No. 17-1569

IN THE

Supreme Court of the United States

GLADIS CALLWOOD, AS ADMINISTRATRIX OF THE ESTATE OF KHARI NEVILLE ILLIDGE,

Petitioner,

v.

JAY JONES, *et al.,*

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(Continued on inside cover)

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REPLY FOR PETITIONER

The petition explains that this Court should grant certiorari for three reasons. First, the Eleventh Circuit failed to apply the governing legal rule established by *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989)—that when police use serious force during arrest, that force must serve a legitimate governmental purpose. Second, the Eleventh Circuit failed to apply the governing summary judgment standard by not considering the evidence that showed there was no legitimate reason for Deputy Smith to tase unarmed Khari Illidge thirteen times while he was on the ground being handcuffed. Third, the Eleventh Circuit's decision conflicts with decisions from the Fourth, Sixth, and Seventh Circuits, which held that summary judgment was improper when confronted with similar evidence of gratuitous tasing.

Respondents agree that *Garner* and *Graham* set the standard for excessive force cases, yet do not (because they cannot) argue that the Eleventh Circuit applied the standard established by those cases. Respondents also do not defend (because they cannot) the Eleventh Circuit's failure to consider all the evidence at summary judgment. And Respondents do not seriously dispute the existence of a circuit split; they only seek to distinguish this case from the three other circuits by picking and choosing facts that favor their position rather than viewing the evidence in the light most favorable to Ms. Callwood.

This case warrants the Court's consideration.

I. THE ELEVENTH CIRCUIT DID NOT APPLY THE RULE ESTABLISHED BY *GARNER* AND *GRAHAM*.

Garner and *Graham* clearly establish that when police use serious force during arrest, that force must further a legitimate governmental purpose. This rule flows directly from the Fourth Amendment's prohibition against "unreasonable . . . seizures." U.S. Const. amend. IV. Respondents do not dispute that this rule has been clearly established for over three decades. Indeed, Respondents embrace this standard by arguing that Deputy Smith's repeatedly tasing Mr. Illidge served "numerous legitimate governmental interests." Resp'ts' Opp'n to Cert. at 17.

Yet the Eleventh Circuit failed to apply this "governing legal rule." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1288 (2017) (Alito, J., joined by Thomas, J., concurring). Rather than citing *Garner* or *Graham*, the Eleventh Circuit cited its own precedent and held that because Mr. Illidge was not "fully restrained" when Deputy Smith tased him thirteen times, the tasing did not violate clearly established law. The bright-line "diving point" that the Eleventh Circuit has established, *see* App. 63a—allowing police to use substantial force so long as a person is not "fully restrained"—finds no support in the Court's cases, and Respondents do not point to any other circuit that has adopted a similar rule.

The outlier rule the Eleventh Circuit has created and that it then applied here, is dangerous. Following this rule, police could use nearly unbridled force against a suspect so long as he is not yet fully

handcuffed, even if: (1) he is effectively restrained; (2) the force does not assist with handcuffing, and (3) an officer involved in the arrest concedes that the force did not "help" the police further restrain the suspect—all the case here. But this Court's cases have always required police use of force to serve *some* purpose. By not requiring the same here, the Eleventh Circuit "decided an important federal question in a way that conflicts with the relevant decisions of this Court." Sup. Ct. R. 10(c).

II. THE ELEVENTH CIRCUIT DID NOT APPLY THE SUMMARY JUDGMENT STANDARD.

The summary judgment record included a wealth of evidence supporting the conclusion that the thirteen tases[1] police administered against Mr. Illidge while he was naked, unarmed, on the ground, and being handcuffed by two officers, served no legitimate purpose. This evidence includes

(1) Taser guidelines showing that tasing does *not* immobilize a person, which would help with handcuffing, but instead produces

[1] Respondents claim that Deputy Smith's "last four discharges of the Taser could not have had any effect on Illidge" because the taser prongs "failed to make a connection with Illidge." Resp'ts' Opp'n at 20. Respondents fail to explain why such purported misfires make Deputy Smith's conduct more reasonable, and, in any event, they misread the record. Their own expert opined that three of the last four tases made a "good connection with the subject," and that the last tase made a "probable partial connection with the subject." ECF No. 81-39 at 28-30 (Rep. of Bryan Chiles). The record therefore shows that Deputy Smith tased Mr. Illidge thirteen times after bringing Mr. Illidge to the ground and that altogether, Deputy Smith's taser logs "recorded a total of 37.2 seconds of delivered charge." *Id.* at 31.

strong involuntary spasms, which would hinder handcuffing. *See* Pet. at 11.

(2) Expert testimony explaining that a taser is used to bring a person to the ground so that hands-on restraint can be used, and that further tasing after a person is on the ground is ineffectual because tasing is not a "restraint" technique. *See id.* at 8.

(3) The critical testimony of Officer Butler, who, consistent with taser guidelines and the expert evidence, explained that Deputy Smith's tasing Mr. Illidge did not "help" the police handcuff Mr. Illidge or "benefit [them] any." *See id.* at 10. And that given this, the only reason for the repeated tasing would be to "shutdown [Mr. Illidge's] nervous system" and cause him "pain." *See id.* at 10-11.[2]

The Eleventh Circuit did not consider *any* of this evidence when deciding whether Respondents were entitled to summary judgment, even though it went the heart of whether Respondents violated clearly established law. By overlooking this evidence, the

[2] Contrary to Respondents' assertion, there is nothing "interesting[]" about Ms. Callwood relying on Officer Butler's candid testimony while "maintaining this lawsuit against [him]." Resp'ts' Opp'n at 20-21 n.15. Ms. Callwood has maintained this suit against Officer Butler because Officer Butler and Deputy Mills did not intervene when Deputy Smith was repeatedly tasing Mr. Illidge, as the law required. The district court did not reach this issue because it erroneously found that Deputy Smith's actions did not violate clearly established law. *See* App. at 36a.

Eleventh Circuit failed to apply this Court's governing precedent, which makes clear that, at summary judgment, *all* evidence must be viewed, and *all* inferences drawn, in favor of the nonmoving party, "even when, as here, a court decides only the clearly-established prong of the [qualified immunity] standard." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). The Eleventh Circuit "failed to view the evidence at summary judgment in the light most favorable to [Ms. Callwood] with respect to the central facts of this case." *Id.*

Respondents do not defend the Eleventh Circuit's failure to consider this evidence. Indeed, they too ignore the taser guidelines and expert testimony Ms. Callwood presented at summary judgment, both of which create a triable issue over whether any legitimate governmental interest supported Deputy Smith's tasing Mr. Illidge thirteen times while he was on the ground being handcuffed.

Respondents fleetingly address Officer Butler's testimony that there was no reason for Deputy Smith to continually tase Mr. Illidge other than to hurt him, but their arguments only confirm that this case cannot be resolved at summary judgment. First, Respondents suggest the Court should discount the testimony because Officer Butler was responding to "counsel's leading questions." Resp'ts' Opp'n at 21. This baseless evidentiary objection does not change the substance of Officer Butler's answers. And the time for any objection to the weight of Officer Butler's testimony is at trial.

Respondents next claim Officer Butler's testimony is "subjective" and thus has "no bearing on

a court's qualified immunity analysis." *Id.* at 22. Officer Butler's testimony was not "subjective." Rather, his testimony reflects a "reasonable officer on the scene['s]," *Graham*, 490 U.S. at 396, understanding of the need for continued tasing based on the objective facts and circumstances. This Court often considers officers' explanations of events when determining whether there was a reasonable need to use force. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (considering that "[Officer] Kisela says he shot Hughes because . . . he believed she was a threat to" a third party when deciding whether he was entitled to qualified immunity); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 n.1 (2015) (considering Officer Reynolds' testimony "that the officers had not been 'able to do a complete assessment of the entire room'" when deciding whether he was entitled to qualified immunity). The Eleventh Circuit had to consider Officer Butler's testimony alongside that of the other officers when deciding whether Respondents were entitled to summary judgment on qualified immunity grounds.

Then, after suggesting that the Court should disregard Officer Butler's testimony, Respondents try to use that same testimony to support their argument that Deputy Smith acted reasonably. *See* Resp'ts' Opp'n at 21-22. Respondents claim Officer Butler's statements that the tasing would have "shut down [Mr.] Illidge's nervous system," and that Mr. Illidge "was still actively resisting" when Deputy Smith tased him, legitimizes his taser use. *Id.* at 21. But right after saying this, Officer Butler testified that the tasing still did not "help" or "benefit" the police, and he agreed there was no "need" for the tasing after

he and Deputy Mills were "on top of [Mr. Illidge]" "apply[ing] the other restraints." ECF No. 134-4 at 81 (Dep. of David Butler). The clear import of Officer Butler's testimony was that Deputy Smith's repeated tasing did not help police restrain Mr. Illidge. And, in any event, competing inferences about the import of that testimony is an issue for trial.

Respondents also try to downplay Officer Butler's testimony by saying that he was merely opining "the Taser failed to have an effect on Illidge's active resistance to being secured in handcuffs." Resp'ts' Opp'n at 22. But that is precisely the point. Because the tasing did not help the officers handcuff Mr. Illidge, it did not serve a legitimate "governmental interest." *Garner*, 471 U.S. at 8. A reasonable officer in Deputy Smith's position would therefore "have understood that his delivery of some if not all, of the [] additional taser shocks violated [Mr. Illidge's] Fourth Amendment right to be free from the use of excessive and unreasonable force." *Meyers v. Baltimore County*, 713 F.3d 723, 735 (4th Cir. 2013). Furthermore, to the extent there is room to interpret Officer Butler's testimony, it must be interpreted in Ms. Callwood's favor at this juncture. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Eleventh Circuit was not free to ignore at summary judgment Officer Butler's testimony or any of the other evidence that favored Ms. Callwood. This is especially true given that the evidence bore directly on whether Deputy Smith violated clearly established law by continually tasing Mr. Illidge after he had been brought to the ground and was being handcuffed by two officers. Because the Eleventh Circuit flouted

well-established summary judgment standards, this Court should grant certiorari and further use its "summary reversal procedure." *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004).

Unable to defend either the Eleventh Circuit's failure to apply *Garner* and *Graham* or its failure to consider all the evidence at summary judgment, Respondents recast the facts to try to both diminish the cert-worthiness of this case and distinguish it from the Fourth, Sixth, and Seventh Circuit cases, which found summary judgment unwarranted under similar facts. However, their factual exposition is legally irrelevant or not viewed in the light most favorable to Ms. Callwood.

Respondents devote substantial space to describing what supposedly happened before police encountered Mr. Illidge. For example, they insist that Mr. Illidge had taken LSD. *See, e.g.*, Resp'ts' Opp'n at 2. But this is belied by the record. An autopsy found no LSD in Mr. Illidge's system, *see* ECF No. 81-37 at 17, and Nicholas Woodham (who Respondents use as the basis for this claim), told his mother that he did not know whether Mr. Illidge had taken any drugs.[3] *See* App. 13a. Moreover, what happened before police encountered Mr. Illidge is mostly irrelevant given that a qualified immunity analysis considers only "the facts and circumstances within [the officers']

[3] Nicholas Woodham's account of what happened is also dubious. He provided an affidavit to Respondents, but evaded process when Ms. Callwood tried to subpoena him. When he eventually was subpoenaed, he did not show for his deposition. *See* Appellant's Reply Br. at 3.

knowledge." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quotation marks omitted).

Thus, to determine whether Deputy Smith was entitled to qualified immunity for tasing Mr. Illidge thirteen times while on the ground being handcuffed, the relevant question is what was happening at the time of the tasing. As to this, Respondents pick and choose facts to say Mr. Illidge was "violently" resisting arrest (a narrative developed during this litigation). *See* Resp'ts' Opp'n at 9-10. They even say Mr. Illidge got "up from the ground and moved with the officers on top of him." *Id.* at 10.

Respondents' version of events is not the version most favorable to Ms. Callwood. The version of events most favorable to Ms. Callwood comes from the accounts that Deputy Smith and Officer Butler provided to internal investigators the day after the incident. These accounts are also likely to be the most accurate given their contemporaneousness and the fact that they were not given during litigation.

Officer Butler told investigators that Mr. Illidge "was laying on his stomach" and that he and Deputy Mills were on top of him "wrestl[ing]" "trying to secure his [arms]." 134-4 Tr. at 47-48, 53. Deputy Smith was "standing behind" them "controlling the Taser." *Id.* at 51-52. He said nothing about "violent" resistance or Mr. Illidge getting up and walking with him and Deputy Mills on his back. Deputy Smith similarly did not tell investigators that Mr. Illidge was resisting "violently" or that Mr. Illidge got back up after Deputy Smith tased him to the ground. Instead, Deputy Smith also said Mr. Illidge was "face down" with Deputy Mills and Officer Butler "on his back," that

Mr. Illidge was "thrashing" while they were trying "to get him handcuffed," so he "hit the arc switch on [his] Taser." ECF No. 144-36 at 4 (Audio Tr. of Ray Smith).

In fact, despite giving many accounts over several years, Respondents themselves have never claimed that Mr. Illidge got "up from the ground" after Deputy Smith's taser took him down. Respondents therefore use Gloria Warr's deposition testimony to support this assertion. This a particularly bold gambit given that: (1) this assertion is contradicted by Respondents' own recollections; (2) Respondents submitted an affidavit from Ms. Warr that contained materially false information, *see* Pet. at 9 & n.8; and (3) Ms. Warr expressly testified that she did not witness the tasing, ECF No. 134-10 at 51 (Dep. of Gloria Warr).[4]

In short, this is the version of events that the courts below had to consider at summary judgment: Mr. Illidge was on the ground with Officer Butler and Deputy Mills on his back wrestling to put him in

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[4] Respondents attempt to downplay the fact that they submitted a falsified affidavit from Ms. Warr below. First, they blame Ms. Callwood for not discovering the "inconsistent testimony." Resp'ts' Opp'n at 22. But it was Respondents' burden to correct any false information they presented to the courts. *See* Fed. R. Civ. P. 11. Indeed, their own representatives said they would correct the false information before submitting Ms. Warr's affidavit to the court, and then did not. *See* App. 31a; *see also* Pet. at 9 n.8. Respondents then suggest that the Court cannot consider the falsified affidavit because it was stricken from the record. Resp'ts' Opp'n at 22-23. Respondents miss the point. It is not the substance of the affidavit that the Court should consider. Rather, the fact Respondents knowingly submitted an affidavit with false information is relevant to Respondents' credibility and thus relevant to whether summary judgment should have been granted.

handcuffs when Deputy Smith tased him thirteen times. *See Scott v. Harris*, 550 U.S. 372, 378 (2007) ("In qualified immunity cases, [courts must] usually adopt[] . . . the plaintiff's version of the facts." (Quotation marks and citations omitted)).

III. RESPONDENTS CANNOT DISTINGUISH THIS CASE FROM CASES FROM THE FOURTH, SIXTH, AND SEVENTH CIRCUITS.

When considering the version of events most favorable to Ms. Callwood, this case is no different than *Meyers*, 713 F.3d 723, *Cyrus v. Town of Marengo*, 338 F.3d 856 (7th Cir. 2010), and *Landis v. Baker*, 297 F. App'x 453 (6th Cir. 2008) (unpublished). In all three cases, the courts of appeals held summary judgment was improper when there was evidence that police repeatedly tased a suspect after he had been brought to the ground and was being handcuffed. These cases are consistent with this Court's rule that any force that police use during arrest must serve *some* purpose. The law of the Eleventh Circuit, which turns on whether a suspect is "fully restrained," is not.

Respondents have no persuasive answer to the conflict between the Eleventh Circuit and three other circuits on this issue. They mainly claim that *Meyers* and *Cyrus* are distinguishable because there was "conflicting evidence regarding the extent to which the individual's [sic] resisted." Resp'ts' Opp'n at 26. But, as already explained, the evidence is conflicting here too. They say *Landis* is distinguishable because in that case, an officer hit Landis with a baton and Landis fell into a swamp. *Id.* at 27. But these factual

differences do not affect the court's holding that police violated clearly established law when they repeatedly tased Landis after he had been brought to the ground and was being handcuffed. *Landis*, 297 F. App'x at 462.

The Court should grant certiorari because the Eleventh Circuit's decision conflicts with decisions of the Fourth, Sixth, and Seventh Circuits. *See* Sup. Ct. R. 10(a).

CONCLUSION

The Court should grant certiorari and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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