

No. 19-222

In The
Supreme Court of the United States

PAUL ANTHONY VALDERAS,

Petitioner,

v.

CITY OF LUBBOCK, TEXAS, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**RESPONDENT BILLY MITCHELL'S
BRIEF IN OPPOSITION**

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QUESTION PRESENTED FOR REVIEW

Is a court required to deny a summary judgment based on qualified immunity where multiple officers were on scene and not all officers utilized force?

**LIST OF PARTIES TO THE
PROCEEDING IN THE COURT WHOSE
JUDGMENT IS UNDER REVIEW**

Respondent agrees with Petitioner's List of Parties except that the City of Lubbock (represented by Jeff Hartsell) was not a party to the interlocutory appeal to the Fifth Circuit which is the basis of Petitioner's Petition for Writ.

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On August 26, 2019, following the filing of Petitioner's Petition for Writ, notice was sent by the Fifth Circuit that the opinion below was reissued as published. It is cited at 774 Fed.Appx. 173 (5th Cir. 2019).



STATEMENT OF THE CASE

A. Facts

Petitioner Valderas ("Petitioner") is a known violent criminal and member of the West Texas Tango Blast gang. Record 301. Plaintiff has been arrested on multiple occasions and his previous encounters with law enforcement include arrests for felony theft and felony possession. Record 96-99, 127-128, 141-142, 286-297, 301. Petitioner has previously been incarcerated in state prison and, due to his prior felony convictions, it is illegal for him to possess a firearm. Record 286-297, 348.

In December of 2016, Petitioner violated his parole by failing to report and a warrant was issued for his arrest. Record 309, 315. Petitioner was fully aware of the warrant and was actively avoiding law enforcement. Record 309, 315, 331. On December 27, 2016, a detective with the City of Lubbock Police Department was assisting narcotics on a controlled purchase at a residence in Lubbock when Petitioner was observed pulling up to the designated location and entering the residence. Record 263-271, 316-317. Petitioner then

left and was followed by law enforcement to a burger restaurant where he was observed making contact with multiple subjects that was consistent with street level narcotics trafficking. Record 263-271. As Petitioner left the burger restaurant, law enforcement decided to initiate a traffic stop. Record 263-271. Petitioner failed to signal a lane change and the officer following him initiated the stop. Record 263-271.

Petitioner immediately began to evade the officer, traveling at high rates of speed through a residential neighborhood. Record 263-271, 304-314. The officer's in-car camera demonstrated Petitioner's dangerous behavior as he careened through the neighborhood, placing the public in danger. Record 272. During the pursuit, Petitioner ran a stop sign and jumped a curb. Two children can be seen in the officer's video crossing the street with their bikes as Petitioner careened through the neighborhood. Record 272. The officer canceled the pursuit for public safety. Record 263-264. Petitioner's vehicle was later found abandoned in an alley near Grinnell Street and Indiana Avenue, just across the street from the residence where the January 26, 2017, incident would take place. Record 263-271, 304-312. Methamphetamine was located in the vehicle. Record 263-271, 304-312. Petitioner admitted in his deposition he was the individual who fled from the officer and testified he was fleeing because he knew he had a warrant and did not want to be arrested. Record 315.

Respondent Officer Billy Mitchell ("Officer Mitchell") is a detective for the City of Lubbock Police

Department. Record 96-99. Officer Mitchell has served with the Lubbock Police Department since 2010 and previously served with the Houston Police Department from 2007 to 2009. Record 96-99. Officer Mitchell is, and was at all relevant times, a sworn, licensed and certified peace officer according to the mandates of the Texas Commission on Law Enforcement. Record 96-99. On January 26, 2017, Officer Mitchell was assigned to the Lubbock Police Special Operations Gang Unit (“Gang Unit”). Record 96-99. Officer Mitchell’s duties included violent criminal gang member documentation and apprehension, narcotics-related investigations, illegal firearm possession investigations, surveillance and tactical operations. Record 96-99. During his career, Officer Mitchell has been involved in multiple operations in which criminals had to be taken into custody and he has been trained on the use of force continuum by the City of Lubbock Police Department. Record 96-99.

As part of the “Gang Unit,” Officer Mitchell became familiar with Petitioner. Record 96-99. Officer Mitchell knew Petitioner was a known violent criminal and a known gang member who had previously used threats and violence. Record 96-99. Officer Mitchell knew Petitioner was known to possess firearms and Officer Mitchell was aware of the high speed chase with Petitioner that occurred in December 2016. Record 96-99, 267. After the pursuit, Officer Mitchell was assigned to take photographs of the abandoned vehicle and he had become familiar with the area around where the abandoned vehicle was located. Record

96-99, 267. In addition to photographing the abandoned vehicle, he had also previously assisted the “Gang Unit” with locating a wanted fugitive across the street from the abandoned vehicle, all within close proximity to the house where Petitioner was shot on January 26, 2017. Record 96-99.

On January 26, 2017, Officer Mitchell was assigned to assist the “Gang Unit” with locating and apprehending Petitioner. Record 96-99. On that date, the “Gang Unit” was briefed regarding Petitioner and his violent past. Record 96-99, 105-183. The unit was advised Petitioner was a known violent criminal and a known member of a gang who had an outstanding felony warrant for his arrest. Record 96-99, 105-183. Petitioner was considered armed and dangerous. Record 96-99, 105-183, 260-272. At the time he was being investigated, Petitioner was unemployed and was actively selling illegal drugs. Record 297-301.

On the evening of January 26, 2017, in furtherance of the plan to locate and apprehend Petitioner, law enforcement was able to locate and visually confirm his location at a convenience store at the intersection of the Clovis Highway and North Indiana Avenue. Record 96-99, 106-107, 127-128, 141-142, 319-320. Petitioner was observed exiting the store and entering a vehicle driven by an unknown female. Record 96-99, 127-128, 141-142, 319-320. The vehicle proceeded to the 3300 Block of Grinnell Street and dropped Petitioner off at a residence. Record 96-99, 127-128, 141-142, 319-320. The surveillance team then set up to watch Petitioner and prepare to take him into custody,

if possible. Record 96-99, 127-128, 141-142. Among the officers on duty, a plan was formulated to have a team of three officers ride in one vehicle to approach and apprehend Petitioner before he became mobile due to his previous history of evading and endangering the public. Record 96-99, 127-128, 141-142. The team included Officer Mitchell, Sergeant Don Billingsley, and Investigator Daniel Merritt. Record 96-99, 127-128, 141-142. Sergeant Billingsley has been a police officer with the City of Lubbock Police Department for 15 years. Prior to becoming a police officer, Sergeant Billingsley was a paramedic and served four years in the United States Marine Corps. Sergeant Billingsley is a member of the Lubbock SWAT Team. Record 438-439. Investigator Daniel Merritt has been a police officer with the City of Lubbock Police Department for six years and is SWAT trained. Record 611, 616.

In accordance with the agreed upon plan, Sergeant Billingsley drove the vehicle, Officer Mitchell sat in the front passenger seat and Investigator Merritt sat directly behind Officer Mitchell. Record 96-99, 127-128, 141-142. All three officers were wearing their department issued tactical vests with "POLICE" in bold, white reflective letters on the upper front portion and had their badges clipped to their vests. Record 96-99, 127-128, 141-142, 256.

The three officers set up within the vicinity of the residence awaiting confirmation that Petitioner was outside. Record 96-99, 127-128, 141-142. As they waited, a blue car with one driver and one passenger approached the residence and Petitioner exited the house. Record

96-99, 127-128, 141-142. This information was relayed to the three awaiting officers and they drove into position. Record 96-99, 127-128, 141-142. Sergeant Billingsley drove toward the residence, approaching from the east. Record 96-99, 127-128, 141-142. The three officers observed the blue car parked on the north side of Grinnell Street facing east with Petitioner leaning into the right front passenger side window. Record 96-99, 127-128, 141-142, 274. As the officers approached, Officer Mitchell slightly opened his door, activating the dome light and preparing for a head start in the event Petitioner attempted to flee back into the house. Record 96-99. As the officers approached, Petitioner stood upright, looked at the officers and raised the right side of his shirt with his right hand exposing a gun. Record 96-99, 127-128, 141-142, 274, 373-376.

The officers all observed Petitioner pull the gun from his waistband and turn his body slightly toward them as Investigator Merritt yelled out, "Gun!" Record 96-99, 127-128, 141-142, 274, 373-374, 491, 615. Sergeant Billingsley stopped the vehicle and Officer Mitchell was the first to exit. Record 96-99, 127-128, 141-142, 274, 491, 615. Officer Mitchell drew his weapon and yelled, "Police!" as he moved to the right of the vehicle so the occupants of the blue car would not be in the line of fire. Record 96-99, 274. Officer Mitchell then fired his pistol multiple times in quick succession at Petitioner, who he believed was still in control of the weapon and posed an imminent and serious threat of death or serious bodily injury to himself and the other officers. Record 96-99, 274.

Officer Mitchell observed Petitioner crouch down and fall to the ground. Record 96-99, 274. Sergeant Billingsley and Officer Mitchell then approached the passenger side of the blue car. Record 96-99, 127-128, 141-142, 274, 457, 625. Investigator Merritt held cover on the passengers in the blue car as Officer Mitchell held cover on Petitioner while the occupants were removed from the car. Record 96-99, 127-128, 141-142, 274, 628. After the occupants were safely removed and security was established around Petitioner, the officers began to administer first aid to him. Record 96-99, 127-128, 141-142, 274.

A neighboring residence had a security camera activated that captured audio and video of the occurrence corroborating the testimony of all of the officers. Record 274. As the officers' vehicle came to a stop, someone from the vehicle can be heard yelling, "He's got a gun!" Record 274. This is followed by Officer Mitchell yelling, "Police!" and Petitioner turning his body toward the officers and pulling his weapon from his waistband. Record 274. Officer Mitchell can then be seen firing his weapon at Petitioner. Record 274. The video clearly depicts the sequence of events. Record 274.

Investigator Merritt testified he was expecting a gunfight when Petitioner turned and pulled the gun from his waistband. Record 127-128, 274, 617, 619, 627. He feared for his life when the gun was pulled and he exited the vehicle while drawing his own weapon. Record 127-128, 274, 617, 619, 627. When he exited, Officer Mitchell was in front of him and was blocking his view of Petitioner. Record 127-128, 274, 617, 619, 627.

Similarly, Sergeant Billingsley testified he feared for his life when Petitioner drew his gun and considered discharging his firearm from inside the vehicle. Record 141-142, 492-496. However, he decided to exit the vehicle so he would not be a stationary target. Record 141-142, 492-496. While exiting, Sergeant Billingsley struggled with the door and did not get out as quickly as Officer Mitchell. Record 141-142, 492-496, 507. Both Sergeant Billingsley and Investigator Merritt testified as to the circumstances that led to Officer Mitchell exiting the vehicle first and thus, being the first to confront Petitioner and his drawn weapon. Additionally, each testified they feared for their lives during the encounter with Petitioner and none of them saw Petitioner discard the weapon prior to the shots being fired. ROA.127-128, 141-142.

Petitioner acknowledged that, as the officers' vehicle approached him, the passenger in the blue car told him it was police. Knowing that, he continued to remove the gun from his waistband in front of the police officers. Record 373-374. Petitioner himself testified he pulled the weapon in order to let the vehicle's occupants know he was armed. Record 389-392. There is no question Petitioner knew the vehicle was occupied by police officers as he pulled his weapon. Record 373-376, 378. Petitioner testified he does not believe he would have been shot if he had not pulled the gun from his waistband. Record 182-183.

Despite the video evidence, Plaintiff alleges that when he learned the vehicle was occupied by police officers, he threw his weapon in the car, put his hands up

and turned to start running toward Indiana Avenue. Record 322-323, 374. Plaintiff testified he took a step-and-a-half when the first bullet grazed him and he was shot “about one to two steps away from the vehicle.” Record 322-323, 374, 400. However, the video clearly shows Petitioner pulling the weapon and remaining close to the blue car. Record 274. Despite knowing there were officers in the approaching vehicle and after showing them his weapon, Petitioner never put his hands up and never turned to run as he has now alleged. Record 274.

B. Misstatements by Petitioner

Throughout the history of the case, Petitioner has plead various assertions that are unsupported by any admissible evidence before the Courts. At the trial court level and at the Fifth Circuit, Respondent repeatedly cited to the evidence in an effort to point out the various misstatements and what the evidence actually shows. Below are the misstatements and citations to the evidence as far as any misstatements in Petitioner’s Petition for Writ:

Plaintiff attempts to portray Officer Mitchell’s version of the events following the shooting as containing contradictions. However, Officer Mitchell’s statements regarding his use of force have been consistent throughout. He stated he saw Petitioner remove the gun from his waistband and display the weapon. Record 104. He also stated he did not see Petitioner discard the weapon. Record 98. He stated that, following his firing

of his weapon, he held cover on Petitioner and then helped administer first aid. Record 98. He also stated that, following the shooting, he saw a gun on the ground near Petitioner. Record 104. This is consistent with Investigator Merritt's testimony that after the shooting, he removed Petitioner's gun from the blue car and placed it on the ground. Record 628-629. The location of the gun is noted in another officer's report and can be seen in the crime scene photographs. Record 145, 191, 218, 223. Thus, Petitioner's attempts to portray Officer Mitchell's testimony as conflicting are thwarted by the evidence before the Court.

Petitioner also continuously alleges he was coerced by confidential informants to take possession of the gun three days prior to the incident. He has wholly failed to offer any admissible evidence supporting this contention. Instead, his own testimony shows he took possession of the gun from individuals in exchange for their smoking a portion of his methamphetamine. Record 350. He further testified he later acquired ammunition for the gun and carried it with him after leaving the motel at which he was staying. Record 358-359. Even if the claim was taken as true, Petitioner fails to state why he continued to possess the firearm for three days, bought ammunition for it and knowingly violated the law that bars a felon from possessing a firearm.

Petitioner argues again and again certain things that Sergeant Billingsley saw or did that are simply false. He asserts that Sergeant Billingsley saw exactly what Officer Mitchell saw and did not use lethal force because it was not reasonable to do so. This is in

contradiction to Sergeant Billingsley's testimony that he did not have the same view as Officer Mitchell. He testified he struggled with his door while getting out of the vehicle and did not exit as quickly as Officer Mitchell. Record 141-142, 492-496, 507. When asked why he did not shoot, these are the reasons he gave. Record 141-142, 492-496, 507. He testified he considered discharging his firearm while in the vehicle but decided to exit so he could "make himself small" and so he would not be a stationary target. Record 493. He further testified he believed Officer Mitchell's use of force was in self defense. Record 500.

Petitioner alleges the Fifth Circuit made an improper inference that Sergeant Billingsley did not shoot because he did not have a line-of-sight to fire and that such inference was not supported by the evidence. Petitioner claims, "If both identically trained officers observed the same 'display' but had two separate responses and both are objectively reasonable then *Graham* is a fallacy." This completely sidesteps the fact that the evidence shows Sergeant Billingsley and Officer Mitchell did NOT see the same displays. Petitioner's assertion is inaccurate. The admissible evidence in this case, relied upon by the Fifth Circuit, is that Sergeant Billingsley did not have the same line-of-sight to fire as Officer Mitchell did. He testified he heard the first two gun shots AS he was exiting the vehicle and that he lost his line-of-sight as he was exiting. Record 453-455, 507. Thus, he was not fully out of the vehicle and stationary as Officer Mitchell was. Additionally, Sergeant Billingsley testified Petitioner was already collapsing

by the time he was able to exit. Record 455. Thus, Petitioner's assertion that Sergeant Billingsley and Officer Mitchell were met with identical circumstances is wrong.

Petitioner asserts at different times that Sergeant Billingsley could not recall what he had seen. Petitioner asserts, "we know what Billingsley saw because Officer Merritt's testimony confirmed that [Petitioner] threw the gun in the car." The fact that the gun was found in the car after the shooting does not indicate any of the officers on scene saw Petitioner discard it. The officers have all stated they did NOT see Petitioner discard the weapon. Record 98, 104, 454, 615. Thus, Petitioner's assertion that Sergeant Billingsley knew Petitioner was no longer armed and the threat had subsided, upon which Petitioner bases his entire argument, is unfounded and unsupported by the evidence. There is no evidence before the Court that Sergeant Billingsley saw Petitioner discard the weapon into the car or that he perceived the threat to be over.

Petitioner argues the only reason Sergeant Billingsley did not fire his weapon was because he saw Petitioner discard the weapon. Sergeant Billingsley testified unequivocally that he did not see Petitioner discard the weapon into the vehicle. Record 452-455. Sergeant Billingsley also testified he feared for his life and was expecting a gun fight. Record 492-496. Petitioner then argues the only reason Sergeant Billingsley did not fire his weapon was because Petitioner was fleeing. This is contradicted by the video evidence and by Petitioner's own testimony. Record 322-323, 374,

400. The video evidence shows it is unclear what Petitioner was doing with his hands after he had drawn his weapon and Plaintiff testified he was not actually fleeing at the time he was shot. Record 274, 322-323, 374, 400.

Petitioner asserts Officer Mitchell's use of lethal force was unreasonable because he admitted he saw Petitioner discard the gun. This is inaccurate and unsupported by any evidence in the record. Officer Mitchell has consistently stated he did not see Petitioner discard the weapon. Record 98, 104.

Petitioner alleges he had dropped the weapon, threw up his hands and begun to run at the time of the first shot. However, as noted in both the trial court's order and the Fifth Circuit opinion, this claim is directly contradicted by the video evidence and by Petitioner's own testimony. Record 274, 322-323, 374, 400.

Petitioner repeatedly asserts and implies the three officers on scene saw Petitioner discard the weapon into the car beside him. This is simply not supported by the evidence which directly contradicts that assertion. Record 98, 104, 454, 615.



SUMMARY OF THE ARGUMENT

Despite Petitioner's claims of a split of authority in the lower courts, thereby requiring review by this Court, there is no split on authority when it comes to *Graham*. *Graham v. Connor*, 490 U.S. 386 (1989). The

courts, and specifically the courts in the cases cited by Petitioner, are consistently applying the standard set forth in *Graham* and looking at all the factors and circumstances with which the officers are presented in determining the application of qualified immunity. Simply because two officers on scene react differently, it does not necessarily follow that one has acted unreasonably. Stated differently, the fact that one officer on scene uses deadly force and another does not, does not mean the officer who used deadly force necessarily acted unreasonably. This is because different officers may have different vantage points, different perceptions and may see or hear things the other officers did not. The courts are required to look at the totality of the circumstances and that is what the lower courts have done, including the trial court and Fifth Circuit on this case.

◆

ARGUMENT

Qualified immunity protects government officials from civil liability if the acts were objectively reasonable in light of then clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A defendant's acts are held to be objectively reasonable unless ALL reasonable officials, acting under the circumstances presented to the defendant, would have then known the conduct violated the Constitution or a federal statute. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Under *Graham*, "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the

course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard....” *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness of the force is judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. *Id.* at 396. The court assesses the reasonableness with an “allowance for the fact 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 397. The proper application of reasonableness under the Fourth Amendment “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, or whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396. The defense of qualified immunity must be assessed in the context of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor*, 490 U.S. 386 (1989).

Petitioner attempts to portray a conflict among the lower courts in the applicability of *Graham*. However, in each of the cases cited by Petitioner, the courts noted the factors to consider from *Graham* and applied those to the facts at issue. It seems Petitioner is asking this Court to hold that when multiple officers are on scene and some officers use force while others do not, there should be a bright line rule that the officers who used

force acted unreasonably. Such a holding would completely abrogate *Graham* and would create extremely difficult situations for officers making split second decisions. It has never been the law that officers on scene must come to a consensus with one another before using force. The situations with which officers are faced typically do not allow for that.

Petitioner argues that, if the lower courts do not consider the actions of other officers on scene, they are misapplying *Graham* and qualified immunity can never be overcome. However, in *Young*, two officers were on scene and only one shot the plaintiff. *Young v. District of Columbia*, 322 F.Supp.3d 26 (D.D.C. 2018). The court did not consider why the one officer did not shoot and still found the officer who utilized force was not entitled to qualified immunity. *Id.* The court in *Diaz* likewise did not consider the other officers' actions and still denied qualified immunity for the officer who used force. *Diaz v. Salazar*, 924 F.Supp. 1088 (D.N.M. 1996).

In *Clem*, two officers were on scene and only one shot the plaintiff. The court did discuss the other officer's actions and found the officer who utilized force was not entitled to qualified immunity. *Clem v. Cty. of Fairfax*, 150 F.Supp.2d 888 (E.D.Va. 2001). In *A.D.*, the court considered the actions of all officers on scene and denied qualified immunity for the officer who used force. *A.D. v. California Hwy. Patrol*, No. C 07-5483 SI, 2009 WL 733872 (N.D.Cal. March 17, 2009).

In *Santana*, there were two officers on scene and one shot the plaintiff. The court looked at both officers' actions, noted they had different vantage points at the time of the use of force and granted qualified immunity. *Santana v. City of Hartford*, 283 F.Supp.2d 720 (D.Conn. 2003). In *Remillard*, two officers were on scene but only one was present when the plaintiff was shot. *Remillard v. City of Egg Harbor City*, 424 F.Supp.2d 766 (D.N.J. 2006). Thus, it would have been of no benefit to discuss what the second officer did because he was in a completely different situation than the officer who used force. *Id.* The court denied qualified immunity. *Id.* In *Kelley*, the court looked at the actions of 16 officers who were on scene. Two officers fired shots. In analyzing how the different officers responded, the court noted the different viewpoints for the various officers and granted qualified immunity for the two officers who used force. *Kelley v. O'Malley*, 328 F.Supp.3d 447 (W.D.Pa. 2018). Under all of the cases cited by Petitioner, the courts looked at the totality of the circumstances and analyzed the factors set forth in *Graham*, in conjunction with the specific facts of the case. Such application of *Graham* by the lower courts did not, as Petitioner argues, result in an across-the-board granting of qualified immunity for the officers.

Petitioner is asking the Court to hold that when multiple officers are on scene, they must all act identically for their actions to be reasonable. The trial court and the Fifth Circuit refused to do so, following the holding from *Graham*. While the actions of the other officers on scene may be considered, they should be

considered within the totality of the circumstances. Despite Petitioner's claim to the contrary, the Fifth Circuit did analyze what Sergeant Billingsley did and did not do in conjunction with all the other circumstances Officer Mitchell faced. In analyzing Sergeant Mitchell's actions, the Fifth Circuit noted he and Officer Mitchell had different positions. This is fully supported by the evidence presented.

Likewise, the trial court looked specifically at all of the officers' versions of events. The district court noted that each officer present thought Petitioner was very much a threat and each of them feared for their lives when they saw he possessed a gun. Additionally, the trial court noted, all officers stated the events occurred rapidly and once the gun was observed, each took action to guard their safety and the safety of the occupants in the vehicle beside Petitioner. The trial court looked at the officers' actions in conjunction with the other circumstances the officers faced, including the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others and whether the suspect was actively resisting arrest or attempting to evade arrest by flight, and found Officer Mitchell acted reasonably. This is directly in line with the test set forth in *Graham* and followed consistently by the lower courts.

The trial court specifically looked at Officer Mitchell's two statements to determine if Petitioner's argument was true that he had changed his testimony. The court noted both statements said that Officer Mitchell saw Petitioner draw the gun from his waistband and

he believed Petitioner was still armed when he shot him and thus, the statements were consistent. The trial court also noted the video evidence clearly shows Petitioner did not run from the officers and was not shot while running away as he attempts to claim. Further, the video does not clearly show Petitioner disarming himself in such a manner as to objectively remove any threat the officers might have perceived. In further analyzing each of the officers' actions, the court stated, "the officers all noted that [Petitioner] had a gun and feared for their safety; each of the three officers began evasive positioning to remove themselves from the interior of the car and prevent the possibility of being shot in the vehicle; there is not evidence that any of the officers believed [Petitioner] was unarmed when shots were fired." Contrary to Petitioner's claims, the Fifth Circuit and the trial court here considered what the other officers on scene perceived and found Officer Mitchell acted reasonably.

The Fifth Circuit and the district court properly used the *Graham* standard and applied qualified immunity for Officer Mitchell. The ruling was in line with this Court's prior decisions. In *Kisela*, this Court noted the officer believed the armed woman was a threat and had "mere seconds" to assess the danger. Qualified immunity applied. *Kisela v. Hughes*, 138 S.Ct. 1148, 200 L.Ed.2d 449 (2018). Here, Officer Mitchell reasonably believed Petitioner posed a threat of serious harm to himself or others. Officer Mitchell knew Petitioner to be an armed and violent felon. He knew Petitioner had previously fled from law enforcement endangering

both the public and law enforcement officers. On the date of the incident, Officer Mitchell was briefed that Petitioner was armed and dangerous. Knowing all of these things, Officer Mitchell was tasked with taking Petitioner safely into custody. As the officers approached to do that, Petitioner pulled a weapon on the officers. Petitioner has been unequivocal that he knew it was officers approaching and he continued to pull the gun out. Despite knowing it was officers and despite the cries of "Police!", Petitioner never put his hands up and did not attempt to flee. This is shown in the video evidence.

Officer Mitchell's fear was mirrored in both Sergeant Billingsley and Investigator Merritt. Investigator Merritt was unable to gain a line of sight to fire his weapon because Officer Mitchell was blocking his shot. Similarly, Sergeant Billingsley considered discharging his firearm from inside the vehicle, but decided to exit first so he would not be a stationary target. Sergeant Billingsley struggled with his door which led to Officer Mitchell being the first officer to successfully exit the vehicle and confront Petitioner. The other officers' testimony demonstrates a genuine fear by the officers for their lives and establishes that it was reasonable for Officer Mitchell to respond to the threat with deadly force. Because Officer Mitchell, Sergeant Billingsley and Investigator Merritt all perceived an immediate threat to themselves and others around and had only seconds to respond, Officer Mitchell's use of force was reasonable.



CONCLUSION

There is no split in authority as alleged by Petitioner and the lower courts are properly applying the standard for qualified immunity as set forth in *Graham*. It would be an abrogation of *Graham* and would do away with the objectively reasonable test to adopt the hard line rule suggested by Petitioner—that if multiple officers are on scene and one officer does not use force, any officer who did use force would have acted unreasonably and qualified immunity would be denied. Here, Officer Mitchell and the other officers on scene all encountered an armed Petitioner. They each feared for their safety and took the necessary steps to get to the best tactical position to protect themselves and the others in the area. Because of their different positions in the vehicle, each had a different view point. Based on the circumstances presented, Officer Mitchell feared for his safety, the safety of the officers with him and the safety of the occupants of the vehicle beside Petitioner and utilized force. The other officers with him had the same fear but did not have the line-of-sight to use force. When viewed under *Graham*, Officer

Mitchell acted as a reasonable officer would have and thus, was entitled to qualified immunity.

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