

For cops who kill, special Supreme Court protection

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The U.S. high court's continual refinement of an obscure legal doctrine has made it harder to hold police accountable when accused of using excessive force.

Sick with pneumonia, agitated and confused, Johnny Leija refused to return to his hospital room.

Moments later, with three police officers pinning him on the floor, Leija was dead at age 34.

Staff at the local hospital in tiny Madill, Oklahoma, called the police in the early evening of March 24, 2011, for help giving Johnny Leija an injection to calm him. Security cameras captured much of the ensuing encounter.

The officers, after shooting Leija with a stun gun, follow him down a corridor, shock him again, and wrestle him to the floor. One officer then straddles Leija's back, trying to handcuff him as the others struggle to pull back his arms. They get one handcuff on. Leija goes limp. The officers step back. Hospital staff drop to Leija's side and begin a futile effort to resuscitate him.

The Oklahoma Chief Medical Examiner's Office determined that Leija, his lungs already compromised by pneumonia, was starved for oxygen in his struggle with the police and died from "respiratory insufficiency."

The county sheriff and the Madill police chief defended the officers' actions as appropriate to the situation. The cops were not charged with any wrongdoing.

Erma Aldaba, however, blamed the officers for her son's death. "My son wasn't a criminal, my son was sick," she said in an interview.

HITTING A WALL: Erma Aldaba sought to hold police liable for her son's deadly encounter with police, but qualified immunity ended her lawsuit before it could even get to trial. REUTERS/Andrew Chung

So Aldaba took the only other route open to people in her situation: She sued. Her lawsuit in federal district court in Muskogee, Oklahoma, alleged that the three officers used excessive force, violating her son's civil rights under the Fourth Amendment to the U.S. Constitution, which protects against unreasonable search and seizure.

But almost immediately, her case hit a formidable obstacle: a little-known legal doctrine called qualified immunity. This 50-year-old creation of the U.S. Supreme Court is meant to protect government employees from frivolous litigation. In recent years, however, it has become a highly effective shield in thousands of lawsuits seeking to hold cops accountable when they are accused of using excessive force.

Excessive force, zero justice

Even when courts find police used too much force, they still often grant immunity. Here are just a few of those cases.

Video submitted as evidence to U.S. District Court for Utah

David Becker suffers brain damage after a cop smashes him to the ground in Heber City, Utah.

Video submitted as evidence to U.S. District Court for Eastern Michigan

Laszlo Latits is shot dead while in a car and trying to reverse away from police in Ferndale, Michigan.

Video submitted as evidence to U.S. District Court for Central California

Gerrit Vos, during mental health crisis, is shot dead exiting a store in Newport Beach, California.

At first, it looked like Aldaba would clear the hurdle. The judge hearing her case, and then a federal appeals court, rejected the officers' claim of qualified immunity.

The appeals panel based its decision on a two-question test courts use to weigh police requests for immunity. The first is whether the evidence shows or could convince a jury that the officers used excessive force in violation of the Fourth Amendment. The second question is whether the officers should have known they were breaking "clearly established" law – a Supreme Court coinage for a court precedent that had already found similar police actions to have been illegal.

To both questions, the court determined, the answer was yes.

Then, at the officers' request, the Supreme Court intervened. The justices ordered the appeals court to reconsider its ruling, indicating that they disagreed with the lower court.

Back at the appeals court, Aldaba's lawyer argued, as he had the first time around, that the cops' treatment of Leija was "clearly established" as illegal. To support his argument, he cited earlier cases in which police were held liable for using excessive force on unarmed, mentally compromised people. Not similar enough, the court now said, so the cops had no reason to think they were breaking the law. The police got immunity. Aldaba's case was dead.

"It makes me feel that there was a mistake, but we can't win," Aldaba, 60, said. "We can't win fighting the cops."

Qualified immunity: Grant or deny?

Appellate courts apply a two-part test to determine whether to grant immunity to police accused of using excessive force. Here's how the test was applied in 252 cases from 2015 to 2019.

Appellate cases from 2015-2019

In part one, the court considers whether police used excessive force in violation of the Fourth Amendment to the U.S. Constitution.

If yes, the court moves to part two of the test.

If no, qualified immunity is immediately granted.

Since 2009, the Supreme Court has allowed appellate courts to skip part one. Courts have increasingly chosen this option.

In part two, the court determines whether police should have known their actions violated the Constitution because court precedent clearly established their conduct as unlawful.

If yes, the case goes to trial.

If no, qualified immunity is granted.

In more than half of the cases during this period, the court granted immunity to the police.

Effective barrier

Aldaba's lament has become an increasingly common one. Even as the proliferation of police body cameras and bystander cellphone video has turned a national spotlight on extreme police tactics, qualified immunity, under the careful stewardship of the Supreme Court, is making it easier for officers to kill or injure civilians with impunity.

The Supreme Court's role is evident in how the federal appeals courts, which take their cue from the high court, treat qualified immunity. In an unprecedented analysis of appellate court records, Reuters found that since 2005, the courts have shown an increasing tendency to grant immunity in excessive force cases – rulings that the district courts below them must follow. The trend has accelerated in recent years. It is even more pronounced in cases like *Leija's* – when civilians were unarmed in their encounters with police, and when courts concluded that the facts could convince a jury that police actually did use excessive force.

Reuters found among the cases it analyzed more than three dozen in which qualified immunity protected officers whose actions had been deemed unlawful. Outside of Dallas, Texas, five officers fired 17 shots at a bicyclist who was 100 yards away, killing him, in a case of mistaken identity. In Heber City, Utah, an officer threw to the ground an unarmed man he had pulled over for a cracked windshield, leaving the man with brain damage. In Prince George's County, Maryland, an officer shot a man in a mental health crisis who was stabbing himself and trying to slit his own throat.

The increasing frequency of such cases has prompted a growing chorus of criticism from lawyers, legal scholars, civil rights groups, politicians and even judges that qualified immunity, as applied, is unjust. Spanning the political spectrum, this broad coalition says the doctrine has become a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights.

The high court has indicated it is aware of the mounting criticism of its treatment of qualified immunity. After letting multiple appeals backed by the doctrine's critics pile up, the justices are scheduled to discuss privately as soon as May 15 which, if any, of 11 such cases they could hear later this year.

Justice Sonia Sotomayor, one of the court's most liberal members, and Clarence Thomas, its most conservative, have in recent opinions sharply criticized qualified immunity and the court's role in expanding it.

In a dissent to a 2018 ruling, Sotomayor, joined by fellow liberal Justice Ruth Bader Ginsburg, wrote that the majority's decision favoring the cops tells police that "they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."

In that case, *Kisela v. Hughes*, the justices threw out a lower court's ruling that denied immunity to a Tucson, Arizona, cop who shot a mentally ill woman four times as she walked down her driveway while holding a large kitchen knife.

A year earlier, Sotomayor in another dissent called out her fellow justices for a "disturbing trend" of favoring police. "We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity," Sotomayor wrote, citing several recent rulings. "But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity."

Sotomayor was responding to the majority's decision not to hear an appeal brought by Ricardo Salazar-Limon, who was unarmed when a Houston police officer shot him in the back, leaving him paralyzed. A lower court had granted the officer immunity.

The Reuters analysis supports Sotomayor's assertion that the Supreme Court has built qualified immunity into an often insurmountable police defense by intervening in cases mostly to favor the police. Over the past 15 years, the high court took up 12 appeals of qualified immunity decisions from police, but only three from plaintiffs, even though plaintiffs asked the court to review nearly as many cases as police did. The court's acceptance rate for police appeals seeking immunity was three times its average acceptance rate for all appeals. For plaintiffs' appeals, the acceptance rate was slightly below the court's average.

In the cases it accepts, the court nearly always decides in favor of police. The high court has also put its thumb on the scale by repeatedly tweaking the process. It has allowed police to request immunity before all evidence

has been presented. And if police are denied immunity, they can appeal immediately – an option unavailable to most other litigants, who typically must wait until after a final judgment to appeal.

“You get the impression that the officers are always supposed to win and the plaintiffs are supposed to lose,” University of Chicago law professor William Baude said. In his research, Baude has found that qualified immunity, as a doctrine, enjoys what he calls “privileged status” on the Supreme Court, which extends to cases the court decides without even hearing arguments – a relatively rare occurrence. In such cases, the court disproportionately reversed lower courts’ denials of immunity.

Taking the measure of qualified immunity: How Reuters analyzed the data

1. When cops kill, redress is rare – except in famous cases
2. Before the court: A united front takes aim at qualified immunity

All nine current justices declined to be interviewed for this article. They have offered few explanations of the court’s stance on qualified immunity beyond writing in opinions that the doctrine balances individuals’ rights with the need to free officials from the time-consuming and costly burden of unnecessary litigation.

Defining ‘clearly established’

The main challenge for plaintiffs in excessive force cases is to show that police behavior violated a “clearly established” precedent. The Supreme Court has continually reinforced a narrow definition of “clearly established,” requiring lower courts to accept as precedent only cases that have detailed circumstances very similar to the case they are weighing.

“We have repeatedly told courts not to define clearly established law at a high level of generality,” the court wrote in a November 2015 opinion, repeating its language from an earlier ruling. In that 2015 opinion, the justices reversed a lower court decision and granted immunity to Texas State Trooper Chadrin Mullenix, who had stopped a high-speed chase by shooting at a vehicle from an overpass, killing the driver.

Critics of qualified immunity say the high court’s guidance has created a ludicrously narrow standard. Even some judges feel constrained. In a 2018 decision, James Browning, a judge in federal district court in New Mexico, said he was ruling “with reluctance” in favor of an officer who had slammed an unarmed man to the floor in his own home while he was yelling at the police.

The force the cop used, Browning ruled, was excessive. But the officer had to be granted immunity, he said, because of subtle differences with the earlier case Browning had considered as a possible “clearly established” precedent. Those differences included the distance between the men and the officers and what the men were yelling. Even the locations of the respective incidents could be a factor, the judge noted, the earlier case having occurred in a Target parking lot.

In his ruling, Browning criticized the high court’s approach because “a court can almost always manufacture a factual distinction” between the case it is reviewing and an earlier case.

In February, the federal appeals court in Cincinnati, Ohio, granted immunity to an officer who shot and wounded a 14-year-old boy in the shoulder after the boy dropped a BB gun and raised his hands. The court rejected as a precedent a 2011 case in which an officer shot and killed a man as he began lowering a shotgun. The difference between the incidents was too great, the court determined, because the boy had first drawn the BB gun from his waistband before dropping it.

In other recent cases, courts have sided with police because of the difference between subduing a woman for walking away from an officer, and subduing a woman for refusing to end a phone call; between shooting at a dog and instead hitting a child, and shooting at a truck and hitting a passenger; and between unleashing a police dog to bite a motionless suspect in a bushy ravine, and unleashing a police dog to bite a compliant suspect in a canal in the woods.

The Supreme Court in 2009 raised the bar even higher for plaintiffs to overcome qualified immunity. In *Pearson v. Callahan*, it gave judges the option to simply ignore the question of whether a cop used excessive force and instead focus solely on whether the conduct was clearly established as unlawful.

In the decade since then, the Reuters analysis found, appeals courts have increasingly ignored the question of excessive force. In such cases, when the court declines to establish whether police used excessive force in violation of the Fourth Amendment, it avoids setting a clearly established precedent for future cases, even for the most egregious acts of police violence. In effect, the same conduct can repeatedly go unpunished.

Plaintiffs in excessive force cases against police have had a harder time getting past qualified immunity since a 2009 Supreme Court decision allowing lower courts to weigh only whether the force used is established in precedent as unlawful.

The case of Khari Illidge shows this perverse dynamic at work.

One cool spring evening in 2013, sheriff's deputies in Phenix City, Alabama, a suburb of Columbus, Georgia, responded to a trespassing call. They found Illidge wandering along a quiet, tree-lined road. The 25-year-old was naked, covered in scratches and behaving erratically.

NEVER BEFORE? Khari Illidge died after police hogtied him and a 385-pound officer kneeled on his back, but the court hearing Illidge's mother's lawsuit determined there was no precedent establishing the cops' behavior as unlawful. Gladis Callwood/Handout via REUTERS

In the encounter, the deputies shocked Illidge six times with a stun gun before he fell to the ground. As he lay face-down, one deputy shocked him 13 more times as two others struggled to handcuff his wrists, according to their testimony. They then shackled his ankles with leg irons and fastened them to his handcuffs – an extreme form of restraint, known as a hogtie, that many police departments across the country have banned.

A 385-pound officer then kneeled on Illidge's upper back until he went limp. Illidge was pronounced dead on arrival at the hospital. The autopsy report lists cardiac arrest as the cause of death.

"They treated him like an animal," Gladis Callwood, Illidge's mother, said. "Or maybe even worse."

Callwood sued the police, alleging excessive force. The cops claimed qualified immunity. They said they did what was necessary to subdue an aggressive man who resisted arrest and who, according to a friend who had seen him earlier, had probably taken LSD. A toxicology report found no traces of the drug in his blood.

"You have to make split-second decisions," Ray Smith, one of the deputies who had shocked and hogtied Illidge, told Reuters. Hesitation can be deadly, he said.

Judge W. Harold Albritton in federal district court in Montgomery, Alabama, sided with the cops. In his ruling, the judge said there was no precedent establishing that the officers' treatment of Illidge was unlawful.

The Atlanta-based 11th U.S. Circuit Court of Appeals agreed – even though it had heard a case involving hogtying in Florida in 2009. In that earlier case, Donald George Lewis died after West Palm Beach cops hogtied him on the side of the road where they had found him disoriented and stumbling through traffic. But the appeals court in that earlier case granted immunity without addressing whether the force police used was excessive. As a result, the court didn't establish a precedent that could apply in subsequent cases – including Callwood's.

By allowing judges to consider only the question of clearly established law in excessive force cases, the Supreme Court created a closed loop in which "the case law gets frozen," said lawyer Matt Farmer, who represented Lewis's family.

In October 2018, the Supreme Court declined to review Callwood's case. Her lawsuit, like Aldaba's, was dead.

High-profile outliers

Police have difficult, high-risk jobs. Few would dispute that. Qualified immunity is essential, proponents say, because police need latitude to make split-second decisions in situations that could put lives, including their own, at risk.

“It is very easy to second-guess the decision making of a police officer when you are sitting at a desk,” said Chris Balch, an Atlanta-based lawyer who represents police departments in civil rights cases.

Larry James, general counsel of the National Fraternal Order of Police, said the trend in appeals courts to favor immunity reflects the high volume of meritless lawsuits civil rights lawyers file. “Plaintiffs’ lawyers sue everyone under the sun, irrespective of the facts,” he said.

Even so, as the Reuters analysis found, appellate courts have ruled in favor of plaintiffs, denying cops immunity, in 43 percent of cases in recent years. As opponents of qualified immunity point out, denial of immunity doesn’t automatically mean cops will be held liable for alleged excessive force. When such cases go to trial, juries may side with police after weighing the facts of a case. Also, local governments or their insurers, not the cops themselves, typically bear the financial burden of litigation, settlements or jury awards.

The U.S. government does not maintain comprehensive data on civilians killed or seriously injured by police. According to media organizations and police-accountability groups that compile numbers from police reports, news accounts and other sources, the number of deaths alone is about 1,000 a year.

A handful of those incidents draw national attention to police tactics – for example, the 2014 death of Eric Garner after New York City police put him in a lethal chokehold. In such high-profile cases, qualified immunity rarely comes into play. Instead, police departments, often under heavy political pressure and facing public protests, typically offer big dollar settlements to victims or their survivors. The cops may also face disciplinary action or criminal charges.

In the far more numerous incidents of alleged excessive force that don’t make national headlines, police departments are under less pressure to settle, and officers are even less likely to be prosecuted or otherwise disciplined. In those cases, federal civil rights lawsuits provide the obvious avenue for holding cops accountable.

The United States first allowed citizens to sue government officials for civil rights violations in a law passed in 1871. These so-called Section 1983 lawsuits were intended to give citizens a path to justice when state and local authorities in the post-Civil War era turned a blind eye to – or even participated in – acts of racist violence by groups like the Ku Klux Klan.

Nearly a century later, the Supreme Court introduced qualified immunity, articulating the doctrine in a 1967 ruling to limit Section 1983 lawsuits. The court reasoned that police should not face liability for enforcing the law in good faith. The court refined the doctrine in 1982 to include the “clearly established” test.

Today, after decades of Supreme Court tweaks to how excessive force cases are judged, plaintiffs’ lawyers say the deck is unfairly stacked against their clients. “Why are there so many police shootings?” said Dale Galipo, a prominent California civil rights attorney. “I would say one of the reasons is there’s no accountability, there’s no deterrent.”

Several lawyers told Reuters they decline to take cases they think may have merit in large part due to the high barrier of qualified immunity. “I have turned down dozens of police misconduct cases and have routinely referred the potential plaintiffs to qualified immunity as a major problem,” said Victor Glasberg, a civil rights lawyer in Virginia.

The American Association for Justice, the plaintiff bar’s main lobbying group and a backer of efforts to curb qualified immunity, knows that its “members would like to pursue cases where people are treated unjustly,”

said Jeffrey White, the group's senior associate general counsel. But, he added, lawyers must think carefully when "the chances of obtaining justice are tilted heavily towards defendants."

Gentle and loyal

Johnny Leija spent his life in small towns in the dry, flat farming and oil country on both sides of the Oklahoma-Texas border, quitting school after junior high to take a series of temporary construction jobs.

He was gentle and fiercely loyal to his family, friends and relatives told Reuters. They recounted the time Leija ended up with a broken leg after sticking up for his sister in a fight with her abusive boyfriend. In his early 20s, he spent a year in Marshall County jail for marijuana possession. After that, his family said, he never indulged in anything harder than the occasional Bud Light.

ILL-FATED VISIT: Johnny Leija, here at the baptism of his infant daughter, had only recently moved to Madill, Oklahoma, when illness forced him to seek medical attention at the hospital where he would die in an encounter with police. Olivia Flores/Handout via REUTERS

Leija moved to Madill in early 2011 with his girlfriend, Olivia Flores, and the four children they were raising – one of their own and three by Flores from an earlier relationship. He soon got a job welding and painting horse trailers, but money was tight. Leija, Flores and the children were sleeping on the floor of their still-unfurnished house. In late March, when Leija started complaining about pain in his chest and torso, Flores had to pawn a radio to buy medicine.

On the morning of March 24, 2011, after Leija spent most of the night vomiting, he and Flores headed to the emergency room at Integris Marshall County Medical Center, now called AllianceHealth Madill. Details of what happened over the next 12 hours come from a review of hundreds of pages of medical, police and court records and interviews with people involved.

When first examined, Leija was agreeable and alert, but his blood oxygen levels were dangerously low. He was put on oxygen and given antibiotics through an intravenous line. He soon seemed on the mend and was admitted to a room down the hall.

Flores left midafternoon to pick up the children from school. Soon after, Leija's breathing became labored. His blood-oxygen level plunged again. He became distressed and aggressive. The doctor on call, John Conley, prescribed over the phone an anti-anxiety pill. Leija refused it, claiming that the hospital staff was trying to poison him. "I am Superman," he yelled. "I am God!"

He somehow cut the IV line and told a nurse that he needed to leave. Conley, again by phone, told nurses to give Leija an injection to calm him. The hospital had no security staff, so a nurse called the police to help restrain Leija for the shot. Conley arrived minutes later, finding Leija in the bathroom still insisting he had to leave the hospital.

Madill Police Officer Brandon Pickens and Marshall County Deputy Sheriffs Steve Atnip and Steve Beebe were eating dinner at La Grande, a Tex-Mex joint on a highway north of Madill, when they got the call about an unruly patient at the hospital.

They had little information when they arrived. Beebe thought Leija, dressed in a white T-shirt and pajama bottoms, was a visitor, not a patient.

According to the officers' accounts, Leija pulled the gauze from his IV site and yelled, "This is my blood!" as it dripped on the floor.

The officers ordered Leija to his knees. He did not comply. Beebe aimed his Stinger stun gun at Leija and fired, hitting Leija in the chest.

It had little effect. Leija “hollered out, shook a bit,” a nurse later testified. Beebe, Pickens and Atnip then grabbed Leija, 5 foot 8 and 230 pounds, and pushed him against a wall, where Beebe pressed the Stinger against Leija’s back and shocked him again. The four toppled onto the lobby floor with a thud.

Pickens and Atnip were holding Leija face down and Beebe was trying to handcuff him when he grunted and stopped moving. Clear fluid poured from his mouth and pooled on the floor around his head.

Conley and staff spent 40 minutes trying to revive Leija. At 7:29 p.m., he was pronounced dead, a Stinger dart still stuck in his chest.

Marc Harrison, a forensic pathologist with the Oklahoma Chief Medical Examiner’s Office, testified in a sworn deposition that Leija’s manner of death was “natural,” but that “it would be reasonable to assume” that two shocks with a stun gun and Leija’s physical struggle with police would have “required an elevated need for oxygen.” Through the medical examiner’s office, Harrison said he stands by his opinion.

Stern denials

When Aldaba’s lawsuit against the officers landed in federal court in Muskogee, Oklahoma, the officers’ lawyers quickly asked that the case be thrown out on the grounds of qualified immunity.

It was “abundantly clear” that the force used on Leija was not excessive, the police lawyers argued. Further, they said, no established precedent put the officers on notice that they would violate Leija’s rights “by attempting to subdue an individual so that medical staff could properly treat him.”

Judge Frank Seay disagreed. He noted that officers’ accounts differed from each other about the extent of the threat Leija posed and what the officers knew about his medical condition. For instance, the two sheriff deputies said Leija was “slinging blood” and had challenged them to fight, but officer Pickens did not make those claims. And while all three officers said Leija was bleeding heavily, two nurses present testified that he wasn’t.

“Leija was a hospital patient. He was not armed in any fashion. While it is alleged that he was using his blood as a weapon, there is no evidence that any blood spattered on any of the officers,” Seay said in his April 5, 2013, ruling. The case against the three officers could now move forward.

Beebe, the deputy who twice shocked Leija, said in an interview that his biggest regret about the fatal encounter was not having more details on Leija and his medical condition. “Maybe we could have done things different if we had that information,” Beebe said. “The last thing you want to do is end up with somebody dying.” He added: “I’m sad for the family. We all live in the same community.”

IN THE MOMENT: Marshall County Deputy Sheriff Steve Beebe, one of the three officers trying to subdue Johnny Leija when he died, said cops “shouldn’t have to worry about being sued every time” they have to use force. REUTERS/Andrew Chung

Beebe also serves as pastor at a Southern Baptist church in a nearby town – a role that he said has helped him understand the need to de-escalate stressful situations.

In the encounter with Leija, however, he and the other officers “did the right thing” to protect themselves and the people in the hospital, he said. “I think we need to be held accountable,” Beebe said. “But when we go out, sometimes we have to use force...We shouldn’t have to worry about being sued every time.”

Pickens, now a firefighter in Madill, directed questions to his police superiors. City Manager James Fullingim, who was police chief at the time of Leija’s death, said immunity is important for officers to perform their jobs. “The officers absolutely did not do anything wrong,” he said.

Atnip died in a motorcycle accident in 2015. Conley, the doctor who treated Leija, declined to comment.

The police took their case to the 10th U.S. Circuit Court of Appeals in Denver, Colorado. That court was no less stern in denying the officers’ appeal, faulting their decision to “Tase and wrestle to the ground a hospital

patient whose mental disturbance was the result of his serious and deteriorating medical condition.” Leija did not commit any crime, the court said, and he posed a threat only to himself, passively resisting the officers. “The situation the police officers faced in this case called for conflict resolution and de-escalation, not confrontation and Tasers,” the court said.

The officers then petitioned the Supreme Court to review the case. Their appeal arrived just as the justices were weighing the case of Texas State Trooper Mullenix, the cop who shot and killed a fleeing driver from an overpass.

The lower courts had denied Mullenix immunity, saying it was unclear how much of a risk the driver had posed. But on Nov. 9, 2015, the Supreme Court reversed the lower courts. Ignoring whether the force used was illegal, the justices focused on whether Mullenix’s actions had been clearly established as illegal. It concluded that none of the three car-chase cases it had previously decided were similar enough.

The same day, the justices ordered the 10th Circuit to use the Mullenix ruling as a guide in reconsidering whether qualified immunity should apply in Aldaba’s case.

Aldaba’s lawyer, Jeremy Beaver, pointed out to the appellate panel a handful of “strikingly similar” rulings from the 10th Circuit going back nearly 20 years that provided “ample warning” to the police that their actions were unlawful.

Case law since 2001, Beaver noted, required police to consider a person’s diminished mental health or capacity when determining what force to use. A 2007 case denounced the beating and Tasing of an unarmed, nonviolent person who was not fleeing. So did a similar case from 2010.

“Mr. Leija had a clearly established right to be free from Tasing and tackling while he was a hospital patient who had committed no crimes, was unarmed, was not a threat to the officers or the public, and was mentally and physically compromised,” Beaver argued in court papers.

That wasn’t enough. The revised appeals court decision, written by Judge Gregory Phillips, dismissed Beaver’s arguments because the “offered cases differ too much from this one.”

Phillips said the cases Beaver cited involved force to detain people for “non-medical” reasons and did not involve hospital personnel “standing by observing” the incident. “We have found no case presenting a similar situation,” the judge wrote. Phillips did not respond to a request for comment.

The outcome, Beaver said, highlights the painful paradox of qualified immunity. Aldaba “had to live with the fact that at every stage, every judge that reviewed the case determined that there were constitutional violations that had occurred,” he said. “Despite that, she still couldn’t have a trial.”

UNMARKED: Johnny Leija’s mother, Erma Aldaba (right), and one of his sisters at Johnny’s grave, where they had hoped to place a gravestone paid for from the jury award they expected from Aldaba’s lawsuit against the cops.