No. 20-83

In The
Supreme Court of the United States

JACOB JONES AND BRYAN WRIGHT,

Petitioners,

vs.

WAYNE DUKE KALBAUGH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Jacob Jones and Bryan Wright respectfully submit this reply to respondent's brief in opposition to petitioners' petition for a writ of certiorari.

ARGUMENT

I. RESPONDENT'S BRIEF IGNORES SUPREME COURT AND TENTH CIRCUIT PRECEDENT BY FOCUSING ON HIS INTENTIONS RATHER THAN THE INFORMATION KNOWN TO THE OFFICERS

Because this case concerns the defense of qualified immunity, the Court considers only the facts that were knowable to the defendant officers. *White v. Pauly*, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017), citing *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2474, 192 L. Ed. 2d 416 (2015). As the Court recognized in *Nieves v. Bartlett*, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019), police officers conduct approximately 29,000 arrests every day; this is a dangerous task which requires making quick decisions in "circumstances that are tense, uncertain and rapidly evolving." *Nieves* at 1725, quoting *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1769, 167 L. Ed. 2d 443 (1989). Recognizing that state of mind is easy to allege and hard to disprove, the Court has consistently declined to probe subjective intent in Fourth Amendment cases. *Nieves* at 1724-1725. Under *Nieves, Graham*, and every other

Fourth Amendment case decided by this Court since 1989, Kalbaugh's beliefs that "the OCPD was angry with him for leading them on a high-speed vehicular chase" and that "Officer Bryan Wright was angry because he had just tripped," Resp. Brf. p. 10, are irrelevant to the officers' qualified immunity defense. Kalbaugh's repeated assertions that Officers Jones and Wright were acting with evil intent, Resp. Brf. pp. 11-12, 33 also provide no support for the Tenth Circuit's decision to reverse the district court's grant of qualified immunity.

Kalbaugh's arguments regarding why the Court should deny the petition for certiorari focus almost entirely on his intentions. Kalbaugh ran, albeit after disabling his car in an unsuccessful attempt to crash through a chain-link fence surrounding a National Guard facility, only because he "heard someone yelling shoot him." Resp. Brf., p. 9. Kalbaugh wanted to surrender, and was under the impression he had surrendered, to someone who was not a police officer. Resp. Brf., p. 10.[1] Kalbaugh did pull two guns from his waistband after exiting his disabled vehicle, but did so "in a non-threatening way" and "drop[ped] the guns to the ground as soon as they cleared his waistband." Resp. Brf., p. 14. Kalbaugh did have a knife in his back pocket at the time Officers Jones and Wright were trying to handcuff him, but "he didn't even remember he had [it]

[1] Sgt. Deon did not know Kalbaugh intended to surrender, but instead considered it necessary to stop Kalbaugh because he was concerned there would be shoot-out or that Kalbaugh would enter the National Guard building with a weapon. App. 22.

on his person." Resp. Brf., p. 12. The knife did not pose any real threat to the officers, according to Kalbaugh, because "it would take both hands" to access and Officer Wright probably could not see it anyway. Resp. Brf., pp. 12, 28.

Kalbaugh admits he "previously" posed a threat to officers and members of the public, but argues the circumstances changed when the high-speed chase ended. Resp. Brf., pp. 20-21. However, knowing that Kalbaugh no longer had access to some firearms or the ability to continue to use his vehicle as a weapon would not put a reasonable officer on notice that the danger had ended. Maybe Kalbaugh was actually trying to disarm himself, or maybe he "surrendered" his most visible weapons as a tactical ploy. Officers Jones and Wright saw Kalbaugh put his hands up and feign surrender just long enough to back over the downed fence, then turn and continue to flee. A reasonable officer could conclude from Kalbaugh's actions that Kalbaugh, like the suspect in *Brousseau v. Haugen*, 543 U.S. 194, 200, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004), "would do almost anything to avoid capture." The point is that Officers Jones and Wright neither knew nor could know Kalbaugh's intentions. Perhaps it should be expected Kalbaugh would believe his purportedly benign intentions are enough to defeat qualified immunity, but it was improper for the Tenth Circuit to ignore *White* and adopt Kalbaugh's analysis.

A Fourth Amendment standard requiring subjective inquiry into the motivations of police officers might pose overwhelming litigation risks. *Nieves*

at 1725. However, a Fourth Amendment standard dependent on the motivations or intentions of a suspect, like that applied by the Tenth Circuit in the instant case, would also pose overwhelming *safety* risks to law enforcement officers. Certiorari is appropriate under Sup. Ct. Rule 10(c) because, by adopting a Fourth Amendment standard dependent on the subjective intentions of a suspect rather than the knowledge and reasonable perceptions of an officer, the Tenth Circuit decided an important federal question in a way that conflicts with 30 years of relevant decisions of this Court. Given that this is an issue potentially faced by police officers, collectively, thousands of times every day, exercise of this Court's supervisory power is also called for under Sup. Ct. Rule 10(a).

II. THE PRECEDENT CITED BY RESPONDENT HIGHLIGHTS THE ABSENCE OF ANY SUPREME COURT OR TENTH CIRCUIT CASE WHERE POLICE OFFICERS ACTING UNDER SIMILAR CIRCUMSTANCES WERE HELD TO HAVE VIOLATED THE FOURTH AMENDMENT

In arguing that the force used by Officers Jones and Wright was barred by clearly established law, Kalbaugh asks this Court to consider *Perea v. Baca*, 817 F. 3d 1198, 1204 (10th Cir. 2016), *Casey v. City of Federal Heights*, 509 F. 3d 1278 (10th Cir. 2007), *Morris v. Noe*, 672 F. 3d 1185 (10th Cir. 2012), *Olsen v. Layton Hills Mall*, 312 F. 3d 1304 (10th Cir. 2002), and *Glenn v. Washington County*, 673 F. 3d 864 (9th Cir. 2011).

None of these cases involve circumstances remotely similar to those facing Officers Jones and Wright in the instant case.

Perea, as is discussed in the petition for certiorari, involved a welfare check of an unarmed mentally ill individual who was pushed off of his bicycle and tased ten times in two minutes. The officers were not looking for Perea because they suspected he had committed a crime, and did not believe he posed a danger to anyone but himself before they attempted to effect an arrest. *Id.* The only crime they observed Perea commit was pedaling through a stop sign in violation of local traffic ordinances, after he saw the officers' patrol car. *Id.* at 1202-1203. Based on these facts, the Tenth Circuit held it is not reasonable for officers to repeatedly use a taser against a subdued arrestee[2] whom they know to be mentally ill, whose crime is minor, and who poses no threat to the officers or others. *Id.* at 1204.

In *Casey*, the plaintiff was contesting a traffic ticket in municipal court. After losing, he walked from

[2] In *Perea*, in response to the defendant officers' argument that the district court erred in finding Perea was effectively subdued, the Tenth Circuit held it did not have jurisdiction to reevaluate the district court's conclusion the record was sufficient to prove that Perea was subdued. *Id.* at 1204, n. 3. In the instant case, the Tenth Circuit ignored this limitation, and did reevaluate the district court's conclusion on this issue. See App. 24, n. 31 ("[W]hile it is difficult (if not impossible) to make out precise details in the twenty or so seconds between the time Defendants Wright and Jones both reached Plaintiff and the time they clearly had him sitting up and under control, see Video, at 4:58 to 5:22, the fact that Plaintiff was *not* subdued during that time is evident.").

the courthouse to the parking lot to retrieve money to pay the fine, with the court file still in his hand. *Casey* at 1279. If leaving the courthouse with a file was a crime, it was a misdemeanor. *Id.* at 1280, n. 2. As Casey was walking back to the courthouse to return the file, the defendant officers tackled, tased and beat him. *Id.* Unlike the instant case, the duration of the use of force was in dispute; it could have been as long as three minutes. *Id.* Under these circumstances, the Tenth Circuit held the defendant officers were not entitled to qualified immunity because "the crime was not severe, Mr. Casey was not threatening, and he was not fleeing from the scene." *Id.* at 1285. *McCoy v. Meyers*, 887 F. 3d 1034, 1048 (10th Cir. 2018), which is the precedent the district court applied and the Tenth Circuit should have applied in the instant case, distinguished *Casey* because the plaintiff was "suspected of innocuously committing a misdemeanor" and "was neither violent nor attempting to flee." *McCoy* at 1049. Kalbaugh selectively quotes part of a sentence from *McCoy* for the proposition that Officers Jones and Wright "should have been able to recognize and react to the changed circumstances."[3] However, Kalbaugh fails to discuss the facts of *McCoy* or the reasons the Tenth Circuit affirmed qualified immunity for the officers in *McCoy* for

[3] The complete sentence supports the opposite conclusion. See *McCoy* at 1048 ("Whether an individual has been subdued from the perspective of a reasonable officer depends on the officer having enough time to recognize that the individual no longer poses a threat and react to the changed circumstances.").

the force used prior to the time the suspect was handcuffed.[4]

In *Morris*, the defendant police officer was one of three officers who responded to the scene of a domestic dispute. *Morris* at 1189. Morris was not involved in the dispute, but his son was. When Morris arrived, the police were present and his son had left. However, Morris tried to talk to the remaining combatants. When one of the combatants moved towards Morris, Morris put his hands up and started backing towards the police officers. *Id.* at 1190. The officers grabbed Morris from behind, threw him to the ground, and handcuffed him. *Id.* In its analysis of the unlawful arrest claim, the Tenth Circuit held that the defendant officer threw Morris to the ground despite the fact Morris presented no threat to officer safety and had not engaged in any suspicious activity. *Id.* at 1193. In affirming the officer was not entitled to qualified immunity on the excessive force claim, the Tenth Circuit held Morris was, at most, a misdemeanant who posed no threat to others and who did not resist or flee. *Id.* at 1198.

In *Olsen*, as Kalbaugh notes, the suspected crime was attempted fraudulent use of a credit card. *Olsen* at 1309-10. When approached by the defendant officer, Olsen made no attempt to flee but nevertheless was either "shoved" or "maneuvered" into a store window while being handcuffed. *Id.* at 1310. As in the instant case, Olsen maintained that he "complied physically at

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[4] The facts and analysis of *McCoy* are discussed at length in the petition for certiorari, pp. 30-32.

all times" while the officer contended he was resisting arrest; the Tenth Circuit concluded this factual dispute precluded summary judgment. *Id.* at 1315. Unlike the instant case, Olsen had not endangered officers and innocent bystanders during a high-speed pursuit immediately prior to arrest, and the defendant officer had no reason to believe Olsen was armed. Also, unlike the instant case, the district court did not have the benefit of a video capturing the encounter between the defendant officer and Olsen. Thus, the Tenth Circuit's concern that the district court granted summary judgment based on facts which "considered collectively present an incomplete picture of the relevant circumstances," *Olsen* at 1214, is not a concern in the instant case.

In the Ninth Circuit case of *Glenn v. Washington County*, 673 F. 3d 864 (9th Cir. 2011),[5] the decedent was an 18-year-old man with no history of violence or criminal activity who was shot in the driveway of his parents' home after threatening suicide. *Id.* at 867-868. The officers initially employed a beanbag gun then, when the subject tried to retreat towards the house, fired eleven shots from their service weapons. *Id.* at 869. Prior to being shot with the beanbag gun, the subject had not moved from the position he was in when the officers arrived and showed no signs of attempting to do so. *Id.* at 878. In this context, although

[5] *Glenn v. Washington County*, 661 F. 3d 460 (9th Cir. 2011), cited by Kalbaugh was withdrawn from publication and superceded by *Glenn v. Washington County*, 673 F. 3d 864 (9th Cir. 2011).

recognizing that officers are not required to use the least intrusive means possible when responding to an exigent situation, the Ninth Circuit held police should consider if there were clear, reasonable, and less intrusive alternatives to the force employed and suggested that a taser might have been an appropriate lesser force option. *Id.* at 876-878.[6] *Glenn* also recognized that less force may be appropriate when dealing with an emotionally disturbed individual than when dealing with a dangerous criminal. *Id.* at 877. In the former, increased force may exacerbate the situation; in the latter, increased force is more likely to "bring a dangerous situation to a swift end." *Id.* at 877.

Officers Jones and Wright did not use a taser, beanbag gun or any weapon to take Kalbaugh into custody. Apparently the only "less intrusive" alternative Kalbaugh believes would have been appropriate was for the officers to simply hope that, Kalbaugh's immediate past actions notwithstanding, when Kalbaugh reached behind his back while on the ground he was attempting to cooperate with handcuffing rather than to access his knife and attempt to resume his flight. That is a dangerous gamble which Officers Jones and Wright were not constitutionally required to take. As *Saucier v. Katz*, 533 U.S. 194, 204-205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) recognizes, if an officer

[6] The Tenth Circuit has never applied this approach, but instead has consistently held that "The Fourth Amendment does not require police to use the least intrusive means in the course of a detention, only reasonable ones." *Lindsey v. Hyler*, 918 F. 3d 1109, 1113-14 (10th Cir. 2019), quoting *Fisher v. City of Las Cruces*, 584 F. 3d 888, 894 (10th Cir. 2009).

reasonably, but mistakenly, believed that a suspect was likely to fight back, the officer would be justified in using more force than in fact was needed. Police officers who make on-the-spot choices in dangerous situations are entitled to a fairly wide zone of protection in close cases, *Saucier* at 215, n. 6, and Officers Jones and Wright were entitled to use the force they believed was necessary to bring a dangerous situation to a swift and safe end.

In a subsequent Ninth Circuit case, *Ventura v. Rutledge*, 978 F. 3d 1088, 1090 (9th Cir. 2020), the court distinguished *Glenn* and granted qualified immunity to an officer who used deadly force to stop an armed suspect who had recently committed an assault. The Court held *Glenn* would not have put the officer on notice that her actions violated clearly established law, because the decedent in *Glenn* "had not previously attempted to hurt anyone else and had not moved toward anyone else prior to the time he was shot with a beanbag gun." *Id.* at 1092. *Glenn* was not helpful precedent because the "degrees of apparent danger" in the two cases were not comparable. *Ventura* at 1092. That is an equally apt description of the differences between the instant case and the cases cited by Kalbaugh.

A reasonable officer familiar with *Perea*, *Casey*, *Morris* and *Olsen* would know not to repeatedly tase an unarmed mentally ill individual during a welfare check, would know not to tackle, tase and beat an individual who inadvertently left the courthouse with a file after appearing in traffic court, and would know not to throw an individual who presented no threat to officer

safety to the ground or against a plate glass window. None of those cases, however, would put a reasonable officer on notice that the force used by Officers Jones and Wright in the instant case, against an armed felony suspect who appeared determined to avoid being apprehended and who had ignored multiple prior opportunities to surrender, was prohibited by the Fourth Amendment.

In the instant case, as in *White*, the Tenth Circuit "misunderstood the clearly established analysis because it failed to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *White* at 562. See also *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503, 202 L. Ed. 2d 455 (2019). Instead of looking for clearly established law that was "particularized" to the facts facing Officers Jones and Wright, the Tenth Circuit defaulted to its pre-*White* position that "a scavenger hunt for prior cases with precisely the same facts" is unnecessary. App. 8, quoting *Perea* at 1204. In addition to *Perea*, which denied qualified immunity to officers who repeatedly tased a mentally ill individual not suspected of any crime, the Tenth Circuit relied on two deadly force cases in reversing the district court's grant of qualified immunity to Officers Jones and Wright.[7] In defending the Tenth Circuit's decision, Kalbaugh asks the Court to consider *Perea* and four other cases involving the use of force against individuals

[7] *Fancher v. Barrientos*, 723 F. 3d 1191 (10th Cir. 2013) and *Estate of Smart v. City of Wichita*, 951 F. 3d 1161 (10th Cir. 2020).

suspected of, at most, nonviolent misdemeanor crimes. It is hard to imagine a better illustration of the absence of "existing precedent [which] placed the statutory or constitutional question beyond debate." See *White* at 551; *Kisela* at 1152.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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