No. 19-486

IN THE

Supreme Court of the United States

DONNETT M. TAFFE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN JEROLD THOMPSON, DECEASED,

Petitioner,

v.

GERALD E. WENGERT, IN HIS INDIVIDUAL CAPACITY, SCOTT ISRAEL, IN HIS INDIVIDUAL CAPACITY, AND SCOTT ISRAEL, IN HIS OFFICIAL CAPACITY,

Respondents.

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

REPLY BRIEF

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LIST OF PARTIES

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STATEMENT OF THE CASE

The Respondents fail to address the questions presented by Petitioner. Instead, to deflect from the issues at hand, Respondents respond only to questions of their own devise, thereby ignoring what is before this Court. Respondents argue that it was "improper" for Petitioner to present a detailed discussion of facts, falsely claiming that the version of facts of the nonmoving party Petitioner are "unsupported by any evidence, or reasonable inference." Respondents' Joint Brief, p. 3. They do not address any of these material facts that they claim are "unsupported by any evidence." That is because they cannot. Instead, to deflect from this deficiency, they refer this Court to the incorrect facts set forth in the Eleventh Circuit decision. (Id.). These are the "facts" which Respondents had presented to the Eleventh Circuit based upon their misrepresentation of the record evidence, which are in stark contrast to the extensive record evidence referred to in Petitioner's Writ that was presented to the district court and to the Eleventh Circuit. Petitioner's evidence came from the testimony of the Broward County Sheriff's personnel, including its forensic experts, its official records, including crime scene reports, diagrams and photographs, other law enforcement personnel, independent witnesses, and, of course, the dispatch tape. While the district court carefully examined that evidence, the Eleventh Circuit simply accepted the words of the moving parties.

Based solely upon the Respondents' representation of material facts, and failing to review the record evidence, the Eleventh Circuit stated:

> "Presented alone, these conflicting accounts would likely be sufficient to establish a genuine dispute that Thompson did not fire at Wengert. But the audio of the shooting resolves these conflicting accounts. The audio captures one or two initial shots, a call over the radio of 'shots fired,' someone—presumably Wengert—shouting 'put the gun down,' and *then* a barrage of gunfire." (Emphasis supplied). (App. A, p. 14a).

This statement by the Eleventh Circuit is patently false. In denying summary judgment, the district court had carefully reviewed the extensive record evidence, and properly determined that Petitioner had materially disputed "virtually every material fact" raised by Respondents. (App. B, p.32a). The district court did not and could not find any evidence on the audio of "one or two initial shots," nor "Wengert—shouting 'put the gun down,'" because it does not exist. The radio transmissions and the CAD reports, i.e., the dispatch reports in real time, do not reflect any "initial shots," nor is there any evidence on the dispatch tape of anyone saying "put the gun down." None of this was addressed by Respondents. The moving parties' representations and the conclusions of the Eleventh Circuit were clearly contradicted by the record evidence. The dispatch tape is clear.

Something that does not exist cannot "blatantly contradict" the nonmoving party's version of facts. What the record evidence demonstrates is that Wengert, a deputy sheriff with an extensive record of using excessive and deadly force, shot and killed Thompson, an unarmed black man. Thereafter, the record evidence reasonably

demonstrates that Wengert and his cohorts covered up that Wengert had shot and killed an unarmed man. Emergency rescue personnel were prevented from entering the scene for twelve minutes while Mr. Thompson lay in the hallway of the building writhing in agony asking for help. The rescue personnel were precluded from entering the building by deputy Yoder, who claimed they were searching the hallway for a second suspect, this, despite the fact that, well before the shooting, Wengert and Yoder had been informed that the second suspect was already many miles away, as demonstrated by the radio transmissions and the CAD reports. In stark contrast, Wengert claimed that he left the scene at this critical time for the purpose of moving his vehicle. Twelve minutes was more than sufficient time to place a gun at the far end of the hallway 51 feet from where Thompson had fallen, and salt the scene with one cartridge and one spent projectile. Wengert and his cohorts engaged in this cover up knowing that the unwritten policy of the Broward County Sheriff's office (Israel) of simply accepting the word of its deputies with respect to the use of force, and ignoring contrary evidence in order to justify the misconduct of its deputies would protect them.

Under Petitioner's version of record facts and inferences that can be drawn therefrom, no reasonable officer could have mistakenly believed that Thompson posed a threat of serious physical harm to anyone. The relevant material facts are in dispute. Wengert falsely claimed that he caught up with Thompson and encountered him only a few feet away in the elevator lobby, and that Thompson had shot at him two times. However the physical evidence shows no strike marks or projectiles to support any part of Wengert's false story. Wengert's

false claim that, from 63 feet away down a dark hallway, he could see Thompson with a gun in his hand, laying in a pool of blood, with his finger trying to squeeze the trigger, is likewise contradicted by the physical evidence. The gun which Deputy Yoder initially swore no one had touched, was 51 feet from where Thompson had fallen, and lacked any trace of Thompson's blood or fingerprints. The record evidence also shows that, despite being in possession of Thompson's clothing and swabs from his hands taken for the purpose of gun powder residue testing, Respondent Israel deliberately declined to have the residue test performed. This test certainly would have been evidence of whether or not Thompson had held and fired the gun. From this fact, a reasonable jury could have inferred that Respondents had reason to believe Wengert's story was false.

I. The Eleventh Circuit, in reversing a district court ruling denying summary judgment based upon the defense of qualified immunity, had accepted the moving party's version of the evidence and ignored the evidence of the non-moving party, contrary to the decisions of this Court and other Circuits.

Respondents' argue that the cases cited by the Petitioner simply do not apply, incorrectly finding, without basis, that:

> "because there simply was no dispute in this case. The Eleventh Circuit did not find any material facts in the Petitioner's favor. Again, as detailed above, the Deputy and the Sheriff sought review of the district court's failure to properly apply this Court's precedent, and the

> legal question of whether or not they violated the Decedent's constitutional rights. It was only in addressing those questions that the appellate court concluded that the Petitioner's claims were without basis." (Emphasis added). Respondents' Joint Brief, p. 12.

According to the Respondents', the Eleventh Circuit was able to reach this conclusion by "slosh[ing] [its] way though the fact bound morass of 'reasonableness'" in addressing Deputy Wengert's entitlement to qualified immunity." Respondents' Joint Brief, p. 13. In truth, there was no "morass." Simply listening to the dispatch tape would have demonstrated the clear misrepresentations of the moving parties. Instead, the Eleventh Circuit simply accepted and adopted those misrepresentations as its own.

Respondents argue that this matter does not warrant review by this Court "as there is no cognizable conflict or any other compelling reason warranting certiorari review." Respondents' Joint Brief, 3-4.

The integrity of the courts is of paramount importance. Where an appellate court accepts jurisdiction, it has an obligation to review that record in the light most favorable to the non-moving parties, and not simply rely upon the statements of the moving parties. The district court properly reviewed the record evidence prior to rendering its decision. The Eleventh Circuit did not.

Despite this Court's wide discretion to grant or deny review on a writ of certiorari, the Respondents argue that this matter is not an example of a "compelling reason" and that Petitioner's Writ "does not satisfy Rule 10 of this

Court." Respondents' Joint Brief, p. 3. According to the Respondents, a discussion of the material facts in dispute is "improper," and that this Court should look only to the factual version set forth in the Eleventh Circuit opinion. *Id.* In doing so, the Respondents ignore the reality that their "factual" version is "blatantly and demonstrably false." The Eleventh Circuit opinion in this case is analogous to a similar judicial error corrected by this Court in *Tolan v. Cotton*, 572 U.S. 650, 659 (2014), wherein it stated:

> "Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while 'this Court is not equipped to correct every perceived error coming from the lower federal courts,' *Boag v. MacDougall* 454 U. S. 364, 366 (1982) (O'Connor, J., concurring), we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents."

The Eleventh Circuit, by repeating the claimed "facts" presented by the Respondents which are contradicted by the record evidence, as well as, weighing the evidence in favor of said moving parties is contrary to the dictates of this Court. *Id.;* See also: *Scott v. Harris, 550 U.S. 372 (2007).* As another example, in a footnote, the Eleventh Circuit acknowledged that Deputy Yoder had changed his initial sworn statement that no one had touched the gun to the diametrically opposite testimony that he had kicked it 20 to 25 feet down the hallway (which was still

less than half the distance to the actual position where a gun was located), and proceeded to interpret this lie in the light most favorable to the moving parties. (App. A, 5a).

It is clear that the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10 (a).

A judicial decision which accepts, as its own, the moving parties' blatant misrepresentations is contrary to the dictates of this Court, and is in conflict with other Circuits.

As stated by the Sixth Circuit:

> "We may decide, as a legal question, an appeal challenging the district court's factual determination insofar as the challenge contests that determination as 'blatantly contradicted by the record, so that no reasonable jury could believe it.' *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) ; *Plumhoff*, 134 S.Ct. at 2020.
>
> We may not, however, decide an appeal challenging the district court's determination of "'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Because such a challenge is purely fact-based, lacking any issue of law, it 'does not present a legal question in the sense in which the term was used in Mitchell,'

> *Plumhoff,*134 S.Ct. at 2019, and is therefore not an appealable 'final decision' within the meaning of 28 U.S.C. §1291."

McDonald v. Flake, 814 F.3d 804, 812-813 (6th Cir. 2016).

Throughout the appeal process, Respondents have disputed the material facts of the case, repeatedly misrepresenting the record evidence and testimony, including denying the existence of evidence that, shortly after the shooting, Wengert left and returned to the hallway where Thompson lay dying, giving him and his cohorts the time and opportunity to plant evidence, all the while not allowing others, including paramedics, from entering the scene. As the record evidence demonstrated, Wengert, in his initial statement, admitted to leaving to move his vehicle and then returning to the shooting scene. It took twelve minutes. The twelve minutes that precluded emergency rescue personnel from treating the dying man, under the guise that they, Wengert and Yoder, were looking for another suspect in the hallway.

> "'Under *Johnson*, therefore, a determination that a given set of facts violates clearly established law is reviewable, while a determination that an issue of fact is `genuine' is unreviewable.' This jurisdictional limitation requires that, if 'the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal.'" (Internal citations omitted).

Moldowan v. City of Warren, 578 F.3d 351, 370 (6th Cir. 2009).

The decision of the Eleventh Circuit has departed from the accepted and usual course of judicial proceedings, thereby warranting review by this Court.

II. The Eleventh Circuit's findings of fact based upon the moving party's version of the evidence, and its acceptance of pendent jurisdiction based upon those facts, is in conflict with the decisions of this Court, other Circuits and Florida courts

The Eleventh Circuit improperly accepted pendent jurisdiction on the Petitioner's state law and Monell claims, stating that such claims are "inextricably intertwined" with the denial of qualified immunity. This is contrary to the dictates of this Court and other Circuits.

> "'Pendent appellate jurisdiction may be exercised only when the immunity issues absolutely cannot be resolved without addressing the nonappealable collateral issues.' *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 752 (6th Cir.2015) (editorial marks omitted) (quoting *Archie v. Lanier*, 95 F.3d 438, 443 (6th Cir.1996)); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir.1998) (emphasizing that 'pendent appellate jurisdiction is not meant to be loosely applied as a matter of discretion; rather, such jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without addressing the nonappealable collateral issue'). Such is not the case here."

Flake, 814 F.3d at 816.

To accept pendent jurisdiction based upon "blatantly and demonstrably false" factual determinations would be a clear departure from the accepted and usual course of judicial proceedings, thereby warranting review by this Court.

CONCLUSION

The Respondents have not, and cannot, explain away the patently incorrect findings of the Eleventh Circuit, which are in direct conflict with the record evidence.

For the foregoing reasons and as stated in her Petition, Petitioner respectfully requests that this Honorable Court grant certiorari.

Respectfully submitted,

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