No. _____

IN THE

Supreme Court of the United States

DAVDRIN GOFFIN,

Petitioner,

v.

ROBBIE K. ASHCRAFT, INDIVIDUALLY AND OFFICIAL CAPACITY AS POLICE OFFICER WARREN, AR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL S. HARAWA*
Counsel of Record
WASHINGTON UNIVERSITY SCHOOL OF LAW APPELLATE CLINIC
One Brookings Drive, Box 11200
St. Louis, MO 63130

March 15, 2021

QUESTION PRESENTED

Tennessee v. Garner announced the rule that it is unconstitutional for police officers to use deadly force to apprehend a fleeing suspect who does not appear to be armed or otherwise dangerous. 471 U.S. 1, 11 (1985).

The question presented is:

Is an officer entitled to qualified immunity if she shoots a fleeing suspect in the back without warning after watching another officer search the suspect for weapons and the search turned up nothing, and thus the officer had no probable cause to that believe the suspect was armed?

PARTIES TO THE PROCEEDINGS

- Petitioner Davdrin Goffin was appellant in the court of appeals.
- Respondent Officer Robbie K. Ashcraft was appellee in the court of appeals
- Randy Peek, Chief of Police, Warren, AR, was appellee in the court of appeals
- Bryan Martin, Mayor, Warren, AR, was appellee in the court of appeals.
- John Doe, 1-10, was appellee in the court of appeals.
- City of Warren, AR, was appellee in the court of appeals.

RELATED CASES

- *Goffin v. Ashcraft*, No. 18-1430, U.S. Court of Appeals for the Eighth Circuit. Judgment entered October 15, 2020.

- *Goffin v. Peek*, No. 1:15-cv-1040, U.S. District Court for the Western District of Arkansas. Judgement entered January 23, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Davdrin Goffin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion issued after panel rehearing is reported at 977 F.3d 687 (App. 1a-15a). The withdrawn opinion is reported at 957 F.3d 858 (App. 16a-26a). The opinion of the United States District Court for the Western District of Arkansas is unpublished but available at 2018 WL 522783 (App. 27a-39a).

JURISDICTION

The Eighth Circuit granted Mr. Goffin's petition for panel rehearing and issued its revised judgment on October 15, 2020. On March 19, 2020, this Court entered a standing order extending the time to file a petition for a writ of certiorari in this case to March 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Title 42 U.S.C. § 1983 provides:

> 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

Davdrin Goffin was suspected of burglarizing his uncle's house and stealing two guns. After receiving the report, Officers Robbie Ashcraft and Aaron Hines found Mr. Goffin sitting in the passenger seat of a car at a nearby body shop. The officers approached with their guns drawn and ordered Mr. Goffin to exit the car with his hands up. Mr. Goffin complied. His hands were empty. Seeing his empty hands, Officer Hines holstered his weapon, ordered Mr. Goffin to put his hands on the trunk, and "searched every part" of Mr. Goffin's body for weapons. With Officer Ashcraft close by and observing, Officer Hines' pat down turned up nothing. When Officer Hines tried to handcuff Mr. Goffin, Mr. Goffin spun around and began to run from the officers. Suddenly and without warning, Officer Ashcraft shot Mr. Goffin in the back from just two steps away. When Mr. Goffin asked why she shot him, Officer Ashcraft replied that he "shouldn't have ran."

Mr. Goffin alleged that Officer Ashcraft's use of deadly force violated his clearly established Fourth Amendment rights. Indeed, over three decades ago, the Court in *Tennessee v. Garner* held that police cannot use deadly force to apprehend an unarmed nondangerous suspect who tries to flee.

The Eighth Circuit nevertheless held Officer Ashcraft was entitled to qualified immunity. Two judges agreed that Officer Ashcraft's use of deadly force violated the Fourth Amendment. As Chief Judge Smith explained in his concurrence, "probable cause to believe that Goffin was armed dissipated upon completion of [the] full body pat-down search that revealed no weapons." However, he and Judge Kobes

concluded that the shooting did not violate clearly established law because no case had dealt with these precise facts. As Judge Kobes's majority opinion held and Chief Judge Smith's concurrence emphasized, qualified immunity was warranted because Mr. Goffin did not "provide a case clearly establishing that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous."

Judge Kelly agreed with Chief Judge Smith that Officer Ashcraft violated the Fourth Amendment, but dissented from the ruling that Mr. Goffin's rights were not clearly established. Judge Kelly explained that this Court "has long rejected the notion that 'an official action is protected by qualified immunity unless the very action in question has been previously held unlawful.'" In Judge Kelly's view, Officer Ashcraft was on "fair notice that her conduct was unlawful" because it is "undisputed that since 1985, it has been established by the Supreme Court that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted." Judge Kelly concluded that "although the novel faculty circumstance of a pat down may impact whether a reasonable jury finds Ashcraft's actions objectively reasonable, it does not render inapplicable [this] clearly established law . . . ."

Certiorari is warranted. The *Garner* Court put police on fair notice over three decades ago that they cannot shoot an unarmed suspect who tries to flee. And as Judge Kelly explained, the fact that there was an intervening pat down in this instance does not

make this established principle any less clear. *How* an officer comes to learn a suspect is unarmed is immaterial to the qualified immunity analysis. In fact, Officer Ashcraft watching her partner search every part of Mr. Goffin's body, and seeing from the search Mr. Goffin was unarmed, only underscores the unreasonableness of her use of deadly force. Under analogous circumstances, other circuits have denied qualified immunity.

Summary reversal is appropriate. *See Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam) (summarily reversing because the lower court's decision was "at odds" with the Court's case law). Chief Judge Smith and Judge Kobes were laser-focused on the fact that Mr. Goffin had not identified a case with the same exact facts. But as the Court recently reiterated, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" making a closely analogous case unnecessary. *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The constitutional rule established by *Garner*—that an officer may not use deadly force to apprehend an unarmed suspect—applies with obvious clarity here. Officer Ashcraft had more than fair warning that her use of deadly force against Mr. Goffin, who police had confirmed was unarmed, was unconstitutional. Her actions did not fall within the "hazy border between excessive and acceptable force." *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (quotation marks omitted).

Alternatively, the Court should grant certiorari, vacate the judgment below, and remand for further

consideration in light of *Taylor*. *See, e.g.*, *McCoy v. Alamu*, No. 20-31, 2021 WL 666347 (Feb. 22, 2021). In light of "intervening developments"—the Court's decision in *Taylor*—it is likely that "if given the opportunity for further consideration," that "such a redetermination may determine the outcome of the litigation." *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (explaining when GVR orders are appropriate).

STATEMENT OF THE CASE[1]

A. Officer Ashcraft Shot Unarmed Mr. Goffin in the Back.

One evening, Officers Robbie Ashcraft and Aaron Hines responded to a burglary call at the house of Tommy Reddick. App. 27a. Reddick reported that his nephew, Davdrin Goffin, broke into his home earlier that day and stole a couple of guns, a box of bullets, and a bottle pain pills. App. 27a-28a. Officer Ashcraft told Mr. Reddick they had been "looking for" Mr. Goffin in relation to a robbery. App. 28a. Mr. Reddick responded that Mr. Goffin is "out of control," and told the officers they "better be ready to fight when you find him." App. 2a.

The officers split up to search for Mr. Goffin. Officer Ashcraft stopped Dewayne Moore and asked him if he had seen Mr. Goffin. App. 3a. Mr. Moore responded that earlier, Mr. Goffin had flagged him down for a ride. App. 3a. According to Mr. Moore, when he pulled over, Mr. Goffin flashed two guns and demanded that he take him to the carwash. App. 3a. Afraid, Mr. Moore gave Mr. Goffin a ride. App. 3a. Mr. Moore told Officer Ashcraft that Mr. Goffin looked like he "was going to do something stupid." App. 3a.

Officers Ashcraft and Hines found Mr. Goffin at a nearby body shop. App. 3a. Mr. Goffin was sitting in the passenger seat of a car, talking on the phone. App. 3a. The officers drew their weapons and approached, ordering Mr. Goffin to exit the car with his hands up.

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[1] Because the case was resolved at summary judgment, the facts are construed in the light most favorable to Mr. Goffin. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

App. 3a. Mr. Goffin complied. App. 3a. His hands were empty. *See* App. 3a. As Mr. Goffin was getting out of the car, Officer Ashcraft claimed she saw something "bumping in [his] right front pocket." App. 3a.

Officer Hines then directed Mr. Goffin to the back of the car, while Officer Ashcraft kept her gun trained on Mr. Goffin. App. 29. Officer Hines ordered Mr. Goffin to put his hands on the trunk. App. 29a. He then patted Mr. Goffin down and "searched every part of [Mr. Goffin's] body" looking for weapons. App. 3a. Officer Ashcraft was watching from a few feet away with her gun still drawn. App. 29a.

Officer Hines's search for weapons did not turn up anything. App. 3a. Satisfied that Mr. Goffin was unarmed, Officer Hines tried to handcuff Mr. Goffin. App. 3a. He got one cuff around Mr. Goffin's left wrist and was about to cuff the right, when Mr. Goffin wheeled around and started toward the street near where several people were standing. App. 8a. Mr. Goffin made it two steps before Officer Ashcraft, without warning, shot him in the back. App. 4a.

The officers handcuffed Mr. Goffin and searched his pockets, finding loose bullets and a magazine, but no weapons. App. 4a. Mr. Goffin looked up at Officer Ashcraft and asked her why she shot him. Officer Ashcraft responded "because you shouldn't have ran." ECF No. 56, Exh. 1 at 24.

B. The District Court Granted Officer Ashcraft Summary Judgment.

Mr. Goffin sued under 42 U.S.C. § 1983, alleging Officer Ashcraft violated his Fourth Amendment

right to be free from excessive force. Officer Ashcraft moved for summary judgment, arguing she did not use constitutionally excessive force because she reasonably believed Mr. Goffin was armed, and in the alternative, that it was not clearly established that her use of force was unconstitutional. Mr. Goffin responded that it has been clearly established since *Garner* "that an officer could not shoot a felon for the purpose of preventing an escape." ECF No. 56 at 23.

The district court granted summary judgment on the ground that Officer Ashcraft did not violate Mr. Goffin's Fourth Amendment rights. The district court held that "[t]he fact that a pat down occurred prior to the shooting and the fact that Ashcraft never saw a weapon in Goffin's hand" were "insufficient to satisfy Goffin's burden of proving that Ashcraft's actions were objectively unreasonable." App. 35a. It held that under the totality of the circumstances, "Ashcraft had probable cause to believe that Goffin posed a threat of serious physical harm to her and others . . . ." App. 35a-36a. The district court did not engage in any analysis of *Garner*.

C. A Divided Eighth Circuit Affirmed.

A fractured Eighth Circuit affirmed the district court's ruling, though none of the judges adopted its reasoning. Judge Kobes wrote the majority opinion, joined by Chief Judge Smith. Chief Judge Smith wrote a separate concurring opinion. Judge Kelly dissented.

The majority opinion recognized that *Garner* established that an "officer is justified in using lethal

force [only] when 'she has probable cause to believe that the suspect poses a threat of harm to the officers or others.'" App. 5a (quoting *Garner*, 471 U.S. at 11). However, the majority held that Mr. Goffin had to "provide a case clearly establishing that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous." App. 6a (footnote omitted). Because Mr. Goffin failed to identify such a case, the majority concluded "that Officer Ashcraft [was] entitled to summary judgment because it is not clearly established that after observing a pat down that removes noting from a suspect who an officer reasonably believed to be armed and dangerous, [that] an officer cannot use lethal force against that suspect when he flees . . . ." App. 7a.

Chief Judge Smith wrote separately to opine that Officer Ashcraft violated Mr. Goffin's Fourth Amendment rights. In his "view, probable cause to believe that [Mr.] Goffin was armed dissipated upon completion of the full body pat-down search that revealed no weapons." App. 9a. "Nonetheless, [he] agree[d] with the court's determination that Officer Ashcraft is entitled to qualified immunity because Goffin has not identified a case *clearly establishing* that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous." App. 9a (quotation marks omitted).

Judge Kelly disagreed. In her opinion, "a jury could find that a reasonable officer would not have believed Goffin posed a threat of serious physical harm to the officer or others." App. 12a. Judge Kelly

recounted the facts supporting this assertion: While Officer Ashcraft initially received reports that Mr. Goffin was armed, when "she arrived at the auto body shop, she never saw a gun in Goffin's possession." App. 12a. Mr. Goffin "was not holding a gun when he was in the car, or when he exited the car." App. 12a. "At the back of the car," Officer Ashcraft watched Officer Hines "search[] every part of [Mr. Goffin's] body for weapons, including feeling for items in his pockets and around his waist." App. 12a. And Officer "Ashcraft saw that the pat down revealed no weapons of any kind." App. 12a-13a. Still, "she shot him in the back—without warning—after he took no more than two steps." App. 13a (quotation marks omitted). Based on these facts, Judge Kelly believed that Officer Ashcraft had "fair notice that her conduct was unlawful" given that "since 1985, it has been established by the Supreme Court that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted." App. 14a. Judge Kelly concluded that the majority "relies on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law. But the pat down is a novel fact that does not render inapplicable the clearly established law . . . ." App. 14a.

REASONS FOR GRANTING THE PETITION

Sometimes a "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Hope*, 536 U.S. at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). In 1985, the Court established the constitutional rule that an officer can resort to deadly force to apprehend a fleeing suspect only if "the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). *Garner* established that police are not permitted to use "deadly force to apprehend a fleeing suspect who [does] not appear to be armed or otherwise dangerous . . . ." *Graham v. Connor*, 490 U.S. 386, 394 (1989).

The rule announced in *Garner* applies with obvious clarity in this case. Officer Ashcraft shot Mr. Goffin in the back from a few steps away despite the fact Mr. Goffin was not holding a weapon, despite just watching her colleague search Mr. Goffin for weapons and personally witnessing the search turn up nothing, despite his having only taken a few steps, and without any warning that she was going to shoot. Based on these facts, a jury could find that Officer Ashcraft's use of deadly force violated Mr. Goffin's rights as established over thirty years ago in *Garner*. Indeed, two judges on the Eighth Circuit panel found that Officer Ashcraft's use of deadly force violated the Fourth Amendment.

However, two judges on the Eighth Circuit held Officer Ashcraft was entitled to qualified immunity

because no case "*clearly establish[ed]* that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous." App. 9a; *see* App. 6a.

The Court should grant certiorari and reverse. It has rejected the notion that the "very action in question" must have been previously "held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, all that is necessary is "that in the light of pre-existing law the unlawfulness must be apparent." *Id.* The unlawfulness of shooting an unarmed suspect has been established for decades. And as Judge Kelly explained, whether an officer knows a suspect is unarmed because she witnessed a full body pat down or through some other means does not render the unlawfulness of shooting an unarmed suspect any less clear. Officer Ashcraft had more than "fair notice" that she could not shoot an unarmed suspect. *Hope*, 536 U.S. at 739. That she watched Mr. Goffin get searched before she shot him only underscores the illegality of her actions. Other circuits have denied qualified immunity when faced with similar facts revealing that the officer should have known the suspect was unarmed, finding that *Garner* provided more than sufficient clarity. In accordance with *Garner*, the Eighth Circuit should have denied qualified immunity here, too. Because it did not, the Court should grant certiorari and reverse the Eighth Circuit's judgment. Alternatively, the Court should grant certiorari, vacate the Eighth Circuit's judgment, and remand for further consideration in light of *Taylor v. Riojas*.

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A. The Eighth Circuit's Decision Cannot be Squared with *Garner*.

In *Tennessee v. Garner*, the Court held "that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. at 7. There, two officers responded to burglary call. *Id.* at 3. When they arrived, they were met by a woman who said the prowler was inside. *Id.* One officer radioed dispatch while the other went to investigate. *Id.* The officer heard a door slam and saw Garner running across the backyard. *Id.* The officer "saw no sign of a weapon, and, though not certain, was 'reasonably sure' and 'figured' that Garner was unarmed." *Id.* As Garner went to hop the back fence, the officer shot Garner in the back of the head. *Id.* at 3-4.

The Court held that the officer's use of force violated the Fourth Amendment's reasonableness requirement. The *Garner* Court explained "that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him." *Id.* at 9. The Court then announced the rule that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11. However, a "police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* Moreover, "where feasible, some warning [must be] given." *Id.* at 11-12.

Garner clearly established the unlawfulness of Officer Ashcraft's conduct. Like in *Garner*, Officer Ashcraft shot an unarmed burglary suspect from

behind without warning because he was trying to flee. What makes the conduct here more egregious than that in *Garner*, is that the officer in *Garner* thought the suspected prowler was unarmed based only on a hunch. Here, Officer Ashcraft not only saw that Mr. Goffin had nothing in his hands, but watched a fellow officer search him for weapons. Officer Ashcraft had visual confirmation that Mr. Goffin was unarmed, making her use of deadly force blatantly unreasonable. More still, worse than in *Garner*, the deadly force used here was not even necessary to prevent the suspect's escape. Mr. Goffin had only taken two steps and therefore was still in arm's reach of two officers, who could have seized Mr. Goffin by means other than deadly force (e.g., physical restraint or using a taser). By shooting Mr. Goffin in the back from pointblank range without warning, knowing full well Mr. Goffin was unarmed, Officer Ashcraft violated clearly established Fourth Amendment law.

Yet purporting to heed this Court's warning that courts should "'not define clearly established law at a high level of generality,'" App. 6a (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)), the Eighth Circuit granted qualified immunity. The court did so because Mr. Goffin did not "provide a case clearly establishing that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous." App. 6a. As the majority noted, in the Eighth Circuit, "A plaintiff's failure to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment is often fatal to a claim outside of obvious cases." App. 5a (*quoting K. W. P. v. Kansas City Public Schools*, 931 F.3d 813, 828 (8th Cir. 2019)).

And according to the majority, *Garner* "stands for a general proposition and cannot clearly establish the rule in most cases." App. 7a.

The Eighth Circuit's decision is deeply flawed. Officer Ashcraft did not need a case to tell her that she no longer had probable cause to believe that Mr. Goffin was armed after watching him being searched for weapons. *Garner* explicitly established that it is unreasonable for an officer to use deadly force against an unarmed fleeing suspect. *How* an officer comes to learn a suspect is unarmed does not change the applicability of this clearly established rule. *Garner* put police on notice that they cannot shoot unarmed suspects to prevent them from getting away.

Qualified immunity only "shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Here, there are facts that dispel any probable cause to believe Mr. Goffin was armed when Officer Ashcraft decided to use deadly force. Her conduct was so obviously illegal that a case with the same exact facts was unnecessary.

B. The Eighth Circuit's Decision Conflicts with Other Circuits' Decisions Holding it is Clearly Established that an Officer Cannot Use Deadly Force in the Face of Facts that Dispel Belief that the Suspect is Armed.

Judge Willett of the Fifth Circuit observed that the "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for a constitutional right to be clearly established. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).[2] Here, to overcome qualified immunity, the Eighth Circuit did not want just a case with analogous facts. It demanded a case with an identical fact pattern of an officer witnessing a pat down before shooting a fleeing suspect in order to overcome qualified immunity. This circumscribed approach all but ensures no officer will ever be held liable for their unreasonable use of deadly force in the Eighth Circuit. Whereas other courts of appeals, applying the rule announced in *Garner*, have denied qualified immunity when an officer is on notice that a suspect is unarmed and yet shoots anyways.

Second Circuit. In *O'Bert ex rel. Est. of O'Bert v. Vargo*, police received reports of a man beating a woman in a trailer park parking lot. 331 F.3d 29, 33

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[2] In a comprehensive investigative report, Reuters studied 529 excessive force cases and found "significant differences in how the federal appeals courts treat qualified immunity." Andrew Chung, et al., *Shielded: Wrong Place, Wrong Time*, REUTERS, Aug. 25, 2020, https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/.

(2d Cir. 2003). Police arrived and spoke with the woman, Miller, outside, while the man, O'Bert, waited in the trailer. *Id.* The officers decided to arrest O'Bert and ordered him out of the trailer. *Id.* O'Bert refused. *Id.* When the officers warned they would come in and arrest him, O'Bert threatened, "I will blow your fucking heads off." *Id.* Police asked Miller if O'Bert had any guns, and she told them he had "a rifle or hunting guns." *Id.* One of the officers looked in the trailer's windows and saw "O'Bert standing in the middle of the living room with nothing in his hands but a cigarette." *Id.* The other officers took the opportunity to enter the trailer; one officer holstered his gun so he could "tackle O'Bert and subdue him." *Id.* at 34. As the officer went for the tackle, O'Bert turned in response, prompting another officer to "sh[o]ot [O'Bert] through the chest." *Id.*

Applying the rule announced in *Garner*, without citing a case with the same precise facts, the Second Circuit held that the officer who fired the deadly shot was not entitled to qualified immunity. *See id.* at 36-37. The Second Circuit reasoned that viewing the facts in the light most favorable to the plaintiff, "it could be permissibly inferred that at the moment the officers entered the trailer they observed O'Bert without a gun in his hands [and] that the officers knew that he remained unarmed." *Id.* at 39 (cleaned up). While the officer emphasized the fact O'Bert had threatened to "blow the officers' heads off just minutes before," the Second Circuit concluded that the "earlier threat did not give [the officer] license to shoot to kill a man he knew, immediately before and

at the moment of the shooting, was unarmed." *Id.* at 39-40 (cleaned up).[3]

Third Circuit. In *Russell v. Richardson*, a mom called the court to ask for help with her teenage son, L.T., who the court had previously deemed a "Person in Need of Supervision" "beyond [his guardian's] control." 905 F.3d 239, 244 (3d Cir. 2018). The court dispatched marshals to the house; they found L.T. "relaxing in his room, in his underwear and unarmed." *Id.* (quotation marks omitted). Upon seeing the marshals, L.T. tried to run past them, prompting one of the marshals to shoot L.T., paralyzing him. *Id.* at 244-45.

Applying the rule announced in *Garner*, without citing a case with the same precise facts, the Third Circuit held that the marshal who fired the shot was not entitled to qualified immunity. *See id.* at 252. The Third Circuit explained that *Garner* established that police cannot resort to deadly force "where the circumstances reflect the absence of a serious threat of immediate harm to others." *Id.* (quotation marks omitted). The court of appeals reasoned that given that L.T. was in his underwear, it would have been "implausible to a reasonable officer that he was hiding a weapon on his person." *Id.* Therefore, "there was no serious threat of immediate harm to others," making

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[3] Not long after the Court decided *Garner*, the Second Circuit affirmed a bench trial verdict finding an officer guilty of violating the plaintiff's Fourth Amendment rights where the officer patted the plaintiff down, put him in the back of the police car, the plaintiff got out and tried to escape, and the officer shot him from behind. *Davis v. Little*, 851 F.2d 605, 606-08 (2d Cir. 1988).

this "an obvious case where *Garner* clearly establishes the law." *Id.* (cleaned up).

Fourth Circuit. In *Streater v. Wilson*, police responded to reports of a stabbing. 565 F. App'x 208, 209 (4th Cir. 2014) (unpublished). Officers identified the victim, Streater, who told them "her assailant had already fled by car." *Id.* An officer saw two people walking towards them from approximately 50 feet away, one of whom was carrying a kitchen knife. *Id.* An officer unholstered his weapon and ordered the person holding the knife, J.G.—Streater's son, to drop it. *Id.* "J.G. failed to immediately comply and continued to approach." *Id.* J.G. then stopped 30 feet away and dropped the knife. *Id.* The officer still yelled at J.G. to disarm; J.G. responded that he had dropped the knife. *Id.* The officer shot J.G. twice, paused, then shot him twice more, killing him. *Id.*

Comparing this case to *Garner*, without citing another case with the same precise facts, the Fourth Circuit held that the officer violated J.G.'s clearly established rights, because *Garner* held that "'police officer[s] may not seize an unarmed nondangerous suspect by shooting him dead.'" *Id.* at 212 (quoting *Garner*, 471 U.S. at 11). The court of appeals rejected the officer's argument that the facts in the case were "not directly analogous to *Garner*," concluding that "J.G.'s right to be free from the use of lethal force to effectuate a seizure under the totality of the circumstances was manifestly included within more general applications of the core Fourth Amendment principles." *Id.* (cleaned up).

Ninth Circuit. In *A.K.H. by & through Landeros v. City of Tustin*, Hilda Ramirez called 911 to report that her boyfriend, Benny Herrera, had stolen her phone and hit her in the head. 837 F.3d 1005, 1008 (9th Cir. 2016). She told police her boyfriend "had not used a weapon to take her phone, that Herrera did not carry any weapons, and that Herrera had never been violent with her before." *Id.* An officer found Herrera walking on the shoulder of the road. *Id.* at 1009. The officer turned on the lights of his police SUV, at which point "Herrera put his right hand in his sweatshirt pocket and started alternately to skip, walk, and run backwards facing [the officer]." *Id.* The officer opened the car door, drew his gun, and ordered Herrera to get down. *Id.* He did not comply. *Id.* Another officer pulled up beside Herrera and shouted for him to get his hand out of his pocket. *Id.* "Just as Herrera's hand came out of his pocket," the officer "fired two shots in rapid succession" without "any warning that he would shoot," killing Herrera. *Id.*

In holding that the officer violated Herrera's clearly established rights, the Ninth Circuit pointed to *Garner*, which it called "instructive." *Id.* at 1013. Comparing the facts of *Garner* to the facts there, the Ninth Circuit reasoned that the officer "in this case had no more reason to suspect that Herrera was armed than did the officer in *Garner*." *Id.* Quoting *Garner*, the Ninth Circuit concluded: "It has long been clear that a police officer may not seize an unarmed, nondangerous suspect by shooting him dead. Viewing the evidence in the light most favorable to the plaintiffs, that is precisely what [the officer] did here." *Id.* (cleaned up).

Tenth Circuit. In *Carr v. Castle*, two officers responded to an assault at an apartment building. 337 F.3d 1221, 1224 (10th Cir. 2003). They knocked on the suspect's door and Randall opened it, "acting very excited and very aggressive." *Id.* at 1224-25. One of the officers tried to handcuff Randall; Randall struck the officer in the head and kicked the other in the groin. *Id.* at 1225. Randall ran from the building with the officers in pursuit. *Id.* Another officer joined the chase and found Randall unable to climb a fence because he had a slab of concrete in his hands. *Id.* "Randall then ran toward [the officer] while raising his arm to throw the concrete]," prompting two of the officers to open fire. *Id.*

The Tenth Circuit held that the officers were not entitled to qualified immunity, as *Garner* "plainly control[s] this case." *Id.* at 1227. The court of appeals reasoned that the issue of when police are permitted to "use deadly force to apprehend an unarmed fleeing suspect" was "thoroughly vetted" in *Garner*, and that although no case had been decided with these exact facts, the circumstances here would "plainly come under the rubric [of obvious cases] marked out in *Hope v. Pelzer*." *Id.* (citation omitted).

In short, other circuits have heeded the lesson of *Garner* and have denied qualified immunity when an officer is on notice that a suspect is unarmed or not otherwise dangerous. These cases from other circuits evince that *Garner*'s rule—that police may not use deadly force to seize an unarmed suspect—applies with obvious clarity to situations where the facts dispel an officer's probable cause to believe the suspect is dangerous, even if the facts dispelling the

belief are novel. This is because the bottom line rule announced in *Garner* remains the same. The Eighth Circuit failed to follow *Garner*'s clear teachings. The Court should grant certiorari and reverse. *See, e.g.*, *Wilkins*, 559 U.S. at 34 (summarily reversing where the lower court's decision was "at odds" with this Court's precedent).

C. The Court Should Vacate the Eighth Circuit's Judgment and Remand for Further Consideration in light of *Taylor v. Riojas*.

Alternatively, the Court should grant certiorari, vacate the Eighth Circuit's judgment, and remand for further consideration in light of *Taylor v. Riojas*, 141 S. Ct. 52 (2020), as the Eighth Circuit's mistake in this case is similar to the mistake made by the Fifth Circuit in *Taylor*. *See Lords Landing.*, 520 U.S. at 896 ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is potentially appropriate." (cleaned up)).

In *Hutto v. Finney*, the Court opined about when prison conditions violate the Eighth Amendment, in dicta stating a "filthy, overcrowded cell . . . might be tolerable for a few days and intolerably cruel for weeks or months." 437 U.S. 678, 686-87 (1978). In *Taylor*, an inmate alleged that he was confined in "a

pair of shockingly unsanitary cells," one of which was covered in feces and the other overflowing with sewage. 141 S. Ct. at 53. The Fifth Circuit held that the conditions violated the Eighth Amendment, but nevertheless concluded the officers were entitled to qualified immunity. *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). The Fifth Circuit specifically reasoned that the dicta in *Hutto* did not give prison officials "'fair warning' that their specific acts were unconstitutional." *Id.*

This Court summarily reversed. The Court held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Taylor*, 141 S. Ct. at 53. No closely analogous case was needed, said the Court, because "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." *Id.* at 54. In his concurring opinion, Justice Alito took particular issue with the Fifth Circuit's hiding behind *Hutto*, admonishing that even the "equivocal and unspecific dictum" in *Hutto* "does not justify what petitioner alleges." *Id.* at 56 (Alito, J., concurring).

Taylor is a reminder to the lower courts that they should not inflexibly look for a case with identical facts when faced with an obvious constitutional violation. Yet that is exactly what the Eighth Circuit did here. The Eighth Circuit held that qualified immunity was appropriate because no case had dealt with a pat down before the use of deadly force. But

that misses the forest for the trees, as the pat down only confirmed that Mr. Goffin was unarmed and thus made obvious that the use of deadly force was unconstitutional. In the words of Judge Kelly, "the pat down is a novel fact that does not render inapplicable the clearly established law that officers may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others." App. 14a (quotation marks omitted).

This Court decided *Taylor* a month after the Eighth Circuit issued its opinion below. And the Fifth Circuit's analysis in *Taylor* that the Court found erroneous mirrors the Eight Circuit's analysis here. Accordingly, the Court should grant certiorari, vacate the judgment below, and remand the case for further consideration in light of *Taylor*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

DANIEL S. HARAWA*
Counsel of Record
WASHINGTON UNIVERSITY SCHOOL OF LAW APPELLATE CLINIC
One Brookings Drive, Box 1120
St. Louis, MO 63130
(314) 935-4689
dharawa@wustl.edu

Counsel for Petitioner
Davdrin Goffin