No.

IN THE

Supreme Court of the United States

NANETTE BLANCHARD-DAIGLE,
Representative of the estate of Lyle Blanchard,

Petitioner,

v.

SHANE GEERS; JIM HATFIELD; BELL COUNTY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari

To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred by overlooking precedent in determining whether an officer enjoys qualified immunity after applying deadly excessive force to a person who is incapacitated?

2. Whether the complaint plausibly alleged that the defendant officer used excessive force when shooting Mr. Blanchard four more times after he was incapacitated?

RELATED PROCEEDINGS

Blanchard v. Geers, et al., No. 18-cv-208 (W.D. Tx. Oct. 29, 2018)

Blanchard v. Geers, et al., No. 18-51022 (5th Cir. Feb. 12, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nanette Blanchard-Daigle, representative of the estate of Lyle Blanchard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a) is available at 802 Fed. Appx. 113. The Fifth Circuit's order denying rehearing en banc (App., *infra,* 22a**)** is unreported. The district court's order dismissing plaintiff's claims (App., *infra*, 24a) is available at 2018 WL 10798643.

JURISDICTION

The judgment of the court of appeals was filed on February 12, 2020, and a timely petition for en banc rehearing was denied on March 31, 2020. The Court's order of March 19, 2020, extended the time to file this petition to August 28, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides, in relevant part: 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 equity, or other proper proceedings for redress ***.

STATEMENT

At about 3:40 on the afternoon of Tuesday, August 30, 2016, Mr. Lyle P. Blanchard, a 59-year-old U.S. Navy veteran, drove along East Knights Way in Bell County, Texas toward his home. App., *infra*, 25a. Deputy Shane Geers suspected Mr. Blanchard of driving under the influence and began following him. App., *infra*, 25a. Neither Bell County nor any other police department dispatch told Geers that Mr. Blanchard was armed or suspected of any felony or outstanding crime.

As Mr. Blanchard engaged his right turn signal and prepared to take a right turn down his driveway, a private dirt road known as Rummel Road, Geers turned on his siren and emergency lights. App., *infra*, 25a. Mr. Blanchard pulled over and stopped his vehicle after travelling 1,000 feet down Rummel Road. App., *infra*, 25a. After about thirty seconds, Mr. Blanchard opened the door of his vehicle and remained in the driver's seat awaiting instructions from Deputy Geers. Geers did not turn off his siren, did not use his P.A. system or bullhorn, did not approach Mr. Blanchard's vehicle, and did not issue any audible instructions to Mr. Blanchard. App., *infra*, 25a. Mr. Blanchard subsequently exited the vehicle. App., *infra*, 3a. Mr. Blanchard stood about fifty feet away from Deputy Geers, who stood behind his armored patrol car door. App., *infra*, 3a. Mr. Blanchard outstretched his hands to show that he was unarmed. Mr. Blanchard said something inaudible to Geers. He then reached towards the right, lower pocket of his cargo shorts, which contained his identification. App., *infra*, 26a.

Immediately upon Mr. Blanchard's reaching towards his shorts pocket, Deputy

Geers fired his pistol four times at Mr. Blanchard. App., *infra*, 26a. Mr. Blanchard fell to the ground, incapacitated. App., *infra*, 26a. Geers then fired an additional four times at Mr. Blanchard. App., *infra*, 26a. Mr. Blanchard died that day of gunshot wounds. App., *infra*, 26a. Deputy Geers continues to be employed as an officer with the Bell County Sheriff's Department, where he worked for seventeen years prior to the killing.

On March 23, 2017, Ms. Nanette Blanchard-Daigle, as representative of the estate of her brother Lyle Blanchard, filed suit against Deputy Shane Geers, Bell County, and Ranger Jim Hatfield, seeking damages for constitutional violations pursuant to 42 U.S.C. § 1983. App., *infra*, 3a. Deputy Geers and Bell County filed a motion to dismiss that original complaint. App., *infra*, 3a. Ms. Blanchard-Daigle twice amended that complaint before the Magistrate Judge entered a report and recommendation that the defendants' motions to dismiss be granted. App., *infra*, 3-4a.

Before the United States District Court for the Western District of Texas ruled on those motions, Ms. Blanchard-Daigle voluntarily dismissed the first lawsuit. App., *infra*, 4a.

Ms. Blanchard-Daigle filed a new Complaint initiating the instant matter on July 26, 2018. App., *infra*, 4a. Defendants Shane Geers and Bell County filed a motion to dismiss pursuant to Rule 12(b)(6) on August 16, 2018. App., *infra*, 4a. Defendant Jim Hatfield filed a motion to dismiss pursuant to the same Rule on August 21, 2018.

The district court granted the Motion to Dismiss, dismissing Ms. Blanchard-

Daigle's claims with prejudice on October 29, 2018, and awarding attorney's fees to the Defendants. App., *infra*, 4a. The district court held that qualified immunity should protect Officer Geers from suit, refused to impose *Monell* liability on Bell County, and dismissed the claims against Ranger Hatfield. App., *infra*, 24a. This honorable Court should grant this petition for writ of certiorari and review the Fifth Circuit's decision to affirm.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion affirming the district court's grant of qualified immunity ignores its own precedent and this Court's precedent because firing on a "clearly incapacitated and gravely injured" person violates the clearly established Fourth Amendment right to be free from excessive force. App., *Infra*, 5a. *See Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 278 (5th Cir. 2015); *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."). Ms. Blanchard-Daigle's complaint[1] states that "Deputy Geers fired approximately four shots at the unarmed U.S. Navy Veteran" and that, "[a]fter Blanchard fell to the ground, clearly incapacitated and gravely injured, Geers fired four more shots at the dying man." App., *infra*, 26a. In ruling that these allegations failed to state a claim for an excessive

[1] In assessing a motion for dismissal under Federal Rule of Civil Procedure 12(b)(6), a reviewing court is limited to considering the facts as stated in the complaint and in doing so must accept "all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[]." *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018).

force violation, the Fifth Circuit committed a legal error on a matter of exceptional public importance that warrants granting this petition.

I. Precedent Clearly Establishes the Right of an Incapacitated Person to be Free from Deadly Force.

This Court has instructed that an officer who fired "a second round of shots after an initial round had clearly incapacitated [a suspect] and had ended any threat" would likely have engaged in an objectively unreasonable use of force even if the first round of shots was justified. *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (engaging in a fact-intensive analysis and concluding that the use of fifteen shots was not objectively unreasonable in that case because the individual posed a threat until the last shot was fired). Additionally, circuit courts have similarly held that an officer cannot continue to fire at a suspect after the individual has become incapacitated and thus no longer presents a threat. *See Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."); *Perea v. Baca*, 817 F.3d 1198, 1205 (10th Cir. 2016) ("[O]ur precedent is clear that continued use of force after an individual has been subdued is a violation of the Fourth Amendment.").

Well before August 30, 2016, decisions plainly established that "[s]hooting a clearly incapacitated suspect is inconsistent with *Garner's* command that deadly force is unconstitutional when a 'suspect poses no immediate threat to the officer and no threat to others,'" and violates an individual's constitutional right to be free from

excessive force.[2] *Mason*, 806 F.3d at 278 (*quoting Tennessee v. Garner*, 471 U.S. 1 (1985)); *see Lytle v. Bexar County, Tex.*, 560 F.3d 404, 413 (5th Cir. 2009) (declaring that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased"); *Graves v. Zachary*, 277 F. App'x 344, 348-49 (5th Cir. 2008) (holding that it was a "genuine material issue whether [the officer] violated [the plaintiff's] constitutional rights by shooting him after he was already 'incapacitated'" and further holding that "it does not take a specific case for an officer to know that he . . . cannot fire again at someone who is objectively 'downed or incapacitated'").

In *Mason*, the Fifth Circuit reversed a trial court's grant of qualified immunity, agreeing that the first five shots that an officer fired at an individual were objectively reasonable, but ruling that the last two shots the officer fired raised a genuine issue of material fact such that qualified immunity was not warranted.[3] 806 F.3d at 277.

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[2] Courts determine whether an individual's right to be free from excessive force has been violated under the Fourth Amendment's reasonableness standard. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In cases involving an officer's use of deadly force, a court examines whether the excessiveness of the force used by the officer was clearly unreasonable. *See Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). Courts assess whether excessive force was clearly unreasonable by examining the *Graham* factors. *Graham v. Connor*, 409 U.S. 386, 396 (1989) ("[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight."). The "inquiry is confined to whether the [officer or another person] was in danger at the moment of the threat that resulted in the [officer's use of deadly force]." *Rockwell v. Brown*, 664 F.3d 985, 993 (5th Cir. 2011).

[3] None of the cases cited by the Fifth Circuit involved an officer continuing to shoot at an already incapacitated individual. *See* App., *Infra*, 17a. In *Salazar-Limon v. City of Houston*, the officer fired a single shot at the plaintiff. 826 F.3d 272, 275 (5th Cir. 2016). In *Manis v. Lawson*, the defendant-officer fired "four times in rapid succession."585 F.3d 839 (5th Cir. 2009); *see* Original Brief of Defendants-Appellants at 8, *Manis v. Lawson*, (5th Cir. Oct 13, 2008) (No. 08-30987); *see also Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 381 (5th Cir. 2009) (involving two shots fired

The individual fired upon allegedly reached for his gun while being attacked by a police canine. *Id.* at 273. The Fifth Circuit noted that the district court "did not expressly address whether [the officer's] use of his firearm was justified throughout the encounter," and found that a jury could reasonably conclude that: "[the plaintiff] lay incapacitated on the ground and did not move in a threatening manner before [the officer] fired the final two shots" and "[the plaintiff] objectively posed no immediate threat, such that [the officer] violated the Fourth Amendment by firing the final two shots." *Id.* at 277. Accordingly, the Fifth Circuit reversed and remanded the case, instructing the district court to determine whether the officer was objectively unreasonable in firing the last two shots. *Id.*

In *Lytle v. Bexar County, Tex.*, the Fifth Circuit affirmed a district court's denial of a deputy's motion for summary judgment based on qualified immunity after the deputy fired upon a passenger in a car that had previously been moving toward the deputy during a chase. 560 F.3d 404 (5th Cir. 2009). The court determined that, although the deputy would not have violated the individual's rights if he had fired when the car was reversing towards him, a jury could find that the threat of serious harm ceased when the driver put the car in drive and drove in the opposite direction, away from the deputy. *Id.* at 416. In denying the defense on the basis of qualified immunity, the Fifth Circuit concluded that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of

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together). Therefore, those cases are of limited value when considering whether the *subsequent* shots Officer Geers fired at Mr. Blanchard violated his constitutional right to be free from excessive force.

force has ceased." *Id.* at 413 (citing *Abraham v. Raso*, 183 F.3d 279 (3rd Cir. 1999).

II. The Complaint Plausibly Alleged that Officer Geers Used Excessive Force by Shooting Mr. Blanchard Four More Times after He was Already Downed and Incapacitated.

Because Ms. Blanchard-Daigle's complaint alleged that Officer Geers shot at her brother four additional times after he dropped to the ground, clearly injured and incapacitated—two more times than the additional shots the officer in *Mason* fired at a downed and incapacitated individual—it stated a plausible claim that Geers violated Mr. Blanchard's clearly established Fourth Amendment right. *See* 806 F.3d at 277. Splayed on the ground, incapacitated, Mr. Blanchard posed no threat to Officer Geers or others. In fact, Mr. Blanchard posed less of a threat than did the individual in *Lytle*, who overcame a defense of qualified immunity even though she was a passenger in a fleeing vehicle during a police chase when the officer fired at her. 560 F.3d at 407-08. Even if Geers reasonably believed that Lyle Blanchard was potentially reaching for a weapon, which Ms. Blanchard-Daigle does not concede, this justification had ceased to exist when Officer Geers fired four additional shots at Mr. Blanchard as he lay incapacitated and injured in his driveway. *See Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005); *Estate of Jones by Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 668 (4th Cir. 2020), *as amended* (June 10, 2020); *Brockington v. Boykins*, 637 F.3d 503, 507 (4th Cir. 2011) (finding "[t]here [was] no indication that deadly force was necessary or reasonable once [suspect] was initially shot, thrown to the ground by the force of the bullets, and wounded."); App.,

infra, 26a.[4]

CONCLUSION

The Court should grant the petition and review the Fifth Circuit's decision. The Fifth Circuit improperly upheld the grant of qualified immunity to Officer Geers. Officer Geers violated Mr. Blanchard's clearly established constitutional right to be free from deadly excessive force when he fired four additional times at a clearly incapacitated Mr. Blanchard. Ms. Blanchard-Daigle respectfully requests that this Court grant her petition for certiorari.

Respectfully submitted,

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[4] Likewise, the Fifth Circuit did not consider the implications of an officer's firing four additional shots at a downed and incapacitated individual to its inquiry of Bell County's liability. Because Bell County did not reprimand or discipline Officer Geers despite the presence of an "extreme" factual situation, that failure to discipline or remand could constitute a policy of "reckless dangerousness" such that Bell County may be liable under the ratification theory of *Monell* liability. *See Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985).

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