LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL

21800 Cactus Avenue, Riverside, CA 92518
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

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May Officers Rely That Other Officers Performed Their Duties Properly When Resorting to Deadly Force?

In Unanimous Ruling, The U.S. Supreme Court Says "Yes", But the Facts Are All-Important.

By Michael P. Stone, Esq.
& Robert Rabe, Esq.

Officers arrive on-scene in a variety of volatile encounters at different times. Usually, in these highly dangerous and rapidly-unfolding circumstances, later-arriving officers have little or no time to confer with on-scene officers before being thrust into the confrontation. The extent to which "late-arrivals" can reasonably rely on other early-arriving officers to have correctly performed their duties is the focus of this recent U.S. Supreme Court Decision (January 9, 2017). It is *White v. Pauly*, No. 16-67, decided January 9, 2017, Supreme Court of the United States, 580 U.S. ___ (2017) ("*White*").

FACTS

Daniel Pauly ["Daniel"] was involved in a road-rage incident near Sante Fe, New Mexico. Two women called 911 to report a "drunk driver" who was "swerving all crazy." The two followed the driver, close behind, with their bright lights on. Daniel, feeling threatened, pulled his truck over to confront them. After a brief encounter, he drove to a secluded house where he lived with his brother, Samuel Pauly ["Samuel"]. Officer Truesdale was dispatched to respond to the women's 911 call. He interviewed the women at the off-ramp. The women told Truesdale that the driver had been driving recklessly and gave him the license plate number. That plate was registered to the Pauly brothers' address. After the women left, Truesdale was joined by Officers White and Mariscal. While the three officers agreed that there was insufficient probable cause to arrest Daniel, they wanted to speak with him to find out if he was intoxicated. Truesdale and Mariscal drove to the Pauly brothers' address and White stayed at the off-ramp, just in case Daniel returned. Upon reaching the Pauly residence, the officers found Daniel's pickup truck, then radioed White to have him join them. The Pauly brothers became aware that persons were outside their home, and yelled out, "Who are you?" and "What do you want?" In response, Mariscal and Truesdale laughed and responded, "Hey [expletive], we got you surrounded. Come out or we're coming in." Truesdale also shouted, "Open the door, State Police, open the door." Mariscal yelled, "Open the door,

open the door." Neither Samuel nor Daniel heard the officers identify themselves as state police, but did hear someone yelling, "We're coming in. We're coming in." The brothers then armed themselves, Samuel with a handgun and Daniel with a shotgun. One of the brothers yelled, "We have guns." The officers saw someone run to the back of the house, so Truesdale positioned himself behind the house and shouted, "Open the door, come outside." White arrived at the house just as one of the brothers said: "We have guns." When White heard that, he drew his gun and took cover behind a stone wall. Officer Mariscal took cover behind a pickup truck. A few seconds later, Daniel stepped part way out of the back door and fired two shotgun blasts. Samuel opened the front window and pointed a handgun in Officer White's direction. Mariscal fired immediately at Samuel, but missed. White then shot and killed Samuel.

Samuel's estate and Daniel filed suit against the three officers. One of the claims was that the officers were liable under 42 U.S.C. §1983, for violating Samuel's Fourth Amendment right to be free from excessive force. All three officers moved for summary judgment on qualified immunity grounds. White, in particular, argued that the Pauly brothers could not show that his use of force violated the Fourth Amendment and, that Samuel's Fourth Amendment right to be free from deadly force under the circumstances of this case was not clearly established. The District Court denied the officers' motions for summary judgment. The Court of Appeals analyzed Officer White's claim separately because he "did not participate in the events leading up to the armed confrontation." Despite the fact that Officer White arrived late on the scene and heard only "We have guns" before taking cover, the Court of Appeals held that a jury could have concluded his use of force was not reasonable. The Court of Appeals decided the rule that a reasonable officer in White's position would believe a warning was required, was clearly established at the time of Samuel's death. In reaching its decision, the Court of Appeals' relied on "general" statements of case law that hold "if the suspect threatens the officer with a weapon [,] deadly force may be used if necessary to prevent escape, and if [,] where feasible, some warning has been given." (*Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989).) The Court of Appeals concluded that a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.

Qualified immunity attaches when an officer's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." While case law "doe[es] not require a case directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." The Court noted that in the last five years, it has issued a number of opinions reversing federal courts in qualified immunity cases. In this case, it was again necessary for the Court to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." As the Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. The Court noted the Court of Appeals failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the Court of Appeals relied on *Garner* and *Graham*, which lay out excessive-force principles at only a general level. The Court remarked that this was not a "run-of-the-mill" Fourth Amendment violation, and "[t]his alone should have been an important indication [] that White's conduct did not violate a 'clearly established' right." The Court held: "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here."

THE EFFECT OF THIS CASE ON YOU

This decision makes it more difficult to successfully sue police officers for using excessive force, because almost all use of force situations have unique features that could be used as a reason to dismiss such lawsuits. One "Bloomberg Views" writer, Noah Feldman, suggests that, [i]n essence, the court is signaling that it wants fewer suits against officers in the lower courts, and is chiding the appellate courts for allowing such suits." Another commentator, in "Tactical Initiatives", too, suggests "that the lower courts will rule more often for qualified immunity instead of passing the buck to a higher court for their review."

What is especially interesting about this case is the Supreme Court has recognized that peace officers, like other professionals, may also reasonably assume proper procedures have been followed, and they are not required to "second-guess" their fellow officers and unnecessarily repeat warnings and other procedures that should have already been done prior to their involvement in the matter.

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced exclusively in police law and litigation for 37 years, following 13 years as a police officer, supervisor and police attorney.

Robert Rabe is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.