No. 20-245

In The

Supreme Court of the United States

PATRICIA NELSON, next friend of N.K., a minor,

Petitioner,

v.

ESTEBAN RIVERA, *Respondent.*

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the undisputed facts show that an officer who responded to a 911 dispatch call stemming from a citizen report that a white man in a gray shirt and jeans was carrying a black hand gun who may be at the Drive Thru Party Store, and where the officer spotted a suspect matching the description crouched down outside that very convenience store and then twice ordered the suspect: "Let me see your hands!" but instead of showing his hands, the suspect pulled the gun out of his waistband, is it objectively reasonable for an officer to believe that the suspect presents an immediate threat when he sees the reach, even though it turns out the suspect threw the gun to the ground, entitling the officer to the protection of qualified immunity for shooting the suspect once in the shoulder when these things all happened over a span of two seconds?

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The Order of the United States Court of Appeals for the Sixth Circuit Denying a Petition for Rehearing en banc (Pet. App. 34) is reported at 2020 U.S. App. LEXIS 10317* (6th Cir. April 1, 2020). The opinion of the Circuit Court of Appeals (Pet. App. 2-19) is reported at 802 Fed. Appx. 983* (6th Cir. Feb. 4, 2020). The order of the district court (Pet. App. 21-32) is reported at 2018 U.S. Dist. LEXIS 27780* (W.D. Mich. Feb. 21, 2018). For consistency, citations to the record are made in the same format as Petitioner, referencing the page in Petitioner's Appendix.

INTRODUCTION

There is no split of authorities in the courts of appeals on the issue of an officer's entitlement to qualified immunity for using deadly force to protect himself when he reasonably, even if incorrectly, believes that a suspect presents an immediate threat to his safety or others nearby. The circuit courts of appeals uniformly rely on and apply the criteria this Court has established to analyze when an officer is entitled to qualified immunity. Following this Court's precedents, the circuit courts consider the totality of the circumstances when analyzing if it was reasonable for the officer to use deadly force, even where the suspect was later found to have been unarmed at the time of the use of force. The circuit courts also follow this Court's precedents in applying the standard for granting summary judgment in a case where the plaintiff has the burden to overcome the defense of qualified immunity.

Instead of following that established framework, Petitioner attempted to demonstrate an error in a factual finding and/or that the circuit court of appeals misapplied a correctly stated rule of law. And without identifying any circuit split, Petitioner characterizes the opinion below as though it authorizes officers to shoot a suspect even though the suspect is unarmed and poses no threat, disregarding the totality of the circumstances, and disregarding what a reasonable officer on the scene would objectively perceive when having to make a split-second decision. Petitioner attempts to apply the summary judgment standard to allow inference to be stacked upon inference as a way of overcoming N.K.'s own admissions of disregarding commands of the officer to "show his hands" and instead reaching for the gun, and despite N.K. having the opportunity to directly contradict the officer's testimony but not doing so.

Petitioner's Writ does not rely upon any decisions of settled law to present clearly established law to defeat qualified immunity. Instead, Petitioner relies upon a case that couldn't be more dissimilar to the instant case: *Tolan v Cotton*, 572 U.S. 650 (2014), standing for the proposition that for the purposes of analyzing a summary judgment motion, the court must take the facts in the light most favorable to the nonmoving party. However, *Tolan* did not have a video recording, the officer did not concede Petitioner's main point as Rivera did here, nor was there any hint of a gun or any weapon, all of which were undisputed material factors in the instant case. Finally, the material facts of *Tolan* were not alleged to have taken place over a mere two-second time span nor anything close to that short.

Petitioner then cites various inapplicable and wholly dissimilar out-of-circuit cases where the reviewing court had not viewed the facts in the light most favorable to the nonmoving party. None of these cases were even presented as providing clearly established law. Nothing in Petitioner's cases suggests that any of the circuit courts would reach a result different from what the Sixth Circuit did based upon the facts of this case.

Finally, the main thrust of Petitioner's Writ is an attempt at a persuasive argument that the doctrine of qualified immunity should be tossed aside, in spite of the fact that this court has denied Petitions for Writs of Certiorari as recently as June of 2020 for excessive force cases where the lower court held that the Defendant *had* violated the Plaintiff's constitutional rights but that the law had not been clearly established thus the officer was granted qualified immunity in each case. Such an argument is clearly inapplicable to the instant case where the circuit court of appeals held that Respondent had not violated Petitioner's constitutional rights.

STATEMENT OF THE CASE

Statutory and legal context

Through his mother Patricia Nelson as next friend, Petitioner, N.K., a minor, brought this suit under 42 U.S.C. § 1983 asserting that Officer Rivera violated his rights against excessive force under the Fourth Amendment to the U.S. Constitution. Petitioner contends that Officer Rivera's use of deadly force to stop a perceived threat was excessive because Petitioner was

later found to have tossed down his gun in the second before having been shot. The district court below mistakenly found the legal question of whether Officer Rivera violated N.K.'s clearly established constitutional rights was dependent upon disputed facts in spite of the fact that the *material facts* were found within the parties' joint statement of the material facts and the dash cam video, and that N.K.'s deposition testimony filled any gaps, and further Officer Rivera had conceded to Ms. Nelson's version of the facts to the extent they were not contradicted to that which had been captured by the video, and denied summary judgment. The Sixth Circuit Court of Appeals below reversed the district court, holding the facts which were *material* were not in dispute, and Officer Rivera reasonably perceived a threat of serious physical harm and therefore Respondent Rivera was entitled to qualified immunity.

The Sixth Circuit has long recognized that the purpose of qualified immunity is to protect police officers "from undue interference with their duties and from potentially disabling threats of liability." *Sample v Bailey*, 409 F.3d 689, 695 (6th Cir. 2005) (quoting *Elder v. Holloway*, 510 U.S. 510, 514 (1994). The defense of qualified immunity allows police officers "breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v Sims*, 571 U.S. 3, 6 (2013) (per curium) (citations and internal quotation marks omitted). The first step is to "define the 'clearly established' right at issue on the basis of the 'specific context' of the case.'" *Tolan v Cotton*, 134 S. Ct. 1861, 1866 (2014). That requires analyzing the specific factual situation confronting the officer when he decided to use deadly force." *Id.* First, the court must

determine if the facts, taken in the light most favorable to the party asserting the injury, shows the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, if a constitutional right has been violated, the court must ask whether the right was clearly established. *Id*. The inquiry into whether the individual officers are entitled to qualified immunity turns on the objective reasonableness of their actions in light of the legal rules clearly established at the time. *Pearson v Callahan*, 555 U.S. 223, 243 (2009). If the conduct did not violate a constitutional right, then there is no need to address the second prong of the qualified immunity analysis. *Id*. at 922.

It is incumbent upon the non-moving party to prove that the factual difference is "material," meaning that "its resolution will affect the outcome of the controversy" in order to preclude the entry of summary judgment. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). "Factual disputes which are irrelevant or unnecessary won't be counted." *Id*.

Where there is a video recording of the incident in the record, the court takes the facts as they appear in the video, even though it may not necessarily be in the light most favorable to the nonmoving party. *Scott v Harris*, 550 U.S. 372, 378-70 (2007).

Whether an asserted constitutional right was "clearly established" at such time "presents a question of law," not fact. *Elder v. Holloway*, 510 U.S. 510, 516 (1994)(quoting *Mitchell v. Forsyth*, 472 U.S. 511 at 528 (1985)).

Factual Context

Although the district court mistakenly considered a disputed fact as material, it accurately recited the undisputed facts of this case which *were* material, some of which will be repeated here. The circuit court of appeals also accurately recited additional material facts in this case, some of which will also be repeated here. Petitioner omitted important undisputed facts and admissions by N.K. in its statement of facts, which are included below.

N.K.'s Preparation and the "Game"

On November 16, 2013, N.K. and three of his friends (S.C., S.W., and J.W.) were playing "cops and robbers" in N.K.'s neighborhood. (A3, A22) During this game, N.K. had an Airsoft BB pistol, which he had colored all black with a Sharpie marker. (A3, A22) The Airsoft gun had also been altered so that it no longer had the blaze-orange barrel tip, which typically characterizes these types of toy guns. (A3, A22) N.K. carried around his altered Airsoft BB gun to make their game feel "more real." (A3) N.K.'s mother and a friend both warned him that he was going to get himself hurt brandishing the replica because a reasonable person would think it was real at first glance. (A26) N.K. was openly displaying the gun before the incident as he walked toward the party store. (A27) N.K. and his friends took a break from the cops-and-robbers game and went to the Drive-Thru Party Store because the girls had to use the bathroom. (A3, A22) While the girls were in the party store, N.K. crouched down behind a sign, and tucked the BB gun into his waistband before Officer Rivera arrived. (A3, A22, A27)

Dispatch Call

A citizen called 911 reporting that a white male was carrying a black handgun near the Party Store. (A3, A27) Officer Rivera responded, was dispatched and en route to the call at the Party Store at 11:58 am. (A3)

Officer Rivera's Arrival on Scene

Officer Rivera did not activate his lights or siren. (A22) He waited to approach until it seemed as if the situation could quickly grow much more dangerous. (A26) N.K. was still crouched down by a sign at the end of the store when he first saw Officer Rivera's car. (A22) With the gun tucked into his waistband, N.K. walked toward the front door of the store. (A22) As Officer Rivera turned onto the street of the Party Store, he radioed dispatch to tell them he saw the suspect (N.K.) walking toward the store. (A22) As Officer Rivera turned into the store parking lot, he could see the girls exit the Party Store and N.K. walking toward them. (A22) Officer Rivera pulled in and parked his patrol car at an angle in front of N.K. and the girls, using it to create a wedge between potential hostages and immediately exited his car. (A3, A22, A26)

The Confrontation

As he exited the patrol car, Officer Rivera twice demanded, "Let me see your hands! Let me see your hands!" (A3, A26) N.K. did not immediately comply with Officer Rivera's orders. (A28) Although the video does not clearly show N.K.'s actions when Defendant yelled, "let me see your hands," *according to N.K.'s own testimony*, when Defendant said, "let me see your

hands," N.K. instead "pulled the gun out and thr[e]w it then kick[ed] it." (A28, A31) N.K. was in front of Defendant's police car when he reached his hand into his waistband and pulled the gun out and then kicked it. (A28) **N.K. *admitted* he took this action *after* Officer Rivera said let me see your hands.** (A28) Officer Rivera stated that he made the decision to pull the trigger in response to the perceived threat of harm. (A30)

The Shot to the Shoulder

Within a two-second period of time, two things happened: 1) N.K. pulled the gun out of his waistband and tossed it away *before* raising his hands; and 2) While N.K. was doing this, Rivera fired one shot at N.K. (A3) Although the dash cam video does not depict Rivera in-frame, nor does it completely show N.K., it does capture the audio and timing of this exchange. (A3) While Officer Rivera uttered his second "let me see your hands order," one of N.K.'s friends moved away from the patrol car making N.K. partially visible. (A3) N.K.'s right hand appears near his right shoulder and Rivera fired his weapon. (A3) N.K. then turned slightly and crouches down, and his left hand appeared near his left ear. (A3) Rivera testified that it was only after he decided to shoot and started pulling the trigger that he realized N.K. was tossing the gun away. (A4) For purposes of the appeal, Officer Rivera conceded that "at the moment the bullet actually hit N.K., N.K. had thrown away the gun and had begun to raise his hands 'sort of halfway or whatever.' " (A4) N.K. also admitted that after he threw the gun, he had gotten his hands up halfway when he was shot in the shoulder. (A30)

Officer Rivera fired his gun one time, hitting N.K. in the right shoulder. (A22) N.K. then ran away as Officer Rivera shouted, "Get on the ground. Get on the ground." Other officers found N.K. nearby and took him to the hospital for treatment. (A4)

Procedural history

Nelson sued the City of Battle Creek and Officer Rivera, claiming that the shooting was a violation of N.K.'s constitutionally protected rights. Nelson stipulated early in the case to dismiss the City of Battle Creek. The district court denied Officer Rivera's motion for summary judgment on the sole remaining count of excessive force under 42 USC §1983, finding that three major factual disputes precluded summary judgment: (1) whether N.K. was "brandishing a gun" or "unarmed"; (2) whether N.K. complied with Rivera's orders; and (3) the timing of the shooting relative to N.K.'s compliance and handling of the gun. (A4)

Officer Rivera appealed to the circuit court of appeals, which reversed the district court and remanded for entry of summary judgment in Rivera's favor on the basis of qualified immunity. The circuit court of appeals held that what the district court had identified as the "key disputed issues" were not genuinely disputed based upon N.K.'s acknowledgment that when given an order to raise his hands, he pulled the gun out of his pants and then raised his hands and Rivera's concession that by the time he shot N.K., N.K. had released the gun and begun raising his hands.(A7) It further held that neither the district court nor Petitioner herein identified any case law where an officer under sufficiently similar circumstances was

held to have violated the Fourth Amendment thus there was no clearly established law under which to deny Officer Rivera qualified immunity. (A9)

The circuit court of appeals identified the pertinent issue for purposes of qualified immunity analysis as this: "[A]s of November 16, 2013, was it clearly established that it was unconstitutional for an officer to shoot when, over the span of two seconds, someone pulls what appears to be a real gun, drops it, and raises his hands after being given a warning." (A9)

In reversing the district court, the 6th Circuit Court of Appeals answered the question in the negative, holding: "We hold it was not. Rivera reasonably perceived a threat of serious physical harm when he saw N.K. reach for and grab what looked like a real gun. It was not objectively unreasonable for Rivera to decide to shoot N.K. as he saw N.K. grip and raise his gun, even if the bullet ultimately struck N.K. after he had dropped the gun." (A9) "[T]hese observations about when N.K. was struck – which Rivera concedes was after N.K. threw his gun away – do not create a dispute of fact as to when Rivera decided to shoot. Rivera claims he decided to shoot when he saw N.K. grab and raise the gun. Nelson fails to dispute this fact because N.K. and other witnesses cannot speak to Rivera's decision-making or his perception of harm in the two-second span the events unfolded." (A10)

Ms. Nelson timely filed a Petition for Rehearing En Banc. The 6th Circuit Court of Appeals entered an order April 1, 2020 denying the Petition, with the Order providing: "The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. The petition was then circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc. Therefore, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent." (A34)

Reasons for Denying the Writ

First, there is no triable issue regarding Officer Rivera's entitlement to summary judgment on the grounds of qualified immunity. Second, there is no split of authority on any material issue in this case, and no indication that any other circuit would decide the question of qualified immunity differently on these facts. Third, Petitioner's asserted error is that there are erroneous factual findings and/or the misapplication of a properly stated rule of law, which the Supreme Court by its own rules rarely grants and should not be granted here on this basis because Respondent has clearly demonstrated that the circuit court of appeals correctly identified which factual findings were material and properly applied the properly stated rule of law. This is not the case to do away with the Doctrine of Qualified Immunity, where Respondent was found not to have violated Petitioner's constitutional rights.

Finally, Respondent objects to Petitioner's "Question Presented" because the circuit court of appeals did not disregard the standard set forth in ***Tolan v Cotton***, 572 U.S. 650 (2014) and did not grant qualified immunity based upon the defendant officer's testimony while failing to consider N.K.'s testimony and the other witnesses and the video. As noted in the

above cited "Factual Context" the material facts found in the record by both courts below were consistent. Further, it was conceded by Officer Rivera, and acknowledged by the circuit court of appeals that N.K. had tossed the gun down at the time he was hit by the bullet, and acknowledged by N.K. that instead of complying with commands to show his hands, he reached for the gun and threw it down, all of this happening in a rapidly unfolding two-second time span.

I. **There is no triable material fact issue regarding Officer Rivera's entitlement to Summary Judgment on grounds of qualified immunity**.

The Sixth Circuit Court of Appeals recognized that any facts that might have been disputed here were not material to Officer Rivera's entitlement to qualified immunity. Although the district court believed that there was a dispute, the circuit court of appeals amply demonstrated the evidence clearly showed that on the first two issues, there was not a dispute based upon N.K.'s testimony, video evidence in the record, and Officer Rivera's concession for purposes of the summary judgment motion. Below is the analysis of the district court's stated disputed facts:

1) Was N.K. "brandishing a gun" or "unarmed"? Undisputed facts showed that N.K. was armed when Officer Rivera first ordered him to "Let me see your hands," which was admitted by N.K.; Officer Rivera conceded that at the time N.K. was hit by the bullet during the two-second encounter, N.K. had dropped the gun; and

2) Was N.K. compliant with Rivera's orders? It is undisputed that N.K. admitted that instead of complying with Officer Rivera's commands to "Let me see your hands," N.K. reached to his pants and pulled out his gun to throw it to the ground. N.K. admitted that after he threw the gun down, he had *begun* to raise his hands when he was hit by one bullet in the shoulder within the two-second time span. This is consistent with Rivera's concession.

3) On the third issue, the district court wrongly identified it as being material: "[T]the timing of the shooting relative to N.K.'s compliance and handling of the gun. The circuit court noted that the "observations about when N.K. was struck – which Rivera concedes was *after* N.K. threw his gun away – do not create a dispute of fact as to when Rivera *decided* to shoot. Rivera claims he decided to shoot when he saw N.K. grab and raise the gun. Nelson fails to dispute this fact because N.K. and other witnesses cannot speak to Rivera's decision-making or his perception of harm in the two-second span the events unfolded." (A10)

Because there are no disputed material facts, there is nothing for a jury to decide. Fed. R. Civ. P. 56(c). In short, the "reviewable determination" for the circuit court of appeals was the purely legal question whether a "given set of facts"—that is, the facts construed in the light most favorable to the plaintiff—"violates clearly established law." *Roberson v. Torres*, 770 F.3d 398, 402 (6th Cir. 2014). , 770 F.3d at 402 (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995).

Officer Rivera is entitled to qualified immunity on Nelson's Fourth Amendment excessive force claim because Officer Rivera's use of force was reasonable. Nelson's claim that summary judgment was improper and that granting it was contrary to *Tolen* has no merit because there is no material fact issue for a jury as noted above.

Petitioner contends that a reasonable officer in Rivera's position would understand that the use of lethal or deadly force in shooting N.K., a person who was armed at the beginning of a two-second encounter but had dropped the gun and was unarmed at the end of the two-second encounter when he was struck by the bullet, would violate Petitioner's clearly established constitutional rights under the Fourth Amendment. Petitioner alleges that at no time during the events described above did Rivera possess justification or excuse to use deadly force. The undisputed evidence listed below, however, shows that Rivera is entitled to summary judgment on grounds of qualified immunity:

(1) Rivera responded to a dispatch call for a man with a gun at a Party Store;

(2) Upon arrival at that Party Store, Rivera saw N.K. who matched the caller's description and was suspiciously crouched down outside the Party Store;

(3) When Rivera saw three girls emerge from the Party Store, whom Rivera did not know were friends of N.K., and saw N.K. stand up to head toward them, Rivera feared a potential

hostage situation might take place and so he quickly moved in parking his car right in front of N.K. at an angle to use it as a barrier;

(4) Rivera immediately stepped from his patrol car and shouted to N.K. "Let me see your hands!" but instead of showing his hands, N.K. *admitted* that he reached into his pants to pull out a gun to discard it;

(5) Officer Rivera did not know at the time of the encounter that N.K.'s gun was an Airsoft BB gun because N.K. had used a Sharpie marker to make it all black with an appearance of a real gun and the orange tip that clearly identifies it as a toy gun had been removed;

(6) In the two-second time span of this encounter, Officer Rivera did not know N.K.'s intent was to reach for the gun to discard it, instead believing that he was face-to-face with a suspect who may be reaching for a gun to shoot Rivera, one of the girls, or another bystander and presenting an imminent threat of deadly harm;

(7) Officer Rivera made the decision to fire his gun at the moment he saw N.K.'s reach for the gun but as he pulled the trigger, he realized N.K. may be discarding the gun, but it was too late to stop from firing the one shot.

(8) After N.K. threw the gun, he had only gotten his hands up halfway when he was shot in the shoulder.

(9) Officer Rivera had reevaluated and not fired after the first shot once he realized there was no longer a reasonable fear of an imminent threat of deadly harm.

There was no evidence to controvert the material facts of Officer Rivera's testimony or the record video evidence. Officer Rivera's decision to fire one shot at N.K. was reasonable in light of the totality of circumstances, and was consistent with established jurisprudence. Even viewing the summary judgment evidence in a light most favorable to Petitioner, the undisputed evidence in the record establishes that any reasonable officer facing the same circumstances and with the same information as Rivera would have fired.

In a similar case to the one at hand, *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), the Sixth Circuit properly granted summary judgment to a police officer who fired two shots at a 16-year-old, killing him, even though it turns out the teenager had released his weapon before having been shot. The officer was conducting a stop-and-frisk of an African American teenager. The officer had concerns due to what he perceived as furtive actions by Mullins even though he did not alert any other officers or radio in any reports of concern. Officer Cyranek and Mullins ended up struggling on the ground. Cyranek always had his hand on Mullin's right bicep and was able to control his arms. At some point, Mullins was able to throw his weapon 10 to 15 feet behind the officer. At the same time Mullins threw his gun, officer Cyranek quickly rose from his crouched position and fired twice, killing Mullins. Importantly, "[f]ootage shows that, at most, five seconds elapsed between when Mullins threw his

firearm and when [officer] Cyranek fired his final shot." *Mullins* at 764. Like the video in the instance case, surveillance video in Mullins doesn't show exactly within that five second window the officer fired his two shots. The only timing evidence comes from the casings, with the first casing appearing approximately three seconds ***after*** Mullins threw his gun.

In the case at hand, the entire confrontation took place over two seconds, and Rivera had the wherewithal not to take a second shot after he could see N.K. no longer had the gun. In *Mullins*, the court found both shots were reasonable and clearly the same outcome– holding that Officer Rivera's actions in firing the one shot was reasonable is appropriate and consistent with applicable case law.

"The fact that Mullins was actually unarmed when he was shot is irrelevant to the reasonableness inquiry in this case. *See Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 403-04 (6th Cir. 2015), cert. denied (136 S. Ct. 217, 193 L. Ed. 2d 130, 2015 WL 4467981) ("That [decedent] was actually unarmed and did not have a permit is beside the point"). Rather, "what matters is the reasonableness of the officers' belief . . . ." *Id*. Because only a few seconds passed between when Mullins brandished his firearm and when Cyranek shot Mullins, a reasonable officer in the same situation could have fired with the belief that Mullins still had the gun in his hand. *See Untalan* 430 F.3d at 315. [*768]." *Mullins*, at 767.

Like in *Mullins*, while hindsight reveals that N.K. was no longer a threat when he was shot, "we do not think it is prudent to deny police officers qualified

immunity in situations where they are faced with a threat of severe physical injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat." *Mullins*, at 768. See, e.g., *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 792 (4th Cir. 1998) ("[W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him."); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) ("Also irrelevant [**16] is the fact that [the decedent] was actually unarmed . . . The sad truth is that [the decedent's] actions alone could cause a reasonable officer to fear imminent and serious physical harm.")

Given all those undisputed facts, it was objectively reasonable for Officer Rivera to fear for his safety, as well as for the safety of the girls who had just emerged from the Party Store, and he was legally entitled to use deadly force. *Graham*, 490 U.S. at 396-97. Where there is no material fact in dispute, there is nothing for the jury to decide and summary judgment is proper. Fed. R. Civ. P. 56(c); *Florence v. Frontier Airlines, Inc.*, 149 F. App'x 237, 240 (5th Cir. 2005); *Harris v. Interstate Brands Corp.*, 348 F.3d 761, 762 (8th Cir. 2003); *Fidelity & Deposit Co.*, 187 U.S. at 319-20. Once raised, it is the plaintiff's burden to show that the defendants are not entitled to qualified immunity." *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013). "In other words, the defendant is entitled to summary judgment unless the plaintiff can show the defendant's actions violated clearly established law at the time." *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 902 (6th Cir. 1998).

II. There is no split of authority.

The opinion below stands for the proposition that where an officer reasonably believes, in light of the totality of the circumstances, that a suspect presents an immediate threat to his safety, it is not "clearly excessive" or "unreasonable" to use deadly force to protect himself from that perceived threat. That proposition is consistent with this Court's precedents in *Mullenix v. Luna*, 136 S.Ct. 305, 311-12 (2015); *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . 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."); *Brosseau v. Haugen*, 543 U.S. 194, 198, 200-01 (2004); and *White v. Pauly*, 137 _ S.Ct. 548, 552 (2017) (considering only the facts knowable to defendant officer asserting qualified immunity). Petitioner has shown no conflict with any authority from this Court.

A. This case is not in conflict with *Tolan*.

Petitioner's Writ does not rely upon any decisions of settled law to present clearly established law to defeat qualified immunity. Instead, Petitioner relies upon a case that

couldn't be more dissimilar to the instant case: *Tolan v Cotton*, 572 U.S. 650 (2014) standing for the proposition that for the purposes of analyzing a summary judgment motion, the court must take the facts in the light most favorable to the nonmoving party. However, *Tolan* did not have a video recording, the officer did not concede Petitioner's main point as he did here, nor was there any hint of a gun or any weapon, all of which were undisputed material factors in the instant case and the material facts of *Tolan* were not alleged to have taken place over a mere two-second time span.

B. Petitioner has made no attempt to demonstrate a split in authority among the circuits.

In fact, Petitioner does not even attempt to list cases showing a split of authority on whether the officers actions were reasonable when presented with similar circumstances, likely because such a split does not exist. Below is a quick survey of some similar cases in other circuits with the same result where officers were granted summary judgment for shooting a suspect in rapidly unfolding events even though it was subsequently discovered the suspect was unarmed:

Third Circuit: The Third Circuit held that the officers use of deadly force was reasonable against a suspected

car thief who was fleeing on foot when they thought he was drawing a gun as they saw him suddenly pull his right hand out of his waistband, even though it turned out he had only grabbed a crack pipe. *Lamont v. New Jersey*, 637 F.3d 177, 179, 180, 183-84 (3d Cir. 2011)

Fourth Circuit: In *Ayala v. Wolfe*, 546 F. App'x 197, 200-01 (4th Cir. 2013), another case where the officer shot the suspect as he was seen pulling a gun from his waistband, the court applied its reasoning and holding from *Elliott v Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996) where it declared: "No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life." As it explained, "The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm." *Id*. At 641.

The Fourth Circuit granted qualified immunity to an officer, holding that, "[W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him."). *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 792 (4th Cir. 1998)

Fifth Circuit: In *Valderas v. City of Lubbock*, 937 F.3d 384, 390, 774 Fed. Appx. 173 (5th Cir. 2019), the officer saw Valderas pull a gun from his waistband as the officers approached. However, the officers had not seen that the suspect had thrown the gun into a car in the seconds before being shot, yet the court still held that the officer reasonably used deadly force against the

suspect, See *id*. at 387, 390. In *Valderas*, the officer "was not required to wait to confirm that [the suspect] intended to use the gun before shooting"; "[o]ur circuit has repeatedly held that an officer's use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon." *Id*.

The Fifth Circuit also granted qualified immunity in a case where the Plaintiff argued that the decedent was actually unarmed at the time of the shooting, holding that such a fact was irrelevant. *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991)

Tenth Circuit: In *Estate of Valverde v. Dodge*, 967 F.3d 1049 * (10th Cir. 2020), an excessive force case where the officer shot the decedent in the back after the decedent had discarded the gun, the District Court denied Summary Judgment holding that a reasonable jury could find that Valverde had discarded the gun and was in the process of surrendering before Dodge shot him and (2) the use of deadly force in that situation would violate clearly established law. The 10th Circuit reversed in spite of the fact that the Decedent's estate argued that there was no evidence Valverde had pointed the gun at the officer and he clearly had complied and discarded the gun before he was shot five times. Dodge did not dispute that Valverde was discarding the gun and raising his hands before being shot. Similarly, in the case at hand, N.K. admitted that he had already been shot at the same time he was raising his hands. Dodge argued that his own actions should be assessed from his perspective of what was

happening, and that his actions were reasonable in light of his reasonable beliefs at the time. The 10th Circuit agreed with Dodge since the events took place over such a short period of time with no time for reflection.

Eleventh Circuit: The Eleventh Circuit granted a police officer qualified immunity when he shot a robbery suspect who was fleeing who held a gun but argued that he hadn't pointed it at officers. Jean-*Baptiste v. Gutierrez*, 627 F.3d 816, 818-19, 821 (11th Cir. 2010). The court held that "[t]he 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," *Id*. at 821 (original brackets and internal quotation marks omitted).

In *Robinson v. Arrugueta*, 415 F.3d 1252, 1256 (11th Cir. 2005) the Court held that an Officer's decision to shoot within a reaction time of 2.72 seconds was reasonable, even if subsequent assessment showed that the officer could have escaped unharmed.

In *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002), the court held that the use of deadly force in the "very few seconds" after a serious threat had subsided was reasonable and qualified immunity was granted.

III. This is not the case to do away with the doctrine of Qualified Immunity, where Respondent was found <u>not</u> to have violated Petitioner's constitutional rights.

Finally, the main thrust of Petitioner's Writ is an attempt at a persuasive argument citing treatises and

articles that the doctrine of qualified immunity should be tossed aside, in spite of the fact that this court has denied various Petitions for Writs of Certiorari as recently as June of 2020 for excessive force cases where the lower court held that the Defendant had violated the Plaintiff's constitutional rights but that the law had not been clearly established thus the officer was granted qualified immunity in each case. Such an argument is clearly inapplicable to the instant case where the circuit court of appeals held that Respondent had not violated Petitioner's constitutional rights, thus there is no basis for which to grant Nelson's Petition for a Writ of Certiorari here.

In *Brennan v. Dawson*, the Sixth Circuit found that the officer violated Plaintiff's 4th amendment rights when, without a warrant, he repeatedly entered and circled the close perimeter of Brennan's home—remaining fully within its curtilage—searching for Brennan, but granted qualified immunity because there was no clearly established law. *Brennan v. Dawson*, 752 Fed. Appx. 276, 278-279, 2018 U.S. App. LEXIS 28895, 2018 FED App. 0508N (6th Cir.) In spite of the constitutional violation, officer Dawson was granted qualified immunity because the scope of his implied license to enter and remain on Brennan's curtilage was not clearly established when the constitutional violation occurred. Yet this court denied the Petition for writ of certiorari. *Dawson v. Brennan*, 2020 U.S. LEXIS 3245, 207 L. Ed. 2d 1050.

In *Corbitt v. Vickers*, officer Vickers was alleged to have violated Corbitt's fourth amendment constitutional rights when he intended to shoot a dog and accidentally shot a minor. 929 F.3d 1304, 1323, 2019 U.S. App.

LEXIS 20447, *39, 27 Fla. L. Weekly Fed. C 2166, 2019 WL 3000798. Without making a determination as to whether Vickers had violated Corbitt's constitutional rights, the Eleventh Circuit reversed the district court's order denying officer Vickers's motion for summary judgment, and remanded with direction to grant him qualified immunity because it found no violation of a clearly established right.

Again, in June, this Court denied Corbitt's Petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. *Corbitt v. Vickers*, 2020 U.S. LEXIS 3152, 207 L. Ed. 2d 1051.

In *West v. City of Caldwell*, the Ninth Circuit granted the officer qualified immunity because no U.S. Supreme Court or Ninth Circuit case clearly established, as of August 2014, that the officers had exceeded the scope of consent by causing tear gas canisters to enter the house in an attempt to flush the boyfriend out into the open. *West*, 931 F.3d 978, 980, 2019 U.S. App. LEXIS 22184, *1, 2019 WL 3333744.

Also in June, in *West v. Winfield*, 2020 U.S. LEXIS 3153, 207 L. Ed. 2d 1052, the Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit was denied.

PRAYER FOR RELIEF

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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