This Suicidal, Gasoline-Drenched Man Burned to Death After Cops Tased Him. A Federal Court Says That's Reasonable Force.

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June 28, 2021

Gabriel Olivas burned to death in his Arlington, Texas, home. His house burned down along with him.

The U.S. Court of Appeals for the 5th Circuit last February ruled that the cops who tased the suicidal, gasoline-drenched Olivas—after they had been warned that such conduct would result in him bursting into flames—exercised a reasonable use of force. On Friday, the same court upheld that decision, declining Olivas' family's petition for a rehearing and thus preventing them from suing.

On July 10, 2017, Olivas was experiencing a mental health crisis when his son called the police for help. Upon arrival, Officers Jeremias Guadarrama, Ebony Jefferson, and Caleb Elliott of the Arlington Police Department found Olivas in his bedroom with a "red gas can." Guadarrama admits to smelling gasoline when he entered the residence.

Elliott pepper-sprayed Olivas, leaving him temporarily blind. It was around the same time that Olivas poured the gas onto his body. "If we tase him, he is going to light on fire!" Elliott yelled. The officers had been trained on Taser safety and the ill effects of using the weapon when paired with gasoline.

Guadarrama and Jefferson tased him anyway, engulfing Olivas' body in flames that eventually metastasized throughout the home, burning it to the ground. (As *Reason*'s Jacob Sullum mentions, Jefferson initially denied that before owning up to the facts.) Olivas' wife and son, who were standing nearby, and who had to evacuate as he died, note in their suit that the only person Olivas posed a threat to was himself.

Yet the 5th Circuit employed a perverse logic in determining that the officers acted reasonably. It was for the family's own good, they said—a line of thought that Circuit Judge James C. Ho re-upped as he defended the majority's choice not to revisit the case.

"The fact that Olivas appeared to have the capability of setting himself on fire in an instant and, indeed, was threatening to do so, meant that the officers had no apparent options to avoid calamity," wrote the panel in February. "If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly, we, who are separated from the moment by more than three years, cannot conclude that [officers] Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably."

There's one problem with that argument: The cops' actions caused the very mayhem they allegedly sought to avoid. Olivas could have set himself on fire, the court notes, endangering others and setting the home ablaze. That happened because the cops tased Olivas—not in spite of it.

That irony was apparently lost on Ho, who wrote that "there was no reasonable alternative course of action that the officers could have taken instead to protect innocent lives." The family's lawsuit lists several obvious avenues: namely that the officers could have attempted to evacuate the house, which they did not, or that they could have opted to subdue him, when considering that they were standing only six feet away.

It wasn't lost on Circuit Judge Don Willett, however, who was nominated to the court by former President Donald Trump, and who has been a steady critic of qualified immunity. The legal doctrine gives state actors a green light to violate your constitutional rights unless the precise way the rights-violating conduct played out has been outlined somewhere in a prior court precedent. (Ho, on the other hand, is the same judge who puzzlingly claimed that cops need qualified immunity to "stop mass shootings.")

Put plainly, qualified immunity is the reason that a cop didn't have to face a jury in civil court despite killing a man who had been sleeping. So, too, did qualified immunity shield the cops who allegedly stole $225,000 during a search warrant; the cops who assaulted and filed bogus charges against a man for standing outside of his own house; the cops who beat a man up during a routine traffic stop; the cop who shot a teen on his way to school; and the cop who shot a 10-year-old child while aiming at a nonthreatening dog. The victims in those cases were prevented from suing, not because the government's conduct wasn't egregious, but because there were no pre-existing court precedents with almost the exact same sets of facts.

The lower court in this case withheld qualified immunity from the officers. But the 5th Circuit overturned. "In what legal universe is it not even plausibly unreasonable to knowingly immolate someone?" Willett asks. "How is it reasonable—more accurately, not plausibly unreasonable—to set someone on fire to prevent him from setting himself on fire?"

It would seem difficult to find adequate answers to those questions. Yet somehow the 5th Circuit thinks it has. Willett emphasizes that denying the officers qualified immunity would not vindicate the family's claim. At this stage, it wouldn't even send it to a jury. It would have allowed the plaintiffs to proceed to discovery, a pre-trial procedure where evidence is exchanged. That would have been an opportunity to parse through the viability of those alternatives, which Ho casually dismisses outright.

Clark Neily, senior vice president for legal studies at the Cato Institute, previously told *Reason* about how qualified immunity undermines the jury process. The founders intended for citizen jurors to make such determinations; now, they're made by judges like Ho. "Three dissenting judges led by Don Willett took the majority to task, both for deciding that question in favor of the police on the basis of zero evidence," says Neily, "and for failing to heed increasingly clear signals from the U.S. Supreme Court that lower courts should be less reflexive in granting qualified immunity to police and other government officials who engage in what at least some people find to be conscience-shocking behavior, such as lighting a mentally disturbed man on fire in front of his wife and son."

Indeed, the Supreme Court has recently zeroed in on the 5th Circuit specifically for its overly granular interpretation of qualified immunity. In November, they overturned a decision granting the protections to a group of prison guards who left a naked inmate in a cell defaced in "massive amounts" of human feces and another freezing cold cell covered in sewage; in February, the Court rejected a ruling giving qualified immunity to a corrections officer who pepper-sprayed an inmate without any provocation.

Unless the Supreme Court intervenes in *another* 5th Circuit decision—this one—the Olivas family will have to live with the notion that it is reasonable for the government to set a man on fire and destroy a family's home without recourse. "The horrific death of Gabriel Olivas is also suffused in sorrow," concludes Willett. "And while qualified immunity has enjoyed special solicitude at the Supreme Court, perhaps these 'particularly egregious facts' will prompt another meaningful message from the Court, one that marries law with justice (and common sense) and makes clear that those who enforce our laws are not above them."