No. 19-466

In the Supreme Court of the United States

ZACHERY PITTMAN,
Fayetteville Police Department,
Petitioner,

v.

HERMAN HARRIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS COURT SHOULD ACCEPT REVIEW TO CLARIFY APPLICATION OF *SCOTT V. HARRIS*

In *Scott v. Harris*, this Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record," – not a single piece of evidence – "so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. 550 U.S. 372, 380 (2007) (emphasis added). Harris argues, and the Fourth Circuit agreed, that "the record," as referenced in *Scott*, refers to a single piece of evidence. Thus qualified immunity does not attach unless a non-moving party's version of events is "blatantly contradicted" by a single piece of evidence. If anything, Harris' argument on this issue proves the need for review by this Court.

Video evidence is not always available. It is almost always incontrovertible. The Fourth Circuit opinion eliminates qualified immunity if a self-serving narrative is not discredited by one piece of evidence, like a video. *Scott* does not direct such an outcome. And Harris' account –that Officer Pittman justifiably shot him to the ground and then stood over him and unjustifiably shot again – is "blatantly contradicted by the record," including Officer Pittman's description of events, the statements of audio witnesses, photographs, affidavits of responding officers, Harris' guilty plea to felony assault of an officer with a firearm, and Harris' first *pro se* complaint.

If this case presented "a one-on-one swearing contest between Harris and Pittman," the decision below would be correct, "but it is hardly that." *Harris v. Pittman*, 927 F.3d 266, 284 (4th Cir. 2019) (Wilkinson, J. dissenting). *Scott* directs a district court to disregard "visible fiction" when ruling on a motion for summary judgment. 550 U.S. at 381. What is unclear, as this case demonstrates, is when a non-party's version of events may be ignored; whether the version should be judged against each piece of evidence in isolation for a "blatant contradiction," or whether the version should be judged against the record *in toto*. This Court should accept review to resolve this uncertainty.

II. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE FOURTH CIRCUIT RELIED ON FACTUALLY DISTINCT CASE LAW TO FIND A "CLEARLY ESTABLISHED" RIGHT

Harris contends that, even if the Fourth Circuit misapplied settled law in its analysis of a "clearly established," right, such error does not warrant review by this Court. To the contrary, this Court has recently, and repeatedly, accepted review "to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' " *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017); *City and County of San Francisco v. Sheehan,* 575 U.S. 600, n. 3 (2015) (collecting cases). In order for a Fourth Amendment right to be "clearly established," a plaintiff must "identify a case where an officer acting under similar circumstances as [a defendant] was held to have violated the Fourth Amendment." *Pauly*, 137 S. Ct. at 552.

On this question, Harris maintains that *Brockington v. Boykins*, 637 F.3d 503, 507–08 (4th Cir. 2011) and *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005) both present the "similar circumstances" required for a right to be "clearly established." Those cases are "similar" on a macro-level. Both explore when a suspect has a "clearly established" right to be free from a police shooting. But neither case involved a suspect that disarmed an officer in a dark and wooded area, tried to kill the officer with his own service weapon, and refused repeated instructions to stand down, thereby demonstrating his willingness to do anything to escape the officer. There is no case law that acknowledges a "clearly established" right under these circumstances.

This Court has repeatedly held that qualified immunity is essential to "society as a whole." *Sheehan,* 575 U.S. 600, n. 3 (2015) (collecting cases). Despite this Court's frequent rulings on the issue, the Fourth Circuit has disregarded this Court's clear and unambiguous directives. *Harris v. Pittman*, 927 F.3d 266, 284 (4th Cir. 2019) (Wilkinson, J. dissenting) (collecting cases and noting that "[a]t some point a pattern of Court decisions becomes a drumbeat, leaving one to wonder how long it will take for the Court's message to break through"). This case provides this Court an important opportunity to once again stress the importance of qualified immunity and the necessity of only finding clearly established law based upon cases that are not factually distinct.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO DEFINE WHEN QUALIFIED IMMUNITY IS AVAILABLE UNDER *SCOTT V. HARRIS*

Finally this case is the ideal vehicle to clarify the scope of qualified immunity when video evidence does not exist, but a non-moving party's version of events is "blatantly contradicted by the record," as contemplated by *Scott v. Harris*. This is shown by the parties briefing.

Officer Pittman has DNA evidence, ear-witness testimony, a life-threatening fight in the dark, photographs of his injuries, multiple and contradictory statements from Harris given under oath, and a guilty plea by Harris to attempting to shoot Officer Pittman in the head with his own service weapon. All this stacked against a single self-serving affidavit utterly without any evidentiary support in the record. If any case without a video is ripe for analysis under *Scott*, it is this one.

The Fourth Circuit opinion is hardly unremarkable or commonplace, as Harris suggests. On this point, Harris claims "[t]he decision below in no way suggests that an officer is not entitled to qualified immunity for using deadly force to defend himself when faced with a threat to his life in the midst of an ongoing and serious physical struggle." Yet that is exactly what the Fourth Circuit decision portends. Officer Pittman was undeniably in a life and death struggle. The Fourth Circuit denied his prayer for qualified immunity, ostensibly because Harris' tale could not be discredited by video.

This "Court has repeatedly emphasized that qualified immunity 'is an immunity from suit rather than a mere defense to liability; and like an absolute

immunity, it is effectively lost if a case is erroneously permitted to go to trial.' " *Harris*, 927 F.3d at 284 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (Wilkinson, J. dissenting). "If a case goes to trial when a valid basis for summary judgment exists, the entire purpose of the immunity is thwarted." *Id.* Officer Pittman was stripped of his immunity, despite the fact that no reasonable jury could possibly believe Harris' self-serving statement.

Incredibly, Harris concludes his argument by claiming, "the decision below does not apply to an officer who acts in the manner that [Officer Pittman] claims he acted." Not true. In fact, Officer Pittman is Exhibit A to the case against the accuracy of this statement. Officer Pittman will stand trial for actions taken to save his life; actions for which he would have immunity, but for a fanciful description of the shooting that is "blatantly contracted by the record." This decision undeniably jeopardizes immunity available to constables like Officer Pittman. And "qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'" *Pauly*, 137 S. Ct. at 551-52 (quoting *Pearson v. Callahan,* 555 U.S. 223, 231 (2009).

CONCLUSION

For the foregoing reasons, as well as the arguments set out in the Petition for Writ of Certiorari, Officer Pittman respectfully requests that his writ of certiorari be granted.

Respectfully submitted,

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