No. 19-___

In the Supreme Court of the United States

JAMILA RUSSELL & L.T.,
Respondents,

v.

SUPERIOR COURT OF THE VIRGIN ISLANDS,
SUPERIOR COURT MARSHAL CHRISTOPHER RICHARDSON,
Applicants, and
GOVERNMENT OF THE VIRGIN ISLANDS.

To the Honorable Samuel A. Alito, Jr.,
Associate Justice of the Supreme Court of the United States
And Circuit Justice for the Third Circuit Court of Appeals

APPLICATION FOR STAY

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APPLICATION FOR STAY

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, the Applicants, Defendants-Appellants Superior Court of the Virgin Islands ("Superior Court") and Superior Court Marshal Christopher Richardson ("Richardson"),[1] move to stay the order of the District Court entered on November 30, 2018, requiring the parties to proceed with discovery pending appeal and to proceed to trial, notwithstanding the appeal currently pending in the Court of Appeals for the Third Circuit.

The District Court summarily denied the Defendants' motion for stay on November 30, 2018, and denied reconsideration on December 13, 2018. App. at 18a–19a, 21a. The Court of Appeals summarily denied the Defendants' subsequent motion for stay on January 2, 2019. App. at 1a.

Because the underlying appeal involves important questions of qualified immunity, in the event the Third Circuit does not reverse the District Court's denial of summary judgment, it is likely that four justices of this Court would vote to grant certiorari and there is a fair probability that the Court would reverse the Court of Appeals. Further, because the District Court made no finding that the underlying appeal was frivolous and because orders pertaining to qualified immunity are immediately appealable, the District Court lacked jurisdiction to order discovery and

[1] In addition to the Superior Court and Richardson, the Government of the Virgin Islands is also a Defendant in this appeal. The Government does not join this motion. For the sake of this Application, the term "Defendants" refers to only the Superior Court and Richardson unless stated otherwise.

set a trial schedule.

I. STATEMENT OF THE CASE

A. Procedural Background

This case arises from the shooting and serious injury of then-minor Plaintiff L.T. by Richardson. *Russell v. Richardson*, 905 F.3d 239 (3d Cir. 2018). At the time, the Virgin Islands Superior Court had designated L.T. as a "Person in Need of Supervision" (PINS). *Id.* at 244. L.T.'s mother, Plaintiff Jamila Russell, sought the assistance of the Superior Court Marshals, including Richardson in executing his arrest pursuant to an outstanding "Pick-Up" order. *Id.* The shooting occurred during the execution of the warrant. *Id.*

The Plaintiffs sued Richardson, the Superior Court, and the Government of the Virgin Islands, claiming, inter alia, that Richardson used excessive force during the execution of the warrant. *Id.* at 245. The Defendants moved to dismiss the complaint on the grounds of quasi-judicial immunity, qualified immunity, and sovereign immunity under the Virgin Islands Tort Claims Act ("VITCA"). *Id.* The District Court[2] denied the motion, but recognizing the fact-bound nature of the qualified immunity claim, permitted Richardson to renew the defense after development of the factual record. *Id.*

The Defendants appealed, and the District Court and Court Appeals permitted discovery "solely on the issue of . . . qualified immunity" while the appeal was pending. *Id.* at 246. The Court of Appeals affirmed the District Court except as to an

[2] The Hon. Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

issue not relevant here. *Id.* at 258. The Court of Appeals anticipated that the Defendants would renew their qualified immunity claim at the summary judgment stage after completion of discovery on that issue. *Id.* at 253.

Subsequently, the District Court denied Richardson's motion for summary judgment on his qualified immunity claim, and denied in part and granted in part the Superior Court's summary judgment motions. *Russell v. Richardson*, No. CV 15-49, Op. at 14 (D.V.I. Aug. 13, 2018); JA4–27. The Defendants timely appealed.[3]

On November 30, 2018, the District Court held a telephonic status conference at which the Court sought the parties' positions as to whether "full-fledged discovery" should proceed. App. at 4a (Tr. 11/30/18). The Defendants argued, inter alia, that the appeal divested the District Court of jurisdiction. *Id.* at 13a. While acknowledging that rule, the Court identified exceptions for appeals taken from non-appealable orders and appeals that are frivolous or dilatory. *Id.* at 15a. The Court recognized that denials of motions claiming qualified immunity are appealable. *Id.* at 16a. The Court did not find that the Defendants' appeal was frivolous or dilatory but instead held that "the plaintiffs' entitlement to have this matter litigated in a timely fashion outweighs the defendant's position with regard to the pending appeal . . . ." *Id.* Accordingly, the Court ordered discovery to proceed and the parties to submit proposed scheduling orders that would include proposed trial dates. *Id.* at 18a. The Defendants moved orally for a stay, which the Court summarily denied. *Id.* at 18a–19a. The

[3] The Defendants filed a consolidated brief with the Government of the Virgin Islands in the Court of Appeals on January 11, 2019. The Defendants challenge the ruling on the qualified immunity claim and the Court's ruling as to sovereign immunity.

Court denied reconsideration of that decision on December 13, 2018.[4] *Id.* at 21a.

On December 5, 2018, the Defendants moved for stay in the Court of Appeals. The Plaintiffs objected on December 21, 2018, arguing that the appeal was frivolous because it purportedly raised the same issues that the Court of Appeals previously decided. The Defendants filed a reply on December 27, 2018, explaining, in broad strokes, that the initial appeal from the denial of the motion to dismiss was based only on the allegations in the complaint.[5] The summary judgment motion, however, was based on undisputed facts obtained after discovery that were substantially different from those alleged. On January 2, 2019, the Court of Appeals summarily denied the motion for stay. App. at 1a.

B. Factual Background

Plaintiff L.T. cannot remember the events giving rise to the shooting, and Plaintiff Russell was not present. JA8–9, 14. The evidence pertaining to qualified immunity derives from statements Russell made to two marshals and the statements of five marshals that responded to the call and the people to whom they spoke. *See* JA7–14.

Taken in the light most favorable to the Plaintiffs the evidence established the following facts. On July 11, 2013, Russell approached Deputy Ann Marie Wong and requested that she execute a Pick Up Order against L.T. JA5–7, 9. Russell told Wong that she saw a picture of L.T. on social media posing with a firearm and a marijuana

[4] On December 17, 2018 the District Court issued a scheduling order requiring the completion of written discovery by January 17, 2019, and the completion of fact discovery by March 15, 2019. Trial is set for December 2, 2019.

[5] The Plaintiffs did not address the jurisdictional issue.

cigarette. JA7. She also told Wong that L.T. had entered her home through a broken window. JA7–8. She gave Wong a key to her home to aid in executing the Pick Up Order. JA8.

Wong spoke to another deputy, Glenn Parris, who agreed to get the key to Russell's home and execute the Pick Up Order. JA8. Wong advised Parris to proceed with caution in light of the social media photo of L.T. holding a gun. *Id.* Russell told Parris that L.T. was "a runner," and that if L.T. saw the marshals he would run out of the house through the bedroom and "you won't be able to catch him." JA9.

Upon Parris's arrival, he noticed the broken window, checked around the house, and called for back-up assistance from other deputies. *Id.* Parris called Richardson to request immediate assistance in the execution of juvenile arrest warrant. JA10. Parris told Richardson that L.T. was in the house and refused to come out, that he had planned to grab L.T. while he slept but that L.T. was now awake and running through the house, and that—significantly—L.T. "might be armed." *Id.*

Donning their bulletproof vests, Richardson and another deputy went to the scene. JA10-11. During the drive there, Parris called Richardson to ask about their ETA as he "could hear someone running around and rummaging around inside and could see him looking through the windows, but [he] would not leave the residence." JA11. Richardson overheard Parris say, "Don't try it!" *Id.* Parris sounded "shaky" and urgent on the phone. SA29.[6]

Upon arriving, Parris briefed Richardson and the other marshals and warned

[6] SA refers to the Defendants' Sealed Appendix in the Court of Appeals.

them that L.T. might be armed. JA11. Richardson took the house key from Parris and approached the front door cautiously with another marshal. JA11–12. Richardson held the key with one hand and his drawn gun with the other. *Id.* Richardson unlocked one of two locks and signaled that he was about to unlock the other when the door was unexpectedly thrown open, hitting Richardson in the chest. JA12–13. Richardson felt a forceful thump. *Id.*

Richardson saw L.T. in the doorway as it opened and it appeared that L.T. either charged at him or was coming towards him when the door burst open. JA13. Richardson feared for his life and the life of the other marshal and fired a single shot. JA13–14, 22. "[L]ess than a millisecond" elapsed between the time the door opened and the shot. JA13. L.T. knocked into Richardson, nearly taking him to the ground. JA14. Thinking Richardson had been shot, the other marshal immediately fired his weapon at L.T.[7] *Id.* Another deputy arrived at the porch and applied pressure to L.T.'s wound while Richardson and Parris called for medical assistance.[8] *Id.*

The District Court denied summary judgment. JA27. Additional facts will be set out as necessary.

II. REASONS FOR GRANTING A STAY

Rule 23 and the All Writs Act, 28 U.S.C. § 1651, confer authority on a single Justice or the Court to issue a stay of a decision by a District Court pending an appeal

[7] This marshal, Michael DeChabert, is not a party to this action.

[8] This factual record stands in stark contrast with the record in the first appeal, which was based solely on the allegations in the complaint. For example, according to the complaint, "[w]hen Richardson arrived, L.T. allegedly was 'relaxing,' 'in his underwear,' and 'unarmed.' And, when L.T. 'attempt[ed] to run past the marshals,' Richardson shot him." *Russell*, 905 F.3d at 252.

in the Court of Appeals. *See Northern California Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1308 (1984) (Rehnquist, J., in chambers). The parties seeking a stay must show "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsberg, J., in chambers)). As explained below, all three factors are met here.

A. THIS COURT WILL LIKELY GRANT CERTIORARI IF THE COURT OF APPEALS AFFIRMS THE DISTRICT COURT'S DECISION DENYING SUMMARY JUDGMENT.

Rule 10 of this Court describes the "character of the reasons the Court considers" when deciding petitions for certiorari. As to petitions from Courts of Appeal, the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . . .

Sup. Ct. Rule 10(a). This Court has granted certiorari in several cases involving claims of qualified immunity where no circuit split or conflict with a state court of last resort existed, suggesting that the third prong was the basis for granting the petition. *See*, e.g., *Escondido v. Emmons*, No. 17-1660, (U.S. Jan. 7, 2019) (slip op.) (granting certiorari, summarily reversing, and remanding for further proceedings);

Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam) (granting certiorari and summarily reversing Court of Appeals); *White v. Pauly*, 137 S. Ct. 548 (2017) (same); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (same); *see also City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases).

As explained in *White*, the Court has found it necessary to reverse federal courts in qualified immunity cases "both because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." 137 S. Ct. at 551 (citing *Sheehan*, 135 S. Ct. at 1774 n.3; *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)) (internal quotation marks omitted).

The law as to qualified immunity is well established. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela*, 138 S. Ct. at 1152. "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

Whether qualified immunity applies turns on a two-prong analysis that need not be considered in any particular order. *Pearson*, 555 U.S. at 236. First, the Court determines whether the official violated a constitutional right, *id.* at 232, here whether Richardson used excessive force. Second, the Court must assess whether the right was "clearly established" at the time of the official's purported misconduct. *Id.*

The District Court here considered only the first prong, concluding that a genuine issue of fact existed as to the use of excessive force. JA21–23.

Assessing whether conduct constitutes excessive force "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 v. Connor*, 490 U.S. 386, 396 (1989). Qualified immunity protects actions in the "hazy border between excessive and acceptable force." *Mullenix*, 136 S. Ct. at 312 (internal quotation marks omitted).

Further, whether force is reasonable "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. This analysis recognizes that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The undisputed facts here demonstrate: (1) Richardson and the other deputies were told that L.T. might be armed and they prepared and acted accordingly; (2) L.T. had evaded arrest for several weeks and refused to comply with officers to leave the house on the day of the incident; (3) Russell told the marshals that L.T. was a runner

who was likely to evade arrest; (4) L.T. burst through the door as Richardson was unlocking it, hitting Richardson in the process; and (5) an extraordinarily short amount of time – less than a millisecond – elapsed between the door's opening and the firing of Richardson's gun.

A reasonable officer in Richardson's circumstances would believe that deadly force would be necessary where a possibly armed individual with a history of flight burst through a door during an arrest attempt. This is especially so where Richardson feared for his life and had prepared by wearing a bullet-proof vest and bringing substantial back up.

The Court concluded that genuine issues of material facts existed as to "whether Defendant Richardson reasonably believed Plaintiff [L.T.] was or might be armed, what he observed Plaintiff [L.T.] doing once the door swung open, and why he fired his weapon (i.e. in fear versus being startled by the door) . . . ." JA23. The record belies this assessment.

It is undisputed that Richardson was told L.T. might be armed. It is undisputed that a very short time elapsed between the door opening and hitting Richardson and the shooting. In context of the split second when this transpired, whether Richardson was afraid or startled hardly matters. As the Third Circuit Court of Appeals has stated:

> We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004) (citation and internal quotation marks omitted). The District Court's slow-motion analysis of a tense, rapidly evolving situation runs afoul of this principle.

Moreover, no reasonable officer would know that under the circumstances he could not fire his weapon without violating L.T.'s clearly established rights. While a case directly on point is not required to put the officer on notice, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullinex*, 136 S. Ct. 308 (internal quotation marks and alterations omitted).

Because excessive force cases are fact-specific, qualified immunity applies unless "existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 309). The Plaintiffs relied below on *Kopec v. Tate*, 361 F.3d 772, 777–78 (3d Cir. 2004), for the proposition that "[t]he very fact of the Shooting . . . establish[es] the violation of a clearly established Constitutional right . . . to be free from injury through the excessive force by law enforcement officers . . . ." JA108 (Pl. Opp. to Richardson Mot. for Summ. J.). But this Court has made clear that the analysis is not so broad. *See White*, 137 S. Ct. at 552 (noting that the Court of Appeals "misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as [the officer] was

held to have violated the Fourth Amendment."). In the absence of a factually similar case in which the force used was excessive, and in the face of precedent indicating the opposition—*see*, *e.g.*, *Kisela*, 138 S. Ct. at 1150–53 (suspect wielding knife in manner the officer perceived to be threatening justified use of deadly force)—no reasonable officer would recognize that firing his gun under the circumstances here would violate L.T.'s clearly established rights.

In light of the numerous decisions of this Court reversing lower court decisions on qualified immunity, it is likely that this Court will grant certiorari if the Court of Appeals affirms the District Court's denial of summary judgment.

B. A FAIR PROSPECT EXISTS THAT THE COURT WOULD REVERSE THE COURT OF APPEALS.

For the same reasons the Court is likely to grant certiorari, there is a "fair prospect" that the Court would reverse if it grants certiorari. *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers).

In addition, the District Court's scheduling orders runs afoul of the well-established rule that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The jurisdiction of the District Court pending appeal is limited to staying, modifying, or granting injunctive relief, reviewing applications for counsel fees, directing the filing of a supersedeas bond, correcting clerical errors, making orders pertaining to the record on appeal, and issuing orders pertaining to bail. *Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 198

F.3d 391, 394 (3d Cir. 1999). The District Court may also retain jurisdiction if the appeal is frivolous. *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980). While acknowledging this rule and failing to make a finding that the appeal was frivolous, the District Court nonetheless denied the stay on the grounds that "the plaintiffs' entitlement to have this matter litigated in a timely fashion outweighs the defendant's position with regard to the pending appeal . . . ." App. at 16a. This apparent attempt to balance the equities is not the proper analysis and disregards the jurisdictional rule set out in *Griggs*.

Nor could the District Court reasonably conclude that the appeal is frivolous on this record. It is true that the Court of Appeals addressed the issue of qualified immunity in the first appeal. *Russell*, 905 F.3d at 251–53. But that appeal concerned the Defendants' motion to dismiss the complaint and only assessed the allegations in the light most favorable to the Plaintiffs. *Id.* at 245. Both the District Court and the Court of Appeals recognized that the fact-specific nature of qualified immunity required development of the record. *Id*. Indeed, the motion for summary judgment was based on undisputed facts developed through "limited discovery" that differ significantly from the allegations in the complaint. The District Court properly declined to make a finding that the instant appeal was frivolous in light of the fully developed factual record on the question of qualified immunity.

C. THE EQUITIES FAVOR IMPOSING A STAY OF THE DISTRICT COURT PROCEEDING.

Well-established standards govern the decision to issue a stay.

A stay is not a matter of right, even if irreparable injury might otherwise

> result. It is instead an exercise of judicial discretion and [t]he propriety of its issue is dependent upon the circumstances of the particular case. . . . The part requesting a stay bears the burden of showing that circumstances justify an exercise of that discretion.

Nken v. Holder, 556 U.S. 418, 433-34 (2008) (citations and internal quotation marks omitted).

The four factors considered when deciding whether to issue a stay include:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations and internal quotation marks omitted). "The first two factors of the standard are the most critical." *Id.* Application of these factors leads to the conclusion that a stay is warranted.

1. *The Defendants Are Likely to Succeed on Appeal.*

As set out in Part I, *supra*, the Defendants have a strong likelihood of success on appeal.

2. *The Defendants Will Suffer Irreparable Harm.*

Qualified immunity includes the right not to be sued. *Pearson*, 555 U.S. at 237 ("Qualified immunity is an immunity from suit rather than a mere defense to liability.") (internal quotation marks omitted). The Defendants will lose this right if the District Court's scheduling order remains in place. Thus, the Defendants will be forced to engage in discovery, engage experts and pay them for reports, and attend a mediation session, file further motions, and possibly go to trial when they have a right not to be subject to these proceedings.

3. *The Effect of a Stay on the Plaintiffs Is Minimal.*

The only effect on the Plaintiff is to delay trial by six months to a year. While the District Court noted that L.T. uses a wheelchair and requires care, App. at 17a, he is in a facility that provides that care, and the Court did not find that he was in danger of suffering a rapidly deteriorating condition or impending demise that would warrant expediting the proceedings. Instead, the stay here would simply cause a delay that is not uncommon in civil proceedings and which is typically a de facto occurrance when an appeal has been filed and the lower court has been divested of jurisdiction.

4. *The Public Interest Warrants a Stay.*

Qualified immunity vindicates the public interest in having public officials perform their duties without the distraction of litigation for actions arising out of their official duties.

> The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits may offer the only realistic avenue for vindication of constitutional guarantees. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to discretionary functions performed in their official capacities. The doctrine of qualified immunity gives breathing room to make reasonable but mistaken judgments about open legal questions.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (citations and internal quotation marks omitted).

Qualified immunity protects the ability of government to function by "helping

to avoid unwarranted timidity in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing harmful distraction from carrying out the work of government that can often accompany damage suits." *Filarsky v. Delia*, 566 U.S. 377, 389–90 (2012) (citations and internal quotation marks omitted).

Put simply, subjecting the Defendants to continued proceedings in the District Court, including full discovery and other pre-trial requirements, where the undisputed facts make clear that the Defendants did not violate L.T.'s constitutional rights, undermines the purpose of qualified immunity. The public interest in preventing the interference with government warrants imposition of a stay of proceedings.

III. Conclusion

For the foregoing reasons, this Court should stay proceedings in the District Court pending the resolution of the appeal in the Court of Appeals.

Respectfully submitted,

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