

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

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the Eleventh Circuit properly affirmed the grant of summary judgment to Respondent based on qualified immunity by first excluding inadmissible affidavits submitted by Petitioner and then construing the remaining admissible evidence in favor of Petitioner Benjamin.

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STATEMENT OF THE CASE

On January 18, 2013, Respondent was sitting at a traffic light in his patrol car when he witnessed Jayvis Benjamin¹ speed through an intersection, running a red light. (App.3, 43). Jayvis then barreled through a residential area in Avondale Estates, Georgia, ultimately, striking a power pole and crashing into a parked car in the driveway of a house. (*Id.*).

Respondent followed Jayvis into the neighborhood and shortly came upon the wreck scene. (App.3, 44). Respondent got out of his police car, and as he approached Jayvis' wrecked vehicle, he gave repeated and loud verbal commands for Jayvis to remain in the car. (*Id.*). Jayvis ignored the commands and attempted to get out of the car. (*Id.*) When Respondent got to the car, he reached in through the broken driver's side window to try and contain Jayvis, continuing to give commands to "stay in the car." (*Id.*). Jayvis ignored those commands, struck the officer, climbed out of the car through the driver's side window and turned toward Respondent. (*Id.*). Respondent then began backing up, drew his gun and ordered Jayvis to "get back in the car" and then when he did not, to "get down." (*Id.*). Jayvis ignored those commands as well and instead began advancing on Respondent, waving his arms, saying, "Ya'll see what he's trying to do to me?" (App.3-4, 44). Respondent retreated, continuing to point his

¹ The deceased is referred to herein as "Jayvis" or "Jayvis Benjamin" to avoid confusion with the Petitioner, Montye Benjamin and her other son, Steven Benjamin.

weapon at Jayvis. (App.4, 44). All of these events were recorded on Respondent's dash cam of his police car. (App.3, 48-49).

Jayvis forced Respondent to retreat so far that he and Jayvis moved out of the frame of the camera. Two to three seconds later, a scuffle could be heard, and then a single gunshot. (App.4, 44). Eight eyewitnesses described by affidavit testimony the events that occurred, including those 2-3 seconds when Jayvis and Respondent were outside the camera's purview. (*Id.*). They were all consistent that: Jayvis continued to pursue Respondent; he did not comply with commands to get back in the car, get down or stop; and Jayvis was much taller and larger than the officer. (App.4). Some witnesses said that Respondent fell backwards, some testified he tripped over bushes and fell, others thought he crouched or remained standing. (*Id.*). The Eleventh Circuit accepted the version of the facts in the record most favorable to Benjamin: that Respondent remained standing and was approximately six feet away from Jayvis when he fired the single shot. (*Id.*).

In opposition to Respondent's summary judgment motion, Petitioner submitted affidavits from herself and her son, Steven, contending for the first time that the dash cam video submitted by the Respondent had been altered. (App.6). She also claimed that she had viewed another, allegedly missing video at the District Attorney's office that showed what occurred in the 2-3 seconds prior to the gunshot but after Respondent and Jayvis left the video frame. (*Id.*). Petitioner never produced that video she claimed to have viewed, and neither she nor her son were at the scene of the shooting. (App.6-7). Accordingly, under the Best Evidence rule, the Eleventh

Circuit excluded from evidence Petitioner's affidavits describing the contents of a video that was not in the record and had never been produced. (App.6-9).

The exclusion of these affidavits – the only evidence adduced by Petitioner in response to Respondent's summary judgment motion – meant that the only evidence in the record to be considered on summary judgment was Respondent's testimony, Respondent's dash cam video, and the affidavit testimony of eight eyewitnesses. (App.2). This evidentiary ruling is the real reason for the Petition.



ARGUMENT

I. PETITIONER FAILS TO PROVIDE A “COMPELLING” REASON FOR REVIEW

Petitioner fails to set forth any compelling reason for this Court's review. “Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.” Supreme Court Rule 10. Those reasons include:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court,

or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

Respondent respectfully submits that the Petition in this case does not fall within any of the above categories for review. Even if it did, this Court has already provided the guidance to the lower courts that Petitioner is requesting here. Indeed, the Petition itself cites the very case in which this Court gave that guidance just five years ago. Moreover, what Petitioner is actually seeking from this Court is exercise of its supervisory powers over an unfavorable evidentiary ruling.

A. *Tolan v. Cotton* Has Already Done What Petitioner Is Asking This Court to Do.

There is no need for review in this case because this Court has repeatedly provided the lower courts the very direction Petitioner is now seeking. Petitioner purportedly seeks review in order to provide guidance to the lower courts on the proper application of the summary judgment standard in qualified immunity cases. Recently, in *Tolan v. Cotton*, 572 U.S. 650 (2014), a § 1983 case arising out of an officer-involved shooting, this Court thoroughly examined the facts in that case and explained how the summary judgment standard should have been applied to those facts. *Tolan* reaffirmed and applied the same summary judgment standard articulated by this Court more than thirty years ago in the seminal case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor).

This Court accepted certiorari in *Tolan* and summarily vacated the Fifth Circuit Court of Appeals' decision granting summary judgment to the officer "because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedent." *Tolan*, 572 U.S. at 659. In his concurrence, Justice Alito warned that "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." *Id.* at 661. He explicitly noted that "[t]here is no confusion in the Court of Appeals about the standard to be applied in ruling on a summary judgment motion . . . In the Court of Appeals, cases presenting this question are utterly routine." *Id.* (Alito, J., concurrence).

This case, like *Tolan*, involves the routine application of the summary judgment standard. Indeed, the Petition in this case offers less reason than *Tolan* for review, since *Tolan* already addressed the exact same issue just five years ago.² Moreover, unlike in *Tolan* where evidence presented by opposing parties was diametrically opposed, the only evidence in the record in this case was produced by the Respondent,

² In 2007, this Court also addressed the summary judgment standard in *Scott v. Harris*, 550 U.S. 372 (2007), a § 1983 qualified immunity case that involved a police dash cam video as the primary evidence in the record. There, this Court held that the lower court should have viewed the evidence in the light depicted by the police dash camera video where the respondent's version of the facts were wholly discredited by the record. *Id.* at 379-381. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, 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." *Id.* at 380.

so there are no material disputed facts to review. The Eleventh Circuit construed Respondent's evidence most favorably for Petitioner. (App.4). Thus, there is nothing new or significant about this case that requires review. There is no conflict among the circuit courts in applying the summary judgment standard. Nor does this case involve a state court of last resort in conflict with another high court or a federal court on an important federal question.

Because the *Tolan* court already answered the question presented by the Petitioner, this Court need not reiterate or revisit that precedent. While this case, like *Tolan*, is no doubt important for the parties, "the same is true for a great many other cases that fall into the same category." *Id.* The Petitioner's Request for a Writ of Certiorari should be denied.

B. Petitioner is Actually Seeking Review of an Evidentiary Ruling Under the Best Evidence Rule.

Petitioner characterizes the need for review as seeking guidance for lower courts on the proper application of the summary judgment standard. In actuality, Benjamin's Petition is a request for review of an evidentiary ruling excluding Petitioner's affidavits under the Best Evidence Rule.

Benjamin did not present any admissible evidence to dispute Respondent's dash cam video and the testimony of eight eyewitnesses. The affidavits that Benjamin did submit did not create a factual dispute because they were excluded by the 11th Circuit. Thus, the Eleventh Circuit did not improperly favor Respondent's evidence over Petitioner's affidavits. Indeed, there was no other evidence besides Respondent's to consider because Petitioner's affidavits were inadmissible.

Petitioner Benjamin relied on affidavits from herself and her son, Steven (the “Benjamin Affidavits”). Petitioner and Steven were not present at the scene of the shooting. Nonetheless, these affidavits purported to describe the events that occurred just moments before Jayvis Benjamin was shot. According to the Benjamin Affidavits, Petitioner and her son Steven viewed a video during the civil grand jury proceedings that was different than the dash cam video produced by Respondent and that supports Petitioner’s version of what occurred at the scene. The Benjamin Affidavits describe the contents of this alleged video. But the video that is described in Petitioners’ affidavits was never produced by Petitioner, nor did she demonstrate she ever made any attempt to obtain the alleged video. Therefore, the video described by the Petitioner’s affidavits does not exist in the record.

Petitioner further claimed that the dash cam video that was produced by the Respondent had been altered to support Respondent’s version of the events. But again, other than claiming she and her son Steven viewed a different video, Petitioner never submitted any evidence of alteration, and she failed to identify any individual responsible for allegedly altering the dash cam video produced by Respondent. Because Benjamin neither introduced the purportedly unaltered video into evidence, nor explained its absence, and because she had no first-hand knowledge of the events that occurred on January 18, 2013, the Eleventh Circuit properly determined that the Benjamin Affidavits and accounts therein were inadmissible under Federal Rule 1002 (Best Evidence Rule).

Petitioner attempts to set up a fictitious factual dispute by pitting Respondent's evidence against the inadmissible affidavits describing the contents of the alleged missing video. She then claims that the Eleventh Circuit improperly credited Respondent's evidence on summary judgment. To the contrary, the Eleventh Circuit did not consider those affidavits at all on summary judgment. As that court noted in its recitation of the facts, “[w]e discuss here only those facts that are properly supported in the record.” (App.3). The only admissible evidence in the case was the dash cam video produced by Respondent, Respondent's testimony, and eight eyewitness affidavits.

In sum, the real reason Petitioner seeks this Court's review is due to her disagreement with an evidentiary ruling. But as stated clearly in 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.”

An objection to exclusion of evidence is not within the universe of “compelling” reasons for this Court to exercise its discretion to grant certiorari. It should decline to do so here.

II. PETITIONER'S BRIEF OOMITS ANY MENTION OF EIGHT EYEWITNESSES' TESTIMONY AND MISREPRESENTS KEY FACTS.

A. Petitioner Ignores Eight Eyewitnesses.

Petitioner's Brief conveniently omits any reference to the affidavit testimony of eight eyewitnesses to the shooting. Instead, Petitioner misleads the Court to believe that in affirming summary judgment for Respondent, the 11th Circuit relied solely

on Defendant Thomas' testimony and the dash camera video. Petitioner tells this Court that:

"Because Jayvis Benjamin died of his injuries, there was only one surviving witness. Thus, Lynn Thomas' testimony was pitted against the video."

(Petition, p. 12)(emphasis added). This statement is blatantly false. Eight (8) eyewitnesses to the shooting testified by affidavit as to what occurred at the scene. Their testimony was consistent with Respondent's version of the events and the dash cam video produced by Respondent. Their testimony also explained what occurred in the 2-3 seconds leading up to the gunshot after Jayvis and Respondent exited the dash cam video frame. The Eleventh Circuit considered these eyewitnesses' testimony and resolved minor disputes among the witnesses' accounts most favorably for Benjamin. (App.4). Yet, not one word of Petitioner's Brief even mentions these witnesses.

B. Petitioner Alleges "Facts" That Do Not Exist in the Record.

Incredibly, without a shred of evidence, Petitioner pronounces as "fact" 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." (Petition, p. 12). Petitioner claims that "four" witnesses' "sworn" statements indicate this video exists. (Petition, 13). Once more, Petitioner misrepresents the evidence. In actuality, Petitioner only produced two affidavits. And although those affidavits referenced two other family members, those other two individuals did not provide statements, much less sworn statements.

More importantly, nothing in the two inadmissible affidavits that Petitioner submitted reflects any effort by Petitioner to obtain the video she claims to have viewed in the District Attorney's office. She did not seek it through discovery. She did not file a motion to compel it. She does not indicate she requested an opportunity to review it with the District Attorney.

Petitioner then claims: "... 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." (Petition, p. 13). As the Eleventh Circuit astutely noted, "Benjamin has neither identified an individual responsible for altering the footage nor located a version of the dash camera footage that portrays the events . . . as Benjamin describes in her affidavit." (App.7).

Petitioner further attempts to deceive this Court by claiming that at oral argument, "[t]he defense acknowledged that there was another version of the video . . ." Petitioner's self-serving summary of oral argument again misstates the facts. In responding to a question from the Eleventh Circuit panel, Respondent's counsel explained that the District Attorney's office had a separate copy of the same video produced by Respondent and that Respondent's counsel did what Petitioner did not bother to do personally reviewed that video and confirmed that it was the same as the dash cam video produced by Respondent. Instead, Petitioner prefers to ask this Court to exercise its supervisory powers to trample all over the rules of evidence and allow her to rely on self-serving and inadmissible affidavits to oppose summary judgment.

Petitioner hopes that by ignoring eight eyewitnesses' testimony and concocting a salacious tale of an allegedly missing video and altered police dash cam video, she can capture this Court's interest. But a review of the record demonstrates that Petitioner's argument is nothing more than a run-of-the-mill appeal based on exclusion of inadmissible affidavits.

This Court should treat it as such and deny the petition, as it does not meet any standard governing review by this Court.



CONCLUSION

Respondent respectfully requests that this Court DENY the Petition for a Writ of Certiorari. Petitioner offers no compelling reason that review is needed in light of thirty years of precedent on the same issue raised in the Petition in this case, namely, the correct application of the summary judgment standard to disputed facts. That standard is no different for qualified immunity cases or any other case, and therefore presents no need for further explanation here. Second, the actual complaint that Petitioner raises is the Eleventh Circuit's exclusion of her inadmissible affidavits under the Best Evidence Rule. A complaint about an evidentiary ruling also fails to meet the very high standard for review by this Court.

Respectfully submitted,



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