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Qualified Immunity in the Eleventh Circuit After Hope v. Pelzer

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A Look at the Law

By Michael B. Kent Jr.

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The defense of qualified immunity protects government officials performing discretionary functions from liability, trial, and other burdens of civil litigation (such as discovery), as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[1] This defense, which ultimately derives from the common law immunity enjoyed by judicial officers[2], plays a significant role in lawsuits alleging constitutional or civil rights violations by officials of local governments.[3] In situations where officials are forced to make quick decisions under volatile circumstances — for example, when a police officer must use force to effect an arrest — the defense is particularly necessary to balance the rights of individuals legitimately falling victim to abuse of power against the costs that insubstantial litigation imposes on society.[4]

Since 1982, when the Supreme Court established the contemporary formula for granting qualified immunity, the Eleventh Circuit Court of Appeals has frequently been called upon to define the contours of the defense as it applies to government officials in Georgia, Florida and Alabama. Over the course of time, the Eleventh Circuit's decisions gave a distinct shape to the doctrine of qualified immunity and rendered the defense the decisive issue in most cases alleging civil rights violations by government officials. As the court explained as recently as 2001: "A government-officer defendant is entitled to qualified immunity unless, at the time of the incident, the 'preexisting law dictates, that is, truly compel[s],' the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiffs' federal rights in the circumstances."[5] Although circumstances clearly existed under which qualified immunity would be denied, government officials could find comfort that, in most cases, their entitlement to qualified immunity would be upheld.

In July 2002, however, the Supreme Court issued a decision that threatened the stability of the Eleventh Circuit's qualified immunity jurisprudence and raised several questions about the doctrine's applicability in the states that comprise the Eleventh Circuit. In *Hope v. Pelzer*[6] — a case where a panel of the Eleventh Circuit had affirmed the district court's grant of qualified immunity — the Supreme Court held that the defense was not applicable and accused the Eleventh Circuit of imposing a "rigid gloss on the qualified immunity standard."[7] The decision in *Hope* potentially dealt a harsh blow to twenty years' worth of case law, as well as to the rules under which qualified immunity in the Eleventh Circuit was analyzed. Since *Hope*, however, the Eleventh Circuit has indicated that those rules, and the defense of qualified immunity, are very much alive and well despite premature reports to the contrary.

This article explains the law of qualified immunity in the Eleventh Circuit prior to the *Hope* decision and examines how the fundamental characteristics of that law were called into question by *Hope*. This article also examines the Eleventh Circuit's post-*Hope* decisions, demonstrating that the substance of qualified immunity in the Eleventh Circuit essentially remains the same.

QUALIFIED IMMUNITY IN THE ELEVENTH CIRCUIT PRIOR TO HOPE

In *Harlow v. Fitzgerald*, the Supreme Court laid down the general rule that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[8] Abandoning prior precedent that largely analyzed qualified immuni-

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ty by looking to the subjective intent of the official, the Court announced that, from that point forward, the entitlement to qualified immunity would depend primarily on objective factors.[9] The Court explained that its new test struck the proper balance between the competing interests underlying most civil rights litigation. Where an individual's rights are clearly established, the official can be expected to know whether his conduct violates those rights, and he should be subject to liability. On the other hand, where an individual's rights are not clearly established, the public interest is better served by allowing the official to perform his duties "with independence and without fear of consequences."[10]

At first, the Eleventh Circuit seemed slow to adopt the new *Harlow* formula for qualified immunity[11], but the court clearly had become a believer by 1994 when it issued its en banc decision in *Lassiter v. Alabama A&M University*.[12] Latching on to *Harlow*'s rationale that an official can be charged with knowing whether his conduct violates a "clearly established" right, the court undertook to define what "clearly established" meant in the objective context of qualified immunity. Noting that "government agents are not always required to err on the side of caution," the court explained that rights generally are clearly established only when they previously have been developed in "such a concrete and factually defined context to make it obvious to all reasonable government actors, in the [official's] place, that 'what he is doing' violates federal law."[13] What this means in real life, according to the *Lassiter* court, is that a civil rights plaintiff cannot defeat the qualified immunity defense by pointing to general propositions and abstractions, such as a requirement that the official act reasonably.[14] Rather, to defeat qualified immunity, the rights at issue must have been defined by prior cases, the facts of which, although not required to be identical, must be "materially similar" to the facts of the case being decided.[15] Put differently, "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*."[16]

The *Lassiter* formulation of qualified immunity itself became "clearly established" in the Eleventh Circuit, although the court did add two clarifications and one corollary. In *Jenkins v. Talladega City Board of Education*[17] — an opinion that explicitly reaffirmed *Lassiter*'s "guiding directives for deciding cases involving. . . qualified immunity"[18] — the en banc court clarified that the law could be clearly established only by decisions from the U.S. Supreme Court, the Eleventh Circuit itself, or the highest court of the state where the case arose.[19] Similarly, in *Hamilton v. Cannon*, the court clarified that only the holdings of such cases, as opposed to *dicta* contained in an opinion, could clearly establish the law for purposes of qualified immunity.[20] Finally, in *Smith v. Mattox*, the court noted an important corollary to the *Lassiter* rule: a controlling and factually similar case is not necessary to defeat the qualified immunity defense if "the official's conduct lies so obviously at the very core of what the [statute or Constitution] prohibit..... that the unlawfulness of the conduct was readily apparent to the official."[21] Such cases, however, represent a "slender category" of qualified immunity jurisprudence.[22]

These rules — the *Lassiter* test, the *Jenkins* and *Hamilton* clarifications, and the *Smith* corollary — were reaffirmed in the court's 2001 en banc decision in *Marsh v. Butler County*.[23] Thus, roughly twenty years after *Harlow*, the Eleventh Circuit had developed a stable body of qualified immunity law consisting of the following rules: (1) to defeat a defense of qualified immunity, preexisting case law with materially similar facts generally must compel the conclusion that all reasonable officials in the defendant's position would understand that the conduct in question violates federal rights; (2) only case law from the U.S. Supreme Court, the Eleventh Circuit, or the highest court of the relevant state can clearly establish the law; (3) only the holdings of such case law, and not the *dicta* contained in judicial opinions, are useful in the qualified immunity analysis; (4) preexisting case law is *not required* in the narrow category of cases where the official's misconduct obviously affects the very core of the rights at issue; and

(5) the official's entitlement to qualified immunity is the usual rule.

THE SUPREME COURT'S DECISION IN *HOPE V. PELZER*

Almost a year after *Marsh*, these rules were called into question by the Supreme Court's opinion in *Hope v. Pelzer*, which reversed the Eleventh Circuit's grant of qualified immunity. *Hope* involved an Eighth Amendment claim brought by an Alabama inmate alleging that prison guards restrained him on a hitching post for seven hours without water as punishment for disruptive conduct.[24] A panel of the Eleventh Circuit decided that the guards' actions in cuffing the inmate to the hitching post violated the Eighth Amendment.[25] Nonetheless, because preexisting case law had not established a bright-line rule against such actions, the Eleventh Circuit held that the guards were entitled to qualified immunity.[26] Calling the Eighth Amendment violation "obvious," the Supreme Court agreed that the use of the hitching post violated the inmate's constitutional right to be free from cruel and unusual punishment.[27] However, the Court rejected the Eleventh Circuit's holding — and more importantly, its analysis — with regard to qualified immunity.[28]

The Court began its qualified immunity discussion by criticizing the Eleventh Circuit for requiring preexisting cases with materially similar facts to defeat the guards' qualified immunity defense. Although acknowledging that the unlawfulness of the guards' actions must have been apparent in light of preexisting law,[29] the Court nonetheless accused the Eleventh Circuit of placing a "rigid gloss on the qualified immunity standard."[30] What the "clearly established" requirement means, according to the Court, is that an official is entitled to "fair warning" that his or her conduct deprives the victim of a federal right,[31] and "fair warning" can be given "even in novel factual circumstances."[32] Thus, the salient question was not whether the inmate could point to materially similar facts, but whether the state of the law at the time of the hitching post incident gave the guards "fair warning" that their actions violated the inmate's Eighth Amendment rights.[33] The Court held that it had.

Exactly how the guards received such warning, however, remains ambiguous from the Court's opinion. As noted, in deciding whether the guards had deprived the inmate of his constitutional rights, the Court described the constitutional violations as "obvious."[34] In addressing whether the guards had received fair warning that their conduct was unlawful, the Court again explained that their actions constituted "a clear violation of the Eighth Amendment."[35] The Court strongly suggested that, given the clarity and obviousness of the violation, the general principles of law laid down in the Court's prior Eighth Amendment cases were sufficient to provide fair warning.[36] Thus, the case appeared to fall within the slender category of cases captured by the Eleventh Circuit's corollary from

Smith v. Mattox — i.e., the guards' misconduct went to the very core of the Eighth Amendment's prohibition against cruel and unusual punishment — and the Court simply could have decided that the Eleventh Circuit failed to apply its own precedent in this regard. The Court did not discuss the *Smith v. Mattox* corollary, however, presumably because the Eleventh Circuit panel that decided the case failed to do so. Accordingly, while the Supreme Court's description of the case seemed to fit the *Smith v. Mattox* exception to the requirement for materially similar prior cases, the Court never addressed that exception or even acknowledged that it existed.[37]

Instead, the Court proceeded to explain that — in addition to the fair warning offered by the general principles underlying the Eighth Amendment — the guards also had received fair warning from other sources: (1) binding Eleventh Circuit precedent holding that several forms of corporal punishment, including handcuffing inmates to a fence, violated the Eighth Amendment;[38] (2) *dicta* from an Eleventh Circuit opinion cautioning against punishing an inmate by denying water and physically punishing an inmate who has ceased resistance to authority;[39] (3) an Alabama Department of Corrections regulation that actually allowed use of the hitching post under certain conditions, which conditions the Court determined were not followed by the guards;[40] and (4) a report by the U.S. Justice Department, which opined that the use of the hitching post was unconstitutional.[41] The exact weight and balance of each source in the "fair warning" analysis is unclear from the Court's opinion, but either separately or cumulatively, these sources were found to have provided fair warning that the guards' use of the hitching post violated the inmate's Eighth Amendment rights. Accordingly, the guards were not entitled to qualified immunity.

QUALIFIED IMMUNITY IN THE ELEVENTH CIRCUIT AFTER *HOPE*

Clearly, the Supreme Court's opinion in *Hope* raises serious questions about the state of qualified immunity law in the Eleventh Circuit. The Court sharply criticized the notion that preexisting case law with materially similar facts was necessary to defeat qualified immunity. And in focusing on this prong of the Eleventh Circuit's qualified immunity formula, it failed to acknowledge or apply the important exception established by the *Smith v. Mattox* corollary. Moreover, in applying its new "fair warning" test, the Court relied not only on the holding of a binding decision, but also to some degree on judicial *dicta*, a state regulation, and an advisory report from a federal executive branch agency. Finally, the Court's rejection of the guards' qualified immunity defense — despite the fact that no court had directly held unconstitutional the use of the hitching post (and, in fact, federal district courts in five other Alabama cases had specifically rejected the same Eighth Amendment claim at issue in *Hope*[42]) — rendered uncertain the proposition that official's entitlement to qualified immunity is the usual rule. Thus, in one swoop, the Supreme Court called into doubt each of the distinct rules characterizing the Eleventh Circuit's heretofore stable body of qualified immunity law. The question, after *Hope*, is how this doubt will be resolved.

Fortunately, that question seems already to have been answered. In three post-*Hope* decisions, the Eleventh Circuit has indicated that the substance of its qualified immunity law remains largely unchanged by *Hope*. In its first meaningful discussion of qualified immunity after *Hope*,[43] the Eleventh Circuit undertook to clarify how "fair warning" is provided by preexisting law. To begin with, the court noted that its prior discussions about the general necessity for materially similar facts emphasized, as did *Hope*, the requirement that preexisting law place an official on notice that his actions are unlawful.[44] The court then explained that such notice was given by three primary sources. First, "the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[45] Second, under certain circumstances, case law might set forth a broad principle with such obvious clarity that the principle itself will clearly establish the law for future cases regardless of any factual variations.[46] Third, in most cases where

the law is established by judicial precedents, notice can be given by preexisting cases with indistinguishable facts.[47] If the facts of prior precedents are "fairly distinguishable from the circumstances facing a government official," however, the law is not clearly established and qualified immunity attaches.[48] In addition, the court strongly suggested that only the holding of prior precedents, and not *dicta* contained in the court's analysis, can provide the requisite notice.[49] The judicial *dicta* cited in *Hope*, explained the court, merely strengthened the notice that already had been provided by binding precedent.[50]

The next Eleventh Circuit decision meaningfully to address *Hope* began by stating emphatically that *Hope* "did not change the preexisting law of the Eleventh Circuit much."[51] Taking its lead straight from *Hope*'s requirement that preexisting law give an official fair warning, the court explained that fair warning flowed from "the applicable law's being 'clearly established' at the time of the official's alleged unlawful conduct."[52] The court also explained that *Hope*'s "fair warning" standard was not substantively different than the law as stated by the Eleventh Circuit prior to *Hope*, which did not require the "rigid gloss" perceived by the Supreme Court. Citing a line of cases beginning with *Smith v. Mattox*, the court noted that it "ha[d] repeatedly acknowledged the possibility that a general statement of the law might provide adequate notice of unlawfulness in the right circumstances."[53] Nonetheless, as recognized in *Hope* itself, the unlawfulness must be apparent, and "[i]n many — if not most — instances, the apparency of an unlawful action will be established by (if it can be established at all) preexisting caselaw which is sufficiently similar in facts to the facts confronting an officer, such that we can say every objectively reasonable officer would have been on 'fair notice' that the behavior violated a constitutional right."[54]

The Eleventh Circuit echoed this sentiment in the final decision of the post-*Hope* triumvirate.[55] Again, the court explained that *Hope*'s "fair warning" standard stems from the requirement that the unlawfulness of the official's conduct be apparent in light of clearly established, preexisting law.[56] And again, citing *Smith v. Mattox*, the court acknowledged that "factually similar case are not *always* necessary to established that a government actor was on notice that certain conduct is unlawful."[57] In the narrow category of cases where an official's conduct is so beyond the pale that he or she must be aware of the unlawfulness of his actions, no factually similar prior precedent is needed.[58] But, where the applicable legal standard is characterized by broad generalities and abstract principles — which is true of many, if not most legal standards — "preexisting caselaw that has applied general law to specific circumstances will *almost always* be necessary to draw a line that is capable of giving fair and clear notice than an official's conduct will violate federal law."[59] And the court expressly reaffirmed that, in such circumstances, only decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state in which the case arose — in other words, precedent binding on the officials accused of the violation — can provide the requisite notice.[60]

Putting these three decisions together yields the conclusion that, despite the doubts raised by *Hope*, the Eleventh Circuit's qualified immunity law remains for the most part unchanged. All three decisions explain that "fair warning" flows from the need for clearly established law rendering the unlawfulness of an official's conduct apparent. All three decisions state that, under normal circumstances, the law is clearly established by prior cases with very similar facts. All three decisions

acknowledge that factually similar precedent is not always required, and all three make clear that the Eleventh Circuit has never required factually similar precedent in all cases. Finally, two of the decisions reveal that the body and type of precedent to which courts should look when analyzing qualified immunity remains the same as it was before *Hope*. Thus, the law of the Eleventh Circuit after *Hope* can be stated as follows: (1) to defeat a defense of qualified immunity, pre-existing case law with indistinguishably similar facts generally must define the law sufficiently to give every objectively reasonable officer "fair warning" that the behavior in question violates a federal right; (2) only case law from the U.S. Supreme Court, the Eleventh Circuit, or the highest court of the relevant state can provide the requisite warning; (3) only the holdings of such case law, and not the *dicta* contained in judicial opinions, are useful in the qualified immunity analysis; (4) pre-existing case law is *not required* in the narrow category of cases where the official's misconduct is so egregious that he or she must be aware that he or she is acting illegally; and (5) the official's entitlement to qualified immunity is the usual rule.

CONCLUSION

A comparison of the Eleventh Circuit's post-*Hope* qualified immunity cases with those rendered by the court prior to *Hope* demonstrates that *Hope* wrought no substantive change in the law governing an official's entitlement to qualified immunity. In fact, the rules applied post-*Hope* are almost identical to their pre-*Hope* counterparts. Accordingly, as it was before *Hope*, the defense of qualified immunity continues to be the threshold issue in civil rights cases against local government officials, and those officials can still find comfort that, in most cases, their entitlement to qualified immunity will be upheld. GBJ

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Endnotes

1. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
2. *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896).
3. The Supreme Court first recognized the qualified immunity defense for police officers sued under 42 U.S.C. § 1983 in Pierson v. Ray, 386 U.S. 547, 555-57 (1967).
4. *See* Harlow, 457 U.S. at 814. The Supreme Court has defined such social costs as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.*
5. Marsh v. Butler County, 268 F.3d 1014, 1030-31 (11th Cir. 2001) (en banc) (quoting Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)).
6. 536 U.S. 730, 122 S. Ct. 2508.
7. *Id.* at 2515.
8. Harlow, 457 U.S. at 818.
9. *Id.*
10. *Id.* at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
11. In its first two qualified immunity decisions after Harlow, the Eleventh Circuit rejected the defense based in large part on the subjective intent of the officials involved. *See* Espanola Way Corp. v. Meyerson, 690 F.2d 827, 830 (11th Cir. 1982) (stating that "qualified immunity is unavailable to officials . . . who act with malice or contrary to clearly established law"); Williams v. Bennett, 689 F.2d 1370, 1386 (11th Cir. 1982) (stating that, because intent was element of Eighth Amendment violation alleged by plaintiff, "subjective good faith and intent of the individual defendants remain relevant even in light of objectivity now associated with the [qualified immunity] defense").
12. 28 F.3d 1146 (11th Cir. 1994).
13. *Id.* at 1149.
14. *Id.* at 1150.
15. *Id.*
16. *Id.* (emphasis in original).
17. 115 F.3d 821 (11th Cir. 1997) (en banc).
18. *Id.* at 823.
19. *Id.* at 826 & n.4.
20. 80 F.3d 1525, 1530 (11th Cir. 1996).
21. 127 F.3d 1416, 1419 (11th Cir. 1997).
22. *Id.* at 1420.
23. 268 F.3d 1014 (11th Cir. 2001) (en banc).
24. *See* Hope v. Pelzer, 122 S. Ct. 2508, 2512-13 (2002).
25. *See* Hope v. Pelzer, 240 F.3d 975, 980-81 (11th Cir. 2001).
26. *Id.* at 981.
27. *See Hope*, 122 S. Ct. at 2514.
28. *See id.* at 2515-18.
29. *Id.* at 2515.
30. *Id.*
31. *Id.*
32. *Id.* at 2516.
33. *Id.*
34. *Id.* at 2514.
35. *Id.* at 2516.
36. *Id.*
37. It is presumed that the Court was aware of the Smith v. Mattox corollary since it previously had cited with approval to an Eleventh

Circuit decision applying that corollary. *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) (citing Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000)).

38. Hope, 122 S. Ct. at 2516-17. The Court referred to the former Fifth Circuit decision in Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). Decisions from the former Fifth Circuit rendered prior to October 1, 1981 are binding on the Eleventh Circuit. *See* Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).
39. Hope, 122 S. Ct. at 2517. The Court referred to Ort v. White, 813 F.2d 318 (11th Cir. 1987). The Court acknowledged that it was relying on *dicta*, stating that "[t]he reasoning, though not the holding" of Ort provided fair warning to the guards. As pointed out by the dissent, Ort actually held that there was no Eighth Amendment violation, s*ee id.* at 2526-27 (Thomas, J., dissenting), and it is therefore difficult to see how that decision fairly could have warned the guards that they were violating the inmate's constitutional rights.
40. Hope, 122 S. Ct. at 2517-18. As pointed out by the dissent, because the regulation actually allowed the use of the hitching post, it seems that the regulation would have favored the guards' qualified immunity defense by providing legal support for their actions. *See id.* at 2526 (Thomas, J., dissenting).
41. *Id.* at 2518.
42. *See id.* at 2524 (Thomas, J., dissenting).
43. Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002).
44. *Id.* at 1350 (citing Marsh v. Butler County, 268 F.3d 1014, 1031 (11th Cir. 2001)).
45. *Id.*
46. *Id.* at 1351.
47. *Id.*
48. *Id.* at 1352.
49. *Id.* at 1354 n.27 (noting that there exists "an important difference between the holding in a case and the reasoning that supports that holding").
50. *Id.*
51. Willingham v. Loughnan, 321 F.3d 1299, 1300 (11th Cir. 2003).
52. *Id.* at 1301.
53. *Id.* at 1302.
54. *Id.*
55. *See* Thomas v. Roberts, — F.3d — , No. 00-11361 (11th Cir. Mar. 10, 2003), *available at* 2003 WL 934249.
56. *Id.* at 2003 WL 934249 *3.
57. *Id.* at *6.
58. Id. One example of such a case is provided by Vaughan v. Cox, -F.3d -, No. 00-14380 (11th Cir. Aug. 29, 2003), available at 2003 WL 22025451. In Vaughan, the defendant officer fired three rounds without warning into a suspect vehicle on Interstate 85 in Coweta County. The court first held that the evidence, when viewed in the plaintiff's favor, would allow a reasonable jury to determine that the officer violated the plaintiff's Fourth Amendment right against unreasonable seizure. See id. at *3-4. Additionally, this same evidence, when viewed in the plaintiff's favor, would likewise defeat the officer's entitlement to qualified immunity because it permitted the following inferences: (1) the plaintiff did not pose an immediate threat of serious harm; (2) the use of deadly force was not necessary to effect a stop of the plaintiff's vehicle; and (3) it was feasible for the officer to warn the plaintiff before using such force. See id. at *4-5. Although the court did not cite Smith v. Mattox, its opinion shows that the court considered the case to fit (depending on the true facts) within the Smith v. Mattox corollary. If the facts were as alleged by the plaintiff, then "an objectively reasonable officer in [the defendant's] position could not have believed that he was entitled to use deadly force . . . ." Id. at *6. Put differently, if the plaintiff's version of events were true, then the officer's conduct lay "so obviously at the very core of what the Fourth Amendment prohibits" that it went beyond "[t]he hazy border between permissible and forbidden force." See Smith v. Mattox, 127 F.3d at 1419. On the other hand, if the plaintiff's version of events was not true, then "the qualified immunity analysis would be changed," and the defendant would be entitled to the defense. See Vaughan, 2003 WL 22025451 at *6. And because the officer's entitlement to qualified immunity depended on the actual version of events, the court held that the officer should be allowed to pose special interrogatories to the jury to resolve the specific factual disputes on which the qualified immunity analysis depended. Id. Of course, the jury would decide only "the issues of historical fact that are determinative of the qualified immunity defense," while the court (and it only) would determine as a matter of law whether those facts entitled the officer to the defense. See Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002); see also Cottrell v. Caldwell, 85 F.3d 1480, 1488 (11th Cir. 1996). The procedure employed in Vaughan thus comports with pre-Hope decisions of the Eleventh Circuit, and while the denial of qualified immunity seems anomalous at first blush, nothing in Vaughan suggests a sea-change in the Eleventh Circuit's qualified immunity jurisprudence.
59. Id.
60. Id. at *3.

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