UIC Law Review

Volume 55 | Issue 3 Article 4

2022

Johnson v. City of Ferguson: Unreasonable Seizures of Bystanders of Police Brutality, 55 UIC L. Rev. 587 (2022)

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JOHNSON V. CITY OF FERGUSON: UNREASONABLE SEIZURES OF BYSTANDERS OF POLICE BRUTALITY

CASHMERE COZART*

I. INTRODUCTION 587
II. BACKGROUND 588
A. The Altercation that Led to Michael Brown's Murder 589
B. The Indictment 590
C. The Department of Justice Findings on Policing in Ferguson 591
D. Procedural History of Dorian Wilson's Suit 594
E. The Eighth Circuit Affirmed the District Court 596
III. COURT'S ANALYSIS 599
A. The En Banc Panel Held that Johnson was not Seized and Vacates the Lower Court Decision 599
B. The Dissent Would Affirm the Lower Court 601
C. Effects on the Parties 604
D. Effect on the Community 605
E. Legal Effects 606
IV. PERSONAL ANALYSIS 608
A. Fourth Amendment Issue 608
B. Circuit Split on move on orders 609
C. Issues with SCOTUS and Qualified Immunity 609
D. Congress Needs to Act 611
E. Inconsistency Issue 611
F. Comparison to Voting Rights Act 612
V. CONCLUSION 613

I. INTRODUCTION

Technology has allowed African Americans to document and instantly spread awareness of the violence that African American citizens face at the hands of police. It is difficult to deny the violence that police enact on African Americans when watching a video of an officer tasing someone while they are in a car with their children or kneeling on their neck until they die. One of the issues in the larger discussion of police brutality are the cases that arise from these acts of violence. Often people see videos of the violence, and the only other highly publicized information is whether the officer gets indicted. Rarely are the suits from bystanders and companions heavily publicized even though they can pose unique constitutional issues as well.

This Case Note will analyze *Johnson v. City of Ferguson*, Missouri, a case where the plaintiff, Dorian Johnson, was with Michael Brown when Brown was murdered by police officer Darren Wilson.[1] Part II of this Case Note will go over the background of this case and its relevance to the larger issue of police brutality and

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1. Johnson v. City of Ferguson, Missouri, 926 F.3d 504, 505-07 (8th Cir. 2019) *reh'g en banc*, *cert. denied*, 140 S. Ct. 553 (2019).

unreasonable seizures. Then, Part III will detail the Eighth Circuit's holding which concluded that there was no Fourth Amendment seizure and granted qualified immunity to Wilson and the police chief. Finally, Part IV will offer an in-depth analysis of the court's holding, focusing on the lack of consistency in Fourth Amendment unreasonable seizures jurisprudence and how it can be remedied. This lack of consistency plays a large role in the uncontrollable police brutality that American citizens face, especially African American citizens, every day. If the police feel they are above the law, especially when it pertains to the murders of unarmed African Americans, they will continue to commit these murders on tape for the world to see because they know they will not be held accountable.

II. BACKGROUND

The summer of 2020 was full of social unrest in response to the murders of Breonna Taylor, George Floyd, and Ahmaud Arbery by police officers with people proclaiming Black Lives Matter.[2] "#BlackLivesMatter [the organization] was founded in 2013 in response to the acquittal of Trayvon Martin's murderer."[3] The hashtag became a unifying slogan in response to police violence against Black people, especially after the murder of Michael Brown in Ferguson, Missouri.[4] The protests drew an aggressive response from law enforcement, which stunned and radicalized a generation of activists.[5] This section will go over the altercation that led to Darren Wilson killing Michael Brown and the protests that ensued. Then this section will turn to the Department of Justice's report on policing in Ferguson. Finally, it will cover the holdings of Dorian Johnson's case in the district court and Eighth Circuit.

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2. *Black Lives Taken: George Floyd, Breonna Taylor, and Ahmaud Arbery: What's happening and what you can do.*, DOSOMETHING.ORG, www.dosomething.org/us/articles/black-lives-taken [perma.cc/DR3P-MPNA] (last visited Apr. 9, 2022) (covering the killings of three African Americans whose deaths became the catalyst for protests in summer 2020 and what actions people are taking).

3. *About*, BLACK LIVES MATTER NETWORK, www.blacklivesmatter.com/about/ [perma.cc/6EJQ-M42B] (last visited Apr. 9, 2022).

4. *See* Jose A. Del Real et al., *How the Black Lives Matter Movement Went Mainstream*. WASH. POST. (June 9, 2020), www.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html [perms.cc/33J7-VGSG] (discussing how Black Lives Matter as an ideology has evolved into something that is now a part of the everyday discourse). When it first became popular seven years ago, it was considered a radical idea, but now it has gained support from celebrities and politicians. *Id.*

5. *Id.*

A. The Altercation that Led to Michael Brown's Murder

On August 9, 2014, Darren Wilson shot and killed Michael Brown.[6] Brown's body was left out in the August sun for four hours on the very street where Wilson killed him.[7] "Neighbors were horrified by the gruesome scene: Mr. Brown, [eighteen years old], face down in the middle of the street, blood streaming from his head."[8] Local residents posted pictures of the scene on social media to express their outrage at a teen being killed and left out on the street.[9] Social media played a pivotal role in the unfolding of this case because the attention was quickly fixed on Ferguson as many average people traveled to Ferguson to protest and tweet live updates about what was happening.[10] The facts, as alleged in the complaint, are as follows:

> On August 9, 2014, at approximately 12:00 noon, Plaintiff and Michael Brown, Jr., both African American males, were 'peacefully and lawfully walking down Canfield Drive in Ferguson, Missouri.' A marked police vehicle driven by Wilson stopped next to Plaintiff and Brown, and Wilson ordered the pair to 'Get the f*ck on the sidewalk.' Wilson continued to drive his vehicle several yards, put it into reverse, and parked it at an angle to block the path of Plaintiff and Brown, stopping the vehicle within inches of Brown. The complaint alleges that Wilson forcefully opened his door which struck Brown, and then reached through his open window and grabbed Brown who was closer to Wilson than was Plaintiff. Wilson threatened to shoot his weapon. As Brown struggled to break free, Wilson discharged his weapon twice, striking Brown in the arm. Fearing for his life, Plaintiff ran away from Wilson 'simultaneously with Brown.' Wilson did not order Plaintiff or Brown to stop or freeze but withdrew his weapon and fired 'at Plaintiff [and Brown]' as they fled, striking Brown several more times (and killing him).[11]

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6. *See* Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html [perma.cc/DSQ7-9NHW] (reporting on the lapse in time of why it took so long to remove Michael Brown's body). This article covered the standard time and how this lapse contributed to the unrest. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See They Helped Make Twitter Matter in Ferguson Protests*, N.Y. TIMES (Aug. 10, 2015), www.nytimes.com/2015/08/11/us/twitter-black-lives-matter-ferguson-protests.html [perma.cc/9B7Y-CA5E] (focusing on how three average citizens became known as prominent activists when they traveled to Ferguson after Michael Brown's death, and how they live tweeted the protests and helped keep the rest of the country informed about what was happening on the ground in Ferguson).

11. Johnson v. City of Ferguson, No. 4:15CV00832 AGF, 2016 WL 1023028, at *1 (E.D. Mo. Mar. 15, 2016), *aff'd in part, appeal dismissed in part sub nom.* Johnson v. City of Ferguson, Missouri, 864 F.3d 866 (8th Cir. 2017), *as corrected*

The protests that ensued in Ferguson lasted for weeks.[12] The police actions toward the protestors became increasingly violent.[13] Local residents captured images of police using pepper spray, tear gas, and batons on protesters.[14] "Snipers trained their rifles on protesters."[15] "Officers patrolled city streets in an armored truck that was built with combat in mind."[16] The police's militant response to citizens protesting Michael Brown's murder is indicative of the issues created by police brutality.

B. The Indictment

In 2014, a grand jury decided not to indict Darren Wilson for Michael Brown's murder.[17] The evidence included conflicting statements about everything ranging from the eyewitness statements to Brown's autopsies to the injuries Wilson had the day of the murder.[18] Wilson claimed that Brown hit him in the face multiple times while he was sitting in the car and began waving his gun since he did not have his taser on him and felt he was not able to use mace.[19] According to Wilson, he began shooting because he

(July 31, 2017), *reh'g en banc granted*, vacated (Sept. 12, 2017), *on reh'g en banc*, 926 F.3d 504 (8th Cir. 2019), *and rev'd and remanded sub nom*. Johnson v. City of Ferguson, Missouri, 926 F.3d 504 (8th Cir. 2019).

12. *See It's Been 5 Years Since Ferguson. Are Racial Tensions Even Worse Now?* USA TODAY (last updated Aug. 8, 2019), www.usatoday.com/story/news/nation/2019/08/08/ferguson-missouri-riots-5-years-since-shooting-race-tensions-worse/1952853001/ [perma.cc/VTK3-B9XA] (covering the mass protests in Ferguson and their lasting influence on the town in 2019, five years later).

13. *Id.*

14. *Id.*

15. Matt Apuzzo, *Justice Dept. Report Says Police Escalated Tensions in Ferguson,* N.Y. TIMES (June 30, 2015), www.nytimes.com/2015/07/01/us/draft-justice-dept-report-says-police-escalated-tensions-in-ferguson.html [perma.cc/XYF7-WW99] (covering the investigation of the Ferguson Police Department's activity during the protests following Michael Brown's death. The Department of Justice concluded that the Ferguson Police Department escalated the situation with their use of military tactics).

16. *Id.*

17. *Darren Wilson not indicted: read the full grand jury report*, GUARDIAN (Nov. 25, 2014), www.theguardian.com/us-news/ng-interactive/2014/nov/25/darren-wilson-not-indicted-ferguson [perma.cc/LN2W-TQXX] (releasing the full grand jury report after the jury's decision to not indict Darren Wilson for shooting Michael Brown).

18. *Id.*; U.S. Dep't of Justice Civil Rights Div., Regarding the Criminal Investigation Into The Shooting of Michael Brown by Ferguson Police Officer, Darren Wilson, at 17 (2015) (explaining all three autopsies conducted on Michael Brown's body and the differing opinions of the examiners. The first autopsy was conducted by St. Louis County Medical Examiner, the second by a private forensic pathologist at the request of the Brown family, and the third was conducted by the Armed Forced Medical Examiner for the DOJ's investigation).

19. U.S. Dep't of Justice Civil Rights Div., Regarding the Criminal

felt Brown had reached for a gun and intended to behave aggressively.[20] Most eyewitnesses said Brown had his hands up when Wilson fatally shot him, while only one witness said Brown charged at Wilson.[21]

C. The Department of Justice Findings on Policing in Ferguson

In 2015, the Department of Justice ("DOJ") published its report on the state of policing in Ferguson.[22] To summarize, the DOJ found that the "unlawful and harmful practices in policing and in the municipal court system erode police legitimacy and community trust, making policing in Ferguson less fair, less effective at promoting public safety, and less safe."[23] It found that while the level of crime in the city stayed consistent, the level of ticketing in the city under the municipal code increased.[24] It was common practice for officers to issue as many as fourteen tickets in a single encounter.[25] The most serious ticketed offenses, such as driving under the influence and assault, did not increase.[26] The police would issue tickets under the city municipal code even when there was an applicable state code so that the city would get revenue from the ticketing.[27]

This focus on revenue for the city resulted in consistent constitutional violations."[28] Police had a pattern of conducting stops without reasonable suspicion and making arrests without probable cause, violating the Fourth Amendment.[29] This behavior included

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Investigation Into The Shooting of Michael Brown by Ferguson Police Officer, Darren Wilson, at 17 (2015).

20. *Id.*

21. *Id.*

22. U.S. Dep't of Justice Civil Rights Div., Investigation of the Ferguson Police Department, at 28 (2015) [hereinafter DOJ Report].

23. *Justice Department Finds a Pattern of Civil Rights Violations by the Ferguson Police Department*, U.S. DEPT. OF JUSTICE (Mar. 4, 2015), www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri [perma.cc/M9PE-3HUN].

24. DOJ Report, *supra* note 22, at 28.

25. *Id.* at 11.

26. *Id.* at 7.

27. *Id.*

28. *Id.* at 15; Ezekiel Edwards, *The DOJ Ferguson Report Isn't Just an Indictment of Ferguson Police, but of American Policing Writ Large*, ACLU BLOG (Mar. 6,2015), www.aclu.org/blog/speakeasy/doj-ferguson-report-isnt-just-indictment-ferguson-police-american-policing-writ-large [perma.cc/Q9C9-3KMH] (discussing how the focus on revenue in Ferguson was not unique, and links their report on debtors prisons nationwide.).

29. DOJ Report at 17 (detailing an incident where the Ferguson Police handcuffed an African American man in the parking lot of the apartment building while on their way to arrest someone in the building). They were aware the man they handcuffed was not the person they were looking for, but they

pedestrian stops where officers engaged in "legally unsupportable stops."[30] The Ferguson Police Department ("FPD") also did not track or analyze these pedestrian stops which left the stops open to being used for discriminatory purposes.[31] These stops were made more harmful because the officers used excessive force while carrying out the unlawful stops.[32] This included the use of canines and tasers specifically to retaliate against people for not listening to police instructions.[33] The DOJ reviewed many incidents where physical force was used to inflict punishment and not to neutralize a physical threat to the officers.[34]

There was a practice of little to no oversight of the use of force against citizens.[35] The report found that officers rarely reported uses of force.[36] This was reflected in the department's use of force reporting, which had stretches of two to four months where no use of force was reported at all.[37] When there were reviews of an officer's use of force, the officer's account of the incident was taken as true and usually resulted in no consequences for the officer.[38] The reviews were even more relaxed when the involved officer was at the sergeant level or above because those officers could review the use of force incidents they were involved in leaving them accountable to no one.[39] The FPD did not use these incomplete records to compile reports to detect patterns of officer misconduct, or excessive force continually being used by the same officers.[40] This prevented the department from doing early intervention to stop officers from engaging in constitutional violations.[41]

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handcuffed him, put him in the patrol car, and ran his record anyway. *Id*. He was the landlord of the building and was willing to help. *Id*.

30. *Id.* at 18.

31. *Id*.

32. *See id*. at 34 (detailing an incident about Ferguson Police escalating an unsupported stop. The officers attempted to arrest an African American man for trespassing even though the man had been invited into the home. Seven officers subdued the man and used tasers on him after tackling the man who is 5'8 and 170 pounds).

33. *See id.* at 33 (detailing an incident about retaliatory force they faced from Ferguson Police.). One man was tased in the back by an officer while peeing on the floor in the jail. *Id*. Some of it got on the officer's pant leg and the only explanation the officer offered for his behavior was that he tased the man to stop the ongoing threat of urine. *Id*.

34. *Id.* at 33.

35. *Id.* at 38.

36. *Id*.

37. *Id.* at 39.

38. *Id.*

39. *Id.* at 40.

40. *Id.* at 41. Richard Rosenfeld, *Ferguson and Police Use of Deadly Force*, 80 MO. L. REV. 1076, 1092 (2015) (discussing how the lack of a comprehensive data on police's use of deadly force contributes to lack of policy changes on the local level like Ferguson.). The article also discusses what a national database of police use of deadly force should include. *Id.*

41. DOJ Report at 41.

The report also showed that the FPD used their force almost exclusively against Black people.[42] While only making up sixty-seven percent of the population of Ferguson, Black people made up ninety-three percent of all arrests, ninety percent of citations, and eighty-five percent of traffic stops.[43] Black people were more likely to receive multiple citations during each traffic stop.[44] The report found that the racially disparate impact followed African American people in every stage of law enforcement from traffic stops to the courts.[45] The report concluded that the disparate impact of law enforcement on African American people violated the "Fourteenth Amendment's Equal Protection clause which prohibits discriminatory policing on the basis of race."[46]

The DOJ also found direct evidence of racial bias in the work emails of the town's officials.[47] This included racist statements that were made about an African American woman who terminated her pregnancy was rewarded by Crimestoppers, depictions of President Barack Obama as a chimpanzee, and claims that he would not last all four years in office because "what Black man holds a steady job for four years."[48]

This report was the basis of the consent decree between Ferguson and the Department of Justice.[49] The consent decree requires the city to make a multitude of institutional changes to

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42. *Id.* at 62.

43. *Id.*

44. *Id.*

45. *Id.* at 63.

46. *Id.* at 70.

47. U.S. CONST. amend. XIV; Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1976) (holding that the refusal to rezone an area in a suburb because the new building would be required to be racially integrated was not unconstitutional because the zoning laws did not have a discriminatory intent and were facially neutral.) This holding solidifies that laws that have racially disparate outcomes do not automatically make a law unconstitutional because of Fourteenth Amendment Equal Protection rights *Id.*; Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977) (holding that when there is a pattern or practice of discrimination alleged long evidence of statistical disparity is significant.) "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id*; *see also* DOJ Report, *supra* note 22, at 62 (detailing more disproportionate treatment of African Americans by Ferguson Police Department.). African Americans were sixty-eight percent less likely to have their case dismissed and in 2013 they accounted for ninety-two percent of all cases where an arrest warrant was issued. *Id.*

48. DOJ Report, *supra* note 22, at 72 (detailing other derogatory emails such as describing a photograph of topless dancing women in Africa as "Michelle Obama's high school reunion"; an email describing a man seeking welfare for his dogs because they are "mixed in color, unemployed, lazy, can't speak English, and have no frigging clue who their Daddies are"; and emails with offensive stereotypes about Muslims).

49. Consent Decree, United States v. City or Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016).

ensure compliance with the Constitution.[50] If the department does not comply with the consent decree, then the DOJ can enforce the decree in court.[51] This report became important in Dorian Johnson's suit against the City of Ferguson because of his supervisory and municipal liability claims.[52]

D. Procedural History of Dorian Wilson's Suit

Dorian Johnson filed suit against Wilson and the former FPD chief of police in state court.[53] Wilson and the chief of police removed the case to the Eastern District of Missouri.[54] The complaint alleged a Fourth Amendment unreasonable seizure, excessive force, and supervisory liability against the former chief.[55] Wilson and the chief of police filed a motion to dismiss, raising a qualified immunity defense.[56]

The Fourth Amendment is aimed to protect citizens from unreasonable searches and seizures.[57] When a police officer "accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[58] *Terry v. Ohio* authorizes police to conduct brief investigatory stops of citizens when they have "a reasonable and articulatable suspicion that crime is underfoot."[59] In the instant case, Johnson claimed he was seized by Wilson when Wilson created a roadblock stopping him and Brown from walking in the direction they were going.[60] He claimed this was a Fourth Amendment violation since this was not a legally justifiable stop.[61] The basis for the excessive force claim was that Wilson began shooting at him and Brown during the unlawful stop.[62]

Johnson's supervisory liability claim was based largely on the DOJ report, which concluded that the FPD had a pattern of

50. *Id.*

51. 42 U.S.C. § 14141 (2012) (making it unlawful for a law enforcement officers to engage in a pattern or practice of depriving citizens of their constitutional rights, it also authorizes the Attorney General to bring civil actions against government entities they believe are in violation of this statute to obtain equitable and declaratory relief).

52. *Johnson*, 2016 WL 1023028, at *7-8.

53. *Id.* at *1.

54. *Id.* at *2.

55. *Id.* at *1.

56. *Id.* at *5.

57. U.S. CONST. amend. IV.

58. Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that police officers are allowed to stop citizens for brief investigatory stops when they suspect that crime is under way without being found to have seized someone within the meaning of the Fourth Amendment).

59. *Id.* at 30.

60. *Johnson*, 2016 WL 1023028, at *3.

61. *Id.* at *8.

62. *Id.*

constitutional violations.[63] He claimed that the lack of proper police protocol was the reason that Wilson seized him and used excessive force.[64] He also claimed that the police chief's failure to implement a system that tracked constitutional violations and officer misconduct contributed to the force used by Wilson against him.[65]

Wilson asserted a qualified immunity defense.[66] Qualified immunity is immunity from suit for government officials when they are acting in the scope of their job.[67] It is not meant to protect the incompetent and those who knowingly violate the law.[68] This is an objective inquiry rather than a subjective one.[69] One prong of the qualified immunity test is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[70] If there is no constitutional right, then the inquiry ends.[71] The other prong is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[72] Wilson claimed that there was no seizure and, even if there was a seizure, it was not clearly established that his actions were unlawful.[73] He claimed that there was no seizure since the roadblock was not a barrier and Johnson did not submit but chose to flee.[74] Johnson claimed that Wilson knew that creating a roadblock and shooting at him and Brown was criminal behavior.[75]

The district court denied Wilson's motion to dismiss.[76] The district court found that Johnson alleged sufficient facts that there was a Fourth Amendment unreasonable seizure to survive a motion to dismiss.[77] This analysis largely depended on the timeframe that the events took place in considering that Johnson did eventually

63. *Id.*
64. *Id.* at *9.
65. *Id.*
66. *Id.*
67. Saucier v. Katz, 533 U.S. 194, 201 (2001) (establishing that excessive force and qualified immunity are two distinct analyses.). This established qualified immunity as a two-prong test first there should be an analysis of whether the officer's conduct violated a clearly established right, then whether the right was clearly established. *Id.*
68. *Id.* at 202.
69. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (establishing the qualified immunity standard that government officials are generally shielded from liability in discretionary functions unless they are violating clearly established law or rights which a reasonable person would have known).
70. *Saucier*, 533 U.S. at 201.
71. *Id.*
72. *Id.* at 202.
73. *Johnson*, 2016 WL 1023028, at *9.
74. *Id.* at *6.
75. *Id.*
76. *Id.* at *8.
77. *Id.*

flee the scene.[78] The district court also denied the motion to dismiss the excessive force claims because in viewing the facts most favorably to Johnson, Wilson shot at Johnson during a Fourth Amendment unreasonable seizure.[79] The qualified immunity defense was also rejected because the facts alleged that a reasonable officer in that scenario would have known they were "violat[ing] clearly established federal law."[80]

The district court denied the motion to dismiss the supervisory liability claims and the municipality liability claims.[81] The district court concluded that Johnson pled sufficient facts to show that there was liability in not only the police chief, but the city government, as well.[82] These claims both stemmed from the culture of law enforcement analyzed by the DOJ in Ferguson which led to a long history of constitutional violations against its African American residents.[83]

E. The Eighth Circuit Affirmed the District Court

In the Eighth Circuit's original opinion, it affirmed the district court's finding that there was a seizure.[84] The court concluded that Johnson's stop was more than a momentary pause before fleeing.[85] Johnson was present during the entire altercation between Wilson and Brown before he fled the scene fearing for his life.[86] The Eighth Circuit held that Johnson was seized by virtue of being with Brown during the altercation, similar to a passenger in a car where the driver has been seized.[87]

The Eighth Circuit next held that there was excessive force used during that seizure.[88] The reasonableness of the force used during a seizure is analyzed not by "20/20 hindsight, but the standard is the reasonable officer at the scene."[89] The factors

78. *Id.*

79. *Id.* at *6-7.

80. *Id.* at *8.

81. *Id.* at *7.

82. *Id;* Davis v, White 794 F.3d 1008, 1014 (8th Cir. 2015) (holding that for plaintiffs claims that their injury was caused by municipal failure to adopt a policy, the plaintiff must show widespread and persistent pattern of unconstitutional conduct.). This is another excessive force case against Ferguson, MO, the plaintiff was a post arrest detainee who was beaten and sustained a concussion, bruising, and scalp lacerations. *Id*. at 1011.

83. *Id.*

84. Johnson v. City of Ferguson, Missouri, 864 F.3d 866, 873 (8th Cir. 2017), *as corrected* (July 31, 2017), *reh'g en banc granted*, *vacated* (Sept. 12, 2017), on *reh'g en banc*, 926 F.3d 504 (8th Cir. 2019).

85 *Id.* at 874.

86. *Id.* at 873.

87. *Id.* at 875.

88. *Id.* at 875.

89. Graham v. Connor, 490 U.S. 386, 396 (1989) (holding that excessive force claims should be analyzed under the objective reasonableness standard for

considered in that analysis are the "severity of the crime, the immediate threat the person poses to public safety and whether the person is resisting or attempting to evade arrest."[90] The main principle in use of force analysis is that "force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public."[91] The Eighth Circuit found that Johnson and Brown were merely walking down the street; they were at most violating a municipal ordinance, which posed no danger to public safety.[92] They stopped walking when Wilson created a roadblock and did not resist or evade him.[93] Thus, Wilson drawing a weapon on them, shooting at them, and killing Brown was objectively unreasonable.[94]

The Eighth Circuit held there was a clearly established law by their own jurisprudence.[95] A clearly established constitutional right does not require case law with similar facts to be clearly defined.[96] In a case with novel facts, it requires a "beyond debatable" question of whether an action was proper or improper.[97] Officers are on notice that deadly force should not be used unless there is danger of serious bodily injury or death of the officer others.[98] In *Brown v. City of Golden Valley,* "this court held that the use of a Taser on a person whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator" constituted excessive force."[99] In *Shekleton v. Eichenberger*, the

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Fourth Amendment seizures.). The inquiry is whether the officer's actions in using force are objectively reasonable in light of the circumstances the officer faced with no regard to underlying intent or motivation. *Id.*

90. *Id.*

91. Small v. McCrystal, 708 F.3d 997, 1005 (8th Cir. 2013) (denying qualified immunity for a police officer who tackled an arrestee even though he was engaged in no violent behavior and the officer gave no warning to disperse).

92. *Johnson*, 864 F.3d at 875.

93. *Id.*

94. *Id.*

95. *Id.*

96. Hope v. Pelzer, 536 U.S. 730, 741 (2002) (denying qualified immunity to a prison guard for handcuffing a prisoner to a hitch post in the sun for seven hours with no bathroom breaks holding that a constitutional violation can be clearly established even in novel situations.). The Court held that when there is no on point case law, an action can be clearly established as unconstitutional when the action's constitutionality is beyond debate. *Id.*

97. *Id.*

98. *See* Craighead v. Lee, 399 F.3d 954, 962 (8th Cir. 2005) (denying qualified immunity for a police officer when he fatally shot a man, who was wrestling a carjacker for his gun, without trying to deescalate the situation.). The officer gave no warning that he was about to shoot even though giving a warning would have been feasible in that situation especially since he knew one of the parties was the victim of criminal activity and one was the offender. *Id.*

99. *See* Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009) (denying qualified immunity to an officer who Tasered someone he was about to arrest whose only noncompliance with his orders was that they did not end their phone call as he ordered them to.). The Eighth Circuit held that it is

Eighth Circuit held the use of a taser on an individual that police were attempting to handcuff was excessive force because the individual was not attempting to flee nor were they acting aggressively toward police.[100] The Eighth Circuit held in *Johnson* that tasers typically are less force and generally less harmful than guns.[101] "It follows that, if the use of a [t]aser in these circumstances constitutes excessive force, the use of a gun in these circumstances necessarily constitutes excessive force."[102]

The Eighth Circuit held that there was supervisory liability for the chief of police.[103] The Eighth Circuit previously articulated that "[l]iability cannot attach to a supervisor merely because a subordinate violated someone's constitutional rights."[104] For liability, "[t]he supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he or she] might see."[105] If the supervisor was not directly involved in the incident where the constitutional violation occurred, the supervisor is "entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts."[106] The *Johnson* court held that since the police chief "rarely reviews offense reports and has never overturned a supervisor's determination of whether a use of force fell within [Ferguson Police Department] policy" he had sufficient notice of the officer's conduct.[107] By "failing to review offense reports and hold officers accountable for excessive force, Chief Jackson was deliberately indifferent to the unconstitutional

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clearly established that force is least justified against nonviolent citizens who do not actively resist arrest, flee, and pose little to no threat to security of the public and the officers. *Id*.

100. *See* Shekleton v. Eichenberger, 677 F.3d 361, 367 (8th Cir. 2012) (denying qualified immunity to an officer who tasered someone he was arresting when they both accidentally fell while he was trying to handcuff them).

101. *Johnson*, 864 F.3d at 876.

102. *Id.* at 876.

103. *Id.* at 877.

104. Otey v. Marshall, 121 F.3d 1150, 1155 (8th Cir. 1997) (granting a police chief qualified immunity because there was insufficient evidence that he was aware of a pattern of Constitutional violations by an officer.). The plaintiff could only cite to two incidents which were not similar to the issue they faced with the officer, that they alleged were constitutional violations. *Id*.

105. Kahle v. Leonard, 477 F.3d 544, 551 (8th Cir. 2007) (affirming the district court's denial of summary judgement on qualified immunity defense for a jail supervisor who the detained claimed was deliberately indifferent to a substantial risk that she would be sexually assaulted by a prison guard.). The indifference to a substantial risk does not require knowledge of the abuse, but a failure to act when they became aware of the risk of substantial harm. *Id*.

106. S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015) (granting qualified immunity to a sheriff who was unaware of the sexual misconduct that a lieutenant committed during the supervision of drug court participants and fired the lieutenant as soon as he was made aware).

107. *Johnson*, 864 F.3d at 877.

practices carried out by Ferguson police officers."[108]

The Eighth Circuit did not have appellate jurisdiction over the municipal liability claims.[109] It concluded that the issue of whether Wilson and the police chief were entitled to qualified immunity turned on whether they violated Johnson's Fourth Amendment rights, but municipal liability does not.[110] Municipal liability turns on whether the "constitutional violation was caused by the city engaging in a widespread and persistent pattern of unconstitutional misconduct that municipal policymakers were either deliberately indifferent to or tacitly authorized."[111] The municipal liability claims are not dependent on the denial of qualified immunity for the officers because they are two separate questions.[112] Thus, the Eighth Circuit held that it did not have jurisdiction over the appeal of the municipal claims.[113] Wilson and the police chief petitioned for a rehearing en banc which was granted.[114]

III. COURT'S ANALYSIS

First, this section will cover the Eight Circuit's en banc opinion. Then, it will turn to the dissent's opinion. Finally, this section will look at the impact of the holding on the parties, the residents of Ferguson, and the briefs for certiorari to the Supreme Court, which were denied.

A. The En Banc Panel Held that Johnson was not Seized and Vacates the Lower Court Decision

First, the court narrowed the issue to whether there was a seizure since both parties acknowledged that if there was no seizure, then all other charges must be dismissed.[115] The court first looked at Wilson's cursing expletives at Johnson and Brown.[116]

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108. *Id.*

109. *Id*; Kincade v. City of Blue Springs, 64 F.3d 389, 394 (8th Cir. 1995) (holding that courts only have appellate jurisdiction regarding interlocutory appeals if the claim of one necessarily resolves the other issue).

110. *Johnson*, 864 F.3d at 877.

111. Davis v. White, 794 F.3d 1008, 1014 (8th Cir. 2015) (holding the plaintiff must prove the poor record keeping directly caused his injury for a finding of municipality liability).

112. Veneklase v. City of Fargo, 78 F.3d 1264, 1270 (1996) (holding that the denial of summary judgement on municipal liability claim was not inextricably intertwined with the underlying qualified immunity claim because the claims require two different analyses).

113. *Johnson*, 864 F.3d at 877.

114. *Johnson*, 926 F.3d at 504-05.

115. *Id.*

116. *Id.* at 506.

Johnson conceded that neither he nor Brown was ordered to stop or freeze.[117] Based on this concession, the en banc panel concluded that Johnson made the decision to remain by Brown's side during Brown's altercation with Wilson rather than complying with Wilson's command to get on the sidewalk.[118] The court found that since Johnson was not physically restrained, did not comply with the order to get on the sidewalk, and chose to flee instead, he was never seized.[119] The court found that Johnson's ability to flee was sufficient evidence that there was no seizure.[120] Further, the court concluded that Wilson's police vehicle was not a barrier to Johnson being able to cross the street.[121] The court compared this situation to the officers in *United States v. Hayden*, where the Eighth Circuit held there was no seizure where the defendants were merely approached by police officers.[122]

The court did not analyze the excessive force claim, only offering one sentence about the use of a gun on Johnson and Brown.[123] "Any physical or weapon-related contact by Wilson was directed towards Brown alone in the first instance."[124]

The court then turned to the requirement of submission for there to be a seizure, relying on *Brendlin v. California*.[125] Submission would require a "verbal or physical impediment to Johnson's freedom of movement," which the court decided was not present in this case.[126] The court concluded that there was no seizure because there was no "intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied which occurred in *Brower v. County of Inyo* and *Tennessee v Garner*."[127] There is a string cite of cases from other circuits the court offered as standing for the same legal

117. *Id.*
118. *Id.*
119. *Id*
120. *Id.*
121. *Id.*
122. *Id.*; United State v. Hayden, 759 F.3d 842, 847 (8th Cir. 2014) (holding there was no seizure when the police merely shined a light on the citizens, identified themselves as police, and approached the citizens) The police did not block their ability to cross the street, did not touch the men, and did not display weapons. *Id.*
123. *Johnson*, 926 F.3d at 506.
124. *Id.*
125. Brendlin v. California, 551 U.S. 249, 263 (2007) (holding passengers are seized within the meaning of the Fourth Amendment during traffic stops and can challenge that seizure as unreasonable in court).
126. *Johnson*, 926 F.3d at 506.
127. *Id.*; Brower v. County of Inyo, 489 U.S. 593 (1989) (holding that the creation of a roadblock constituted a Fourth Amendment seizure because the government terminated the freedom of through means intentionally applied); Tennessee v. Garner, 471 U.S. 1 (1985) (holding that a Tennessee statute which authorized police to use deadly force to prevent suspected felons from escaping violated the Fourth Amendment).

conclusion as the decision in this case.[128] However, the court offered no analogies as to why these cases were similar.[129]

On the claim of supervisory liability, the court held that there was no liability since "to maintain an action for training or supervisory liability, a plaintiff must show the failure to train or supervise caused the injury."[130] The court also held there was no municipal liability because, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim.[131]

B. The Dissent Would Affirm the Lower Court

The dissent concluded that this was an unreasonable seizure and went through a step-by-step analysis of Fourth Amendment unreasonable seizures, unlike the majority.[132] The dissent began the analysis with a discussion of show of authority seizures.[133] For a plaintiff to successfully state a claim of "seizure through a show of authority (rather than through physical force), the plaintiff must demonstrate both (1) a show of authority and (2) actual submission to that show of authority."[134]

The dissent categorized Wilson's actions as a show of authority seizure.[135] There is an objective reasonable person test for

128. United States v. Stover, 808 F.3d 991,1000 (4th Cir. 2015) (holding that no reasonable person in appellant's position would have felt free to terminate the encounter where officers approached the appellant, but appellant had not submitted until he discarded his loaded gun); United States v. Salazar, 609 F.3d 1059, 1067 (10th Cir. 2010) (holding the defendant did not submit to the officer's initial show of authority and backing his car away was evasive.). It concluded he did not submit to the officer's authority until he got out of the car. *Id*.; United States v. Waterman, 569 F.3d 144, 146 (3d Cir. 2009) (reversing the grant of motion to suppress because the defendant did not submit when the police pulled their guns on everyone on the porch, so he was not seized); United States v. Baldwin, 496 F.3d 215, 219 (2d Cir. 2007) (holding that the defendant did not submit to police authority when he stopped momentarily after being approached by police); United States v. Letsinger, 93 F.3d 140, 145 (4th Cir. 1996) (holding that the defendant's luggage wasn't seized on a train until he gave police access to the luggage not when the train began moving); United States v. Hernandez, 27 F.3d 1403, 1407 (9th Cir. 1994) (holding that the defendant was not seized because he never submitted to authority or was physically subdued in a foot chase with a police officer); United States v. Washington, 12 F.3d 1128, 1132 (D.C. Cir. 1994) (holding that the defendant was not seized because he abandoned his car when told to stop by police officers instead of submitting to their authority).

129. *Johnson*, 926 F.3d at 506.

130. *Id.* (quoting *Moore v. City of Desloge*, 647 F.3d 841, 849 (8th Cir. 2011)).

131. *Johnson*, 926 F.3d at 506.

132. *Id.* at 507 (Melloy, J., dissenting).

133. *Id.*

134. Brendlin v. California, 551 U.S. 249, 254 (2007).

135. *Johnson*, 926 F.3d at 508 (Melloy, J., dissenting).

the show of authority.[136] The test is "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."[137] The test also considers "[whether] the officer's conduct convey[s] to a reasonable person that they are not at liberty to ignore the police presence."[138] The analysis should center around the "totality of the circumstances."[139] This analysis has several relevant factors such as the "presence of several officers, display of weapons by officers, physical touching of the person or use of language or tone of voice indicating that compliance will be compelled."[140]

The dissent characterized the Eight Circuit's holdings on police seizure as a high hurdle to constitute the police seizure.[141] The dissent cited a few cases where the Eighth Circuit has held that there was no Fourth Amendment seizure.[142] For instance, in one case the Eighth Circuit held that there was no seizure when the police parked their car behind the defendant's car, activated the wig wag lights, and approached the defendant's car.[143] In another case, the Eighth Circuit held there was no seizure "when a police officer pulled his vehicle alongside the defendant, shined a flashlight on him, and yelled 'Police!'"[144]

The dissent then applied the show of authority seizure test to Wilson's actions in the interaction with Johnson and Brown and

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136. *Id.*

135. *Brendlin*, 551 U.S. at 254 (holding that the in a seizure analysis the relevant question should be whether a reasonable person would believe they are able to terminate their encounter with the police.) In this case the court found that none of the passenger's felt free to terminate the encounter with the police. *Id*.

137. Florida v. Bostick, 501 U.S. 429, 437 (1991) (holding that the free to leave inquiry is about termination of the encounter with police not whether the subject is able to leave the location of the encounter.). In this case, Florida had a per se law that made all police encounters on buses seizures which was overturned. *Id*.

138. United States v. Johnson, 326 F.3d 1018, 1021 (8th Cir. 2003) (holding that there was no unreasonable seizure when the defendant engaged with the police officer consensually until they decided to flee).

139. United States v. Flores-Sandoval, 474 F.3d 1142, 1145 (8th Cir. 2007) (holding there was no unreasonable seizure when the defendant openly admitted that was an undocumented immigrant to an immigration agent. It held the totality of the circumstances show he was in a non-threatening environment when asked).

140. *Johnson*, 926 F.3d at 508 (Melloy, J., dissenting).

141. *Id.*

142. United States v. Cook, 842 F.3d 597, 601 (8th Cir. 2016) (holding there was no unlawful seizure when police approached a parked car and turned the wig wag lights on). Wig wag lights are the lights that flash the headlamps on the police car.

143. United States v. Hayden, 759 F.3d 842, 846 (8th Cir. 2014) holding that there was no unreasonable seizure when the police stopped the defendant on the sidewalk and told him to take his hand out of his pocket).

144. *Johnson*, 926 F.3d at 508 (Melloy, J., dissenting).

viewed them in the light most favorable to Johnson.[145] Wilson began the interaction by yelling expletives at the plaintiff while he and Brown were just walking down the street.[146] Wilson then abruptly created a roadblock and stopped the car and struck Brown with the door. Wilson escalated the situation even further by grabbing Brown through the car window and then threatening to shoot the two young men.[147] Wilson then opened fire on the young men, which is when Johnson began to flee.[148] The dissent concluded that "Wilson communicated an intent to use a roadblock to stop Johnson's movement."[149] The dissent reasoned that a "reasonable person would see the roadblock's purpose was to serve as a physical obstacle conveying an order to stop – not an order to go around the vehicle and continue on one's way."[150]

The dissent then addressed the amicus curiae brief from the National Police Association.[151] The amicus claimed that the order was just "simply for two pedestrians to get off the street and use the sidewalk and that [h]e did not order anything other than compliance with the law."[152] These are commonly categorized as "move on orders" and are meant to communicate that the person can't remain where they are, but they are free to go anywhere else.[153] They claimed that this move on order would make the reasonable person believe that they are still free to go on their way.[154] The dissent acknowledged that there is a circuit split on the issue of whether move on orders constitutes Fourth Amendment seizures and that the Eighth Circuit has never decided a case about move on orders.[155] Most of the decisions that do exist on move on orders turn on whether there was physical contact between the officers and citizens.[156] The dissent concluded that the facts were not as simple as the amicus curiae claimed.[157] In viewing the facts in the light most favorable to Johnson, the facts showed a situation escalated by Wilson that conveyed that Johnson was not free to

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id;* Bostick, 501 U.S.at 437 (analyzing whether a person feels at liberty to ignore police presence.) The dissent analyzed liberty to ignore the police presence and whether the show of authority was also aimed at Johnson under *Brendlin*, 551 U.S. 261.
150. *Id.*
151. *Id* (quoting Brief for National Police Association as Amicus Curiae Supporting Appellants, Johnson v. City of Ferguson, 926 F.3d 504 (8th Cir. 2019) (No. 16-1697)).
152. *Id.* at 8.
153. *Id.*
154. *Id.*
155. *Johnson*, 926 F.3d at 509 (Melloy, J., dissenting).
156. *Id.*
157. *Id.*

ignore Wilson's presence.[158]

The dissent categorized Johnson's stopping as submission.[159] "Fleeing or refusing to comply with a show of authority does not qualify as submission to authority, stopping one's movement often qualifies as submission."[160] Temporary stopping does not always count, but the analysis of what constitutes whether a stop was made largely depends on the facts of the case.[161] "Johnson remained throughout the time that Officer Wilson reached through his window and grabbed Brown, threatened to shoot his weapon, wrestled with Brown who struggled to break free, and then twice fired his weapon."[162] The dissent concluded that the facts could not be generalized so much to say that only Brown may have been seized.[163] The two were walking together when Wilson approached them and created a roadblock, and they were together when Wilson fired his gun at the pair and killed Brown.[164] The dissent concluded that "if one of the two were seized, both were seized."[165]

The dissent acknowledged that passive acquiescence can be submission to a show of authority.[166] Passive acquiescence can be as simple as remaining where the seized person is.[167] The dissent concluded that Johnson actively acquiesced to Wilson's show of authority because he stopped walking.[168]

There was no argument that there was an objective reason that the use of deadly force was employed on Johnson, so the dissent concluded that the issue was abandoned on appeal.[169] The dissent did not address the supervisory liability or municipal liability claims.[170]

C. Effects on the Parties

The effect this holding had on the parties was that Johnson had no recourse for being shot at by a police officer and Wilson suffered no legal consequences for shooting at Johnson or killing Brown.[171] A year after the shooting, Wilson was living a quiet life

158. *Id.*

159. *Id.* at 510.

160. *Id.*

161. United States v. Baldwin, 496 F.3d 215, 219 (2d Cir. 2007) (holding that the defendants temporary stop while driving when he saw the police car did not constitute a seizure because after the temporary stop, he began a car chase).

162. *Johnson*, 926 F.3d at 510 (Melloy, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*; Brendlin, 551 U.S. at 255 (holding that submission depends on what the person was doing before the show of authority).

168. *Johnson*, 926 F.3d at 510 (Melloy, J., dissenting).

169. *Id.* at 511 (Melloy, J., dissenting).

170. *Id.* at 510 (Melloy, J., dissenting).

171. *Id.* at 506; *see* Joel Currier, *St. Louis County Prosecutor Reopened*

with his newborn and wife with over half a million dollars in donations to help with his legal fees.[172] While he could not get another police job because he could be viewed as a liability[173] he was nonetheless honored by the Columbia Police Department with a Darren Wilson Day on the first anniversary of his killing of Michael Brown.[174]

A 2019 check on Johnson showed that he had been living a rougher path since the shooting.[175] In the months following the shooting, Johnson lost his job and apartment, and he still has a hard time keeping a steady job because he gets recognized regularly.[176] Johnson was just getting his life back on track five years after the shooting.[177]

D. Effect on the Community

Granting qualified immunity, in this case, has ensured that

Michael Brown shooting Case but won't Charge Darren Wilson, STL TODAY (July 31, 2020), www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutor-reopened-michael-brown-shooting-case-but-wont-charge-darren-wilson/article_8e537a12-4dd0-51d8-a325-11ba7dddd20e.html [perma.cc/45YC-54LL] (covering the announcement that the St. Louis County prosecutor began a quiet investigation on whether charges should be brought against Darren Wilson for killing Michael Brown.). They concluded no charges should be brought. *Id*.

172. Jake Halpern, *The Cop*, NEW YORKER (Aug. 3, 2015), www.newyorker.com/magazine/2015/08/10/the-cop [perma.cc/WZV2-LBS8] (reporting on Darren Wilson's life since he shot Michael Brown. At the time he was unemployed and living a very private life with his wife, new baby, and stepchildren.) The article also discusses his career path as a police officer. He began his police career in Jennings, MO a town notorious for its racism where the police force in the town was disbanded. *Id*. The article also focuses on his time in Ferguson's Police department, he claims the Department of Justice Report was skewed and no institutional racism existed, just a few bigots. *Id*.

173. *Id.*

174. Daniel Victor, *Police Group's 'Darren Wilson Day' Is Condemned*, N.Y. TIMES (Aug. 10, 2015), www.nytimes.com/2015/08/11/us/darren-wilson-day-columbia-missouri-ferguson-michael-brown.html [perma.cc/6P35-2YVE] (reporting on police department in Columbia, MO wanted to show their support of Darren Wilson, who they called "innocent, but persecuted" on the anniversary of Darren Wilson killing Michael Brown.). The officers claimed it was not about race, but they wanted to support Darren Wilson and all law enforcement agents who face similar issues. *Id*.

175. Wesley Lowery, *Dorian Johnson, Witness to the Ferguson shooting, Sticks by his Story*, WASH. POST. (Aug. 9, 2019), www.washingtonpost.com/national/dorian-johnson-witness-to-the-ferguson-shooting-sticks-by-his-story/2019/08/08/79ff3760-b77e-11e9-a091-6a96e67d9cce_story.html [perma.cc/JWQ3-NMY5] (looking into Johnson's life immediately following the shooting which included his family having to shuffle him around hotels in the St. Louis area to avoid press and being the target of death threats.). The article then discusses his current life. *Id*.

176. *Id.*

177. *Id.*

no individual officer will face consequences for the violence that has been inflicted on Black people in Ferguson.[178] When interviewed five years later, some Ferguson residents still see no change: "If anything, it feels the same. I don't even feel like I can call the police to save myself."[179] James Taylor, the mayor at the time, said large scale changes were too expensive and time consuming to undertake along with fulfilling the consent decree. Some residents said they could tell that FPD treated the consent decree as a punishment and not as an opportunity to be better for the citizens of Ferguson.[180] This holding reinforced the persistent constitutional violations committed by FPD on Black people in Ferguson.[181]

E. Legal Effects

Johnson petitioned for certiorari to the Supreme Court of the United States.[182] The first argument in support of granting certiorari was that there was a circuit split on the issue of whether move on orders can be seizures.[183] The Sixth Circuit held that move on orders can be seizures while the Second and Eighth Circuit held that they are not seizures.[184] The Sixth Circuit has held that someone is seized when a "reasonable person would not feel free to remain somewhere, by virtue of some official action."[185] The Second Circuit has focused its analysis on would a "reasonable person have felt they were not free to leave."[186] Recently, it held that there is no seizure "as long as the person is otherwise free to go where he wishes."[187] The brief pointed out that the Seventh and Tenth

178. DOJ Report, *supra* note 22, at 62.

179. Yamiche Alcindor et al., *5 years After Michael Brown's Death, what has Changed in Ferguson — and what hasn't,* PBS (Aug. 8, 2019), www.pbs.org/newshour/show/5-years-after-michael-browns-death-what-has-changed-in-ferguson-and-what-hasnt-2 [perma.cc/NAK7-XJNR] (interviewing Ferguson residents about the fallout of the Department of Justice report, how local politics have changed, and their beliefs about how policing has changed in the city).

180. *Id.*

181. *Id.*; DOJ Report, *supra* note 22, at 62.

182. Johnson v. City of Ferguson, 140 S. Ct. 553, 2019 WL 6257423 (2019).

183. Petition for a Writ of Certiorari at 10, Johnson v. City of Ferguson, 140 S. Ct. 553 (2019) (No. 19-345).

184. *Id.* at 10.

185. Bennett v. City of Eastpointe, 410 F.3d 810, 834 (6th Cir. 2005) (holding that there was a seizure when the police officer stopped Black children riding their bikes in a costly white neighborhood and gave them a move-on order.) After giving the move on order he waited to watch them cross Eight Mile out of the white neighborhood). *Id.*

186. Sheppard v. Beerman, 18 F.3d 147, 153 (2d Cir. 1994) (holding there was no seizure when a law clerk was physically removed from a judge's chambers and the courthouse after being fired).

187. Salmon v. Blesser, 802 F.3d 249, 254 (2d Cir. 2015) (holding there was a seizure when the police officer twisted a man's arm and threw him out of the courthouse while he was in the hallway waiting on his attorney.) It held that

Circuits have had the opportunity to decide on whether move on orders constitute seizures, but avoided the issue.[188]

The brief then turned to the importance of the Supreme Court deciding on the issue to avoid further confusion on the issue.[189] The brief argued that move on orders being uncategorized meant that "people's rights hinge not on clear dictates of the Fourth Amendment, but on vagaries of geography and the whims of individual judges."[190] The brief argued that a decision on the issue would clarify what police activity constitutes a seizure and what further show of police authority is necessary to seize someone.[191]

Wilson filed a brief in opposition to the petition for certiorari.[192] The first argument was that the issue of move on orders was not raised by Johnson in the pleadings to the lower court and the case. Further, the opposition brief claimed that the petitioners were asking for the court to create a de facto rule about whether a particular police action is a seizure would go against the Fourth Amendment factually bound standard of analysis required of courts.[193] The opposition brief then claimed that the decision of the Eighth Circuit en banc panel does not contrast with any Supreme Court holdings or any of the other Circuits.[194]

Johnson filed a reply brief.[195] The reply brief argued that even though the amicus brief below was the only brief to mention the words "move-on order" all parties discussed it below.[196] The

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generally using guiding force such as grabbing an elbow does not amount to seizure, but this is more force than that. *Id*.

188. Brief for Respondent at 10, Johnson v. City of Ferguson, 140 S. Ct. 553 (2019) (No. 19-345); Kernats v. O'Sullivan, 35 F.3d 1171,1181 (7th Cir. 1994) (holding there was no seizure when the police came and evicted a family in the middle of the night.) Plaintiff asserted a claim that the family was seized because they were not free to remain in their home. *Id*. at 1178. The Seventh Circuit called this a "novel theory" of Fourth Amendment seizure and granted qualified immunity. *Id*. at 1177; White v. City of Markham, 310 F.3d 989, 995 (7th Cir. 2002) (holding did not address whether there was a seizure when the plaintiffs were thrown out of their rented apartment after a dispute with the landlord.). The Seventh Circuit held because of the domestic disturbance the police officer was tasked to resolve the removal of the plaintiffs was reasonable. *Id*; Hamilton v. Vill. of Oak Lawn, Ill., 735 F.3d 967, 972 (7th Cir. 2013) (holding that not every expulsion is a confinement or a seizure). In this case the plaintiff was detained in her employer's home while the police tried resolve the domestic dispute. *Id*. No force was used against her nor were any charges filed against her. *Id*.

189. Brief for Respondent at 24, Johnson v. City of Ferguson, 140 S. Ct. 553 (2019) (No. 19-345).

190. *Id*. at 27.

191. *Id*. at 10.

192. *Id*.

193. *Id*. at 13.

194. *Id*. at 16.

195. Reply Brief of Petitioner at 1, Johnson v. City of Ferguson, 140 S. Ct. 553 (2019) (No. 19-345).

196. *Id*. at 5.

reply brief claimed the move on order was Wilson's crude directive to get on the sidewalk which was discussed by the parties in their briefs below.[197] The reply brief also claimed they are not asking for a per se rule about move on orders but saying the Second and Eighth Circuits were incorrect in holding that "regardless of all the circumstances there is no seizure during a move on order.[198] The writ of certiorari was denied.[199]

IV. PERSONAL ANALYSIS

This section of the Case Note will focus on analysis of the case. First, this section will discuss why the writ of certiorari should have been granted. Then it will address the circuit split on move on orders, as well as issues with qualified immunity.

A. Fourth Amendment Issue

The writ of certiorari should have been granted because the Eighth Circuit en banc panel created a per se rule in holding that since Johnson was able to flee, he could not have been seized.[200] Per se rules are considered inappropriate in the Fourth Amendment unreasonable seizure context because the right is analyzed by the facts of each case.[201] The en banc panel focused on Johnson's ability to flee from the scene as determinative of whether there was a seizure.[202] However, the en banc panel dismissed the factors that heightened this interaction to an unreasonable seizure such as the display of a weapon and language or tone of voice that indicated compliance with the officer's requests might be compelled.[203] Wilson threatened and shot at Johnson, which forced him to flee.[204] Fleeing from gunfire is not the same as fleeing to avoid something benign like a jaywalking ticket. However, this per se rule that if someone is able to flee means there is no seizure leads to this absurd result. Further, not factoring the violent behavior of the officer when the plaintiff is also claiming that the officer used excessive force during the unreasonable seizure is an alarming departure from the standards set by the Supreme Court, which has held that whether a seizure occurred depends on the facts of the police interaction.[205]

197. *Id.*

198. *Id.*.

199. Johnson v. City of Ferguson, 140 S. Ct. 553 (2019).

200. *Johnson*, 926 F.3d at 505-06.

201. United States v. Drayton, 536 U.S. 194, 201 (2002) (holding that the Eleventh Circuit's per se rule that passengers on a bus were seized was inappropriate in the Fourth Amendment context).

202. *Johnson*, 926 F.3d at 506.

203. United States v. Mendenhall, 446 US 544, 554 (1980).

204. *Johnson*, 926 F.3d at 506.

205. California v. Hodari, 499 U.S. 621, 628 (1991).

This en banc panel disregarded the Supreme Court's Fourth Amendment jurisprudence and created a per se rule about what constitutes an unreasonable seizure.

B. Circuit Split on move on orders

There is a circuit split on move on orders because the Supreme Court has not directly addressed the issue.[206] The Second Circuit created a per se rule that move on orders do not constitute unreasonable seizures unless there is physical contact.[207] Even then, the physical contact must be "sufficient to intentionally restrain a person and gain control of his movements."[208] The Second Circuit also suggests that something such as a physical shove with a move on order may not be a seizure, but a collar grab and arm twist does allege a seizure.[209] The Seventh Circuit did not meaningfully address the issue and called it a novel theory of Fourth Amendment seizures.[210] The Sixth Circuit inquires "whether a reasonable person would not feel free to remain somewhere because of some official action" when faced with move on orders.[211] In this case, the Eighth Circuit has created a per se rule that move on orders cannot constitute Fourth Amendment seizures no matter what force the officer uses.[212] Overall, the state of move on orders has the different circuits in a state of confusion leaving constitutional rights unclear. The Supreme Court should have taken this chance to clarify.

C. Issues with SCOTUS and Qualified Immunity

While the Fourth Amendment question presented here is pressing and certiorari should have been granted, the larger hoop to jump would have been qualified immunity. Legal scholars are increasingly concerned about the battle plaintiffs are fighting to overcome qualified immunity.[213] Some believe the Supreme Court

206. City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (holding the Chicago Gang Ordinance which allowed the police to give move on orders to anyone they thought was a gang member was unconstitutional because of its vagueness.) This is the closest the Supreme Court has gotten to deciding on move on orders. *Id*.

207. Sheppard v. Beerman,18 F.3d 147, 153 (2d Cir. 1994).

208. Salmon v. Blesser 802 F.3d 249, 254 (2d Cir. 2015).

209. *Id.* at 254.

210. *Kernats*, 35 F.3d at 1177.

211. *Bennett*, 410 F.3d at 834.

212. *Johnson*, 926 F.3d at 505-06.

213. Karen Blum et. al, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 642-51 (2013) (discussing how qualified immunity has developed since the Supreme Court held in Pearson v. Callahan, 555 U.S. 223, 236 (2009), that the prong of whether there was a

has practiced avoidance of analyzing the merits of whether a right was violated under the Fourth Amendment, preferring to skip the prong of whether there was a constitutional violation when they have analyzed qualified immunity claims.[214] They have declined to clarify the issues citizens are facing with police even in a case as erroneously decided as *Johnson v. City of Ferguson*.[215] The case does not follow the analysis that the Supreme Court established over the years, but the Court refused the opportunity to correct and clarify.[216] Even when police brutality cases do make it to the Supreme Court, police are usually granted qualified immunity and suffer no legal consequences for killing people.[217] The Supreme Court even went so far as to chide district courts for the number of times they have had to vacate denials of qualified immunity based on highly generalized rights.[218]

While qualified immunity does pose a hurdle for constitutional claims, it has a strong public policy reasoning behind it.[219] It balances two important interests, accountability for public officials and shielding officials "from harassment, distraction, and liability when they perform their duties reasonably."[220] Further, law enforcement officers have to make split second decisions about public safety and they should be shielded from suit for making reasonable mistakes in high stakes situations.[221] However, qualified immunity has shielded officers from liability "because the law is unclear, and the law is unclear because the violation continues to go unaddressed."[222] The analysis becomes circular leading to the result that it does not matter whether the Constitution is being violated because the analysis centers around

constitutional violation does not have to be analyzed first.). The authors concluded that this has proved to give plaintiffs a lower chance at prevailing because the Supreme Court can choose to avoid the merits of their claim. They further conclude that this avoidance of the merits is bleeding down to the district and circuit courts. Blum, *supra* note 213, at 642-51.

214. *Id.*

215. *Johnson*, 926 F.3d at 504.

216. *Johnson*, 140 S. Ct. at 553.

217. John F. Acevedo, *Restoring Community Dignity*, 59 HOW. L. J. 621 (2016) (discussing the likelihood that police will be granted qualified immunity is so high which is part of the reason the article suggests giving amnesty to the police who are willing to participate in Truth and Reconciliation Commission).

218. *Id*; White v. Pauly, 137 S. Ct. 548, 551 (2017) (holding the lower court erred in denying qualified immunity for an officer who killed a man because he was unaware of what steps had been taken before he arrived at the scene).

219. Pearson v. Callahan, 555 U.S. 223, 232 (2009).

220. *Id.*

221. *Graham*, 490 U.S. at 397.

222. Michael Silverstein, *Rebalancing Harlow: A New Approach to Qualified Immunity in the Fourth Amendment.* 68 CASE W. RES. 495, 522 (2017) (proposing a new qualified immunity approach because they argue the current one is too deferential to police especially in Fourth Amendment cases.). This leads to many plaintiffs being unable to recover because the bar to defeat qualified immunity is so high. *Id*. at 520.

clearly established rights. There must be a better way to strike the balance between the need to protect police from liability for every mistake and the rampant police brutality that faces Americans.

D. Congress Needs to Act

Police brutality is one of the most prevalent civil rights issues facing America today, but the courts are coming to different conclusions on when the officers are liable for their conduct. The lack of agreement between the courts on these issues creates unclear constitutional rights for American citizens and the Supreme Court will not correct this. At first glance, this situation seems hopeless. However, there is a solution left: legislation from Congress. Congress can create legislation if they do not approve of the way the courts have been handling an issue.[223] One of the focuses of that legislation should be greater coherence between the DOJ findings and the cases the Supreme Court takes on. This section proposes that the case that caused the investigation and subsequent consent decree, be litigated first in the United States District Court for the District of Columbia and for the appeals to go straight to the Supreme Court.

E. Inconsistency Issue

The most glaring inconsistency in these proceedings is that the DOJ found that the FPD regularly violated the Constitution, but the Supreme Court refused to hear the case.[224] There seems to be a disconnect between the purpose of having a civil rights division to investigate these issues and the willingness of the Supreme Court to take them on. This case is exactly on point with the DOJ report, which said officers of the FPD frequently used excessive force in legally unsupportable stops.[225] This report led to the city entering into a consent decree because their police department was not complying with the Constitution, and in this case neither were their courts.[226] Johnson, an African American man, was suing a police department known for violating the rights of its citizens, especially African Americans, but this case was not deemed worthy enough to hear.[227] While the future change required by the consent decree will be good for the city, it is not enough to only make future

223. *The Court and Constitutional Interpretation*, U.S. SUPREME COURT, www.supremecourt.gov/about/constitutional.aspx [perma.cc/W4L5-5KWA] (last visited Apr. 9, 2021).

224. *Id.;* Consent Decree, United States v. City or Ferguson (No. 4:16-cv-000180-CDP, E.D. Mo. Mar. 17, 2016).

225. DOJ Report, *supra* note 22, at 62.

226. *Id.*

227. *Id.*; Johnson v. City of Ferguson, 140 S. Ct. at 553

changes and do nothing for the people who have already been harmed. Dorian Johnson was shot at, witnessed Michael Brown being killed, and his safety was put in danger for months after the killing.[228] Yet the highest court in the country refused to even hear his case.[229] The solutions to policing cannot only be forward thinking, but they must contemplate and remedy the past as other civil rights actions have done.

F. Comparison to Voting Rights Act

People often reflect on the Civil Rights Movement of the 1960s as a period of great activism of African Americans to further equality and justice.[230] When trying to remedy civil rights issues that plague the United States today, we should look at the way civil rights issues have been remedied in the past as a guide on what works. Congress had to step in to create new laws that would protect African Americans and remedy the issues such as the Voting Rights Act of 1965.[231]

This direct line to the Supreme Court remedy was introduced in the Voting Rights Act of 1965.[232] It required jurisdictions who were engaged in racist voter suppression tactics prior to the act to either litigate their proposed voting changes this way or do an administrative review with the DOJ.[233] This is the same sort of coherence between the courts and the DOJ that should be required in the police brutality context. The current way police brutality is handled between the DOJ and the courts only focuses on the future and compliance with the consent decrees, but nothing about what has already happened.

Many will point out that this requirement was seriously undermined in *Shelby County v. Holder*.[234] In that case, a county in Alabama successfully argued that the preclearance their voting decisions were subject to were unconstitutional.[235] However, the Supreme Court held that the determination of which states were

228. Lowery, *supra* note 175.

229. *Johnson*, 140 S. Ct. at 553.

230. Leroy Clark, *New Directions For The Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L. J. 259, 274 (1993) (discussing the success of the Civil Rights Movement of the 1960s and how the same tactics can be applied to the exploitation of Black college athletes).

231. *Id.*

232. 52 U.S.C. § 10301 (2022) (outlawing voting laws that serve the purpose of denying the citizens the right to vote based on race).

233. 52 U.S.C. § 10304 (a) (2022) .

234. Shelby County v. Holder, 570 U.S. 529, 559 (2013) (holding that the formula for determining which jurisdictions are subject to preclearance requirement is outdated and therefore unconstitutional.). The Court did not hold the remedy unconstitutional and left it open to being used again if the data was updated. *Id*.

235. *Id.*

subject to preclearance was based on outdated data.[236] It did not hold that the requirement for those states to litigate in a manner specified above was unconstitutional.[237] This remedy is open to apply to different civil rights issues and Congress should take it. Like voting, the constitutional issues posed by police brutality are civil rights that require a multilayered approach to begin to remedy them. If the courts refuse to remedy the constitutional issues that are facing citizens, then Congress needs to respond and push the courts to respond to the issue.

V. CONCLUSION

Nothing can remedy the trauma Dorian Johnson experienced on August 9, 2014, when he witnessed the death of his neighbor, nor the trauma he experienced from the resulting news sensationalism. However, our legal system needs to learn from the mistakes made here. The courts and Congress must do their part in creating accountability for law enforcement. American citizens can't wait around and rely on hope alone, there needs to be accountability for the harm African Americans are facing every day. Without an immediate change via legislation, the number of citizens like Dorian Johnson, who are left with no remedy for their suffering at the hands of police, will continue to grow.

236. *Id.*
237. *Id.*