No. _____

IN THE

Supreme Court of the United States

GREGORY CLARK,
PETITIONER,

v.

AUSTIN CLARK, DEPUTY,
in his individual capacity only,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

W. Bevis Schock
Counsel of Record
7777 Bonhomme Avenue
Ste. 1300
St. Louis, MO 63105
314-726-2322
wbschock@schocklaw.com

QUESTIONS PRESENTED FOR REVIEW

1. During a voluntary interaction in which the subject hands a police officer his ID, if the officer runs the subject is it an unconstitutional seizure?

2. During a voluntary interaction (or at best a Terry Stop) in which the subject puts his hands out the window of his car, if the officer raises his gun and points it at the subject is it excessive force?

PARTIES TO THE PROCEEDINGS

Petitioner is Gregory Clark, an individual.

Respondent is Austin Clark, (no relation to petitioner), a Ste. Genevieve County, Missouri Sheriff's Deputy, sued in his individual capacity only.

These are the same parties who were before the Eighth Circuit and the district court.

CORPORATE DISCLOSURE STATEMENT

Neither party is a corporation.

RELATED COURT PROCEEDINGS

1. Eighth Circuit
   No. 18-1324,
   Gregory Clark v. Austin Clark
   Opinion issued June 13, 2019.

2. United States District Court,
   Eastern District of Missouri
   No. 1:16-CV-00094 AGF
   Gregory Clark v. Austin Clark
   Opinion issued January 23, 2018.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISION

RULES

PETITION FOR WRIT OF CERTIORARI

Gregory Clark respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eighth Circuit.

CITATIONS TO OPINIONS BELOW

The Eighth Circuit Court of Appeals' judgment affirming the District Court was issued on June 13, 2019. It is reported at 926 F.3d 972 and is attached as Appendix A.

The District Court Order granting summary judgment in favor of respondent was issued on January 23, 2018. It is available at 2018 WL 513590 and is attached as Appendix B.

The Eighth Circuit's Order denying rehearing was issued on July 16, 2019. It was not separately reported and is attached as Appendix C.

STATEMENT OF THIS COURT'S JURISDICTION

The Eighth Circuit issued its decision on June 13, 2019. It entered its order denying petitioner's Motion for Panel and En Banc Rehearing on July 16, 2019. Pursuant to the Rules of the Supreme Court of the United States, Rule 13.1, this Petition was filed before October 14, 2019, that is, within 90 days of July 16, 2019.

Under 28 U.S.C. § 1254(1) this court has jurisdiction to review the Eighth Circuit's decision on a writ of certiorari.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The United States Constitution, Fourth Amendment, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Facts

On January 25, 2016 Gregory Clark was on his way from Memphis to Chicago in his black Toyota Tundra pick-up. He stopped at the Bloomsdale rest area on northbound I-55 in Missouri's Ste. Genevieve County. He sat a table and talked to a friend on the phone.

Meanwhile the principal of a school approximately 150 yards away was calling 911 stating "We are hearing gunshots toward the highway by the rest area." A dispatcher spread the word stating, "There is a report of shots fired near the rest stop, possibly in the wooded area between the rest stop and the elementary school." Deputy Austin Clark, (unrelated to petitioner Gregory Clark), and his partner were then in a police car traveling northbound on I-55. They were already past the rest area so they looped back around. Twelve to fifteen minutes after the sound which led the principal to call, they drove into the rest area. Petitioner acknowledges, of course, that a report from a school of "shots fired" is an extremely serious matter, and the officers' investigation was essential.

The officers parked and walked toward Gregory. There were two other passenger cars on the "car side" of the rest area and an unknown number of trucks on the "truck side." There were no other individuals in sight. Gregory recognized that Deputy Clark and his partner were law enforcement. He did not get off the phone and he acknowledges that as they approached he was non-plussed. At that time,

however, he had no idea why they were walking up to him. In any case, because he was carrying a concealed weapon, Gregory acted in a manner consistent with his concealed carry training, that is, he immediately handed the officers his driver's license, military ID, retired, and his concealed carry permit. He also orally informed the officers that he was armed.

The officers asked if he had heard shots and he said no. The officer asked where he was going and he said Chicago.

Deputy Clark proceeded to "run" Gregory, that is, he used Gregory's identification cards to call Gregory's pedigree information into dispatch to check for warrants. Dispatch responded that Gregory was clean. Deputy Clark then handed Gregory back his three ID cards.

Petitioner's first Question Presented is whether Deputy Clark's running Gregory violated Gregory's Fourth Amendment right to be free of an unconstitutional seizure during what he believes was a voluntary interaction but which the Eighth Circuit analyzed either as a voluntary interaction or a *Terry* stop.

Events continued as follows. Gregory asked Deputy Clark "Why did you run me?" Deputy Clark responded with words to the effect of: "Don't play the race card with me." (Gregory is African-American). Their oral dispute continued a moment longer and then Deputy Clark and his partner walked into the rest area building to continue their investigation. Gregory waited a few moments, got some water out of

the back of his truck, and drove off. The officers had not told him to stay.

Deputy Clark and his partner found Gregory's departure suspicious and they followed him in their patrol car. They assert that over the next couple of miles they saw Gregory "moving around" in his cab in a suspicious manner. Gregory counters that the tint on his back window would have prevented them from seeing him "moving around" and "moving around" is innocent conduct anyway.

Being followed by the police made Gregory nervous. At the next exit he pulled off the highway and headed back south. Deputy Clark found the U-turn suspicious. Soon Gregory was leading a procession of several police cars. After several miles he stopped on an exit ramp. He had broken no traffic laws.

The events of the next few moments are the subject of petitioner's Second Question Presented.

After he stopped, Gregory put both his hands out the driver's side window of his truck. Meanwhile Deputy Clark pulled his vehicle behind Gregory's vehicle and Deputy Clark got out of his police vehicle and drew his weapon. Then, as shown on video and as stated by the district court:

> Defendant's bodycam recording shows that as he was approaching Plaintiff's vehicle, Defendant's gun was in a "low ready" position, but as he got closer, he raised his arm so that the gun was pointed at Plaintiff.

Petitioner's second Question Presented is whether raising the gun and pointing it at Gregory, who was neither fleeing nor actively resisting and who had given himself up, was objectively unreasonable from the perspective of a reasonable officer on the scene, and therefore whether Deputy Clark violated Gregory's Fourth Amendment right to be free of excessive force.

A different deputy eventually smelled Gregory's gun, concluded by the lack of odor that it had not been fired, and let Gregory go.

2. Procedural History

Petitioner filed a complaint in the Eastern District of Missouri on May 4, 2016 asserting seven federal constitutional claims. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343, which give the district courts jurisdiction over federal claims.

Petitioner amended and Respondent filed his Answer. The parties conducted discovery. Respondent filed a Motion for Summary Judgment and the parties briefed the Motion. On January 23, 2018 the District Court[1] granted Summary Judgment to Respondent on all claims. That decision constituted a final decision of the district court. That opinion is attached as Appendix B.

Petitioner filed his timely appeal to the Eighth Circuit Court of Appeals on February 14, 2018. That

[1] The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

court had jurisdiction pursuant to 28 U.S.C. § 1291, which gives the Circuit Courts jurisdiction over appeals of final decisions of the District Courts. On June 13, 2019 the Eighth Circuit affirmed.[2] Petitioner filed a timely Motion for Rehearing on June 25, 2019, and the Eighth Circuit denied that Motion on July 16, 2019. The Eighth Circuit's opinion was then a final decision of that court.

Petitioner is filing this Petition for a Writ of Certiorari within 90 days thereafter, Rules of the Supreme Court of the United States, Rule 13.1. Petitioner seeks review in this court of two of his original seven claims.

[2] Smith, Chief Judge, Colloton, and Erickson, Circuit Judges.

REASONS FOR GRANTING THE PETITION

1. Running a Subject during a Voluntary Interaction is an Unlawful Seizure

Gregory Clark was at a highway rest area talking on the phone. A nearby elementary school had reported shots fired from the general direction of the rest area. Twelve to fifteen minutes later Deputy Austin Clark, (unrelated to petitioner Gregory Clark), and his partner drove into the rest area and walked up to Gregory. There were two other cars on the "car side," and an unknown number of trucks on the "truck side." No one else was in sight.

Gregory had a concealed carry permit and consistent with his training he immediately handed the officers his driver's license, his military ID, (retired), and concealed carry permit, and he told the officers he was armed.

There ensued an oral interaction in which Gregory told the officers he had not heard shots fired and that he was going to Chicago.

Deputy Clark then "ran" Gregory, that is, he used Gregory's ID to call Gregory's pedigree into dispatch to check for warrants. Gregory came back clean.

Pursuant to 42 U.S.C. 1983 Gregory sues for an unconstitutional Fourth Amendment seizure while he was being run.

The Eighth Circuit's opinion first stated that the interaction was voluntary and the running

Gregory was not a seizure. The opinion then stated, in the alternative, that "these facts would give an objectively reasonable officer articulable suspicion to conduct a *Terry* stop."

In support of the conclusion that there was no seizure the Eighth Circuit stated:

> [I]nferred consent was never explicitly revoked. Gregory never gave the officers reason to believe that he no longer wished to engage in the contact. Gregory never asked for the return of his identification cards or whether he could leave. Gregory has not pointed to any physical restraint, blocking action, or other show of authority that would indicate he was not free to leave.

In *United States v. Palmer*, 603 F.2d 1286, 1288–89 (8th Cir. 1979) the court stated: "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person… The seizure requirement is fulfilled when it is apparent from the circumstances that the individual was not free to ignore the officer and proceed on his way," (citations and internal quotation marks omitted). *Muehler v. Mena*, 544 U.S. 93, 101, 125 S. Ct. 1465, 1471 (2005) reaffirms that the reciprocal situation, "mere police questioning", does not constitute a seizure.

In *United States v. Black*, 707 F.3d 531, 538 (4th Cir. 2013), the court stated "The retention of a citizen's identification or other personal property or effects is highly *material* under the totality of the circumstances analysis," (citations and internal

quotations omitted, emphasis in original). In *United States v. Mendenhall*, 446 U.S. 544, 551, 100 S. Ct. 1870, 1875 (1980) this court stated that "the Fourth Amendment's requirement that searches and seizures be founded upon an objective justification governs all seizures of the person, including seizures that involve only a brief detention."

During the time Deputy Clark was holding Gregory's ID cards and talking to dispatch Gregory was not free to go. First, no one in such circumstances would leave without his ID cards. Second, if Gregory had told the officers that he was tired of the whole thing and wanted his IDs back so he could leave, Deputy Clark would surely not have stopped his call, handed him his cards back and said "Thanks, see you later." No reasonable person in Gregory's position would have thought otherwise. *See United States v. Guerrero*, 374 F.3d 584, 589 (8th Cir. 2004), discussing whether a reasonable person in the position of the subject would have thought he was free to leave.

Although neither the Eighth Circuit nor the district court opinions held so explicitly, the opinions hint that when Gregory handed his IDs to Deputy Clark, he implicitly consented to the officer running him, perhaps because he handed the officer the IDs of his own volition instead of at the officer's request. Respectfully, petitioner suggests it is not reasonable to believe that handing one's ID to an officer as part of informing him that he is armed, as one should do in such circumstances, manifests consent to being run and thereby seized.

Further, running a subject is materially different from the *de minimus* intrusion of looking at a subject's ID and returning the ID as was approved in *Mendenhall*.

Innumerable cases, of course, make it unconstitutional to seize a subject during a voluntary interaction, *See e.g. United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989).

This court should grant certiorari to determine whether running a subject during a voluntary interaction is an unconstitutional seizure.

In the interest of completeness, petitioner will now address the Eighth Circuit's alternative analysis, that there was articulable suspicion for a *Terry* stop, *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968).

In twelve to fifteen minutes numerous people and cars come and go from a rest area. While Gregory was the only person in view, there were other vehicles present. The dispatcher's description of the location was not limited to the rest area, for the dispatcher had said: "There is a report of shots fired near the rest stop, possibly in the wooded area between the rest stop and the elementary school." The noise may have been from a vehicle backfire. Gregory's possession of a concealed carry permit showed he had already been through a background check and that he was a trusted citizen. Petitioner thus suggests that from the perspective of a reasonable officer on the scene, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), Gregory's presence in the rest area failed to provide articulable suspicion that he was the source of "shots fired."

The next fact, that Gregory had told the officers he was armed and had provided proof of his license to carry a weapon, also failed to provide reasonable suspicion.

In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750, 130 S. Ct. 3020, 3025, (2010), this court applied the Second Amendment right to bear arms to the states. In *Northrup v. City of Toledo Police Department*, 785 F.3d 1128, 1132 (6th Cir. 2015) the Sixth Circuit held that having a gun when one has a right to a have a gun, without evidence of dangerousness does not create reasonable suspicion:

> Clearly established law required Bright to point to evidence that Northrup may have been "armed *and dangerous.*" *Sibron v. New York,* 392 U.S. 40, 64, 88 S. Ct. 1889, 1903 (1968) (emphasis added by 6th Circuit). Yet all he ever saw was that Northrup was armed—and legally so. To allow stops in this setting "would effectively eliminate Fourth Amendment protections for lawfully armed persons," (citations omitted).

In *Bellotte v. Edwards*, 629 F.3d 415, 423 (4th Cir. 2011) the court made the same point with strong language:

> It should go without saying that carrying a concealed weapon pursuant to a valid concealed carry permit is a lawful act… Most importantly, we have earlier rejected this contention: If the officers are correct, then the knock and announcement requirement would never apply in the search of anyone's home who legally

> owned a firearm. We recognized over a decade ago that this clearly was not and is not the law, and no reasonable officer could have believed it to be so. (Internal quotations and citations omitted).

The weapon also therefore provided no articulable suspicion.

While petitioner acknowledges that in the totality of the circumstances several innocent activities taken together may create reasonable suspicion, *United States v. Sokolow,* 490 U.S. at 9, petitioner suggests the only two facts here which conceivably support such suspicion, being in the general area of "shots fired" twelve to fifteen minutes after the noise and being armed, even taken together, still amount to insufficient suspicion. Petitioner thus suggests that there was no articulable suspicion for a *Terry* stop.

If the Eighth Circuit's voluntary interaction analysis stands, there will be a major change in the way law enforcement interacts with citizens. Hereafter during voluntary interactions officers will be allowed not just to examine identification, but will be further allowed to run the citizens for warrants. Perversely, once word reaches the street that merely acceding to an officer's request for ID will result in being run, then during voluntary interactions subjects may decline to turn over their IDs.

Petitioner suggests that voluntary interactions in which officers examine ID occur in America many, many times per day. Allowing officers to run subjects in those circumstances will open the door to unlawful

seizures. Petitioner suggests that this court should grant certiorari to stop that practice.

2. Pointing a Gun at a Subject Who has Surrendered is Excessive Force

After Gregory left the rest area the officers pursued him on the interstate for nineteen miles. He violated no traffic laws. As the pursuit continued the number of patrol cars in the procession increased, although none lit their emergency lights or in any way directed him to pull over. In any case, Gregory stopped on an exit ramp and put both his hands out his driver's side window. He thereby showed surrender and no resistance.

Petitioner would have no quarrel if Deputy Clark had kept his weapon in the "low ready" position. Petitioner asks this court to review, however, whether under this circumstance of surrender it was excessive force for Deputy Clark to raise his gun and point it at Gregory. (In his deposition Deputy Clark claimed he kept his gun in the low ready position. Deputy Clark's bodycam video as shown in the reflection of the rear door of the black Toyota Tundra, however, proved otherwise).

After briefing in the Eighth Circuit but before oral argument, the Eighth Circuit issued *Wilson v. Lamp*, 901 F.3d 981 (8th Cir. 2018), a case in which the court denied qualified immunity to officers who pointed guns at a subject after they knew the subject was the wrong person-although in fairness petitioner notes that in that case the subject was by then out of his vehicle and had been patted down.

After the court issued its opinion but before the filing of the Motion for Rehearing, the Eighth Circuit issued *Rochell v. City of Springdale Police Dep't, et al.*, No. 17-3608, 2019 WL 1859237, (April 25, 2019), unpublished. That case held:

> [A] police officer uses excessive force by pointing his service weapon at the head of a suspect who has dropped his weapon, has submitted to arrest, and no longer poses an immediate threat to the safety of officers or others. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989) (when determining whether force was excessive, relevant considerations include severity of crime, threat suspect posed to officers or others, and whether suspect resisted arrest or attempted to flee); *Wilson v. Lamp*, 901 F.3d 981, 989–90 (8th Cir. 2018) (officers may reasonably brandish weapons when confronted with serious danger in course of investigative stops, but they are not permitted to ignore changing circumstances and new information that emerges).

(Before the Eighth Circuit handed down its opinion petitioner wrote a Federal Rule of Appellate Procedure 28(j) letter drawing the court's attention to *Wilson* and *Rochell*).

Despite *Wilson* and *Rochell* the Eighth Circuit granted Deputy Clark qualified immunity and wrote:

> Gregory signaled compliance by putting his hands out the driver's side window. A reasonable officer was justified in believing the

> situation was not fully under control until Gregory had been removed from the vehicle, patted down, and restrained.

In his concurrence in *Rochell* the Honorable Steven M. Colloton stated:

> *Wilson* held not only that pointing a firearm at a compliant suspect was unreasonable, but that the unreasonableness of that conduct was clearly established as of September 2014—more than a year before the incident in this case. The *Wilson* decision is debatable. Despite the Supreme Court's admonition to ask whether "existing precedent squarely governs the specific facts at issue," *Wilson* relied on cases involving the use of physical force or violence against compliant subjects to conclude that the unreasonableness of pointing a gun was clearly established. *Id.* at 990-91.

The Eighth Circuit opinion, plus the word "debatable" in *Rochell*, leaves the border between excessive and acceptable force more not less "hazy", *Kisela v. Hughes*, 138 S. Ct. 1148, 1153, (2018). A hazy border is fair neither to the public nor to police officers.

Petitioner notes that on August 28, 2019 Cody Ross, the original defendant officer in *Rochell*, filed in this court a now pending Petition for Certiorari, No. 19-263.

Petitioner notes that this is not a case in which the subject drove at high speeds, fled in a getaway car, or fought the officers, and the officers then pointed a

gun to make the subject surrender. This is a case in which the subject had already surrendered and the officer then raised and pointed his gun. Petitioner suggests that this court needs to clarify whether an officer may raise and point a gun at a subject who has already surrendered.

But there is more. The Eighth Circuit's opinion inserts into the analysis the amount of time the gun may be pointed at the subject:

> Gregory relies on cases from this circuit and other circuits that have found that pointing a gun may constitute an unconstitutional display of force. E.g., *Rochell v. City of Springdale Police Dep't*, No. 17-3608, 2019 WL 1859237 (8th Cir. Apr. 25, 2019); *Wilson v. Lamp*, 901 F.3d 981 (8th Cir. 2018); *Mlodzinski v. Lewis*, 648 F.3d 24, 38 (1st Cir. 2011); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1192-93 (10th Cir. 2001). Those cases are not analogous to the circumstances confronting the officers in this case. They involve incidents where guns were pointed at suspects for unreasonably long periods of time, well after the police had taken control of the situation.

The opinion thus suggests that if an officer only points a gun at a non-resisting subject for a short time there has been no excessive force. That ignores for example, *Feemster v. Dehntjer*, 661 F.2d 87, 89 (8th Cir. 1981) holding in a prisoner context that an officer's use of any force is unreasonable when the individual "quietly submits." It also ignores, for example *Green v. City & Cty. of San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014), a case in which among

other acts officers pointed guns at the subject and the court said:

> The question therefore becomes whether this degree of intrusion was justified by the governmental interests at stake. To assess the gravity of the government interests, we have typically considered (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994), (internal quotations omitted). Where these interests do not support a need for force, *any* force used is constitutionally unreasonable. *Lolli v. County of Orange,* 351 F.3d 410, 417 (9th Cir. 2003) (internal quotation marks omitted, emphasis in original).

The *Green* court also held, 751 F.3d at 1050:

> While the crime at issue (stolen vehicle or plates) was arguably severe, there was no indication at the scene that Green posed an immediate threat to the safety of the officers or others.

This case is similar to *Green* in that in both cases the crime under investigation was serious, but the other factors were in the subject's favor. The Eighth Circuit's opinion here thus conflicts with the Ninth Circuit's opinion in *Green*.

Petitioner also notes *Correa v. Simone*, 528 F. App'x 531 (6th Cir. 2013) a tasering case where there

was concern that the subject had a gun but he was not resisting arrest and the court denied qualified immunity. The court stated at 534 that in 2010 "it was clearly established that tasing a suspect who was potentially armed with a gun, but who offered no resistance to arrest, violated the suspect's Fourth Amendment rights." Surely pointing a gun at a subject, and therefore threatening to kill the subject, is more serious than tasing a subject. The *Correa* court also said at 535-536:

> The precedent in this Circuit clearly holds that a police officer must encounter some level of resistance by the defendant to justify using a taser. The mere possession of a gun is not, in and of itself, resistance unless coupled with something more, such as a physical or verbal action. Holding otherwise would mean ignoring a significant amount of precedent establishing the importance of a defendant's resistance to an officer's calculation of whether to use his or her taser. Using a taser on a potentially armed suspect who is complying with all officer commands and not resisting violated clearly established law as of May 2010.

Subjects surrender to law enforcement in an obvious manner in America many times per day. The Eighth Circuit opinion at issue here, which allows officers to raise their guns at subjects in those circumstances, countenances unconstitutional excessive force. Petitioner suggests that this court should grant certiorari to stop that practice.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

W. Bevis Schock
Counsel of Record for Petitioner
7777 Bonhomme Ave., Ste. 1300
St. Louis, Missouri 63105
314 726-2322
wbschock@schocklaw.com

October 2, 2019