No. 20-1362

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

DANIEL S. HARAWA*
Counsel of Record
COURTNEY ANDREW VANOSTRAN
WASHINGTON UNIVERSITY SCHOOL OF LAW
APPELLATE CLINIC
One Brookings Drive, Box 1120
St. Louis, MO 63130

August 25, 2021

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Introduction

Officer Robbie Ashcraft watched a fellow officer pat down "every part" of Davdrin Goffin for weapons. The pat down did not turn up anything, indicating Mr. Goffin was unarmed. This obviated any probable cause Ashcraft might have had to believe Mr. Goffin posed a serious threat to her or to others. Yet moments later and without notice, Officer Ashcraft deployed deadly force, shooting Mr. Goffin in the back from steps away solely because he tried to escape. Her use of lethal force was objectively unreasonable. This Court should grant certiorari to confirm that officers may not resort to deadly force to prevent an escape when a suspect "poses no immediate threat to the officer and no threat to others[.]" *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The rule announced in *Garner* applies with "obvious clarity" to this case. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Contrary to Ashcraft's assertions, this case does not involve "unique circumstances" that "effectively compel qualified immunity." Br. in Opp. 13. Rather, it arises from a straightforward situation previously addressed by this Court: (1) an officer, (2) uses deadly force without warning, (3) against a fleeing suspect, (4) known not to pose a threat of serious physical harm. *See Garner*, 471 U.S. at 3–4. The only factual nuance in this case is the *way* in which Officer Ashcraft came to know that Mr. Goffin was unarmed: a pat down by a fellow officer, to which Officer Ashcraft was a witness. That factual variation—or, as Judge Kelly called it, "novel fact" (App. 14a)—is immaterial to the dispositive legal question at hand: whether a police officer is entitled to qualified immunity after shooting an unarmed, fleeing suspect, who does not pose any serious risk, in the back? Because the Eighth Circuit failed to abide by this Court's answer to that question, its conclusion is at odds with decisions reached by the Second, Fourth, Ninth, and Tenth Circuits. This Court should grant certiorari.

A. Officer Ashcraft's Use of Deadly Force Violated Clearly Established Law.

Officer Ashcraft argues she is entitled to qualified immunity because "no existing precedent squarely governs the facts [she] confronted so as to put her on notice that the use of force might be deemed improper under the Fourth Amendment." Br. in Opp. 11. But since *Garner*, police have had "fair warning" that they cannot shoot an unarmed

suspect from behind simply to prevent their escape. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *Garner*, 471 U.S. at 11. Officer Ashcraft violated this clearly established principle when she shot Mr. Goffin in the back from steps away only because, in her words, he "shouldn't have ran." Pet. for Cert. 8. As Chief Judge Smith recognized below in his concurrence, any probable cause that Officer Ashcraft had "to believe that [Mr.] Goffin was armed dissipated upon completion of this full body pat-down." App. 8a–9a. Yet Ashcraft shot Mr. Goffin from behind at pointblank range anyway. A "reasonable [ ] officer would have known that this course of conduct was unconstitutional[.]" *Taylor v. Riojas*, 141 S. Ct. 52, 56 (2020) (Alito, J., concurring). Qualified immunity does not shield police officers "who knowingly violate the law." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal citation and quotation marks omitted).

None of the cases cited by Ashcraft undermine this conclusion, as they all involve situations where the officer used deadly force because the suspect posed an immediate danger. In *White*, the suspect shouted "[w]e have guns" and "fired two shotgun blasts while screaming loudly" before the officer used deadly force. 137 S. Ct. at 550. In *Kisela v. Hughes*, the suspect was wielding a "large kitchen knife" and acting erratically, which prompted the officer to resort to deadly force. 138 S. Ct. 1148, 1153 (2018). In *Plumhoff v. Rickard*, the officers used deadly force to end a high-speed car chase. 572 U.S. 765, 770 (2014). And in *Brosseau*, this Court held that it was not clearly established that an officer could not use deadly force (after giving multiple warnings and attempting to use non-deadly force) against "a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 200. These cases stand for the unremarkable proposition that this Court will not second-guess an officer's use of deadly force against a person who poses an immediate risk of serious harm. They do not disturb the established proposition that police cannot use deadly force against an unarmed suspect simply because he ran.

This Court reminded just last year that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor*, 141 S. Ct. at 53–54 (quoting *Hope*, 536 U.S. at 741). Or as this Court said in *Brosseau*, "[o]f course,

in an obvious case, [previously announced] standards can 'clearly establish' the answer, even without a body of relevant case law." 543 U.S. at 199 (internal citation omitted). Officer Ashcraft knew (or should have known) that shooting an unarmed suspect without warning is unconstitutional; *Garner* says so. 471 U.S. at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."). Construing the facts in Mr. Goffin's favor, Officer Ashcraft lacked probable cause to believe that Mr. Goffin was armed when she shot him in the back. *Garner* applies with obvious clarity to this case, and the Eighth Circuit disregarded this Court's guidance by granting Ashcraft qualified immunity.

B. The Eighth Circuit's Decision Conflicts with Decisions from Other Circuits Applying *Garner* Under Analogous Circumstances

Underscoring the Eighth Circuit's error, the Second, Fourth, Ninth, and Tenth Circuits have consistently held that when, if viewing the facts in the light most favorable to the plaintiff, an officer lacks probable cause to believe a suspect is armed or dangerous, *Garner* clearly establishes that the use of deadly force is unconstitutional. And all of these courts have applied this well-established rule to deny qualified immunity in "novel" factual circumstances. The Eighth Circuit's decision below conflicts with these cases.

Officer Ashcraft attempts to distinguish these cases by misconstruing the inquiry at summary judgment. As an initial matter, her arguments rely on an understanding that she believed that Mr. Goffin posed a risk because of circumstances preceding their encounter. *See, e.g.*, Br. in Opp. 15. But even granting Ashcraft had probable cause to believe Mr. Goffin was armed before the encounter, viewing the evidence in the light most favorable to Mr. Goffin, any probable cause was obviated by the pat down she witnessed that produced no indicia that Mr. Goffin was armed.[1] And although Ashcraft insists "no 'settled Fourth Amendment principle' . . . *requires* an officer to assume that a brief, in-

[1] Ashcraft takes pains to note that after she shot Mr. Goffin and placed him under arrest, she found ammunition in his pockets. Br. in Opp. 14. This is a red herring. As observed by two of the judges below, the point of a pat down is the "*discovery of weapons*." App. 8a; *see also* App. 12a–13a ("The pat down here would only be unsuccessful if Goffin had a weapon that the pat down failed to reveal."). Ashcraft does not contest the fact that Mr. Goffin was unarmed when she shot him from behind.

the-field pat down search . . . conclusively establishes the suspect is unarmed," Br. in Opp. 13, that is not the question at summary judgment. Rather, as Judge Kelly explained, the question is whether a "reasonable jury could find that Ashcraft's use of deadly force was objectively unreasonable." App. 23a; *see also Tolan v. Cotton*, 572 U.S. 650, 657 (2014); *Taylor*, 141 S. Ct. at 56 (Alito, J., concurring). And as Judge Kelly then elaborated, "viewing the facts in the light most favorable to Goffin and giving him the benefit of all reasonable inferences, a jury could find that a reasonable officer would not have believed Goffin posed a threat of serious physical harm to the officers or others." App. 24a. Put another way, a reasonable jury could find that Officer Ashcraft shot Mr. Goffin without warning, in the back, at pointblank range, solely because "he ran," Pet. for Cert. 3, 13, not because he posed a serious safety risk.

With this correct framing in mind, Ashcraft's efforts to distinguish the other circuit cases that correctly applied this Court's ruling in *Garner* fall flat. As is the case here, each case involved a situation where the officer may have at first had probable cause to believe that the plaintiff was armed, but then, when viewing the facts in the light most favorable to the plaintiff, that probable cause dissipated during the course of the encounter. And in each case, the lower courts applied *Garner*'s rule prohibiting the use of deadly force against an unarmed suspect to deny qualified immunity. *See A. K. H. by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1013 (9th Cir. 2016); *Streater v. Wilson*, 565 F. App'x 208, 211 (4th Cir. 2014); *O'Bert ex rel. Est. of O'Bert v. Vargo*, 331 F.3d 29, 39–40 (2d Cir. 2003); *Carr v. Castle*, 337 F.3d 1221, 1227 (10th Cir. 2003); *Davis v. Little*, 851 F.2d 605, 608 (2d Cir. 1988). The Eighth Circuit's decision conflicts with this line of cases, providing yet another reason for this Court to grant certiorari.

C. Alternatively, This Court Should Grant Certiorari, Vacate the Judgment Below, and Remand for Further Consideration in Light of *Taylor v. Riojas*.

Alternatively, this Court should grant the petition for certiorari, vacate the judgment below, and remand for further consideration in light of *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *see, e.g.*, *McCoy v. Alamu*, 141 S. Ct. 1364 (2021)

(granting certiorari, vacating the judgment below, and remanding for further consideration in light of *Taylor* in an excessive force case).

Taylor reminded that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, *reasonably* misapprehends the law governing the circumstances she confronted." 141 S. Ct. at 53 (internal citation and quotation marks omitted, emphasis added). But where "no reasonable . . . officer could have concluded that, under the extreme circumstances of [the] case, it was constitutionally permissible to" take the challenged action, qualified immunity is improper. *Id.*

Officer Ashcraft contends that *Taylor* supports her position because the "egregious nature of the alleged conduct" in *Taylor* stands in contrast with the conduct in this case. Br. in Opp. at 21. But *Taylor* does not hold that only "egregious" conduct is unprotected by qualified immunity (although it certainly can be said that shooting an unarmed person in the back is egregious). Instead, it reiterated and then applied *Hope*'s edict that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." 141 S. Ct. at 53–54 (internal citation and quotation marks omitted).

Vacating and remanding for further consideration in light of *Taylor* is particularly appropriate here given that two of the judges held that Ashcraft violated Mr. Goffin's Fourth Amendment rights, *see* App. 8a and 11a, while a different two judges reasoned that qualified immunity was appropriate solely because there was not an identified case with the exact same set of facts. App 2a. Because these judges did not have the benefit of *Taylor*, this Court should vacate and remand for the Eighth Circuit to consider whether *Garner*, which firmly establishes the prohibition against deadly force where a suspect "poses no immediate threat to the officer and no threat to others," 471 U.S. at 11, applies with "obvious clarity" in this case. *Taylor*, 141 S. Ct. at 54 (internal citation omitted).

Conclusion

This Court should grant the petition.

Respectfully submitted,

DANIEL S. HARAWA*
Counsel of Record
COURTNEY A. VANOSTRAN
WASHINGTON UNIVERSITY
SCHOOL OF LAW
APPELLATE CLINIC
One Brookings Drive,
Box 1120
St. Louis, MO 63130

Counsel for Petitioner
Davdrin Goffin