NO. 21-789

IN THE

Supreme Court of the United States

CASEY BENTON,

Petitioner,

v.

MARY JO BRADLEY, AS ADMINISTRATRIX OF THE ESTATE OF TROY ROBINSON; R.B., R.B., T.B., J.B., AND G.B., THROUGH THEIR MOTHER AND NEXT FRIEND RAKISHA BANDY; *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case involves a straightforward denial of summary judgment by both lower courts based on genuine disputes of material fact. Defendant Casey Benton, a DeKalb County, Georgia, police officer, used his Taser X26 electronic control device to stop Plaintiffs' decedent, Troy Robinson, after Robinson (for reasons unknown) fled from the scene of a traffic stop. A foot-chase took Benton and Robinson to a spot behind a Family Dollar store, where Robinson tried to escape by climbing an eight-foot wall into an adjacent apartment complex. Benton testified that he deployed the Taser before Robinson began to climb, and that it inexplicably had no effect on him. But an abundance of other evidence, including physical evidence and eyewitness testimony, would permit the jury to find that Benton used the Taser while Robinson was at the top of the wall, causing him to fall, break his neck, and die.

A unanimous Eleventh Circuit panel denied Benton's motion for summary judgment as to qualified immunity. The circuit court held that it is clearly established under *Tennessee v. Garner*, 471 U.S. 1 (1985), that an officer may not use deadly force to stop an unarmed person, who is not suspected of any violent crime, from fleeing on foot. That holding is not at issue here. In his Petition, Benton does not dispute "that *Garner* clearly establishes the general proposition that 'an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot.'" Pet., pp. 17-18.

Eleventh Circuit precedent defines deadly force as "force that an officer 'knows to create a substantial risk of causing death or serious bodily

harm.'" Slip Op. at 14, citing *Pruitt v. City of Montgomery, Ala.*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985). Benton does not ask this Court to review that definition, which derives from the Model Penal Code and has been widely adopted by lower courts.

Benton also does not and cannot dispute that he knew, as a factual matter, that his use of the Taser on Robinson satisfied this definition of deadly force. Like other police officers around the country, Benton was trained that a Taser causes temporary paralysis and should not be used in circumstances where a fall could kill or seriously injure the subject. DeKalb County's official use-of-force policy, as well, informed Benton that the Taser "will cause most everyone to fall" and therefore should not be used when the subject is at an elevated height. Thus, Benton knew that the force he used was deadly, both in the sense that it was likely to kill someone and in the sense that the courts would deem it deadly for purposes of qualified immunity.

How, then, does Benton claim that the lower courts erred? His argument is that, even though he knew deadly force would be excessive, and he knew his use of the Taser in the circumstances would satisfy the definition of deadly force, he should enjoy qualified immunity because no factually specific prior decision expressly told him that it would be excessive to use the Taser in the circumstances.

Generously construed, Benton's Petition claims nothing more than that the Eleventh Circuit incorrectly applied an undisputed general rule of law to the facts of the case. Such contentions rarely warrant certiorari, and they do not here. Benton cannot point to any division of authority in the lower

federal courts, and his admissions below preclude relief. The Petition should be denied.

STATEMENT OF THE CASE

Because this case arises from a ruling on Defendants' Motion for Summary Judgment, this Court must resolve all genuine factual disputes, and draw all reasonable factual inferences, in favor of Plaintiffs as the non-moving parties. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). Viewed under this legal standard, the material facts are as follows.

I. Statement of Facts

A. The Traffic Stop

In the early evening of August 6, 2015, DeKalb County Police Officers Casey Benton and C.M. Franklin were patrolling the Highlands at East Atlanta apartment complex in DeKalb County, Georgia, in separate vehicles. Doc. 48-2, ¶¶ 4, 5, 6, 8, 20. They were part of a DeKalb County Police Department gang task force assigned to The Highlands of East Atlanta Apartments (also known as the East Hampton Apartments) at 2051 Flat Shoals Road, Decatur, Georgia. Doc. 50, pp. 5-6; Doc. 51, pp. 4-6; Doc. 52, pp. 6-7. Benton testified that his assignment was to "patrol[] the area . . . make traffic stops, . . . stop suspicious persons." Doc. 50, p. 21:11-12. [1] There is no evidence that Robinson, or anyone else connected with this case, was a gang member.

[1] Where a citation is to a deposition transcript, the page numbers used are the internal page numbers of the deposition transcript.

Officer Benton stated over the radio that he saw a vehicle circulating in the Highlands at East Atlanta apartment complex and that he might perform a traffic stop of that vehicle. Doc. 51, p. 28:1-23. The vehicle was owned and driven by Wilford Sims, and Troy Robinson was riding as a passenger. Doc. 48-2, ¶¶ 17-18. Sims had just purchased the vehicle a couple of days earlier, and it still had the temporary tag issued by the dealership. *Id.*, ¶ 18; *see also* Doc. 57, pp. 19-20. It is undisputed that the temporary tag had an expiration date printed on it. Doc. 48-2, ¶¶ 10-11; *see also* Doc. 57, pp. 25 and 27.

Officer Benton testified in his deposition that he decided to pull the vehicle over because it entered and left the Highlands complex within a short period of time (he did not explain why he thought that was suspicious) and because he did not see the expiration date on its tag when the vehicle exited the complex. Doc. 50, pp. 23:11-16, 24:25-25:1, 26:11-14. Officer Franklin's testimony, however, was that Officer Benton initially told him only that the vehicle was circulating in the Highlands complex and did not mention any problem with the tag.

Benton testified that he followed the vehicle for approximately a quarter-mile before turning on his blue lights. Doc. 50, p. 25:4-8; *see also* Doc. 51, p. 29:9-13 (testimony of Officer Franklin, that Benton followed the vehicle for three to four minutes before making the stop). DeKalb County provides its officers the ability to check the validity of a tag in a matter of seconds, either by calling the dispatcher or by using an onboard computer. Doc. 53, pp. 77:6-79:3. Benton testified that he used this system to check the tag, and that the tag's date of issue is included in the information that the system returns, but that he did not check to see if the tag was

expired because he had not stopped the vehicle for an expired tag. Doc. 50, p. 25:17-27:1 ("I didn't stop him because it was expired."). When Benton stopped the vehicle, he did not look to see whether there was an expiration date on the tag. Doc. 50, p. 33:21-24. Benton now admits that the tag had an expiration date, and that Sims had just purchased the vehicle a few days earlier. Doc. 50, pp. 33:25-34:3; Doc. 48-2, ¶ 18; *see also* Doc. 57, pp. 19:3-20:10 (testimony of Sims describing purchase of truck and issuance of temporary tag by dealer). Sims was not charged with any tag violation, or any other offense, as a result of the stop. Doc. 57, pp. 36:17-37:6.

Officer Benton approached Sims's vehicle and told him something about a tag, to which Mr. Sims responded that there was nothing wrong with his tag. Doc. 57, p. 26:6-10. Benton asked for Sims's license, which Sims produced. *Id.*, 26:11-13. Benton then asked Sims if there were any weapons in the vehicle. *Id.*, 26:13-15. Sims immediately disclosed that there was a firearm in the vehicle. *Id.*, 26:15-16; 27:4-6. The firearm was in plain view, because Sims had taken it out of his center console and placed it in the cup holder so that it would not be concealed. *Id.*; 27:14-18; 54:7-56:9. Benton told Sims to get out of the truck; retrieved the weapon from the truck; and told Sims to get back in. *Id.*, pp. 57:13-58:8; Doc. 48-2, ¶¶ 25-26. Benton gave the weapon to Franklin. Doc. 48-2, ¶ 25. Officer Benton did not believe there was any threat to his safety at this point in the encounter. Doc. 50, p. 30:15-19.

Officer Benton later testified that he smelled an odor of marijuana in Sims's vehicle. A reasonable

jury could find that this was a lie.[2] Benton never asked Sims if there was marijuana in the vehicle; he never searched for drugs in the vehicle or on any of its occupants; he never asked any of his fellow officers to search for drugs; and, in fact, he never even told anyone at the scene that he smelled drugs. Doc. 50, pp. 31:19-32:12. Officer Franklin stood next to Officer Benton beside Mr. Sims's truck and did not smell any odor of marijuana. Franklin Dep., p. 43:17-20. Mr. Sims testified that there was no odor of marijuana and that neither he nor Mr. Robinson had been smoking marijuana that day. Doc. 57, pp.25:15-17; 28:14-15; 48:7-14. Mr. Sims later consented to a search of his vehicle, and no marijuana was found. Doc. 57, p. 33:7-34:4, and Exh. 6 thereto (written consent to search, signed by Mr. Sims).

B. The Foot Chase

At this point, Officer Benton asked another officer to run Mr. Robinson's name. Doc. 57, pp. 19-22. Mr. Robinson got out of the vehicle and began to run from the scene, across Fayetteville Road and towards a nearby Family Dollar store. Doc. 48-2, ¶ 30. Benton chased after Robinson on foot. *Id.*, ¶ 31. Officer Lee O. Niemann, who had arrived at the scene a short time earlier, attempted to follow in his

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[2] Knowing a jury could find that he lied about smelling marijuana, Benton contended below that the issue was not material, Doc. 48-1, p. 6, n. 7. Obviously, a lie told under oath is material to Benton's credibility; and since Robinson is dead and cannot testify, Benton's credibility or lack thereof is an important matter for the jury. Further, Benton testified that the smell of marijuana was what turned the traffic stop from a voluntary encounter into a custodial stop of Robinson as a passenger, and that if he had not smelled drugs, he would have had no reason to apprehend Robinson for fleeing the scene. Doc. 50, pp. 106:23-108:4; 111:5-14.

vehicle. *Id.* Franklin told Benton over the radio that Robinson was running with one arm swinging free and one hand on the waistband of his pants, but Franklin did not see whether Robinson was holding anything. Doc. 56, p. 45:9-46:18.

The foot-chase led Benton to a small wooded area behind the Family Dollar store. Doc. 48-2, ¶¶ 33-34; Doc. 50, pp. 34:24-35:14. Benton was only a few seconds behind Robinson, and had eyes on him during the entire chase. Doc. 50, pp. 38:1-3; 39:13-18; 40:3-7. The wooded area sloped down to a standard-height chain-link fence, behind which was a concrete wall somewhat taller than the fence. *Id.*, pp. 40:22-25; 41:10-16; 48:24-49:17.

C. The Taser Incident

The evidence sharply conflicts as to what happened at this point. Defendants contend that Officer Benton fired his Taser at Mr. Robinson while Mr. Robinson was still standing on the ground, at the bottom of the embankment on the near side of the chain-link fence. Doc. 48-2, ¶ 36. Benton testified that, when he fired the Taser, he was pointing it at a downward angle. Doc. 50, p. 50:21-23. He testified that the Taser had no effect on Mr. Robinson, and that **after** the Taser was deployed, Robinson climbed the chain-link fence and the wall and then fell over the wall of his own accord. Doc. 50, p. 36:1-10.

There is abundant evidence in the record, however, that would authorize a jury to discredit Benton's testimony and to find that Benton, in fact, fired his Taser upward when Robinson was on top of the wall, not downward when Robinson was standing at the base of the chain-link fence.

The X26 Taser that Officer Benton used in the incident had green blast doors. Doc. 50, p. 45:17-18. Benton did not see where his blast doors went when he fired the Taser. *Id.*, p. 51:4-5. According to DeKalb County's Taser representative, blast doors typically fly five to seven feet. Doc. 53, p. 28:8-18. When a Taser is fired, the blast doors normally fly off in the same direction that the probes go. Doc. 58, p. 45:10-19. DeKalb County's Taser representative testified that, if a Taser was deployed at a subject who was standing on the ground on the near side of an eight-foot wall, the blast doors would be expected to land on the **near** side of the wall. Doc. 53, p. 29:10-15.

A few days after the Troy Robinson incident, a DeKalb County police officer found a green blast door from a Taser cartridge near Building N of the Highlands at East Atlanta, on the **far** side of the wall from the Family Dollar. Doc. 50, pp. 95:4-98:12 and Exh. 16 thereto; Doc. 48-13, p. 20 (GBI 00109). The officer filed a supplemental police report and submitted the green Taser cartridge blast door as additional evidence relevant to the Robinson incident. *Id.* Officer Benton had no explanation for why the Taser cartridge blast door was found on the far side of the wall. Doc. 50, p. 98:9-12.

Taken in the light most favorable to Plaintiffs as the non-moving parties, the record also shows that Officer Benton's Taser was in proper working order at the time of the incident. DeKalb County policy required Officer Benton to spark-test his Taser at the beginning of each shift and to immediately report any improperly functioning device to his supervisor. Doc. 50, pp. 86:24-87:10; Doc. 53, pp. 104:24-105:6. Benton tested his Taser "[m]aybe once a week." Doc. 50, p. 87:15-19. The day

before the Troy Robinson incident, Benton used his Taser to apprehend a suspect, and it worked properly and caused the suspect to fall. Doc. 50, pp. 43:25-44:16. In the course of the GBI use-of-force investigation following the Troy Robinson incident, the GBI tested Officer Benton's Taser and found that "the device appeared to be in proper working order." Doc. 48-13 (Wallace Decl.), p. 22 (GBI 00112).

In addition, there is evidence from which the jury could find that the Taser probes made contact with Mr. Robinson in a manner that would deliver the full effect of the Taser. The DeKalb County Medical Examiner's report describes the following physical evidence relating to Officer Benton's use of the Taser on Troy Robinson: "II. Use of 'Taser' by Law Enforcement: A. Skin defect on upper back likely correlates with embedded dart. B. Non-specific small abrasions on upper right thigh and small defects, right lower and posterior area of tee shirt." Doc. 48-13 (Wallace Decl.), p. 30 (GBI 00142).

When one probe of the Taser enters the skin, but the other probe gets caught in the subject's clothing, the circuit may still be completed if the distance from probe to skin is not more than one inch. Doc. 53, pp. 31:24-32:6; 46:17-17:1. Indeed, the Taser probes can complete a circuit and deliver their full effect even if they are attached to a person's clothing with alligator clips rather than being embedded in the skin. Doc. 55, p. 114:9-23; Doc. 73, pp. 129:5-132:15.

If the Taser probes make an incomplete connection, there will be a loud noise of electrical arcing. Doc. 73, pp. 47:12-49:11; 137:16-138:1. This loud arcing sound would occur if one probe entered the body but the other probe was too far from the

skin for the circuit to be completed. Doc. 53, p. 32:11-14. The loud arcing sound of an incomplete connection is in addition to, and "very distinct" from, the "pop" that occurs when the Taser is deployed. *Id.*, p. 33:11-24. The arcing sound is audible in an outside environment. *Id.*, pp. 35:5-36:2. If the Taser makes a good connection, it is quiet and does not make an electrical arcing sound. *Id.*, pp. 107:22-108:2. DeKalb County officers are trained to recognize the arcing sound of an incomplete connection. *Id.*, p. 34:18-25. It is undisputed that Officer Benton's Taser **did not** make the arcing sound of an incomplete connection during the Troy Robinson incident. Doc. 50, pp. 50:2-51:7 (Benton) ("Q: Did you hear or see anything else? A: No."); Doc. 55, p. 70:11-17 (Niemann, to the same effect).

The testimony of eyewitnesses in the apartment complex also suggests that Officer Benton used the Taser while Mr. Robinson was on the wall. Eyewitness Da. Shaw testified that he saw Mr. Robinson on top of the wall saying "Help me," and then saw Mr. Robinson "stiffen up" or go into "shock" before falling off the wall. Doc. 61, pp. 23:1-24:20. This is consistent with the testimony of DeKalb County's Taser training officer, who testified that the electrical impulse of the Taser probes affects both the sensory neurons, causing intense pain, and the motor neurons, causing neuromuscular incapacitation ("NMI"), or "full-body lockup." Doc. 73, pp. 28:22-30:6. Finally, eyewitness Neffertiti Geter testified that she saw Mr. Robinson on top of the wall, heard the words "Help me," and then heard a "pop" that sounded like a shot while Mr. Robinson was still on the wall. Doc. 60, pp. 21:15-25:4; 32:4-15; 68:16-69:8. Officer Benton disputed that testimony, claiming that the "pop" occurred before Mr. Robinson

scaled the fence and wall. Doc. 50, p. 50:2-20. This is a plain dispute of fact.

II. Statement of Proceedings Below

The Complaint in this action was filed on April 9, 2018 (Doc. 1) and is a renewal, pursuant to a state savings statute, of the causes of action asserted in *Bradley, et al. v. Benton, et al.*, No. 1:16-CV-03757-WSD (N.D. Ga.). The Plaintiffs are Robinson's mother (as executor of his estate) and his nine children, through their mothers as next friends. (Petitioner's Rule 14(B) statement omits five of the children and fails to mention the prior action.) The original Defendants included three patrol officers and DeKalb County, a political subdivision of the State of Georgia.

All Defendants except Defendant Benton responded to the Complaint by filing a Motion to Dismiss. (Doc. 8.) Defendant Benton filed an Answer. (Doc. 9.) The District Court denied the Motion to Dismiss as to Section 1983 claims against Defendants Franklin and DeKalb County, but granted it in other respects. (Doc. 16.) Plaintiffs' claims against Benton, of course, were not included in the Motion.

Discovery proceeded, and Defendants DeKalb County, Franklin, and Benton filed a Motion for Summary Judgment on July 31, 2019. (Doc. 48.) In relevant part, Benton argued that he was entitled to summary judgment as to Plaintiffs' Section 1983 claims because (1) he had "at least arguable reasonable suspicion" to support a *Terry* stop of Robinson (Doc. 48-1, pp. 17-22); and (2) the force used to carry out that stop was reasonable because the evidence supposedly established as a matter of

law that Benton used only non-deadly force (Doc. 48-1, pp. 22-26). Nowhere did Benton argue that he would have been justified in using deadly force to apprehend Robinson. (Doc. 48-1, pp. 17-26.) In particular, Benton did not argue that he had probable cause to believe that Robinson posed a threat to anyone or that Robinson had committed, or was about to commit, any crime. *Id.*

In a carefully reasoned, 63-page Order, the District Court granted summary judgment in part but denied summary judgment to Defendant Benton as to the claims at issue here. (Doc. 77.) This holding was based on several genuine issues of material fact.

First, the District Court determined that "a reasonable jury could find that Officer Benton lacked arguable reasonable suspicion to perform the traffic stop," because the jury could find that the car's tag was valid and that Benton saw the expiration date on the tag but falsely stated that he did not in order to create a pretext for the stop. (*Id.*, p. 28.)

Second, the District Court held that the jury was not required to find that Robinson's flight from the traffic stop gave Benton arguable reasonable suspicion to seize Robinson. (*Id.*, pp. 29-41.) The District Court acknowledged the holding of *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), and cases following that decision, that "unprovoked flight" from a traffic stop can provide reasonable suspicion to support a second stop. (*Id.*, pp. 35-37.) But the Court held that the jury could find the situation here to be different. If the jury found that Benton stopped Sims's vehicle on a pretext and without reasonable suspicion, then under Georgia law, Robinson would have been at liberty to leave, to refuse to cooperate, and even to flee the scene. (*Id.*, pp. 37-38.) The

District Court noted that some people — particularly people of color in communities that are heavily policed — may have a fear of police encounters that has nothing to do with guilt or innocence. (*Id.*, p. 40.) And the Court further noted that this Court has held that a subject's flight from police did not give probable cause to arrest when the flight was provoked by the officers' own conduct. (*Id.*, pp. 40-41 (citing *Wong Sun v. United States*, 371 U.S. 471, 483-84 (1963).) Based on these observations, the District Court held that, if the jury found Benton's traffic stop to be pretextual, the jury also could find that Robinson's flight from the stop did not give Benton arguable reasonable suspicion for a second seizure of Robinson. (Doc. 77, p. 41.)

Third, the District Court held that Benton was not entitled to summary judgment as to the reasonableness of his use of force against Robinson. (*Id.*, pp. 41-49.)

On August 26, 2021, the Eleventh Circuit entered its unanimous opinion affirming in part and reversing in part the judgment of the District Court. (Pet. App. A.) In relevant part, the Eleventh Circuit held that a reasonable jury could find that Benton fired his Taser at Robinson while Robinson was on top of the wall. *Id.*, pp. 4a-5a, 12a. The circuit court further held that such force was unreasonable under the circumstances, because (1) there was no probable cause to believe that Robinson posed a threat to anyone; (2) Benton lacked probable cause to believe that Robinson had committed any crime whatsoever, much less a crime involving violence or the threat of violence; and (3) Benton gave no warning before his use of force. *Id.,* pp. 12a-17a.

Next, the Eleventh Circuit held that Benton's use of force deprived Robinson of a right that "was clearly established by a materially similar precedent and was obviously clear in any event." *Id.*, p. 18a. As Benton notes, the materially similar precedent cited by the circuit court was *Tennessee* v. *Garner*, 471 U.S. 1 (1985). Pet. App., pp. 18a-19a. The Eleventh Circuit took note of this Court's admonition in *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004), against relying on *Garner* to the extent that its rule is "cast at a high level of generality." *Id.*, p. 19a. But the court made clear that it was "concerned with *Garner*'s analogous facts, not *Garner*'s high-level holding." *Id.* At a factually specific level, the Eleventh Circuit held, "*Garner* clearly established that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." *Id.* The court held that a jury could find Benton had done just that. *Id.*

Alternatively, the Eleventh Circuit held that Benton's use of force violated clearly established law because it was "obviously unconstitutional even absent a case directly on point." Pet. App., p. 20a. The court noted that Benton had no probable cause to believe that Robinson posed a threat to anyone or that he had committed any violent crime. *Id.* Even the initial traffic stop was only for a tag offense, and Robinson was not the suspect. *Id.*, pp. 20a-21a. And because Robinson fled on foot, there was no risk of a car chase that could pose danger to the public. *Id.*, p. 21a. Yet Benton stopped his flight by using deadly force without warning. *Id.* The Eleventh Circuit held that this was obviously excessive. *Id.*

Defendants did not petition for rehearing. Their Petition for Writ of Certiorari was docketed in this Court on November 29, 2021.

REASONS TO DENY THE PETITION

I. Defendant's admissions make this case an ill-suited vehicle for Defendant's first two questions presented.

The first two questions presented in Benton's Petition concern the Eleventh Circuit's holding that his use of the Taser against Robinson violated the materially similar precedent of *Garner*. On its surface, Defendant's argument appears to question both the Eleventh Circuit's reasoning and its result; but in fact, he admits the basic premises on which the circuit court relied, and the result follows from those premises. Defendant cannot even show error, much less an error that reflects any uncertainty in the law, so as to call for this Court's intervention. The writ of certiorari should be denied.

A. The Eleventh Circuit rightly relied on *Garner* for a factually specific precedent, not a general legal test.

Defendant contends that the Eleventh Circuit defined *Garner*'s rule at the same level of generality as the errant lower courts in *Brosseau* v. *Haugen*, *supra*, and *Mullenix* v. *Luna*, 577 U.S. 7 (2015); but that contention is simply wrong. In *Mullenix*, the Fifth Circuit purported to apply the rule "that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Mullenix*, 577 U.S. at 12 (internal quotation marks omitted). And in *Brosseau*, the Ninth Circuit held that the officer had violated the clearly established rule that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer

or to others." *Id.* Here, in contrast, the Eleventh Circuit took pains to clarify that it was "concerned with *Garner*'s analogous facts, not *Garner*'s high-level holding." Pet. App. A, p. 19a. The court relied on *Garner* for the factually specific rule "that an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot." *Id.*

The Eleventh Circuit's decision here takes its model, not from the lower courts' decisions in *Brosseau* and *Mullenix* as Defendant wrongly claims, but from the corrective decisions of this Court in those cases. For instance, in *Brosseau*, this Court described the issue presented as whether the Fourth Amendment clearly prohibited an officer "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 199-200. And in *Mullenix*, this Court asked whether the defendant officer violated clearly established law by shooting "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer . . .." *Mullenix*, 577 U.S. at 13. Just like the rules set forth by this Court in *Brosseau* and *Mullenix*, the rule cited here by the Eleventh Circuit focuses on the factual particulars surrounding the use of force: the facts known to officers about the suspect; the suspect's means of flight or resistance to police; the risks that the suspect's conduct creates to others; and the level of force used by the officers.

In fact, Benton agrees with the Eleventh Circuit's stated rule: he does not dispute "that

Garner clearly establishes the general proposition that 'an officer cannot use deadly force to stop an unarmed man who is not suspected of committing a violent crime from fleeing on foot.'" Pet., pp. 17-18. His quarrel is not with the rule that the Eleventh Circuit applied, but with the manner in which the court applied it to the facts. Thus, from the very outset, his Petition falls into a category that this Court's Rules single out as generally disfavored for a grant of certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists . . . the misapplication of a properly stated rule of law."). And as demonstrated below, Benton ultimately disputes only a narrow aspect of the circuit court's application of law to fact. His criticisms are baseless, and his Petition meritless.

B. The Eleventh Circuit correctly applied the factually specific rule laid down by *Garner*.

Benton's effort to distinguish the facts of *Garner* has two main parts. First, he contends that *Garner* could not have put him on notice that the use of a Taser might be excessive, because *Garner* did not involve a Taser. As the Eleventh Circuit held, this is "a distinction without a difference." Pet. App., p. 19a. The rule in *Garner*, by its express terms, concerned the use of "deadly force," not merely the use of a particular instrumentality to effect such force. *See Garner*, 471 U.S. at 11 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."). And that was for good reason. There would be limited use for a precedent that forbade officers to kill a non-threatening suspect by shooting him, but left them free to kill him by stabbing him,

or pushing him off a roof, or running him over with a patrol car. Benton's effort to distinguish *Garner* by parsing the specific means by which deadly force is applied must fail.

Benton admits in his Petition that "use of a taser may sometimes result in serious injury or death," Pet. p. 24, and he does not dispute that he knew he would create a substantial risk of killing or seriously harming Robinson by deploying the Taser while Robinson was on top of the wall. *Id.*, p. 25. As the Eleventh Circuit noted, the training that Benton received from DeKalb County informed him that the Taser would cause a person's muscles to be incapacitated from pain for a period of five seconds. Pet. App. A, p. 5a. Indeed, Benton had used his Taser on another person the day before the incident at issue here, and it had caused the person to fall down. Doc. 50, pp. 43:25-44:16. Further, DeKalb County's written use-of-force policy informed Benton that the Taser could cause a significant risk of death by causing an uncontrolled fall. Pet. App. A, p. 5a. Benton testified that he was aware of this policy and that he knew it was "not appropriate" to use the Taser when the subject was at an elevated height. *Id.* Thus, there is no real dispute that Benton knew he was using deadly force, in the ordinary sense of force that is "likely to cause or capable of producing death." Merriam-Webster.com/dictionary/deadly (last viewed December 28, 2021).

Benton argues in his Petition that it does not matter whether he knew the force he used was deadly, because an officer's subjective state of mind is irrelevant to the existence of qualified immunity. This contention lacks merit. It is true that qualified immunity does not depend on the officer's motive or intent; but it does not follow that the facts known to

the officer also are irrelevant. To the contrary, this Court has made clear that the reasonableness of a Fourth Amendment seizure depends upon the facts known to the officer at the time. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

As lower courts have recognized, it is common knowledge among law enforcement officers that a Taser causes temporary paralysis and is likely to send the subject into an uncontrolled fall. *See Peroza-Benitez v. Smith*, 994 F.3d 157, 168 (3d Cir. 2021) (collecting a "robust consensus of cases" for the proposition that a Taser may be lethal when used on a subject at a height); *Baker v. Union Twp.*, 587 F. App'x 229, 234 (6th Cir. 2014) ("It is widely known among law enforcement . . . that tasers should not be employed against suspects on elevated surfaces because of the risk of serious injury from a resulting fall."). Benton admits that his training and experience taught him this fact.

As a circumstance informing his use of force, Benton's knowledge of what the Taser was likely to do to Robinson is no different from his knowledge that Robinson's back was to him, or that Robinson was on the wall, or that Robinson was not suspected of a crime. Benton did not need a federal court to tell him what he admits he already knew. Indeed, it is fair to say that the task of informing police officers as to the effects and risks of Tasers is better suited for the institutional competence of police training organizations than for that of federal courts. In this case, proper deference to law-enforcement agencies entails holding Benton accountable for not following the training and policies that those agencies gave him to follow.

The second way in which Benton attempts to distinguish *Garner* is by arguing that he had reason to believe Robinson posed a threat of violence. But Benton's admissions and the undisputed evidence foreclose this argument. In the lower courts, Benton admitted that Robinson never posed a threat to him. Doc. 50, pp. 46:12-47:9; 56:9-10; 84:1-85:7; 85:24-86:10; *see also* Pet. App. A, p. 6a (noting that "Officer Benton later testified that he never felt like Robinson posed an immediate threat to him or any of the other officers."). Benton also admitted that he knew of no evidence that Robinson had a weapon. Doc. 50, p. 106:17-22. It is undisputed that Robinson was unarmed. Pet. App. A, p. 6a ("The officers found no weapons on Robinson's body, and there is no other evidence he had a weapon.").

At most, Benton argues that he "had reason to believe [Robinson] **might** have a weapon," because Robinson was holding the front of his pants with one hand while he ran. Pet., p. 1 (emphasis added); *see also id.*, pp. 3, 6-7, 9, 13, 19, 27, 31. But this argument falls far short of the standard set forth in *Garner*. As this Court held in that case:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11-12. Benton does not make any effort to argue that he had probable cause to believe that Robinson posed a threat to anyone. Nor does he point to any authority that an officer may use deadly force simply because he has "reason to believe" that someone "might" be armed. This is not a recognized legal standard; it is just vague language that Benton uses because he cannot show that he had probable cause.

Even if Robinson had been carrying a weapon, which he was not, there was no objective reason to believe that he meant anyone any harm. Benton does not contend that Robinson offered any threat to him or to the other officers. As the Eleventh Circuit pointed out, Robinson had just left the Highlands apartment complex when Benton stopped Sims's vehicle. Pet. App. A, p. 20a (noting that the officers "had no reason to think [Robinson] posed a threat to anyone in the apartment complex, which he had just left"). If he had wanted to harm someone there, he could have done so then. But there is no evidence that he had any such intent. Instead, all of the evidence suggests that he was running back to the apartment complex to get away from Benton. Benton admits this. *See* Pet., p. 4 (stating that "Robinson climbed onto an eight-foot wall to avoid apprehension by attempting to escape into the apartment complex on the other side").

Robinson's flight from Benton on foot did not involve any violence or threat of violence. This fact puts the present case squarely within the precedent of *Garner* and further distinguishes it from cases such as *Brosseau* and *Mullenix*, in which police used deadly force against suspects who fled in vehicles. Because Robinson fled on foot, his flight did not, in and of itself, create any heightened risk to the

public, as would a high-speed vehicular chase on public thoroughfares.

In sum, Benton does not dispute the rule of law that the Eleventh Circuit derived from *Garner*, and his criticisms of the circuit court's application of that rule lack merit. Further, as demonstrated below, the Eleventh Circuit correctly held that Benton's use of force was prohibited with obvious clarity, such that no factually specific case law was necessary. The Petition therefore should be denied.

II. Defendant's third question is not properly framed and was decided correctly below.

This Court made clear in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), that materially similar case law is not always required to inform public officials that their conduct violates constitutional rights. The fundamental question is whether an officer has "fair warning" that conduct is unconstitutional. *Id.*

Benton contends that the Eleventh Circuit erred in holding that his use of force was obviously unconstitutional, because "an eight-foot wall is not so high that tasing a person on it obviously constitutes deadly force." Pet., p. 31. But that is a red herring, because the Eleventh Circuit did not hold that the height of the wall made Benton's Taser obviously deadly. Rather, Benton admitted that he knew, from his training and from DeKalb County's official use-of-force policy, that the Taser caused neuromuscular incapacitation and should not be used when the subject was at an elevated height. Pet. App. A, pp. 13a-15a. Because it was undisputed that Benton knew this, the circuit court had no occasion to rule that it was obvious. Its holding was that "no reasonable officer could have believed that

the application of deadly force was warranted under these circumstances." Pet. App. A, p. 21a.

Yet even if the Eleventh Circuit had held that the risk of death inherent in Benton's Taser use was obvious, that holding would have been correct, given the information available to Benton at the time. In *Pelzer*, this Court relied on "binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report" in holding that the unconstitutionality of the hitching-post practice at issue there should have been obvious to the defendants. *Pelzer*, 536 U.S. at 741-42. Here, Benton had the benefit of similar sources of information.

In a prior case, *Harper v. Perkins*, 459 Fed. Appx. 822 (11th Cir. 2012), the Eleventh Circuit had already held that an officer violated clearly established law by using a Taser to apprehend a subject who allegedly was unarmed and standing in a tree about four feet off the ground — *i.e.*, about half as far as Robinson fell. The subject fell and suffered paralyzing injuries. The Eleventh Circuit held that the use of the TASER on an unarmed and non-threatening subject at an elevated height violated the Fourth Amendment with "obvious clarity." *Harper*, 459 F. App'x at 827.

In addition to this prior decision, Benton had his Taser training and DeKalb County's official use-of-force policy to inform him that he could kill someone by using his Taser on a person at an elevated height. Benton had "fair warning" of, and obviously should have known, the rules that governed his job — rules that he admits he actually knew. The mere fact that the Eleventh Circuit held

him responsible for that knowledge is not a reason to grant the Writ of Certiorari.

CONCLUSION

For the foregoing reasons, certiorari should be denied as to all three of Defendants' questions presented.

Respectfully submitted, this 29th day of December, 2021.

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