

**LAWFUL BUT AWFUL: EVALUATING REASONABLENESS
IN EXCESSIVE FORCE CLAIMS AGAINST THE
MENTALLY ILL, EMOTIONALLY DISTURBED, AND
INTOXICATED**

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INTRODUCTION

The ex-husband is back. And he is drunk. The car that drops him off is unfamiliar, but you recognize him. The last time you saw him, he was

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moving out; the court let her keep the house. The divorce was a long time coming, but still, they seemed to have worked something out. After all, she let him leave his tools at the house. You see him stagger up the driveway into the garage. You wonder if she knows he is there. You wonder whether she is home and expecting him, perhaps letting him gather the rest of his belongings. Your answer comes five short minutes later in the form of blue and red flashing lights. Four officers pull into the driveway calling for the ex-husband to come out from the garage.

“This is my house! My tools are in here!” you hear him say.

“You need to leave, sir.”

“I have a ride coming.”

All four officers walk into the garage. The ex-husband retreats further into the garage behind a workbench and grabs a hammer, raising it defensively and prompting the officers to draw their guns. He puts his arm out in front of him as if asking for distance.

“Put the hammer down, sir.”

“No.” He moves to the officers’ left and comes out from behind the workbench. There are about 8 to 10 feet between him and the officers.

One policeman says, “I’m going to go less lethal,” exchanging his gun for his taser.

“I’ve done nothing wrong here,” the ex-husband says calmly, arm still outstretched. “I’m in my house,” he adds.

“Drop the hammer now!” one officer yells.

“No.”

An officer steps toward him. What happens next is up for debate. Did the ex-husband move slightly and spook one of the officers? It does not matter—gunshots ring through the air. You hear four in succession. The ex-husband falls, critically wounded, to a squatting position, remarkably still alive and still holding the hammer. Another, more final gunshot ends the scene. Your neighbor’s ex-husband falls back dead in his garage. The entire ordeal: 90 seconds.

This scene is almost identical to the facts in *Bond v. City of Tahlequah, Oklahoma*, where, in 2020, the decedent’s estate sued the city for a violation of his Fourth Amendment rights, an excessive force claim under 42 U.S.C. § 1983.¹ The scenario is not uncommon; it is one of several fueling the ongoing national conversation about police brutality.² However, it is one

¹ 42 U.S.C. § 1983; *Bond v. City of Tahlequah*, 981 F3d. 808 (10th Cir. 2020).

² E.g., Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/article/breonna-taylor-police.html>; Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y.

of the few that has reached the Supreme Court.³ The Justices must resolve a crucial circuit court split to determine at what point in the analysis of the totality of the circumstances the reasonableness of the officer's actions comes under scrutiny.⁴ The Tenth Circuit ruled in this case that the officers' unnecessary encroachment of a man's space became the point of escalation that resulted in the need for lethal force.⁵ It reasoned that "reasonableness" should also consider whether officers' actions recklessly or deliberately created the need for force.⁶ The Fifth Circuit, among others, has ruled that it does not matter what prompted the force; only the immediate precipitating moments that cause the force to become necessary are required for scrutiny.⁷

This Note is broken into four parts. Part I examines the evolution of the current circuit split. Part II discusses how the Supreme Court misapplies the Fourth Amendment and disregards the Framers' intentions in *City of Tahlequah, Oklahoma v. Bond*, and cases like it, to create lawful but awful outcomes. Part III discusses the application of the Tenth Circuit's totality-of-the-circumstances test and what its application would look like in other excessive force cases. Lastly, Part IV provides a brief conclusion.

I. THE EVOLUTION OF THE CURRENT CIRCUIT SPLIT

To fully appreciate the circuit court split, one must be familiar with specific cases that have created standards for evaluating excessive force claims and how those standards have developed. The Court's analysis begins with *Johnson v. Glick*⁸ and is sharpened in *Tennessee v. Garner*.⁹ Finally, in

TIMES <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (last updated Jan. 24, 2022); Shaila Dewan & Richard A. Opper, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html>; Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/article/who-was-elijah-mcclain.html>.

³ *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021).

⁴ See Brianna Vollman, *The Use of Force: The Proper Timeframe to Assess Reasonableness in Excessive Force Cases*, UNIV. CINCINNATI L. REV. (July 28, 2020), <https://uclawreview.org/2020/07/28/the-use-of-force-the-proper-timeframe-to-assess-reasonableness-in-excessive-force-cases/>.

⁵ *Bond*, 981 F.3d. at 824.

⁶ *Id.* at 822.

⁷ *Malbrough v. Stelly*, 814 F. App'x 798, 803 (5th Cir. 2020).

⁸ See *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

⁹ See *Tennessee v. Garner*, 471 U.S. 1 (1985).

Graham v. Connor,¹⁰ the Court creates a series of factors to help weigh reasonableness with more precision. These factors are still used today. In subsequent cases, circuit courts developed two types of approaches for determining the scope of the totality of the circumstances—a narrow approach and a broad approach. Which approach is most appropriate is in contention in *Bond*.¹¹

A. Introducing *Johnson v. Glick*

Johnson v. Glick introduces the circuit split involving excessive force analysis.¹² This 1973 case involves an inmate alleging that a prison guard hit him repeatedly on the head, and the case established that § 1983 claims should be evaluated under the Fourteenth Amendment’s substantive due process principle.¹³ The question is whether the force was such that it “shock[ed] the conscience . . . is ‘brutal’ and offends ‘even hardened sensibilities.’”¹⁴ The violations must rise above a normal tort.¹⁵ Although denied certiorari, this analysis became the standard for lower courts until 1985 with *Tennessee v. Garner*.¹⁶

In *Garner*, the Court implicitly overturned *Glick*’s substantive due process approach when it required analysis through the Fourth Amendment rather than the Fourteenth.¹⁷ The Court reasoned that under *Garner*, an arrest constitutes a seizure under the Fourth Amendment because it prevents a person from walking away.¹⁸ Thus, when deadly force is used to prevent a suspect from walking away, police must have probable cause to believe that the suspect was a danger to them or the public.¹⁹ The Court further reasoned that the use of deadly force against a non-threatening person is a violation of the Fourth Amendment.²⁰ And, it subjects the seizure to Fourth Amendment

¹⁰ See *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (including crime severity, safety of the officers, and whether a suspect is resisting or evading arrest)

¹¹ See *Bond*, 981 F.3d at 808.

¹² *Glick*, 481 F.2d at 1030.

¹³ *Id.* at 1031.

¹⁴ *Id.* at 1033; *Rinker v. County of Napa*, 831 F.2d 829, 831 (9th Cir. 1987).

¹⁵ *Rinker*, 831 F.2d at 831.

¹⁶ *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁷ William Heinke, *Deadly Force: Differing Approaches to Arrestee Excessive Force Claims*, 26 S. CAL. REV. L. & SOC. JUST. 155, 160 (2017).

¹⁸ *Garner*, 471 U.S. at 7.

¹⁹ *Id.* at 11.

²⁰ *Id.*

“reasonableness” analysis.²¹ To determine reasonableness, the Court employed a balancing test that weighed the extent of the intrusion against the need for the intrusion.²² It was here that the Court first used the phrase “totality of the circumstances” to describe the Fourth Amendment balancing test for search and seizure.²³ That phrase is what has been contested in the circuit courts.

What *Garner* left implicit, *Graham v. Connor* made explicit. Just four years after *Garner*, the Court created a three-part test for excessive force cases whether or not they result in death.²⁴ These factors are known as the *Graham* factors.²⁵ They are used to analyze reasonableness in excessive force cases by asking: (1) What is the severity of the crime at issue; (2) Does the suspect pose an immediate threat to the officers or the public; (3) Is the suspect trying to evade arrest by flight or active resistance?²⁶

In laying out this test, the Court does not clarify what is meant by the “totality of the circumstances” mentioned in *Garner*, continuing to leave the lower courts to determine on their own when the analysis of reasonableness begins.²⁷ That is, what is the scope of the “totality” that should be used to evaluate what is reasonable? The Court includes the admonition that reasonableness should be viewed through the lens of a “reasonable officer on the scene” and not as a person with the benefit of “20/20 vision of hindsight.”²⁸ It makes room for the officer who must make split-second decisions in unpredictable situations.²⁹

Graham also clarifies that for claims citing 42 U.S.C. § 1983, a statute protecting citizens from government abuses, there must first be a constitutional violation claim to qualify it for evaluation.³⁰ In other words, there is no right inherent in § 1983 to be free from excessive force; one must be able to “isolate the precise constitutional violation with which the

²¹ *Id.* at 7.

²² *Id.* at 8.

²³ *Id.* at 9.

²⁴ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

²⁵ *Id.* at 390; *see, e.g.*, *St. George v. City of Lakewood*, No. 20-1259, 2021 U.S. App. LEXIS 24934, at *14–16 (10th Cir. Aug. 20, 2021).

²⁶ *Graham*, 490 U.S. 386 at 396.

²⁷ Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 UNIV. TOL. L. REV. 1, 2–3 (2018).

²⁸ *Graham*, 490 U.S. at 396.

²⁹ *Id.* at 397.

³⁰ *Id.* at 394.

defendant is charged.”³¹ Courts disagree as to when analysis regarding the breach of a constitutional right begins. This judicial disagreement has resulted in a circuit split.³²

1. The Narrow Approach

The circuit split falls into two groups: the narrow approach and the broad approach.³³ The narrow approach is where courts determine that only the moments before the need for force arises is what matters for reasonableness; who or what created the need does not.³⁴ For those courts, that timeframe amounts to the “totality of the circumstances.”

This approach is evidenced in *Greenidge v. Ruffin*,³⁵ where a police officer attempting to break up a prostitution transaction shot and injured a suspect after disregarding her police protocol.³⁶ Officer Ernestine Ruffin suspected that a woman entering a vehicle with a man sought to engage in prostitution.³⁷ She and three other officers were in plain clothes approaching the car.³⁸ Although it was dark, none of the officers had flashlights, contrary to police procedure.³⁹ Additionally, none of the officers called for backup, also contrary to standard procedure.⁴⁰ When Officer Ruffin opened the door, identified herself as a police officer, and ordered them to show their hands, neither complied.⁴¹ She then drew her weapon.⁴² One of the occupants reached for something behind the seat when Officer Ruffin fired her weapon, permanently injuring him.⁴³ At trial, the court excluded evidence that showed that Officer Ruffin disregarded standard protocol for approaching a prostitution crime at night.⁴⁴ The court wrongly reasoned that the only

³¹ *Id.*

³² Zouhary, *supra* note 27, at 4, 6.

³³ *Id.* at 4.

³⁴ *Id.* at 2, 4.

³⁵ *Greenidge v. Ruffin*, 927 F.2d 789, 791 (4th Cir. 1991).

³⁶ *Id.* at 790.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 791.

⁴⁰ *Id.*

⁴¹ *Id.* at 790.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

necessary moments to evaluate were those immediately preceding the use of force.⁴⁵

Similarly, in *Cole v. Bone*, where police shot and killed a suspect who had sped through a toll booth without paying, the court ruled that no Fourth Amendment violation occurred because the suspect had not been “seized” until the bullet struck him.⁴⁶ “Seizure” is defined as occurring “only when the pursued citizen is physically touched by the police or when he submits to a show of authority by the police.”⁴⁷ Thus, the pursuit of Cole did not constitute a seizure because it did not result in his submission to authority or physical contact.⁴⁸ All conduct before Cole was struck, including failure to follow police protocol, was beyond the scope of the totality of the circumstances governing reasonableness.⁴⁹

Malbrough v. Stelly used the same rationale when it coined the term “state-created-need theory”⁵⁰—an idea that considers whether the State, not the suspect, created the need for force. In this case, Malbrough’s son, Campbell, claimed that he believed he was being robbed when police surrounded his car and ordered him out.⁵¹ According to him, they were in unmarked cars and plain clothes.⁵² When Campbell refused to get out of the car and instead reversed and attempted to speed off, an officer fired his gun, hitting Campbell in the head, which permanently injured him.⁵³ Regardless of any evidence that the officers lacked identification, the court still reasoned that police conduct prior to the shooting was irrelevant for a Fourth Amendment reasonableness analysis.⁵⁴ Other courts, such as the Tenth Circuit court, would likely have differed in opinion.

2. The Broad Approach

The Tenth Circuit’s broad approach, however, reasons that conduct that is “immediately connected” to the need to use force *is* relevant for

⁴⁵ *Id.* at 792.

⁴⁶ Zouhary, *supra* note 27, at 5–6.

⁴⁷ *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1333.

⁵⁰ *Malbrough v. Stelly*, 814 F. App’x 798, 803 (5th Cir. 2020).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 799.

⁵⁴ *Id.* at 803.

analysis.⁵⁵ That means that police conduct that either recklessly or deliberately creates the need for force should be analyzed for reasonableness.

The Tenth Circuit discusses state-created-need theory in *Allen v. Muskogee*.⁵⁶ In this case, Terry Allen, after a fight with his wife, left his house armed and drove to his sister's home in Muskogee, Oklahoma.⁵⁷ The complaint stated that an unidentified person reported the fight to the police, who found Mr. Allen in a car outside of his sister's home threatening suicide.⁵⁸ Mr. Allen sat in the driver's seat with the door open, one foot on the ground, and a gun in his hand resting on the console between the seats.⁵⁹ Officer Smith ordered him to drop the gun and reached into the car to grab it.⁶⁰ A second officer approached the car from the passenger's side and attempted to get in.⁶¹ Mr. Allen reacted by pointing the gun at one of the officers.⁶² Shots were fired, and Mr. Allen was killed.⁶³ The entire episode lasted 90 seconds.⁶⁴

Mr. Allen's wife argued that the police were poorly trained and used excessive force.⁶⁵ The court found that the city's training did demonstrate an indifference regarding its dealings with emotionally disturbed and mentally ill citizens.⁶⁶ In this instance, reckless police conduct before the seizure was relevant in the court's analysis because there was a "[more direct] causal link between the officers' [lack of proper] training and the alleged constitutional deprivation."⁶⁷

*Sevier v. City of Lawrence*⁶⁸ is another example of the state-created-need theory. Parents of 22-year-old Gregory Sevier called the police after learning that their son was sitting at home with a knife shortly after a romantic breakup.⁶⁹ When police arrived, they ordered him to put the knife

⁵⁵ *Bond v. City of Tahlequah*, 981 F.3d 808, 816(10th Cir. 2020).

⁵⁶ *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997).

⁵⁷ *Id.* at 839.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 842–43 (relying on expert testimony to show lack of police training).

⁶⁶ *Id.* at 843.

⁶⁷ *Id.* at 844.

⁶⁸ *Sevier v. City of Lawrence*, 853 F. Supp. 1360 (D. Kan. 1994).

⁶⁹ *Id.* at 1361.

down. However, because loud music was blaring, Gregory did not hear the order.⁷⁰ Despite posing no risk or threat of serious injury or death, police shot Gregory.⁷¹ The events lasted only four minutes and 21 seconds.⁷² The court denied the officers summary judgment because of this disputed fact and because of evidence suggesting that their own conduct may have precipitated the need for deadly force.⁷³ The court reasoned that “events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.”⁷⁴ Such an evaluation would have been appropriate in the recent Supreme Court case *City of Tahlequah v. Bond*.

B. City of Tahlequah v. Bond

In *City of Tahlequah v. Bond*, a recently decided Supreme Court case, the Justices declined to analyze the force at all.⁷⁵ The Court decided that the officers had passed one prong of qualified immunity: no violation of a clearly established law.⁷⁶ Thus, there was no reason to decide on the other prong, whether the officers had violated a constitutional right.⁷⁷

Police shot and killed Dominic Rollice after his ex-wife, Joy, called the police to have him removed from the garage.⁷⁸ Joy did not indicate that Dominic was violent or threatening, only that she wanted him gone before it got “ugly.”⁷⁹ She informed the dispatcher that Dominic was drunk and that although he did not live there, he had tools still stored in the garage.⁸⁰

When officers arrived, Joy showed them to the side door of the garage where they met Dominic and explained that they were there to give him a ride elsewhere.⁸¹ Dominic explained that he already had a ride coming.⁸² One of the officers alleged that he perceived Dominic as “fidgety”

⁷⁰ *Id.* at 1365.

⁷¹ *Id.* at 1361.

⁷² *Id.* at 1365.

⁷³ *Sevier v. City of Lawrence*, 60 F.3d 695, 701 (10th Cir. 1995).

⁷⁴ *Id.* at 699 (quoting *Bella v. Chamberlain*, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994)).

⁷⁵ *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 10–11.

⁷⁹ *Bond v. City of Tahlequah*, 981 F.3d 808, 812 (2020).

⁸⁰ *Id.*

⁸¹ *Id.* at 812–13.

⁸² *Id.* at 813.

and asked to pat him down.⁸³ Dominic declined. The officer took a step toward Dominic; Dominic took a step back.⁸⁴ The officer continued forward toward Dominic and into the garage.⁸⁵ When Dominic turned and walked toward the back of the garage, two other officers came into the garage,⁸⁶ effectively cornering him. Standing near the work bench, Dominic grabbed a hammer and stretched his arm out in front of him to signal for distance.⁸⁷ Officers drew their guns.⁸⁸ After several commands to drop the hammer went ignored, one officer decided to “go less lethal” and exchanged his gun for his taser.⁸⁹ Dominic calmly but cautiously explained that he had done nothing wrong; he was in his own house.⁹⁰ On the video, Dominic appears to have pulled the hammer behind his head when police fired their weapons.⁹¹ When Dominic was critically wounded and had fallen into a low squatting position, still grasping the hammer, an officer fired again, killing Dominic.⁹² It all took less than one minute.⁹³

The Tenth Circuit, when it heard this case, appropriately evaluated the final shot as immediately connected to the actual seizure that precipitated it. Whether the court determined that the initial seizure occurred when Mr. Rollice was cornered in his garage or whether it occurred when the first bullet struck him, the final kill shot was undoubtedly an immediately connected event and subject to a reasonableness analysis. To parse the moments so finely as to almost always put the citizen in error seems to contravene the intentions of the Fourth Amendment.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 814.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 823.

II. HOW THE COURT MISAPPLIES THE FOURTH AMENDMENT AND THE FRAMERS' INTENTIONS IN *BOND* AND OTHER CASES TO CREATE LAWFUL BUT AWFUL OUTCOMES

A. Bond was Lawful but Awful . . . and It Isn't the Only One

The courts reassigned the Framers' intentions behind the Fourth Amendment with the advent of qualified immunity by placing the State's interests above the citizen's. *Bond* is one such example. In other instances, laws immunize the State from penalty at the citizen's expense. The story of John T. Williams is an excruciating example of this. Both *Bond* and Williams's story are examples of how State agents can act in ways that are morally abhorrent and opposed to the Framers' intentions but remain legally acceptable by way of modern law.

The Supreme Court held that the officers involved in Mr. Rollice's death deserved qualified immunity because no Fourth Amendment violation precedent with similar circumstances existed.⁹⁴ Under qualified immunity, the discretionary functions of an officer are protected unless a clearly established law was violated such that a reasonable officer would know or should have known that his conduct was unlawful.⁹⁵ A clearly established law is either a constitutional violation or one nested in a precedent with similar facts.⁹⁶ The constitutional right appropriate in an excessive force claim is the Fourth Amendment.⁹⁷ The Fourth Amendment states that people have the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . [except] upon probable cause."⁹⁸ To prove excessive force, the officers must have used more force than reasonably necessary to effect a lawful arrest.⁹⁹ This is an objective standard requiring consideration of the totality of the circumstances.¹⁰⁰

The qualified immunity analysis must evaluate whether there was a violation of a constitutional right and whether a clearly established law or

⁹⁴ *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021).

⁹⁵ *Medina v. City of Philadelphia*, 2004 U.S. Dist. LEXIS 9137, at *14–15 (E.D. Pa. May 19, 2004).

⁹⁶ *Bond*, 142 S. Ct. 9 at 11.

⁹⁷ *Johnson v. City of Roswell*, 752 F. App'x 646, 650 (10th Cir. 2018).

⁹⁸ U.S. Const. amend. IV.

⁹⁹ *Lynch v. Bd. of Cnty. Comm'rs of Muskogee Cnty*, 786 F. App'x 774, 781 (10th Cir. 2019).

¹⁰⁰ *Id.*; *Burke v. City of Tahlequah*, No. CIV-18-257-RAW, 2019 U.S. Dist. LEXIS 164249, at *2 (E.D. Okla. Sept. 25, 2019).

right exists.¹⁰¹ Under the first prong, this means determining whether the intrusion of a person's Fourth Amendment right is greater than the government's interests.¹⁰²

The constitutional violation is a seizure. A seizure occurs when there is physical force or a show of authority that in some way restrains the liberty of the person.¹⁰³ *Graham* created factors to help analyze whether the seizure or intrusion was reasonable to employ for the government's greater interests.¹⁰⁴ Those factors include: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officers or others; and (3) whether the citizen-suspect is actively resisting arrest or fleeing.¹⁰⁵

In *Bond*, the severity of the crime was low. The officers did not come to make an arrest, only to remove Mr. Rollice from the premises.¹⁰⁶ This means that the first *Graham* factor weighs against the reasonableness of the seizure. It also means the third prong is satisfied because he could not be resisting arrest if he was not being arrested.¹⁰⁷ Hence, the second prong is at issue here. Looking to *Pauly v. White*, the use of deadly force is justified where an officer has probable cause to believe that there is a threat of serious physical harm to himself or others.¹⁰⁸

This case provides a four-part test to determine the threat of serious physical harm, which asks:

- (1) whether the officers ordered the suspect to drop his weapon, and whether the suspect complied with police commands;
- (2) whether any hostile motions were made with the weapon towards the officers;
- (3) the distance separating the officers and the suspect; and

¹⁰¹ *Burke*, 2019 U.S. Dist. LEXIS 164249, at *2–3.

¹⁰² *Id.* at *5; *Graham v. Connor*, 490 U.S. 386, 396 (1989).

¹⁰³ *Gold v. Bissell*, 1 Wend. 210 (N.Y. Sup. Ct. 1828) (stating that submission to an officer's authority is sufficient and physical force is not required).

¹⁰⁴ *Graham*, 490 U.S. at 396.

¹⁰⁵ *Id.*

¹⁰⁶ *Burke*, 2019 U.S. Dist. LEXIS 164249, at *5.

¹⁰⁷ *Id.* at *6–7.

¹⁰⁸ *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017).

(4) the manifest intentions of the suspect.¹⁰⁹

Although *Bond*'s facts favor the officers when using this test, the Tenth Circuit considered the officers' pre-seizure conduct in its analysis of reasonableness.¹¹⁰ This is a departure from the Fifth Circuit and others who evaluate only the danger presented at the precise moment that officers used force.¹¹¹ The Tenth Circuit's pre-seizure evaluation looks to whether officers manufactured the need for force, either deliberately or recklessly.¹¹² This is the Tenth Circuit's application of the totality-of-the-circumstances standard set out by the Supreme Court.¹¹³

Here, the Supreme Court declined to rule on *Bond* at all. Looking first at whether a clearly established law was violated and deciding that it had not been, the Justices were not bound to go any further. The Court explained that it was unnecessary to decide whether police officers violated the Fourth Amendment or whether police recklessly creating a situation that required deadly force even has the ability to violate the Fourth Amendment.¹¹⁴ In the Court's estimation, because there were no precedents of similar circumstances, there was no clearly established legal violation that the officers would have or should have known they committed. *Bond*'s facts failed one of the required prongs, which shut down any further analysis, resulting in a grant of qualified immunity.

This is a prime example of "lawful but awful." Clearly, the legal prongs have been met, but when case after case¹¹⁵ occurs where a citizen, not under arrest, is shot as a result of a police interaction, it indicates there is a missing protection.

¹⁰⁹ *Burke*, 2019 U.S. Dist. LEXIS 164249, at *6.

¹¹⁰ *Bond v. City of Tahlequah*, 981 F.3d 808, 817 (10th Cir. 2020).

¹¹¹ *E.g.*, *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *Malbrough v. Stelly*, 814 F. App'x. 798, 803 (5th Cir. 2020).

¹¹² *Burke*, 2019 U.S. Dist. LEXIS 164249, at *7; *Pauly*, 874 F.3d at 1219.

¹¹³ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)).

¹¹⁴ *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021).

¹¹⁵ *Sevier v. City of Lawrence*, 60 F.3d 695, 698 (10th Cir. 1995); *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997); *Malbrough*, 814 F. App'x at 803; *see also* *Chamberlain v. City of White Plains*, 960 F.3d 100, 101–104 (2nd Cir. 2020). In this case, an elderly man suffering from mental illness accidentally activated his medical alert bracelet. Police arrived, but in spite of the medical operator having told them that it was an accidental activation, police forced their way in, shot, and killed the man.

A similar situation appears in the story of John T. Williams, an incident that never even made it to a courtroom on technical grounds.¹¹⁶ Williams, a Native American woodcarver in Seattle, was walking across the street with his woodcarving tools in hand when an officer stopped at a light, jumped out of his car and ordered Williams to drop his carving knife.¹¹⁷ Williams, who was hard of hearing and intoxicated at the time, did not hear the officer.¹¹⁸ Within four seconds of the officer's order, Williams was dead.¹¹⁹ Officers are heard talking on the dash cam: "I'm alright. He had [the knife] open. I asked him to drop it multiple times. He was carving up that board with it. He kind of turned toward me."¹²⁰

"You did the right thing," a second officer replies.¹²¹ Eyewitness pedestrians unanimously agreed that Williams posed no threat, and eight out of nine jurors polled echoed the same conclusion.¹²² Yet, the King County prosecutor decided not to pursue charges because state law required proof of mal-intent on the part of the officer.¹²³ Although Williams's story never progressed to the courts to find out if the officer would be granted qualified immunity, the same principle still holds: some legal technicality permitted an officer to go unpunished. The Court must provide the missing protection for the citizen-victim.

B. The Supreme Court Miscuses the Fourth Amendment in Excessive-Force Cases Because It Was Intended Foremost to Protect the Citizen, Not the State

The Framers' concerns, which led to the development of the Fourth Amendment, are documented in several 18th-century documents and caselaw. They individually and collectively warn against the same issues

¹¹⁶ James Ross Gardner, *The Shooting of John T. Williams, 10 Years Later*, SEATTLE MET (Aug. 26, 2020), <https://www.seattlemet.com/news-and-city-life/2020/08/the-shooting-of-john-t-williams>.

¹¹⁷ *Id.*

¹¹⁸ Lynda V. Mapes, *10 Years Ago a Police Officer Shot Woodcarver John T. Williams. The Grief Reverberates Today.*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/10-years-ago-a-police-officer-shot-woodcarver-john-t-williams-the-grief-reverberates-today/> (last updated May 20, 2021).

¹¹⁹ *Id.*

¹²⁰ Gardner, *supra* note 116.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

facing modern policing: too much police discretion; too much state power that offends citizens' dignity of person and property; and too little, if any, legal consequence.

When the Framers created the Fourth Amendment, it was with suspicion of the State in mind, not suspicion of the citizen.¹²⁴ As it stands, citizens are at a physical and legal disadvantage that the Framers did not intend. Courts repeatedly allow an excuse of officer fear, either real or imagined, to grant cover for citizen fatalities.¹²⁵ Even in instances where officers are not forced to make the “split-second decision” that the *Graham* court took into account, officers are still offered cover.¹²⁶

In a historical English case, *Entick v. Carrington*,¹²⁷ a plaintiff complained that the King's officials broke into his home and ransacked his cabinets, drawers, chests, and boxes for over four hours, seizing seditious materials. In 1896, the Supreme Court described the case as a guide for the Framers' intentions for the Fourth Amendment.¹²⁸ Although the case did not involve an arrest, it embodies the spirit of the Fourth Amendment, which lends itself to *Bond* and other such cases.

In *Boyd v. United States*, an 1886 Supreme Court case, the Court seems to foreshadow the 21st-century exigency. It describes the intrusion of

¹²⁴ See generally *Entick v. Carrington*, 95 Eng. Rep. 807, 815–18 (C. P. 1765); see generally THE BOSTON COMMITTEE OF CORRESPONDENCE, THE BOSTON PAMPHLET (Nat'l Humans. Ctr. 2013) (1772), <https://americainclass.org/sources/makingrevolution/crisis/text6/bostonpamphlet.pdf>.

¹²⁵ See Martel A. Pipkins, *I Feared for My Life: Law Enforcement's Appeal to Murderous Empathy*, 9 RACE & JUSTICE 180, 187 (2017). (“In the Trayvon Martin case, for example, one of the jurors who acquitted Zimmerman said she ‘had “no doubt” he feared for his life in the final moments of his struggle with Trayvon Martin, and that was the definitive factor in the verdict.’”) (quoting Dana Ford, *Juror: ‘No Doubt’ That George Zimmerman Feared for His Life*, CNN, <https://www.cnn.com/2013/07/15/justice/zimmerman-juror-book> (last updated July 16, 2013)) (“Though Zimmerman is not a police officer, this shows that the power of this narrative pushes beyond the mere officers but is encapsulated in the criminal justice system as a whole at various levels.”).

¹²⁶ See, e.g., Gardner, *supra* note 116; Tompkins, *supra* note 2. In all of these cases, officers were given deference because the court used *Graham's* “split-second decision” rhetoric to justify shooting two children and one partially deaf and intoxicated woodcarver carrying a tool of his trade in a non-threatening manner. In none of these cases were officers forced into split-second decisions, but the court treated them as if they were.

¹²⁷ *Entick*, 95 Eng. Rep. at 807–08.

¹²⁸ *Boyd v. United States*, 116 U.S. 616, 626–27 (1886).

the writs of assistance, documents akin to a search warrant, that empowered officers to use their own discretion to break into homes and search and seize items.¹²⁹ This discretion “placed the liberty of every man in the hands of every petty officer.”¹³⁰ This kind of discretion applied to property, but today, to every citizen’s person and puts the State’s interests ahead of the citizen’s.

Those with mental illness or emotional disturbances are vulnerable to this kind of broad discretion because they are often interacting with police not because there is a serious crime at hand but because they are having a crisis.¹³¹ In most cases, they are committing some low-level crime, such as disturbing the peace, are a victim themselves, have wandered off, or require a welfare check.¹³² Officer discretion is what allows an officer to imagine a plausible threat from an extremely improbable scenario, like a critically wounded man on the ground suddenly attacking officers. The officer can exercise poor discretion and neutralize the perceived threat, possibly without ever having to justify it in court if there was no clearly established law with similar facts.

¹²⁹ *See id.* at 626–27.

¹³⁰ *Id.* at 625.

¹³¹ GARY CORDNER, *PEOPLE WITH MENTAL ILLNESS* 4 (2006)

Research suggests several factors associated with this group’s violent behavior, including drug and alcohol abuse, noncompliance with medication requirements, and biological or biochemical disorders. In general, however, “violent and criminal acts directly attributable to mental illness account for a very small proportion of all such acts in the United States. Most persons with mental illness are not criminals, and of those who are, most are not violent.”

(quoting P. Marzuk, *Violence, Crime, and Mental Illness: How Strong a Link?*, *Archives of Gen. Psychiatry*, June 1996, at 485).

¹³² CORDNER, *supra* note 131, at 4–5.

Police interactions with people with mental illness can be dangerous, but usually are not. In the United States, 982 of 58,066 police officers assaulted in 2002, and 15 of 636 police officers feloniously killed from 1993 to 2002, had “mentally deranged” assailants. These represent one out of every 59 assaults on officers and one out of every 42 officers feloniously killed—relatively small portions of all officers assaulted and killed. Encounters with police are more likely to be dangerous for people with mental illness than for the police. An early study found that an average of nine New York City police shootings per year between 1971 and 1975 involved emotionally disturbed people. Between 1994 and 1999, Los Angeles officers shot 37 people during encounters with people with mental illness, killing 25.

In another foreshadow to today's police crisis,¹³³ the Boston Committee of Correspondence, in a 1772 document titled *The Boston Pamphlet*, noted that "[o]fficers may under color of Law and the cloak of a general warrant break through the sacred Rights of the Domicil [private household], ransack Men's Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders."¹³⁴ This, again, speaks to the intention of the Fourth Amendment to prioritize the safety and sanctity of the citizen before the right of the State. Although the bulk of the document discusses illegal searches, not arrests, the principle applied to the sanctity of the home also applies to the sanctity of the body. Today's officers, "under color of Law and the cloak of" qualified immunity, offer citizens the choice to either comply or die, "and with little Danger to themselves commit the most horrid Murders."¹³⁵ Such was the case in *Bond*. But if courts abided by the original intentions of the Fourth Amendment, perhaps the officers who killed Mr. Rollice would have been held accountable.

C. Applying the Framers' Intentions to Bond

There were at least four different commonsense options available to the *Bond* officers that would have possibly saved Mr. Rollice's life and comported with the Framers' intentions. The first was to wait for his ride to arrive; the second was to provide the distance that he asked for; the third was to use less lethal means to subdue him; and the fourth was to resist shooting him a final time after he was critically wounded. All of these put little burden on the officers and place the citizen's safety and dignity as the foremost priority, as intended.

Re-imagining the Court's application of the Framers' intentions to *Bond* would not necessarily eliminate qualified immunity for officers. After all, providing protections for officers who act in good faith is a valid policy. But qualified immunity is so liberally applied as to create an egregious imbalance of power between the citizen and the state. The language of the Court is heavily preoccupied with the safety of the officer rather than the

¹³³ See, e.g., Gardner, *supra* note 116; Tompkins, *supra* note 2 (demonstrating a few examples of unjustified deaths by police that gained national attention and a microcosm of a larger police brutality issue).

¹³⁴ THE BOSTON PAMPHLET, *supra* note 124.

¹³⁵ *Id.*

safety of the citizen.¹³⁶ It gives deference to officers by excusing fatal mistakes because they must make “a split-second decision,” saying it is better for the citizen to mistakenly die than for the officer to calculate certainty. Such luxury is rarely afforded to the layperson in a similar situation as they would likely face manslaughter charges or be personally liable for a wrongful death.¹³⁷ In many cases, officers do not have to make split-second decisions that jeopardize either their lives or the citizen’s. Simply following police protocol designed to avoid preventable dangers could do the trick, as in *Ruffin*.¹³⁸ Yet, the Court will use this language in any regard.¹³⁹ The Framers knew firsthand how that felt and pointedly sought to defend themselves against it.¹⁴⁰

Applying the Framers’ intentions to modern-day excessive-force claims would demand options beyond the binary choice of immediate compliance or death. In *Bond*, officers had several commonsense options prior to drawing their guns that the Court ought to have considered despite there being no “clearly established” law. The first is to allow space for a natural resolution. Mr. Rollice told officers from the outset that he had a ride coming. Since their only objective was to see that he left the property, the officers could have easily waited for his ride to arrive. If there was worry about the ex-wife’s safety, they could have removed her from the house until

¹³⁶ See generally Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016) (highlighting how the prosecutorial protocols are altered in favor of police when officers are defendants).

¹³⁷ See, e.g., Christine Hauser, *Cyntoia Brown Is Freed from Prison in Tennessee*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/cyntoia-brown-release.html?searchResultPosition=1>. This article discusses now 31-year-old Cyntoia Brown who was sex trafficked at age 16. She shot and killed her trafficker when she thought he was reaching for a gun to shoot her. She was tried as an adult in 2006 and convicted of first-degree murder. She was sentenced to life in prison; See also Christine Hauser, *Florida Woman Whose ‘Stand Your Ground’ Defense Was Rejected Is Released*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/marissa-alexander-released-stand-your-ground.html?searchResultPosition=1>. Although this case was not a manslaughter or wrongful death charge, it similarly demonstrates the uneven treatment of laypeople in similarly high-strung situations as police. Here, even though there were no injuries, Marissa Alexander was sentenced to 20 years for firing a warning shot to ward off an abusive husband who physically attacked her nine days post-partum.

¹³⁸ *Greenidge v. Ruffin*, 927 F.2d 789, 791 (4th Cir. 1991).

¹³⁹ *Id.* at 792.

¹⁴⁰ See generally James Otis, *Essay on the Writs of Assistance Case*, BOS. GAZETTE, Jan. 4, 1762, reprinted in COLLECTED POLITICAL WRITINGS OF JAMES OTIS 15–18 (Richard Samuelson ed., 2015).

he had vacated the premises. Instead, the officers offered their narrow plan—for Mr. Rollice to get in the police car to leave—as the only option to avoid a heightened situation. This first commonsense option would easily comport with the 18th-century approach that “[a]ll positive and civil Laws should conform, as far as possible, to the Law of natural Reason and Equity.”¹⁴¹

The second option officers had was to honor Mr. Rollice’s nonverbal request for distance when he stretched his arm out in front of him.¹⁴² Even his wielding a weapon would not have put the Framers in the mindset that State agents were at liberty to kill a citizen. In an 1865 case, now overturned, the Supreme Court held that citizens had the right to resist arrest in cases of excessive force.¹⁴³ This right was overturned as recently as 1983 in *Commonwealth v. Moreira*.¹⁴⁴ The Court held that because modern society was no longer like that of 1709, arrestees ought to allow themselves to be peaceably arrested, even if the arrest is unlawful, and pursue justice in the court.¹⁴⁵ The Court held out an exception, however, for cases where excessive force is used to subdue a person.¹⁴⁶

The third option that officers had was to use less lethal means, as one of the officers attempted to do.¹⁴⁷ This would, no doubt, have been an approach favored by the Framers. Again, Otis articulates this modern and ongoing issue: “[C]an a community be safe with an *uncontroll’d* power lodg’d in the hands of *such* officers, some of whom have given abundant proofs of the danger there is in trusting them with any?”¹⁴⁸ Of the three officers in *Bond*, only one saw fit to control the power he had to harm Mr. Rollice.¹⁴⁹

The fourth option was to resist shooting Mr. Rollice an additional time after he was already critically wounded.¹⁵⁰ The Fourth Amendment makes room for officers to perform seizures with probable cause. One is “seized” when one’s liberty is restricted by an officer’s show of authority or when one is physically detained.¹⁵¹ In a previous case, the Court found that a

¹⁴¹ THE BOSTON PAMPHLET, *supra* note 124.

¹⁴² *Bond v. City of Tahlequah*, 981 F.3d 808, 814 (10th Cir. 2020).

¹⁴³ *Commonwealth v. Crotty*, 92 Mass. 403, 405 (1865).

¹⁴⁴ *Commonwealth v. Moreira*, 447 N.E.2d 1224, 1228 (Mass. 1983).

¹⁴⁵ *Id.* at 1226–27.

¹⁴⁶ *Id.* at 1228.

¹⁴⁷ *Bond*, 981 F.3d at 814.

¹⁴⁸ Otis, *supra* note 140, at 18.

¹⁴⁹ *Bond*, 981 F.3d at 814.

¹⁵⁰ *Id.* at 820.

¹⁵¹ *California v. Hodari D.*, 499 U.S. 621, 624–25 (1991).

suspect had not been “seized” until the bullet struck him.¹⁵² Here, Mr. Rollice was officially seized when he was shot with the first bullet, since prior to that he was free and encouraged to leave. Once seized, officers used the hammer still in Mr. Rollice’s hand as probable cause to shoot him to satisfaction. The Supreme Court has given a wide range of discretion for officers to determine probable cause. The spectrum spans between “bare suspicion” and “beyond a reasonable doubt.”¹⁵³ This does not comport with the Framers’ articulated frustrations against such wide discretion.¹⁵⁴

In James Otis’s *Essay on the Writs of Assistance*, Otis writes about the injustice of citizen-colonists being left vulnerable to the discretion of petty officers who may merely imagine a pretext for forcibly entering one’s home.¹⁵⁵ The same concern is present in *Bond*, where the law gave officers a window to imagine probable cause to act with additional lethal force. Mr. Rollice had already been shot several times by then. He was on the ground. And he held a weapon of short range. Only the imagined possibility of an attack created the justification for a final bullet. The question Otis poses is the same one with which modern society is presented:

[W]hat, if it should appear, that there was no just grounds of suspicion; what reparation will he make? [I]s it enough to say, that damages may be recover’d against him in the law? . . . [A]re we *perpetually* to be expos’d to outrages of this kind, [and] to be told for our *only* consolation, that we must be *perpetually* seeking to the courts of law for redress? Is not this vexation *itself* to a man of a well disposed mind?¹⁵⁶

While it is good to have the option to pursue justice in court, the resulting reward is always an insufficient substitute for life and limb. Thus, it is even more important today to put in place safeguards against the loss of life, not just against the dignity of personal property rights.

¹⁵² *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993).

¹⁵³ Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 Miss. L.J. 279, 280 (2004).

¹⁵⁴ Otis, *supra* note 140, at 16.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

III. HOW THE COURT GOT *BOND* WRONG IN UNDERVALUING THE TENTH CIRCUIT'S ANALYSIS AND HOW THAT ANALYSIS SHOULD BE APPLIED TO FUTURE CASES INVOLVING IRRATIONAL PERSONS

The holding from *Bond* destroyed the lower courts' ability to introduce nuance into their rulings. First, the Court ignored two cases of clearly established law that the Tenth Circuit rightly relied on to deny qualified immunity to the officers in *Bond*. Second, the Tenth Circuit's ruling created space for police to consider how best to apprehend an irrational person without the loss of life. Lastly, the difference between the courts that use the Tenth Circuit's analysis and the courts that do not is evidenced in a hypothetical plaintiff.

A. How the Court Got Bond Wrong When It Ignored a Clearly Established Law

The officers in *Bond* had notice and should not have prevailed under qualified immunity because the Tenth Circuit had previously used *Allen v. Muskogee* as clearly established law.¹⁵⁷ The qualified immunity doctrine says that a law or right is not “clearly established” if it is so general that a reasonable officer could not make the link between the precedent and their current circumstances.¹⁵⁸ The Tenth Circuit's holding in *Allen* instructed the officers in *Bond* not to “rely on lethal force unreasonably as a first resort in confronting an irrational suspect who is armed only with a weapon of short-range lethality and who has been confined on his own property.”¹⁵⁹ In *Estate of Ceballos v. Husk*, the court relied on *Allen* as clearly established law that denied four officers qualified immunity.¹⁶⁰ The facts in *Ceballos* and *Bond* are strikingly parallel. In both cases, decedents' wives called police reporting that their husbands were outside under the influence of a substance and that they wanted the men removed.¹⁶¹ In *Ceballos*, the decedent had the added factor of having been off his anti-depressant medication.¹⁶²

In both cases, the decedents were alone and were not a threat to bystanders or the public.¹⁶³ Both were armed with a weapon of short range—

¹⁵⁷ *Bond v. City of Tahlequah*, 981 F.3d 808, 825 (10th Cir. 2020).

¹⁵⁸ *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021).

¹⁵⁹ *Bond*, 981 F.3d at 825.

¹⁶⁰ *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1215 (10th Cir. 2019).

¹⁶¹ *Id.* at 1208–09; *Bond*, 981 F.3d at 817.

¹⁶² *Ceballos*, 919 F.3d at 1209; *Bond*, 981 F.3d at 823.

¹⁶³ *Ceballos*, 919 F.3d at 1210.

a baseball bat and a hammer.¹⁶⁴ In both cases, officers blocked the exits. And in both cases, the men were shot outside their homes less than two minutes from police arrival because officers relied on lethal force as a first resort rather than the last when dealing with an irrational person.¹⁶⁵ But even without such similarities, a law or right can be “clearly established” with “notable factual distinctions” between the precedent and the present case.¹⁶⁶ The officers’ actions violated a rule established prior to *Bond* where the Tenth Circuit held that “where an officer has an ‘opportunity to perceive that any threat had passed by the time he fired his final shots,’ he violates the Fourth Amendment by shooting anyway.”¹⁶⁷ But the Supreme Court held otherwise when it rejected the Tenth Circuit’s view of *Allen*.¹⁶⁸

The Court’s reasoning stemmed from the fact that *Ceballos* happened after officers shot Mr. Rollice.¹⁶⁹ Therefore, the officers could not be on notice. But because *Ceballos* relied on *Allen*—a case that was settled years before *Bond*—in its decision, it indicates that *Allen* was sufficiently “clearly established” and should be applied in *Bond* as well.¹⁷⁰ In neglecting this precedent to overcome the “clearly established” prong of qualified immunity, the Court denied itself the opportunity to evaluate reasonableness and put the circuit split to rest. Thus, the Supreme Court failed to recognize the value of the Tenth Circuit’s analysis and unduly short circuited the analysis of a valid claim.

B. How the Tenth Circuit Got Bond Right When It Put the Citizen’s Interests First

The Tenth Circuit got *Bond* right in its analysis because it included four things: (1) an alignment with the Framers’ intentions; (2) an alternate reasonable explanation for Mr. Rollice’s movements cast in the light most

¹⁶⁴ *Id.*; *Bond*, 981 F.3d at 813.

¹⁶⁵ *Ceballos*, 919 F.3d at 1209, 1219; *Bond*, 981 F.3d at 817.

¹⁶⁶ *Smith v. LePage*, 834 F.3d 1285, 1291 (11th Cir. 2016).

¹⁶⁷ *Bond*, 981 F.3d at 821 (quoting *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1175 (10th Cir. 2020)).

¹⁶⁸ *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021).

¹⁶⁹ *Id.*

¹⁷⁰ *Bond*, 981 F.3d at 825. This same tactic was used in *Ceballos* when the court reasoned that Plaintiffs could not rely on two of their cited sources—an unpublished case and a case outside the court’s jurisdiction. Both cases relied on *Allen* to prove the rule was clearly established, so while they were not helpful on their own to prove precedent, their reliance on *Allen* pointed to the rule in *Allen* as a clearly established one.

favorable to him; (3) proper consideration of the totality of the circumstances; and (4) a consideration for an irrational subject.

When the Tenth Circuit analyzed the video recording in *Bond*, it gave deference to the citizen, just as the Framers intended.¹⁷¹ It noted that the previous court's ruling had failed to view the video in the light most favorable to Rollice.¹⁷² It also took into consideration that a reasonable jury could view Rollice's stance as a defensive one rather than an aggressive one.¹⁷³ Both of these align best with the Framers' intentions, which made the citizen's welfare, innocence, and dignity the foremost priority.

In James Otis's 1762 essay, he scorns the State's arbitrary imaginations used to justify the intrusion of citizens' homes: "[S]hall the *jealousies* and mere *imagination*s of a custom house officer, as *imperious* perhaps as injudicious, be accounted a sufficient reason for his breaking into a freeman's house!"¹⁷⁴ Here, when the Tenth Circuit considers an alternative explanation for Rollice's defensive movements, it is eschewing the overused narrative that says when a citizen does not comply with officer orders, police are reasonable in assuming they are under imminent and aggressive threat that requires split-second decision making.¹⁷⁵ This is particularly true when officers, who were not intending to make an arrest, block the only exit and one of them reaches for his taser.¹⁷⁶ It is here that the court determines that Rollice's movements are defensive and the officers needlessly escalated the situation.¹⁷⁷

The court further gets it right when it accounts for the irrationality of a subject in its totality-of-the-circumstances analysis. This, too, is fair and consistent with the Framers' intentions when it does not merely account for officers' high stress when considering the totality of the circumstances. With this even-handed analysis, the Tenth Circuit seems to have built a rule that considers all sides while keeping the citizen first.

¹⁷¹ *Id.* at 819.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Otis, *supra* note 140, at 16.

¹⁷⁵ *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 267, 270 (2003).

¹⁷⁶ *Bond*, 981 F.3d at 823.

¹⁷⁷ *Id.*

1. Applying the Tenth Circuit's Rule

As *Sevier*, *Husk*, *Allen*, and *Bond* show, there is a police pattern of cornering irrational subjects, disregarding alternative solutions, and relying on lethal force that leads to preventable deaths.¹⁷⁸ Taking into account actions that are immediately connected to a fatal outcome in the totality-of-the-circumstances analysis would be a step forward in correcting “lawful but awful” outcomes. It would hold police responsible for violating clearly established law, put police on notice, hold them legally responsible, encourage less-lethal measures, and perhaps reduce the number of fatalities that result from interactions with this vulnerable population.

Police would not prevail under the Tenth Circuit's rule. For instance, consider the following hypothetical. Police respond to a call about a schizophrenic middle-aged woman who is threatening other residents in her group home.¹⁷⁹ She refuses to take her medicine, yells at police to leave her alone, threatens to kill herself, and barricades herself in her bedroom. Police follow her to her residence, citing concern that she could escape through a back window or retrieve weapons. They knock down her front door and kick open the bedroom door with guns drawn. Police crowd inside, effectively corner her, and block the doorway. Now aggravated by the intrusion and escalation, the woman arms herself with a knife. She yells at them to leave. She waves the knife in the air to discourage the officers from coming closer, but the movement itself causes police to open fire. Wounded, she falls, still clutching the knife. She uses her knife-wielding hand to grab the corner of the dresser above her to lift herself up, but police interpret the motion as an act of aggression and shoot her again, killing her.

According to the Tenth Circuit's general rule, a Fourth Amendment violation may occur when an officer's reckless or deliberate conduct creates the need for lethal force.¹⁸⁰ Moreover, the Tenth Circuit's rule that a clearly established law is violated when an officer confronts an irrational subject in an aggressive manner, corners her on her own property, and relies on lethal force as a first response applies to this very hypothetical.¹⁸¹

¹⁷⁸ *Sevier v. City of Lawrence*, 853 F. Supp. 1360, 1361 (D. Kan. 1994); *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1209, 1219 (10th Cir. 2019); *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997); *Bond*, 981 F.3d at 817.

¹⁷⁹ Nadja Popovich, *Police Shooting of Mentally Ill Woman Reaches US Supreme Court. Why Did It Happen at All?*, GUARDIAN (Mar. 23, 2015), <https://www.theguardian.com/us-news/2015/mar/23/police-shooting-mentally-ill-teresa-sheehan-supreme-court>.

¹⁸⁰ *Bond*, 981 F.3d at 818.

¹⁸¹ *Id.* at 825.

Using the Tenth Circuit's precedents and reasoning in *Allen* and *Ceballos*, officers should have known that they would be recklessly escalating tensions with an irrational person armed with only a short-range weapon by returning to the residence with guns drawn, crowding her inside her bedroom, and blocking her exit. Officers knew that she was mentally ill because she lived in a group home for the mentally ill and the 911 caller informed the dispatcher that the woman had not been taking her medication. Police could also reasonably assume that because she was at home, she would have access to a weapon such as a knife, but because she lived in a group home, it was unlikely that she had access to more powerful weapons. They also knew that she was an irrational subject because of her illness, her desire for suicide, and her refusal to take her medication.

Using this approach to evaluate the qualified immunity prongs and reasonableness, the Court would find a Fourth Amendment violation because of the police's reckless or deliberate conduct that resulted in the need for lethal force. The Court would also find that the police's entry, which led to the need for lethal force, was immediately connected to the outcome and deserved to be evaluated in the totality-of-the-circumstances analysis. And, lastly, the Court would find that the officers violated a clearly established law. These officers would not benefit from qualified immunity and the ruling would further cement the rule in case law.

By contrast, without using the Tenth Circuit's approach, the Court either would have evaluated only the moment where the woman raised her knife-clutching hand above her head to determine whether the force was appropriate or declined to rule at all by ignoring clearly established law as it did in *Bond*. Evaluating only the moment before the final shot would have de-contextualized who the actual aggressor was, neglected to determine the woman's actions in a light most favorable to her, and justified a preventable killing. The Court would have given cover to State agents in the exact way that the Framers warned against because officers would only have needed to claim they felt an imminent threat, even if it were merely imagined. The Justices would invoke *Graham v. Connor*'s language that officers need deference because they are using split-second reasoning, even if the actual circumstances offer sufficient time to make better judgments. For the Court to continue to defer to the officer's decision-making at the expense of the citizen is to make it easy for the State to take human life with only a "whoops!" to echo behind the ring of gunfire. The Tenth Circuit's approach to evaluate whether police created the need for force is the least that justice can do on behalf of its citizens.

CONCLUSION

In conclusion, the Supreme Court should adopt the Tenth Circuit's totality-of-the-circumstances approach. Analyzing police action that materially contributes to the need for lethal force is a commonsense measure that would hold police accountable for causing preventable deaths. More specifically, the Court should adopt the Tenth Circuit's analysis in *Allen* making it a clearly established law federally. Cornering an irrational subject or aggressively approaching him or her recklessly escalates tensions and raises the potential need for force. If the Court adopted this rule as clearly established, it would put all police officers on notice, nullifying their eligibility for qualified immunity. As a result, it would inform officers of how to better handle citizens who are under the influence of a mood-altering substance and those who have mental or emotional disorders. Adopting this rule would also bring the Court in alignment with the intentions of the Framers who created the Fourth Amendment. Those intentions were to put the safety, dignity, and privacy of the citizen before the right of the State to search or seize a person. Lastly, adopting the Tenth Circuit's rule would help put an end to "lawful but awful" outcomes by holding police responsible for their actions and encouraging them not to rely on lethal force as a first option when interacting with irrational subjects.