

No._____

**In The
Supreme Court of the United States**

MONTYE BENJAMIN, as Administratrix of the
Estate of JAYVIS LEDELL BENJAMIN,
Petitioner,
v.

LYNN THOMAS,
Respondent.

**On Petition For A Writ Of Certiorari To The United
States Court of Appeals for the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defense of qualified immunity raised by a law enforcement officer in a § 1983 action is a valid basis for a Federal court to resolve disputed issues of fact in favor of the defendant and grant summary judgment

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	iv
CONSTITUTIONAL PROVISIONS AND	
STATUTES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISION.....	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT.....	9
REVIEW IS NECESSARY TO GIVE SPECIFIC GUIDANCE TO THE LOWER COURTS ON THE APPLICATION OF THE DOCTRINE OF QUALIFIED IMMUNITY IN § 1983 ACTIONS TO SUMMARY JUDGMENT MOTIONS WHERE GENUINE ISSUES OF DISPUTED FACT EXIST	
CONCLUSION	16

Appendix A - Opinion of the Eleventh Circuit Issued 3-13-2019.....	App. 1
Appendix B - Opinion and Order of the District Court Granting Motion for Summary Judgement and Dismissal Entered 12-20-2017.....	App. 15
Appendix C - Judgement of the Eleventh Circuit Issued as Mandate 4-11-2019.....	App. 34
Appendix D - Judgement of the District Court entered 12-20-2017.....	App. 36
Appendix E - United States Constitution, Amendment IV.....	App. 37
Appendix F - 42 U.S.C. § 1983.....	App. 37
Appendix G - Rule 56, Federal Rules of Civil Procedure.....	App. 37
Appendix H - Defendant's Motion for Summary Judgment filed 4-10-2017.....	App. 40
Appendix I - Plaintiff's Response to Defendant's Motion for Summary Judgment filed 4-28-2017.....	App. 53

TABLE OF AUTHORITIES

CASES	PAGE(S)
<u>Tolan v. Cotton</u> , 572 U.S. 650 (2014).....	<u>passim</u>
CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. CONST. Amend. IV.....	11

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Montye Benjamin, as the Administratrix of the Estate of her late son Jayvis Ledell Benjamin, respectfully prays that a writ of certiorari be issued to review the judgments of United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on March 13, 2019.

OPINIONS BELOW

The March 13, 2019 opinion of the United States Court of Appeals for the Eleventh Circuit whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, pages App. 1.

JURISDICTION

This Petition is filed within 90 days of the March 13, 2019 decision of the United States Court of Appeals for the Eleventh Circuit and two extensions granted by this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment IV

42 U.S.C. § 1983

Rule 56, Federal Rules of Civil Procedure

STATEMENT OF THE CASE

On January 18, 2013, at approximately 5:00 p.m. Sgt. Lynn Thomas (since promoted to Chief of Police) of the Avondale Estates Police Department was on routine patrol when he observed a Ford Mustang proceed through the intersection of Covington Highway and Kensington Road in Avondale Estates, Georgia without stopping. (App. 54). The Mustang was traveling at a high rate of speed, and Thomas then began a pursuit of the vehicle. (App. 54). The dashboard video camera on Thomas' patrol car was activated and recording. (App. 54)

The video establishes that almost immediately after starting the pursuit, Thomas lost sight of the vehicle, and eventually found that it had crashed in the front yard of a residence a short distance away at 3113 Kensington Road in Avondale Estates, Georgia. (App. 54). Jayvis Benjamin was seated behind the wheel of the car, and Thomas stopped his vehicle and exited, shouting at Benjamin to remain in the car. Benjamin followed those instructions. (App. 54). Thomas approached the Mustang, shouting at him to remain in the car, then drew his firearm and shouted for Benjamin to get out of the car, and pushed him as he sat. (App. 54). Because the driver's side door was damaged, Jayvis Benjamin started to climb out of the window. Thomas pointed his firearm at Benjamin and began to back up as he continued shouting. (App. 54). At no point did Thomas give any warning that he was going to discharge his firearm. (App. 54).

Benjamin exited the vehicle through the driver side window and stated, "Y'all see what he's trying to do to me?" appearing to address other people in the area. (App. 54). Benjamin's hands were clearly visible and held nothing. He continued to walk, not run, forward at an angle from Thomas as Thomas continued to back away. (App. 54). While Benjamin was 6 feet away from Thomas, and for reasons not made clear, Thomas fired a single gunshot fatally penetrating Benjamin's chest. (App. 54). The penetrating gunshot wound entered from the chest and traveled front to back, slightly left to right, and downward. (App. 54). As Benjamin is heard groaning, Thomas did not administer aid after shooting Benjamin. Benjamin died of his injuries that evening. He was 19 years old at the time.

The DeKalb County District Attorney's Office conducted an investigation into the death of Jayvis Benjamin. (App. 79). A Civil Grand Jury was convened to hear testimony on this matter as one of six-cases involving police officer-related shootings. (App. 79-81). On April 30, 2015, Jayvis Benjamin's mother, brother, sister, and aunt (Montye Benjamin, Steven Benjamin, Stephanie Brown, and Penelope Pugh, respectively) went to the District Attorney's Office prior to Montye Benjamin's testimony before the Grand Jury. (App. 79-81, 84). They went to a conference room and were seated, and a monitor displayed the dashboard camera video, which was on a flash drive and appeared to be a VLC video file. (Id.). Assistant District Attorney Golden played the video on the computer. The time counter on the video appeared approximately 40 minutes or more. However, Ms.

Golden only played the first 8:13 minutes (approximately) of the video for them. The video they saw was described as follows:

8. The video we saw was the dashboard camera of Officer Lynn Thomas which starts with the officer stopped at traffic light when vehicle traveling in a perpendicular direction comes into view and passes in front of Thomas' car. Thomas' car then turns to follow the other vehicle, which is visible in the camera view for a moment, then disappears. After a short period of time, Thomas' vehicle pull over onto a grassy area, and a Ford Mustang was on the grassy area which appeared to crash into a parked car. **When Thomas' vehicle comes to a stop, Thomas jumped out of his car and immediately pointed his weapon at Jayvis Benjamin.** Thomas is in the field of view of the dashboard camera. Also visible in the right-hand edge of the video is a white vehicle which is oncoming traffic. Thomas is approximately 5-10 feet away from the Mustang, which is still occupied by Jayvis Benjamin, who is in the driver's seat. The driver's side door appears to have damage. Thomas yells at Jayvis Benjamin to stay in the car, and Jayvis Benjamin exits the car from the driver's side window face-first, and

catches himself and stands up. Thomas tells Jayvis to get back into the car, and starts to walk backward, and Jayvis walks away from Officer Thomas, looks around and appears to address several people, including the driver of the white car on the right hand side of the video, and says "Yall see this shit?" and starts to walk past Officer Thomas. At this point, Jayvis' right hand is raised over his head, and the other hand is at his side but clearly visible. **At no point does Jayvis lunge at the officer, or attempt to reach into his pocket.** Officer Thomas placed his free hand on Jayvis' torso, still pointing his firearm, and appears to give him a push, and Jayvis pulls away from Officer Thomas and tries to move away from him, trying to move past Officer Thomas. At this point both of them go to the left of the screen and go off camera. Approximately 1-2 seconds after both Jayvis and Lynn Thomas go off-camera, a single gunshot is heard. At this point, Officer Thomas is heard calling for backup on his radio, and Jayvis Benjamin is struggling to breathe. On the right hand side of the video, another police officer pulled up on the right hand side of Thomas' vehicle, and exists the vehicle. He is within the field of view of the camera, and appears to look around the scene.

Paramedics arrive, but they are not visible on the video. Paramedics say they cannot get the ambulance through, and they are heard rendering aid to Jayvis and talking to him. At approximately 7:53 minutes, Officer Thomas is heard speaking with what appears to be other officers, and begins to give his account of what occurred. Thomas is heard saying that Jayvis attacked him, and utters the word "Bang," and body movements are heard as if he were gesturing, but none of this is on camera.

9. As Thomas started giving his account, Ms. Golden shut the video off.

...

15. The next time I saw a video depicting the shooting was when a portion of the video was played on the news in March, 2016. The video clip that was played on the news was only a few seconds long. The video clip on the news appeared to be heavily edited and was different from the video I had seen in the District Attorney's Office and the Grand Jury.

16. In March, 2017, I watched a 49:33 minute video supplied to me by Patrick Michael Megaro, Esq., which was supplied to him by the Defendant's attorney. That video (Video # 2) has several differences from the video I saw

at the District Attorney's Office and in the Grand Jury (Video # 1).

17. First, Video # 1 was a much higher quality, higher resolution than Video # 2, it is difficult to make out faces, expressions, and other details that were plainly visible on Video # 1.

18. Second, Video # 2 appears to be warped and skewed, as if someone had cropped one side of the video and had stretched the image. Video # 1 had a much wider angle of view – the entire video occupied the entire screen. Video # 2 appears to be cut off on both the left and right sides, and the view is restricted. As a result, Video # 2 shows substantially less of what occurs between Jayvis and Officer Thomas on the left side of the screen immediately prior to the shooting.

19. **On Video # 2, because the left side of the screen is cut off, what is not visible is the actions of Officer Thomas in placing his hands on Jayvis' body and pushing him. What is also not visible is Jayvis pulling away from Officer Thomas and attempting to walk past him.** This is contrary to what Officer Thomas claimed, which is that Jayvis lunged toward him, not away from him.

20. I do not know what happened to the original video that I saw, but I do know that the video supplied by the

Defendant to my attorney is not the same video that I saw at the District Attorney's Office. It appears to be intentionally edited to remove the most important part immediately before the Defendant killed my son.

(App. 85-87) (emphasis added).

After the presentation, the Civil Grand Jury recommended the case be presented to a Criminal Grand Jury in DeKalb County to consider charges against Thomas for the unjustified killing of Jayvis Benjamin. However, instead of presenting the case to a criminal Grand Jury, on March 11, 2016, the District Attorney notified Montye Benjamin he would not pursue criminal charges against Thomas stemming from the unlawful and unjustified killing of Jayvis Ledell Benjamin.

Thereafter Montye Benjamin, acting in her capacity as the personal representative of the Estate of Jayvis Ledell Benjamin, commenced this suit pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Georgia on May 12, 2016. Thomas moved for summary judgment on April 10, 2017. (App. 40). Benjamin opposed the motion in writing on April 28, 2017. App. 53). On December 19, 2017, the District Court entered an order granting Thomas' motion for summary judgment on the basis of qualified immunity. (App. 15).

Benjamin perfected an appeal to the Eleventh Circuit, which affirmed the order granting summary judgement on March 13, 2019. (App. 1).

This Petition follows.

REASONS FOR GRANTING THE WRIT

**REVIEW IS NECESSARY TO GIVE SPECIFIC
GUIDANCE TO THE LOWER COURTS ON THE
APPLICATION OF THE DOCTRINE OF
QUALIFIED IMMUNITY IN § 1983 ACTIONS TO
SUMMARY JUDGMENT MOTIONS WHERE
GENUINE ISSUES OF DISPUTED FACT EXIST**

In the concurring opinion of Tolan v. Cotton, 572 U.S. 650 (2014), Justice Alito opined:

In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F. 3d 299, 304 (CA5 2013). Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party,

is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.

Tolan v. Cotton at 661.

There should be no confusion by the various Circuit Courts of Appeals as to the correct standard of review for an order upon a summary judgment motion. Every lawyer has learned in their first year of law school civil procedure class that summary judgment is only appropriate when there are no disputed issues of material fact.

When a case involves not a normal contractual dispute or a personal injury case, but involves a claim against a law enforcement officer under 42 U.S.C. § 1983 for deprivation of civil rights and the inevitable defense of qualified immunity, confusion persists. The lower courts now start to engage in fact-finding and frequently resolve disputed issues of fact in favor of the moving party in § 1983 cases – almost always the law enforcement officer.

The Tolan v. Cotton case referenced above implicitly recognized this phenomenon. The instant case here is yet another manifestation of this same phenomenon: when a § 1983 case is brought against a law enforcement officer, especially for excessive force, the lower courts tend to “err on the side of

caution” and dismiss otherwise legitimate claims that should be tried before a fact-finder.

In *Tolan v. Cotton*, police officers observed Tolan and his cousin drive a car that police mistakenly believed to be stolen, and exit the car. One of the officers drew his sidearm and ordered the two men to lie face-down. Tolan's parents heard the commotion and came outside, and a struggle between police and Tolan's mother ensued. The facts of what happened during the struggle were disputed; however, what is clear is that Tolan was shot in the chest by Cotton, one of the officers who responded to the scene, and survived. Tolan was unarmed.

Tolan filed a § 1983 action, raising a claim of excessive force. The District Court granted summary judgment in favor of the defendant police officer, finding that Cotton's use of force was not unreasonable and therefore did not violate the Fourth Amendment.

The Fifth Circuit affirmed, ruling that at the time Cotton shot Tolan, “it was . . . clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an ‘immediate threat to [his] safety.’” *Id. at* 654-655. The Court of Appeals reasoned that Tolan failed to overcome the qualified-immunity bar because “an objectively-reasonable officer in Sergeant Cotton's position could have . . . believed” that Tolan “presented an ‘immediate threat to the safety of the officers.’” *Id. at* 654-655. In support of this conclusion, the Fifth Circuit relied upon Cotton's

version of the facts, which had been disputed by Tolan and his witnesses.

In a unanimous decision, this Court reversed, holding that the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to plaintiff with respect to the central facts of the case. Reviewing the disputed facts set forth in the record, this Court arrived at the “inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion.” Id. at 659.

Here, like in Tolan, both the District Court and the Eleventh Circuit credited Lynn Thomas’ version of what occurred on January 18, 2013 between him and Jayvis Benjamin. However, what makes this case slightly different, and perhaps more egregious than the Tolan v. Cotton case, is that unlike Tolan v. Cotton, in this case there was an actual video of what occurred from the dashboard camera of Lynn Thomas’ police cruiser. Because Jayvis Benjamin died of his injuries, there was only one surviving witness. Thus, Lynn Thomas’ testimony was pitted against the video.

Adding further controversy to this case is that the video produced by the defense during discovery is not the entire video that is (or was at one time) in the possession of the DeKalb County District Attorney’s Office. The video produced by the DeKalb County District Attorney and shown to the Benjamin family during the Grand Jury presentation contradicted the Defendant’s version of events, and supported a

version consistent with excessive force.¹ In contrast, there is evidence that the video produced by the defense and relied upon by the Eleventh Circuit was altered so as to support the defense version of events.

To solve this inconvenient problem, the Eleventh Circuit ruled that the affidavits (not the testimony) of four people who saw the complete, unedited version of the video were inadmissible. App. 2. The Eleventh Circuit then proceeded to rely upon the edited, altered version of the video to find that Thomas' version of what occurred was factually correct, while at the same time recognizing that there were factual disputes as to what occurred. App. 2-3. Central to the Eleventh Circuit's factual determination was its finding that “[t]he record contains no indication that this unedited video is available anywhere” despite four witnesses' sworn statements to the contrary, and a concession by the defense that the original video was in the possession of the District Attorney. App. 9. Using these findings of fact, the Eleventh Circuit went on to conclude Thomas's actions were reasonable, necessitating a finding of qualified immunity. (App. 11.)

¹ The issue of the “missing” video was addressed in the courts below, and at oral argument, with the panel expressing concern that the video produced was not a true and complete copy of the video that was actually recorded. The defense acknowledged that there was another version of the video that existed at oral argument. An audio version of the oral argument in the Eleventh Circuit is in counsel’s possession, should this Court require it for review.

What the Eleventh Circuit did in this case was almost identical to what the Fifth Circuit did in the Tolan v. Cotton case.

The phenomenon of the lower courts resolving disputed issues of fact in favor of the law enforcement officer is a direct result of a hard fact. That hard fact is that the chances that someone like Montye Benjamin will have her case heard by this Court, and a clear error corrected, is approximately 1%. Against these odds, 99-1, a District Court or a Circuit Court is free to protect the law enforcement officer from being judged by a jury of their peers – a perhaps frightening prospect for the police officer, or more so for the insurer or municipal entity that is obliged to indemnify them if a jury finds that they violated a citizen's civil rights.

This is especially so in light of a number of high-profile events that have taken place since Tolan v. Cotton was decided in 2014, involving deadly encounters between police officers and unarmed citizens. Preventing that case from going to trial therefore takes on a whole new importance, because another hard fact is that it is legally harder to disturb a jury's verdict once it has been rendered.

In his concurring opinion in Tolan v. Cotton, Justice Alito prophetically observed

that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, e.g., this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* §5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari")."

Tolan v. Cotton at 661.

Because this continues to be a problem, this Court has two choices. It can act on this very important issue that is front and center in the national conversation, and has been for the last 5 years. Or it can leave things the way they are, with a resultant loss of public confidence in the judiciary to right wrongs perpetrated by those who wear a badge.

This case presents this Court with the perfect opportunity to address this problem that is, and would otherwise continue to be, capable of repetition yet evading significant review.

CONCLUSION

For the reasons set forth above, this Court should grant this petition herein in its entirety

Respectfully submitted on this 8th day of August, 2019.

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