

Qualified Immunity: A Divided Sixth Circuit Wrestles with the Controversial Doctrine

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On a cold February morning in 2017, Ashtabula County deputy sheriff [Matthew Johns gunned down a bipolar and schizophrenic man, Vincent Palma](#).¹ Minutes earlier, Palma grabbed a TV remote from his stepsister and broke it.² Palma's stepmother called 911 and asked that Vincent be removed from her house.³ The 911 dispatcher informed Johns that Palma was mentally ill and "unwanted" at his family's house.⁴

When Johns arrived on scene, Palma was standing on the porch with his hands in his pockets.⁵ Johns greeted Palma several times, but he never responded.⁶ Instead, Palma began slowly approaching Johns.⁷ Palma never attacked or threatened Johns, but did not respond when Johns ordered him to stop and show his hands.⁸ Johns told Palma that if he did not stop approaching, he would use his taser.⁹ Palma did not stop, and Johns tased him several times.¹⁰ That proved ineffective, and Palma continued walking toward Johns.¹¹ Johns warned Palma that "this is how people get shot," and unholstered his gun.¹² Palma continued to approach Johns, who then shot Palma several times.¹³ Palma fell to the ground, "possibly in a fetal position."¹⁴ Johns alleged that Palma then "lunged" at him; he fired several more shots in response, killing Palma.¹⁵

After Palma's family sued Johns, the district court summarily dismissed their claims because Johns "acted reasonably" when he killed Palma and was therefore entitled to qualified immunity.¹⁶ A majority of the Sixth Circuit reversed, articulating a new set of factors to evaluate whether officers

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¹ Palma v. Johns, 27 F.4th 419, 424 (6th Cir. 2022).

² *Id.* (Palma was apparently displeased with what was on TV).

³ *Id.* at 426.

⁴ *Id.* at 424.

⁵ *Id.*

⁶ *Id.*

⁷ Palma v. Johns, 27 F.4th 419, 424–25 (6th Cir. 2022).

⁸ *See id.* at 424.

⁹ *Id.*

¹⁰ *See id.*

¹¹ *See id.* 424–25.

¹² *Id.* at 425 (citation omitted).

¹³ Palma v. Johns, 27 F.4th 419, 425 (6th Cir. 2022).

¹⁴ *Id.* at 426.

¹⁵ *Id.* at 425.

¹⁶ *Id.* at 427.

reasonably used force.¹⁷ Although the majority's factors go beyond those set forth by the Supreme Court, its analysis remains faithful to Supreme Court precedent. To explore how, we begin with an overview of qualified immunity.

Public officials protected by qualified immunity are entitled to summary judgment against civil claims stemming from their official conduct.¹⁸ But their immunity is “qualified”—officials (in theory) receive no immunity for conduct that “violate[s] clearly established statutory or constitutional rights” a reasonable person would know about.¹⁹ So, when applying qualified immunity to police, the Sixth Circuit asks: “(1) whether the officer violated the plaintiff’s constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident.”²⁰

Here, the first question turned on whether Johns reasonably used deadly force against Palma, because the “Fourth Amendment’s prohibition against unreasonable seizures protects citizens from excessive use of force by [police].”²¹ Deadly force is “unreasonable unless ‘the officer has probable cause to believe that the suspect poses a threat of serious physical harm’”²² To determine whether an officer reasonably believed that a suspect posed a threat, “courts must consider the totality of the circumstances.”²³

The Supreme Court, in *Graham v. Connor*, said that when assessing the totality of the circumstances, courts must pay “careful attention to the facts and circumstances of each particular case, *including* [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether [the suspect] is actively resisting

¹⁷ See *id.* at 429, 432.

¹⁸ See *id.* at 427–28. Qualified immunity has been widely criticized. See, e.g., *Demand Congress End Qualified Immunity*, BLACK LIVES MATTER (Feb. 10, 2022), <https://blacklivesmatter.com/demand-congress-end-qualified-immunity/> [on file with author]; Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Policy Analysis No. 901, CATO INSTITUTE (Sept. 14, 2020). Justice Sotomayor found that the Court’s approach to qualified immunity “transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Justice Thomas doubts that qualified immunity has a textual basis because “the text of § 1983 ‘ma[kes] no mention of defenses or immunities.’” *Baxter v. Bracey*, 140 S. Ct. 1862, 1862–63 (2020) (Thomas, J., dissenting from the denial of certiorari) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and in judgment)).

¹⁹ *Palma v. Johns*, 27 F.4th 419, 427–28 (6th Cir. 2022) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

²⁰ *Id.* at 428 (quoting *Kent v. Oakland Cnty.*, 810 F.3d 384, 390 (6th Cir. 2016)).

²¹ *Id.* (quoting *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015)).

²² *Id.* at 432 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

²³ *Id.*

arrest”²⁴ While not dispositive, those three factors help courts evaluate whether an officers’ actions were “objectively reasonable.”²⁵

Unfortunately, those factors do not neatly apply to Palma, who neither committed a crime nor resisted arrest.²⁶ Instead of using the three *Graham* factors, the majority here applied seven other factors to determine whether Johns acted reasonably: (1) the reason for police response, (2) the presence of a weapon, (3) disobedience or threatening behavior, (4) the distance between the officer and the person, (5) the encounter’s duration, (6) the officer’s awareness of any mental illness, and (7) available alternatives to deadly force.²⁷

Here, Johns was not responding to a crime, but a disagreement between Palma and his family over a TV remote.²⁸ And Palma was unarmed when Johns shot him.²⁹ Although police “need not face the business end of a gun to use deadly force,”³⁰ an officer’s “mere hunch that [the person] had a firearm cannot be enough to meet his burden.”³¹ Johns had no indication that Palma was armed,³² and his “mere failure to follow orders would not lead a reasonable officer to believe that Palma posed a danger.”³³

Although he continually approached Johns, Palma never acted aggressively toward nor threatened him – by Johns’ own admission, Palma “wasn’t walking at a fast pace.”³⁴ In terms of distance and duration, Johns stayed about fifteen feet away from Palma throughout the encounter, which lasted roughly ten minutes.³⁵ Further, Johns knew Palma was mentally ill when he arrived on scene, and was “required to [account for] Palma’s diminished capacity before using force against him.”³⁶ Using deadly force against the mentally ill is only reasonable in extreme cases, *i.e.*, where the person is armed and threatening officers.³⁷ And Johns had ample opportunity to use non-lethal force.³⁸

Based on the majority’s application of those seven factors, Johns’ use of force was unreasonable here.³⁹ The dissent, however, argued that Johns was

²⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Garner*, 471 U.S. at 8–9) (emphasis added).

²⁵ *Graham*, 490 U.S. at 397 (citations and internal quotations omitted).

²⁶ See *Palma v. Johns*, 27 F.4th 419, 429 (6th Cir. 2022).

²⁷ See *id.* at 432.

²⁸ *Id.* at 432–33.

²⁹ See *id.* at 433.

³⁰ *Id.* at 433 (quoting *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019)).

³¹ *Id.* at 434 (quoting *Bougress v. Mattingly*, 482 F.3d 886, 891 n.5 (6th Cir. 2007)).

³² *Palma*, 27 F.4th 419, 433 (6th Cir. 2022) (Johns “never saw Palma holding any object, let alone a firearm or other weapon.”).

³³ *Id.* at 430.

³⁴ *Id.* at 424 (citation omitted).

³⁵ See *id.* at 435–36.

³⁶ *Id.* at 436–37 (citation and internal quotation marks omitted).

³⁷ See *id.* at 439–40.

³⁸ See *Palma v. Johns*, 27 F.4th 419, 439 (6th Cir. 2022) (citing cases where alternatives to deadly force were available and appropriate, rendering deadly force unreasonable).

³⁹ *Id.* at 441–42.

entitled to qualified immunity and took exception to the majority's departure from the traditional three-factor *Graham* approach.⁴⁰ The dissent further noted that none of the majority's factors are dispositive.⁴¹ More broadly, the dissent argued that the majority's factors were based not in law, but on its desired result.⁴² But those critiques are unpersuasive.

For one, the Supreme Court's *Graham* factors were neither dispositive nor exhaustive, because "reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."⁴³ As Judge Readler points out, what truly matters is the totality of the circumstances.⁴⁴ The majority does not "concede" that point⁴⁵—it accurately states that the factors "merely guide courts as they consider the 'totality of the circumstances' to determine whether the officer's use of force was objectively reasonable."⁴⁶ Indeed, in prior cases where the *Graham* factors were less applicable, the Sixth Circuit applied additional factors not discussed by the Supreme Court.⁴⁷ The majority, in short, considered factors beyond those outlined in *Graham* to get a more complete picture of the circumstances.⁴⁸

Although the *Graham* factors may not neatly apply here, they are clearly embodied in the majority's seven-factor analysis.⁴⁹ The majority analyzed the "severity of the crime" by observing that no underlying crime occurred here;⁵⁰ but it did not, as the dissent suggests, make crime a prerequisite to finding that someone posed a threat.⁵¹ The majority then considered whether Palma posed an immediate threat or actively resisted arrest by considering whether he was armed, aggressive, threatening, and near Johns.⁵² Again, while no single factor is dispositive, each is useful in understanding the totality of the circumstances because each is relevant to determining whether an officer acted reasonably.⁵³

In truth, the dissent takes far greater issue with the majority's understanding of the totality of the circumstances.⁵⁴ In particular, it argues that the majority improperly considered Palma's mental illness as a mitigating factor, because Palma's disobedience and unpredictability made Johns' use of deadly force

⁴⁰ See *id.* at 449–50 (Readler, J., dissenting).

⁴¹ See *id.* at 450.

⁴² See *id.* at 444, 449–50.

⁴³ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation omitted).

⁴⁴ See *Palma v. Johns*, 27 F.4th 419, 450 (6th Cir. 2022) (Readler, J., dissenting).

⁴⁵ *Id.*

⁴⁶ *Id.* at 429 (majority opinion) (quoting *Jacobs v. Alam*, 915 F.3d 1028, 1040–41 (6th Cir. 2019)).

⁴⁷ See, e.g., *Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 314 (6th Cir. 2017).

⁴⁸ See *Palma*, 27 F.4th at 429, 432.

⁴⁹ See *Palma v. Johns*, 27 F.4th 419, 429, 432 (6th Cir. 2022).

⁵⁰ *Id.* at 429.

⁵¹ See *id.* at 450 (Readler, J., dissenting).

⁵² *Id.* at 433–36 (majority opinion).

⁵³ See *id.* at 429, 432.

⁵⁴ See *id.* at 450–54 (Readler, J., dissenting).

more reasonable.⁵⁵ But these disagreements point to issues with the reasonableness standard itself, not the majority's application.

Ultimately, analyzing the totality of the circumstances requires judges to make a judgment call about what was reasonable based on the facts. But reasonable judges can look at the same circumstances and disagree about whether someone acted reasonably. That bug (or feature) seems inescapable for courts, because a precise, mechanical definition of Fourth Amendment reasonableness eludes even the highest court in the land.⁵⁶

Here, the majority sought a more complete picture of the circumstances, through a more expansive set of factors, to inform its judgment.⁵⁷ Far from creating a strict set of analytical factors, the *Graham* Court's language expressly enables courts to consider factors beyond those its decision set forth.⁵⁸ While considering more factors does not inherently cut against qualified immunity, it may indicate a trend toward less deferential review of qualified immunity claims, and a more comprehensive assessment of whether police officers acted reasonably under all the circumstances.

⁵⁵ See *Palma v. Johns*, 27 F.4th 419, 451–52 (6th Cir. 2022).

⁵⁶ See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation omitted).

⁵⁷ See *Palma*, 27 F.4th at 429, 432, 440.

⁵⁸ See *id.* at 428–29. See also *Graham*, 490 U.S. at 396.