff and the other passenger exited. They approached the deputy, who was alone, and he drew a shotgun from his patrol car. One of the other occupants became verbally abusive and belligerent, and challenged the deputy's authority to stop them. In response, the deputy pointed the shotgun toward them and instructed all three to lie face down on the ground until backup units arrived approximately thirty minutes later. The plaintiff was not touched or harmed in any way. The trial court denied the deputy's motion for summary judgment,<sup>162</sup> but the Eleventh Circuit reversed and held that the deputy was entitled to qualified immunity because the deputy "used no unreasonable force with respect to [the plaintiff] and her companions."<sup>163</sup> The court reasoned that Fourth Amendment case law had condoned pointing weapons at persons in connection with investigatory stops relating to drug offenses.<sup>164</sup>

None of these cases clearly establish the law with regard to the use of non-deadly force, or otherwise establish a "bright line" between legal and illegal conduct. Even though *Cottrell* and *Courson* hold that the actions of the police officers were lawful, they do not dictate what is *unlawful*.<sup>165</sup>

*Graham's* "reach and limits [have] not been defined in this circuit, particularly in [this] context. "The bright line of "clearly established law" remain[s] to be staked out by a process of inclusion and exclusion in individual [concrete] cases."<sup>166</sup> Moreover, even as the available pool of relevant case law expands in the future, there will rarely be cases involving "materially similar"

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162. *Courson*, 939 F.2d at 1485.

163. *Id.* at 1496.

164. *Id.*

165. See *id.*; *Cottrell v. Caldwell*, 85 F.3d 1480, 1492 (11th Cir. 1996).

166. *Adams v. St. Lucie County Sheriffs Dep't*, 962 F.2d 1563, 1576 (11th Cir. 1992) (Edmondson, J., dissenting) (citing *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989)), *vacated and dissent's reasoning approved en banc*, 982 F.2d 472 (11th Cir. 1993).

facts. As the Eleventh Circuit has noted, "when presented with allegations that a police officer used excessive force in the apprehension of a suspect, the federal courts must assess the reasonableness of the officer's actions in light of the essentially *unique factual circumstances* accompanying the arrest."<sup>167</sup> Likewise, in *Courson v. McMillian*,<sup>168</sup> the court observed that, "[t]he facts of each case obviously are critical in determining when force is excessive."<sup>169</sup>

A reasonable police officer—and any lawyer—perusing the case law for precedent will almost always find a constitutionally significant, factual distinction insofar as the amount and type of non-deadly force used and the circumstances encountered by the police officer on the scene, including, but not limited to, the severity of the crime at issue, the level of the threat to safety, and the conduct of the suspect.<sup>170</sup>

Therefore, until a substantial number of "reported cases testing the boundaries and details"<sup>171</sup> of "unreasonableness" further illuminate the contours of that legal norm, police officers who utilize non-deadly force should be entitled to summary judgment based on qualified immunity with regard to individual capacity claims under 42 U.S.C. § 1983.

## VI. APPLICATION IN DEADLY FORCE CASES

The body of deadly force case law is much larger than that of non-deadly force. Moreover, unlike the non-deadly force context, there are at least a few deadly force cases which clearly establish unlawfulness by holding that particular conduct is

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167. *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989) (emphasis added) ("Such determinations cannot be made *en masse*, and such suits therefore are especially unsuited to class disposition.").

168. 939 F.2d 1479 (11th Cir. 1991).

169. *Courson*, 939 F.2d at 1495 n.26. See also *Harrell*, 22 F.3d 1570, 1578 (11th Cir. 1994) (Dubina J., dissenting), *vacated and dissent's reasoning approved on reh'g*, 41 F.3d 1494 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989), quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)) ("[T]he question is 'whether the totality of the circumstances justify[s] a particular sort of . . . seizure.'").

170. Cf. *Courson*, 939 F.2d at 1496 ("Officers react to circumstances that they encounter and the conduct of detainees may dictate a particular officer's response.").

171. *Harris v. Coweta County*, 21 F.3d 388, 393 (11th Cir. 1994).

unconstitutional under the Fourth Amendment's reasonableness standard.<sup>172</sup> However, the full contours of the legal norms to be applied are still to be decided.

The only United States Supreme Court decision in this context was in *Tennessee v. Garner*,<sup>173</sup> a case involving the night-time burglary of a home. Following the arrival of police officers, the suspect left the home and ran across the backyard, crouching at a chain link fence at the edge of the yard. The police, who believed the suspect to be unarmed, ordered him to halt, at which time the suspect attempted to climb the fence. For the sole purpose of preventing the suspect's escape, a police officer, Hymon, shot the suspect in the back of the head. The District Court and the Sixth Circuit held that the police officer was entitled to qualified immunity because he had acted in reliance on a state fleeing felon statute.<sup>174</sup> The case was appealed to the Supreme Court on the issue of the constitutionality of that statute under the Fourth Amendment.<sup>175</sup> The Court held that the statute was unconstitutional as applied.<sup>176</sup> The Court explained that the facts did not justify the use of deadly force because "Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others."<sup>177</sup>

In *Pruitt v. City of Montgomery*,<sup>178</sup> the police were called to the scene of a reported night-time burglary of a commercial building. When a police officer, Kidd, went behind the building, a suspect came out from behind some bushes and initially approached or "came at" Kidd before attempting to flee. Kidd yelled "halt, police" several times, but the suspect ignored these commands and continued running. Kidd then shot the suspect, who had already crossed a ditch, in the buttocks area with his shotgun. As in *Garner*, the sole reason given by the police officer

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172. *Compare Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988) (applying due process standards), *with Clark v. Evans*, 840 F.2d 876 (11th Cir. 1988) (applying Eighth & Fourteenth Amendment standards), *and Acoff v. Abston*, 762 F.2d 1543 (11th Cir. 1985) (holding that factual disputes existed).

173. 471 U.S. 1 (1985).

174. *Garner*, 471 U.S. at 5.

175. *Id.* at 6.

176. *Id.* at 22.

177. *Id.* at 20-21.

178. 771 F.2d 1475 (11th Cir. 1985).

for using deadly force was to prevent the suspect's escape.<sup>179</sup> The plaintiff voluntarily dismissed the police officer from the case, apparently based on the likelihood that he would be entitled to qualified immunity due to his reliance on the state fleeing felon statute.<sup>180</sup> However, the District Court granted summary judgment to the plaintiff on his claim against the City of Montgomery.<sup>181</sup> The Eleventh Circuit affirmed, holding that the police officer engaged in an unconstitutional use of deadly force because Kidd's subjective fear had already passed and his only purpose in shooting was to stop Pruitt.<sup>182</sup>

In *Gilmere v. City of Atlanta*,<sup>183</sup> police responded to a call regarding an intoxicated driver who had threatened another motorist with a handgun after a near collision. The suspect was in his home when the police arrived at approximately 5:00 p.m. When the suspect came to the door, the police officers grabbed him and led him toward their patrol car. The suspect attempted to flee but was subdued. He tried to escape a second time, "flailing his arms about."<sup>184</sup> A scuffle ensued, during which the suspect was struck on the head several times with either open palms or fists. The officers eventually got the suspect to their patrol car. However, at that point the suspect wrenched free and grabbed one of the officer's revolvers. The revolver became dislodged and fell to the ground. The suspect then lunged at one of the officers, Sampson, who pulled his gun and fired two shots into the suspect's abdomen. After a bench trial the District Court held that the officers had used excessive force.<sup>185</sup> Apparently, the qualified immunity defense was not raised.<sup>186</sup> A majority of the Eleventh Circuit, sitting *en banc*, held that the use of deadly force was unreasonable because the police officer's reasonable fear of bodily injury was somehow tainted by the fact that the suspect's conduct was justified by the officers' having

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179. *Pruitt*, 771 F.2d at 1477.

180. *Id.* at 1478 n.6.

181. *Id.* at 1477-78.

182. *Id.* at 1483 & n.14.

183. 774 F.2d 1495 (11th Cir. 1985) (*en banc*).

184. *Gilmere*, 774 F.2d at 1497.

185. *Id.*

186. *Id.*

earlier physically abused the suspect during his efforts to resist arrest.<sup>187</sup> Current Chief Judge Tjoflat dissented on this issue.<sup>188</sup> Although *Gilmere*, which is a pre-*Graham* decision, has never been expressly overruled on this issue, Judge Tjoflat's dissent appears to have prevailed.<sup>189</sup>

Finally, in *Lundgren v. McDaniel*,<sup>190</sup> the last Eleventh Circuit decision to actually hold that the use of deadly force was unconstitutional, deputies investigated what they believed to be a night-time burglary of a store. The police testified that upon entering the store they were fired upon and returned fire, shooting and killing one of two suspects. The surviving suspect, who happened to be the wife of the store's owner (who was the shooting victim), testified that the police fired at them but that she and her husband never fired a shot. A jury ruled in favor of the plaintiff and the Eleventh Circuit affirmed and also held that the deputies were not entitled to qualified immunity because a jury could reasonably conclude that "the officers without provocation shot at a nondangerous suspect."<sup>191</sup>

*Garner*, *Pruitt*, and *Lundgren* clearly establish the law applicable to the facts facing the officers in each case and they each have common factual denominators. First, each involved the use by the police officers of a gun. Second, each involved suspected property crimes. Third, the suspect was not threatening the officers at the time deadly force was used. The unlawfulness of the use of deadly force under these circumstances is clearly established.

However, these cases do not clearly establish the unlawfulness of the use of deadly force when any of these factors are not present. For example, what if the police officer does not use a gun? In *Adams v. St. Lucie County Sheriff's Dept.*,<sup>192</sup> deputies rammed a petty theft suspect's vehicle during a high speed

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187. *Id.* at 1501.

188. *Id.* at 1510 n.17 (Tjoflat, J., dissenting).

189. See, e.g., *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994) ("In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.").

190. 814 F.2d 600 (11th Cir. 1987).

191. *Lundgren*, 814 F.2d at 603.

192. 962 F.2d 1563 (11th Cir. 1992), *vacated and dissent's reasoning approved en banc*, 998 F.2d 923 (11th Cir. 1993).



chase, causing the vehicle to leave the roadway and hit a telephone pole and a house, and killing an occupant of the vehicle. The Eleventh Circuit held that the deputies were entitled to qualified immunity.<sup>193</sup> The Court distinguished *Garner*, stating that "given *Garner's* facts, *Garner* stands chiefly for the proposition that a 'police officer's fatal shooting of a fleeing suspect constituted a Fourth Amendment "seizure,"" <sup>194</sup> whereas "[a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person."<sup>195</sup> In addition, *Adams* involved the commission by the suspect of a serious crime, a factor which, according to the court, also distinguished the case from *Garner*.<sup>196</sup>

Likewise, in *Harrell v. Decatur County*,<sup>197</sup> a deputy stopped a weaving motorist and arrested him for driving under the influence of alcohol. While the deputy was handcuffing the suspect, the suspect attacked the deputy. Following a struggle, during which the suspect hit the deputy with his flashlight several times, the suspect got in his car. The deputy followed and shot the suspect three times through the passenger side window. The Eleventh Circuit held that the deputy was entitled to qualified immunity because of "the combined facts that [the suspect] had been driving while intoxicated and had just committed a felony against a law enforcement officer that involved a significant threat of death or serious physical injury. . . ." <sup>198</sup>

Finally, *Garner* and its progeny have also been distinguished from cases in which the police officer uses deadly force in self-defense. In *Menuel v. City of Atlanta*,<sup>199</sup> the Eleventh Circuit held that the shooting of a mentally deranged person, who had previously lunged at police with a knife and who fired

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193. *Adams*, 998 F.2d at 923 (citing Judge Edmondson's earlier dissent, 962 F.2d at 1573-79).

194. *Adams*, 962 F.2d at 1574 (citations omitted).

195. *Id.* at 1577.

196. *Id.* at 1577-78.

197. 22 F.3d 1570 (11th Cir. 1994), *vacated and dissent's reasoning approved on rehearing*, 41 F.3d 1494 (11th Cir. 1995).

198. *Harrell*, 22 F.3d at 1581. *Accord* *Montoute v. Carr*, 114 F.3d 181, 182-83 (11th Cir. 1997) (granting qualified immunity to officers who shot suspect after suspect fired sawed-off shotgun and fled).

199. 25 F.3d 990 (11th Cir. 1994).

at the police in a darkened room, was constitutional as a matter of law.<sup>200</sup> Similarly, in *O'Neal v. DeKalb County*,<sup>201</sup> the shooting of a deranged hospital patient was also held to be constitutional as a matter of law where the patient rushed at officers with a knife.<sup>202</sup>

In sum, the law is clearly established that shootings of unarmed property crime suspects who have not threatened the officer or others are unconstitutional. Except for this fact situation, however, police officers should be entitled to qualified immunity for the use of deadly force because the law is not otherwise clearly established.

Even in cases where the law is clearly established, there is still room for argument that the police officer is entitled to qualified immunity where his use of deadly force was based on a reasonable but mistaken belief or perception with respect to the facts under which he was acting. For example, if the police officer reasonably but mistakenly believed that the suspect was guilty of the commission of a dangerous crime, or that the suspect was armed or threatening the officer, the plaintiff will be unable to carry his burden of proving that a reasonable police officer would not have believed that the use of force was lawful. This argument is particularly compelling in the context of investigatory stops and arrests, where the police officer's ability to accurately perceive the facts may be impaired by darkness or the speed at which the events evolve.

## VII. RAISING THE DEFENSE AT THE PLEADING STAGE

Like other government officials, police officers can and should raise the defense of qualified immunity repeatedly at successive stages in the litigation.<sup>203</sup> During the pretrial stage, the issue may be decided by the court in three ways: (1) on a motion to dismiss for failure to state a claim; (2) on a motion for judgment on the pleadings; and (3) on a summary judgment

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200. *Menuel*, 25 F.3d at 997.

201. 850 F.2d 653 (11th Cir. 1988).

202. *O'Neal*, 850 F.2d at 654.

203. See *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1487 (11th Cir. 1992) (noting that the defense may be asserted throughout the proceedings).

motion.<sup>204</sup>

According to the Eleventh Circuit, it is "imperative" that the question of qualified immunity be decided as early as possible in the lawsuit on one of these pretrial motions.<sup>205</sup> The rationale is that the underlying purpose of qualified immunity is to not only provide immunity from liability, but also immunity from litigation, including discovery and trial.<sup>206</sup> Immunity "is effectively lost if a case is erroneously permitted to go to trial."<sup>207</sup>

### A. Motion to Dismiss

In ruling on a motion to dismiss, it is the officer's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness.<sup>208</sup> It is unclear whether a heightened pleading standard, requiring a claimant to set forth in detail the facts upon which he bases his claim, is to be applied.<sup>209</sup> Irregardless, in the case of a *pro se* action, the court must liberally construe the complaint.<sup>210</sup>

In general, the motion should be granted if, taking the alle-

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204. *Ansley v. Heinrich*, 925 F.2d 1339, 1347 (11th Cir. 1991); *Bennett v. Parker*, 898 F.2d 1530, 1535 n.2 (11th Cir. 1990) (Tjoflat, J., concurring). See also *Nolen v. Jackson*, 102 F.3d 1187, 1189 (11th Cir. 1997) (allowing consideration of motion to dismiss following pretrial hearing).

205. *Cottrell v. Caldwell*, 85 F.3d 1480, 1487 (11th Cir. 1996); *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1184 & n.15 (11th Cir. 1994) (discouraging delay by defense counsel in raising the issue); *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1369 (11th Cir. 1993) ("[I]ts determination on summary judgment is strongly favored."); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1234 (11th Cir. 1992); *Ansley*, 925 F.2d at 1348. See also *Jordan v. Doe*, 38 F.3d 1559, 1564 n.3 (11th Cir. 1994) (noting that qualified immunity ordinarily should be decided long before trial).

206. *Cottrell*, 85 F.3d at 1487; *Hill*, 40 F.3d at 1184 n.15.

207. *Sims*, 972 F.2d at 1233.

208. *Behrens*, 516 U.S. 299 (1996).

209. Compare *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (leaving the question open), with *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1402 n.23 (5th Cir. 1996) (applying the standard); *Oladeinde*, 963 F.2d at 1485 (same); *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305 (11th Cir. 1989) (same); *Marx v. Gumbinner*, 855 F.2d 783, 788 n.7 (11th Cir. 1988) (same); *Arrington v. Dickerson*, 915 F. Supp. 1516, 1520, 1522 (M.D. Ala. 1996) (same).

210. *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990).

gations of the complaint in the light most favorable to the plaintiff, the plaintiff could prove no set of facts entitling him to relief.<sup>211</sup> More specifically, unless the plaintiff's allegations state a violation of clearly established law, a government official is entitled to dismissal before the commencement of discovery.<sup>212</sup>

However, a few courts have expressed reticence in granting motions to dismiss despite the fact that immunity is also intended to apply to discovery. They have held that if substantial factual development is necessary before the district court can identify the set of facts implicating a clearly established law that the defendant allegedly violated, a ruling on the qualified immunity issue should be deferred until discovery develops these facts.<sup>213</sup>

If the motion is not granted, the government official will be required to answer the complaint. The defense of qualified immunity must be specially pled as an affirmative defense,<sup>214</sup> or it will be deemed to have been waived.<sup>215</sup>

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211. See *Brower v. County of Inyo*, 489 U.S. 593 (1989); *Powell*, 914 F.2d at 1463; *Fundillar v. City of Cooper City*, 777 F.2d 1436, 1439 (11th Cir. 1985).

212. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed."); *Nolen v. Jackson*, 102 F.3d 1187, 1190 (11th Cir. 1997); *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1182 (11th Cir. 1997); *Wooten v. Campbell*, 49 F.3d 696, 699 (11th Cir. 1995); *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993); *Oladeinde v. City of Birmingham*, 962 F.2d 1481, 1485 (11th Cir. 1992); *Jasinski v. Adams*, 781 F.2d 843, 845 (11th Cir. 1986); *Flinn v. Gordon*, 775 F.2d 1551, 1553 (11th Cir. 1985).

213. See *Andreu v. Sapp*, 919 F.2d 637, 639 (11th Cir. 1990). See also *Oladeinde*, 963 F.2d at 1487 (denying qualified immunity on motion to dismiss because of the limited record).

214. *Siegert*, 500 U.S. at 231; *Harlow*, 457 U.S. at 815; *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *L.S.T., Inc., v. Crow*, 49 F.3d 679, 683 n.7 (11th Cir. 1995); *Courson v. McMillian*, 939 F.2d 1479, 1486 (11th Cir. 1991); *Williams v. City of Albany*, 936 F.2d 1256, 1259 (11th Cir. 1991); *Hutton v. Strickland*, 919 F.2d 1531, 1536 (11th Cir. 1990); *Nicholson v. Georgia Dep't of Human Resources*, 918 F.2d 145, 146 (11th Cir. 1990); *Hudgins v. City of Ashburn, Ga.*, 890 F.2d 396, 402 (11th Cir. 1989); *Wilson v. Attaway*, 757 F.2d 1227, 1246 (11th Cir. 1985); *Berdin v. Duggan*, 701 F.2d 909, 913 n.13 (11th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir. 1982).

215. *Hill v. DeKalb Reg'l Youth Detention Ctr.*, 40 F.3d 1176, 1184 (11th Cir. 1994); *Moore v. Morgan*, 922 F.2d 1553, 1557 (11th Cir. 1991).

### B. Motion for Summary Judgment

The government official bears the initial burden of informing the trial court of the basis for a motion for summary judgment, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The plaintiff must then adduce specific facts showing there is a genuine issue of material fact regarding whether the defendant's conduct violated clearly established law.<sup>216</sup> Because qualified immunity also protects government officials from the burdens of "broadranging discovery disruptive to effective government,"<sup>217</sup> the trial court may restrict discovery to that issue or even deny discovery altogether.<sup>218</sup> This will obviously have an adverse effect on the plaintiff's ability to oppose the motion.

When faced with a motion for summary judgment based on qualified immunity, the trial court must determine whether there is a genuine issue of material fact as to whether the government official committed conduct that violated clearly established law. This analysis can be broken down into six steps.

First, what was the government official's conduct and knowledge at the time of that conduct? The trial court must examine the pleadings, depositions, and affidavits and identify precisely the official's relevant actions and knowledge at the time of the conduct.<sup>219</sup> In case of factual disputes with regard

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216. *L.S.T., Inc.*, 49 F.3d at 684; *Andreu v. Sapp*, 919 F.2d 637, 639 (11th Cir. 1990); *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989); *Rich v. Dollar*, 841 F.2d 1558, 1562 (11th Cir. 1988) ("[T]he plaintiff/appellee cannot rely on the factual basis alleged in his complaint.").

217. *Harris v. Coweta County*, 21 F.3d 388, 390 (11th Cir. 1994).

218. *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 524 (11th Cir. 1994) (noting that the trial court properly stayed discovery). See also *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 996-97 (5th Cir. 1995) (allowing interlocutory appeal of district court's failure to stay discovery).

219. See *McMillian v. Johnson*, 88 F.3d 1554, 1570 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996); *Dolihite v. Maughon*, 74 F.3d 1027, 1041 (11th Cir. 1996) ("taking the facts known to the particular defendant"), *cert. denied*, *Dolihite v. King*, 117 S. Ct. 185 (1996); *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996); *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir. 1995) ("We look to . . . the information possessed by the official at the time the conduct occurred.") (citing *Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir. 1992)); *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) ("courts judge the acts of defendant gov-



to that conduct or knowledge, the trial court assumes as correct the facts in the record which are most favorable to the plaintiff.<sup>220</sup> Thus, the mere existence of a factual dispute between the parties is insufficient to avoid a summary judgment.<sup>221</sup>

Second, does the conduct constitute a violation of currently applicable law?<sup>222</sup> Third, was this conduct within the officer's discretionary authority?<sup>223</sup> Fourth, was the applicable law "clearly established" at the time in question?<sup>224</sup> Summary judgment should be granted if the plaintiff fails to demonstrate that the law was clearly established,<sup>225</sup> regardless of factual dis-

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ernment officials against the law and facts at the time defendants acted, not by hindsight, based on later events"); *Harris*, 21 F.3d at 391-93.

220. *Behrens v. Pelletier*, 516 U.S. 299, 313 ("facts the district court, in the light most favorable to the nonmoving party, likely assumed") (citing *Johnson v. Jones*, 515 U.S. 304, 319 (1995)); *Almond v. DeKalb County, Ga.*, 103 F.3d 1510, 1511 n.1 (11th Cir. 1997) ("resolving disputes in Plaintiff's favor and giving Plaintiff the benefit of all reasonable inferences"); *Cottrell v. Caldwell*, 85 F.3d 1480, 1486 (11th Cir. 1996); *Swint*, 51 F.3d at 992; *Belcher v. City of Foley*, 30 F.3d 1390, 1394 n.4 (11th Cir. 1994); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 n.8 (11th Cir. 1993) ("the issue material to qualified immunity is whether a reasonable officer in Seller-Sampson's place could have thought the facts were such that he could reasonably conclude that Lirio was committing or was about to attempt, acts of obstruction or resistance"), *modified*, 14 F.3d 583 (11th Cir. 1994); *Andreu*, 919 F.2d at 639.

221. *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923 (11th Cir. 1993); *Burrell v. Board of Trustees*, 970 F.2d 785, 787-88 (11th Cir. 1992); *Moore v. Gwinnett County*, 967 F.2d 1495, 1498 n.1 (11th Cir. 1992); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991); *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991); *Hutton v. Strickland*, 919 F.2d 1531, 1536 (11th Cir. 1990); *McDaniel v. Woodard*, 886 F.2d 311, 313 (11th Cir. 1989); *Harrell v. United States*, 875 F.2d 828, 831 (11th Cir. 1989) ("there is no evidence that Lt. Atkin knew any of this at the time he acted"); *Rich*, 841 F.2d at 1564-65; *Clark v. Evans*, 840 F.2d 876, 881 (11th Cir. 1988).

222. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Cottrell*, 85 F.3d at 1490; *Lenz v. Winburn*, 51 F.3d 1540, 1545-50 (11th Cir. 1995); *Swint*, 51 F.3d at 1000; *Wooten v. Campbell*, 49 F.3d 696, 699-701 (11th Cir. 1995); *Eubanks v. Gerwen*, 40 F.3d 1157, 1160-61 (11th Cir. 1994); *Caraballo-Sandoval*, 35 F.3d at 525; *Spivey v. Elliott*, 29 F.3d 1522, 1524 (11th Cir. 1994).

223. *Dolihite*, 74 F.3d at 1040 n.21.

224. *Behrens*, 516 U.S. at 313 ("the issue whether the federal right allegedly infringed was 'clearly established'"); *Howell v. Evans*, 922 F.2d 712, 718 (11th Cir. 1991), *vacated pursuant to settlement*, 931 F.2d 711 (11th Cir. 1991); *Hutton v. Strickland*, 919 F.2d 1531, 1538 (11th Cir. 1990).

225. *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269-70 (11th Cir. 1996); *Haney v. City of Cumming*, 69 F.3d 1098, 1102 (11th Cir. 1995); *McCoy v. Webster*, 47 F.3d 404, 408 (11th Cir. 1995) (noting that the plaintiff failed to cite a case in which similar conduct was held to be unlawful); *Spivey*, 41 F.3d at 1499 ("Once it is determined that there is no clearly established right, the Court could well leave for

putes.<sup>226</sup>

Fifth, assuming the law was established, did the defendant violate that law?<sup>227</sup> If so, or if a genuine issue of fact must be resolved to determine this, the defendant is not entitled to summary judgment based upon qualified immunity.<sup>228</sup>

Sixth, assuming that the law was clearly established and that the defendant violated that law, could a reasonable government official have believed his or her actions were lawful in light of that clearly established law and the information possessed by the government official at the time the conduct occurred?<sup>229</sup>

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another day the determination as to whether there is such a right.”).

226. *Burrell*, 970 F.2d at 787-88; *Moore*, 967 F.2d at 1498 n.1; *Ansley*, 925 F.2d at 1348; *Wright v. Whiddon*, 951 F.2d 297 (11th Cir. 1992); *Courson*, 939 F.2d at 1497; *Hutton*, 919 F.2d at 1536; *McDaniel*, 886 F.2d at 313; *Rich*, 841 F.2d at 1564-65.

227. *Dolihite*, 74 F.3d at 1040 (“The qualified immunity analysis requires the court to determine whether a defendant violated clearly established constitutional law.”); *Eubanks*, 40 F.3d at 1160; *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (“No evidence showed that Sellers-Sampson, Hurley, at Danziger had anything to do with the decision whether or not to prosecute Lirio.”), *modified*, 14 F.3d 583 (11th Cir. 1994).

228. *Swint v. City of Wadley*, 51 F.3d 988, 1000 (11th Cir. 1995); *Kelly v. Curtis*, 21 F.3d 1544, 1554-55 (11th Cir. 1994); *Harris v. Coweta County*, 5 F.3d 507, 509 (11th Cir. 1993), *superseded on reh'g*, 21 F.3d 388 (11th Cir. 1994); *McKinney v. DeKalb County, Ga.*, 997 F.2d 1440, 1443 (11th Cir. 1993); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1064 (11th Cir. 1992); *Sammons v. Taylor*, 967 F.2d 1533, 1538-39 (11th Cir. 1992); *Herren v. Bowyer*, 850 F.2d 1543, 1544 (11th Cir. 1988); *Rich*, 841 F.2d at 1565 (11th Cir. 1988).

229. *Behrens*, 516 U.S. at 313 (“Here the District Court’s denial of petitioner’s summary judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law.”); *Dolihite*, 74 F.3d at 1041; *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996); *Tindal v. Montgomery County Comm’n*, 32 F.3d 1535, 1539 (11th Cir. 1994); *Harris v. Coweta County*, 21 F.3d 388, 390 (11th Cir. 1994); *Post*, 7 F.3d at 1558; *Nicholson v. Georgia Dept. of Human Resources*, 918 F.2d 145, 146-47 (11th Cir. 1990); *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989); *Harrell v. United States*, 875 F.2d 828, 830 (11th Cir. 1989) (applying “reasonable officer” standard); *Edwards v. Gilbert*, 867 F.2d 1271, 1273 (11th Cir. 1989), *modified*, *Edwards v. Okaloosa County*, 23 F.3d 358 (11th Cir. 1994); *Clark v. Evans*, 840 F.2d 876, 879-80 (11th Cir. 1988) (addressing deadly force).

### C. Interlocutory Appeal of Denial of Pretrial Motion

Normally, the denial of a pretrial motion is not appealable on an interlocutory basis. This is not the case where the motion is based on qualified immunity.

Although an appellate court has no jurisdiction to review on an interlocutory basis the grant of summary judgment to a defendant on qualified immunity grounds,<sup>230</sup> a trial court's pretrial rejection of the qualified-immunity defense—whether based on substantive or procedural grounds—is a “final decision” subject to immediate appeal under the general appellate jurisdiction statute, 28 U.S.C. § 1291.<sup>231</sup> No certification pursuant to Rule 54(b) or 28 U.S.C. § 1192 is required even where the trial court's order did not dispose of claims or parties unaffected by qualified immunity.<sup>232</sup>

Such an appeal may be taken on each occasion the court denies a pretrial motion which asserts the defense, and the government official is not confined to a single appeal.<sup>233</sup> Thus, an unsuccessful appeal of the denial of a motion to dismiss does not preclude a later appeal of a denial of a motion for summary judgment.<sup>234</sup> Theoretically, the case could “yo-yo” back and forth between the trial court and the appellate court if the trial court does not rule in the defendant's favor on the issue of qualified immunity.

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230. *Cottrell v. Caldwell*, 85 F.3d 1480, 1484 (11th Cir. 1996).

231. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). See also *Behrens*, 516 U.S. at 313 (denying immunity based on factual conflict); *McElroy v. City of Macon*, 68 F.3d 437, 438 (11th Cir. 1995) (denying immunity due to untimeliness); *Howell v. Evans*, 922 F.2d 712, 717-18 (11th Cir. 1991) (noting that the trial court did not mention qualified immunity). See also *Jordan v. Doe*, 38 F.3d 1559, 1563-64 (11th Cir. 1994) (noting that even a “postponement” of a decision on the immunity issue until after trial is appealable); *Collins v. School Bd.*, 981 F.2d 1203, 1204-05 (11th Cir. 1993) (same).

232. See *Cottrell*, 85 F.3d at 1484; *Haney v. City of Cumming*, 69 F.3d 1098, 1101 (11th Cir. 1995); *Rogers v. Miller*, 57 F.3d 986, 988 (11th Cir. 1995); *Collins*, 981 F.2d at 1205; *Burrell v. Board of Trustees*, 970 F.2d 785, 788 (11th Cir. 1992); *Green v. Brantley*, 941 F.2d 1146, 1150-51 (11th Cir. 1991) (en banc); *Howell*, 922 F.2d at 723-24; *Marx v. Gumbinner*, 855 F.2d 783, 787 (11th Cir. 1988) (“even though a claim for injunctive relief remains pending in the district court”); *Flinn v. Gordon*, 775 F.2d 1551, 1552 (11th Cir. 1985).

233. *Behrens*, 516 U.S. at 309.

234. *Id.* Accord *Cottrell*, 85 F.3d at 1487 n.4.

Conversely, a government official does not waive his qualified immunity defense by electing to forego an interlocutory appeal.<sup>235</sup> The standard of review on appeal is "de novo," that is, review that substitutes the decision of the appellate court for the decision of the trial court, as if the appellate court had resolved the motion in the first instance.<sup>236</sup> Whether reviewing the denial of a motion to dismiss<sup>237</sup> or a motion for summary judgment,<sup>238</sup> the appellate court applies the same standard and method of analysis as the trial court.

In exercising its interlocutory appellate jurisdiction, an appellate court has the option of either making its own determination of the facts, accepting the facts as found by the trial court, or accepting those facts but supplementing them based on its own review of the record.<sup>239</sup> In connection with appeals of denials of summary judgment motions, the appellate court has jurisdiction over the purely legal issue of whether, taking the facts in the light most favorable to the plaintiff, clearly established federal rights were violated.<sup>240</sup>

The appellate court does not have jurisdiction to determine whether the government official actually committed the particular act alleged by the plaintiff if that is the only question raised.<sup>241</sup> Thus, if this "I did not do it" argument is the sole issue raised, the appeal will be dismissed.<sup>242</sup> Moreover, the ap-

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235. See *Hamm v. Powell*, 874 F.2d 766, 770 (11th Cir. 1989), *modified*, 893 F.2d 293 (11th Cir. 1990).

236. *Menuel v. City of Atlanta*, 25 F.3d 990, 994 n.7 (11th Cir. 1994). *Accord Harris v. Board of Educ.*, 105 F.3d 591, 595 (11th Cir. 1997); *Suissa v. Fulton County*, 74 F.3d 266, 269 (11th Cir. 1996); *D'Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995); *L.S.T., Inc., v. Crow*, 49 F.3d 679, 683 (11th Cir. 1995).

237. See *Powell v. Georgia Dep't of Human Resources*, 114 F.3d 1074 (11th Cir. 1997); *Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992); *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990).

238. See *Harrell v. Decatur County*, 22 F.3d 1570 (11th Cir. 1994), *vacated and dissent's reasoning approved on reh'g*, 41 F.3d 1494 (11th Cir. 1995).

239. See *McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996); *Cottrell v. Caldwell*, 85 F.3d 1480, 1486-87 (11th Cir. 1996).

240. See *Foy v. Holston*, 94 F.3d 1528, 1531 n.3 (11th Cir. 1996); *McMillian*, 88 F.3d at 1562.

241. See *Johnson v. Jones*, 515 U.S. 304, 312 (1995); *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996).

242. See *Jones*, 515 U.S. at 312; *Clifton*, 74 F.3d at 1091.

pellate court does not have pendent jurisdiction to review issues other than qualified immunity or state law immunity from suit,<sup>243</sup> such as the sufficiency of other claims against the appealing government official,<sup>244</sup> or against other parties.<sup>245</sup> Thus, while the qualified immunity issue is on appeal, other parties must "cool their heels" and await its resolution.<sup>246</sup>

If the appellate court reverses the trial court's denial of the motion, the police officer is entitled to immunity and the case is at an end insofar as the section 1983 claim is concerned.<sup>247</sup> Of course, if there are pendent state law claims, the trial court may either resolve them or elect to dismiss them without prejudice in the interest of judicial economy based on 28 U.S.C. § 1367(c).<sup>248</sup> Government officials who do not initially prevail on appeal should strongly consider applying for rehearing *en banc*. In *Adams*,<sup>249</sup> *Lassiter*,<sup>250</sup> and the more recent case of *Jenkins v. Talladega City Board of Education*,<sup>251</sup> the Eleventh Circuit reversed or vacated panel decisions which were adverse to government officials and rendered favorable opinions in order to guarantee uniformity on the application of qualified immunity principles.

If the appellate court ultimately affirms the denial of quali-

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243. See *McMillian*, 88 F.3d at 1572 n.23; *Cummings v. DeKalb County*, 24 F.3d 1349, 1352 (11th Cir. 1994).

244. See *Harris v. Board of Educ. of Atlanta*, 105 F.3d 591, 595-96 (11th Cir. 1997), *Nolen v. Jackson*, 102 F.3d 1187, 1189-90 (11th Cir. 1997); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995).

245. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995); *Hamilton v. Cannon*, 80 F.3d 1525, 1527 n.3 (11th Cir. 1996), *vacated in part*, 114 F.3d 172 (11th Cir. 1997); *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995); *Swint v. City of Wadley*, 51 F.3d 988, 1002-03 (11th Cir. 1995).

246. See *Buckley v. Fitzsimmons*, 20 F.3d 789, 799 (7th Cir. 1994).

247. See *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991).

248. See *L.S.T., Inc. v. Crow*, 49 F.3d 679, 685 (11th Cir. 1995); *McCoy v. Webster*, 47 F.3d 404, 406 n.3 (11th Cir. 1995); *Eubanks v. Gerwen*, 40 F.3d 1157, 1161 (11th Cir. 1994); *Courson v. McMillian*, 939 F.2d 1479, 1498 (11th Cir. 1991). *But see* *Schmelz v. Monroe County*, 954 F.2d 1540, 1543 n.3 (11th Cir. 1992) ("[O]ur holding that the district court should have granted summary judgment on the qualified immunity issue in favor of the defendants will deprive the district court of jurisdiction over the pendant state claim. Therefore, the claim will either have to be dismissed or transferred to the state courts.").

249. 998 F.2d at 923.

250. 28 F.3d at 1148.

251. 115 F.3d 821, 822 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 412 (1997).



fied immunity, the case goes to trial.<sup>252</sup> A holding that the government official is not entitled to qualified immunity is not dispositive of whether the officer actually violated the plaintiff's constitutional rights and should be liable therefor. At trial, the official may produce evidence tending to contradict and rebut the plaintiff's allegations, thereby precluding recovery.<sup>253</sup>

#### VIII. RAISING THE DEFENSE AT THE TRIAL AND POST-TRIAL STAGE

The denial of a pretrial motion asserting qualified immunity does not bar the issue from being raised at the trial.<sup>254</sup> Although early Eleventh Circuit decisions were to the contrary,<sup>255</sup> the law is now clear that qualified immunity may not be argued or mentioned to the jury as a defense to liability.<sup>256</sup> Instead, it must be decided by the trial judge and may not be submitted for decision by the jury.<sup>257</sup> If there are disputed issues of fact concerning qualified immunity that must be resolved,<sup>258</sup> the court may (and must, if requested) utilize special jury interrogatories and special verdicts.<sup>259</sup>

The defense can be raised during the trial on a directed verdict motion or after the trial on a motion for judgment notwithstanding the verdict.<sup>260</sup> In deciding the motion, the trial

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252. *Ansley*, 925 F.2d at 1348.

253. See *Foy v. Holston*, 94 F.3d 1528, 1530 n.1 (11th Cir. 1996); *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1541 n.6 (11th Cir. 1994); *Jasinski v. Adams*, 781 F.2d 843, 850 (11th Cir. 1986).

254. See *Swint v. City of Wadley*, 51 F.3d 988, 992 (11th Cir. 1995).

255. See, e.g., *Wilson v. Attaway*, 757 F.2d 1227, 1246-47 (11th Cir. 1985).

256. *Ansley*, 925 F.2d at 1348.

257. See *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1234 (11th Cir. 1992); *Stone v. Peacock*, 968 F.2d 1163, 1165-66 (11th Cir. 1992); *Bailey v. Board of County Comm'rs of Alachua County*, 956 F.2d 1112, 1126 n.17 (11th Cir. 1992).

258. See *Parker v. Williams*, 855 F.2d 763, 772 (11th Cir. 1988) ("It is the rare case where applicable law turns on extraordinary circumstances requiring jury resolution."), *superseded*, 862 F.2d 1471 (11th Cir. 1989).

259. See *Cottrell*, 85 F.3d at 1487 (noting that "jury interrogatories should be restricted to the who-what-when-where-why type of historical fact issues"); *Kelly v. Curtis*, 21 F.3d 1544, 1547 (11th Cir. 1994); *Stone*, 968 F.2d at 1166.

260. See *Cottrell*, 85 F.3d at 1488; *Kelly*, 21 F.3d at 1546. See, e.g., *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1148 (11th Cir. 1994) (affirming judgment as

court should consider all the evidence in the light most favorable to the plaintiff, and it may grant the motion unless there is a conflict in substantial evidence on whether a constitutional violation occurred.<sup>261</sup>

A party who receives an adverse ruling on a motion for directed verdict or judgment notwithstanding the verdict may seek appellate review of that ruling in the usual manner following final judgment.<sup>262</sup> In determining whether a trial court erred in denying a motion for directed verdict or for judgment notwithstanding the verdict, the appellate court applies the same standard as that applied by the trial court.<sup>263</sup>

### IX. CONCLUSION

Police officers asserting the qualified immunity defense in excessive force cases in the Eleventh Circuit have great advantages. They can seek to limit discovery solely to the qualified immunity issue. They are free from the burden of demonstrating that the law was not clearly established at the time of the incident in question. The current law is underdeveloped such that there really is very little "clearly established" law within the narrow definition given to that phrase by the Eleventh Circuit. The police officer is also not hamstrung by the existence of factual disputes between his version of the event and the plaintiffs.

Furthermore, if the police officer does not prevail on the defense by way of a pretrial motion, he is not required to await the outcome of the trial before seeking redress in the appellate

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a matter of law for defendants); *Wu v. Thomas*, 996 F.2d 271, 273 (11th Cir. 1993) (allowing defendants to assert a qualified immunity defense after attempt to recover damages); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1234 (11th Cir. 1992) (holding that district court would not have erred in allowing the defendants to reassert the qualified immunity contention during trial); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 713 (11th Cir. 1992) (denying defendant's defense of qualified immunity raised in motion for j.n.o.v.); *Davis v. Locke*, 936 F.2d 1208, 1213 (11th Cir. 1991) (holding that district court did not err in refusing to grant defendants' motion for directed verdict and j.n.o.v. on the basis of qualified immunity); *Hamm v. Powell*, 874 F.2d 766, 770 (11th Cir. 1989) (affirming district court's grant of directed verdict for appellants although defense was not invoked prior to trial).

261. *Von Stein v. Brescher*, 904 F.2d 572, 578 (11th Cir. 1990).

262. See *Cottrell*, 85 F.3d at 1488.

263. *Von Stein*, 904 F.2d at 578.

courts, but instead, can file interlocutory appeals each time a pretrial motion based on that defense is denied or even deferred. Given the Eleventh Circuit's present stance that defendants are entitled to qualified immunity in all but exceptional cases, a police officer is likely to prevail in such an appeal. Thus, it is no surprise that one district judge has remarked that "a more appropriate name for this defense would be 'unqualified immunity.'"<sup>264</sup>

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264. *Arrington v. Dickerson*, 915 F. Supp. 1516, 1527 (M.D. Ala. 1996).