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In The  
Supreme Court of the United States

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MICHAEL SLAGER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

—◆—  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

—◆—  
PETITION FOR WRIT OF CERTIORARI  
—◆—

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*Dated: April 29, 2019*

**QUESTION PRESENTED**

Did the district court deny Petitioner's right to due process when it found that the underlying conduct at issue here—Officer Michael Slager's shooting of Mr. Walter Scott, immediately after the two were engaged in a physical altercation on the ground, constituted second-degree murder and not voluntary manslaughter, when that finding was contrary to the record?

**PARTIES TO THE PROCEEDING**

The Petitioner is Michael Slager, the defendant and appellant in the court below.

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## OPINION BELOW

The Fourth Circuit Court of Appeals' decision affirming the conviction and sentence is reported at *United States v. Slager*, 2018 WL445497, 1a, and was published on January 8, 2019. The Fourth Circuit denied Slager's petition for rehearing on February 5, 2019. 88a.

## JURISDICTION

Petitioner pleaded guilty to Deprivation of Rights Under Color of Law, Resulting in Death in violation of 18 U.S.C. § 242 and a sentencing hearing was held between December 4<sup>th</sup>-7<sup>th</sup>, 2017 before the Honorable David Norton, district court judge for the District of South Carolina, Charleston Division. The district court issued its Sentencing Order and Judgment on January 16, 2018. Petitioner timely appealed, and the Fourth Circuit Court of Appeals issued its decision on January 8, 2019. The court then denied Petitioner's petition for rehearing on February 5, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment guarantees, in pertinent part, that no State shall deprive any person of life, liberty or property without due process of law. . . .

## STATEMENT

The district court's finding of second-degree murder is not supported by a fair, or accurate, reading of the record of Officer Michael Slager's sentencing proceeding. Officer Slager has been denied his right to due process. Specifically, the district court's reasoning, as offered when published to the courtroom on December 7, 2017



and in its written order, issued on January 16, 2018, JA 1849-1905, commits the following three errors:

First the district court clearly erred when it fully credited government witness, Feidan Santana's testimony without considering Santana's distance from these events as they were unfolding, the speculative quality of his testimony, and the fact that, in at least one material aspect, it was concededly erroneous. Next, the district court also clearly erred in discounting Officer Slager's testimony because it found his version of the shooting had "evolved" and when, in fact, Officer Slager testified at the state trial that Mr. Scott had used the taser against him. And lastly, the district court erred in discounting the findings of three expert witnesses whose conclusions supported a finding that the ground altercation between Officer Slager and Mr. Scott was much more provocative and violent than found by the district court. The district court erred, and this Court should grant cert.

#### **A. Relevant Facts**

The events of this early Spring morning encounter between Officer Michael Slager and Mr. Walter Scott unfolded quickly. That morning, Officer Slager was patrolling a high-crime area of North Charleston, South Carolina, alone. At the federal sentencing proceeding<sup>1</sup>, Lieutenant Wade Humphries of the North Charleston

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<sup>1</sup> Unless otherwise noted, all references are to the federal sentencing proceeding held in the J. Waties Waring Judicial Center in Charleston, South Carolina on February 4-7, 2017. But the district court noted in its order that it reviewed the state trial proceedings, so reference to those proceedings are indicated where appropriate. JA 1855, 1859 (comparing testimonies of Officer and Slager in both state and federal court proceedings).

Police Department testified to the conditions of this area, and local law enforcement's policies regarding "contacts" with members of the community. Lieutenant Humphries testified that this area had once been one of the top 4 or 5 most violent cities in the country. JA 1389. When Chief Zumalt took over command, "he had a different mindset" and he instituted a program of more citizen contact. JA 1389, l. 13. He wanted "officers more or less out on the streets making their presence known." JA 1389, ll. 16-18. Chief Zumwalt wanted his officers to have a "goal" of making a certain amount of "contacts" with people. He wanted his officers to stop cars. JA 1390. Based on an officer's meeting these "goals," they were then rewarded with terms of "days off, time off, vacation choice, holiday choice, equipment in their vehicles." JA 1390, ll. 12-15. The department's "goals" were to have 8 contacts a day. JA 1397, l. 19.

By all accounts, Officer Slager was an exceptional officer. Lieutenant Humphries testified that Officer Slager was "highly driven." JA 1392, l.1. He was "a highly motivated officer." JA 1392, l. 9. Humphries testified Officer Slager was his "go to man." JA 1394, l.1. He was a mature and senior officer, and he was "one that we could count on to get the job done." JA 1394, ll.10-11. He received an award from the department approximately 2 weeks before this shooting to recognize his accomplishments. JA 1395, ll. 12-15.

The area where Officer Slager was patrolling that day was known as a "high violent crime area." JA 1397, l. 13. In addition to this part of North Charleston's being an area known for its criminal activity, Lieutenant Humphries also testified, more generally, to how dangerous traffic stops could be. He testified that "[t]raffic stops

are one of the most dangerous things any law enforcement officer does.” JA 1399, l. 13-14.

A: Yes, sir, you don't know. In your head you may know what you are stopping, I might stop someone for a headlight out, but that driver thinks I'm stopping them because they just did some horrific crime. So I'm not-- I being whatever officer is stopping the car, might not be aware, that's why they're so dangerous.

JA 1399, ll. 16-21.

Within that setting, Officer Slager observed a broken tail light on Mr. Scott's car on April 4, 2015 in his designated patrol area. Per the policy of his department, he pulled him over.

From the video of the encounter, Defense Exhibit #7, JA 1912, obtained through use of Officer Slager's in-car camera, Officer Slager approached Mr. Scott's car from the driver's side and requested Mr. Scott's license, registration and insurance card. Officer Slager and Mr. Scott spoke, as a passenger sat in the car next to Mr. Scott. When Officer Slager asked about the registration and insurance card, Mr. Scott indicated that he was about to buy the car on Monday, and that he did not have those items in the car. Initially Mr. Scott told Officer Slager that he had just purchased the car. A review of the video shows Officer Slager's professional, non-confrontational demeanor.

Mr. Scott then got out of the car. Officer Slager told him to get back into his car. Mr. Scott complied. Then, 18 seconds later, Mr. Scott opened up his door, and began running. Officer Slager followed. At the time Officer Slager began following Mr. Scott, he had not received information back from NCIC. JA 712.

**B. Government Witness, Feidan Santana**

The prosecution's key witness, in both the state trial and federal sentencing proceeding, was Feidan Santana, a barber from the Dominican Republic. Santana captured some of these events on his telephone camera.

Santana testified that the first thing he saw that morning, as he was walking through this area on his way to work, was Walter Scott running. He observed Mr. Scott and Officer Slager then turn into an empty lot and he decided to run after them. JA 969. Santana lost sight of them momentarily while they were in the empty lot. JA 997. He then saw Officer Slager and Mr. Scott on the ground. JA 969. Santana also described what he thought was something that sounded electric. JA 972. Santana claimed that he never saw Mr. Scott on top of Officer Slager. JA 973. Government's Exhibit #26, frame 158 (JA 1659), and Government's Exhibit #13 (JA 1630), however, suggests otherwise. *See also* Government's Exhibit #25 and #27 (JA 1647, 1662).

According to Santana's testimony, after the ground altercation between Officer Slager and Mr. Scott, Mr. Scott got up from the ground "very fast." He described it as, "aggressively." JA 975. Santana noted there was a lot of movement, from both men, during this encounter. JA 984.

Santana reiterated this testimony about Mr. Scott's getting up quickly and aggressively:

Q: And did you see them get off the ground?

A: Yes.

Q: And did you say that Mr. Scott acted aggressively when he got off the ground?

A: He got right off the officer fast and aggressive, yes.

JA 1003.

At the state trial, Santana testified:

Q: And what happened when he got up did he move at the officer?

A: Yes. He moved-- he moved towards like this side. The officer was grabbing, grabbing him. And I say aggressively, I mean like if you holding me this way and I just tried to move and leave, you know, to get away from you.

JA 44.

At the federal sentencing hearing, Santana admitted he had some difficulty communicating what he observed because English is not his first language:

A: For me, for me, it's just the same way, you know, as I say to the prosecutor, I just can describe the position. My English is not a first language. The position where they were, there was a lot of movement, Walter Scott was on the ground, the officer was on top of Walter Scott. I say I don't know however you want to describe it, that's just the easiest way that I can describe it.

JA 999, ll. 3-9.

He reiterated that he saw Walter Scott act "fast and aggressive." JA 1003, l.

19.

Santana testified that Officer Slager repeatedly told Mr. Scott to stop. JA 1000.

### **C. The Ground Altercation**

It was a significant distance from the parking lot where Officer Slager stopped Mr. Scott to where Officer Slager ultimately shot Mr. Scott. *See* Defense Exhibit #84, JA 1839. After chasing Mr. Scott this distance, there was a ground altercation. It is clear from the testimony and physical evidence that a ground altercation did occur just prior to the shooting, a fact that the district court conceded in its order.

Lieutenant Charles Ghent, of the South Carolina Law Enforcement Division (SLED), confirmed that physical evidence corroborated the ground fight. He remarked on Officer Slager's disheveled clothing and minor injuries. He noted an injury on Officer Slager's right hand. JA 1072-73. He also testified as to additional evidence corroborating the encounter -- the broken screen on Mr. Scott's cell phone, yellow paint on the phone consistent with where the fight took place, a watch, wallet, and hat located on the ground. He also noted the wrist band on Mr. Scott's watch was broken off. JA 1090. *See* Defense Exhibits #65 and 66, JA 1668, 1669.

A government's witness, Agent Anthony Imel, a forensic image analyst with the FBI, testified that there was some kind of object in Mr. Scott's left hand. He believed it could have been a cell phone, given the location of the cell phone when it was recovered after the shooting. JA 1107. He, too, conceded there was an altercation or confrontation that occurred on the ground just prior to the shooting. JA 1143-44. He based that opinion on the "totality" of the investigation, including audio that he heard. JA 1145.

Defense counsel also presented significant, additional testimony to show a ground altercation occurred. Grant Fredericks, a forensic video analyst, testified there was clearly a fight on the ground preceding the shooting. JA 1167. *And see* Defense Exhibit #80, Slides 390-439, JA 1670. He also testified he heard Mr. Scott's statement, "Fuck the police." He heard Officer Slager state, "Let go of my taser or I'll shoot you." Fredericks also remarked on the tenor of Officer Slager's voice when he

signaled to his back-up police officer to “step it up.” JA 1179. He, too, noted an object in Mr. Scott’s hand. JA 1184.

David Hallimore, another defense expert and forensic audio analyst, testified that Officer Slager sounded absolutely “winded” when he called for back-up, which he testified was an indication that Officer Slager realized he was in serious trouble. JA 1212. He, too, heard Mr. Scott state “fuck police.” JA 1215. He, too, heard Officer Slager state, “Let go of the taser or I’ll shoot.”<sup>2</sup> JA 1218. He interpreted Officer Slager’s voice as his being in fear, and that there was “alarm.” JA 1221.

Defense expert Darko Babic testified, too. He was qualified as an expert, without objection, in the area of mechanical engineering and material science. JA 1466-68. Babic was asked to analyze the taser used in this case to determine whether electricity actually flew through the wires and metal probes that were deployed during this event. JA 1468. He analyzed the three probes he received and concluded there was no evidence that electrical current had gone through it; there was no “arcing.” JA 1481.

Defense counsel also called, in its case, the government’s forensic expert witness, FBI Agent Anthony Imel. Agent Imel testified that at the time of Santana’s witnessing these events, he was 136 feet from the incident location. Before that, he was at an even greater distance. JA 1285. Agent Imel also calculated that Officer

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<sup>2</sup> The district court did not credit this testimony because it could not hear it himself. JA 1856, fn. 4.

Slager's first shot at Mr. Scott occurred 1.44 seconds from when the two separated from their physical encounter. JA 1128, JA 1848.

In its Order, the district court found that voluntary manslaughter was not the appropriate cross-reference based on its conclusion that Scott was never "on top of" Officer Slager" nor did he believe that Mr. Scott ever obtained control of Officer Slager's taser. JA 1854. And see JA 1861. ("But Santana's state and federal testimony reveal that during the entirety of the ground altercation, Scott was on the bottom and did not assault or tase Slager."). The district court then made an adverse credibility finding as to Officer Slager, JA 1855, but fully credited the perceptions of Santana, who was, at closest, 136 feet from these events as they were unfolding. JA 1855. *See Anderson v. Russell*, 247 F.3d 125, 130-31 (4th Cir. 2001) ("In a rapidly evolving scenario such as this one, a witness's account of the event will rarely, if ever, coincide perfectly with the officers' perceptions because the witness is typically viewing the event from a different angle than that of the officer.")

**D. The District Court Erred in Fully Crediting Santana's Testimony When Santana was too Far from these Events to Perceive Them Accurately**

In its order, the district court found that it would credit Santana's account of what happened, which he viewed from a distance of 136-180 feet<sup>3</sup>, instead of Officer

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<sup>3</sup> Santana, in his state testimony, testified that he was 60 yards from where these events occurred at the time of his video-taping. JA 39. At the federal sentencing, government witness, Anthony Imel, testified Santana was 136 feet from Officer Slager and Mr. Scott at the time of the shooting, but farther away before that. JA 1285.



Slager’s account due to what he characterized as Officer Slager’s “evolving stories of what happened.” JA 1855.<sup>4</sup>

Nowhere in its order does the court even acknowledge that Santana was not close to these events when they happened. The uncontroverted testimony was that Santana was approximately 136 feet from Officer Slager and Mr. Scott when Officer Slager shot Mr. Scott. Before that, and during the crucial on-ground altercation, Santana was even farther away. The district court’s wholesale adoption of Santana’s testimony was error.

#### **E. The Speculative Quality of Santana’s Testimony**

But also, the district court, in its order, repeatedly credits Santana’s highly speculative testimony about what Santana **believed** was happening.<sup>5</sup> Per the order, the district court, after quoting a substantial amount of Santana’s speculative testimony, then adopted those “factual determinations” before its analysis of the voluntary manslaughter cross-reference. JA 1861. After concluding that he would “credit[]” Santana’s testimony, and discredit Officer Slager’s testimony, the court then proceeded to seemingly adopt Santana’s interpretations of these events, instead

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<sup>4</sup> The district court also refused to credit government witness expert Megan Fletcher (JA 1859, fn. 11), or defense expert witness expert David Hallimore (JA 1856, fn. 4), or defense expert witness Eugene Liscio (JA 1859), and when all three of them, analyzing the objective, physical evidence, presented testimony suggesting a much more violent encounter on the ground between Mr. Slager and Mr. Scott than that claimed by Santana.

<sup>5</sup> It is also not clear whether Santana testified from his independent recollection of the events, or from watching the same video footage that everyone else has access to.

of regarding Santana as the mere fact-witness that he was. For example, the district court appeared to credit Santana's testimony, describing Mr. Scott's actions, as "to be as if someone was trying to grab you and you didn't want them to control you." JA 1856. And, "Scott just tried to get away from the taser" and Santana "didn't see [the taser] in Walter Scott's hands." JA 1856. He also credited his testimony that "Santana later reiterated that Slager was on top at all times during the ground altercation, and that "[i]t was just [Scott] trying to get away from the taser. And when I say a lot of movement, I don't mean being in a steady position. I mean moving trying to stand up." JA 1856. And also, "Scott then, according to Santana, "got off" the ground and in a "determined" manner began to run away, at which point Slager began to fire." JA 1857.

It is unclear why the district court adopted these factual conclusions of what occurred during the ground encounter since it was videotaped and available for independent analysis (as was done by expert witnesses Grant Fredericks, David Hallimore, and Eugene Liscio). Indeed, the district court's adoption of Santana's testimony of the videotape which he could readily view is inconsistent with his rejection of Eugene Liscio's testimony regarding the trajectory of the taser ("However, Liscio's opinion about where the taser originated from is one that any viewer of the video can form. Therefore, the court does not consider Liscio's opinion regarding whose hand the taser was dropped as credible."). JA 1859

The adoption of Santana's interpretation of these events is also notable because the district court then failed to consider Santana's repeated testimony that,

just prior to the shooting, Mr. Scott moved “aggressively” towards Officer Slager. It also fails to mention Santana’s testimony that Officer Slager repeatedly told Mr. Scott to stop.

**F. Santana’s Testimony Is Concededly Erroneous**

The district court was informed by FBI Agent Anthony Imel that Mr. Scott probably had a cell phone in his hand at the time of the shooting, despite Santana’s consistent testimony that Mr. Scott did not have anything in his hands. During the government’s cross-examination of defense expert, David Hallimore, the ASUA asked, “Now, at the time that you were listening to the audio for the very first time, were you aware that during this incident, Walter Scott was on the phone with his mother?” JA 1230. Defense expert, Eugene Liscio also identified an object, probably a cell phone, in Mr. Scott’s hand. JA 1260. From this, it is clear that Santana did not have completely accurate perception of these events even though the government conceded that, at the very least, he had a cell phone in his hand during some portion of these events. The district court erred in relying on Santana’s testimony regarding these events, when even the government conceded that, at least in one material aspect, Santana’s perceptions were erroneous.

**G. Slager’s “Evolving” Versions of What Happened**

In discounting the testimony of SLED Agent Megan Fletcher, the district court found that “Slager never claimed in his initial statements to his supervisors or SLED, or even in his state court testimony, that he had been drive stunned by a taser, but raises that issue for the first time in his sentencing memorandum before this court.”

JA 1859, fn. 5. Also, in finding that it would discount Officer Slager's testimony, it pointed to what it characterized as "evolving stories." JA 1855. The district court's conclusions are not supported by the record.

A review of Officer Slager's November 29, 2016 state court trial testimony shows that, in fact, he did state that Mr. Scott used the taser against him. He testified before the jury:

A: In my mind at that time, people don't run from the broken taillight. There's always another reason. And with him running and continually escalating the situation, he's running from something he's also fighting me on the ground and he grabs my Taser, **he uses it on me**, tries to use it again, Mr. Scott is getting away-- he wants to get away for some reason he-- I don't know.

JA 292-93 (emphasis added).

Officer Slager also testified at the April 21, 2017 hearing that he remembered being "punched" in the chest by Mr. Scott. JA 731. The district court's finding that this aspect of Officer Slager's testimony "evolved" is belied by the record. Officer Slager consistently portrayed the ground altercation as being one that was very physical, and during which he was physically injured. Again, the district court, in its order, does not even mention the evidence supporting the injuries that Officer Slager received during this altercation.

But additionally, Officer Slager never gave a written statement regarding these events. In its order, the district court credits Agent Angela Peterson's "memorandum of interview" as being the "most accurate" record of what Officer Slager said during an interview conducted on April 7, 2015. JA 1882. During the first occasion of testifying to these events under oath, Officer Slager testified that he

believed Mr. Scott used his taser against him. The district court erred in finding that Officer Slager's recounting of these events "evolved" when Officer Slager testified at the state court trial that Mr. Scott used his taser against him.

#### **H. The Expert Witnesses Whose Testimonies Were Discounted by the District Court**

In finding Mr. Slager guilty of second-degree murder, the district court explicitly disregarded the testimonies of three expert witnesses, choosing instead to adopt Santana's version of these events, witnessed by him at a distance no closer than 136 feet. The district court erred in doing so because their testimonies were credible and important to the court's fact-finding mission.

##### **i. Megan Fletcher**

Megan Fletcher testified at a pre-trial hearing on April 24, 2017. She is an agent with the South Carolina Law Enforcement Division's trace evidence unit where, at the time of trial, she had worked for nearly 10 years. JA 890. She testified at the state court trial. She was asked to perform a fiber comparison analysis for Mr. Slager's trial. JA 893.

Pertinent to the claims before this Court, Agent Fletcher was asked to determine whether a taser was capable of creating damage to a polyester garment. She obtained an exemplar uniform shirt from the North Charleston Police Department and conducted experiments. She concluded that, in the drive stun mode, a taser is capable of damaging a polyester garment by creating melted fibers and causing holes in the garment. JA 894. She testified that heat was the cause of the

fiber damage. JA 894. She identified the damaged fibers by observing them with a microscope. JA 895.

She then was asked to examine Officer Slager's uniform on the left pocket area to determine if there was any damage to that area that could have been caused by a taser. JA 895. When she examined the shirt, she found individual fibers that showed characteristics of having been melted. JA 896. She did not, however, find any holes in the shirt. JA 896. She found that the kind of damage found on the uniform could have resulted from exposure to the stun drive mode of a taser for 1/2 second. JA 896.

She conducted this experiment by consulting with a couple of textbooks. JA 898. She consulted one particular textbook regarding fiber damage; the other, regarding characteristics of polyester. JA 898.

Q: And did that require any novel scientific technique for you to look at the fiber under the microscope and look at the picture in the book to determine the damage was similar?

A: That is part of a fiber analysis.

Q: And that's just part of the routine fiber analysis that you would do all the time.

A: If there is damage to that, it would be part of a routine fiber analysis.

JA 898, ll. 12-19.

She testified that, in conducting this experiment, she followed SLED's standard operating procedure, "as well as just practical procedures that are used in forensic fiber examinations." JA 901, ll. 15-16. She further testified that using a stereo microscope to examine an article of clothing or other fiber article is an accepted

practice for determining the physical characteristics of individual fibers, threads or weaves. JA 901.

Agent Fletcher also experimented with other sources of heat, including an iron, a laminator press, and a Bic lighter. These produced different characteristics than the taser. JA 899. Agent Fletcher testified they searched for peer-reviewed articles regarding the damage that could be caused by a taser to fabric and did not find any. JA 899. At the state trial, her expert conclusion was that there were damaged fibers on Officer Slager's left pocket that showed characteristics of having been melted, and that a taser could not be excluded as a possible source of that melting. JA 900.

The district court completely discounted this testimony. See Argument IV. Additionally, in discounting Fletcher's testimony, the district court found that "Slager never claimed in his initial statements to his superiors or SLED, or even in his state court testimony, that he had been drive stunned by a taser, but raises the issue for the first time in his sentencing memorandum before this court." JA 1859, fn.5. As earlier noted, that is not accurate.

**ii. David Hallimore**

Defense counsel presented the testimony of David Hallimore during the federal sentencing proceeding. Mr. Hallimore is a forensic audio analyst. JA 1192. A former Houston police officer, at the time of his retirement in 2016, he had spent almost his entire career as both an analyst in the forensic audio/video lab, and then as a supervisor of that lab. JA 1192. He is also involved in several standards-making groups. He is a member of the Organization of Scientific Area Committees, which is

funded by the federal government for purposes of creating forensic standards. He is on the digital evidence committee of that organization, and the chair of the forensic audio subcommittee. He is also a primary author for the best practices for forensic audio. JA 1193-94.

Hallimore received three different audio recordings in connection with his work on this case-- Officer Slager's in-car camera system which included the audio track, the dispatch audio, including the radio traffic from his hand-held police radio, and the Santana video. He was asked to enhance or clarify these audio recordings so they could be better understood. He explained that he had worked on "thousands" of cases. JA 1203. As the only audio lab in Texas, he received cases from all jurisdictions including the Texas Rangers and the FBI. JA 1203. He also has a highly developed skill of critical listening. JA 1204.

The information that he gathered was incorporated into Mr. Frederick's exhibit. JA 1202.

Reviewing the audio-video, Hallimore testified:

Well, in that I clearly hear the exhaustion in Officer Slager's voice. The-- he's having to take deep breaths between each phrase that he gets out, because he is absolutely winded. It certainly sounds very different than the initial traffic stop at the window, talking in a normal way. There, he's, you know, just, again, my critical listening, but I would like to think that, again, if your hearing is normal, that any average person can certainly hear the exhaustion and the windedness in that phrase where he's trying to call out the direction of where he's at.

JA 1212.

Q: If, by the tone of his voice, in your experience, we were at a green at the confrontation at the car, might have gone up to yellow when he got out of the car and back in, we're orange or red at this point?



A: Correct.

JA 1213.

Hallimore used a number of various techniques to enhance the quality of the audio, and to hear what was being said. He was, for example, able to slow down the tape to hear it. JA 1219. He applied different filtrations to allow the speech to be more clear. JA 1216.

Hallimore testified that he heard Mr. Scott state “fuck police” on Mr. Slager’s body-worn microphone. JA 1215. He was able to discern what that utterance on the recording was after playing it multiple times and applying different filtrations to it. JA 1216.

Hallimore heard “Let go of the taser or I’ll shoot” from the Santana video. JA 1218. To discern that, he listened to it repeatedly, filtered some of the noise, and turned up the volume of the utterance. He also slowed it down. JA 1219.

Hallimore again testified to the stress in Mr. Slager’s voice as all of this was occurring:

Q: Your interpretation of his voice is that he-- remind me again, what was your interpretation the way his voice sounds at that point? I’m speaking of the defendant at that point.

A: Yes, sir. It sounds stressed. I mean, I hear-- I would interpret it as fear even. It certainly, once again, I could be projecting my past and listening to all the recordings that I have, but generally when an officer, knowing that, you know, there is other units on the way, is having to say get here even faster, and you already know that they’re going as fast as they can, but that just tells me there was an alarm, there’s a certain stress in his voice.

JA 1221-22.

The district court did not credit Hallimore's testimony that Mr. Slager said "Let go of the taser or I'll shoot" because Santana testified he never saw Mr. Scott with a taser. Also, he was unable to hear it himself. JA 1856, fn. 4. It appears the district court did credit the finding that Mr. Scott said "Fuck the police." JA 1854.

### **iii. Eugene Liscio**

Eugene Liscio, a 3D forensic analyst, testified for the defense. Liscio studied aerospace engineering in Toronto, which is where he started his career in 3D technologies. JA 1232. He is a member of the Professional Engineers of Ontario, the American Society of Photogrammetry and Remote Sensing, and the International Association of Forensic and Security Metrology. JA 1232. Liscio teaches, as an adjunct professor at the University of Toronto where he teaches a 3D forensic reconstruction and mapping course. He is also a trainer for FARO, a laser scanner manufacturer. He conducts forensic training for law enforcement agencies throughout North and South America. JA 1234. He was qualified, without objection, as an expert in 3D forensic analysis and photogrammetry.

Liscio received the data he used from SLED, who collected it using a FARO scanner. JA 1237. Liscio's contribution to this case was that he analyzed the Santana video and the data collected by SLED to determine the positions of Mr. Scott and Officer Slager at the moments just prior to the shooting, and to identify the path, speed and origin of the taser that was found on the ground. This technology creates a 3D environment that allows an observer to view the objects in that space. JA 1234.

Liscio presented the laser scan data that was collected by SLED about 19 days after the shooting. JA 1235.

So the laser scanner data is really a collection of millions and millions and millions of points that are tightly packed together, and they're also colored. So when you look at it on a 3D program, you can move around and you can take measurements. So every point is a discrete coordinate or a discrete XYZ location. So you can take an enormous amount of measurements from the data.

JA 1235, l. 22 - JA 1236, l.3.

Assembling all of this data allows an observer to “virtually walk through the scene.” JA 1238, l. 1. Liscio testified he was capable of calculating distances. Liscio used Defense Exhibit #84, JA 1839, to explain his conclusions to the district court. Liscio testified that there were 30 inches from Officer Slager’s left foot to Mr. Scott’s right foot. JA 1247. Liscio identified the moving taser in the Santana video. JA 1248, JA 1252-53. Liscio determined that the final resting place of the taser was approximately 9 feet from where Officer Slager was standing. JA 1253. It was moving at an average speed of 9 feet per second. JA 1253. Liscio noted that Mr. Scott had a cell phone, or some object, in his hand. JA 1260.

Using this sophisticated technology, Liscio concluded a couple of things could have happened to account for the final placement of the taser. First, Mr. Scott threw the taser and it bounced on the ground. JA 1260-61. Or it could have hit Officer Slager’s foot when it bounced. JA 1261. But in this modeling, he determined the positions of Officer Slager and Mr. Scott and the final resting position of the taser. JA 1264. The district court discounted Liscio’s testimony because it “is one that any viewer of the video can form.” JA 1859. He also found that Liscio’s opinion regarding

whose hand the taser was dropped (Mr. Scott's) was not credible because it conflicted with Santana's testimony that Mr. Scott never had a taser in his hand. JA 1859.

The district court's findings are incredible given the sophistication of the technology used to analyze these events from the visual media available. It is also clearly not accurate to say that "any viewer of the video" can determine these conclusions since Liscio's 3D analysis of the data included SLED's FARO data which is not available by just watching the Santana video. The district court erred in discounting so much of the objective scientific data provided to the court, choosing instead to rely on the perceptions of Santana, who viewed these events from a distance of at least 136 feet. The district court erred by discounting this valuable evidence from three expert witnesses who analyzed the physical evidence using well-accepted scientific principles. Not only were these testimonies more objective than the subjective perceptions of Santana, they also painted a picture of a more contentious and provocative physical altercation between Officer Slager and Mr. Scott just prior to the fatal shooting.

### **WHY THE COURT SHOULD GRANT THE WRIT**

#### **A. The Decision Below Is Incorrect Because Voluntary Manslaughter is the Appropriate Cross-Reference**

The Fourth Circuit Court of Appeals erred in finding that the district court properly found second-degree murder to be the appropriate cross-reference under the facts of this case. The district court, in analyzing whether to apply the second-degree murder or voluntary manslaughter cross-reference found:

To decide the reasonableness of Slager's alleged "heat of passion" in confronting someone who fled after being stopped for a broken brake light, the court must determine what happened in the minutes immediately prior to the events captured by the Santana video. Most saliently, it depends on whether Scott was ever "on top of" Slager during the ground altercation and/or was in control of his taser, and whether Scott tased or attempted to taser Slager.

JA 1854.

The fact of that the ground altercation occurred at all appears to be of little to no consequence to the district court's ruling. Nor did the district court note Mr. Scott's "aggressive" movements just prior to the shooting, or Officer Slager's repeated admonitions to Mr. Scott to "stop."

"Murder is the unlawful killing of a human being with malice aforethought," 18 U.S.C. 1111, while "[voluntary] manslaughter is the unlawful killing of a human being without malice...[u]pon a sudden quarrel or heat of passion." 18 U.S.C. 1112(a). First-degree murder requires proof of premeditation, while second-degree murder simply requires proof of "malice aforethought, [which] may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *United States v. Williams*, 342 F.3d 350, 356 (4th Cir. 2003).

In its order, the district court finds that Officer Slager had "malice" because, as Officer Slager admitted in his plea, he fired eight shots at Mr. Scott while he was unarmed and running away. JA 1868. Later, it found that "[t]he Santana video

makes clear that at no point after Slager began to employ deadly force did Scott turn around, and at no point did Scott ever have a taser in his hand.” JA 1871.

The district court errs because it does not even consider that, just prior to the shooting, Officer Slager and Mr. Scott were on the ground in a violent altercation that left wounds on Officer Slager’s hands, a broken watch-band, and possibly a cracked cell phone. The district court does not, for a moment, acknowledge the extreme fear Officer Slager must have felt as he was on the ground, attempting to arrest someone who believed it in his best interest to flee rather than receive a traffic ticket, and when he was armed with a taser and a gun. The district court did not consider that Officer Slager’s taser appears to have not been effective against Mr. Scott, and that Officer Slager’s asking his backup to “step it up” suggested that Officer Slager realized he was in extremis during this encounter. Assuming *arguendo* that the district court was accurate and Mr. Scott never actually had the taser, that does not mean that Officer Slager was not deeply fearful of Mr. Scott’s getting either possession of the taser, or his gun, and using either one, or both, against him. The district court appears to assume that Officer Slager had nerves made of steel and was not at all emotionally affected by this unexpected, and sudden, physical altercation. The district court did not consider that it was a mere 1.44 seconds after this highly-charged encounter that Officer Slager first fired his weapon. The district court judge’s findings simply do not acknowledge the ever-present danger that police officers face, as has been repeatedly recognized by other courts. The Fourth Circuit Court of

Appeals erred in simply deferring to the district court's credibility determinations between Officer Slager and Santana.

The danger faced by an officer making a custodial arrest flows from the fact of the arrest itself and “not from the grounds for arrest.” *United States v. Robinson*, 414 U.S. 218, 234 n. 5 (1973). *And see Thornton v. United States*, 541 U.S. 615, 621 (2004) (A “custodial arrest is fluid and ‘[the] danger to the police officer flows from the *fact of the arrest* and its attendant proximity, stress, and uncertainty.”). This Court, too, has recognized that a suspect resisting arrest creates heightened danger. *United States v. Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003) (“The act of resisting arrest poses a threat of direct confrontation between a police officer and the subject of the arrest, creating the potential for serious physical injury to the officer and others”). *And see Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (“Headlong flight-- wherever it occurs-- is the consummate act of evasion; It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”). *See also Graham v. Connor*, 490 U.S. 386, 397 (1989) (explaining that courts must make “allowance for the fact that police officers are often forced to make split-second judgments-- in circumstances that are tense, uncertain, and rapidly evolving”).

And the cases relied on by the district court in its order do not support the district court's findings. JA 1868-1871.

In *United States v. Milton*, 27 F.3d 203 (6th Cir. 1994), the Sixth Circuit specifically noted that the defendant there was “unprovoked” when he fired shots into the victim's car. *Id.* at 208. *United States v. Conaster*, 514 F.3d 508 (6th Cir. 2008),

*cert denied*, 555 U.S. 9632 (2008) is similarly not relevant to this case because it involves a correctional officer who failed to render aid to an inmate. That is a much different factual situation than the one presented here. *United States v. Sharma*, 394 Fed. Appx. 591 (11th Cir. 2010) is another prison inmate death case. Here, the defendant intentionally moved one inmate into another inmate's cell with the intention that the first inmate harm the other inmate. Again, this is not a case where a police officer is immediately involved in an extremely dangerous ground altercation with a suspect just moments before fatal shots are fired. In *United States v Smiley*, 2014 WL 223381, the district court there, in overruling the defendant's sentencing objections, found that second-degree murder was appropriate (and not first-degree murder) when the defendant may have formed the intent to kill after the victim had escaped in his car. And, in *United States v. Ashford*, 718 F.3d 377 (4th Cir. 2013), this Court upheld a cross-reference for 2nd degree murder when the defendant "reignited the dispute by driving across town to retrieve his revolver hours after the initial altercation that morning." *Id.* at 384. Significantly, none of the cases cited by the district court in its order even comes close to the factual situation that is presented in this case. Indeed, none of the cases cited by the district court even involve the actions of police officers encountering difficult situations during the course of their duties. The Fourth Circuit erred by deferring to the district court's judgment in this case.

The federal case law is replete with acknowledgment of how difficult and dangerous being a police officer can be. As Lieutenant Humphries testified, even a



minor traffic stop can be an extraordinarily dangerous enterprise. The district court erred when he did not take those factors into account in assessing Officer Slager's mental state a mere moment before he fired his gun.

Officer Slager was alone that day, in a high crime area. He had fought, on the ground, with an unknown suspect who believed it in his best interests to flee from simple traffic stop than receive a ticket. He felt pressure on his body, either from a strike, or from his taser. He had injuries on his body, and he believed his taser had been taken from him. In a split second, he fired his weapon at Mr. Scott who had moved towards him, "aggressively." This factual situation does not support a finding of second-degree murder, and the district court erred in finding that it did, by uncritically adopting the testimony of Santana, that was clearly erroneous, and by overlooking facts that tended to support the highly provocative quality of the ground altercation just prior to the shots being fired.

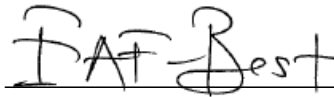
**B. This case is a good vehicle to address this issue of significant importance.**

The record in this case is fully developed as to these issues, and law enforcement officers throughout this country need more guidance to know if their actions are going to be considered 2<sup>nd</sup> degree murder or voluntary manslaughter. Officer Slager did not wake up that morning intending to murder anyone. But that morning, he was alone, in a high-crime area, attempting to apprehend a suspect who believed it was in his best interests to flee than to submit to a garden-variety traffic citation. After a physical altercation, within a mere moment, he fired his service

weapon. These facts simply do not rise to the level of murder, and respectfully  
Petitioner asks this Court to grant the writ.

**CONCLUSION**

This Court should grant the writ.

Handwritten signature of Elizabeth A. Franklin-Best in cursive script, written above a horizontal line.

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