No. 22-615

In the Supreme Court of the United States

ESTATE OF ERIC JACK LOGAN,
Petitioner
v.
CITY OF SOUTH BEND, INDIANA, AND RYAN O'NEILL,
Respondents

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Peter J. Agostino
Counsel of Record
Anderson, Agostino & Keller, P.C.
131 S. Taylor Street
South Bend, IN 46601
agostino@aaklaw.com
(574) 288-1510

Attorneys for Respondents

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals followed well established law in affirming the grant of summary judgment in a police shooting case in which the only surviving witness was the police officer, rejecting credibility challenges because there was no other evidence in the record contradicting the officer's account of events.

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INTRODUCTION

No division between the circuits exists as to this law: summary judgment cannot be defeated solely by challenging the credibility of the movant, even if the movant is the sole surviving witness in a police shooting case. Every circuit examining this issue has been clear that if the movant is the sole surviving witness, then careful analysis of the case must occur, and a party may successfully defeat summary judgment if the non-movant can present other evidence which contradicts the testimony of that witness. Without such other evidence, however, a mere challenge to the credibility of a sole witness does not defeat summary judgment. Thus, contrary to the Petitioner's claim, there is no division between the circuits on this point. Since the Petitioner presented no such "other" admissible evidence contradicting the testimony of the sole witness in this case, the Court of Appeals correctly affirmed the granting of summary judgment to the police officer.

STATEMENT OF THE CASE

The following facts are relevant to this appeal and were detailed by the District Court in its Opinion:

On June 16, 2019, a 19-year veteran of the South Bend Police Department, Sergeant Ryan O'Neill, responded to a 911 dispatch call about a suspect in dark clothing breaking into vehicles in the parking lot. Appx., p. 6a. From there, events unfolded quickly. Appx., p. 6a. The only living eyewitness is Sergeant O'Neill. *Id*. There is no video or audio footage of the incident. *Id.* The parties present forensic evidence. *Id*

When Sergeant O'Neill arrived at the parking lot, he observed a person leaning into the open driver's side door of a Honda. Appx., p. 6a. Sergeant O'Neill parked his squad car and walked toward the Honda. *Id.* Standing about a foot from the Honda's back bumper, Sergeant O'Neill used his left hand to point his flashlight at the driver's door and rested his right hand on his holstered firearm. *Id.* Sergeant O'Neill asked the person leaning into the Honda, later identified as Eric Jack Logan, if it was his car. *Id.* Mr. Logan backed out of the car slightly to look up at Sergeant O'Neill and said, "Yeah." Appx., p. 7a. Sergeant O'Neill observed a purse peeking out of Mr. Logan's sweatshirt pocket and asked why he had a woman's purse. Appx., p. 7a.

Mr. Logan stood up. *Id.* Sergeant O'Neill saw that Mr. Logan was carrying a napkin and a Gerber knife in his right hand, which he raised above his head. *Id.* Sergeant O'Neill was 5'8" and weighed 225 pounds. *Id.* Mr. Logan was 6'2" and weighed 269 pounds. *Id.* Mr. Logan wielded a Gerber knife approximately 8 inches long, including a 3.5 inch blade – a hunting style knife with a blunted tip and control jimping ridges. *Id.*

What happened next occurred in a matter of seconds. *Id.* Mr. Logan advanced on the sergeant with the knife raised. *Id.* Sergeant O'Neill backpedaled, drew his gun, and ordered Mr. Logan repeatedly to put the weapon down: "Drop the knife. Drop the knife. Drop the knife." *Id.* Mr. Logan forged forward, knife still raised, clearing the length of the Honda. *Id.* Mr. Logan didn't say anything. *Id.* He started making guttural sounds. *Id.*

Mr. Logan came within about seven and a half feet – a mere three steps away – when Sergeant O'Neill fired two shots from his hip and Mr. Logan threw his knife at Sergeant O'Neill. Appx, pp. 7a- 8a. Sergeant O'Neill testified that the thrown knife and gunshots occurred "almost one on top of the other." Appx., p. 8a. The knife hit Sergeant O'Neill's forearm. Appx., p. 8. Sergeant O'Neill's first shot struck the car door. *Id.* The second shot hit Mr. Logan's abdomen. *Id.* Sergeant O'Neill ordered Mr. Logan to get on the ground and put his hands behind his back, and only then Mr. Logan complied. *Id.*

The autopsy found that the single bullet entered Mr. Logan's right upper abdomen 11 inches below the top of the right shoulder and 4.5 inches right of the midline with a "front to back, downward, slightly right to left" direction. *Id.*

O'Neill made multiple recorded statements after the shooting. *Id.* The first of O'Neill's statements was in his call to dispatch: "71. 31. Shots fired. Give me an ambo." *Id.* When asked his status, O'Neill replied, "Yeah, I'm fine. Another unit here. Guy threw a knife at me." Appx., p. 14a.

The second statement of O'Neill can be heard on his body worn camera when O'Neill is asked if he is alright, and he stated:

> Yeah, f---er threw the knife at me. He's coming at me with the knife and I'm like drop the knife, drop the … and he f---ing throws it at me. Yeah he f---ing threw the knife at me, so I f---ing shot him.

Appx., p. 14a. Just minutes later, O'Neill made a third statement, describing the full encounter with Mr. Logan:

> So I saw him bent in this uh, he had a cut hand so obviously he broke glass, and he had a woman's purse shoved in there. So I come up and I'm like hey man, is this your car and he goes yeah. I said uh why you got a woman's purse and he lifts his hands up I can see he has a knife in hand and he's going (grunt sounds) coming at me and then he f---ing lifts it up like this and so I'm like, I'm telling him drop that knife, don't, drop that knife, he kind of said bam bam, shot him twice.

Appx., p. 15a. The fourth statement was made when Sgt. Hiipaaka arrived, and O'Neill told Sgt. Hiipaaka what occurred:

> Pulled up and he's bent in this car, I see that he has a woman's purse shoved into his uh pocket. So I said hey man is that your car and he goes yeah, but I saw he had a woman's purse shoved in it, so he backs up and I can see he has this knife in his hand, and I'm like dude drop that knife drop that knife. He's coming at me with a knife and I'm backing up and he goes to throw it so I f---ing shot him twice.

Appx., p. 15a. The fifth statement made by Sergeant O'Neill occurred during his interview with Metro Homicide Unit just hours after the shooting, O'Neill's account of the critical incident was as follows:

> As he turns to face me, I keep following that hand and I see there is a knife there, and it took me a second because he has that napkin in his hand. And so, now my mind is going quick, because we are only probably about 7, 8 feet away from each other. So, I see that knife and pull my pistol out right away and I start backing up and the thought went through my head as his arm came up, holding the knife, the thought came to me to back pedal because if I can create some distance.
>
> If he is standing 10 feet away from me with a knife, and I'm standing, I feel pretty good about that, in the sense of, maybe, I can negotiate with him, get him to drop it, see what his intentions are.
>
> But as soon as he came up with that, he made these uh, just a couple of these guttural sounds, kinda like a "ugh ugh" and uh so I took those 3, 4 steps, but he started walking toward me.
>
> So, you know I have had my gun out thousands of times working midnights for over 19 years, but this was the first time it got to that critical distance that where with as tall as the guy is, he's

> probably, 6'2, 6'3, he's a big guy, and I. Honestly, I was watching that knife up in the air, and with the way he was walking toward me, I could feel, I mean he was going to get me, he was gonna get me for sure.
>
> And, all I could imagine is that knife coming down on my head, so I fired two quick shots, and that motion that he had started, went forward with force, and I had the flashlight like this and that's when the knife hit me in the arm.

Appx., pp. 15a- 16a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' RULING FOLLOWS THIS COURT'S DECISION AND IS CONSISTENT WITH DECISIONS OF THE OTHER CIRCUITS.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court established the rule of law regarding review of motions for summary judgment. The Seventh Circuit Court of Appeals has followed this well-established approach (followed in every other circuit) in holding that a summary judgment motion cannot be defeated solely by challenging the credibility of the sole witness. *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (citing *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 406 (7th Cir. 1998) ("[T]he prospect of challenging a witness' credibility is not alone enough to avoid summary judgment.)) Nevertheless, Petitioner claims "the circuits are divided on whether a party opposing summary

judgment may challenge the credibility of the movant." *See* Writ, p. 6. Petitioner also claims both the Seventh Circuit and district court applied some alleged Seventh Circuit rule barring consideration of credibility on summary judgment. Petitioner's analysis of the opinions of the Seventh Circuit, district court, and the other circuits is incorrect.

Every circuit, as detailed below, has been clear in its position that if the movant is the sole surviving witness, then careful analysis of the case must occur, and the non-movant may only successfully defeat summary judgment if they present other admissible evidence which contradicts the testimony of that witness. This standard is based on the ultimate consideration for any summary judgment motion: whether there is any genuine issue of material fact that warrants submission of the case to the trier of fact. If there is no genuine issue of material fact, then judgment as a matter of law is appropriate.

As set forth below, the Seventh Circuit approaches the issue of credibility on summary judgement consistently with the other circuits.

SEVENTH CIRCUIT

Petitioner identifies four Seventh Circuit cases where the Seventh Circuit rejected challenges to the credibility of the movant; three of which were simply listed in footnote 7 without any further explanation, but all fully support the Seventh Circuit's decision in this case. The only Seventh Circuit case Petitioner discusses beyond citation is *Outlaw v. Newkirk*, 259 F.3d 833 (7th Cir. 2001). Petitioner relies upon the Seventh Circuit's reference in *Outlaw* to the Advisory

Committee Notes to the 1963 Amendments to Federal Rule of Civil Procedure 56(e), and claims that that the Seventh Circuit has not followed the Advisory Committee Note about credibility of witnesses on summary judgment. This misinterprets the Court's analysis of the Advisory Committee Note. The Court was actually responding to Mr. Outlaw's contention in his response brief that since he had asserted a contradiction between an affidavit and incident report provided by the movant, on this basis alone the court should have denied summary judgment. *Outlaw*, 259 F.3d at 838. The Court, however, disagreed and specifically stated:

> As the Advisory Committee Notes to Fed.R.Civ.P. 56(e) indicate, issues of credibility defeat summary judgment **only** "[w]here an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility".

Id. at 838 (quoting Advisory Committee Notes, 1963 Amendment to Fed.R.Civ.P. 56(e) (emphasis added)[1].

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[1] The full paragraph of the Advisory Committee Notes from the 1963 Amendment to the Fed.R.Civ.P. 56(e) provides: Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it

The Court continued, "such is not the case here, for the defendants would be entitled to summary judgment even assuming the truth of Outlaw's **version** of the incident." *Id*. (emphasis added). The Seventh Circuit explained:

> Therefore, it is not the case that the resolution of any material fact issue hinges on an assessment of Mable's credibility. The question of whether Outlaw was actually attempting to throw garbage (which is the only point on which Mable's statements could possibly be seen as being inconsistent) is not a *material* dispute for summary judgment purposes, since the resolution of this dispute is not outcome-determinative under the governing Eighth Amendment substantive law.

Id. at 840. Importantly, the Court also explained that Outlaw's case was distinguishable from a different Seventh Circuit case, *Cameron v. Frances Slocum Bank & Trust Co.,* 824 F.2d 570 (7th Cir. 1987), where the Court denied summary judgment, contrary to Petitioner's claim that "the Seventh Circuit has never applied this principle [challenge of the movant's credibility] to reverse a grant of summary judgment." Petitioner's Brief, p.8. (In *Cameron v. Frances Slocum Bank & Trust Co.,* unlike this case, the movant's witness's statements and their competing inferences were the only evidence on a genuine issue for trial).

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shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

FIRST CIRCUIT

Petitioner also claims the First Circuit has also made decisions in conflict with other circuits. Yet, this is not the case. The First Circuit, in *LaFrenier v. Kinirey*, 550 F.3d 166 (1st Cir. 2008), affirmed summary judgment and specifically explained: "Here, LaFrenier agrees he has **no affirmative evidence contrary to the defendants' evidence,**" and "The court did not, as LaFrenier argues, presume the truth of the officers' accounts; rather it looked to **whether plaintiff had put material facts in dispute**." *LaFrenier*, 550 F.3d at 167- 168 (emphasis added). In fact, relying on a Fifth Circuit case cited by Petitioner and which Petitioner claims is at odds with the First Circuit, the Court in *LaFrenier* explained: "The Fifth Circuit has applied its *Bazan* holding narrowly and refused to allow a nonmovant to defeat summary judgment **where, as here, he or she 'points to nothing in the summary judgment record that casts doubt on the veracity of the witness's version of the events.**" *Id*. at 169 (quoting *Aujla v. Hinds County*, 61 Fed.App. 917, 918 (5th Cir. 2003) (emphasis added)).

The First Circuit confirmed this analysis in *Harriman v. Hancock County*, 627 F.3d 22 (1st Cir. 2010), when it affirmed a summary judgment when the plaintiff's defense to the summary judgment was nothing more than "a naked attack on the credibility of the defendants' testimony." *Harriman*, 627 F.3d at 32. The First Circuit found the plaintiff did "not identify any admissible facts that raise a genuine issue that one or more correctional officers beat him." *Id*. at 33.

It is clear that both the Seventh and First Circuits have followed the general rule regarding summary judgment motions set out by Federal Rule of Civil Procedure 56, and which all the other circuits have also followed.

SECOND CIRCUIT

In *Soto v. Gaudett*, 862 F.3d 148 (2d Cir. 2017), the Second Circuit followed the same analysis as the First and Seventh Circuits in its review of a denial of summary judgment:

> In cases in which officers have used deadly force, leaving "the witness most likely to contradict" the officers' version of the events "unable to testify[,].... **the court may not simply accept what may be a self-serving account by the police officer" but must instead "consider circumstantial evidence that, if believed, would tend to discredit the police officer's" version** and must "undertake a fairly critical assessment of, *inter alia*, the officer's original reports or statements ... to decide whether the officer's testimony could reasonably be rejected at trial." As the district court here noted, the record should be given the same careful scrutiny where the alleged victim of excessive force is alive, but the events have left him incapable of communicating.

Soto, 862 F.3d at 157 (emphasis added). The Seventh Circuit, in the present case, had an evidentiary record that it carefully scrutinized to decide that the cited inconsistencies in the officer's statements were immaterial. Thus, the Second and Seventh Circuits are in accord.

THIRD CIRCUIT

While the Third Circuit case cited by Petitioner, *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999), ultimately decided there was a genuine dispute of material facts that precluded summary judgment, it did so based on both physical evidence and inconsistent statements; not inconsistent statements alone. The Third Circuit decided that "[c]onsidering the **physical evidence together with** the inconsistencies in the officer's testimony, a jury will have to make credibility judgments, and credibility determinations should **not** be made on summary judgment." *Id*. at 294 (*Boyle v. County of Allegheny, Pa.*, 139 F.3d 386, 393 (3d Cir. 1998) (emphasis added)). The Third Circuit did, however, acknowledge that "defendant can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Id*. at 290 (citing *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994)). Essentially, the court in *Abraham*, unlike in the present case, found the physical evidence conflicting as to the threat posed by the plaintiff's conduct, and, therefore, found there was a genuine dispute of material facts that precluded summary judgment.

FOURTH CIRCUIT

In *Stanton v. Elliott*, 25 F.4th 227 (4th Cir. 2022), the Fourth Circuit reversed the district court because the physical evidence **contradicted** the officer's testimony. The Court did note that there are special difficulties with deadly force cases, but also noted "… neither does caution lead us to be especially critical of officer testimony in these cases." *Stanton*, 25 F.4th at 234. The Court reasoned it "need only apply our normal summary-judgment rules, which ask whether reasonable juries might disagree over some **material factual disputes**." *Id*. (emphasis added) (referencing *Harris v. Pittman*, 927 F.3d 266, 276 (4th Cir. 2019) and a Seventh Circuit case, *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994)). Ultimately, the Court found that the physical evidence showing the suspect was shot in the **back**, but that the officer stated he first shot the suspect when the suspect was **turned towards him**, created a sufficient genuine issue of material fact to defeat summary judgment. *Stanton*, 25 F.4th at 235.

FIFTH CIRCUIT

Likewise, in the Fifth Circuit case, *Bazan ex. rel. Bazan v. Hidalgo County*, 246 F.3d 481 (5th Cir. 2001), the Court affirmed the denial of summary judgment by the district court because "the district court concluded that **material facts *are* genuinely disputed**," and the Court believed the district court reached that decision **"because little evidence corroborating the Trooper's version exists.**" *Bazan*, 246 F.3d at 492 (emphasis added).

SIXTH CIRCUIT

The Sixth Circuit, in *Burnette v. Gee*, 137 Fed.Appx.806 (6th Cir. 2005), reviewed a case in which a sheriff fatally shot a man who had attempted suicide and threatened paramedics and the police with a gun. The Sixth Circuit, in its review of the district court's grant of summary judgment, explained:

> "[A] nonmoving party may **not** avoid a properly supported motion for summary judgment **by simply arguing that it relies solely or in part upon credibility considerations** or subjective evidence. Instead, the nonmoving party **must** present **affirmative evidence** to defeat a properly supported motion for summary judgment." *Cox,* 53 F.3d 146, 150 (6th Cir. 1995). Furthermore, where the officer defendant is the only witness left alive to testify, the award of summary judgment to the defense in a deadly force case must be decided with particular care. *See Plakas v. Drinski,* 19 F.3d 1143, 1147 (7th Cir.1994) (The "defendant knows that the only person likely to contradict him or her is beyond reach .... [s]o a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at trial.")

Burnette, 137 Fed.Appx. at 809 (emphasis added). The Court specifically addressed the plaintiff's position that the officer's version of the events could be placed into doubt:

> Unfortunately for the appellants, no direct evidence exists to rebut Sheriff Gee's version of the events. Furthermore, even considering the circumstantial evidence presented by Appellants in a light most favorable to them, there is no reasonable basis for overturning the district court's finding that Wilson reached for or raised his rifle and struggled with Sheriff Gee over the weapon, and that as a consequence, Sheriff Gee reasonably feared for his life when he shot Wilson. We believe that the district court's thorough analysis of the facts supports its grant of summary judgment in favor of Sheriff Gee.

Id. at 810.

Eighth Circuit

Petitioner cited an Eighth Circuit case, *Ribbey v. Cox*, 222 F.3d 1040 (8th Cir. 2000), in defense of its position, but Petitioner failed to acknowledge that the Court found that "a genuine question of fact exists," and thus, based upon the evidence summary judgment was not appropriate. *Ribbey*, 222 F.3d at 1043. Importantly, this case was very limited to the facts and "readily distinguishable from cases in which the

officer actually observed the decedent with a weapon." *Id*. at 1043 (citing *Mettler v. Whitledge*, 165 F.3d 1197 (8th Cir. 1999)).

Ninth Circuit

In the Ninth Circuit case *Smith v. Agdeppa*, 56 F.4th 1193 (9th Cir. 2022), the Court held "when other evidence in the record, 'such as medical reports, contemporaneous statements by the officer, the available physical evidence, and any expert testimony proffered by the plaintiff' is inconsistent with material evidence offered by the defendant, '[q]ualified immunity should not be granted.'" *Smith*, 56 F.4th at 1201 (quoting *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016)). The Court continued: "In such cases, district courts must allow juries to consider the evidence that contradicted the officers' version of events, and decide whether they were persuaded by the officers' testimony." *Id*. (citing *Bator v. State of Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994) ("At the summary judgment stage, … the district court may not make credibility determinations or weigh conflicting evidence.")

D.C. Circuit

In *Flythe v. D.C.*, 791 F.3d 13 (D.C. Cir. 2015), the Court did not uphold the denial of summary judgment solely because the jury should be allowed to question the officer's credibility, but, instead focused on the contradiction between the evidence and the officer's testimony to find the existence of a genuine issue of material fact: "In this case, record evidence casting doubt on Officer Eagan's testimony abounds. Indeed, in several significant respects Eagan's

testimony conflicts with that of every other witness, as well as the physical evidence." *Flythe*, 791 F.3d at 19-20. In addition, the D.C. Circuit made it clear that no division exists as to how the Courts decide summary judgment matters:

> …courts must 'carefully examine all evidence in the record … to determine whether the officer's story is internally consistent and consistent with other known facts.' *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Courts 'must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.' *Id*.
>
> Every circuit to have confronted this situation – where the police officer killed the only other witness to the incident – follows this approach. For example, the Seventh Circuit has explained that '[t]he award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify.' *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994). Accordingly, "a court must undertake a fairly critical assessment of the forensic evidence … to decide whether the officer's testimony could reasonably be rejected at a trial.' *Id*; *see*

> *also Jefferson v. Lewis*, 594 F.3d 454, 462 (6th Cir. 2010); *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 206); *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999); *Ludwig v. Anderson*, 54 F.3d 465, 470, n. 3 (8th Cir. 1995); *Hegarty v. Somerset County*, 53 F.3d 1367, 1376 n. 6 (1st Cir. 1995).

Id. at 19.

The above cases support the Seventh Circuit's position that "when challenges to witness' credibility are *all* that a plaintiff relies on, and he has shown no independent facts – no proof – to support his claims, summary judgment in favor of the defendant is proper. *Springer v. Durfinger*, 518 F.3d 479, 484 (7th Cir. 2008) (quoting *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 406 (7th Cir. 1998) ("[T]he prospect of challenging a witness' credibility is not alone enough to avoid summary judgment.") Ultimately, Petitioner's attempt to defeat summary judgment in the present case was just this; nothing more than an attempt to challenge O'Neill's credibility without any independent facts to contradict O'Neill's version of the facts.

II. THE EVIDENCE IN THE RECORD DID NOT CONTRADICT THE TESTIMONY OF THE SOLE WITNESS.

As mentioned above, the law of the land, as outlined by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), is that a plaintiff may not defeat summary judgment by merely asserting that the jury might disbelieve the defendant's version of events. The non-movant must present evidence to show there is a genuine dispute about the material facts. In this case, each argument by Petitioner as to why summary judgment should be denied failed to be accompanied by reference to admissible evidence contradicting movant's version of events.

Petitioner claims that O'Neill's conviction for ghost employment should have been considered. However, Petitioner fails to demonstrate how the conviction creates any dispute as to the material facts of this case. Instead, Petitioner is simply asking the Court to not believe O'Neill's testimony. As the Seventh Circuit rightfully explained: "Disbelief of the only witness is not proof that the opposite of the witness's statements is true; disbelief would mean the record is empty, and on an empty record the plaintiff loses, because the plaintiff has the burdens of production and persuasion." *App.*, pp. 2a-3a.

Likewise, Petitioner claims the fact that O'Neill did not turn his body camera on until after the shooting, and then briefly muted the video when speaking to another officer, should be a basis for denying summary judgment. Again, the fact that the body camera was not turned on until after the

shooting does not create any conflict with O'Neill's testimony. Rather, Petitioner is simply using the body camera recording as an attempt to throw skepticism and speculation onto O'Neill's testimony. Yet, every circuit has maintained that a witness's credibility **alone** is insufficient to defeat summary judgment.

The third claim by Petitioner is that "had credibility been at issue, the courts below would not have summarily dismissed the conflict between O'Neill's actions and standard police practices described by plaintiff's expert." P. 11. This is simply not true. First, the Petitioner's expert did not provide the "standard police practice" when he claimed that O'Neill should have shot Mr. Logan **more than** two times. The Seventh Circuit found the expert's premise untenable. The Seventh Circuit specifically held:

> The idea that police officers must *keep* shooting a suspect in order to establish their right to have fired in the first place is perverse. Such a principle would induce officers to empty their magazines – making sure that the suspect dies – instead of using the least force necessary to end the hazard. O'Neill left Logan with a chance to live and should not be penalized for doing so.

p. 4a. The district court also found Petitioner's expert's opinion wholly lacking of sound factual basis and entirely unhelpful:

> Worse still, there is no reliable basis for saying, on this record, that Sergeant O'Neill should have shot Mr. Logan *more*

> times. With the knife and gunshots exchanged near simultaneously, with Mr. Logan then disarmed, and with Mr. Logan struck by one of two bullets, Sergeant O'Neill acted appropriately in immediately seeing to the suspect's medical aid rather than firing yet more shots. Mr. Waller's opinion is inherently contradictory and entirely irrelevant. His opinion that the sergeant should have fired more times doesn't fit an excessive force case at all. The issue is whether Sergeant O'Neill used unconstitutionally excessive force, not whether he used insufficient force. His opinions prove unreliable under the law and create no triable issues for the jury.

p. 27a and 28a (internal quotations omitted).

In the present case, then, the other evidence corroborated the only survivor's version of events:

i. A near simultaneous exchange of two gunshots and knife thrown at the officer;

ii. A knife found on scene matching description by the officer and also matching description of knife stolen by Logan;

iii. Injury to O'Neill's arm consistent with being hit by the knife in question;

iv. The limited number of shots—two—only one hitting the victim in the lower part of the abdomen, which indicates an

intention to stop the aggression/future aggression, not an intention to kill; path of bullet consistent with Logan leaning forward toward O'Neill when shots fired;

v. Other shot hits the lower part of a door of a parked vehicle, which is consistent with the fact that the officer was aiming to hit a non-lethal part of the victim's body; and

vi. The officer called for medical assistance immediately after the incident.

These and other facts supported O'Neill's version and no admissible evidence was offered to contradict this other evidence.

Based on the above, it is clear there is no dispute among the circuits regarding the rule associated with witness credibility at the summary judgment stage. The rule of law followed by every circuit is that it is not the court's role to question the witness' credibility, and, as such, the courts will not deny summary judgment if there is nothing more than mere speculation as to the credibility of the witness, even the testimony of a sole surviving officer in a shooting case, if there is no other evidence in the record to contradict that testimony. The Seventh Circuit followed this well-established approach for review and consideration of summary judgment in such a case and correctly affirmed the district court's grant of summary judgment.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Peter J. Agostino
Counsel of Record
ANDERSON, AGOSTINO & KELLER, P.C.
131 S. Taylor Street
South Bend, IN 46601
Telephone: (574) 288-1510
Facsimile: (574) 288-1650
E-mail: agostino@aaklaw.com

Attorneys for Respondents