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## Constitutional Law - Freedom from Accidental Shootings by Police Is Not a Clearly Established Right for the Purposes of Qualified Immunity - Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019)

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**CONSTITUTIONAL LAW—FREEDOM FROM  
ACCIDENTAL SHOOTINGS BY POLICE IS NOT A  
CLEARLY ESTABLISHED RIGHT FOR THE  
PURPOSES OF QUALIFIED IMMUNITY—  
CORBITT V. VICKERS, 929 F.3D 1304  
(11TH CIR. 2019).**

The Fourth Amendment controls “a free citizen’s claim that law enforcement officials used excessive force in the course of . . . [a] ‘seizure’ of his person.”<sup>1</sup> As the law stands today, an action by law enforcement must be intentionally—rather than accidentally—directed towards the plaintiff for a court to find that the action violated the plaintiff’s constitutional right to be free from excessive force.<sup>2</sup> In *Corbitt v. Vickers*,<sup>3</sup> the United States Court of Appeals for the Eleventh Circuit determined whether a gunshot, intended for a family dog that accidentally hit and injured a ten-year-old boy who was lawfully seized by police, violated the child’s Fourth Amendment right to be free from excessive force.<sup>4</sup> The Eleventh Circuit held that the district court erred by denying the officer’s motion to dismiss based on a qualified immunity defense because the plaintiff could not offer evidence to support any of the three means by which a plaintiff may overcome such a defense.<sup>5</sup>

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<sup>1</sup> See U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*; see also *Graham v. Connor*, 490 U.S. 386, 388 (1989) (discussing requirement of specific constitutional infringement to overcome qualified immunity in excessive force cases).

<sup>2</sup> See *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (reasoning that law enforcement action cannot be simultaneously unknowing and violative of constitutional rights). “Violation of the Fourth Amendment requires an intentional acquisition of physical control.” *Id.*

<sup>3</sup> 929 F.3d 1304 (11th Cir. 2019).

<sup>4</sup> See *id.* at 1313–14 (reviewing whether bystanders have established Fourth Amendment right to be free from accidental police shootings). The court, quoting *Terry v. Ohio*, stated “[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)). This also applies with equal force to cases involving innocent bystanders. *Corbitt*, 929 F.3d at 1313–14.

<sup>5</sup> See *Corbitt*, 929 F.3d at 1312 (characterizing three ways plaintiffs may overcome qualified immunity in excessive force cases). A plaintiff must “show that a materially similar case has already been decided,” that a “broader, clearly established principle should control the novel facts” of a certain situation, or that the case “fits within the exception of conduct which so obviously

On July 10, 2014, Deputy Sheriff Michael Vickers (“Vickers”) and several other Coffee County Sheriff’s Officers in Georgia were tasked with apprehending a criminal suspect who had wandered into Amy Corbitt’s (“Corbitt”) property.<sup>6</sup> Corbitt’s ten-year-old child (“SDC”), along with five other minor children and one adult, were all in the yard when the officers entered and demanded that all seven individuals lay on the ground.<sup>7</sup> While the children were lying on the ground and obeying the officers’ orders, Officer Vickers discharged his firearm at the family dog twice.<sup>8</sup> After Vickers’s first shot missed, the dog retreated under the home before reappearing to approach its owners.<sup>9</sup>

As the dog approached after the first shot was fired, Vickers discharged his firearm again, missed the dog, struck the back of SDC’s right knee—who was lying only eighteen inches away from the officer.<sup>10</sup> The suspect, who the officers originally entered the property to detain, was visibly unarmed and readily compliant during the entire seizure.<sup>11</sup> Doctors performed medical imaging to confirm a serious gunshot wound to SDC’s right knee, resulting in chronic and severe pain and mental trauma.<sup>12</sup> SDC’s injuries required ongoing care from an orthopedic surgeon.<sup>13</sup>

Corbitt brought a civil action against Officer Vickers, pursuant to 42 U.S.C. § 1983, alleging the officer violated SDC’s Fourth Amendment constitutional right to be free from excessive force.<sup>14</sup> The district court

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violates [the] constitution that prior case law is unnecessary.” *Id.* (quoting *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005)).

<sup>6</sup> *See Corbitt*, 929 F.3d at 1308 (discussing reasons police entered property). There was no indication as to the nature of the crime the suspect was being apprehended for, but the complaint noted that the suspect appeared to be compliant and unarmed. *Id.*

<sup>7</sup> *See id.* (describing relationship between bystanders and suspect). Since SDC was a minor child, the suit was filed by his mother, Amy Corbitt, on behalf of SDC. *Id.* His name remains confidential due to his status as a minor. *Id.*

<sup>8</sup> *See id.* (describing officer’s actions when dog appeared). The children complied with the officers’ orders at all times, and it is alleged that the discharge of the firearm occurred without necessity or immediate cause. *Id.*

<sup>9</sup> *See id.* (discussing officer’s decision to shoot dog twice). No efforts were made to restrain the dog and the dog did not appear to be threatening toward either the children or officers. *Id.*

<sup>10</sup> *See id.* (describing scene prior to officer shooting child). Just before the second shot, the child was readily viewable and remained compliant with the officers. *Id.*

<sup>11</sup> *See id.* (discussing allegation of unreasonable police conduct).

<sup>12</sup> *See Corbitt v. Vickers*, 929 F.3d 1304, 1308 (11th Cir. 2019) (discussing physical and psychological effects of officer’s actions).

<sup>13</sup> *See id.* (noting long-term effects of injuries).

<sup>14</sup> *See* 42 U.S.C. § 1983 (2019) (stating current law for civil actions for deprivation of constitutional rights).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

denied Vickers's motion to dismiss based on the qualified immunity defense because it was determined that he used excessive force in firing his weapon.<sup>15</sup> Officer Vickers appealed the denial of his motion to the Eleventh Circuit, which subsequently remanded the case to the district court with instructions to grant Vickers's motion to dismiss because there was no clearly established right to be free from accidental applications of force.<sup>16</sup>

Qualified immunity first developed in 1967 as a defense of "good faith and probable cause" when plaintiffs filed claims against arresting officers using the Fourth Amendment.<sup>17</sup> By 1982, the Supreme Court moved toward an objective formulation to determine whether the defense of qualified immunity could shield a government official "accused of violating the Constitution from having to pay money damages if the defendant's conduct did not violate clearly established rights of which a reasonable official would have known."<sup>18</sup> To overcome the defense of qualified

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any citizen of the United States or other person within the jurisdiction thereof 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

*Id.*; see also *Corbitt*, 929 F.3d at 1308 (explaining civil action *Corbitt* brought against officer and police force).

<sup>15</sup> See *Corbitt*, 929 F.3d at 1309 (finding officers not entitled to qualified immunity when they use excessive force). The district court reasoned that, although the Vickers meant to shoot the animal, his shot ultimately was intended to maintain control of the situation. *Id.* As such, SDG was "seized" for 4th Amendment purposes. *Id.*

<sup>16</sup> See *id.* at 1318 (finding such Fourth Amendment violations require officer's action be intentional).

<sup>17</sup> See *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967) (expanding defense of good faith and probable cause to apply to actions under § 1983); see also Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 186 (2008) (outlining expansion of "reasonable mistake" defense to almost all executive agents); George Leef, *Qualified Immunity—A Rootless Doctrine the Court Should Jettison*, FORBES (Mar. 21, 2018, 9:53 AM), <https://www.forbes.com/sites/georgeleef/2018/03/21/qualified-immunity-a-rootless-doctrine-the-court-should-jettison/#15a4227e31c7> [perma.cc/6MTW-XXB9] (noting qualified immunity defense was not explicit in statute but "invented" by Supreme Court).

<sup>18</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (holding "subjective element" of good-faith defense incompatible with "good faith" immunity); see also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 581, 619 (1998) (analyzing objective test requiring "plaintiff to allege more than" malice to overcome qualified immunity defense); Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 869–70 (1998) (examining shift to objective test). The shift was necessary to balance the redressability of civil abuses and protection of government stability. Eskow & Cole, *supra*, at 869–70; see also Nick Sibilla, *Cop Who Accidentally Shot 10-Year-Old When Aiming for Family Dog Can't Be Sued, Federal Court Rules*,

immunity, a plaintiff must show that the government official violated a constitutional right and that the right was “clearly established.”<sup>19</sup>

Since the development of the objective formulation for qualified immunity, federal courts have continually split over cases where a government official used excessive or unreasonable force against an individual.<sup>20</sup> The Eleventh Circuit, specifically known for granting officials qualified immunity even when there may have been no lawful basis, has outlined three potential ways a plaintiff may overcome the defense of qualified immunity, but characterizes each with an especially high burden on the plaintiff.<sup>21</sup> First, the plaintiff can show that a “materially similar case has

FORBES (July 18, 2019, 9:30 AM), <https://www.forbes.com/sites/nicksibilla/2019/07/18/cop-who-accidentally-shot-10-year-old-when-aiming-for-family-dog-cant-be-sued-federal-court-rules/#9d68d039877b> [perma.cc/PJ93-732K] (discussing reshaping of doctrine in 1980s and its protection of all officials except those “plainly incompetent”).

<sup>19</sup> See *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1199 (11th Cir. 2007) (discussing applicability of qualified immunity when police act reasonably). “Qualified immunity shields public officials from civil damages ‘as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.’” *Id.* (internal citations omitted); see also *Armacost*, *supra* note 18, at 619–20 (noting that right must be “clearly established” and described with particularity in factually analogous cases); Karen M. Blum, Symposium, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1893–94 (2018) (addressing court discretion to forgo tough constitutional questions when alternative analysis is available).

<sup>20</sup> See *Eskow & Cole*, *supra* note 18, at 871 (examining circuit variations in analysis of excessive force law and availability of qualified immunity defense); see also Marcus R. Nemeth, Note, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C.L. REV. 989, 1005 (2019) (analyzing that courts continue to “build upon past precedents by increasing protections for police officers.”).

<sup>21</sup> See *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (discussing requirement that case law be factually similar). “[I]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.” *Id.*; see also *Brown*, *supra* note 17, at 197 (explaining between 1990 and 2002 “constitutional victims’ chances of” overcoming qualified immunity “closely approached zero”). The Eleventh Circuit has granted the defense of qualified immunity to government officials in “just about every constitutional context imaginable.” *Brown*, *supra* note 17, at 197. Notably, following the Eleventh Circuit’s granting of qualified immunity in *Hope v. Pelzer* (240 F.3d 975, 977 (11th Cir. 2001)), the Supreme Court vacated and remanded three more Eleventh Circuit opinions involving “egregious violations” that would have had different results in other circuits. *Brown*, *supra* note 17, at 205; see also *Eskow & Cole*, *supra* note 18, at 906 (requiring but for showing once official introduces objectively reasonable explanation for conduct); Emma Ockerman, *It’s Nearly Impossible to Sue a Cop for Shooting Someone. These Democratic Candidates Are Trying to Change That*, VICE (Oct. 31, 2019, 12:25 PM), [https://www.vice.com/en\\_us/article/7x5jj9/its-nearly-impossible-to-sue-a-cop-for-shooting-some-one-these-democratic-candidates-are-trying-to-change-that](https://www.vice.com/en_us/article/7x5jj9/its-nearly-impossible-to-sue-a-cop-for-shooting-some-one-these-democratic-candidates-are-trying-to-change-that) [perma.cc/W7HT-YQXE] (noting plaintiffs must prove “a systemic problem or an official police department policy” caused constitutional violation). The plaintiff must show the officer violated a “clearly established right” that had been previously established in case law; however, because “so few of these cases make it to court,” that showing is nearly impossible. Ockerman, *supra*.

already been decided.”<sup>22</sup> Second, the plaintiff can show a “broader, clearly established principle should control the novel facts” of the specific situation.<sup>23</sup> Finally, the plaintiff can show the particular case “fits within the exception of conduct which so obviously violates [the] [C]onstitution that prior case law is unnecessary.”<sup>24</sup>

When an innocent bystander is temporarily detained and subsequently becomes the victim of unreasonable or excessive force by law enforcement officials, it is difficult to overcome a qualified immunity defense, even if he or she is considered “seized” under the Fourth Amendment as “the force employed was not directed towards [him or] her.”<sup>25</sup>

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<sup>22</sup> See *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005) (requiring “materially similar” case be decided before the officer’s alleged violative conduct); see also *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (recognizing “longstanding principle that clearly established law ‘should not be defined’ with high level of generality.”); *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204 (11th Cir. 2012) (explaining analysis must tie particularized facts to judicial precedents); David French, *A Dreadful Police Shooting Highlights the Need to Change a Terrible Law*, NAT’L REVIEW (July 11, 2019, 3:57 PM) <https://www.nationalreview.com/2019/07/a-dreadful-police-shooting-highlights-the-need-to-change-a-terrible-law/> [perma.cc/Z689-GEPK] (discussing “extraordinarily restrictive” definition of “clearly established” rights leaves plaintiffs with little hope of redress). The plaintiff’s requirement of showing a clearly established right through “remarkably similar case[s] with nearly identical facts” essentially gives officers in each jurisdiction “one ‘free’ constitutional violation, and since there are virtually endless different ways in which state officials can interact with citizens,” these violations pile up. French, *supra*; see also Jay Schweikert, *Eleventh Circuit Grants Immunity to Officer Who Shot Child Lying on the Ground*, CATO INST.: CATO AT LIBERTY (July 15, 2019, 10:48 AM) <https://www.cato.org/blog/eleventh-circuit-grants-immunity-officer-who-shot-child-lying-ground-while-trying-shoot> [perma.cc/X7VJ-CLJF] (realizing difficulty in finding similar case law involving “unique facts of this case”). Although overcoming qualified immunity does not require “the very action in question [to] ha[ve] previously been held unlawful,” the Eleventh Circuit seems to require “this level of specificity.” Schweikert, *supra*.

<sup>23</sup> See *Mercado*, 407 F.3d at 1159 (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 743 (2002)) (noting “reasoning . . . not the holding” of prior cases also places reasonable officers on notice of clearly established right); see also *Loftus*, 690 F.3d at 1205 (holding clearly established principles must exist “with obvious clarity by the case law.”). The purpose of the obvious clarity rule is to ensure that every “objectively reasonable government official” will have notice of the violative conduct. *Loftus*, 690 F.3d at 1205.

<sup>24</sup> See *Mercado*, 407 F.3d at 1159 (requiring plaintiff identify law “interpreted by the Supreme Court, the Eleventh Circuit, or the Supreme Court of Florida.”); see also *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002) (highlighting only way to overcome test). The plaintiff must show that case law standards “inevitably lead every reasonable officer in [the defendant’s] position to conclude the force was unlawful.” *Ferraro*, 284 F.3d at 1199 (alteration in original) (citation omitted).

<sup>25</sup> See *Schultz v. Braga*, 455 F.3d 470, 480 (4th Cir. 2006) (declining extension of protection to innocent bystanders “unintentionally killed by police” while seizing fleeing criminal). Where a victim is “not the intended object of the shooting by which he was injured,” he cannot be “seized” within the meaning of the Fourth Amendment. *Id.* (citing *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991)); see also *Brower v. County Of Inyo*, 489 U.S. 593, 596–97 (1989) (determining Fourth Amendment protections do not cover accidental effects of otherwise lawful government

The objective test outlined by the Supreme Court has left room for interpretation, allowing circuit courts to refuse to recognize innocent bystanders' Fourth Amendment claims by distinguishing between the "police action directed toward producing a particular result—in Fourth Amendment parlance, 'an intentional acquisition of physical control'—and police action that simply causes a particular result."<sup>26</sup> The focus of a qualified immunity defense and Fourth Amendment violation analysis is the "misuse of power, not the accidental effects of otherwise lawful government conduct."<sup>27</sup>

In *Corbitt v. Vickers*, the Eleventh Circuit Court of Appeals decided whether a police officer should be shielded from liability through the doctrine of qualified immunity when the officer accidentally shot a lawfully

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conduct); see also *Childress v. City of Arapaho*, 210 F.3d 1154, 1155–57 (10th Cir. 2000) (finding no seizure when officers accidentally shot plaintiff while intending instead to restrain plaintiff's abductors).

<sup>26</sup> See *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) (quoting *Brower*, 489 U.S. at 596) (holding "intention" requirement of government action cannot be met by "deliberateness with which a given action is taken."); see also Evan Bernick, *It's Time to Limit Qualified Immunity*, GEO. LAW: GEO. J.L. & PUB. POL'Y (Sept. 17, 2018), available at <https://www.law.georgetown.edu/public-policy-journal/blog/its-time-to-limit-qualified-immunity/> [perma.cc/5GTN-FYCF] (explaining "over-deterrence and fairness concerns" no longer justify modern-day use of defense of qualified immunity); Adam D. Franks, Note, *Constitutional Law—Fourth Amendment and Seizures—Accidental Seizures by Deadly Force: Who Is Seized During a Police Shootout? Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), 38 U. ARK. LITTLE ROCK L. REV. 493, 510 (2016) (noting split among circuits in application of Fourth Amendment violations for innocent bystanders). Since the subjective good faith of officials has been deemed irrelevant in determining whether qualified immunity applies, "it is doubtful that qualified immunity reliably distinguishes between officials who are trying their best to abide by the law and those who are not." Bernick, *supra*. The expansion and hardening of the doctrine of qualified immunity "contradicts the original meaning of Section 1983 and undermines constitutional principles" by making it incredibly difficult for victims of official misconduct to "vindicate their rights." Bernick, *supra*; see also Leef, *supra* note 17 (noting irony that ordinary citizens "can't escape responsibility by saying '[b]ut we did not know that was illegal.'"); cf. Norman Miller, *Court Rules Framingham Officer Not Immune in Shooting Lawsuit*, METROWEST DAILY NEWS (Feb. 5, 2016, 4:04 PM), <https://www.metrowestdailynews.com/news/20160205/court-rules-framingham-officer-not-immune-in-shooting-lawsuit> [perma.cc/8MUT-N5NG] (discussing accidental shooting where officer held loaded gun at suspect on ground and discharged weapon). Since the firing of the gun was directed at the plaintiff and the law was "sufficiently clearly established" to place the officer on notice that his actions toward an "innocent and compliant person" were unreasonable, qualified immunity could not shield the officer from liability. Miller, *supra*.

<sup>27</sup> See *Brower*, 489 U.S. at 597 (holding no Fourth Amendment seizure unless there is "governmental termination of freedom of movement through means intentionally applied."); see also Franks, *supra* note 26, at 524 (noting victims' accidental shooting claims brought under Fourth Amendment do not govern negligent police conduct); Sibilla, *supra* note 18 (analyzing that if plaintiff was not "arrested, investigated, or intentionally targeted" when shot, plaintiff could not show violation of constitutional rights).

seized ten-year-old boy, instead of his intended target—the family dog.<sup>28</sup> The court noted that, since federal courts may exercise discretion in deciding “which of the two prongs of the qualified immunity analysis should be addressed first,” it was permissible to begin the specific fact analysis of this situation to first determine if there was a clearly established right, instead of starting the analysis with a determination of whether a constitutional violation had even occurred.<sup>29</sup> The court decided that because SDC was held at gunpoint while he laid face down on the ground, he had been “seized” for Fourth Amendment purposes, which was consequently a requirement for a qualified immunity analysis based upon SDC’s status as an innocent bystander to excessive force.<sup>30</sup>

In analyzing whether Corbitt could overcome the defense of qualified immunity, the court noted that, because she did not present any “materially similar case[s]” from a controlling jurisdiction, the only way she could survive the motion to dismiss was to show either that “a broader, clearly established principle should control the novel facts . . . as a matter of obvious clarity,” or that the officer’s conduct “so obviously violates [the] constitution that prior case law is unnecessary.”<sup>31</sup> Lending deference to the

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<sup>28</sup> *Corbitt v. Vickers*, 929 F.3d 1304, 1310 (11th Cir. 2019) (reasoning that officer is shielded where no clearly established right existed).

<sup>29</sup> *See id.* at 1311 (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)) (articulating discretion in determining which prong of clearly established right test should be analyzed first). In determining first whether a clearly established right existed, the court noted that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Corbitt*, 929 F.3d at 1311 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>30</sup> *See Corbitt*, 929 F.3d at 1313–15 (demonstrating innocent bystanders can still be considered seized within meaning of Fourth Amendment). The court stated that, although the “commands of the officers” were directed at SDC, Corbitt did not claim those actions violated SDC’s Fourth Amendment rights, rather that the action of firing at the dog and accidentally injuring the child violated his Fourth Amendment rights. *Id.* at 1315. In order to prove a violation of SDC’s Fourth Amendment rights, Corbitt must have alleged that a seizure occurred and that “the force used to effect the seizure was unreasonable.” *Id.* (quoting *Troupe v. Sarasota County*, 419 F.3d 1160, 1166 (11th Cir. 2005)); *see also California v. Hodari D.*, 499 U.S. 621, 626–29 (1991) (holding that seizure occurs when subject yields to show of authority by police); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (concluding seizure occurs when reasonable person does not feel free to leave). Using precedent, the Eleventh Circuit found “there was without question an initial ‘show of authority’ to which SDC clearly yielded,” and, therefore, a seizure under the Fourth Amendment. *Corbitt*, 929 F.3d at 1313. The court further noted that this principle applies “with equal force in cases involving innocent bystanders located at the scene of an active arrest.” *Id.* at 1314.

<sup>31</sup> *See Corbitt*, 929 F.3d at 1315 (quoting *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005)) (determining “it is very difficult to demonstrate” remaining ways to overcome qualified immunity). The Corbitt court determined that the district court “erred in relying on the general proposition that it is clearly established that the use of excessive force is unconstitutional.” *Id.* at 1316. The plaintiff failed to overcome the officer’s defense of qualified immunity under the second method for two reasons. *Id.* at 1316–19. First, since this case was not obvious, no principles

purpose of qualified immunity, the court concluded that, because police officers are “often forced to make split-second judgments,” the plaintiff’s complaint did not allege a situation that “so clearly and obviously presented such danger to SDC that every objectively reasonable officer confronted with the situation Vickers encountered would have known . . . that a shot at the dog would violate the Fourth Amendment.”<sup>32</sup> Given that the answer to the relevant question of “whether every reasonable officer would have inevitably refused to [shoot the dog] in light of the Fourth Amendment standards” was in the negative, the court concluded that Vickers was entitled to qualified immunity and instructed the district court to dismiss the action against him.<sup>33</sup> In his dissent, Circuit Judge Wilson focused on the third method in which a plaintiff can overcome the defense of qualified immunity, determining that Vickers should not have been entitled to qualified immunity because “no reasonable officer would engage in such recklessness and no reasonable officer would think such recklessness was lawful.”<sup>34</sup>

Although the Eleventh Circuit Court of Appeals correctly determined that the first and second methods to overcome a defense of qualified immunity did not apply in this case, ultimately, the court’s holding

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from prior decisions provided insight into the “obvious clarity” necessary to place officers on notice that this specific conduct could be a violation of an individual’s Fourth Amendment rights. *Id.* Second, the violative conduct was not directed specifically at SDC. *Id.*

<sup>32</sup> *See id.* at 1321–22 (emphasizing possibility that reasonable officer would have fired at dog under these circumstances). The majority noted that the Supreme Court has directed the lower courts to assess the “‘reasonableness at the moment’ of the officer’s actions not from the plaintiff’s perspective, but instead ‘from the perspective of a reasonable officer on the scene’” without 20/20 hindsight. *Id.* at 1322 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The court focused on case precedent that indicated it had not been clearly established whether “the accidental effects of official actions targeting others gives rise to a Fourth Amendment violation . . .” *Id.* at 1323.

<sup>33</sup> *See Corbitt*, 929 F.3d at 1323 (holding clearly established right not violated, therefore no need to determine whether constitutional violation occurred).

<sup>34</sup> *See Corbitt v. Vickers*, 929 F.3d 1304, 1325–26 (11th Cir. 2019) (Wilson, J., dissenting) (examining fact that Vickers faced “no apparent threat,” but chose to shoot regardless). Judge Wilson noted that the Supreme Court has determined that a reasonableness analysis under the Fourth Amendment “‘requires careful attention to the facts and circumstances of each particular case,’ including the severity of the crime at issue, the safety interests of officers and others, and any risk of violence or flight by a suspect.” *Id.* at 1324–25 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Crucial to this discussion was the fact that the pet was of a nonthreatening nature and, thus, “discharging a lethal weapon at a nonthreatening pet surrounded by children” was “plainly unreasonable.” *Id.* at 1325 (Wilson, J., dissenting). The dissent also examined the consistent denial of qualified immunity “when the defendant-officer exhibited excessive force in the face of no apparent threat.” *Id.* Finally, Judge Wilson reiterated the requirement at the motion to dismiss stage to accept the plaintiff’s allegations as true and, instead of unfairly and prematurely cutting off the plaintiff’s only avenue for redress against the officer’s violation, the jury should have considered the question of whether qualified immunity should protect the officer. *Id.*

completely underexaggerated the facts and circumstances of the case.<sup>35</sup> The court correctly found that Corbitt did not meet her burden to overcome the officer's qualified immunity defense as there was neither a "materially similar binding case," nor any "nonbinding case law" to establish a Fourth Amendment violation.<sup>36</sup> Rather, the third method to overcome the qualified immunity defense should be based upon a reasonableness standard.<sup>37</sup> As such, prior case law is unnecessary as it is impossible to say that every reasonable officer would believe that the reckless and unreasonable decision to shoot at a nonthreatening dog, only eighteen inches away from a child, would be reasonable.<sup>38</sup>

Further, the Eleventh Circuit relied far too heavily on Corbitt's claim that by "firing at the dog and accidentally hitting SDC," Officer Vickers violated SDC's Fourth Amendment rights; the court did not focus on the claim that Officer Vickers' seizure of SDC violated his Fourth Amendment rights.<sup>39</sup> As such, intentionality was the ultimate hook on which the court hung its hat in concluding that qualified immunity did not apply.<sup>40</sup> The court

<sup>35</sup> See *Corbitt*, 929 F.3d at 1315 (finding plaintiff could only overcome defense by third method).

<sup>36</sup> See *id.* (noting failure to present materially similar cases or violation was clearly established under Fourth Amendment); see also *Eskow & Cole*, *supra* note 18, at 871 (noting circuit split regarding qualified immunity defense where unreasonable force used and analyzing subjective intent); *Schweikert*, *supra* note 22 (discussing "unsurprising" lack of prior case law based on "shockingly reckless nature of Vickers's actions").

<sup>37</sup> See *Franks*, *supra* note 26, at 502 (discussing reasonableness test where plaintiffs can allege "seizure" by police under Fourth Amendment).

<sup>38</sup> See *Corbitt*, 929 F.3d at 1323 (Wilson, J., dissenting) (maintaining that "no competent officer would fire his weapon in the direction of a nonthreatening pet" while surrounded by children); see also *Eskow & Cole*, *supra* note 18, at 874 (explaining courts must determine whether objectively reasonable official "could have believed his conduct did not violate clearly established law"); *Franks*, *supra* note 26, at 502 (noting reasonableness test only triggered if subjects of police force can allege "seizure" under Fourth Amendment). "[A]n official seeking qualified immunity can guess wrong about the constitutionality of his conduct without incurring liability under section 1983, provided that the mistake is a reasonable one." *Eskow & Cole*, *supra* note 18, at 874. "Law enforcement personnel," however, will not be shielded by qualified immunity if "their actions were inherently wrongful." See *Armacost*, *supra* note 18, at 633. Further, "when the underlying conduct . . . contains indicia of its own blameworthiness" a court should deny qualified immunity since "a precisely analogous case . . . would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books." See *Armacost*, *supra* note 18, at 662 (internal citations omitted).

<sup>39</sup> See *Corbitt v. Vickers*, 929 F.3d 1304, 1315 (11th Cir. 2019) (noting consequences of plaintiff's failure to allege SDC's seizure violated his rights).

<sup>40</sup> See *id.* (finding no Fourth Amendment violation as officer did not intend to shoot SDC); see also *Schultz v. Braga*, 455 F.3d 470, 479–83 (4th Cir. 2006) (granting qualified immunity to officer because officer did not intend to shoot victim); *Brown*, *supra* note 17, at 204–05 (noting Eleventh Circuit's error in application of qualified immunity defense). "The Supreme Court made clear . . .

should have found that the intention requirement of a Fourth Amendment violation was satisfied given the district court's reasoning that this case involved an "accidental shooting," rather than an "accidental firing," and reasonable inferences could lead a jury to find that the officer "intended to shoot the animal in order to maintain his control of the situation," was correct.<sup>41</sup> Instead, the Eleventh Circuit relied heavily on dicta in case precedent to find that accidental effects of government action never rise to the level of misuse of power required to prove a Fourth Amendment violation.<sup>42</sup> Thus, the court ignored that Vickers could still have misused his power by recklessly shooting at a nonthreatening pet to maintain control of an already contained situation.<sup>43</sup>

Finally, the Eleventh Circuit concluded that there was no clearly established right to be free from accidental applications of force, and therefore no need to determine whether a constitutional violation occurred.<sup>44</sup> In doing so, the court failed to solve the problem, not only for the case at bar, but also for additional cases moving forward.<sup>45</sup> As such, plaintiffs remain

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that factual similarity is not the touchstone of qualified immunity . . . ." Brown, *supra* note 17, at 204–05. Rather, "fair warning" to officials that the conduct may be unconstitutional should be the touchstone of qualified immunity. Brown, *supra* note 17, at 204–05; *see also* French, *supra* note 22 (discussing court's faulty reasoning because shot was not directed at the child). "The officer's dangerously poor aim helped him evade liability" because there was no intentional action towards the plaintiff. French, *supra* note 22.

<sup>41</sup> *See* Corbitt v. Wooten, No. 5:16-CV-51, 2017 WL 6028640 at \*6 (S.D. Ga. Dec. 5, 2017), *rev'd*, 929 F.3d (2019) (denying qualified immunity because officer used excessive force in firing his weapon); *see also* Nemeth, *supra* note 20, at 1008 (discussing "proper focus" should be whether, understanding what officer knew at time, there was governmental interest in action).

<sup>42</sup> *See* Corbitt, 929 F.3d at 1317 (finding officer's lack of intent to shoot child created accidental situation and not constitutional violation).

<sup>43</sup> *See id.* (discussing why intent requirement had not been met); *see also* Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (holding that force employed by government official must be directed towards plaintiff); *cf.* Corbitt, 2017 WL 6028640 at \*6 (noting "touchstone for reasonableness in animal shooting cases" is officer safety). Since "no allegations suggest Vickers was unsafe in any way or that [the family dog] exhibited any signs of aggression," the officer had no reasonable basis to discharge his firearm and was not entitled to qualified immunity. Corbitt, 2017 WL 6028640 at \*6; *see also* Schweikert, *supra* note 22 (analyzing downfalls of dismissing cases outright based on qualified immunity). The majority has ignored "the exact mechanism — a public jury trial — that is supposed to ensure accountability for public officials." Schweikert, *supra* note 22.

<sup>44</sup> *See* Corbitt, 929 F.3d at 1323 (discussing unnecessary to determine whether facts amount to constitutional violation and limited holding of case).

<sup>45</sup> *See* Blum, *supra* note 19, at 1897 (noting downfall of courts exercising discretion in leaving clearly established question unanswered). "The exercise of . . . discretion in favor of *not* deciding often leave important, recurring, and non-fact-bound constitutional questions needlessly floundering in lower courts." Blum, *supra* note 19, at 1897; *see also* Schweikert, *supra* note 22 (discussing failure of court to set precedent for future similar acts). The majority took the "cowardly option of declining even to decide the constitutional question, ensuring that the law will

vulnerable to similarly unreasonable and reckless applications of force because such actions cannot be considered “clearly established.”<sup>46</sup>

Although qualified immunity certainly has a place in modern society to ensure police officers are able to serve and protect the public without fear that every application of force will end in a lawsuit, courts must draw a clear line between accidental injuries that are a result of necessary and reasonable police action and accidental injuries that occur as a result of reckless and unreasonable police behavior.<sup>47</sup> Here, since there is no materially similar case precedent and because Officer Vickers’s conduct obviously violated SDC’s Fourth Amendment rights, the court should have taken the position that qualified immunity for accidental shootings can only be available where the officer did not engage in objectively reckless or unreasonable conduct and could not have believed such conduct to be lawful.<sup>48</sup> By finding that Officer Vickers’s actions were objectively unreasonable, the court could have not only created precedent for similar situations, but also start the

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not be ‘clearly established’ going forward either.” Schweikert, *supra* note 22. Essentially, “Vickers could commit the exact same sort of misconduct tomorrow and receive qualified immunity yet again.” Schweikert, *supra* note 22.

<sup>46</sup> See Sibilla, *supra* note 18 (criticizing Eleventh Circuit’s decision and identifying potential consequences). Even if an almost identical case appears in the future, “the court’s refusal means the right not to be accidentally shot by police still wouldn’t have been ‘clearly established’ in the eyes of the Eleventh Circuit.” Sibilla, *supra* note 18.

<sup>47</sup> See Eskow & Cole, *supra* note 18, at 888 (noting even where constitutional violation occurs, officer still should be able to assert qualified immunity). Qualified immunity should still protect an officer as “there may be circumstances under which an officer mistakenly, but reasonably, could have believed the use of force was reasonable.” Eskow & Cole, *supra* note 18, at 888; see also Armacost, *supra* note 18, at 584 (analyzing primary purpose of qualified immunity is “to ensure that government officials can anticipate when their actions are likely to subject them to liability.”); Bernick, *supra* note 26 (discussing historical and pragmatic justifications for qualified immunity for police officers to conduct their jobs); cf. Miller, *supra* note 26 (identifying defense unavailable for SWAT officer who pointed gun at non-threatening man lying on ground). Since the officer was on notice that his actions toward an “innocent and compliant person” were unreasonable, qualified immunity did not shield the officer from liability. Miller, *supra* note 26.

<sup>48</sup> See *Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019) (Wilson, J., dissenting) (agreeing with majority on who is protected). Qualified immunity protects “all but the plainly incompetent,” but because no “competent officer would fire his weapon in the direction of a nonthreatening pet . . . qualified immunity should not protect” the officer. *Id.*; see also Nemeth, *supra* note 20, at 1021 (highlighting that lower courts should be able “to clearly establish laws and recognize constitutional violations irrespective of equivalent cases on point.”); Bernick, *supra* note 26 (analyzing possibility for courts to “retreat from its more sweeping statements concerning qualified immunity”); Schweikert, *supra* note 22 (discussing need to “rethink qualified immunity” to comply with text and history of § 1983). Courts could, for example, disavow “the proposition that officials must be plainly incompetent or knowingly violate the law before they are denied qualified immunity . . . or recognize . . . the relevance of subjective intent of officials.” Schweikert, *supra* note 22; see also Leef, *supra* note 17 (discussing necessity to return to original meaning of § 1983, and hold officials strictly liable for misconduct).

distinction process between reasonable actions that lead to accidental injuries and reckless actions that cause unintended harm.<sup>49</sup>

In *Corbitt v. Vickers*, the Eleventh Circuit Court of Appeals determined whether a police officer was entitled to the defense of qualified immunity when he intentionally shot at a nonthreatening family dog, but accidentally hit a ten-year-old child. The court prematurely cut off the plaintiff's right to seek redress for the officer's unreasonable and reckless conduct by determining that there was no constitutional violation as the officer's decision to fire his gun at the dog was not directed at the child. By refusing to determine whether freedom from accidental and unreasonable uses of excessive force was a clearly established right, the court failed to set any relevant precedent for future plaintiffs who seek to file suit against officers who accidentally, yet unreasonably, injure or kill innocent bystanders. Although there is a place for the defense of qualified immunity in modern society to protect police officers from lawsuits based on reasonable and warranted conduct, courts must find a balance by weighing the purpose of the defense with the right of an innocent bystander to seek damages when unreasonable police conduct so clearly violates their Fourth Amendment rights.

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<sup>49</sup> See Sibilla, *supra* note 18 (discussing consequences of failing to make this distinction); see also Leef, *supra* note 17 (noting demand to hold officials strictly liable under § 1983); Schweikert, *supra* note 22 (explaining necessity in amending qualified immunity analysis).