ORIGINAL

19-7790

No.

IN THE

Supreme Court of the United States

Brenda Mason, et al

Petitioner(s)

v.

Martin Faul, et al

Respondent(s)

On Petition For Writ Of Certiorari
To The Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

BRENDA MASON

IN PROPER PERSON
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QUESTIONS PRESENTED

This case involves the use of excessive force by a police officer that was determined by a jury to be "objectively unreasonable" but nonetheless resulted in a finding that the officer was entitled to qualified immunity.

The questions presented are whether a finding of "objectively unreasonable excessive force" can be squared with a finding of qualified immunity under the facts and circumstances of this case, including whether determinations of the trial court, as affirmed by the Fifth Circuit, resulted in an incorrect analysis of the qualified immunity issue, and whether the Fifth Circuit's determination can be reconciled with other courts.

PARTIES AND AFFILIATES

BRENDA MASON, Individually and on behalf of Quamaine Dwayne Mason;
BILLY C. MASON, Individually and on behalf of Quamaine Dwayne Mason,

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT;
JAMES P. CRAFT, In His Official Capacity as Chief of Police;
MARTIN FAUL, Individually and in His Official Capacity,

- *Mason, et al v. Lafayette, et al,* No. 14-30021, U.S. Court Of Appeals For The Fifth Circuit. Judgment entered Nov. 10, 2015.
- *Mason, et al, v. Faul, et al,* No. 18-30362, U.S. Court Of Appeals For The Fifth Circuit. Judgment entered July 17, 2019.
- *Brenda Mason, et al, v. Martin Faul, et al*, No. 12-2939, U.S. District Court Western District Of Louisiana. Judgment entered March 16, 2018.
- *Brenda Mason, et al, v. Martin Faul,* No. 12-2939, U.S. District Court Western District of Louisiana. Judgment entered March 8, 2014.
- *Brenda Mason, et al, v. Martin Faul,* No. 6:12-CV-2939, U.S. District Court Western District of Louisiana. Judgment entered May 2, 2017.
- *Brenda Mason, et al, v. Martin Faul,* No. 12-2939, U.S. District Court Western District of Louisiana. Judgment entered June 15, 2017.
- *Brenda Mason, et al, v. Martin Faul,* 6:12-CV-2939, U.S. District Court Western District of Louisiana. Judgment entered March 31, 2017.
- *Mason, et al v. Lafayette, et al,* No. 18-30362, United States Court Of Appeals For The Fifth Circuit. Judgment entered July 17, 2019.

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The Fifth Circuit's opinion is reported at 929 F.3d 762 (5th Cir. 2019); App.1a. The district court's judgment after jury trial is unpublished and is reprinted in the Appendix at App.9a.

Also related to this case is an earlier reported opinion of the Fifth Circuit, found at 806 F.3d 268 (2015) ("Mason I"); App.10a. In addition, there are the following unreported opinions and orders from the district court: Mason v. City of Lafayatte, 2013 WL 6493606 (W.D. La. Dec. 10, 2013); App.34a; Mason v. Faul, 2017 WL 2656191 (W.D. La. May 2, 2017); App.74a. Mason v. Lafayette, 2017 WL 2625398 (W.D. La. June 15 2017); App.83a.; Mason v. Faul, 2017 WL 1260284 (W.D. La. March 31, 2017); App.84a; Mason v. Faul, 2018 WL 1371490 (W.D. La. Feb. 8, 2018); App.93a.; Mason v. Faul, 2018 WL 1097092 (W.D. La. Feb. 28, 2018); App.98a.

JURISDICTION

The Fifth Circuit issued the opinion under review on July 17, 2019. App. 1a. On October 4, 2019, Petitioners filed a timely request for extension to file a petition for writ of certiorari with this Court; that request was granted on October 11, 2019, and extended the deadline for Petitioners to file this petition until November 14, 2019. This petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]

U.S. CONST. amend. IV.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

42 U.S.C. § 1983 provides in pertinent part:

> 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[.]"

42 U.S.C. § 1983.

INTRODUCTION

Petitioners Brenda Mason and Billy C. Mason (collectively "Petitioners Mason"), individually and on behalf of their deceased son Quamaine Dwayne Mason, respectfully request that this Honorable Court exercise its discretion and grant Review on Certiorari in the above entitled matter. "Review on a writ of certiorari is not a matter of right," and is "granted only for compelling reasons." U.S. Sup. Ct. R. 10. While "neither controlling nor fully measuring the Court's discretion," Petitioners Mason do, in fact, meet iterated standards governing Review, as set forth in Supreme Court Rule 10(a) and 10(c).

This case, like a great many that have come before it, involves the scope of qualified immunity afforded to a police officer following the officer's use of deadly force. A perusal of qualified immunity cases throughout the country reveals a wealth of inconsistencies; this alone is reason to grant certiorari. Arrigoni Enterprises, LLC v. Town of Durham, Conn., 136 S. Ct. 1409, 1412 (2016) ("In short, the Court's efforts to bring clarity have failed. The quagmire that the Court has created in the lower courts is yet another reason to grant the petition."). That said, "[t]here is a natural tendency on the part of any conscientious court to avoid embroiling itself in a controversial area of social policy unless absolutely required to do so." Ratchford v. Gay Lib, 434 U.S. 1080 (1978) (Rehnquist, Blackmun dissenting). The use of deadly force in the context of policing certainly falls under such an umbrella. However, "this case presents an important question of federal law that has divided the courts of appeals[,]" being "the kind of case [this Court] ought to hear." Brown v. United States, 139 S. Ct. 14, 16 (2018) (Sotomayor, Ginsburg dissenting). The issue of qualified immunity requires clarification.

The Fifth Circuit's decision below "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[.]" Rule 10(a). Respondent

Martin Faul, a police officer, initially shot Quamaine Mason five times -- breaking both of Quamaine's arms, his jaw, and leaving several bullet holes in his chest. Then, Faul shot Quamaine twice more in the back as he lie on the ground, face down. Quamaine's position on the ground resulted from Respondent Faul deploying his police dog upon Quamaine while simultaneously shooting Quamaine with the first five bullets. That Respondent Faul's actions were beyond the scope of lawful policing is an understatement. The Fifth Circuit's decision must not stand. Kalamazoo Cty. Rd. Comm'n v. Deleon, 135 S. Ct. 783 (2015) (Alito, dissent) ("Indeed, the holding of the court below is so clearly wrong that summary reversal is warranted. The strangeness of the Court of Appeals' holding may lead this Court to believe that the holding is unlikely to figure in future cases, but the decision, if left undisturbed, will stand as a binding precedent[.]").

Next, the Fifth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court[.]" Rule 10(c). "[C]ertiorari jurisdiction exists to clarify the law[.]" City & Cty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1774 (2015). Qualified immunity, as a legal concept as it stands today, is anything but clear. This is especially true when considering cases that should be considered under a negligence standard compared to those that fall so far out of bounds of normal policing that they simply cannot be determined under a negligence standard. It is beyond dispute that when the proper authority is applied to this case, the result is clear. Quamaine Mason was subject to objectively unreasonable excessive force that no reasonable officer – ever - would use. As Judge Higginbotham described, this was an "attack of man and dog" in which "an officer used both a dog and a gun together as part of the same attack[.]" Mason I, 806 F.3d at 289; App.38a. As such, qualified immunity cases involving negligence, such as Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985) and progeny, are inapplicable.

Lastly, the Fifth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Police are not permitted to shoot until a suspect stops moving. Police are permitted to shoot to stop a threat. Respondent Faul admits, more than once, that he shot over and over to prevent movement. Respondent Faul admits to deploying a tactic known as a "double tap," a tactic firmly denounced by officers and experts alike as having any place in policing. Respondent Faul admits that the next bullet he shot was going in the back of Quamaine Mason's head. It is far beyond police negligence to ready oneself to shoot a suspect with seven bullets already in him, in the back of the head because he moved. By definition, there is no threat to the officer or others that justifies shooting a downed suspect with seven bullets already in his body. Respondent Faul's narrative removes this case from cases that award qualified immunity to negligent officers. Respondent Faul is not negligent, he is rogue.

"This Court...has a significant interest in supervising the administration of the judicial system." Hollingsworth v. Perry, 558 U.S. 183, 196 (2010). This is a case that calls for this Court's supervision.

STATEMENT OF ARGUMENT

Quamaine Mason was 21 years old when he was shot and killed. On December 9, 2011, Martin Faul, a canine police officer responding to a 911 call, first released his service dog on Quamaine Mason and, according to Faul himself, almost instantaneously shot at Quamaine Mason eight (8) times, hitting him seven (7) times. The seven bullets that hit Quamaine Mason at point-blank range were all fired by Respondent Faul, in two separate volleys of fire. Two other officers had their guns trained on Quamaine Mason; neither fired a single bullet.

Prior to arrival, Respondent Faul admits that he ignored both dispatch and the two witnesses that called 911 in favor of getting his dog, getting his gun, and charging toward the apartment where Quamaine Mason was believed to be. Upon arrival, Quamaine Mason was observed exiting the apartment with his girlfriend, Raquelle Babino.

Respondent Faul began shooting literally within seconds of encountering Quamaine Mason. Faul, a K-9 officer, arrived with a gun in one hand and an attack dog on a 36-inch leash in the other. Just prior to firing upon Quamaine Mason, Faul indicated to his dog to attack. The dog was focused, biting and chewing at Quamaine Mason as he was shot again and again.

Respondent Faul admits that he initially wanted to holster his weapon and fist fight Quamaine, presumably while the other officers with weapons trained were supposed to watch. Faul does not indicate what was to be done with the dog while he engaged in a fist fight, but did indicate that holstering his weapon made sense, as he did not want to be perceived as pistol whipping Quamaine. Thinking better of that, Faul sicced his service dog on Quamaine Mason and simultaneously fired the first five shots into Quamaine's body. To be clear, this was an unprecedented, simultaneous attack of man and dog on the person of Quamaine Mason.

The evidence revealed that the first 5 shots (the first volley) all struck Quamaine Mason at various angles of downward trajectory. This matters, because Faul, aka "Pee Wee," is 5'7". Quamaine was 6'2" and was wearing shoes that gave him three more inches. Mr. Mason stood, hands up, with three guns and a dog only feet away from him. When the dog was released upon him, Quamaine reacted with his hands, lowering them to protect himself against the attack by the dog. This is when the bullets started flying.

Quamaine Mason landed face down, bleeding from five gunshot wounds, with a dog chewing on his body. Respondent Faul admitted that because Quamaine moved, Faul shot him twice more in his back (the second volley). Faul calls this maneuver the "double tap." Faul told the state police investigating the matter that the next bullet, if Quamaine moved, was going into his head.

Petitioners Mason twice appeared before the Fifth Circuit Court of Appeals in this matter. In both instances, the dispositive question that arose was whether Respondent Faul was entitled to qualified immunity in the shooting death of Quamaine Mason. The first case, Mason I, resulted in a reversal of summary judgment that the trial court had granted in favor of Respondent Faul. The second case gives rise to this Petition.

Jurisdiction of the district court was predicated on Title 28 of the United States Code, Section 1331, Title 28 of the United States Code, Section 1343(a)(3), and Title 28 of the United States Code, Section 1367(a).

ARGUMENT

I. THE QUALIFIED IMMUNITY ANALYSIS EMPLOYED IN THIS CASE WAS INVALID.

A. THE RELIANCE ON YOUNG V. CITY OF KILLEEN STANDARDS, AS AFFIRMED BY THE FIFTH CIRCUIT, WAS ERRONEOUS.

The trial court relied on Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985), and its progeny for several determinations. Below, Petitioners Mason argued that it was erroneous to rely on Young. The Fifth Circuit concluded that "the trial court's reliance on [Young] as a general matter was not misplaced." App.5a. Reliance on Young was erroneous, and culminated in a deprivation of Respondents Mason's Constitutional rights, requiring reversal.

In discussing Young, the Fifth Circuit stated:

> In Young, this court explained what has been consistently reinforced as the basis for law enforcement officers' qualified immunity defense. Such immunity may be sustained even when officers act negligently, or when they could have used another method to subdue a suspect, or when they created the dangerous confrontation, or when the law governing their behavior in particular circumstances is unclear.

App.3a. None of these factors explain the events that occurred in this case. In Mason I, Judge Higginbotham, concurring in part and dissenting in part, detailed the inapplicability of Young:

> Appellees argue that Officer Faul was justified in using deadly force because even if he negligently released his attack dog, Quamaine reacted - in a reflexive attempt to fend off the dog - by moving his hands downward and unintentionally closer to the gun in his waistband. But that principle does not address the situation here, where an officer used both a dog and a gun together as part of the same attack, the same direct and intentional deployment of deadly force...
>
> [T]wo key circumstances distinguish this case from Young and its progeny. First, the officer's use of the dog to attack Quamaine did not merely set a risky scene before shots were fired. It was at all times an assault of dog and gun. The moment the dog did as trained, Officer Faul began firing away. That he continued to put two more rounds in his back after Quamaine was lying on his stomach is doubly relevant. It signifies both as an independent act, as the majority observes, but also for its powerful suggestion that Officer Faul intended his force to be deadly from the beginning...
>
> Second, in the Young cases, officers' actions created risky situations, but the suspects then chose to commit intervening acts which threatened the officers... There was no intervening act in this case. To the extent Quamaine moved his hands, he cannot be faulted for reflexively attempting to protect himself from the dog. No reasonable officer would have perceived his reflexive movements as threatening.
> Young and Ramirez do not provide an answer here....

Mason I, 806 F.3d at 286–88; App.39a. (emphasis added). The district court later relied on Judge Higginbotham's facts, which had been presented as a hypothetical recitation of what might have occurred. App.76a-78a. (May 2, 2017 Report and Recommendation); App.74a. (June 15, 2017 Order Adopting). While that Report and Recommendation addressed summary judgment and took the facts in the light most favorable to Petitioners Mason, the facts as presented at trial mirrored those as outlined in the Report and Recommendation. For example, the Report and Recommendation stated that officers arrived, confronting Mason and Raquelle Babino as they exited the apartment, that Mason matched the description and that the call indicated Mason was armed. App.76a. At trial, all parties agree that Mason/Babino were exiting/had exited the apartment, that Mason matched the description, and that Faul was told suspect had a gun. R. 6527-6528. Similarly, the Report and Recommendation noted that Respondent Faul used dog and gun simultaneously, and that neither of the other two officers on the scene fired a single shot. App.77a. This was undisputed. The Report and Recommendation also noted that the path of the chin shot, which was believe to be the first shot, was at a downward angle that could only be explained by Quamaine's struggle with the dog. App. Dr. James Traylor confirmed

this at trial, testifying that, "Officer Faul would have had to have been on the ceiling to shoot him if [Mason] were upright." R. 6083, 6086. As noted in the Report and Recommendation, while the dog was on Mason, Respondent Faul shot Mason "seven times at point-blank range" with the dog on a 36" tether; dog in the left hand, gun in the right. App.77a. This was also undisputed.

At its heart, courts in the Fifth Circuit have applied the Killeen standards to cases involving officer negligence. E.g. Deris v. Normand, 2014 WL 2154859, at *4 (E.D. La. May 22, 2014) ("officer's use of deadly force was reasonable even where the arrest was 'negligently executed[.]'"). In fact, the Fifth Circuit itself characterized the holding in Killeen as "finding no liability where only fault found against the officer was his negligence in creating a situation where the danger of such a mistake would exist." Bazan ex rel. Bazan v. Hidalgo Cty., 246 F.3d 481, 493 (5th Cir. 2001) (modifications omitted). The instant case does not involve a dangerous situation created by the negligence of an officer. This case involves an all-out, multi-pronged, simultaneous assault by dog and by cop. The simultaneous attack of man and dog takes this case far outside of a negligently executed arrest as contemplated in Killeen. In rejecting the Killeen argument, the Fifth Circuit ultimately concluded that the trial court "correctly concluded that officer negligence is not a basis to deny qualified immunity." App.4a. That finding only compounded an already untenable result.

When the Killeen standard is applied to a case that is not one of negligence (or, at a minimum, involves a question of fact as to whether negligence is implicated), the verdict becomes a fait accompli. By utilizing Killeen, the trial court effectively narrows the permissible testimony and evidence to factors only related to negligence. If the best that a plaintiff can do is establish that an officer acted negligently, there would always be qualified immunity. For all practical purposes, that would be absolute immunity.

The trial court relied on Killeen for various determinations, including the decision to exclude evidence. By doing so, the trial court prohibited a fulsome analysis of the issues, thus depriving the jury of the facts necessary to make the qualified immunity determination. For example, Petitioners Mason were stymied in their efforts to introduce evidence with respect to police procedures. See App. (February 14, 2018 Minutes of Court); R. 6957. Such evidence would have included vital information from dispatch. R.903-905, (per Dr. Kirkham, "communications is a life line to police in the field to rely on"). Faul's perspective with respect to dispatch was, "the computer and did all this stuff, but I never paid no attention to the computer." R.627 (2014). In other words, Faul did not listen. Information from dispatch certainly would include "facts that were knowable to the defendant officers." White v. Pauly, 137 S. Ct. 548, 550 (2017). That Faul actively chose to disregard information should not provide him with a shield from liability. The trial court also precluded Dr. George Kirkham from testifying with respect to "whether what happened prior to the incident violated police

procedure." App.94a. The trial court's rationale for keeping this testimony out was borne out of its incorrect reliance on Killeen. R. 6331, 6957.

In upholding this determination, the Fifth Circuit said that "expert testimony concerning police procedure violations by a defendant officer are not relevant to the circumstances that confronted the officer at the moment he used deadly force." App.4a. This, again, however, presupposes that the jury is determining only whether Faul's actions were negligent in the Killeen context. While arguably these decisions would have been appropriate if it was stipulated that Faul had acted negligently, that decision was left to the jury. The trial court put the cart before the horse.

In explaining qualified immunity to the jury, the trial court said:

> Qualified immunity applies if a reasonable officer could have believed that the use of deadly force against Quamaine Mason was justified in light of clearly established law and the information Officer Faul possessed, but Officer Faul is not entitled to qualified immunity if, at the time deadly force was used, a reasonable officer with the same information could not have believed that his actions were justified.

Tr. 1158-59.

First, the issue, as stated by this Court, is information that was "knowable," White, 137 S. Ct. at 550, not necessarily information that was "possessed." While the two will frequently overlap, an officer cannot turn a deaf ear to vital information. Unfortunately, that is precisely what Respondent Faul did here. More egregiously, Respondent Faul actively did not want information from the two witnesses who had called 911; rather, in his zeal to get his dog and charge to the scene he ignored the witnesses. R.7395 (2018). No reasonable officer would ignore or reject pertinent information. To determine whether Respondent Faul's actions were reasonable under the circumstances, the jury should have been permitted to hear evidence with respect to, inter alia, Respondent Faul's refusal to pay attention to dispatch and refusal to communicate with witnesses.

B. Faul Violated A Clearly Established Right.

The Fifth Circuit's decision is inconsistent with its own prior case law, as well as this Court's precedents, and deepens an ever widening misunderstanding about the application of qualified immunity in excessive force cases. Given the jury's finding that Officer Faul utilized "objectively unreasonable excessive force," the concomitant finding that Officer Faul was entitled to qualified immunity, cannot be reconciled, either under clearly established law or based on the particular facts of this case.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (modifications omitted). "The dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. (quotations omitted). "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

In Graham v. Connor, 490 U.S. 386 (1989), in adopting an objective reasonableness standard, this Court held that "subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry. Id. at 399. The Court further noted, however, that:

> [T]he officer's objective "good faith"—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983. See Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

Id., n. 12 (emphasis in original, citation in original).[1]

In making this determination, "the Court considers only the facts that were knowable to the defendant officers." White, 137 S. Ct. at 550 (emphasis added). While there need not be "a case directly on point[,]" "existing precedent must have placed the statutory or constitutional question beyond debate." Id. (quotations omitted). This means that the clearly established law should be "particularized," though it does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful[.]" Anderson v. Creighton, 483 U.S. 635, 640 (1987). Finally, it is well established that conduct can be so far beyond the pale so as to be an "obvious" Fourth Amendment violation. See Brosseau v. Haugen, 543 U.S. 194, 199 (2004). As discussed below, Faul's conduct violated the Fourth Amendment under either analysis.

It is fair to say that qualified immunity exists in law to protect officials as they act in the course and scope of their duties; however, qualified immunity does not give license to officials to act with impunity, denying another's Fourth Amendment constitutional right to freedom from unreasonable searches and seizures.

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[1] That issue was not before the Court in Graham. Graham, 490 U.S. at 399, n. 12.

> [P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting - albeit unconstitutionally - in the name of the United States possesses a far greater capacity for harm...Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power...It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92 (1971) (internal citations omitted). "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name." Id. at 388; Williams v. Treen, 671 F.2d 892, 903 (5th Cir. 1982) ("If immunities were unlimited, we would find ourselves subject to a government of men and not of law.")

C. In Light Of The Constitutional Violation, The Jury Verdict Was Inconsistent.

This is a case of deadly force. "All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]" Graham, 490 U.S. at 395; Bazan ex rel. Bazan, 246 F.3d at 487–88 ("Deadly force is a subset of excessive force; deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.") (citations/modifications omitted). That this violation falls within the ambit of clearly established law is beyond doubt.

As part of this argument, Petitioners' Mason discuss the evidence. The Fifth Circuit stated that Petitioners Masons did not argue "that the verdict was not supported by sufficient evidence or was against the great weight of the evidence." App.6a-8a. Petitioners Mason disagree and would note that their last argument, which was specifically addressed by the Fifth Circuit in Section D of its opinion, was addressed to the sufficiency of the evidence. When Petitioners Mason argued that Faul was not entitled to qualified immunity as a matter of law, something the Fifth Circuit said "seems inconsistent with their preliminary assertion that they do not challenge sufficiency of the evidence," Id.[2], Petitioners Mason's point was that the

[2] This was the Fifth Circuit's conclusion. At no time did Petitioners Mason say they do not challenge the sufficiency of the evidence.

evidence presented could not support the verdict. This is further exemplified by the fact that the argument was based on specific testimony and evidence.

In Mason I, Judge Higginbotham provided context:

> Even if Officer Faul actually believed Quamaine was going to fight him - despite his complete compliance and facing three drawn guns no reasonable police officer could perceive such behavior as life threatening. There is no doubt that Officer Faul's use of lethal force in these circumstances violated the Fourth Amendment. Where the suspect poses no immediate threat to the officer and no threat to others, the use of deadly force is not justified. We also need not dwell on the issue of qualified immunity. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a felon who does not pose a sufficient threat of harm to the officer or others.

App.36a-38a. (Higginbotham, concurring in part and dissenting in part; modifications omitted). The Fifth Circuit criticized reliance on this decision for the conclusion that Faul posed no "sufficient threat," finding that if "it was ever good law, it is clearly no longer good law in light of [Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)]." App.7a-fn8. The Fifth Circuit overstated the impact of Mullenix with respect to this case and disregarded the specific discussion of Judge Higginbotham with respect to the issue. Mullenix reiterated that "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." Mullenix, 136 S. Ct. at 308, quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). Here, the question was beyond debate. "It does not take a specific case for an officer to know that he cannot shoot a compliant suspect and that he cannot fire again at someone who is objectively 'downed or incapacitated.'" Mason I, 806 F.3d at 285.

Graves v. Zachary, 277 F. App'x 334, 344, fn. 10 (5th Cir. 2008)(unpub.), is instructive.[3]

In Graves:

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[3] In the opinion below, while discussing a different issue, the Fifth Circuit noted that Graves was unpublished and thus non-precedential. While that is accurate, Graves is still instructive. Moreover, the proposition for which Petitioners Masons cite to Graves herein has been cited by the Fifth Circuit in reported cases. E.g. Cole v. Carson, 905 F.3d 334, 344 (5th Cir. 2018), revised en banc, 955 F.3d 444 (5th Cir. 2019) ("By October 25, 2010 the no-threat rule had been clearly established ... For example, in an unpublished 2008 decision, Graves v. Zachary, this court denied an officer qualified immunity for shooting a suspect who posed no threat to the officers or others.")

> It is not disputed that Graves was injured by the use of deadly force. The question is whether that force was unnecessary and, if so, whether Zachary should have been on notice that his conduct violated the Fourth Amendment...
>
> There are factual disputes as to whether Graves was incapacitated by the first shot such that the second shot was unnecessary...
>
> If Graves obviously was down, then Zachary would not have had a reason to believe that the suspect posed a threat of serious harm to the officer or others...

> Zachary tries to cloud this straightforward issue of material fact by pointing out that Graves still had his gun, going so far as to say as long as Graves possessed the gun, Zachary had probable cause to believe that Graves posed a threat to Zachary and others. This is unsatisfactory. Though police have good reason to be wary of a suspect who has just been shot, this argument cuts far too broadly. Merely having a gun in one's hand does not mean per se that one is dangerous.
>
> The question is this: Viewing the facts objectively, after being shot, did Graves appear to be in any condition to fire his weapon?...

Graves, 277 F. App'x at 347-349 (modifications excluded; emphasis added). Here, as even Faul's expert confirmed, Mason was in no such condition. R. 6104-05 (Dr. Traylor confirming that wounds III and V shattered bones in Mason's arms and that both of Mason's arms were "shot and essentially useless").

Other precedent is in accord:

> Here, during the 10–second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

Plumhoff v. Rickard, 572 U.S. 765 (2014) (emphasis added). In the instant matter, there is clearly a second round of shots. Faul admits it. R. 6487. He did so because "[t]wo to the chest and one to the head is how we're trained now[.]" R. 6539. With respect to how officers are trained, that is patently false, as confirmed by expert

testimony and Faul's fellow officers. First, Emanuel Kapelsohn, expert in police training, stated:

> [I]t was the idea of firing two shots and then stopping to assess the situation before continuing to fire. That wasn't popular even 35 or 40 years ago, and it certainly hasn't been popular in the last 30 years in any police departments I'm aware of anywhere around the country, and Mr. Armbruster said it certainly isn't what's taught here.
>
> Officers are trained nationwide to fire to stop the threat. They may stop the threat after one shot, in which case two would be excessive[.]

R. 7039 (emphasis added).

Brittany Dugas Ardoin of the Lafayette Police was asked, "[d]o you train double tap and one to the head?" to which she replied, "No." R. 1038. Faul also stated that he fired the second set of shots, which were into Mason's back, R. 6179-80, "because of the spin thing ... It looked like in the movies where they come back alive." R. 6549-50 (emphasis added).[4] That is absurd on its face; the shots were in his back. Moreover, as discussed further below, while Faul provided different reasons for why he fired the second set of shots, those reasons were not because he perceived a threat. There is nothing that would support a reasonable belief sufficient to justify qualified immunity.

Other cases support this conclusion:

> Cooper's right was clearly established. Our caselaw makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced...
>
> In the same way, Cooper was not attempting to resist arrest or flee, and Brown had no reason to think that he posed an immediate threat. Moreover, the fact that Bush and Newman are not dog-bite cases does not shield Brown. Lawfulness of force does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel...Brown had "fair warning" that subjecting a compliant and non-threatening arrestee to a lengthy dog attack was objectively unreasonable.

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[4] This was from a prior state police video statement given by Faul. The video and transcript of the video were published to the jury.

Cooper v. Brown, 844 F.3d 517, 525 (5th Cir. 2016) (modifications excluded; emphasis added). If a lengthy dog attack is objectively unreasonable, so too is a lengthy dog attack that began, tracked, and punctuated a shooting spree. See also Goodman v. Harris Cty., 571 F.3d 388, 398 (5th Cir. 2009) (emphasis added) (A reasonable jury could find that it was unreasonable for a constable to react with deadly force to a disabled suspect who was attempting to protect himself from the officer's canine").

In rejecting the argument that the jury verdict was inconsistent, the Fifth Circuit held:

> To be sure, an officer's conduct must be objectively unreasonable to find a Fourth Amendment violation. And qualified immunity must be rejected where the facts found by the jury demonstrate not only a constitutional violation but also that the law was clearly established such that the officer's conduct was objectively unreasonable according to that law. It was not clearly established at the time of this shooting that an officer armed with a pistol and a trained canine could not release the canine on a suspect and nearly simultaneously begin to shoot to incapacitate Mason, unless no reasonable officer could have believed that Mason continued to pose a danger.

App.6a, (citations omitted). For the reasons noted above, such a right was clearly established at the time. Moreover, while it is understood that there must be a particular violation, the Fifth Circuit's conclusion takes the requirement past the particular stage and perilously close to the "on-point" stage. See City of Palacios, 381 F.3d 391, 400 (5th Cir. 2004) ("The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.")

Next, as a practical matter, this is the type of case that either rises to the level of "obvious." In Pierce v. Smith, 117 F.3d 866, 882 (5th Cir. 1997), the Fifth Circuit noted that, "we also recognize that the egregiousness and outrageousness of certain conduct may suffice to obviously locate it within the area proscribed by a more general constitutional rule[.]"; Stephens v. Giovanni, 852 F.3d 1298, 1316-17 (11th Cir. 2017) ("In an obvious-clarity case, where the officer's conduct is plainly objectively unreasonable, a court does not need prior case law to determine the force used by the officer was excessive and unlawful, because it was disproportionate.") Here, at a minimum, shots six and seven were not due to a perceived threat, they were because Mason was "still alive[,]" R. 6416-6417, or because he was "moving." R.7418, 2018 See R. 6189 (Testimony of Dr. Scott, "Well, I can't explain to you what Officer Faul was intending to say, I can only tell you what he did say ... That he shot Mr. Mason in the back when he was prone."). Faul went so far as to say that if Mason did not stop moving, his next shot was going to be "behind his head." R.7418-7419, (2018). By his

own admission, in the moment of the event, Faul's objective was a shot to Quamaine Mason's head. There is no reasonable officer that shoots because a suspect is "still alive" or because he is moving, let alone one who believes a shot to the head is appropriate simply because a suspect is still moving.

Finally, the Fifth Circuit's opinion below is internally inconsistent on this very issue. The Fifth Circuit observed that "Faul arrived at the scene with his canine and saw two other officers with weapons drawn on Mason and his former girlfriend." App.2a. The Fifth Circuit later stated that, "[q]ualified immunity is justified unless no reasonable officer could have acted as Officer Faul did here, or every reasonable officer faced with the same facts would not have shot at Mason." App.4a. There were two other officers on the scene – neither of them acted as Faul did here and neither of them, who necessarily were faced with the same facts as Faul, did shoot at Mason.

II. THERE IS CONFUSION AND UNCERTAINTY WITH RESPECT TO THE PROPER DETERMINATION OF WHEN QUALIFIED IMMUNITY MAY APPLY IN AN "OBJECTIVELY UNREASONABLY EXCESSIVE FORCE" CASE.

In Saucier v. Katz, 533 U.S. 194 (2001), this Court considered "whether the requisite analysis to determine qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact." Id. at 197. The Ninth Circuit had held that the inquiries merged. Id. This Court reversed, holding "that the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." Id. In a concurring opinion, Justice Ginsburg agreed that officer Saucier was entitled to summary judgment, but disagreed with the reasoning of the majority. Id. at 209-210. Justice Ginsburg wrote:

> Application of the [Graham v. Connor, 490 U.S. 386 (1989)] objective reasonableness standard is both necessary, under currently governing precedent, and, in my view, sufficient to resolve cases of this genre. The Court today tacks on to a Graham inquiry a second, overlapping objective reasonableness inquiry purportedly demanded by qualified immunity doctrine. The two-part test today's decision imposes holds large potential to confuse.

Id. at 210 (citations in original) (emphasis added). Justice Ginsburg's concern that the majority analysis in Saucier "holds large potential to confuse[,]" Id., has proved

prescient. See Solomon v. Auburn Hills Police Dept., 389 F.3d 167, 172 (6th Cir. 2004) ("The district court failed to completely evaluate the second prong of the Saucier test. . . . . This comes, however, as no surprise. As recognized by the concurring Justices in Saucier, the two-part test "holds large potential to confuse") (citation omitted).

Indeed, even when properly applying the Saucier analysis, Circuits have observed at least an apparent redundancy. Johnson v. District of Columbia, 528 F.2d 969, 976 (D.C. Cir. 2008). Other Circuits have not been as clear. In Cowan ex rel. Estate of Cooper v. Breen, 352 F.3d 756, 764, n.7 (2d Cir. 2003), citing Saucier, 533 U.S. at 210 (Ginsburg, concurring), the Second Circuit held, "[f]rom this analysis it appears that at least in some excessive force cases the various parts of the Saucier analysis ultimately converge on one question: Whether in the particular circumstances faced by the officer, a reasonable officer would believe that the force employed was lawful." This is one of those cases; under the particular circumstances faced by Faul, no reasonable officer would believe that the force employed was lawful.

As even the Fifth Circuit itself noted in Lytle v. Bexar County, Tex., 560 F.3d 404, 410 (5th Cir. 2009):

> Allegations that an officer used excessive force in conducting a seizure complicates the Saucier inquiry. This complexity stems from having to make two "overlapping objective reasonableness inquir[ies]." Id. at 210, 121 S.Ct. 2151 (Ginsburg, J., concurring in the judgment). We must first answer the constitutional violation question by determining whether the officer's conduct met the Fourth Amendment's reasonableness requirement, as discussed below. If we find that the officer's conduct was not reasonable under the Fourth Amendment, we must then answer the qualified immunity question by determining whether the law was sufficiently clear that a reasonable officer would have known that his conduct violated the constitution. In other words, at this second step, we must ask the somewhat convoluted question of whether the law lacked such clarity that it would be reasonable for an officer to erroneously believe that his conduct was reasonable. Despite any seeming similarity between these two questions, they are distinct inquiries under Saucier, and we must conduct them both.

Id. at 410 (citations in original, footnote omitted, emphasis added). As detailed above, there was case law at the time of the incident establishing that Faul violated Mason's clearly established right and, even if there was not, this is an obvious case in which the unreasonable excessive use of force is unconstitutional.

In Jones v. Buchanan, 325 F.3d 520, 532 (4th Cir. 2003), the Fourth Circuit noted that its earlier opinion in Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994), had been cited with approval by Justice Ginsburg in Saucier. Jones, 325 F.3d at 532.

Justice Ginsburg, however, cited Rowland in the course of rejecting the majority analysis. See Saucier, 533 U.S. at 210. This again demonstrates uncertainty with respect to the proper application of Saucier.

There is also confusion in the district courts.[5] In Cabisca v. City of Rochester, 2019 WL 5691897 (W.D.N.Y. Nov. 4, 2019), the district court effectively applied the Saucier concurrence:

> 40. Having already engaged in the reasonableness analysis in finding excessive force was used during plaintiff's arrest, the Court need not repeat itself. Suffice it to say that given the particular circumstances confronting defendants Hogg and Prinzi, their actions were not "objectively reasonable." . . .
>
> 41. Accordingly, Officers Hogg and Prinzi are not entitled to qualified immunity on plaintiff's excessive force claims.

Id. at *19 (citation omitted; emphasis added). Another recent Second Circuit district court decision, Alvarez v. City of New York, 2017 WL 1506563 (S.D.N.Y. April 27, 2017), also indicates uncertainly. In an earlier summary judgment opinion in Alvarez, the court had stated that "'because genuine material, factual disputes overlap both the excessive force and qualified immunity issues, summary judgment on the basis of qualified immunity is inappropriate." Id. at *4 (internal quotations omitted). In reviewing the jury's verdict, the Alvarez Court noted that, "[t]he jury's finding that the officers' use of force was, at some point, objectively unreasonable, precludes their defense of qualified immunity." Id. at *4 (emphasis added). Here, there is no question that Faul's use of force was objectively unreasonable "at some point."

The confusion borne out of Saucier has even permeated this Court. For example, as discussed above, Pearson ultimately eliminated the requirement that the Saucier two-step analysis be done in a specific order. Pearson did not, however, invalidate the two-step analysis itself. Nonetheless, in noting the various criticisms of Saucier, Pearson cited to Judge Ginsburg's concurrence in Saucier, and specifically that "[t]he two-part test today's decision imposes holds a large potential to confuse." Pearson, 555 U.S. at 235, quoting Saucier, 533 U.S. at 210. In making that statement, however, Petitioners Mason respectfully submit that Justice Ginsburg was not commenting on the order of the Saucier analysis, but on the necessity of having a second step in the first place:

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[5] While confusion among the district courts may not be sufficient for a grant of certiorari on its own, it is a factor that this Court may consider. See U.S. v. Behrens, 375 U.S. 162, 164 (1963) ("Because of the disagreement between the two appellate courts' interpretation of s 4208(b) and the general confusion in District Court's (sic) and Courts of Appeals as to this section's exact meaning and effect, we granted certiorari in both cases.").

> For the reasons stated, I concur in the Court's judgment, but not in the two-step inquiry the Court has ordered. Once it has been determined that an officer violated the Fourth Amendment by using "objectively unreasonable" force as that term is explained in Graham v. Connor, there is simply no work for a qualified immunity inquiry to do.

Saucier, 533 U.S. at 216 (emphasis added). Here, the jury determined that Faul used "objectively unreasonable" excessive force; under Justice Ginsburg's analysis, there was no more work to do. In addition, even under the majority Saucier analysis, courts have determined that there are cases in which the two questions effectively merge. This is also one of those cases. Whether the Court finds that it needs to clarify uncertainty borne out of the Saucier analysis, or that the Saucier analysis permits the merger of the question in the most obvious cases, and this is one of those cases, Petitioners Mason are entitled to certiorari. To paraphrase language from Saucier, this is a case where Faul unreasonably acted unreasonably. See Saucier, 533 U.S. at 203.

As to the particular confusion in this case, the two jury questions were as follows:

> Do you find by a preponderance of the evidence that Officer Martin Faul deprived Quamaine Mason of his constitutional rights by using objectively unreasonable use of excessive force?
>
> Do you find by a preponderance of the evidence that Officer Martin Faul is entitled to qualified immunity?

R.7194 (emphasis added). The jury answered 'yes' to both questions. Id. While the jury ultimately answered the second question, whether Faul was entitled to qualified immunity, in the affirmative, their history of deliberations reveals that they were hopelessly confused. During deliberations, the jury presented questions specifically related to the qualified immunity issue. The first question indicated that they could not "get past [jury question] number one[.]" R.1173. In the second, the jury asked for "clarification on qualified immunity." R.1178. The third question was, "[w]hat happens to Officer Faul if the jury decides excessive force with qualified immunity?" R.1187. These questions indicate a jury in distress. The jury questions, coupled with the jury's verdict, show a jury that is hopelessly confused.

Finally, a recent case of the Fifth Circuit underscores the lack of clarity and understanding of the application of the qualified ~~immunity doc~~trine. The instant case was decided by the Fifth Circuit on July 17, 2019. Approximately one month later, on August 20, 2019, the Fifth Circuit, sitting en banc, decided Cole v. Carson, -- F.3d -- (2019), 2019 WL 3938014 (5th Cir. Aug. 20, 2019). The Cole case evaluated an excessive force claim in light of this Court's decision in Mullenix. Cole resulted in an 11-7 en banc decision with *five* separate dissenting opinions. See Id. at *9, 18, 19, 21, and 27.

CONCLUSION

This Honorable Court should grant certiorari and reverse the court of appeals.

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