No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TACARA ANDERSON, on behalf of minor child, MA,
Petitioner

v.

OFFICER JONATHAN VAZQUEZ,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are federal courts required to afford qualified immunity to a law enforcement officer who released a K9 on a child who weighed 75 pounds and was 4 feet 10 inches tall causing serious bodily injury because he may have been involved in a property crime and fled?

LIST OF PROCEEDINGS

1. *Tacara Anderson, on behalf of minor child, MA v. Officer Jonathan Vazquez*, Case No. 8:18-cv-1646-JSM-SPF United States District Court for the Middle District of Florida; judgment entered September 30, 2019; Order denying Plaintiff's Motion to Alter or Amend the Judgment entered October 31, 2019;

2. *Tacara Anderson, on behalf of minor child, MA v. Officer Jonathan Vazquez*, Case No. 19-14386-H; United States Court of Appeals for the Eleventh Circuit; Order affirming Motion for Summary Judgment entered on May 6, 2020; Petition for Rehearing En Banc denied August 19, 2020;

3. *Tacara Anderson, on behalf of minor child, MA v. Officer Jonathan Vazquez*, Case No. _____ ; United States Supreme Court; _____

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Tacara Anderson, on behalf of minor child, MA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's initial opinion was unpublished and was issued on May 6, 2020. Anderson filed a petition for rehearing en banc on May 27, 2020. The Eleventh Circuit denied rehearing in an order issued on August 19, 2020.

JURISDICTION

The Eleventh Circuit denied rehearing on August 19, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The United States District Court for the Middle District of Florida had original jurisdiction of this federal civil rights case pursuant to 28 U.S.C. §1331.

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Course of Proceedings

This is a police brutality case. Tacara Anderson, on behalf of her minor child, MA, sued Officer Jonathan Vazquez for violating MA's civil rights under 42 U.S.C. §

1983. (Amended Complaint, Doc. 3) Specifically, the Complaint alleged one 42 U.S.C § 1983 excessive force claim against Officer Vazquez. (Amended Complaint, Doc. 3) The Complaint alleged Officer Vazquez used excessive force when he released his K9 on MA who was twelve-years old and weighed only 75 lbs and was 60 inches tall at the time of the incident. (Amended Complaint, Doc. 3, para. 15-16) As a result, MA was hospitalized and suffered numerous bites to the upper right leg as well as puncture wounds and significant lacerations to the right lower leg and the outer knee that were described as follows: "Several large gaping lacerations to the anterior and posterior lower thigh. Muscle involvement on the anterior aspect. Exposure of tendons on the posterior aspect. Multiple small puncture wounds." (Amended Complaint, Doc. 3. Para. 22).

Defendant, Officer Vazquez, filed a Motion to Dismiss, asserting qualified immunity. (Def's Motion to Dismiss, Doc. 8) In the Order Denying Defendant's Motion to Dismiss, the District Court found that the Court could not analyze the issue of whether Officer Vazquez was entitled to qualified immunity because the alleged facts were sufficient at that stage to establish a plausible constitutional violation. (Order, Doc. 12, p. 4) The District Court reasoned that Defendant's argument was flawed because, although the K-9's pursuit of MA may have been warranted under existing law, the complaint alleges facts suggesting that Officer Vazquez knew MA was a minor and permitted the K-9 to continue to bite MA beyond what was reasonably necessary to detain him under the totality of the circumstances. (Order, Doc. 12, p. 3)

Defendant later moved for summary judgment, again asserting qualified immunity. (Def's Motion for Summary Judgment, Docs. 40-42) In response, Tacara Anderson, MA's mother, opposed summary judgment and asserted material factual disputes existed concerning whether Officer Vazquez could see MA was small in stature prior to releasing his K9. (P's Response in Opp. to Def's MSJ, Doc. 48, p. 2-5) Further, Tacara Anderson argued qualified immunity was not appropriate as MA did not commit a crime, or at least not a violent crime, MA was not a threat, and although MA attempted to evade arrest, that alone did not entitle the officer to use excessive force. (P's Response in Opp to Defs' MSJ, Doc. 48, p. 8-10)

Without a hearing, the District Court reversed course, granted summary judgment, ruled Officer Vazquez committed no constitutional violation and was entitled to qualified immunity. (Order, Doc. 52) Despite conflicting testimony, the District Court found after weighing the *Graham* factors, that Officer Vazquez's use of force was objectively reasonable in light of the facts confronting him. (Order, Doc. 52, 10) Officer Vazquez and the detectives present at the time of the incident were investigating a vehicle burglary, which is a felony. *Id.* The three suspects were observed running off in the dark—one of the suspects was wearing a backpack, which could have contained a weapon. *Id.* It is undisputed that the suspects attempted to evade by flight. *Id.* The Court found that although what happened to Atwater was undoubtedly tragic because he was a small juvenile at the time, the Court found nothing in the record establishing that Officer Vazquez knew Atwater was a small juvenile. *Id.* Further, the Court concluded that, even if Officer Vazquez violated a

federal right, the law was not clearly established in light of the circumstances that occurred at the time of the incident. *Id.* at 13-15.

The District Court subsequently entered judgment in Defendants' favor on all counts. (Judgment, Doc. 53)

Plaintiff filed a Motion to Alter or Amend the Judgment further illustrating genuine issues of material fact with regards to whether Officer Vazquez could see MA's small size and statute prior to releasing his K9. (P's Motion M. to Alter or Amend, Doc. 54)

Defendant filed a Response in Opposition to the Motion to Alter or Amend arguing the Motion should be denied because it did not demonstrate any new fact or law which would call into question the ruling of the Court's grant of summary judgment. (D's Response in Opp. to Motion to Alter or Amend, Doc. 55)

Without a hearing, the District Court denied Plaintiff's Motion to Alter or Amend the Judgment, ruled the legal and factual arguments in Plaintiff's motion were nothing more than reassertions of their prior arguments. (Order, Doc. 56, p. 2) The Court concluded Plaintiff did not raise a meritorious basis for reconsideration, and therefore the Motion should be denied. (Order, Doc. 55, p. 2)

Plaintiff appealed. (Notice of Appeal, Doc. 57) Plaintiff renewed her arguments that there were genuine disputes of material fact whether Officer Vazquez committed a constitutional violation or was entitled to qualified immunity. More specifically, to determine whether a constitutional violation occurred, a jury must determine critical disputed facts: whether or not Officer Vazquez could tell MA's size and stature prior

to the release of the K9. Plaintiff argued the Court should take MA's version as true and allow the jury to determine whether his story is true in light of all the evidence. The jury, not the trial court is supposed to test the evidence presented by both sides and make the credibility determinations. Based on the disputed testimony, summary judgment is inappropriate and must be vacated.

The Eleventh Circuit, in an unpublished opinion found no reversable error and affirmed Summary Judgment. *Tacara Anderson, on behalf of minor child, MA v. Officer Jonathan Vazquez*, Case No. 19-14386-H (11th Cir., May 6, 2020) The Court reasoned the evidence, viewed in the light most favorable to Plaintiff, showed that Officer Vasquez acted objectively reasonably under the circumstances when he released K9 Ares. The Court accepted M.A.'s testimony that no vehicles or objects stood between M.A. and Officer Vasquez, yet nothing adequately contradicts Officer Vasquez's testimony that -- given the darkness, that the suspects were running, and the speed with which the events unfolded -- he was unable to see the suspects' facial features or to determine the individual size of each of the suspects. The Court concluded that on the record, nothing evidenced that a reasonable officer in Officer Vasquez's position must have known that M.A. was a juvenile or that Officer Vasquez's use of the K-9 constituted a violation of the Fourth Amendment.

The Eleventh Circuit also found that nothing about the pre-existing law tied to the Fourth Amendment's prohibitions, especially with the use of K-9s to apprehend suspects, came close to compelling the definite conclusion for every reasonable police officer that Officer Vasquez's use of force was constitutionally unreasonable under

the circumstances presented to him in this case. Therefore, qualified immunity was appropriate.

Plaintiff filed Petition for Rehearing En Banc requesting the Court vacate the Panel opinion, reverse the granting of summary judgement, and remand for trial on the merits. Plaintiff renewed her arguments that material disputed facts existed and therefore Summary Judgment is not appropriate. The Panel completely disregarded the fact that Officer Vazquez was able to see MA's and the other boys' reaction to his challenge, and that they were all startled. (Doc. 41, 55:5-10) Because the Panel incorrectly disregarded this material fact, the Panel took Officer Vazquez's version as true and held no clearly established constitutional violation occurred. Op. at 12.

The Petition for Rehearing En Banc was denied on August 19, 2020.

Statement of Facts

On Monday, July 22, 2014, shortly after midnight undercover detectives with the St. Petersburg Police Department were conducting surveillance in an apartment complex. (Doc. 40-2; para. 3-4) The detectives began surveilling three individuals walking in and around the apartment complex. *Id.* The three individuals were later identified as MA, HK, and ME.

A recording of the St. Petersburg Police dispatch details the officers following the three boys for approximately 10 minutes without any specific reason. (Doc. 40-5) They are heard saying: "It's possible they're just walking home to the apartments."; "Yeah, we can let it go."; "This might be nothing, they're not looking around or anything." (Doc. 40-5, 3:18-19, 3-4:25-1, 4:10-12) However, the officers continue to

watch MA and the two other boys and they observe "the tall one," not MA, going into a Ford pick-up truck, and come to believe that he has taken something from the truck. (Doc 40-5, 12:18-19)

Officer Vazquez testified that he was listening to the CASE[1] channel where the detectives were describing the activity that was going on, although he can not say for sure exactly when he started listening in. ((Doc. 41; 52-53:18-1, 74:13-25) During the audio, his fellow officers can be heard saying, "the little ones are going to some cars," "and now the smaller guys are following back eastbound…" "Little guys went back to a white van and tugged on the passenger side door," and "yes, small, red shirt, flap backpack" (Doc. 40-5, 9:20-21, 10:9-10, 10:19-21, 14:10)

Officer Vazquez was approximately 40-50 feet away and could see the three boys. (Doc. 41, 54:2-22) Although Officer Vazquez testified he could not clearly see the boys, he also testified that when he yelled "Police. K-9. Get on the ground or I will release my dog!" he saw all three boys look in his direction, and then take off. (Doc 41, 54-55:18-10) He could see the reaction to his challenge, that they were all startled. (Doc. 41, 55:5-10) He further testified that he could visually see all three boys continuously running as he was running. (Doc. 41, 68:11-15) In his report written immediately after perceiving the juveniles he wrote, "…I could see three (3) figures

[1] The CASE channel is the encrypted channel used by detectives working individuals who were breaking into vehicles, or casing in the area, to communicate radio transmissions.

on the east side…All three looked in my direction and turned and ran away…" (Doc 41, 156)

According to MA, his entire body was available for Officer Vazquez to see. (Doc 40-3, 62:10-11) His body was not hiding behind a car or behind another object. (Doc. 40-3, 62:17-19) There was nothing between MA and the Officer blocking his view of MA. (Doc 40-3, 62:20-21)

Officer Vazquez subsequently released his K9 who attacked MA. (Doc. 41, 63:2-4) MA injuries from the dog bite were significant. (Doc 48-1, 48-2, 48-3) He spent a total of seventeen days in the hospital. He has scars on his leg, and he is emotionally traumatized from the incident.

Per Officer Vazquez's Use of Force Form (Doc. 41, Exhibit 3) MA weighed 75 pounds and was 4 feet 10 inches at the time of the incident. (Doc. 41, 65:9-24) MA was an extremely small child as evidenced by the photographs taken of him in the hospital and after his discharge following the attack. (Doc 48-1, 48-3) Per Officer Vazquez his K9 Aries weighed anywhere from 62 – 82 lbs. (Doc. 41, 97:1-10) The dog was attacking a child who weighed almost the same as it did.

REASONS FOR GRANTING THE WRIT

The Petition should be granted so that the Supreme Court can decide whether federal courts are required to afford qualified immunity to a law enforcement officer who released a K9 on a child who weighed 75 pounds and was 4 feet 10 inches tall causing serious bodily injury because he may have been involved in a property crime and fled.

I. GENUINE ISSUES OF MATERIAL FACT EXIST AND THEREFORE SUMMARY JUDGMENT IS NOT APPROPRIATE

The United States Supreme Court has for many years concluded that juveniles should be treated differently than adults. The unique treatment of juveniles in criminal law puts law enforcement on notice that they must be treated differently when encountered.

The Court's jurisprudence is replete with examples. Thus, the Court concluded that the status of juvenile offenders warrants different considerations by the states whenever such offenders face criminal punishment as if they are adults. *Roper v. Simmons*, 543 U.S. 551, 553 (2005). The general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). Juveniles' susceptibility to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brenan, J., dissenting), abrogated by *Roper*, 543 U.S. at 551. Likewise, with respect to apprehension, officers must take into consideration the difference between juvenile suspects and adults. Such consideration would make it obvious that a "little one," who weighs 75lbs does not pose a threat supporting the release of a K9.

As such, the Supreme Court should vacate the Panel opinion, reverse the granting of summary judgment, and remand for a trial on the merits. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Jones v. City of Columbus, Ga.*, 120 F.3d 248, 251 (11th Cir. 1997); *citing* Fed.R.Civ.P. 56(c). The movant, Appellee carries the burden of establishing the absence of a genuine issue of material fact. *Jones* at 251; citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Recent published decisions of *Patel v. City of Madison, Alabama, et. al.*, 959 F.3d 1330 (11th Cir. May 27, 2020) and *Stryker v. City of Homewood*, 978 F.3d 769, 776 (11th Cir. October 20, 2020) support Appellant's position.

In *Patel*, Defendant was not entitled to qualified immunity because disputed issues of fact remained that could not be resolved by the video recordings. The case involved an officer's use of a leg sweep that left plaintiff partially paralyzed. *Id.* at 1333. The video did not reconcile "diametrically opposed" versions of what happened. *Id.* The opinion begins with this statement, "It's long been said that a picture is worth a thousand words. Of course, people might reasonably differ on what those words are. That's the problem here." *Id.* at 1332. Similarly, the problem here is each parties' version of fact paints a different picture requiring a jury to divine the facts. Ultimately, the *Patel* court declared if a jury decided these questions of fact in

Plaintiff's favor, Plaintiff's right to be free from the use of excessive force in this case was clearly established.

In *Stryker*, the Eleventh Circuit overturned the district court's granting of summary judgment based on disputed facts. *Id.* at 775. First, the Court reasoned the district court reached the incorrect conclusion on the two *Graham* factors because it decided disputed facts in favor of the officer's version of events. *Id.* The district court stated that "Stryker opted to walk away from Officer Davis, prompting Officer Davis to use an arm bar takedown and then to use his taser in a further effort to bring Mr. Stryker into compliance." *Id.* Stryker denied that an arm-bar takedown (or any other lower level of force) was attempted and alleged that the first indication that he was under arrest was a taser shot to the back. *Id.* The Court concluded, under Stryker's version of events, all of the *Graham* factors indicate that the initial use of the taser by Officer Davis was objectively unreasonable. *Id.*

Second, the Court found the district court reached a contrary conclusion only by declining to consider some of Stryker's critical testimony. *Id.* at 776. The district court found that Stryker offered "conflicting testimony concerning the extent to which he was kicked after being removed from the truck" and reasoned that, as a result, it "need not consider" the evidence. *Id.* The Eleventh Circuit found the "conflicting testimony" noted by the district court merely reflected confusion during the deposition. *Id.* The district court's failure to consider Stryker's testimony on this basis was error. *Id.* A "plaintiff's testimony cannot be discounted on summary judgment

unless it is blatantly contradicted by the record, blatantly inconsistent, or incredible as a matter of law, meaning that it relates to facts that could not have possibly been observed or events that are contrary to the laws of nature." *Id.* citing *Sears v. Roberts*, 922 F.3d 1199, 1208 (11th Cir. 2019) (citation omitted). Because Stryker's testimony met none of these criteria, the district court erred by disregarding testimony that would have created a genuine issue of fact for trial. *Id.* The Court concluded that if it is true that Stryker continued to be struck and kicked after he ceased resistance and submitted to the officers' control, the force used against him was clearly unconstitutional. *Id.*

Here, the Panel completely disregarded the fact that Officer Vazquez was able to see MA's and the other boys' reaction to his challenge, and that they were all startled. (Doc. 41, 55:5-10) This level of visualization coupled with the radio dispatch commentary and the prevalence of juvenile auto burglaries in the area made it obvious Officer Vazquez that MA was a minor and special consideration must be made when using force. Because the Panel incorrectly disregarded these material facts, the Panel took Officer Vazquez's version as true and held no clearly established constitutional violation occurred. Op. at 12. However, is not the standard, as discussed in *Jones* or *Edwards*. Here, the Panel made a credibility determination and incorrectly took Appellee's version as true. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether she is ruling on a motion for summary

judgment or for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (U.S. 1986); citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

While the Panel concludes there is no record evidence that Officer Vazquez knew MA's size or age when he released the dog, that is the crux of the disputed fact and therefore a question for the jury. It is an undisputed fact that MA was a juvenile who weighed 75 pounds and was 4 feet 10 inches at the time of the incident. (Doc. 41, 65:9-24) Therefore, it would have been obvious to anyone who observed the incident that MA was small and/or and juvenile. Moreover, many of the officers involved acknowledged, as did Appellee, that juvenile auto thefts in south St. Pete were nearly epidemic. (Doc. 41, 121:9-12; Doc. 42, 13:18-23)

Officer Vazquez testified that he was listening to the CASE channel where the detectives were describing the activity that was going on, although he cannot say for sure exactly when he started listening in. (Doc. 41; 52-53:18-1, 74:13-25) During the audio, the Officers can be heard saying, "the little ones are going to some cars," "and now the smaller guys are following back eastbound…" "Little guys went back to a white van and tugged on the passenger side door," and "yes, small, red shirt, flap backpack" (Doc. 40-5, 9:20-21, 10:9-10, 10:19-21, 14:10) A jury could reasonably conclude that based on this information Officer Vazquez knew MA was a small child given the serious problem of juvenile auto burglaries in the South St. Petersburg area. (Doc. 41, 121:9-12)

Further, Officer Vazquez was approximately 40-50 feet away and could see the three boys. (Doc. 41, 54:2-22) Although Officer Vazquez testified he could not clearly

see the boys, he did testify that when he yelled "Police. K-9. Get on the ground or I will release my dog!" he saw all three boys look in his direction, and then take off. (Doc 41, 54-55:18-10) He could see the reaction to his challenge, that they were all startled. (Doc. 41, 55:5-10) This is record testimony from Officer Vazquez that he could see and interpret facial features. He had the ability to witness their countenance and could tell they were going to run. When they did run, he testified that he could visually see all three boys continuously running as he was running. (Doc. 41, 68:11-15) Here, Officer Vazquez is acknowledging he witnessed the flight. He naturally would be assessing their size individually and comparatively to determine the challenges he might face when encountered. A reasonable jury could determine he had information that the subjects were small, was able to see the different suspects, could determine their various sizes conformed with the radio communications, and would know that the smallest boy, MA, was vulnerable to serious injuries from his police dog.

According to Officer Vazquez, when the boys ran off, he could see their figures and their bodies running. (Doc. 41, 58:4-6) Officer Vazquez testified that he could not tell they were juveniles because he did not get to see facial features. (Doc. 41, 57:18-20) However, this directly contradicts his previous testimony that he saw the boys' reactions to his challenge, and they were all startled. His ability to observe demeanor and assess their reaction to his show of authority could establish in the mind of a reasonable jury the ability to determine the suspect was a vulnerable juvenile or at the very least a person of small stature who posed no risk of harm.

Regardless of the testimony, Officer Vazquez claims that it was not until after the K9 attacked MA that he first saw the size of MA. (Doc 41; Depo of Vazquez, 71:9-13) This testimonial dichotomy creates a jury question about what happened. Officer Vazquez's testimony conflicts deprive him of any viable summary judgment argument because material facts are in dispute. It is a reasonable inference that if Officer Vazquez is chasing MA, and he could see him, he knew that MA was small and more vulnerable to serious injury from his canine. Officer Vazquez had the ability to recall K9 Ares at any time. (Doc. 41, 69:9-22) Therefore, even if he did not see that MA was small in stature initially, he would have seen him during the pursuit and could have recalled the K9 prior to the bite. Releasing K9 Ares and keeping him released under these conditions made the use of the dog disproportional to any need for force. Thus, under a totality of the circumstances, the force was excessive.

Further, according to MA, his entire body was available for Officer Vazquez to see. (Doc 40-3, 62:10-11) His body was not hiding behind a car or behind another object. (Doc. 40-3, 62:17-19) There was nothing between MA and the Officer blocking his view of MA. (Doc 40-3, 62:20-21) Therefore, a reasonable jury could believe Vazquez could see his small frame.

According to Appellant's Expert, Charlie Mesloh, K9 handlers have a responsibility to identify a specific suspect to target prior to releasing their dogs and determine whether a physical apprehension is appropriate. (Doc. 42-2, 9) As an individual in a wheelchair would not be an appropriate target (under most conditions), an individual displaying small stature (and likely to be a young juvenile)

would equally be an inappropriate target for physical apprehension with a police dog. (Doc. 42-2, 9)

The Court placed great deference on the fact that MA was unable to identify Officer Vazquez as a police officer because it was too dark. (Doc 52, p. 11) However, just because MA was unable to identify the officer, does not mean Officer Vazquez was unable to identify the size and stature of MA. Officer Vazquez and the other officers had been surveilling MA for an extended time. The Officers were specifically watching the minors. To the contrary, MA had no idea he was being watched. In a split second, when the officers made the command, the boys were startled and began to run. They did not have the time to look and process the fact that it was members of the St. Petersburg Police Department. While it is true, MA did not know they were police officers, he did see the person with pitch black clothes that he assumed was the owner of the truck the others had been into. (Doc 40-3, 54:7-10, 54:16-20, 55:5-7) Further, the analysis is not about what MA thought with regards to who was chasing him, it is about what Officer Vazquez testified. Here, Officer Vazquez was able to see the individuals' startled reactions, therefore, a reasonable jury could easily conclude he was able to see the small size and stature of MA.

The Appellee argues the Court must accept as true Appellee's testimony that he did not know that MA was a juvenile or a small person. This interpretation of qualified immunity law would mean that only an officer's perception or belief matters. But that takes the Appellant's version of facts completely out of the picture. Appellee is asking this Court to ignore how summary judgment works and years of established

summary judgment precedent. If officer perception is the lynchpin inquiry, every case would be decided at Summary Judgment based on the officer's testimony alone, and no plaintiff would ever receive a jury trial. Even hard to believe evidence stands up in the test of summary judgment. *Edwards v. Shanley*, 2012 U.S. App. LEXIS 640 (11th Cir. 2012)(court reversed summary judgment in favor of the defendant officers in a dog bite case against Orlando Police Department where plaintiff claimed he was bitten by the police dog for 5 – 7 minutes) citing *Bashir v. Rockdale Cnty.*, 445 F.3d 1323, 1327 (11th Cir. 2006).

The trial court is not free to interpret the evidence and disbelieve Plaintiff's asserted facts. *Edwards v. Shanley, et. al.*, 666 F.3d 1289, 1293 (11th Cir. 2012) Instead, the Eleventh Circuit explicitly recognized that a jury is free to make its own fact determination, and the Court is mindful that a jury has the opportunity to test the evidence presented by both sides in our time-honored adversarial tradition. *Id.* at 1295. Here, the District Court is taking the officer's statement as the gospel facts surrounding the apprehension. In doing so the District Court upends core summary judgment principles, namely, that the Court must take the Plaintiff's best case in for assessment under Rule 56. This Court should take this case to once again memorialize the importance of giving the Plaintiff's best case the test of summary judgment and to affirm that qualified immunity does not infer credibility on the officer's version of facts.[2]

[2] The origins of the doctrine of qualified immunity have given some justices "strong doubts about our § 1983 qualified immunity doctrine." *Baxter v. Bracey*, 140 S. Ct. 1862, 1865, 207 L. Ed. 2d

In *Edwards* Plaintiff alleged that a K-9 repeatedly bit his leg for somewhere between five to seven minutes, and the Plaintiff did not resist. The Court noted, "at summary judgment we must construe the record in the light most favorable to the non-moving party, Edwards… Thus, we conduct our analysis assuming the length of the attack to be five to seven minutes. But in so doing, we are mindful that the trial jury will not be similarly constrained, and will be free to reject Edwards' account as incredible if it so determines." *Id.* So even potentially incredible facts must be taken in Appellant's favor. Therefore, the Court ruled that Summary Judgment was not appropriate.

Like *Edwards*, this Court should take the Appellant's version of the facts leading up to the K9 release as true and allow the jury to determine whether the story is "incredible" in light of all the evidence. The story is simple. Under Appellant's version of facts, Officer Vazquez knew or should have known that MA was a child, or at least a person of small stature, who would suffer serious injury if the K9 was released to attack him. The denial of summary judgment will allow a jury to test the evidence presented by both sides. Reasonable inferences at this stage support denial of summary judgment and pave the way for the jury to make credibility determinations. Qualified immunity was never intended as a complete bar to the courtroom for Plaintiff's suing law enforcement under 42 U.S.C. 1983. Here, as

1069 (2020). In this case, misapplication of facts creates similar concern as a legitimate plaintiff is denied jury trial access.

applied by the District Court, summary judgement would constitute a suit prevention mechanism and if levied would punitively shut the courtroom door against plaintiffs who are seriously injured by law enforcement misconduct.

No reasonable officer would have released their K-9 on a vulnerable juvenile.[3] Vulnerability of the citizen who is the object of police force is certainly a factor in the analysis of reasonableness. A reasonable officer would be on notice that juveniles are different. They can be more vulnerable to the adverse effects of the use of force than adults. As stated at the beginning of this brief, juveniles have routinely been set apart. Notice to the Appellee officer comes from the core premise of all Fourth Amendment jurisprudence regarding force, that it must be proportional to the need. Identical facts are not required for notice in the context of proportionality. As Justice Sotomayor pointed out in her dissent in *Kisela v. Hughes*, 138 S. Ct. 1148, 1161, 200 L. Ed. 2d 449 (2018), "[O]ur cases have never required a factually identical case to satisfy the 'clearly established' standard. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 (2002). It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." *District of Columbia v. Wesby*, 583 U.S. ——, ——

[3] In the District Court's Order Denying Defendant's Motion to Dismiss, the Court recognizes that although the K-9's pursuit of Plaintiff may have been warranted under existing law, the complaint alleges facts suggesting that Officer Vazquez knew Plaintiff was a minor and permitted the K-9 to continue to bite Plaintiff beyond what was reasonably necessary to detain him under the totality of the circumstances. Those facts as alleged are sufficient at this stage to establish a plausible constitutional violation. (Doc. 12, 3-4) Because nothing changed when Appellant's version of facts is considered between the motion to dismiss and summary judgment, a similar ruling was warranted.

, 138 S.Ct. 577, 589, 199 L.Ed.2d 453 (2018) (internal quotation marks omitted). Because, taking the facts in the light most favorable to Hughes, it is 'beyond debate' that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity." Releasing a similar in weight K9 on a small, unarmed twelve-year old juvenile because he ran from an alleged property crime is objectively unreasonable. Therefore, Summary Judgment was not proper and should be reversed by this Court so the matter can be tried before a jury.

CONCLUSION

For the foregoing reasons, TACARA ANDERSON, on behalf of minor child, MA, respectfully requests that her Petition for Writ of Certiorari be granted.

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