No. 24-919

In The
Supreme Court of the United States

MIKE MILLER,
Officer (#1115), individually,
Petitioner,

v.

DILLON ROCK,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Officer Miller's challenge of the Ninth Circuit's denial of summary judgment on qualified immunity grounds is now moot following a full trial on the merits, pursuant to *Ortiz v. Jordan*, 562 U.S. 180 (2011).

RELATED PROCEEDINGS

Rock v. Miller, et al., No. 23-16009, United States Court of Appeals for the Ninth Circuit. The Order affirming the partial denial of summary judgment to Officer Miller on qualified immunity grounds was entered on August 14, 2024.

Rock v. N. Cummings, et al., No. 2:20-cv-01837-DWL, United States District Court for the District of Arizona. The Order denying summary judgment, in part, to Officer Miller on qualified immunity grounds was entered on July 3, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULES, REGULATIONS

INTRODUCTION

Officer Miller asks this Court to grant review of the Ninth Circuit's order affirming the district court's denial of summary judgment on qualified immunity grounds. The four questions presented to the Court in Miller's Petition are sufficiency-of-the-evidence issues. In *Ortiz v. Jordan*, the Court held that an order denying summary judgment on evidence sufficiency grounds is not reviewable after trial. 562 U.S. 180 (2011). The required vehicle to seek review is a Federal Rule of Civil Procedure 50(b) motion for judgment as a matter of law.

In the instant action, there has now been a trial, and Miller has filed a Rule 50(b) motion in the district court. Pursuant to *Ortiz*, the issues raised in Miller's Petition are now moot. Because the procedural posture of this case prevents review of the issues presented, the Petition for Writ of Certiorari should be denied. Even if that was not the case, the Petition should be denied because it does not present a split or conflict among the Circuits, nor does it present an important or unsettled question of law.

STATEMENT OF THE CASE

I. Factual Background

On October 20, 2019, the date of the subject-incident, Plaintiff, Dillon Rock ("Plaintiff"), was living with his father, Timothy Rock ("Timonthy"). Plaintiff's mother, Yolanda Rock ("Yolanda"), was also present, as she was visiting Plaintiff for his birthday. Pet. App. 11a.

The day before the incident, October 19, 2019, Plaintiff noticed that Yolanda had a fake Louis Vuitton purse. Plaintiff expressed his concern to Yolanda that carrying around an expensive looking

purse may increase the risk of getting robbed. To demonstrate this point, Plaintiff picked up a knife and asked Yolanda what she would do if she were attacked with a knife for her purse. Importantly, Rock never threatened Yolanda with a knife. Pet. App. 11a.

On October 20, 2019, Timothy woke Plaintiff and accused him of trying to hurt Yolanda with a knife. Pet. App. 11a. Timothy appeared to Plaintiff to be intoxicated. ER-107.[1] Plaintiff tried to explain to Timothy his concerns about Yolanda's purse, but Timothy would not listen. Out of frustration with Timothy, Plaintiff kicked a step ladder that was near the kitchen. Pet. App. 11a. The ladder did not hit anyone. Pet. App. 12a.

After Plaintiff kicked the ladder, Timothy and Yolanda announced their intention to call the police. To prevent his parents from doing so, Plaintiff took their phones and threw them on the ground, shattering the phones' screens. Plaintiff explained to his parents that he just got a new job, was really happy with it, and did not want to go to jail and miss work. Pet. App. 12a, 12a n.3. Timothy and Yolanda walked out of the house and across the street toward the residence of a neighbor, Willie Berry ("Berry"). Timothy and Yolanda asked Berry to call the police; Berry did so. Pet. App. 12a.

From approximately 5:43 p.m. to 5:56 p.m., based on Berry's call, dispatch informed law enforcement that the Rocks' neighbor had reported that Plaintiff had been acting erratically, had threatened Yolanda with a knife, and had broken his parents' phones. Pet. App. 12a–13a. Dispatch also informed the officers

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[1] Plaintiff cites to the Ninth Circuit's record when no lower court opinion supports a factual assertion.

that Timothy may have been drinking, that it was Timothy who had asked Berry to call the police, and that Berry had never seen a knife. Several Goodyear police officers, including a K9 unit, were dispatched to the Rock residence. Pet. App. 13a.

When the officers arrived, Timothy and Yolanda were standing outside in the driveway. Pet. App. 15a. Officers, including Miller, began questioning Timothy, who informed them that Plaintiff was "out back" and "just drunk out of his ass," and that "[n]obody's hurt." Pet. App. 17a. Although Yolanda appeared to be sober, Timothy struggled to answer questions and was incoherent. ER-142–43, 152–53. Timothy was so intoxicated that he fell backward and hit his head on the pavement, prompting Officer Preston to contact dispatch for the fire department to attend to Timothy's injuries. Pet. App. 19a n.9, 20a n.9.

After hearing that Rock may be in the backyard, Corporal Cummings went to a gate on the front, west side of the residence that led to the backyard. Pet. App. 18a. Cummings saw Rock walking away from the officers and heading east behind the house toward a shed. Pet. App. 18a, 20a n.12. Cummings attempted to communicate with Rock. Pet. App. 19a–20. Rock could not hear specific words and responded by hiding in the shed. Pet. App. 19a, 21a n.13.

Cummings was joined at the front, west side gate by Preston, White, Miller and Miller's K-9, Toby. Pet. App. 18a, 30a. During that time, each one of them approached or passed by Yolanda and Timothy who remained outside in the driveway. Neither Cummings, Preston, White or Miller asked Yolanda questions about the reported events to which the officers had responded. Neither did any of the officers question Timothy whether Dillon had threatened

Yolanda with a knife, when this alleged threat had occurred, or whether Timothy had been present during any of the reported threats. ER-197 at T00:54:00–T01:00:50, 199 at T00:56:20–T01:01:05, 201 at T00:54:20–T01:00:50, 203 at T00:54:30–T01:01:00. Sergeant McCarthy then joined the officers at the gate. Pet. App. 32a.

After setting up a perimeter, Miller failed to instruct the perimeter officers to make K-9 announcements. ER-161–63. In failing to do so, Miller violated City of Goodyear K-9 Unit Standard Operating Procedure 3010 ("SOP 3010"). SOP 3010 required that prior to starting a search "the handler will request that all perimeter units make Public Address ("PA") announcements from their patrol vehicle advising of the verbal warning that the K9 Unit is being used." SER-20. From the front gate, Miller gave two K-9 announcements, unaided by a PA system. Pet. App. 4a. Plaintiff, who was in a shed on the opposite side of the property, could not discern the words spoken by Miller and was unaware of the presence of a police dog. Pet. App. 33a.

After Miller's two K-9 announcements, Miller, Cummings, Preston and White passed through the front, west side gate and walked north along the west side of the house toward the backyard. Pet. App. 36a–37a. Toby, handled by Miller, led the way on a 15' lead in front of Cummings and Preston. Pet. App. 31a, 36a–37a. When Cummings, White and Miller reached the backyard, they turned right and walked east along the length of a swimming pool before turning right again and headed south toward a shed on the east side of the residence. Pet. App. 37a–38a. Preston remained in the backyard on the north side of the

house, where he was joined by McCarthy. Pet. App. 38a, 38a n.26.

A wrought iron gate provided a barrier between the officers and the shed. Pet. App. 38a–39a. No additional efforts were made from behind the gate to provide K-9 warnings or to communicate in any other way with Plaintiff. Pet. App. 39a–40a; ER-197 at T01:01:50–T01:02:40. Instead, White opened the latch to the gate and allowed Toby to approach the shed. Pet. App. 39a.

At the shed, Toby indicated Plaintiff's presence to the officers. Pet. App. 38a–40a. Miller directed Cummings to open the shed door. Cummings did so and stood with his gun drawn. Miller deployed Toby into the shed. Pet. App. 40a. Toby began biting Plaintiff on the arm and shaking his head back and forth as Plaintiff screamed in pain. Pet. App. 42a. Miller pulled on Toby's lead and praised Toby while Toby continued on the bite. Toby remained latched onto Plaintiff's left arm as Plaintiff was dragged from the shed. Pet. App. 42a.

Toby dragged Plaintiff from the shed onto his stomach, where Plaintiff was surrounded by four officers. Pet. App. 4a. As Dillon and Toby were pulled from the shed, it was apparent to the officers, including Miller, that Dillon was unarmed and that the shed was empty. Miller admitted his belief that Plaintiff had nothing in his hands when Plaintiff was dragged from the shed. Pet. App. 4a, 72a. In fact, there is no genuine dispute about whether Miller believed Plaintiff was armed. A few seconds into the encounter, Miller had no such belief. Pet. App. 41a, 41a n.30.

Plaintiff could be seen holding Toby's lead as Toby dragged Plaintiff from the shed by Plaintiff's arm.

Pet. App. 42a. Plaintiff instinctively held onto the lead to relieve the pressure on his arm while screaming and recoiling from the pain. Pet. App. 4a, 43a. Plaintiff was not resisting arrest. Pet. App. 4a, 75a.

Toby continued to bite Dillon for approximately forty-one seconds. Pet. App. 5a, 40a. Cummings, White and Miller were in the immediate vicinity for the entirety of the bite. Pet. App. 41a. McCarthy and Preston also arrived at the shed and watched Toby continue to bite Plaintiff. Pet. App. 42a n.31. Plaintiff was under Miller and Toby's control before Miller gave White the command to remove Toby from the bite. Pet. App. 76a.

White removed Toby from the bite, and Plaintiff was handcuffed by Cummings and Preston as McCarthy stood observing them. Pet. App. 44a–45a. Plaintiff was lifted off the ground and escorted to the front of the house for medical attention. He was taken to the Abrazo West Emergency Room for treatment. Pet. App. 45a. Plaintiff required two surgeries on his left arm to repair the nerve injuries from Toby's bite. Pet. App. 48a, 48a n.34. After the bite, Yolanda informed Officer Torres that Plaintiff had not threatened her and had not possessed a knife. Pet. App. 45a–46a.

II. PROCEDURAL BACKGROUND

A. *District Court*. On September 21, 2020, Plaintiff filed his Complaint in the United States District Court for the District of Arizona. Pet. App. 2a; ER-267–276. The Complaint, which was brought under 42 U.S.C. § 1983, alleged the use of excessive force against Miller for his decision to release Toby and for the duration of Toby's bite. Pet. App. 2a; ER-274. The Complaint also alleged Fourth Amendment violations against

Cummings, McCarthy, Preston, Torres and White as integral participants and for failing to intervene to prevent or terminate Miller's use of Toby. Pet. App. 2a; ER-274–275.

On September 9, 2022, the officers moved for summary judgment, each seeking qualified immunity on Plaintiff's Fourth Amendment claim of excessive force. Pet. App. 2a; ER-174–261. On July 3, 2023, the district court granted in part and denied in part Defendants' Motion for Summary Judgment. Pet. App. 8a–88a. The court held that Miller was entitled to qualified immunity regarding his decision to release Toby. Pet. App. 55a–66a. The court reasoned that Plaintiff had failed to identify clearly established law that would have provided Miller with sufficient notice that his decision to deploy Toby was unconstitutional. Pet. App. 65a–66a. However, Miller was denied qualified immunity on Plaintiff's claim that the duration of Toby's bite was unconstitutional. Pet. App. 66a–80a. The Court concluded that there were genuine disputes of fact as to whether the duration of the bite was excessive. Pet. App. 76a. The Court relied on evidence that Miller could see the shed was empty and that Plaintiff had nothing in his hands. Pet. App. 72a. Also, that Plaintiff's grab of Toby's lead was an instinctive reaction for self-protection. Pet. App. 71a–75a. A reasonable juror, the court held, could determine that Plaintiff did not pose an immediate threat to the officers and that Plaintiff was not attempting to flee or resist arrest during the bite. Pet. App. 73a–75a. Finally, the court concluded that a reasonable juror could find that Plaintiff was under Miller and Toby's control before Miller gave White the command to remove Toby from the bite. Pet. App. 75a–76a.

Regarding the second prong of the qualified immunity analysis, the district court concluded that *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087 (9th Cir. 1998), provided Miller with sufficient notice that the duration of Toby's bite was excessive. The court discussed that in *Watkins* and the instant action, the plaintiffs were not handcuffed but were helpless and surrounded by officers. Further, the plaintiffs were not resisting but were recoiling from pain and unable to comply with commands to show their hands. Pet. App. 77a–79a; *Watkins*, 145 F.3d at 1090. Based on *Watkins*, the district court denied Miller's motion for summary judgment on qualified immunity grounds on Plaintiff's duration and encouragement theory. Pet. App. 88a. Finally, the court ruled that the other officers were entitled to qualified immunity in full on Plaintiff's failure to intervene and integral participation theories. Pet. App. 80a–88a.

On July 17, 2023, Miller filed a notice of appeal as to that part of the district court's Order denying him qualified immunity. ER-277–78. On August 1, 2023, pursuant to Federal Rule of Civil Procedure 54(b), Plaintiff moved the district court to enter final judgment on the court's grant of summary judgment to Miller, in part, and in full to the remaining Defendants. SER-9–13. On September 5, 2023, Plaintiff's Rule 54(b) Motion was denied as to Miller but granted as to the remaining five Defendants. SER-4–8. Judgment in favor of Cummings, McCarthy, Preston, Torres and White was entered on September 5, 2023. SER-3. On August 1, 2023, Plaintiff filed a notice of cross-appeal. Plaintiff sought review of the court's order granting summary judgment on qualified immunity grounds to

Cummings, Preston, Torres, McCarthy and White. SER-27–29.

B. *Ninth Circuit Court of Appeals*. On August 14, 2024, the Ninth Circuit affirmed the district court's denial of qualified immunity to Miller as to the duration of Toby's bite. The Ninth Circuit found that "[v]iewing the evidence in the light most favorable to Rock, Miller allowed the canine to continue biting Rock even though he was unarmed, did not present an immediate threat to the officers or others, and did not resist or actively evade arrest." Pet. App. 5a. The court relied on *Watkins* and *Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994), for clearly established law in denying Miller qualified immunity. Pet. App. 5a. The court explained that "precedent clearly establishes that allowing a canine bite to continue when the plaintiff neither endangers nor attempts to flee or resist arrest violates the Fourth Amendment." Pet. App. 3a–4a (citing *Watkins*, 145 F.3d at 1090, 1093). The appellate court affirmed the district court's grant of qualified immunity to the other officers. Pet. App. 6a. The issue of qualified immunity on Miller's decision to deploy Toby was not before the Court. Pet. App. 1a–6a.

The Ninth Circuit panel denied Miller's petition for rehearing and petition for rehearing en banc on September 26, 2024. Pet. App. 7a–8a.

C. *Post-Petition Developments.* This case proceeded to trial in the district court on May 12, 2025, in *Rock v. N. Cummings, et al.*, No. 2:20-cv-01837-DWL. The jury returned a verdict on May 16, 2025. The jury found that the duration of Toby's bite was excessive. Also, the jury found that Miller's conduct was punitive in that it was malicious, oppressive, or in reckless disregard of Plaintiff's constitutional rights. ECF No.

173. Judgment was entered on the verdict on May 19, 2025. ECF No. 175. On June 13, 2025, Miller filed his Rule 50(b) Motion for Judgment as a Matter of Law and Rule 59(e) Motion to Amend Judgment. ECF No. 183.

REASONS TO DENY THE PETITION

I. THE FIRST THREE QUESTIONS PRESENTED ARE NOW MOOT FOLLOWING TRIAL AND ARE NOT REVIEWABLE.

In *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011), the Court reviewed the issue of whether a party may appeal a denial of summary judgment after a trial on the merits. The plaintiff in *Ortiz* brought an action under § 1983 alleging Eighth and Fourteenth Amendment violations while in custody. *Id.* at 183. The district court denied summary judgment to the defendant officers on their qualified immunity defense. *Id.* The court found that the qualified immunity defense depended on material facts that were genuinely in dispute. *Id.* The case proceeded to trial, where the jury returned a verdict against both officers. *Id.* at 187. The officers moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) but did not renew their motion under Rule 50(b) or seek a new trial under Rule 59(a). *Id.* Instead, they sought review of the district court's order on summary judgment denying qualified immunity. *Id.* On appeal, the Sixth Circuit reversed the district court's denial of summary judgment on the officers' qualified immunity defense. *Id.*

Due to a conflict among the Circuits, the Court granted certiorari to resolve the following question: "whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." *Id.* at 187–77. The Court held

that no, a party may not. The Court reasoned that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Id.* The qualified immunity defense "must be evaluated in light of the character and quality of the evidence received in court." *Id.* After trial, the required procedure to assert qualified immunity is a Federal Rule of Civil Procedure 50(b) renewed motion for judgment as a matter of law. *Id.* at 191–92. Because the officers had not brought a post-verdict motion, the judgment of the Sixth Circuit was reversed. *Id.* at 192.

The Court's holding in *Ortiz* that an order denying summary judgment is not reviewable on appeal following trial applies to sufficiency-of-the evidence issues. *Id.* at 191–192; *Dupree v. Younger*, 598 U.S. 729, 731 (2023). In contrast, in *Dupree*, the Court held that "a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment." *Dupree*, 598 U.S. at 736.

In *Ortiz*, the Court stated that "the officials' claims of qualified immunity hardly present purely legal issues capable of resolution with reference only to undisputed facts." *Ortiz*, 565 U.S. at 190 (internal quotation marks omitted). That is the case with respect to the first three questions presented by Miller. The first question concerns the disputed facts of whether a reasonable officer would have believed Plaintiff was armed during the bite and when the officers, including Toby, had control of Plaintiff. The second question concerns the disputed fact of whether a reasonable officer would have perceived Plaintiff's hold of Toby's lead to be an instinctive, self-protective reaction while recoiling in pain as opposed to an act of

resistance. The third question concerns disputed interpretations of body worn camera footage.

These questions seek to upset the jury's verdict on evidence sufficiency grounds. As such, the proper vehicle for review of these issues is a Rule 50(b) motion for judgment as a matter of law. In fact, Miller has now brought such a motion in the district court. ECF No. 183. Because there has now been a full trial on the merits, the first three questions presented by Miller are not reviewable.

II. THE FOURTH QUESTION PRESENTED BY MILLER IS ALSO AN EVIDENCE SUFFICIENCY ISSUE THAT IS MOOT AND NOT REVIEWABLE FOLLOWING TRIAL.

Miller's fourth question goes to clearly established law under the second prong of the qualified immunity analysis. If the facts were not in dispute and this were a purely legal issue resolved at summary judgment, the matter would be reviewable. *Dupree*, 598 U.S. at 736. However, when qualified immunity turns on the resolution of disputed facts, it is a sufficiency-of-the-evidence issue. *Ortiz*, 562 U.S. at 190–91. That is the case here. Material controverted facts, e.g., at what point Plaintiff was under control, precluded the grant to Miller of qualified immunity. Pet. App. 75a–76a. The Court may only answer Miller's fourth question by finding facts as Miller claims they were. As such, the question, which was decided on summary judgment, is not reviewable. The required vehicle for review is a Rule 50(b) motion, which is what Miller has since filed in the district court.[2]

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[2] Even if there had not been a trial, the issues raised by Miller would not be reviewable. As the Ninth Circuit recognized in this case, "the collateral order doctrine does not provide appellate

III. THE PETITION DOES NOT ALLEGE A CIRCUIT CONFLICT OR PRESENT AN IMPORTANT AND UNSETTLED QUESTION OF LAW.

Plaintiff will not belabor the Court much further discussing non-reviewable issues that are now properly before the district court on Miller's Rule 50(b) Motion. Notable, though, are arguments that Miller's Petition does not make. The Petition does not cite to a split or conflict among the Circuits. Neither does the Petition allege an important or unsettled question of law. The Petition should be denied as it is now nothing more than a defunct vehicle by which Miller asks the Court to engage in fact-finding.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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jurisdiction to review the district court's decision that genuine issues of material fact exist for trial." Pet. App. 4a–5a (citing *Armendariz v. Penman*, 75 F.3d 1311, 1317 (9th Cir. 1996) overruled in part on other grounds as recognized in *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 852 (9th Cir. 2007)).