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

REPLY BRIEF FOR PETITIONER

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1. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN ITS DECISION TO GRANT QUALIFIED IMMUNITY TO RESPONDENT RIVERA BY CONSPICUOUSLY FAILING TO APPLY LONGSTANDING PRECEDENT GOVERNING THE SUMMARY JUDGMENT STANDARD THAT THE COURT MUST ACCEPT THE FACTS IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY WHEN IT FAILED TO CONSIDER EVIDENCE IN FAVOR OF THE DENIAL OF QUALIFIED IMMUNITY WHICH INCLUDED, BUT IS NOT LIMITED TO, MINOR N.K'S TESTIMONY, WITNESSES' TESTIMONY, AND VIDEO EVIDENCE.

Rivera argues that the Sixth Circuit did not inappropriately take the facts in the light most favorable to Rivera because there was no dispute of fact as to when Rivera decided to shoot. However, Rivera's state of mind is inconsequential.

In support of his argument, Rivera relies upon a Sixth Circuit case, *Mullins v. Cyranek*, 850 F.3d 760 (6th Cir. 2015). Notably, Rivera does not cite a substantially similar case from this Court, and no petition came before the Court for review of the *Mullins* decision. Furthermore, *Mullins* is distinguishable from the instant case. In *Mullins*, the defendant officer suspected that the plaintiff's decedent had a gun based upon the decedent's actions of holding his right side and positioning his right side away from the defendant officer. *Id.* at 763. Based upon these concerns,

the defendant officer grabbed the decedent's wrists, and then, a struggle ensued. *Id.* The decedent was able to break free long enough to take hold of his gun with his finger on the trigger, and the defendant officer ordered him to drop his weapon. *Id.* The decedent then threw the gun, and as he was doing so, the defendant officer fired two fatal shots. *Id.* The timing of the shots was based upon the appearance of the casings in surveillance video of the scene, but the casings were not conclusive evidence of the timing. *Id.* If the casings appeared instantaneously with the shots, the second shot must have been fired after the decedent had already turned away from the defendant officer, but no evidence in the record supported this conclusion. *Id.* Notably, the autopsy report showed that the decedent suffered only one gunshot wound. *Id.* The Sixth Circuit held that the defendant officer reasonably believed that the decedent was still armed at the time that he fired the second shot, particularly in light of the fact that the decedent only sustained a single gunshot wound. *Id.* at 768.

Unlike in *Mullins*, the video evidence in the instant case is more conclusive as to the timing of the shot. Specifically, the video evidence shows minor N.K.'s empty and partially raised right hand in the frame at the time that Rivera fired his shot. **(A16, A19).** Moreover, the decedent in *Mullins* was physically struggling with the defendant officer before the decedent placed his finger on the trigger of his gun. Minor N.K. had no physical contact with Rivera. **(A3, A22).** The disputed facts, taken in the light most favorable to minor N.K., should have supported a denial of summary judgment. Instead, however, the Sixth Circuit relied upon Rivera's argument that he "decided" to shoot while minor N.K. still appeared to have his hand on the B.B. gun. **(A10).** It is undisputed that minor N.K. did not have the B.B. gun

in his hand at the time he was shot, and to the extent that Rivera alleges that he made the "decision" to shoot before minor N.K. threw the gun, that question of fact should not have been resolved by the Sixth Circuit. Pursuant to *Tolan v. Cotton*, 572 U.S. 650 (2014), this question of fact should be decided by a jury, and the Sixth Circuit opinion to the contrary "reflects a clear misapprehension of summary judgment standards in light of [the Court's] precedents." *Id.* at 659.

A. Rivera's Attempt to Illustrate the Absence of a Circuit Split Relies Upon Irrelevant Cases and Ignores the Primary Issue in this Case: That the Sixth Circuit Failed to Apply the Proper Summary Judgment Standard

Rivera further argues that there are sufficiently similar cases in other circuits, thus illustrating that the Sixth Circuit did not conspicuously fail to apply a governing rule. Ms. Nelson's principal Brief illustrated that the conspicuous failure to apply the governing rule with regard to the summary judgment standard is widespread amongst the circuits. However, several circuits have indeed reached the correct conclusion upon being presented with similar fact patterns.

Specifically, *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009) is instructive on this issue. In *Nance*, the Eighth Circuit Court of Appeals affirmed the district court's decision denying the police officers' request for summary judgment based upon qualified immunity as it determined: "(1) material questions of fact existed as to whether the officers identified themselves as police, whether they saw

the decedent with a gun in his hand, whether they had reason to fear for their safety at the time of the shooting, and whether they gave warnings before using deadly force; and (2) the right to be free from the use of deadly force was clearly established." *Id.* at 606. Specifically, the defendant police officers conducted surveillance in the area of a convenience store based upon information that two or three males were going to rob it. *Id.* at 606-607. At the time, the defendant police officer observed two black males (plaintiff Farrow, who was 12 years old, and plaintiff Nance, who was 14 years old). *Id.* at 607. However, the facts surrounding the shooting of plaintiff Farrow were in dispute. Specifically, the plaintiffs argue that "Farrow had a toy gun tucked into the waistband of his pants. The gun was gray with a black handle, and it had an orange cap at the tip of the barrel…Farrow was shot while 'fixing to get on the ground' and while the toy gun was still tucked into his waistband.'" *Id.* To the contrary, the defendant police officers argued that "[a]lthough Nance hit the ground immediately, both officers say Farrow remained standing and did not drop his weapon despite repeated commands to do so and that he raised his right hand while still holding the gun." *Id.* The district court denied the defendant police officers the protection of qualified immunity. On appeal, the defendant police officers argued "that the case law is not sufficiently established on a right to be free from the use of deadly force 'where the suspect has in his possession a toy weapon that appears to be real and the suspect does not comply with the officers' commands." *Id.* at 611. However, the *Nance* Court held, "[f]or a constitutional right to be clearly established, there does not have to be a previous case with exactly the same factual issues" and therefore upheld the denial of qualified immunity. *Id.*

Likewise, the Sixth Circuit previously held in similar circumstances that a defendant officer was not entitled to summary judgment based upon qualified immunity. *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011). In *Bletz*, the defendant officers drove to a family residence to execute a bench warrant for the decedent's son. *Id.* at 747. The defendant officers made contact with the son without issue, but the decedent then appeared in the doorway and pointed a gun at the defendant officers. *Id.* at 748. The defendant officers yelled at the decedent to put the gun down, and the decedent did not promptly drop his weapon. *Id.* One of the defendant officers fired four shots at the decedent and killed him. *Id.* The Sixth Circuit subsequently held that there was a question of fact whether the decedent was lowering his gun at the time that he was shot. *Id.* at 752. While the defendant officer argued that the decedent never lowered his gun, this contradicted testimony by the decedent's son. *Id.* The Court found this eyewitness' testimony sufficient to create a genuine fact dispute. *Id.* at 753. Given that a reasonable jury could find that *at the time the decedent was shot*, he was complying with the defendant officer's order to drop his weapon, the Sixth Circuit affirmed the district court's denial of qualified immunity. *Id.* at 752, 754.

Furthermore, the Ninth Circuit has also held that qualified immunity should be denied where a similar question of fact existed. *George v. Morris*, 736 F.3d 829. In *George*, the plaintiff's decedent retrieved a pistol from his truck, loaded it with ammunition, and sat on the front porch of his home. *Id.* at 832. The plaintiff, who was the decedent's wife, called the police and could be heard exclaiming "No!" and "My husband has a gun!" *Id.* The three defendant officers were dispatched for a domestic

disturbance and arrived with service revolvers as well as two AR-15 rifles. *Id.* The defendant officers instructed the decedent to show his hands, and when the decedent came into view, he was using a walker and holding his firearm in one hand with the barrel pointing down. *Id.* The defendant officers broadcast that the decedent had a firearm, and the three defendant officers fired at the decedent. *Id.* at 833. The plaintiff filed suit on behalf of her deceased husband, alleging, in relevant part, that the three officers violated her husband's Fourth Amendment right to be free from unreasonable seizure. *Id.* The district court held that whether the decedent presented a threat was in dispute and therefore denied summary judgment. *Id.* at 834. While no video existed of the incident, the Ninth Circuit affirmed based upon the circumstantial evidence which could lead a reasonable jury to believe that the decedent kept his weapon trained on the ground and did not point it at the defendant officers. *Id.* at 838-39.

In contrast, the cases cited by Rivera are distinguishable from the instant case. *Lamont v. New Jersey*, 637 F.3d 177 (3rd Cir. 2011) involved a suspected car thief fleeing on foot through thick woods. *Id.* at 183. The plaintiff stopped with his hand in his waistband before making a movement consistent with brandishing a gun. *Id.* The Third Circuit held that the defendant officers were justified in shooting while the plaintiff performed this movement. *Id.* However, the Third Circuit further held that subsequent gunfire *after the plaintiff's right hand was visible* constituted excessive force. *Id.* at 185. Therefore, the Third Circuit denied qualified immunity to the defendant officers based upon the shots fired after the threat was no longer present. *Id.* Notably, the shot fired by Rivera in the instant case was not fired until after minor

N.K.'s right had was visibly empty, as is supported by the video evidence. **(A16, A19).**

In *Ayala v. Wolfe*, 546 Fed. App'x 197 (4th Cir. 2013), an unpublished case, the defendant officer responded to a report of an armed robbery. *Id.* at 199. Upon frisking the plaintiff and feeling a weapon, the defendant officer backed away and pointed his service weapon at the plaintiff. *Id.* The plaintiff then removed the weapon from his waistband, and the defendant officer fired several shots. *Id.* No video captured the incident, and the plaintiff lost consciousness during the incident. *Id.* at 199. Moreover, it was very dark and the defendant officer testified that he never saw or heard the plaintiff drop his weapon. *Id.* The Fourth Circuit upheld the district court's denial of qualified immunity. *Id.* at 202. However, unlike in *Ayala*, in the instant case, the video evidence supports that minor N.K. was raising his empty hand at the time he was shot. **(A16, A19).**

In *Valderas v. City of Lubbock*, 937 F.3d 384 (5th Cir. 2019), the plaintiff was arrested pursuant to a felony arrest warrant for a parole violation. *Id.* at 386. The plaintiff had a "violent and lengthy criminal history" and was considered armed and dangerous. *Id.* at 387. The plaintiff pulled out his gun and then threw his gun in the car, but all three officers testified that they did not see the plaintiff discard his gun. *Id.* Video evidence did not show the plaintiff putting his hands up. *Id.* at 390. The Fifth Circuit granted qualified immunity based upon the defendant officers' reasonable belief that the plaintiff had a weapon. *Id.* In contrast, minor N.K. had no known "violent and lengthy criminal history," and both the video evidence and witness testimony supports that he had begun to put his

hands up at the time he was shot. **(A3, A16, A18, A22, A27, A29).**

Estate of Valverde v. Dodge, 967 F.3d 1049 (10th Cir. 2020) is yet another case in which the plaintiff's decedent was a suspect had a prior criminal history. *Id.* at 1055. Specifically, defendant SWAT team organized a drug bust upon the plaintiff's decedent, who was also known to have sold illegal weapons, including AK-47s. *Id.* at 1054-55. As the officers surrounded the decedent during the drug bust, the decedent pulled out a gun, and the lead officer yelled that the decedent was armed. *Id.* at 1057. The defendant officer then fired five shots in quick succession. *Id.* The first shot was fired less than a second after the decedent pulled out his gun. *Id.* at 1063. Based upon these facts, the Tenth Circuit held that the defendant officer's actions were reasonable, even if the decedent had actually discarded the gun at the time he was shot. *Id. Valverde* is distinguishable from the instant case in that it involved a tense situation (a drug bust where the suspect was known to deal illegal weapons).

The remainder of the cases cited by Rivera are equally unpersuasive. *Jean-Baptiste v. Gutierrez*, 627 F.3d 816 (11th Cir. 2010) involved a fleeing robbery suspect who admittedly had a gun in his hands but argued that he was not pointing it at the officers. In contrast, minor N.K. had already disposed of the gun and was raising his hands at the time he was shot. In *Robinson v. Arrugeta*, 415 F.3d 1252 (11th Cir. 2005), the defendant officer responded to a drug bust when the plaintiff's decedent got into his vehicle while the defendant officer was in front of the vehicle. *Id.* at 1254. The defendant officer pointed his gun and identified himself as a police officer, but the decedent

merely "grinned" and began to slowly accelerate towards the defendant officer. *Id.* The defendant officer then shot the decedent. *Id.* While the defendant officer could have moved out of the path of the moving vehicle, the Eleventh Circuit held that the defendant officer reasonably believed that the decedent was using his vehicle as a weapon against the defendant officer and therefore, the use of force was justified. *Id.* at 1256. Finally, in *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002), during a traffic stop, the plaintiff's decedent, a man, was discovered to have a social security number belonging to a woman. *Id.* at 1276. The responding officer initiated a pat down, and the decedent struggled before breaking free and returning to his car. *Id.* As the decedent started his car, responding officer attempted to neutralize him with pepper spray, but the decedent was undeterred and subsequently led the responding officer as well as additional responding officers on a high-speed car chase during which the decedent drove directly towards police cars; drove through someone's yard at 50-60 mph; and nearly hit an elderly motorist head-on. *Id.* When the decedent was cornered in a cul-de-sac, he failed to comply with orders to get out of the car and kept his engine running. *Id.* at 1278. The defendant officers fired at the decedent through his windshield. *Id.* An affidavit submitted by a witness contended that the decedent was not a threat at the time of the shooting, but the Eleventh Circuit emphasized that the witness did not have the context of the prior high-speed chase which lead the defendant officers to conclude that the decedent was a threat. *Id.* at 1280. Therefore, the Eleventh Circuit granted qualified immunity to the defendant officers. *Id.* at 1283.

B. MS. NELSON'S PETITION DOES NOT ASK THIS COURT TO "DO AWAY WITH" QUALIFIED IMMUNITY, BUT RATHER TO REAFFIRM THE SUMMARY JUDGMENT STANDARD IN LIGHT OF THE WIDESPREAD CLEAR MISAPPREHENSION OF THIS STANDARD BY THE SIXTH CIRCUIT AND OTHER COURTS

Finally, Rivera misconstrues Ms. Nelson's petition as a call to "do away with" qualified immunity. This is untrue. Rather, Ms. Nelson highlights the ways in which the summary judgment standard has been abused in qualified immunity cases such as the instant case. Ms. Nelson relies upon articles analyzing this standard rather than articles asking the Court to do away with qualified immunity. Ms. Nelson instead asks that this Court reaffirm the importance of taking the facts in the light most favorable to her given the clear misapprehension of the summary judgment standard by the Sixth Circuit.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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