IN THE UNITED STATES SUPREME COURT

WILLIAM CHARLES BURGESS Petitioner, vs. CHUCK BOWERS, JR., WESLEY G. NORRIS, DEBBIE JENKINS, STEPHEN A. BALLARD, GREGORY H. STANLEY, and DAVID THOMPSON, Respondents.	)	No. 19-5868

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

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Analysis of the Issues Presented by the Petitioner

1. "Whether the Sixth Circuit Court improperly reversed the District Court's finding that Petitioner had an expectation of privacy in and around his business work area of his mother and father's basement thereby ignoring this Court's prior decision cited in hundreds of cases in the past."

a. Problems with the Pleadings

As a preliminary matter, William Burgess never pled an unreasonable search claim under the Fourth Amendment. The complaint did not mention probable cause, and did not raise a claim based upon *Payton v. New York*, 445 U.S. 573 (1980). Nor did Mr. Burgess raise a false arrest claim under the Fourth Amendment. The sole federal claim raised in Mr. Burgess's complaint was excessive force:

> 23. Plaintiff, Grace Burgess' civil rights were violated by all of the Defendants because her house was entered by the Defendants without her consent and without just or reasonable cause.[1]
>
> 24. The search of Plaintiff Grace Burgess' home was unlawful, unconstitutional, humiliating, emotionally painful to Ms. Burgess and violated her constitutional rights under the 4th Amendment and Title 42 USC§ 1983.
>
> 25. Plaintiff William Burgess was battered and falsely arrested by the Defendants and makes claims for damages under Tennessee State law for aggravated assault and false arrest.

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[1] Mr. Burgess's mother Grace Burgess did raise an unlawful search claim, but Mrs. Burgess is not a party to this Petition. As Mr. Burgess noted at page 11, footnote 1 of his Petition, Mrs. Burgess's claims were settled.

> 26. The seizure of Plaintiff by the use of an injurious dog and use of repeated tazer blasts to William Burgess was unconstitutional, unreasonable and an excessive use of force, causing unnecessary injury to him and a violation of his 4th Amendment rights and federal statutory rights under Title 42 USC§ 1983.

[Complaint,Doc.1,PageID#:4-5]. The district court and the Court of Appeals agreed that Petitioner did not plead an unreasonable search or a false arrest claim:

> *William's Purported Unreasonable-Search Claim.* The court's sole analysis of an unreasonable-search claim appears in the final three pages of its opinion. There, at the outset, the court stated that it was addressing "Grace Burgess's unreasonable search claim." [R. 70, Memorandum Op. and Order at PageID at PageID #1156.] At no point did it indicate that it was analyzing any unreasonable-search claim other than hers. And it ended its analysis by concluding that it was denying "summary judgment as to Grace Burgess's unreasonable-search claim[]." [Id. at PageID #1158.] We find, therefore, that the court did not construe the Burgesses' pleadings as stating a Fourth Amendment search claim for William.
>
> *William's Purported False-Arrest Claim.* We likewise find that the court did not construe the Burgesses' pleadings as stating a Fourth Amendment false-arrest claim for William (or Grace, for that matter). Near the beginning of its opinion, the court went out of its way to explain that, based on the parties' pleadings, it was exclusively construing William's false-arrest claim as arising under Tennessee state law. And the court went on to grant summary judgment to the officers on that claim. ...[3]
>
> [3] Assuming William alleged a Fourth Amendment false-arrest claim, it must fail. A claim for false arrest rises or falls depending on whether the plaintiff can show, in light of clearly established

> law, that that no reasonably competent officer would have found there was probable cause to arrest him. *See Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007). Although William was ultimately acquitted of the charges against him, "it has been long settled that 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.'" *Barnes v. Wright*, 449 F.3d 709, 716 (6th Cir. 2006) (*quoting Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002)). Some exceptions to this rule exist, as "when the defendants knowingly present false testimony to the grand jury to obtain an indictment or when they testify with a reckless disregard for the truth." *Bickerstaff v. Lucarelli*, 830 F.3d 388, 398 (6th Cir. 2016) (internal quotations omitted). But William has made no showing that any of these exceptions apply to his case.

Burgess, 773 F. App'x at 243-44.

Because Mr. Burgess did not plead a claim based upon the unreasonable search clause of the Fourth Amendment or *Payton v. New York*, 445 U.S. 573 (1980), his discussion of a right of privacy is irrelevant. Mr. Burgess's *Payton* claim could (and should) have been rejected because it was not pled in his complaint.

b. Misstatement of the issue decided below

Mr. Burgess has failed to properly present for discretionary review any issue concerning the actual holding of the Court of Appeals. Contrary to his formulation of the first issue, the Court did not hold that Mr. Burgess had no expectation of privacy "in and around his business work area of his mother and

father's basement." Instead, it expressly left the constitutional question open and decided the case on the basis of the clearly established prong of the qualified immunity analysis. The Court of Appeals held:

> [W]e need not decide today whether—under these circumstances—the officers violated William's constitutional rights when they arrested him in his mother's home without a warrant (but with probable cause). It will suffice to say that, after extensive research, we cannot say that such a right, if it exists, was clearly established. We therefore reverse the district court's judgment and hold that all of the officers are entitled to qualified immunity on William's unreasonable seizure claim.

Burgess, 773 F. App'x at 245-46.

Mr. Burgess's Petition does not address the issue decided below. That failure is ample reason to deny the Petition.

2. "Whether the Sixth Circuit Court intentionally ignored the law in favor of the police similar to what the Fifth Circuit did prior to this Court's decision in *Tolan v. Cotton*."

a. Disrespect for the Judiciary

In a misguided effort to make the unpublished opinion of the Court of Appeals sound important, rather than routine, Mr. Burgess has accused the Panel of misconduct. The statement of this issue claims that the Panel "intentionally ignored the law in favor of the police." At page 16, the Petition alleges: "The circuit panel did not just get it wrong or make a mistake, they had to have known what they were doing, and did it anyway." At page 18, the Petition alleges: "The deck was stacked

against Mr. Burgess. The Circuit court blatantly went out of its way to destroy Mr. Burgess' case and at the same time further damage Mr. Burgess." At page 20, the Petition alleges "The bias of the court is obvious."

Mr. Burgess's flagrant disrespect for the judiciary provides ample reason to deny discretionary review.

b. Misrepresentations of the record

Mr. Burgess repeatedly misrepresents the record. At page 16 of the Petition, Mr. Burgess states that Officer Ballard told the police dog to "bite his ass." The same misrepresentation was made to the Court of Appeals in a brief filed by Mr. Burgess's counsel:

> The K-9 found a vapor barrier and started digging, and Officer Ballard stated that "I kept watching and the [K-9] keeps digging at the plastic and I can see the bottom of his shoe, and that's when I told him to bite his ass." [BallardTestimony;Doc.61,Ex.12,Pg.248,PageID#830].

[Case No. 18-5179,Plaintiffs'Brief,Doc.24,Pg.7,PageID#:12].

This quote is a misrepresentation of the transcript. In fact, Plaintiffs' counsel acknowledged in the cited page of the transcript that the "bite his ass" comment was *not* made during the arrest - it was made after the entire incident was over in casual conversation with Officer Stanley that was recorded on a body microphone. It is undisputed that during the arrest, Officer Ballard used the Dutch command for apprehension, "Stellen." [BallardTestimony,Doc.61-12,Pg.24,ll7-

18,PageID#:830]. Plaintiffs' counsel acknowledged this fact at the criminal trial when the trial court recognized the same misrepresentation:

> THE COURT: Okay. Officer Ballard denied saying -- I'm going to bite him in the ass.
>
> MR. LOMONACO: No. No. He said that to the other officers outside afterwards.

[Doc.61-18,Pg.346,PageID #938] (bold emphasis added).

Also at page 16 of the Petition, Mr. Burgess misleadingly states that he "was passive, laying still on the ground, no weapon, no threats, no furtive movements no evidence of violence."

> [T]this is a case where an officer was forced to explore an enclosed unfamiliar area in which he knew a man was hiding. ... When Ballard arrived on the scene, William was hiding in the crawlspace of the basement underneath a plastic vapor barrier and refusing to come out. Very little light entered the openings of the crawlspace, so the area was difficult to see and none of the officers could be sure that William was not armed. And because the crawlspace height was as low as eighteen inches in some areas, an officer would need to enter it on his hands and knees, making it difficult for an officer to defend himself.

Burgess, 773 F. App'x at 246. Mr. Burgess cites no relevant caselaw clearly establishing that the use of a police dog to apprehend a suspect refusing to come out of a dark, dangerous crawlspace violates the Fourth Amendment.

The undisputed evidence in the record is that Mr. Burgess was hiding in this dark, dangerous crawlspace and kicking or stomping the K-9 Marco's head

with his right foot when he was Tased. Officer Stanley testified he saw K-9 Marco's head flinch from a blow to the head, and he deployed his Taser to protect Marco. [StanleyDeclaration,Doc.37-3,PageID#:263]. Officer Thompson saw Mr. Burgess kicking Marco's head with his right foot and heard Officer Ballard yell "stop kicking my dog." [ThompsonDeclaration,Doc.37-2,¶11,PageID#:262]. Mr. Burgess did not deny repeatedly kicking or stomping K-9 Marco's head. In fact, he admitted using his "feet" to "defend himself" from Marco *before* he was Tased. [WilliamBurgessDeclaration,Doc.63-1,¶16,PageID#:1076]. Mr. Burgess cites no relevant caselaw clearly establishing that the deployment of a Taser to protect a police dog who is being kicked in the head by a suspect violates the Fourth Amendment.

At page 18 of the Petition, Mr. Burgess argues that he was bitten by Marco without warning, purportedly citing Officer Ballard's testimony at the criminal trial. This quote is a complete misrepresentation of the transcript. The only fair reading of this transcript is that Officer Ballard was explaining that he did not make the "bite his ass" comment during the arrest - it was made after the entire incident was over in casual conversation with Officer Stanley. [Ballard Testimony;Doc.61-12,pg. 248,Page ID#830].

It is undisputed in the record that Mr. Burgess received multiple warnings before he was injured. The officers properly supported their summary

judgment motion by setting forth this evidence in declarations under oath. Officer Stanley testified that while waiting for the K-9 Officer to arrive, he repeatedly announced that if Mr. Burgess was present he should surrender because a K-9 was on the way. Mr. Burgess did not reveal himself. When Officer Ballard arrived with Marco, Officer Ballard announced several times that he was a Knox County K-9 unit and to surrender now. [StanleyDeclaration,Doc.37-3,¶¶7-8,PageID#:263]. Officer Thompson testified that he stayed with Officer Stanley in the basement while they waited for the K-9 to arrive, and when Officer Ballard arrived with Marco, Officer Ballard announced several times that he was a Knox County K-9 unit and to surrender now. [ThompsonDeclaration,Doc.37-2,¶¶6-7,PageID#:260]. Officer Ballard testified that when he arrived, the officers informed him that they had repeatedly announced that if Mr. Burgess was present he should surrender because a K-9 was on the way, and Mr. Burgess had not announced or revealed himself. Officer Ballard then announced, "Knox County Sheriff's Office K-9, come out with your hands up or I will send in the dog, and you will be bit." [BallardDeclaration,Doc.38-2,¶9,PageID#:298].

Mr. Burgess even admitted that he heard the Officers' commands directed at him and Marco.

> Q. Do you recall the words Officer Ballard used to instruct his dog?

> A. No. I don't remember anything from my feet through the whole rest of the ordeal. I don't remember any instructions coming from my feet the whole rest of the ordeal. I did hear instructions from my right side.
>
> Q. To you or to the dog?
>
> A. Both.

[Id.,Pgs.347-348,PageID#:939].

> Q. Okay. And isn't it true, at some point these officers told you to come out of the basement?
>
> A. Yes. After they were in the home, they told me to come out of the basement.

[WilliamBurgessTestimony,Doc.61-19,Pg.374,PageID#:966].

Mr. Burgess admitted that he heard the Officers' voices, and even heard the dog coming down the steps, but he didn't come out at that point. Even when the dog approached him, he continued hiding. [WilliamBurgessTestimony,-Doc.61-19,Pgs.378-80,PageID#:970].

The Court of Appeals addressed Mr. Burgess's failure-to-warn argument as follows:

> On appeal, William selectively quotes Stanley's trial testimony to support his claim that the officers "did not give any warning when the K-9 found Mr. Burgess." [Burgesses No. 18-5179 Response Br. at 8 (emphasis added).] But that does not contradict the officers' declarations—and the part of Stanley's trial testimony that William does not quote—that the officers gave William multiple warnings before Ballard deployed the dog to apprehend him:

> Q. And what did you witness? If you would, tell the jury what you witnessed when the K-9 unite arrived.
>
> A. Officer Ballard arrived. He came down the steps. He made — and I don't know what their protocol is, but they make announcements whenever they're going to search an area, you know, Knox County Sheriff's Office, K-9. This is Officer Ballard. If you don't come out immediately with your hands up, I'm going to send in the dog, and so on and so forth. And he makes that announcement several times.
>
> Q. Did you hear him making those kinds of announcements?
>
> A. Yes, ma'am. I was standing a foot from him.

[R. 61-9, Officer Stanley Test. at PageID #745.]

Furthermore, William admitted in his own testimony that the officers warned him about the dog:

> Q. All right. Let's take it from that point right there. When — once you realized where was a dog — an officer and his dog, what happened?
>
> A. Actually, at this point, I was in disbelief. They were actually in my mother's home with a dog. And then they threatened me with— they threatened me with the dog.

[R. 61-18, William Burgess Test. at PageID #934-35 (emphasis added).]

Burgess v. Bowers, 773 F. App'x 238, 246 n.7 (6th Cir. 2019).

Mr. Burgess next contends, "Officer Stanley saw the K-9 biting Mr. Burgess and he admitted that without any warnings, he fired his taser at Mr. Burgess. [StanleyTestimony;Doc.61-9,Pgs.169-70,PageID#:751-52]." Petition at 20. The record demonstrates that what Officer Stanley saw was Mr. Burgess trying to "stomp the dog's head" with his foot. [StanleyTestimony;Doc.61-9,Pg.166,-PageID#:748]. What Officer Stanley said was, he did not recall announcing that he was going to fire his Taser. [StanleyTestimony;Doc.61-9,Pg.169,PageID#:751]. Mr. Burgess cites no relevant caselaw clearly establishing that the deployment of a Taser without warnings to protect a police dog who is being kicked in the head by a suspect violates the Fourth Amendment.

Assuming that the absence of warnings was material to the qualified immunity analysis, the summary judgment burden clearly shifted to Mr. Burgess to produce evidence suggesting that he was bitten or tased "without warning." Mr. Burgess had every opportunity to create a genuine issue of fact by simply denying under oath that he received any warnings. In response to summary judgment, however, he filed two declarations in the record and never asserted that he was bitten by Marco or tased without warning. [WilliamBurgessDeclaration;Doc.61-23,PageID#:1061]. In fact, in Mr. Burgess' second Declaration, he covered the incident in detail and never asserted that he was bitten *or* tased without warning. [WilliamBurgessDeclaration,Doc.63-1,PageID#:1074]. Indeed, Mr. Burgess'

complaint did not allege that he was bitten or tased without warning. [Doc.1,PageID#1].

Mr. Burgess is attempting to use argument in a Supreme Court Petition to create factual disputes that were not presented under oath to the district court in response to a properly supported summary judgment motion. His misrepresentations of the record provide ample reason to deny discretionary review.

c. The issue decided below

This is a routine case in which a court of appeals held that the defendant officers were entitled to qualified immunity for excessive force based on the "clearly established" prong of the qualified-immunity analysis without determining whether Mr. Burgess's constitutional rights were violated. *Burgess*, 773 F. App'x at 245 n.5. In his concurring opinion in *Tolan*, Justice Alito provided ample reasons to deny discretionary review of this Petition:

> The granting of a petition for plenary review is not a decision from which Members of this Court have customarily registered dissents, and I do not do so here. I note, however, 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").
>
> 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, 572 U.S. 650, 661 (2014) (J. Alito, concurring).

If this Court considers whether the Court of Appeals misapplied the qualified immunity defense, it is Mr. Burgess who is mistaken. At page 16 of the Petition, Mr. Burgess complains: "The Circuit court again did not analyze the use of force under *Graham v. Connor*, 490 U.S. 386 (1989)." Mr. Burgess's reliance upon *Graham* is wrong because in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) and *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) this Court emphasized that *Garner* and *Graham* cannot provide clearly established law because they "are cast at a high level of generality."

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-91 (2018). The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. *Mullenix v. Luna*, 577 U. S. ___, ___, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255, 260 (2015) (per curiam).

Unlike the case of *Tolan v. Cotton*, *Supra,* viewing the facts in this record in the light most favorable to Mr. Burgess as the non-moving party, the Court of Appeals correctly concluded there is no relevant case that would inform reasonable officers that their use of a police dog and Tasers to apprehend Mr. Burgess in a dark, dangerous crawlspace clearly violated the Fourth Amendment.

CONCLUSION

This is a routine case in which a court of appeals granted summary judgment because it concluded that six law enforcement officers did not violate clearly established law and were therefore entitled to qualified immunity. The Petition is replete with insulting and disrespectful accusations against the judiciary, and misrepresentations of the record. No issue is raised that implicates a conflict among the courts of appeals or an important question of law. Even if the faults of the Petition are overlooked, at best the errors asserted "consist of erroneous factual findings or the misapplication of a properly stated rule of law [qualified immunity]." S.Ct Rule 10. Respondents disagree with such allegations but the point here is that the errors asserted in the Petition, at best, do not meet the considerations of Rule 10 for granting discretionary review. *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (J. Alito, concurring). Accordingly, the Petition should be denied.

Respectfully submitted this 2nd day of October, 2019.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on Petitioner by placing a true and correct copy in the United States mail, postage prepaid, to Petitioner's address of record:

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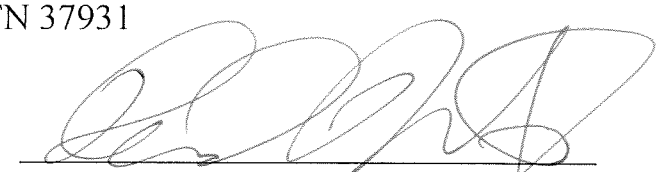

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