



## **NM case part of suit over immunity**

Mark Oswald

March 30, 2018

A prominent libertarian think tank is asking the U.S. Supreme Court to use a lawsuit over a fatal shooting by a New Mexico State Police officer to roll back the “qualified immunity” that protects police from liability.

The Cato Institute, based in Washington, D.C., and with high profiles in both the news media and policy circles, has filed a friend-of-the-court, or amicus, brief in the long-running litigation over the 2011 shooting of Samuel Pauly, 34, at his house in Glorieta, east of Santa Fe.

“This brief will be the first of many in an ongoing campaign to demonstrate to the courts that this doctrine (qualified immunity) lacks any legal basis, vitiates the power of individuals to vindicate their constitutional rights, and contributes to a culture of near-zero accountability for law enforcement and other public officials,” says an essay on Cato’s website.

Lee Hunt, the Santa Fe attorney representing the Pauly family, said Cato’s participation matters because it means that the Pauly family’s wrongful death suit “is bigger than a New Mexico case.”

The outcome “affects anyone who files a lawsuit against the police,” said Hunt. “I think Cato’s involvement speaks to the point that this is a national issue.”

The Supreme Court has already made one ruling in the case, when it decided in January 2017 that State Police Officer Ray White was entitled to qualified immunity from civil liability when he fired the shot that killed Pauly. White did not violate any “clearly established” federal law, the high court said.

The shooting took place after Pauly’s brother David had been involved in a late-night road-rage incident on Interstate 25 in which no one was hurt. Officers used a license plate number to find where the Paulys lived in Glorieta, just off the interstate.

As officers approached the house, David fired a couple of warning shots out the back of the house. He told police later he had no idea the people outside their home were officers and instead believed they could be intruders related to the earlier incident on I-25. White shot Samuel Pauly through a window.

The Supreme Court, in the January 2017 decision, didn’t take a position on whether two other officers also at the shooting scene had immunity. The high court also left open the possibility

that a case could still be made against White, based on how factual disputes about his role in the shooting played out. The case was returned to the federal appeals court in Denver for more consideration.

In November, a panel of the appeals court found that, upon further review, the case record in fact “supports the claim that Officer White may have recklessly participated in the events leading to Samuel Pauly’s death” and that a “reasonable jury” could conclude “that Officer White acted recklessly by precipitating the need to use a deadly weapon.”

But the panel still found that White was entitled to immunity because there was no precedent in federal case law that was close enough “on point” to clearly establish that what White did was against law.

And since White’s actions were protected, qualified immunity also extended to the other two officers on the scene, Kevin Truesdale and Michael Marsical, the appeals court held.

Hunt, representing the Pauly family, had argued that the conduct of Truesdale and Mariscal led to the shooting of Samuel Pauly by White. He has filed a petition asking the Supreme Court to consider and reverse the appeals court’s latest ruling.

“We do think that qualified immunity has gotten out of hand and has almost become complete immunity, and prevents folks like the Paulys from letting a jury decide if what happened is okay,” Hunt said this week.

The Supreme Court has not decided if it will grant “certiorari” and consider the appeal. The Cato Institute’s brief is in support of Hunt’s petition. Attorneys for the New Mexico officers have not filed a response.

### **The shooting**

Pauly was shot about 11 p.m. on a rainy Oct. 4 in 2011. White arrived at the rural Glorieta scene a couple of minutes after Truesdale and Mariscal.

The other officers shouted to Pauly and his brother, Daniel, who were both inside, that they had the house surrounded after the brothers had called out, “Who are you?” and “What do you want?”

Truesdale has said he also yelled “State Police, open the door,” but Daniel Pauly has maintained that the brothers had no way of knowing who was outside.

Daniel Pauly said he fired the two warning shots out the back of the house and yelled, “We have guns,” which White is said to have heard as he approached the house. The Santa Fe District Attorney’s Office has said evidence shows that Samuel Pauly also fired a shot, this one toward officers. He was killed by a gunshot fired by White, who had taken cover behind a stone wall. No charges were filed against the officers.

Cato’s brief to the Supreme Court starts with a summary that says the contemporary doctrine of qualified immunity “is unmoored from any lawful justification – and in serious need of

correction.” The Pauly case, the brief adds, “presents an ideal vehicle for the Court to consider and address the maturing contention that the doctrine itself is unfounded.”

The brief then presents a long history of how qualified immunity came to be over decades and was brought to full flower by court rulings in the late 20th Century.

Cato’s online essay on the case summarizes the institute’s argument this way:

“The doctrine, invented by the (Supreme) Court out of whole cloth, immunizes public officials even when they commit illegal misconduct, unless they violated ‘clearly established law.’ That standard is incredibly difficult for civil rights plaintiffs to overcome, because the courts have required not just clear legal rule, but a prior case on the books with functionally identical facts.”

The Denver appeals court’s decision in the Pauly case “is erroneous even under existing precedent, but it also throws into sharp relief the shaky legal rationale for qualified immunity in general,” the essay says.

The Cato Supreme Court brief says the Denver appeals court’s holding that officers Marsical and Truesdale “could not possibly be liable – even if they recklessly caused the violation of Mr. Pauly’s constitutional rights – is ... at odds with plain meaning” of the governing federal statute.

“Sound textual analysis, informed legal history, judicial prudence, and simple justice all weigh in favor of reconsidering qualified immunity,” the brief concludes.