

law. The court declined to adopt a bright-line rule for the duration needed to determine adequate rehabilitation because of the individualized nature and complexity of recovery. The court contrasted this opinion to specific time-based restrictions for reinstatement after disbarment. It reasoned that new applicants have never violated public trust and their previous misconduct “rarely” provides irrefutable evidence of a lack of good moral character and fitness to practice law. The court stated that Ms. Simmons’ six-year record of sobriety, financial stability, honesty, laudable behavior, and appropriate response to situations that might predispose her to relapse was sufficient to demonstrate that her recovery was of adequate duration. The court cited research that concluded that a substantial majority of substance abusers who remain abstinent for at least five years will not relapse. The court noted that Ms. Simmons had already reached a sufficient period of sobriety such that her behaviors were “about as likely as they ever will be” to represent lasting change (*Simmons*, p 1118). Finally, the court noted that Ms. Simmons was the first person in Washington to be awarded a “Certificate of Restoration of Opportunity,” a civil court order that prohibited many state licensing entities from denying eligible individuals an occupational license solely on the basis of a criminal record.

The court concluded that Ms. Simmons’ “respect for the law” also demonstrated her good moral character and fitness to practice law. The court disagreed with the Board’s conclusion that Ms. Simmons minimized her substance use history. The court concluded that the initial bar application could not lawfully require such a disclosure, in accordance with APR 22.1(e) (2016), and that Ms. Simmons voluntarily provided her medical records once there was specific justification to request such information. Further, the court concluded that Ms. Simmons’ attitude toward the Board was not entitled or inappropriate. The court said that the Board erred in their adverse view of Ms. Simmons’ publicity and pride in her accomplishments and contended that her publicity in the case was reasonable given her circumstances, and that, if anything, her publicity further held her accountable to maintain sobriety. The court reasoned that Ms. Simmons had attained achievements beyond those of an average law student and was right to take pride in her accomplishments. The court did not observe evidence that Ms. Simmons expected special treatment, but rather viewed her efforts to keep the decision to approve her application

at the lowest adjudicatory level as appropriate for a burgeoning lawyer.

Discussion

Matter of Simmons examines the individualized nature of a character and fitness inquiry by a state bar association. As the Washington Supreme Court expressed, a license to practice law is a privilege that should not be granted as a right. It is appropriate to approach evaluation of an individual’s moral character with personalized consideration and with the goal of protecting public interests. An individual’s past is not necessarily indicative of future behavior, and the court affirmed that history of criminal behavior or substance abuse does not categorically exclude an applicant from bar admission. A 2015 study revealed that some data collected during character and fitness inquiries, such as academic performance variables, are associated with higher risk of future discipline; however, the study concluded that information collected during such inquiries is generally unhelpful in predicting subsequent lawyer discipline due to the low base rate of discipline (Levin L, Zozula C, Siegelman P: The questionable character of the bar’s character and fitness inquiry. *Law & Soc. Inquiry* 40:51–85, 2015). Forensic consultants should be mindful of the conclusions in this case when approaching fitness-for-duty evaluations; each inquiry’s conclusions should be substantiated in a logical, individualized, fair, and accurate manner.

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Use of Excessive Force and Qualified Immunity

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U.S. Supreme Court Rules in Favor of Law Enforcement Officer Sued for Use of Excessive Force in Nonfatal Shooting of Woman Wielding a Knife Near Roommate

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The case of *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), considered the parameters of qualified immunity in a claim of excessive force by law enforcement. Amy Hughes sued Officer Andrew Kisela for a Fourth Amendment violation under 42 U.S.C. § 1983 (1996), alleging use of excessive force. In May 2010, Officer Kisela shot Ms. Hughes four times while she held a kitchen knife six feet from her roommate, Sharon Chadwick. The U.S. District Court for Arizona granted summary judgment to Officer Kisela based on the legal principle of qualified immunity, but the Ninth Circuit Court of Appeals reversed. The U.S. Supreme Court granted a summary reversal of the Ninth Circuit's decision. The Court held that Officer Kisela retained qualified immunity as he did not violate any established law during the course of his actions.

Facts of the Case

In May 2010, three Tucson police officers responded to a 911 call for a welfare check involving a woman behaving erratically and “hacking a tree” with a knife. Upon arrival, they observed a woman, later identified as Ms. Chadwick, standing in the driveway of a nearby house. Seconds later, the officers observed another woman, identified as Ms. Hughes and matching the description given by the 911 caller, exiting the house holding a kitchen knife and approaching Ms. Chadwick. Ms. Hughes stopped advancing roughly six feet from Ms. Chadwick and held the knife at her side. A chain-link fence with a locked gate separated the police officers from the two women. At the sight of the knife, the police officers drew their handguns and issued at least two commands for Ms. Hughes to drop the knife. While Ms. Chadwick later stated she heard these commands, the two other officers testified that Ms. Hughes appeared not to notice the officers' presence or hear their commands to drop the weapon. Ms. Hughes was described as “calm and composed” in her interaction with Ms. Chadwick. When Ms. Hughes failed to drop the weapon, Officer Kisela fired four times through the chain links in the fence without warning that he would do so. The other two officers leapt the fence, handcuffed Ms. Hughes, and

called paramedics who transported her to a hospital where she was treated for non-life-threatening injuries. Only one or two minutes elapsed between the arrival of the officers and the shooting.

Information obtained after the shooting revealed that Ms. Hughes and Ms. Chadwick were roommates, and that they were quarreling over a \$20 debt. Ms. Hughes was also discovered to have an undisclosed mental illness. Ms. Chadwick had told officers that she was aware of Ms. Hughes' erratic behaviors and mental health history, but she did not feel threatened at any point during the events that led to Ms. Hughes being shot. Ms. Hughes sued Officer Kisela under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1996), alleging that Officer Kisela used excessive force in violation of the Fourth Amendment. The District Court of Arizona granted summary judgment to Officer Kisela due to qualified immunity, but the Court of Appeals for the Ninth Circuit reversed. The appeals court held that Officer Kisela violated Ms. Hughes' Fourth Amendment rights, and that this violation was clear and obvious. When Officer Kisela's motion for a rehearing *en banc* was denied over the dissent of seven appeals court judges, he filed a petition for *certiorari* in the U.S. Supreme Court.

Ruling and Reasoning

The U.S. Supreme Court granted *certiorari* and reversed the holding of the Ninth Circuit, holding that Officer Kisela did not knowingly violate clearly established law and, therefore, retained qualified immunity. In the majority ruling, the Court noted that excessive force and qualified immunity cases must answer two questions. First, they cited *Graham v. Connor*, 490 U.S. 386 (1989), noting that questions of “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” (p 396). Second, as in *Plumbhoff v. Rickard*, 572 U.S. 765 (2014), the court must determine whether an officer reasonably knew that the use of force violated the Fourth Amendment under “clearly established” law.

The Court reprimanded the Ninth Circuit for not applying the concept of qualified immunity correctly. The Court cited *White v. Pauly*, 137 S. Ct. 548 (2017) for the position that “immunity protects all but the plainly incompetent or those that know-

ingly violate the law” (p 551). The Court pointed out that several cases cited by the Ninth Circuit in their decision (*Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001); *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011); and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997)) do not, in fact, support a denial of qualified immunity. *Deorle*, the Court said, clearly differs from this case as it involved the shooting of an unarmed man without warning by an officer who had a clear line of retreat as opposed to Ms. Hughes who was “within striking distance” of Ms. Chadwick and did not respond to officers’ commands. In addition, *Glenn* came after the events of this case. Therefore, Officer Kisela should not have been expected to adhere to a legal judgment that had not yet occurred. The Court said that Officer Kisela had mere seconds to address a threat posed to Ms. Chadwick, and a reasonable officer in his position would not know that to shoot Ms. Hughes may violate her Fourth Amendment rights. As a result, he retained qualified immunity and the question of whether Ms. Hughes’ Fourth Amendment rights were violated did not need to be addressed by the Court.

Dissent

Justice Sotomayor, joined by Justice Ginsburg, wrote a dissent. She first addressed the perceived threat made by Ms. Hughes. She wrote that at the time of the shooting, Ms. Hughes was reported as “composed and content,” held her knife at her side with the blade pointed away from Ms. Chadwick, had not raised her knife at any point, and had not been observed or suspected of committing any crime. Justice Sotomayor asserted that these facts caused the other two officers on the scene to hold their fire, opting instead to “continue trying verbal commands,” whereas Officer Kisela prematurely resorted to using deadly force (*Kisela*, p 1157). He did not allow Ms. Hughes enough time to respond to two quick and potentially unheard commands to drop the knife and, instead, “unilaterally escalated the situation” by firing without giving Ms. Hughes warning that he would do so (*Kisela*, p 1156).

The dissenting opinion stated that officers must attempt to utilize all available less-intrusive means to de-escalate a situation in which there is no “clear threat” to themselves or others. Without these attempts, an officer cannot reasonably pursue deadly force and is not entitled to qualified immunity. The dissent was critical of the majority for “side-

stepping” the core issue of the alleged Fourth Amendment violation by ruling only on the question of qualified immunity. The dissent repeatedly reminded the majority that cases decided by summary judgment need to be assessed in a light most favorable to the plaintiff. She stated that the majority opinion failed to do this on numerous occasions by misconstruing the evidence and characterizing Ms. Hughes as erratic, noncompliant, and threatening.

Finally, the dissent pointed out what it viewed as a troubling trend in the courts to asymmetrically favor law enforcement and immunity by issuing summary reversals of any lower court findings of excessive force. Conversely, the Court seems to “rarely intervene” when officers may have been mistakenly granted immunity. Justices Sotomayor and Ginsburg expressed concern that this creates an “absolute shield” for law enforcement and sends an “alarming signal” to “shoot first and think later” (*Kisela*, p 1162).

Discussion

With police use of excessive force gaining substantially greater media coverage in recent years, it is important to follow decision trends in these cases. Rulings continue to be characterized by a gray area where facts can be construed toward a single party and, in so doing, have the potential to be inflammatory when a decision is made. Given the ongoing national conflict on the subject of race and inequality, these cases can have tremendous political and cultural reverberations. The reliance on specific prior precedent may enhance this effect. Humans are prone to err, and police officers are challenged by having to perform split-second threat assessment with the potential of deadly intervention. Officers are trained based on prior established precedent, which is why the dissent was concerned about sending a message of absolute immunity to law enforcement.

In situations involving individuals with mental illness, these decisions can lead to environments where perceived erratic behavior could substantially increase the risk of someone being subjected to deadly force. Clarity and consistency on the appropriate response in such situations, as well as further training of officers to assess those in mental health crisis, would serve to restrict the use of deadly force to those situations where it is, unfortunately, the last remaining option. Better recognition of irrational behavior and the presence of mental illness would protect

those individuals who may not be able to protect themselves.

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Impact of Diagnosis of Malingering on a Defendant's Sentence

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A Sentence Enhancement for Obstruction of Justice Involving a Defendant Who Malingered Did Not Discourage a Defendant's Utilization of the Right to Obtain a Competency Hearing

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In *United States v. Bonnett*, 872 F.3d 1045 (9th Cir. 2017), the Ninth Circuit Court of Appeals affirmed the lower court's sentencing enhancements following a guilty plea for receipt and distribution of child pornography. The appeals court ruled that malingering qualified for the district court's application of an obstruction of justice sentence enhancement.

Facts of the Case

Daniel Bonnett was charged with one count of receipt and distribution of child pornography in June 2013. Upon arrest, officers discovered thousands of sexually explicit pictures and videos of children on Mr. Bonnett's multiple computers. His attorney raised the question of competency, and he underwent a court-ordered psychiatric evaluation. While detained, he was observed to behave and interact differently with medical staff compared with how he interacted with other staff or fellow inmates. He refused medical examinations and tests that were or-

dered to assist in evaluating his mental condition, including those designed to check for malingering. He also made damaging statements on recorded jail telephone calls with his wife. The evaluation concluded that Mr. Bonnett was feigning incompetency. The defense never objected to the conclusion of malingering. After his guilty plea, he received a two-level increase to his offense level for obstruction of justice due to malingering pursuant to the U.S. Sentencing Guidelines (U.S.S.G) § 3C1.1. In conjunction with other measures, such as criminal history, offense levels are used by courts as guidelines for deciding how many months of imprisonment a defendant should uniformly receive when convicted of a crime; theoretically, an increased offense level results in more time imprisoned. Mr. Bonnett was sentenced to 15 years in prison followed by 25 years of supervised release. He appealed his sentence arguing that the court erred in using malingering as a basis for an obstruction of justice enhancement, and that the court erred in not resolving factual disputes from the Presentence Report and the Psychiatric Evaluation.

Ruling and Reasoning

The U.S. Court of Appeals for the Ninth Circuit affirmed the sentence given to Mr. Bonnett by the U.S. District Court for the Eastern District of California. The court affirmed that Mr. Bonnett had neither a legal nor a factual basis to challenge the sentence enhancement that resulted from obstruction of justice.

Mr. Bonnett argued that permitting an obstruction of justice sentence enhancement based on his behavior in a competency to proceed evaluation discourages his exercise of the right to obtain a competency hearing. Citing *United States v. Greer*, 158 F.3d 228 (5th Cir. 1998), the Ninth Circuit noted that precedent allowing for an obstruction of justice enhancement for a defendant who feigns mental illness is well established. In *Greer*, the court stated: "While a criminal defendant possesses a constitutional right to a competency hearing if a *bona fide* doubt exists as to his competency, he surely does not have the right to create a doubt as to his competency or to increase the chances that he will be found incompetent by feigning mental illness" (*Greer*, p 237).

The argument that an obstruction of justice sentence enhancement chills a defendant's exercise of the right to a competency hearing has been declined by three other circuit courts ruling after *Greer*: *United States v. Wilbourn*, 778 F.3d 682 (7th Cir.