No. 18-6908

In The Supreme Court of the United States

LIVINGSTON MANNERS,
Petitioner,

v.

RONALD CANNELLA, KARRIE SABILLON, and the CITY OF HOLLYWOOD, FLORIDA,
Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF CANNELLA AND SABILLON

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QUESTIONS PRESENTED

(Restated)

Did Manners' alleged crime of fleeing and eluding in violation of section 316.1935, Florida Statutes, give the arresting officer arguable and actual probable cause for the civilian's arrest, entitling the arresting officer to qualified immunity?

Did the Eleventh Circuit conduct a proper analysis of qualified immunity for an excessive use of force claim in an alleged violation of 42 U.S.C. §1983?

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STATEMENT OF THE CASE

I. Proceedings Below

Manners' operative complaint asserted claims against Officer Cannella under 42 U.S.C. §1983 for excessive use of force and malicious prosecution, against Officer Sabillon under 42 U.S.C. §1983 for excessive use of force, and against the City of Hollywood, Florida for false arrest under state law. (DE 35). The defendants moved for summary judgment on all counts alleged in the complaint. (DE 58, 60). The district court granted summary judgment in favor of defendants on all of Manners' claims and entered final judgment in their favor. (DE 89, 90). According to the district court, the officers had probable cause to stop and arrest Manners. The district court also determined that the officers had not used excessive force. Manners then filed an amended motion for reconsideration of the summary judgment order and final judgment, arguing that the district court granted summary judgment on issues not raised by the parties. (DE 94). The district court denied Manners' amended motion for reconsideration. (DE 109).

Manners appealed the district court's adverse summary judgment to the Eleventh Circuit. The Eleventh Circuit affirmed the district court's grant of summary judgment to the defendants.

II. Factual Background

We recite the facts in edited form as accurately stated by the Eleventh Circuit in its decision.

Close to three in the morning on June 24, 2014, Livingston Manners was sitting in his car on the side of Plunkett Street, a residential street in the City of Hollywood, Florida, before heading to work. Ronald Cannella, a City of Hollywood police officer, was on patrol "in reference to recent crimes of theft in the area," and he drove past Manners. Soon after Cannella drove by, Manners pulled out and turned south on 26th Avenue. There is a dispute about what happened next. Cannella said he saw - through his rearview mirror - that Manners ran a stop sign. Manners claimed that he came to a complete stop.

Cannella made a U turn and followed Manners down 26th Avenue. At some point between Plunkett Street and Pembroke Road, a distance of some four or five blocks, Cannella activated his emergency lights and also ran his sirens, although there is some dispute about when exactly this happened. Manners admitted that, some three blocks past Plunkett Street, he saw Officer Cannella behind him and that the officer's lights and sirens were on. Cannella said that he "activated [his] emergency lights and sirens, as [he] hit the intersection of Pembroke Road and 26th Avenue" and that he was directly behind Manners's vehicle at that intersection.

It is undisputed that Manners did not stop when he saw Cannella behind him, or when he saw Cannella's lights and sirens activated. Manners knew that the vehicle was a police car, that a police car was instructing him to stop, and that the lights and sirens meant he was required to stop his car. Instead of stopping, Manners continued along 26th Avenue, through a traffic light at Pembroke Road, and stopped at a gas station across the intersection. Manners repeatedly and explicitly testified that he did not stop when directed to do so. He also repeatedly testified that he chose not to stop immediately - because he was afraid of being hit or killed by a police officer.

Manners continued driving until he reached a well-lit gas station where video surveillance was available. By Manners's own account, the distance he intentionally traveled after seeing the officer behind him with lights and sirens, but before coming to a stop, was about three blocks, one-tenth of a mile, or 176 yards. He continued to drive after being directed to stop for 14.4 seconds, or, as he said at another occasion in his deposition, for "about two minutes, two minutes at the most."

At the gas station, Cannella stopped behind Manners and approached the driver's side of Manners's car. Cannella asked for Manners's drivers license, which Manners provided. A silent video recording of the entire incident at the gas station was taken from surveillance cameras. Cannella can be seen at Manners's driver's side door, and while Cannella looked in the backseat, Manners stepped out of the vehicle. Cannella and Manners spoke, facing one another, for several seconds. There is no

dispute that Cannella informed Manners that he was under arrest. Manners knew this; in fact, Manners said he asked Cannella to hurry up so that he could get to work and Cannella said "[y]ou're going to jail." According to Cannella, he repeatedly directed Manners to get back into his car, but Manners refused to do so. Cannella then placed Manners under arrest. Cannella said: "I must have told him at least two to three times [to remain seated in the vehicle] and he said, no, every time." Manners, on the other hand, denied that Cannella ever directed him to stay in the car.

The video recording clearly established that a physical struggle ensued when Cannella attempted to place Manners under arrest. Manners' efforts to thwart the arrest are equally evident from the video. The first attempt to handcuff Manners occurred outside the vehicle - Cannella apparently grabbed Manners' wrist as Manners either sat or fell back into his car. A struggle ensued in the car; Cannella leaned or fell on top of Manners, and he tried to pull Manners out of the vehicle. The parties disagree about what happened inside the car. Manners conceded that he pulled back, asked why he was under arrest, and said Cannella punched him three timed while laying on top of him. Cannella, in turn said Manners screamed at him and struck him (Cannella) three to four times.

After the details of an indiscernible struggle occurred inside the car, the video recording shows that Cannella pulled Manners out of the car. Cannella flipped Manners onto the ground and went on top of him. Manners, in turn, is seen shoving

at Cannella, and Cannella is seen punching Manners in the head. Cannella then flipped Manners onto his stomach and attempted to bring Manners's arms together behind his back, evidently attempting to handcuff Manners. Manners is seen pulling his arms away, flailing, and then rolling onto his back. Manners is also seen bringing his leg up and onto Cannella's upper back and grabbing and holding Cannella's wrists for an extended period.

Officer Sabillon arrived on the scene as backup; she said it "looked like [Cannella] was trying to take Livingston Manners into custody, but he couldn't because of the constant power struggle between the both of them with their hands." On the video recording, Sabillon is seen deploying her taser on Manners' stomach. Manners flailed on the ground, and both Cannella and Sabillon are seen attempting to handcuff him for about a minute, deploying one or both of their tasers. Eventually, Sabillon is seen lying across Manners, while Cannella placed Manners in handcuffs. More offices arrived, and four or five of them surrounded Manners and attempted to fully restrain him. Manners is eventually seen lying on his back, handcuffed, and subdued. At no point thereafter was he struck or tased by the officers.

REASONS FOR DENYING THE PETITION

Petitioner seeks certiorari after judgment has been entered against him and in favor of respondents Cannella and Sabillon both by the District Court and the Eleventh Circuit. Review of a writ of certiorari is not a right. Sup. Ct. R. 10. The petition does not present the compelling reasons required for the Court, in its discretion, to grant certiorari. *Id. See City and County of San Francisco, Calif. v. Sheehan,* 135 S.Ct. 1765, 1774 (2016) ("Certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of fight, but of judicial discretion.'") (quoting Sup. Ct. R. 10).

The petition does not present a conflict between the Eleventh Circuit's decision in this case and other Circuit Court decisions. Sup. Ct. R. 10(a). Furthermore, neither the first nor second questions presented raise important questions of federal law which have not been, but should be, settled by this Court. Sup. Ct. R. 10(c). Rather, the petition's questions presented regarding qualified immunity concern well-settled issues of law accurately set forth and applied by the Eleventh Circuit.

I. Manners presents no argument to support further review of his alleged violation of a Florida criminal statute justifying elimination of the police officers' qualified immunity

A. The "exclusionary rule" argument was not presented or pressed by Manners and not passed on below

Manners' first argument is new to the case. He complains that the exclusionary rule should be applied in his civil lawsuit against the respondent police officers to defeat a determination of probable cause so that qualified immunity cannot be applied. See petition for writ of certiorari at 12; *United States v. Calandra,* 414 U.S. 338, 347 (1974) ("Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio,* 367 U.S. 643 (1961)."). Manners suggests that there is a split in the Circuit Court of Appeals as to whether the exclusionary rule should apply in a civil suit against police officers.

The Court's review of this issue is unwarranted because it was not pressed or presented by Manners, nor was it passed on below. *See United States v. Williams,* 504 U.S. 36, 41 (1992); *Cutter v. Wilkinson,* 544 U.S. 709, 718 n. 7 (2005) ("[W]e are a court of review, not of first review."); *Sprietsma v. Mercury Marine,* 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below it is waived."); *Pennell v. City of San Jose,* 485 U.S. 1, 11 n. 5 (1988) (declining to consider an argument "because it was raised for the first time in this Court. . . ."). Manners did not raise below the argument that "whether contemporaneous conduct to an illegal traffic stop in violation of the Fourth Amendment can be used in a civil proceeding to support a law enforcement

officer being entitled to qualified immunity." Petition for writ of certiorari at 12. Manners did not discuss application or non-application of the exclusionary rule in a civil proceeding to the determination of qualified immunity before the Eleventh Circuit or the District Court.

B. There was arguable and probable cause to arrest Manners for fleeing or eluding a police officer

Manners argument on his first point has no merit because the Eleventh Circuit applied a valid Florida criminal statute to the undisputed facts of Manners' failure to stop his vehicle, thereby providing both arguable and probable cause to arrest Manners for fleeing or attempting to elude a law enforcement officer.

Florida law makes fleeing or attempting to elude a law enforcement officer a felony. Section 316.1935(1), Florida Statutes, provides that "[i]t is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer." To establish probable cause for an arrest under section 316.1935(1), the arresting officer must reasonably believe that the arrestee knew that he had been ordered to stop. *See Manners v. Cannella,* 891 F.3d 959, 970 (11th Cir. 2018).

The Eleventh Circuit captured the undisputed facts establishing that Manners violated section 316.1953(1), giving the officers probable cause to arrest Manners:

> There is no dispute that Officer Cannella put on his flashing lights and used his siren when he was directly behind Manners' vehicle at three in the morning. There is no dispute that Manners knew Cannella was a law enforcement officer and that he had been ordered to stop. And there is no dispute that Manners willfully failed to stop when directed to do so because Manners tells us as much in deposition. By Manners's own version of the facts, he continued to drive for three blocks, or one-tenth of a mile, or for 14.4 seconds after seeing that Officer Cannella was behind him with the patrol car's lights and sirens on. Manners himself said that he knew the lights and sirens meant he was obligated to stop his vehicle but that he made a conscious decision not to do so. The facts known to Cannella were the same. Cannella said that Manners continued to drive his car until he reached a well-lit gas station. Although Manners offered that his windows were rolled down and he was traveling at a slower rate of speed (some 25 miles per hour), he does not claim he provided any indication to Cannella that he intended to stop.

Manners, 891 F.3d at 970.

On these undisputed facts, an objectively reasonable officer could have believed that Manners knew that he had been ordered to stop, but was attempting to elude arrest. Accordingly, Officer Cannella had probable cause and arguable probable cause to arrest Manners for attempting to elude arrest in violation of section 316.1935(1), Florida Statutes. The Eleventh Circuit did not decide the case on the exclusionary rule. It decided the case on the factually undisputed violation by Manners of a criminal statute.

Manners citation to the Sixth Circuit's decision in *McCallum v. Geelhood*, 742 Fed. App'x. 985 (6th Cir. 2018), does not advance his cause for review. In affirming a denial of summary judgment on qualified immunity, the Sixth Circuit identified the issue on appeal as the homeowner/plaintiffs' claim that a "search warrant was invalid and that the search of their home violated the Fourth Amendment" because the officer defendant submitted a search warrant containing false and misleading statements. *McCallum,* 742 Fed. App'x at 986. In this case, Manners' affirmative act of eluding and fleeing a police officer is what gives rise to the qualified immunity protection, not the question of whether Manners did or did not run a stop light. See *Manners,* 891 F.3d at 969 ("Probable cause for an arrest may be found if there is probable cause to believe any crime was committed, whether or not there is probable cause for the crime the arresting officer actually believed had been committed.") (citation omitted).

Manners fails to demonstrate that the Eleventh Circuit's determination of qualified immunity merits further review.

II. Under the court's standard, the Eleventh Circuit correctly decided that the police officers' actions were reasonable under the circumstances and they are entitled to qualified immunity on the excessive force claims

Manners contends that the Eleventh Circuit's "decision is tantamount to holding that civilians cannot defend themselves against unlawful excessive force used by law enforcement during an arrest. That decision conflicts with the Florida Supreme Court opinion in *State v. Holley*, 480 So.2d 94, 95 (Fla. 1985), which expressly held that civilians 'may resist the use of excessive force in making the arrest.'" Petition for writ of certiorari at 14. Manners sweeping statement is incorrect and the decision of the Eleventh Circuit did not break new ground or create conflict with a decision of the Florida Supreme Court.

Holley clearly provides that under Florida criminal law an individual is permitted to defend himself against unlawful or excessive force during an arrest. *Holley,* 480 So.2d at 96. Manners makes an unsuccessful jump to the conclusion that *Holley* can be applied in a civil action and that the Eleventh Circuit's decision conflicts with *Holley*. The Eleventh Circuit's decision cited and analyzed the clearly written law

to be applied for an excessive force inquiry and consideration of "whether the officers acted in an objectively reasonable way given the circumstances present during an incident. . . ." *Manners*, 891 F.3d at 973 (quotation and citation omitted).

It is established that excessive force claims are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, 388 (1989). The reasonableness of a given conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and "the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to elect it." *Id.* at 396.

With respect to the objective reasonableness test under the Fourth Amendment, this Court has made it clear that

> [b]ecause "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396 (citations omitted).

The use of force in this incident, as established by the video tape and the perspective of a reasonable officer on the scene does not demonstrate a violation of the Fourth Amendment. "The force necessary to handcuff Manners was not excessive under clearly established precedent." *Manners,* 891 F.3d at 974.

Finally, Manners last paragraph on page 15 of the writ lifts the mask on the argument and reveals the real complaint here. Manners contends that District Court and the Eleventh Circuit got the facts wrong on whether Manners was "defending himself further injury" in resisting arrest. . . ." Petition for writ of certiorari at 15. The District Court and the Eleventh Circuit repeated and made clear that they conducted their respective reviews by construing the evidence in favor of the plaintiff in deciding whether defendants were entitled to qualified immunity under the plaintiff's version of the facts. See *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (noting, in a qualified immunity case, "the importance of drawing inferences in favor of the nonmovant"); *Singletary v. Vargas*, 804 F.3d 1174, 1180 (11th Cir. 2015).

The record, as faithfully recited by the Eleventh Circuit, established the second *Graham* factor that Manners posed an immediate threat to the officers' safety and that he was actively resisting arrest.

> [Officer] Cannella was alone and was faced with an individual larger than he who plainly was not willing to be arrested. Cannella did not know, at that point, what Manners might have in his vehicle or on his person, or whether Manners intended to hurt him in some way. . . . From the video recording, it is abundantly clear that Manners refused to be handcuffed beginning with Cannella's first efforts and continuing throughout the struggle with many officers who attempted to subdue him for at least three minutes. . . . Manners struggled against Cannella's repeated attempts to place him in handcuffs through physical actions – rolling over, bracing his arms, shoving at Cannella, and, indeed, grasping and holding Cannella's wrists for an extended period of time.

Manners, 891 F.3d at 974. Cannella's decisions and use of force were made in moments of the confrontation "in circumstances that [were] tense, uncertain, and rapidly evolving" and his use of force was reasonable entitling him to qualified immunity. See *Graham*, 490 U.S. at 397.

Manners' second argument is nothing more than an attempt to reargue the facts of the force applied to subdue him in the confrontation. Reargument or disagreement with facts is not a basis for certiorari review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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