CASE NO. 19-7790

IN THE SUPREME COURT OF THE UNITED STATES

BRENDA MASON, INDIVIDUALLY AND ON BEHALF OF QUAMAINE DWAYNE MASON, ET VIR
Petitioners

VERSUS

MARTIN FAUL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY
Respondent

On Petition for Writ of Certiorari
to the Fifth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

In 2015, the Fifth Circuit Court of Appeals refused to grant Respondent qualified immunity on summary judgment, citing genuine issues of material fact, and ruling that the jury would need to answer the question of qualified immunity at trial.

The matter proceeded to trial before a jury in March 2018, and the jury concluded that Respondent was entitled to qualified immunity.

On appeal, the Fifth Circuit ruled that the jury's verdict, finding that Respondent's use of force was excessive, but granting him qualified immunity, was not internally inconsistent, and that the issue of qualified immunity was properly determined by the jury. In addition, the Fifth Circuit ruled that the jury's verdict was supported by the record.

The Court of Appeals correctly held that instructing the jury as to the qualified immunity defense was not erroneous. In addition to this analysis is whether the Court of Appeals correctly ruled that the jury must have found that although Officer Faul's belief that Mason posed and continued to pose a serious threat was incorrect, it was excusable, or, at most, negligent under the facts and circumstances of this case.

The questions presented are:

1. Whether a jury's finding that an officer violated the Fourth Amendment by using excessive force precludes a finding of qualified immunity, so as to make such findings by a jury on a special jury verdict form irreconcilable as a matter of law.

2. Whether the jury's verdict, as a whole, was reasonable and supported by the evidence, and whether Petitioners failed to preserve any sufficiency of the evidence argument for review on this application.

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INTRODUCTION

This case arises out of a jury verdict determining that, although Respondent, Martin Faul, violated Quamaine Mason's constitutional rights by using deadly force, Faul was entitled to qualified immunity nonetheless. Quamaine Mason was shot and killed by Officer Faul in December 2011, when officers responded to a dispatch call regarding an aggravated robbery with a gun in progress. This case previously presented to the Fifth Circuit on summary judgment procedure, where the Fifth Circuit ruled that a jury would have to determine Officer Faul's entitlement to qualified immunity for the "last two" shots fired. Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 277–78 (5th Cir. 2015)("Mason I"). The Fifth Circuit also remanded for a determination as to whether Officer Faul was entitled to qualified immunity for the remaining shots fired, in light of Babino's testimony.[1] Judge Higginbotham dissented in part, stating that the qualified immunity question for all seven (7) shots really should go to the jury, citing genuine issues of material fact. Mason I, 806 F.3d at 282+.

On remand, Judge Whitehurst agreed, stating that Babino's testimony created a genuine issue of fact, and that the decision of qualified immunity was "best left for the jury." Mason v. Faul, 2017 U.S. Dist. LEXIS 93330, at *9 (W.D. La. May 2, 2017). Neither ruling prevented Respondent from asserting a qualified immunity defense. In fact, both rulings specifically found genuine issues of fact for trial on the issue of qualified immunity.

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[1]Babino was Quamaine Mason's girlfriend and an eyewitness to the incident.

The entirety of Officer Faul's use of force was presented to the jury in a trial lasting several days. The jury was the ultimate fact finder and credibility maker, and when presented with two different versions of facts, rendered a verdict in Respondent's favor, finding that Faul should not be held responsible for a money judgment for his actions and granting him qualified immunity.

Despite Petitioners' assertion that this case involves a simultaneous assault by dog and by cop, the jury was able to hear directly from Officer Faul and all of the witnesses through their trial testimony. The jury was instructed on the constitutional issue of excessive force and qualified immunity. The jury verdict form separated the two questions, and the instructions provided to the jury were nearly verbatim with the Fifth Circuit Pattern Jury Instructions (Civil) 10.1 and 10.3. These pattern instructions represent a cohesive and accurate summary, based on Supreme Court and Fifth Circuit precedent, on excessive force and the defense of qualified immunity.

Petitioners' attempt to classify the trial testimony by implicating that Officer Faul shot at Quamaine Mason to "prevent movement" is disingenuous, at best. The jury heard all of the testimony, including the fact that the shooting occurred over a very brief time period (a matter of seconds), all while Mason never relinquished control over his gun. There was testimony of where the gun was ultimately found, and there is no dispute that the gun was near Mason's person (underneath his body) when finally located. In addition, there was testimony that revealed that Officer Faul had no idea which bullets struck Mason, nor the location of where Mason was struck and/or the extent of any disabling effects of those bullets at the time the last two shots were fired.

All Officer Faul knew was that Mason was on the ground with his arms under his body, and the gun remained somewhere on or near his person, outside Faul's view. Qualified immunity shields an officer from suit when he makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he confronted. Saucier v. Katz, 533 U.S. 194, 206 (2001)(qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'").[2] Because the focus is on whether the officer had fair notice that his conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, even the burdens of litigation. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id., at 201; Brosseau v. Haugen, 543 U.S. 194, 198 (2004). As stated in the Fifth Circuit's Per curiam ruling:

> 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.

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[2]Respondent notes here that Petitioners' reliance on cases post-Saucier which were decided before this Honorable Court's modification of Saucier in Pearson in 2009 have no real application here. The Pearson court sought to avoid the rigid two-step analysis regarding application of the qualified immunity inquiry, advising lower courts that the "clearly established" prong need not be decided in any particular order. None of the post-Saucier cases, including Pearson, have ever held that the excessive force and qualified immunity inquiries should be melded into one; instead, the cases acknowledge that the two questions are distinct inquiries.

> The term "objective reasonableness" pertains independently to the determination of a constitutional violation and also to the immunity issue. Saucier v. Katz, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158 ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct). While Officer Faul, according to the jury, used objectively unreasonable excessive force in deploying the canine and shooting Mason, this is not fatally inconsistent with a factual finding of immunity. The jury must have found that although Officer Faul's belief that Mason posed and continued to pose a serious threat was incorrect, it was excusable or, at most, negligent in the heat and immediacy of the confrontation. Put otherwise, for immunity purposes, the jury need not have accepted the contention, advanced in Judge Higginbotham's dissent, that Mason posed no "sufficient threat" before or during the confrontation. In that situation, qualified immunity was required.

Petitioners ask this Court to grant their application, stating that qualified immunity presents an important question of federal law that "has divided the courts of appeals" and is the "kind of case" this Court ought to hear; however, Petitioners fail to acknowledge this Court's most recent rulings on qualified immunity, and fail to raise a legal issue worthy of consideration in light of the jury's verdict.[3]

Respondent shows that there is no need for this Court to review what the jury has properly determined – that based on all of the law and facts presented to at trial, Respondent is entitled to qualified immunity.

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[3]The language Petitioners quote in their Introduction are pulled from cases of this Court that have nothing at all to do with the issue of qualified immunity.

STATEMENT OF THE CASE

Petitioners' main argument is that the doctrine of qualified immunity needs further clarification, and in effect, that this Court should completely overrule its prior holdings and rule that if an officer is found to have used unconstitutionally impermissible force, that officer is forever barred from entitlement to qualified immunity. This notion has been repeatedly rejected by this Court, and is quite honestly insufficient reason, after a full trial on the merits, for granting this writ application.

This Court has already ruled that a judgment which denies an officer qualified immunity on summary judgment does not eviscerate the officer's right to again urge the defense at trial. Ortiz v. Jordan, 562 U.S. 180, 184 (2011). Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion. A qualified immunity defense does not vanish when a district court declines to rule on the plea summarily. Id. The plea remains available to officers at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court. Id.

The Fifth Circuit's ruling shows that the jury instructions and verdict form were provided in accordance with and quoted nearly verbatim from the Fifth Circuit Jury Pattern Instructions based on binding law; the jury's verdict is not internally inconsistent as a matter of law; and the issue of qualified immunity was properly presented to the jury for consideration and judgment. The Fifth Circuit has

repeatedly held that an officer is not required to wait to confirm that a suspect intended to use the gun before shooting. Valderas v. City of Lubbock, 937 F.3d 384, 389-91 (5th Cir. 2019). And this Court has warned against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," Ryburn v. Huff, 565 U.S. 469, 477 (2012).

During trial and contrary to Petitioners' factual summation presented to the Court, the jury likewise heard the following evidence from which they based their verdict:

Dr. James Traylor, a forensic pathologist, testified that the shots being fired were not consistent with Mason's hands being held up in the air (ROA.5306). Dr. Traylor testified that he saw no inconsistencies with the officers' statements of what they saw, along with Mason's movements during the time Respondent fired his duty weapon, and that "everything lines up." (ROA.5297 and 5303)

Contrary to Petitioners' assertions that everything had "calmed down" and Mason and Babino were "laughing" at the whole event, Jeremy Richardson testified consistently with his statement to Louisiana State Police – Mason told Babino that he was going to pistol whip her; Mason was "banging" on the door; Mason was shouting; Richardson heard Mason bust through the door and heard the front door make a bang sound; he heard Mason "charge" the gun (i.e, pulling back the slide on the gun) outside the bedroom door; Mason pointed the gun at Richardson's cousin; he saw Babino screaming at Mason "out of fear"; Mason pointed the gun at Richardson; he believes he was still on the phone with the dispatcher when the

officers arrived on scene; he recalls the K-9 officer (Respondent) arriving first; when directing the officers to the proper apartment, he remained fearful for Babino at that time; he did not hear/discern a pause between the shots fired (ROA.5562-5587).

Dr. Kirkham, Petitioners' expert, agreed that police training does not require or command a police officer to wait for a suspect to touch or grab hold of his weapon before the officer may deploy deadly force (ROA.6351-6352; ROA.6360-6361; ROA.6366-6367; ROA.6383-6384; ROA.6385-6386).

Consistently with Dr. Kirkham, defense's expert, Mr. Kapelsohn likewise testified that officers are trained to react prior to waiting to see if a suspect will actually touch or pull a weapon (ROA.7049-7050; ROA.7057; ROA.7058-7059; ROA.7060).

Officer Jace Galland testified that while he was giving commands for Mason and Babino to get on the ground, Mason's left hand remained in the air, but his right hand dropped towards his mid-section or just in front of him (ROA.6597); he saw the rear site of Mason's pistol hanging out of the side of his right hip (ROA.6598); as soon as he saw Mason's gun, Galland was going to yell, "gun," but Respondent already had (ROA.6599); the K-9 was not deployed prior to Mason lowering his right hand (ROA.6602); afterward, Galland saw the gun outside of the waistband around Mason's stomach area; Galland would not speculate whether the gun fell out of the waistband or whether Mason removed it, since he did not see the gun in Mason's hand (ROA.6605); the gun was definitely out of Mason's pants (ROA.6623); Officer Galland was not in a position to be able to take any kind of

action or deploy/use deadly force due to Ms. Babino's location (ROA.6608); he did not perceive any shots fired after Mason was no longer a threat (ROA.6623).

With regards to his training, Officer Galland testified that an officer does not have to wait for a subject to actually grab the gun in order to use deadly force (ROA.6619); he, too, saw Mason's right elbow "jut out" (ROA.6620); Officer Galland perceived Mason's right hand motion to the waistband area a threat (ROA.6620); he did not perceive Mason's right hand come down prior to K-9 deployment, and "definitely not" in response to try to get the K-9 away from him (ROA.6621); when he saw Mason's right hand motion, it was a deadly force situation in his mind and he would have shot, had he had a clear shot (ROA.6622).

Officer Brittany Dugas-Ardoin testified that Mason's hands did not remain up (ROA.6847); Mason dropped his hands and began to turn to Officer Faul (ROA.6847-6848); she heard Officer Faul say "gun" at the time she saw Mason's right elbow come up, prior to Officer Faul's release of the K-9 and prior to Faul firing rounds (ROA.6850-6851); Ardoin saw Mason's right hand on the butt of a gun in his waistband (ROA.6851); Officer Faul did not deploy the K-9 when Mason's hands were up (ROA.6851); she saw Mason's left hand trying to get the K-9 off, not "down to protect the crotch" (ROA.6852); she perceived threats from Mason – she believed there was a firearm, and she saw Mason's hand on the butt of the gun (ROA.6881-6882).

Officer Ardoin testified of training scenarios where she was taught she could and could not use force when dealing with an armed suspect (ROA.6853); she

likewise discussed the training of "action beats reaction" (ROA.6853). She testified that she is trained to fire until the threat stops (ROA.6897). Based on her training, she inferred Mason's motion that he was "reaching for something" (ROA.6857). Officer Ardoin did not fire any rounds at Mason, because Babino was in front of her (ROA.6855). Officer Ardoin would have shot, too, if Babino was not in the way (ROA.6888). Officer Ardoin did not perceive multiple or separate volleys of shots, but instead, "consistent shots" with no pause or break between shots (ROA.6854).

From Officer Ardoin's perception, Officer Faul did not dispatch the K-9 "for no reason." She believed that Mason was reaching for a handgun (ROA.6900). Officer Ardoin did not see deployment of the K-9 nor shots fired while Mason's hands were up (ROA.6901).

Officer Brandon Morvant heard the shooting when exiting his vehicle upon arrival on scene (ROA.6666); he heard a series of verbal commands, then a continuous series of shots (ROA.6669 and 6676).

Upon Trooper Batiste's arrival, he heard "a lot of yelling ... Then I heard the shots go off." (ROA.6826). He recalls the shots were a continuous fire; he did not appreciate any pause or two distinct sets of shots (ROA.6827-6828); when he turned the corner, he noticed one of Mason's arms underneath his body (ROA.6829).

Officer Faul testified that initially, Mason and Babino had their hands up, but when Babino started talking to the other officers, their hands went down (ROA.6248). When Officer Faul saw Mason's right hand come up towards the waistband, he made the decision to use deadly force. He tried to get the dog out of

his hand to be able to grab his duty weapon with both hands. He decided to use deadly force before he deployed his K-9. He released the K-9, because he saw Mason's right arm coming up for his gun. He released the K-9 after he saw Mason's gun and after he saw Mason's right arm make movement towards the waistband. He saw Mason's hand cup the back knuckle of the gun in his waistband. Officer Faul stated that even if he would not have released his K-9, once he shot the first shot, the K-9's training would have kicked in and it would have gone to Mason on its own. (ROA.6251-6257).

Officer Faul likewise testified that he was not trained to wait until a suspect grabs his weapon to use deadly force (ROA.6264). He was trained that action beats reaction (ROA.6541). Mason's hand coming up for the weapon is the reason Officer Faul decided to shoot. Faul released the dog and Mason's hand came into contact with the weapon and touched the gun (ROA.6264-6265).

Faul believed that there was a threat that either he would be killed or someone else on scene would have been killed (ROA.6274). He was in fear of his life and the lives of others in the area (ROA.6542). Faul didn't shoot because Mason had a weapon or a weird look; he didn't release the K-9 because Mason had a weapon or gave a weird look (ROA.6545).

When Faul saw movement that he perceived as a spin (as Mason fell prone to the ground), he had no idea what was hit on Mason's body; he had no idea whether Mason could, in actuality, pose a threat when he perceived that spinning motion (ROA.6547-6548). Again, his training on watching how quickly persons can shoot

from a prone position is what guided him on this threat, thus prompting the last two (2) shots.

After a several day trial, the jury returned a defense verdict, finding Respondent was entitled to qualified immunity. Judgment was entered consistently therewith on March 16, 2018 (ROA.4936). Petitioners appealed to the Fifth Circuit Court of Appeals, which affirmed the jury's verdict. Mason v. Faul, 929 F.3d 762 (5th Cir. 2019)("Mason II"). Now, Petitioners proceed pro se before this Court asking for review; however, for the reasons stated herein, Petitioners' writ application should be denied.

It is this court's duty to resolve any facial conflict in a jury's verdict. Gallick v. Baltimore and Ohio Railroad Co., 327 U.S. 108, 119 (1963)("it is the duty of the courts to attempt to harmonize the answers . . . to reconcile the jury's findings, by exegesis, if necessary . . before we are free to disregard the jury's verdict and remand the case for a new trial."). Given the numerous witnesses' testimony and differing versions of the encounter, the jury's verdict and findings are clearly supported by the record evidence, are not in conflict, and should not be disturbed.[4]

[4]While Petitioners' brief begins with a purported outline of testimony favorable to their case, they have, for the first time on this Application, made legal arguments that the evidence was insufficient to support the jury's verdict. Any such argument is waived. See Davis v. Hollier, 595 F. App'x 428, 429 (5th Cir. 2015)(Appellant waived appellate review of the sufficiency of the evidence because he did not file a post-verdict motion under Federal Rule of Civil Procedure 50(b) for a judgment as a matter of law or a motion under Federal Rule of Civil Procedure 59 for a new trial on the ground that the verdict was contrary to the weight of the evidence. See Downey v. Strain, 510 F.3d 534, 543 (5th Cir.2007); Price v. Rosiek Const. Co., 509 F.3d 704, 707 (5th Cir.2007)). The sufficiency of the evidence for the jury's finding that Officer Faul is entitled to qualified immunity has not been preserved and cannot form the basis of reversal on this application.

SUMMARY OF THE ARGUMENT

Plaintiffs' main arguments are that the District Court Judge committed reversible error in allowing the qualified immunity issue to go to the jury – both in instructions and by way of special interrogatory, and that, since the jury answered "yes" to the question that Officer Faul's use of force was excessive, the finding of qualified immunity renders the judgment a per se inconsistent verdict requiring reversal and a new trial.

Petitioners claim that any rulings relying on Young v. City of Kileen, 775 F.2d 1349 (5th Cir. 1985) "culminated in a deprivation of Respondents Mason's Constitutional rights, requiring reversal." In addition, Petitioners attempt to hang their hat on Judge Higginbotham's dissent in Mason I, claiming that Young was "inapplicable," in a sort of "law of the case" argument that was rightfully rejected by the Fifth Circuit in Mason II. In addition, Petitioners misconstrue the District Court's pretrial rulings relying on Young and even incorrectly argue that "if the best that a plaintiff can do is establish that an officer acted negligently, there would always be qualified immunity." Where Petitioners' argument misses the mark is that in an action under §1983, negligent acts alone are insufficient to establish a civil rights violation. Petitioners' argument loses the forest from the trees. Petitioners' assertion that their expert should have been allowed to testify as to whether the responding officers violated police procedures at any time period before the time force was used is legally incorrect. Anderson v. Creighton, 483 U.S. 635, 641 (1987)(qualified immunity protects reasonable, if mistaken, judgments by law

enforcement); Mullenix v. Luna, 136 S. Ct. 305, 310 (2015)(officers are entitled to qualified immunity even where they could have used "alternative means" to subdue the suspect). In City & Cnty. Of San Francisco v. Sheehan,135 S.Ct. 1765 (2015), this Court restated that the Fourth Amendment is not violated even if police officers, with the benefit of hindsight, may have made some mistakes, because "[t]he Constitution is not blind to 'the fact that police officers are often forced to make split-second judgments.'" Sheehan, 135 S. Ct. at 1775 (quoting Plumhoff v. Rickard, 572 U.S. 765, 775 (2014)). The law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect. Mullenix v. Luna, 136 S.Ct. 305, 311 (2015).

This Court has "repeatedly told courts . . . not to define clearly established law at [that] high level of generality." Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011), yet this is exactly what Petitioners want the Court to do here. Rather, "[t]he dispositive question is whether the violative nature of particular conduct is clearly established." Mullenix, 136 S. Ct. at 308 (citation omitted).

Petitioners wish to throw out this Court's requirement that an officer's conduct be in contravention of "clearly established law," arguing that the use of force here was a clear or obvious case; however, Respondent notes that, to date, this Court has never identified such an "obvious" case in the excessive force context. To the contrary, this Honorable Court has granted qualified immunity in much tougher cases than this one. In Plumhoff, supra officers fired 15 shots and killed two unarmed men who fled a traffic stop. In Brosseau v. Haugen, 543 U.S. 194

(2004), an officer shot an unarmed man who refused to open his truck window. In Kisela v. Hughes, 138 S.Ct. 1148 (2018), officers shot a woman who was hacking a tree with a kitchen knife. In Sheehan, supra, officers shot an old woman holding a kitchen knife in an assisted-living facility. In all of these cases, the officers were entitled to qualified immunity. In fact, "regardless of whether the petitioner is an officer or an alleged victim of police misconduct," the Court has "rarely grant[ed] review where the thrust of the claim is that the lower court simply erred in applying a settled rule of law to the facts of a particular case." Salazar-Limon v. City of Houston, 137 S.Ct. 1277, 1278 (2017)(Justice Alito, concurring in the denial of certiorari).

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Mullenix, supra. Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Id. A review of this Court's jurisprudence reveals that this Court has never held that officers confronted in close quarters with an armed suspect in possession of a gun (a gun that had a bullet chambered and was ready to shoot) must hope they are faster on the draw and a more accurate shot. To the contrary, this Court has repeatedly stated in very clear

and plain terms that qualified immunity exists to balance exactly this type of unfortunate situation that officers so often face.

Qualified immunity for the use of deadly force is assessed at the moment a law enforcement officer confronts a suspect, Graham v. Connor, 490 U.S. 386, 397 (1989), but the officer's understanding of facts leading up to the event color the question whether "a reasonable officer" could have believed his life or the lives of others were endangered. White v. Pauly, 137 S. Ct. 548, 550, 552 (2017).

This Court clarified that for alleged Fourth Amendment excessive force violations, reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. The calculus of "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." Id. at 396-97. Ultimately, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ." Id. at 397. This Court later explained that the test for qualified immunity for excessive force "has a further dimension" in addition to the deferential, on-the-scene evaluation of objective reasonableness. Saucier v. Katz, 533 U.S. 194, 205 (2001). Justice Kennedy explained: "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." Id. "Qualified immunity operates in this case, then, just as it does in others, to protect

officers from the sometimes hazy border between excessive and acceptable force and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Id. at 206 (internal citation and quotation marks omitted). Unfortunately in this case, the Fifth Circuit's ruling in Mason I sent this matter to let the jury sort out the truth, despite the gravity of the situation faced by the officers. The qualified immunity question in this case is obviously on the limits of the force Officer Faul was able to use, and falls on the inquiry as to whether every reasonable officer in this factual context would have known that use of deadly force while deploying a less-than-lethal force (deployment of the K-9) was objectively unreasonable. See Pearson v. Callahan, 555 U.S. 223, 232 (2009). Here, no evidence was submitted to the jury that Officer Faul was "plainly incompetent," or that he "knowingly violated the law." Mullenix, 136 S.Ct. at 308. Absent plain incompetence or intentional violations, qualified immunity must attach, because the "social costs" of any other rule are too high. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); see also, e.g., Sheehan, 135 S. Ct. at 1774 n.3 (noting "the importance of qualified immunity to society as a whole").

An "obvious case" is one where an officer's actions are plainly unlawful under a generalized legal test, even if those actions do not contravene a "body of relevant case law." Brosseau, 543 U.S. at 199 (citing Hope v. Pelzer, 536 U.S. 730, 738 (2002)); White v. Pauly, 137 S. Ct. 548, 552 (2017)(an "obvious case" means that "in the light of pre-existing law the unlawfulness [of the officer's actions] must be apparent")(citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The Petitioners

point to no Supreme Court binding precedent that holds that use of the officer's K-9, while simultaneously deciding to discharge his firearm when perceiving the suspect's movement towards a handgun on the suspect's person, is an action that places the officer's use of force "beyond debate." Nor can Petitioners point to any consensus or body of law that states that it is constitutionally inappropriate to fire shots into the back of a prone suspect who still has possession of his loaded and chambered handgun – especially when the officer did not yet know or perceive that the suspect had been incapacitated by one or more of the previously fired shots.

The jury instructions given here were in accordance with the Fifth Circuit Jury Pattern Instructions and in accordance with law; hence, the jury's verdict is not internally inconsistent. The issue of qualified immunity was properly presented to the jury, and Petitioners failed to preserve any sufficiency of the evidence argument for review.

REASONS FOR DENYING THE PETITION

A. Jury Verdict – Standard of Review

In determining whether a Fourth Amendment violation occurred, the Court draws all reasonable factual inferences in favor of the jury verdict, but as made clear in Ornelas v. United States, 517 U.S. 690, 697-699 (1996), the Court does not defer to the jury's legal conclusion that those facts violate the Constitution. Muehler v. Mena, 544 U.S. 93, 98 (2005). As stated above, this Court has "rarely grant[ed] review where the thrust of the claim is that the lower court simply erred in

applying a settled rule of law to the facts of a particular case." Salazar-Limon, supra.

Courts of review are "especially deferential" to jury verdicts, and "draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the non-moving party." Johnson v. Thibodaux City, 887 F.3d 726, 731 (5th Cir. 2018). Here, Petitioners took a direct appeal from the jury's verdict. They did not file for a Judgment as a Matter of Law, nor did they file a motion for new trial.

The standard of review regarding the weight of the evidence supporting a jury verdict is narrow. See, e.g., Hiller v. Manufacturers Prod. Research Group of North America, Inc., 59 F.3d 1514, 1522 (5th Cir.1995). Petitioners' brief does not directly challenge credibility choices made by the jury, but to the extent that it does, this Court should not disturb those choices. See Martin v. Thomas, 973 F.2d 449, 453 n. 3 (5th Cir.1992); Murdock v. Denton, 134 F.3d 366 (5th Cir. 1997). The jury is solely responsible for determining the weight and credibility of the evidence. United States v. Jaramillo, 42 F.3d 920, 923 (5th Cir.1995).

Because the Court accepts all credibility choices that tend to support the jury's verdict, United States v. Anderson, 933 F.2d 1261, 1274 (5th Cir.1991), it is clear that a reasonable jury could conclude that Officer Faul was entitled to qualified immunity under the circumstances of this case. In fact, the Fifth Circuit has long held that "juries are free to choose among all reasonable constructions of the evidence." United States v. Charroux, 3 F.3d 827, 831 (5th Cir.1993). "Weighing

the conflicting evidence and the inferences to be drawn from that evidence, and determining the relative credibility of the witnesses, are the province of the jury, and its decision must be accepted if the record contains any competent and substantial evidence tending fairly to support the verdict." Gibraltar Savings v. LDBrinkman Corp., 860 F.2d 1275, 1297 (5th Cir.1988), cert. denied, 490 U.S. 1091 (1989); Strauch v. Gates Rubber Co., 879 F.2d 1282, 1285 (5th Cir.1989), cert. denied, 493 U.S. 1045 (1990). A reasonable jury could find that Officer Faul's use of force, albeit excessive, was still entitled to the protections of qualified immunity. There was sufficient evidence to challenge Plaintiffs' version of events and to find that Officer Faul was entitled to qualified immunity, due to a mistake of fact, a mistake of law, or both. The jury had ample evidence on which to base its verdict. Therefore, Respondent prays that this Court decline to disturb the jury verdict.

B. The District Court's pretrial rulings were correct as a matter of law

Where, as here, the Court used the Fifth Circuit Court of Appeal's Pattern Jury Instructions based on applicable law, it would be difficult for any Court to find such an abuse of discretion. Williams v. Honeycutt, 623 F. App'x 268, 269 (5th Cir. 2015). The instructions in this case parallel the pattern jury instructions for a claim of excessive force and is a correct statement of law. See Fifth Circuit Pattern Jury Instruction (Civil) § 10.1 and 10.3 (2014). The provisions complained of in this application comport with Supreme Court and Fifth Circuit authority and precedent. As such, the District Court's use of the pattern jury instructions does not rise to the level of clear or obvious error.

The trial judge has considerable latitude in framing his instructions to the jury as long as he explains adequately all of the claims and theories advanced by both parties. Andry v. Farrell Lines, Inc., 478 F.2d 758, 759 (5th Cir. 1973). Similarly, special interrogatories are unassailable if they adequately present the issues to the jury. Dreiling v. General Electric Co., 511 F.2d 768, 774 (5th Cir. 1975). Respondent shows the jury instructions and verdict form were more than sufficient under these standards. Keyes v. Lauga, 635 F.2d 330, 333–34 (5th Cir. 1981).

A review of the jury charges, as a whole, do not warrant reversal, since the jury was not misled as to the substantive law. Bradshaw v. Freightliner Corp., 937 F.2d 197, 200 (5th Cir.1991). Since the jury instructions and the verdict form were correct recitations of the substantive law, no harmful error exists to warrant review.

1. Petitioners' second complaint fails, as the District Court properly applied Young v. Killeen to the facts of this case

Petitioners do not outline what evidence or specific facts they complain the District Court's rulings prevented them from introducing at trial and/or how they suffered prejudice. They do not refer to any proffered exhibit or evidence they claim was wrongfully excluded. Instead, Petitioners again rely on verbiage from Judge Higginbotham's opinion in Mason I to imply that the District Court's pretrial rulings were in error. Judge Higginbotham's opinion in Mason I is not "law of the case," since it did not conclusively establish any facts on the merits. At this post-trial stage, the Court simply cannot use Petitioners' or Judge Higginbotham's "narrative" any longer. The jury heard the entirety of the testimony from all of the

witnesses. Officer Faul was again granted qualified immunity, but this time, by the jury after a full-blown trial on the merits.

In deadly force cases brought under §1983, the objective reasonableness standard is what controls in this case – not what the officers "could have done" better. The Second, Fourth, Fifth, Eighth, and Eleventh Circuits have generally declined to consider as relevant the pre-seizure conduct of officers. The Fifth Circuit rejected arguments that police officers could be held liable for manufacturing the circumstances that gave rise to a fatal shooting in Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992) and Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985) (finding no constitutional violation where officer shot decedent in self-defense, although the need for force might have been avoided if officer had followed proper police procedures in handling the incident). In Fraire and Young, the court treated the failure to follow proper police procedures as negligent at most, and thus an insufficient basis to support a constitutional violation. A claim that a state actor acted negligently does not state a claim for deprivation of constitutional rights. See Daniels v. Williams, 474 U.S. 327, 328 (1986); Davidson v. Cannon, 474 U.S. 344, 348 (1986).

Accordingly, Petitioners' experts' opinions that Respondent "created" the need to use deadly force by his actions prior to the moment of seizure is irrelevant to the issues presented in this case, and their opinions were properly limited. Expert their testimony basing opinions on what Respondent "should have done" before the decision to use deadly force were properly excluded as were irrelevant.

Petitioners next state that Judge Higginbotham "signaled" the use of Graves v. Zachary, 277 Fed.Appx 344 (5th Cir. 2008)(unpublished) in this case, because an officer cannot shoot a compliant subject, nor can he fire at someone who is objectively downed or "incapacitated." Much evidence on this issue was provided to the jury, including the commands provided to Mason; the approximate time it took for all 7 shots to occur; what the others on scene witnessed; and whether they believed the officers' version of events for the time frame when all of the shots were fired. Petitioners provide absolutely no reference to the record to indicate why, on this full and complete record, Officer Faul would not be entitled to qualified immunity. Here, the jury either did not believe that Mason was no longer a threat to Officer Faul when the last two shots were fired, or they believed that no officer in Officer Faul's position (who perceived Mason quickly attempt to come up while realizing Mason was still in possession of the handgun and not knowing what, if any, injuries Mason sustained in that split second) would have known that firing the last two shots were unconstitutional, especially if Officer Faul did not know at that moment whether Mason was, in fact, incapacitated. There was conflicting evidence on the "simultaneous" use of the K-9 and gun. Respondent testified that his intent was not to truly deploy the K-9 in the traditional sense, but instead, when he saw Mason's hand make motion towards his waistband where the gun was located, he had at that very moment, made up his mind to use deadly force (ROA.6457). The other two officers on scene agreed that they, too, would have used deadly force in this situation (ROA.6622 and ROA.6888). Petitioners' expert, Dr.

Kirkham, agreed that Respondent did not have to wait until Mason pulled or touched the firearm for this to become a deadly force scenario (ROA.6351-6352; ROA.6360-6361; ROA.6366-6367; and ROA.6382-6386). All of the experts agreed on these salient facts, and all of the law enforcement witnesses confirmed that their training reinforces that "action" beats "reaction" every time. For an officer to wait to see what a suspect does with his weapon is not the standard by which their training governs their actions.

Petitioners' application not only fails to articulate what evidence was wrongfully excluded, but likewise fails to show any prejudice regarding the Court's evidentiary rulings based on Young. Thus, these complained of rulings cannot provide the basis for granting Petitioners' application.

2. The issue of qualified immunity was properly before the jury

Respondent shows that he had no right to an interlocutory appeal of the District Court's denial of his Motion for Summary Judgment on remand, since the Court found that genuine issues of material fact remained on the issue of qualified immunity. Nor did Mason I or Magistrate Whitehurst's report and recommendations on remand find that Officer Faul was not entitled to assert the defense of qualified immunity at trial. Petitioners continue to misconstrue Judge Higginbotham's opinion in Mason I. Mason I was rendered in the context of a summary judgment motion and did not foreclose further litigation of Faul's qualified immunity defense. Ortiz v. Jordan, 562 U.S. 180, 184 (2011); see also, Stoner v. State Farm Mutual Auto. Ins. Co., 856 F.2d 1195, 1197 (8th Cir.1988). The

defense offered evidence at trial disputing the version of events upon which the Court's rulings in Mason I were based. Under such circumstances, the law of the case doctrine is not strictly applicable. Peterson v. City of Plymouth, 60 F.3d 469, 473 (8th Cir. 1995). As this Court has observed:

> "The denial of a defendant's motion for ... summary judgment on the ground of qualified immunity ... is 'conclusive' in either of two respects. In some cases, it may represent the trial court's conclusion that even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of the qualified immunity. In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune. Alternatively, the trial judge may rule only that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations...."

Mitchell v. Forsyth, 472 U.S. 511, 527 (1985). Here, Mason I and the opinion on remand clearly stated that it would be for the jury to determine whether Officer Faul was entitled to qualified immunity. Petitioners' arguments on this front raise no colorable legal issue for this Court to resolve.

C. A finding of excessive force does not necessarily preclude a finding of qualified immunity

The determination that an officer used excessive force may preclude a finding that the officer is entitled to qualified immunity, but it does not always do so. Because an officer may be entitled to immunity, even for unlawful conduct if the unlawfulness of his conduct was not "clearly established" and thus obvious at the

time he acted, there is not necessarily inconsistency between a finding of excessive force and a decision that the officer is entitled to qualified immunity.

Here, the way in which the jury was instructed makes the findings of excessive force and immunity easy to reconcile. That is so, because despite Petitioners' assertion that the qualified immunity charge was "redundant" or "unnecessary" if the jury found that the force used was excessive, petitioners fail to concede that the qualified immunity inquiry is distinct from the excessive force inquiry where there is uncertainty about the governing legal standard or its application to particular facts.

In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), this Court ruled that qualified immunity precludes a government officer from being held liable for unconstitutional conduct unless the official conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." In addition, Malley v. Briggs, 475 U.S. 335, 343 (1986) further observed that qualified immunity leaves "ample room for mistaken" but otherwise reasonable "judgments" regarding the requirements of law. Even if an officer errs and violates the Constitution, immunity shields the officer from liability unless "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were constitutional. Id at 341. "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." Ibid.

Under both Anderson and Malley, the excessive force question is not necessarily identical to the immunity question. While the excessive force inquiry asks the jury to determine whether the officer's conduct was "reasonable," the immunity inquiry asks whether, even if the officer's use of force was objectively unreasonable, the officer might nonetheless be immune from liability, because the law or the application of the law to the specific facts the officer confronted did not clearly establish that what he was doing violated the plaintiff's rights. Anderson, 483 U.S. at 640. Thus, as the jury instruction in this case noted, Officer Faul was entitled to immunity if the jury believed that "officers of reasonable competence could [have] disagree[d]" with that conclusion at the time the officer acted. Malley, 475 U.S. at 343. To be clear, even where the legal standard is well articulated, "[t]he contours of" its application "must be sufficiently clear that a reasonable official would understand that what he is doing violates" a constitutional right. Anderson, 483 U.S. at 640.

Moreover, this Court has rejected Petitioners' assertion that an officer who violates the Fourth Amendment by using excessive force could not possibly be entitled to qualified immunity. Anderson v. Creighton, 483 U.S. at 643. In fact, this Court rejected a similar argument as posited by Petitioners' herein as "unpersuasive." Ibid.

When a jury determines whether excessive force has been used, it has decided the standard to govern the officer's conduct when confronting a certain set of facts. And when the jury determines the question of immunity, it asks a different

question, i.e., whether the standard of conduct it determined to exist was sufficiently obvious in the first instance, such that the officer could not reasonably have thought his conduct lawful when he acted. While the term "reasonableness" is used in both the excessive force and the qualified immunity inquiries, Anderson makes it clear that the term serves a different function in each context. Thus, even though the jury determines that an officer's use of force was "unreasonable" (for whatever reason), the jury is not precluded from also acknowledging that the question was sufficiently close that reasonable officers could have disagreed. And, where such disagreement over what constitutes "reasonable force" is possible, such as here, immunity must be granted. Malley, 475 U.S. at 341 (where "officers of reasonable competence could disagree ... immunity should be recognized"); Anderson, 483 U.S. at 640 (reasonable officer must understand that "what he is doing" is unconstitutional).

D. The Jury did not render an inconsistent verdict

Petitioners assert that the jury rendered an inconsistent verdict, since they found that Officer Faul was entitled to qualified immunity, despite also finding that he used unreasonable force. They complain about the second question on the jury verdict form; however, when asked on the record whether there were any objections to the verdict form as finalized, Petitioners' counsel stated there were no objections (ROA.7102).

Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one

possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360 (1957); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962). Petitioners point to no case in this Court that has ever found that providing a jury with questions on excessive force and a question on qualified immunity was "inconsistent on their face" or "per se inconsistent" as a matter of law. In fact, standing precedent reveals just the opposite, as reflected in the Fifth Circuit Pattern Jury Charges generally, and specifically, Pattern Instructions 10.1 and 10.3, as well as footnote 30 contained therein. As instructed from Charge 10.3, qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions, provides protection from liability for "all but the plainly incompetent," or those who "knowingly violate the law." In fact, the protection of qualified immunity applies regardless of whether the officer's error is a mistake of law, mistake of fact, or mistake based on mixed questions of law and fact. Pearson v. Callahan, 555 US 223 (2009).

Accordingly, a qualified immunity instruction and corresponding jury charge was appropriate, since Respondent's entitlement to qualified immunity remained a viable trial issue. On this issue, Petitioners rely solely on the answer to question 1 on the jury verdict form to claim that the verdict granting Faul immunity is irreconcilable and legally erroneous. However, they point to no jurisprudence from this Court that has ever held that there is an inherent, irreconcilable conflict between a finding of excessive force on the one hand, and qualified immunity on the

other. The trial testimony shows that really any officer in Respondent's position would not have perceived that firing upon Mason and deploying the K-9 would violate a person's constitutional rights. Stated another way, there is no consensus in the case law that would put any officer on notice that once he's made a decision to use deadly force, the simultaneous use of some less-than-lethal force would somehow render the force used constitutionally excessive.

Petitioners argue that the District Court erred in submitting the immunity question to the jury. Instead, they insist that only one question must be asked – whether the officer's use of force was constitutionally unreasonable. Petitioners make this argument, despite acknowledging that in 2001, this Court in Saucier v. Katz, 533 U.S. 194 (2001), acknowledged that the inquiries of excessive force and qualified immunity remain distinct inquiries, with qualified immunity having "further dimension." While qualified immunity "ordinarily should be decided by the court long before trial," Hunter v. Bryant, 502 U.S. 224, 228 (1991), if the issue is not decided until trial, the defense is not waived but goes to the jury, which "must determine the objective legal reasonableness of [the] officer's conduct by construing the facts in dispute." Melear v. Spears, 862 F.2d 1177, 1184 (5th Cir.1989) (footnote omitted). So, "if ... there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question." Presley v. City of Benbrook, 4 F.3d 405, 410 (5th Cir.1993).

Mason I found there were important factual questions that remained for trial. Specifically, the jury needed to determine what sequence of events occurred,

and, in particular, whether Mason reached for the gun before Officer Faul released his K-9 (or Officer Faul reasonably believed Mason reached for his gun), whether Officer Faul's release of the K-9 was an inappropriate "seizure," whether Officer Faul's last two shots were in response to a "spin move" that presented a threat, or whether Mason was "incapacitated." Mason I specifically ruled that genuine issues for trial in light of Babino's conflicting testimony, stating that those conflicts needed to be weighed by the trier of fact. Accordingly, the District Court properly submitted the issue of qualified immunity to the jury under these facts. See also, Brown v. Glossip, 878 F.2d 871, 873–74 (5th Cir.1989)("that qualified immunity is available as a defense to monetary liability for an objectively unreasonable use of excessive force under the Fourth Amendment."). Based on the foregoing, this Court should reject Petitioners' argument that the jury reached inconsistent verdicts. Where a party challenges the consistency of a jury verdict, "it is the duty of the courts to attempt to harmonize the answers ... to reconcile the jury's findings, by exegesis, if necessary ... before we are free to disregard the jury's verdict and remand the case for a new trial." Gallick v. Baltimore and Ohio Railroad Co ., 83 S.Ct. 659, 666 (1963). The lower courts were not erroneous in giving the qualified immunity instruction, nor by including the qualified immunity question on the Jury Verdict Form.

The qualified immunity analysis can shield a law enforcement officer that commits a constitutional violation, since qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475

US 335, 341 (1986). The protection of qualified immunity applies regardless of whether the officer's error is mistake of law, mistake of fact, or mistake based on mixed questions of law and fact. Pearson v. Callahan, 555 US 223 (2009). Based on this Court's qualified immunity precedent, the lower courts did not abuse their discretion by allowing the qualified immunity instructions and special interrogatory to go before the jury. Since there was no abuse of discretion in submitting instructions and interrogatories on both qualified immunity and excessive force, the jury's verdict must be allowed to stand. There was sufficient evidence from which the jury could have found as it did. Findings of immunity and excessive force are reconcilable if the fact finder could have determined that the force used was not permissible, but that it was sufficiently close to an unclear constitutional boundary that reasonable officers could have disagreed. And, as the Fifth Circuit stated, the "jury must have found that although Officer Faul's belief that Mason posed and continued to pose a serious threat was incorrect, it was excusable or, at most, negligent in the heat and immediacy of the confrontation." Accordingly, given the evidence adduced at trial, there is no internal conflict in the verdict, and the Fifth Circuit properly affirmed judgment granting qualified immunity to Officer Faul, since the facts presented to the jury support each of the jury's findings.

CONCLUSION

Based on the foregoing, Petitioners' writ application should be denied. There is no legal basis to converge the inquiries regarding excessive force and entitlement to qualified immunity into a singular question. Nor does the weight of the current

state of the law in this area recognize that a finding by a jury that an officer's use of force was constitutionally unreasonable necessarily deprives that officer from asserting his entitlement to qualified immunity. Based on the weight of the trial evidence, the jury's verdict is not inconsistent as a matter of law. The trial evidence fully supports the jury's verdict granting Officer Faul qualified immunity. For all reasons set forth herein, Respondent prays that the jury's verdict be left alone, and this Honorable Court deny Petitioners' writ of certiorari.

Respectfully submitted.

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