No. 20-263

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 A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. PETITIONER HAS NOT SHOWN THAT THE LAW WAS CLEARLY ESTABLISHED OR THAT DEPUTY GEERS ACTED SO CONTRARY TO CLEARLY ESTABLISHED LAW AS TO SHOW SHE COULD PLAUSIBLY OVERCOME HIS QUALIFIED IMMUNITY.

2. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY APPLIED THE PRECEDENT OF THIS COURT AND ITS OWN PRECEDENT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CASE.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment IV, which provides the right to be "secure . . . against unreasonable searches and seizures . . . ."

42 U.S.C. § 1983, which provides in relevant part, protection against the "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

INTRODUCTION

This case involves the use of deadly force by a Deputy Sheriff, Shane Geers, for which the deputy was not only entitled to qualified immunity, but that was justified and reasonable under the circumstances.

Despite Petitioner's selective pleading of facts in her complaint (which was in its fourth iteration at the time of the dismissal by the District Court), and the characterizations of facts in her petition to this Court, the inescapable facts reflected by Petitioner's pleading and the documents attached thereto reflect that when Deputy Geers observed Lyle Blanchard, Blanchard was speeding and swerving, giving rise to the suspicion Blanchard was driving under the influence. At the time, Blanchard was driving on a paved, well-traveled farm to market road, exiting the nearest city and heading into an increasingly rural area. Deputy Geers activated lights and sirens to initiate a traffic stop. Blanchard did not stop on the paved road, but instead turned on to an isolated dirt road. Blanchard did not stop after turning on to the dirt road, but instead, for no apparent reason, drove for almost a quarter of a mile down that road. Blanchard then abruptly came to a stop and without any instruction to do so

from Deputy Geers opened his door, exited his vehicle, turned toward Deputy Geers and reached down and into his pocket in a drawing motion. At that point—faced with a man who he suspected of being intoxicated, who had chosen not to immediately stop in response to activated lights and sirens, who had led Geers from a paved public road 1,000 feet down an isolated dirt road for no apparent reason, who had then suddenly stopped and, without being told to do so, exited his vehicle and turned toward Geers and reached toward his pocket— Geers reasonably feared that Blanchard could be drawing a weapon and fired at Blanchard. Geers's statement, provided as part of a Texas Rangers' independent investigation of the incident and attached to Petitioner's complaint, confirms even more facts that justified Geers's perception that he was in danger and his use of force. *See Fed. R. Civ. P.* 10(c) (allowing consideration of documents attached to pleadings).

Thus, the District Court correctly held that Petitioner had not pled facts sufficient to overcome Deputy Geers's qualified immunity. More importantly, nothing about the ruling by the Court of Appeals merits the issuance of a writ of certiorari by this Court. This case does not involve any unsettled question of federal constitutional or federal statutory law that is of substantial significance, of general interest, or of broad practical consequence, nor does this case involve an issue for which a split among the Circuit Courts of Appeal has developed.

Petitioner asserts that this case involves a misapplication of this Court's precedent, but in doing so Petitioner all but ignores the facts and her own pleadings. Petitioner argues that Blanchard was shot at four times after he was incapacitated

and that Geers's firing of these shots was excessive force. In each case cited by Petitioner, the timing of the shots fired by the officer involved allowed the shots or groups of shots to be evaluated separately and other circumstances surrounding the latter shots created some question as to whether they were reasonable or excessive. In this case, on the other hand, Officer Geers fired all of his shots in a single volley and the other circumstances that were present in the cases cited by Petitioner and that supported a finding that latter shots were excessive are not present in this case.

Accordingly, this case does not present any misapplication of this Court's precedent that warrants the issuance of a writ of certiorari and the petition should be denied.

STATEMENT OF THE CASE

Petitioner initially filed a lawsuit against Deputy Shane Geers, and against Bell County, the County for which Geers worked, alleging that Geers used excessive force. This suit was filed as *Nanette Blanchard-Daigle, as Representative of the estate of Lyle Blanchard v. Shane Geers, Bell County, Texas, and Jim Hatfield,* Cause No. 6:17-CV-00078-RP. After Petitioner had filed two amended complaints, Geers and Bell County filed a motion to dismiss, which the Magistrate Judge recommended be granted. Before the district court could rule on this recommendation, Petitioner voluntarily dismissed her case under *Fed. R. Civ. P.* 41(a). Petitioner then refiled the same lawsuit, now under Cause No. 6:18-CV-0208. Petitioner's factual allegations were almost identical to those made in her first lawsuit, however, Petitioner attached the report of a purported use of force expert to her complaint in an attempt to bolster

her claims. The district court ruled that the case should be dismissed under *Fed. R. Civ. P.* 12(b)(6) for failure to state a claim and the Fifth Circuit affirmed.

After her petition to the Fifth Circuit for rehearing was denied, Petitioner filed her petition for writ of certiorari. She has sought review only of the ruling as to the claims made against Deputy Geers in his individual capacity and has not sought review of the dismissal of her claims against Bell County on her claim against Texas Ranger Jim Hatfield.

REASONS FOR DENYING CERTIORARI

1. PETITIONER HAS NOT SHOWN THAT THE LAW WAS CLEARLY ESTABLISHED OR THAT DEPUTY GEERS ACTED SO CONTRARY TO CLEARLY ESTABLISHED LAW AS TO SHOW SHE COULD PLAUSIBLY OVERCOME HIS QUALIFIED IMMUNITY.

Petitioner claims that the right of a clearly incapacitated person to be free from the use of force was clearly established as of the date of the encounter between Deputy Geers and Blanchard, citing *Plumhoff v. Rickard*, 572 U.S. 765 (2014). Petitioner observes that in *Plumhoff*, this Court observed 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." Petition at 5. Aside from the fact that, as described below, neither the pleadings nor the actual facts show that the shooting at issue involved two volleys of shots, if Petitioner's counsel in the comfort of their office can only state that a second round of shots would "likely" be a violation of the Fourth Amendment, then certainly the law is not clearly established for an officer in the field.

Petitioner's discussion of other cases involving the shooting of incapacitated persons fares no better. For example, in *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268 (5th Cir. 2015), the court of appeals dealt with a shooting involving a volley of five shots and then a second volley involving two shots. *Id.* at 273-74, 276. The Fifth Circuit reversed the district court's grant of summary judgment, holding that there were fact issues as to whether a reasonable officer in the position of the officer who fired the shots would have probable cause to believe deadly force was justified. *Id.* at 277. That is, the court of appeals held that under the circumstances—which included witness testimony that the suspect was face down and not moving when, after a break in time, the officer shot the suspect twice more—that there was fact issues as to whether the use of force was justified. *Id.* The court of appeals specifically refrained from commenting on whether the officer was entitled to qualified immunity for the first five shots, the last of which was fired while the suspect was lying face down. *Id.*

In contradistinction with *Mason* as explained more fully below, Deputy Geers's use of force did not involve two distinct volleys of shots separated by any significant break in time or change in circumstances. Nor did Deputy Geers's use of force involve shooting a subject that could be seen lying face down and not moving. This Court has stated that for the law to be clearly established, the existing precedent must be such that, under the circumstances presented, the contours of the law are "beyond debate." *Plumhoff*, 572 U.S. at 779. This is particularly true in the context of use-of-force as the analysis of whether a use of force was reasonable is highly fact specific. *See id.*

But the cases cited by Petitioner in her attempt to show that the law was clearly established involve circumstances that are not present in this case, and it was those circumstances that supported the conclusion that, objectively, the subject was incapacitated or otherwise no longer a threat. In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005) for example, the subject had initially posed a threat by driving toward officers, who were on foot, but when the officer's fired the contested shots the subject had come to a complete stop. *Id.* at 474-75.

Mason a Fifth Circuit case cited by Petitioner, is even more instructive. In *Mason,* the subject was on the ground at the time the contested shots were fired. 806 F.3d at 277. The similarities with any shots fired by Deputy Geers end there. In *Mason*, the officer had shot the subject five times, including one shot when the subject was not only down, but was face down. *Id.* Then, after a distinct break in time, and despite the facts that the subject was not only face down but witness testimony indicated that he was not moving at all, the officer fired a second volley of two shots at the subject. *Id.* Petitioner recognizes that it is these additional factors that were key to the Fifth Circuit's finding of a fact issue in *Mason.* The mere fact that a subject has gone down within seconds of an officer's first shot does not mean that the person is no longer a threat. For example, given that Petitioner has at various points in the briefing in this case highlighted Blanchard's military service apparently to evoke sympathy one would think she would also appreciate that military trains on shooting from a prone position, which is known to be the most stable shooting position available to a rifleman.

For all of these reasons, it was not clearly established law that, under the circumstances presented to Deputy Geers, Blanchard was "incapacitated" for purposes of a Fourth Amendment use-of-force analysis or that Geers's use of force was excessive.

2. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY APPLIED THE PRECEDENT OF THIS COURT AND ITS OWN PRECEDENT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CASE.

Petitioner's request to this Court to issue a writ of certiorari, and her contention that she pled a plausible claim against Deputy Geers, rests on a single allegation of her complaint that "After Blanchard fell to the ground, clearly incapacitated and gravely injured, Geers fired four more shots at the dying man." Indeed, in the section of her petition arguing that she had plead a plausible claim Petitioner does not point to any other allegation she made in the district court. This one allegation does not show that Petitioner could plausibly overcome Geers's qualified immunity. It certainly does not show that a petition for writ of certiorari should be granted.

First, the allegation is contradicted by Petitioner's own pleading. After Plaintiff had three opportunities to plead her case in her first filing of this lawsuit, the Magistrate Judge recommended that the case be dismissed. Before the District Court could rule on that recommendation Petitioner voluntarily dismissed her case under *Fed. R. Civ. P.* 41. She then refiled substantially the same lawsuit, this time with a purported expert report attached to her pleading in an effort to bolster her claims. That report, which can be considered under *Fed. R. Civ. P.* 10(c) because of

its attachment to Petitioner's complaint, includes Deputy Geers's statement to the Texas Rangers, in which he describes the details of the encounter, including that he "continued" to fire at Blanchard because he did not initially fall and even after falling continued to move and not show his hands.

In *Plumhoff v. Rickard*, 572 U.S. 765 (2014), officers pursued a suspect in a vehicle pursuit and eventually, after the suspect crashed his car, officers were able to exit their patrol cars and engage the suspect on foot. 572 U.S. at 769-70. As the officers confronted the suspect he drove into a police cruiser and as his bumper was pressed against the police cruiser he continued to engage his accelerator. *Id.* at 770. An officer fired three shots into the suspect's car and the suspect then reversed, nearly striking an officer, and fled, at which point other officers fired 12 more shots at the suspect. *Id.* All 15 shots were fired over the span of 10 seconds. *Id.* at 777. This Court concluded that the danger posed by the fleeing suspect justified the use of deadly force and that, with regard to the number of shots fired, if lethal force is justified, "the officers need not stop shooting until the threat has ended" noting that "officers are taught to keep shooting until the threat is over." *Id.* (citing *Estate of Allen v. City of W. Memphis*, 509 Fed. Appx. 388, 392, 2012 U.S. App. LEXIS 25400 (6th Cir.) (6th Cir. 2012)).

Similarly, here the shots fired by Deputy Geers were part of one continuous encounter, with all shots fired in a matter of seconds. Like *Plumhoff*, this case does not involve two distinct volleys of shots separated by any significant passage of time or change in circumstances. In the context of Blanchard's behavior leading up to his

being shot and the fact that Blanchard did not initially go down and continued to move but not comply with orders to show his hands, Geers reasonably believed that he was in danger until his final shot was fired.

Second, even considering the allegation without regard to the report attached to Petitioner's complaint, it is not sufficient to state a claim. Whether use of force is "clearly excessive" or "objectively unreasonable" is evaluated under all of the circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). 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.'" *Graham v. Connor*, 490 U.S. 386, 396 (1989). Even the cases on which Petitioner relies hold that whether the suspect has been incapacitated such that the further use of force is not justified must be viewed objectively. *See Graves v. Zachary*, 277 F. App'x 344, 349 (5th Cir. 2008) ("It does not take a specific case for an officer to know that he cannot shoot a compliant suspect and that he cannot fire again at someone who is *objectively 'downed or incapacitated*.'") (emphasis added). Blanchard was neither compliant nor was Geers able to determine that Blanchard was incapacitated.

Petitioner alleges that after Blanchard fell Deputy Geers filed four more shots. But it is complete speculation as to whether, from Deputy Geers's perspective, Blanchard was gravely injured and incapacitated and thus no longer a threat. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level, ..."). The allegation that Blanchard was "incapacitated" is more a characterization and a parroting of language

from the case law cited by Petitioner than it is a factual allegation. *See Plumhoff,* 572 U.S. at 777 (noting that if an officer fired a "second round of shots after an initial round had clearly incapacitated" the subject, that might constitute excessive force); *Mason*, 806 F.3d at n.10 (quoting *Graves*, 277 F. App'x at 349 (discussing use of force against an "*objectively 'downed or incapacitated*" subject) (emphasis added).

Petitioner relies on cases such as *Waterman v. Batton*, *Perea v. Baca*, *Mason v. Lafayette City Parish*, and *Graves v. Zachary.* But noticeably absent both from Petitioner's pleading and her petition are references to facts in this case that are similar to the facts on which these cases turned. For example, in *Mason* an officer responded to a report of an armed robbery. When an officer encountered a subject matching the description of the suspected robber, the officer ordered the subject to put his hand up and get on the ground. 806 F.3d at 273. The subject instead "squared up" to the officer, as if preparing to fight him, and the officer noticed a gun in the subject's waist band, at which point the officer released his police dog, which attacked the subject. *Id.* While the subject was being attacked by the police dog the officer shot the subject 5 times, including once while the subject was face down in a prone position. *Id.* The officer stopped firing, and after a break in time, fired two more shots into the subject's back, despite the fact that, according to a witness, the subject did not make any threatening movements to prompt the final two shots. *Id.* at 274, 276. Based on these facts, the Fifth Circuit concluded that there were genuine issues of material fact as to whether a reasonable officer in the position of the officer involved would have probable cause to justify the use of force. *Id.* at 278.

Unlike the shots in *Mason,* there was no meaningful break between the shots fired by Deputy Geers during which the circumstances changed. Aside from characterizations that Blanchard was "gravely injured" or "incapacitated" Petitioner did not plead any facts to show that a reasonable officer in the position of Deputy Geers would have believed that the threat had subsided such that any of shots that he fired were not justified. Unlike in *Mason,* there are no factual allegations that Blanchard went down immediately, complied with orders, stopped moving after going down, or other circumstances to show that a reasonable officer in the position of Deputy Geers would have thought the threat had subsided.

In *Waterman*, officers who were on foot opened fire when fleeing suspect drove toward them, giving rise to the concern that the suspect would strike the officers with his vehicle. 393 F.3d 471, 474-75. The suspect drove past the officers and came to a stop. The officers pursued and fired at the stopped vehicle, even though the vehicle had come to a stop and the suspect was no longer a threat to the public or the officers. *Id.* Again, unlike this distinct break in time and change in circumstances between one volley of shots and another, this case like *Plumhoff* involves on single, continuous encounter, one volley of shots, and all the shots fired before Blanchard had ceased moving around and before he clearly became compliant or incapacitated.

And again, this case was dismissed based on Petitioner's fourth pleading of her claim against Geers. If facts consistent with cases such as *Mason* and *Waterman* existed, Petitioner could have and should have pled them by now. If there had been a distinct break in time between two volleys of shots by Geers, or if the circumstances

had changed such that objectively, from Geers's perspective, a reasonable officer would have perceived the threat to be over, Petitioner could have and should have brought that to the district court's attention. Instead, having been given four opportunities to plead her case, the latter three being with the benefit of Deputy Geers's briefing pointing out the deficiencies in those pleadings, Petitioner did not plead specific facts to show this case is in line with cases like *Mason* and *Waterman* rather than *Plumhoff*. Rather, in her fourth attempt at pleading her case, Petitioner included a purported expert report that included Deputy Geers's statement, which only confirmed that Geers reasonably perceived Blanchard as a threat throughout all eight shots. Far from presenting an instance of a clear misapplication of this Court's precedent that needs to be rectified, Petitioner's request to this Court for review presents the relatively mundane issue of the adequacy of Petitioner's pleading, which does not warrant the issuance of a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, Deputy Geers requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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