

Case No. 19-609

In the
SUPREME COURT of the UNITED STATES

ERIN SHEPHERD AND TERRY REED,

Petitioners,

v.

ANGELA STUDDARD,

Respondent.

RESPONDENT ANGELA STUDDARD'S RESPONSE IN OPPOSITION TO
PETITIONERS' APPLICATION FOR STAY OF DISTRICT COURT
PROCEEDINGS PENDING DISPOSITION OF
PETITION FOR WRIT OF CERTIORARI

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**TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF
THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR
THE UNITED STATES COURT OF APPEALS**

Petitioners are former Shelby County Sheriff's Deputy Erin Shepherd and Shelby County Sheriff Deputy Terry Reed who have filed the current motion before this Honorable Court seeking extraordinary relief in the form a stay of District Court proceedings pending disposition of their Petition for Writ of Certiorari.

SUPREME COURT RULE 23

Rule 23.3 of the Supreme Court Rules states:

An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. **Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.**
...

1. This matter was originally stayed in the United States District Court for the Western District of Tennessee pending interlocutory appeal by the Petitioners to the Sixth Circuit Court of Appeals on February 22, 2019 (District Court ECF No. 182, Page ID 2835) just prior to the pretrial hearing in the District Court, which had been set for February 27, 2019. (District Court ECF No 182 Page ID 2835)
2. On August 12, 2019, the United States Court of Appeals for the Sixth Circuit issued an unanimous ruling affirming the District Court's denial of

summary judgment to the Petitioners on the basis of qualified immunity. (Sixth Circuit ECF No. 40) (District Court ECF No. 182, PageID 2835)

3. The Mandate was issued on September 3, 2019 by the United States Court of Appeals for the Sixth Circuit. (Sixth Circuit ECF No. 41) (District Court Nos. 179, 180, 182, PageID 2835)

4. The Sixth Circuit Court of Appeals of the United States held that “Studdard’s claim deserves resolution by a jury.” (District Court ECF No. 182, PageID 2835)

5. Petitioners never filed a motion for rehearing in the United States Court of Appeals for the Sixth Circuit.

6. Petitioners never requested a hearing en banc in the United States Court of Appeals for the Sixth Circuit.

7. Petitioners never filed a Motion to Stay in the United States Court of Appeals for the Sixth Circuit although authorized to file such motion by Rule 41(d)(1) of the Federal Rules of Appellate Procedure.

8. Petitioners filed a petition for writ of certiorari on November 8, 2019 to this Honorable Court. (District Court ECF No. 181). The Clerk of the United States Supreme Court docketed the petition on November 12, 2019. (District Court ECF No. 181)

9. Petitioners erroneously filed a Motion to Continue Stay of the proceedings in the District Court on December 11, 2019, pending the ruling from the United

States Supreme Court regarding the petition for writ of certiorari. (District Court ECF No. 184)

10. The Honorable District Court Denied Petitioners' Motion for Stay on December 12, 2019 based upon the requirements of 28 U.S.C. Section 2101(f). (District Court, ECF No. 186, PageID 2938)

11. The District Court set and scheduled this cause for jury trial on March 9, 2020. (District Court ECF No. 189, PageID 2946)

12. 28 U.S.C. Code Section 2101(f) states that:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. **The stay may be granted by a judge of the court rendering the judgment or decree** or by a justice of the Supreme Court, and may be conditioned on the giving of security...

13. Petitioners **never** filed a motion to stay proceedings in the United States Court of Appeals **prior** to filing the present motion before this Honorable Court as strongly emphasized by Rule 23.3 of the Supreme Court Rules.

14. Petitioners never filed a motion to stay the mandate in the Sixth Circuit Court of Appeals pending the filing of a petition for certiorari as allowed by Rule 41(d)(1) of the Federal Rules of Appellate Procedure.

12. **No “extraordinary circumstances”** exist in this cause regarding Petitioners' Motion to Stay District Court proceedings and the Petitioners failed to

seek a stay of proceedings in the United States Court of Appeals as required by Rule 23.3 of the Supreme Court Rules.

13. Throughout the Petitioner's Motion for Stay and for Writ of Certiorari, Petitioners' refuse to acknowledge and/or view all reasonable factual inferences in favor of the Respondent and simply attempts to incorrectly argue their position of the facts in violation of accepted rules of civil procedure and appellate review.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)

The Courts have held that “we do not have jurisdiction to resolve on an interlocutory basis disagreements over the district court’s reading of the factual record.” Diluzio v. Village of Yorksville, 796 F.3d 604, 609 (6th Cir. 2015)

INTRODUCTION

Petitioners, the losing party at the District Court and the United States Court of Appeals for the Sixth Circuit on the issue of the denial of qualified immunity now ask this Honorable Court to take the extraordinary step, contrary to this Honorable Court's normal practices, to put everything on hold pending their long shot attempt to obtain reversal by this Honorable Court, when there is no basis to do so.

Respondent respectfully states that there is no reasonable likelihood of four Justices of the United States Supreme Court granting review of the Honorable Sixth Circuit panel's 3-0 unanimous decision, and there is less likelihood that five Justices of the United States Supreme Court would vote to overturn the Sixth Circuit panel's well reasoned and considered opinion. Regardless, there is no

irreparable harm that would flow to Petitioners in any event as Respondent is seeking only a money judgment against the Petitioners in this 1983 action. Respondent respectfully prays that this Honorable Court deny Petitioners' Motion to Stay in this cause.

ARGUMENT

Petitioners could have but did not file a Motion to Stay Mandate in the Sixth Circuit pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure in this cause pending the filing of the petition for writ of certiorari to the United States Supreme Court. The reason the Petitioners did not is obvious. The Rules of the Sixth Circuit Court of Appeals make clear that the mandate normally issues regardless of the losing party's efforts to stay proceedings:

In the interest of minimizing unnecessary delay in the administration of justice, the issuance of the mandate will not be stayed simply upon request beyond the time necessary for disposition of a motion seeking stay. The mandate ordinarily will issue pursuant to Fed. R. App. 41(b) unless there is a showing, or an independent determination by this court, that a petition for certiorari would present a substantial question and that there is good cause for a stay

6th Cir. R. 41(a).

Petitioners present no substantial question and there is no good cause for a stay. "The issuance of a mandate does not affect a party's right to seek a writ of certiorari." 6th Cir. I.O.P. 41(d). If the prevailing party recovers a money judgment for money or property, that party may execute upon it" while certiorari is pending.

23-523 Moore's Federal Practice – Civil Section 523.04 (2016)

This Honorable Court follows the well accepted principles underlying 28 U.S.C. Section 2101(f), which is the statutory authority for a Judge of the United States Court of Appeals or this Honorable Court to grant a stay pending certiorari. Because staying the mandate is a form of temporary injunction that stops the normal litigation process, the Court's inquiry centers on whether the losing party can show both a likelihood of success on the merits and that they will suffer irreparable harm without a stay. Thus, in this context, the losing party has the burden to show there is a "reasonable probability that four Justices will vote to grant certiorari and a reasonable probability or "fair prospect" that five Justices will vote to reverse the judgment of the United States Court of Appeals and that party must also show irreparable harm will occur without the stay. 20A-341 Moore's Fed. Practice – Civil Section 341.14(2) (2016) Paying money damages is generally not considered irreparable harm. Birtcher Corp. v. Diapulse Corp. of America, 87 S.Ct 6 (1966)

Regardless, even if the losing party such as the Petitioners make the extraordinary showing to justify a stay, Rule 23.4 of the United States Supreme Court Rules states that:

A judge, court or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. ...

There is no basis for a stay in this cause. First, Petitioners did not first, file a Motion for Stay of Proceedings in the United States Court of Appeals for the Sixth Circuit and it is not proper to file said Motion in this Honorable Court absent setting out “...with particularity why the relief sought is not available from any other Court or judge...” Rule 23.3 Supreme Court Rules further requires extraordinary circumstances which Petitioners have failed to show:

...**Except in the most extraordinary circumstances**, an application for a stay will not be entertained unless the relief requested was **first** sought in the appropriate court or courts **below** or from a judge or judges thereof...

Rule 23.3 Supreme Court Rules.

Petitioners have failed to state with particularity why the relief sought and/or stay is **not** available from any other court or judge. Petitioners have **not** established “extraordinary circumstances” in requesting the stay. Further, Petitioners have failed to show that there is a “reasonable probability” that four Justices will vote to grant certiorari and a reasonable probability or “fair prospect” that five Justices will vote to reverse the judgment of the United States Court of Appeals for the Sixth Circuit. In the alternative, if this Honorable Court grants the stay, Respondent respectfully request this Honorable to condition the stay on the filing of a supersedeas bond conditioned on the satisfaction of the judgment in full, together with the costs, interest and damages for delay that may be awarded. Respondent respectfully adopts her response in opposition to Petitioner’s Petition for Writ of Certiorari and respectfully states:

- I. The Court of Appeals agree on the test applicable to the reasonableness of an officer's use of deadly force under the Fourth Amendment and have reached consistent results.
- II. The Sixth Circuit correctly applied this Court's Fourth Amendment jurisprudence.
- III. The Fourth Amendment violation was clearly established.
- IV. This case does not present an appropriate vehicle for review because material issues of fact remain to be resolved.

The shooting of Eddie by Shepherd and Reed, viewed in the light most favorable to Angela Studdard and/or Eddie Studdard was objectively unreasonable, under the totality of the circumstances considering and viewing the facts taken in the light most favorable to Respondent at the time of the shooting.

It is black letter law that individuals have a clearly established right not to be shot absent a probable cause belief that that individual poses a threat of serious physical harm. Mullins v. Cyranek, 805 F.3d 760, 765 (6th Cir. 2015)

In this case, the Plaintiff has presented admissible material evidence to show that Eddie Studdard was never verbally threatening anyone, never moving and/or walking towards, running towards or attempting to attack Defendant Shepherd, Defendant Reed or anybody else in the area of Big Orange Road through the sworn testimony of Deputy Kyle Lane.

Further, Plaintiff has presented admissible evidence that Deputy Reed and Deputy Shepherd were 34 feet or more away from Eddie Studdard when they shot

him. Plaintiff's Rule 26 Expert Jeffrey Nobles opines that the shooting was a violation of police practices by Defendant Shepherd and Defendant Reed.

Defendants' Rule 26 Expert Richard Lichten agrees that the shooting was unjustified and a violation of police practices if Eddie Studdard, at the time that he was shot, was thirty-four (34) feet away from Reed and Shepherd and standing still and not moving towards Defendant Reed or Deputy Shepherd or anyone else at the time that he was shot.

There is ample admissible evidence in the record of this cause to present a disputed issue of material fact on the issue of whether Eddie Studdard was a threat to anyone except himself, there is admissible facts that Eddie Studdard was **not** moving towards or walking towards Reed and Shepherd or anyone else at the time that he was shot. Also, Appellee has presented admissible facts and inferences that no one was in danger and/or in striking distance of Eddie Studdard regarding the distance that Eddie Studdard was from Reed and Shepherd at the time that he was shot where there is admissible evidence in the record that Eddie Studdard was 34 feet or more away from Shepherd and Reed when they shot him. Here there is ample admissible evidence in the record upon which the trier of fact could believe that Petitioners had no objectively reasonable belief that Studdard posed an imminent threat of serious bodily injury or harm to anyone except himself.

Therefore, based upon the totality of the circumstances known to Reed and Shepherd at the time of the shooting, the use of deadly force was objectively unreasonable and violated the Fourth Amendment. In this instance, there is ample

admissible proof that Eddie Studdard was never moving towards and/or attacking Shepherd and Reed or anybody else. Further, there is ample admissible proof in the record that Eddie Studdard was 34 feet or greater from the Defendants Reed and Shepherd when they shot him holding what they alleged was a knife but in reality, could have been nothing more than a box cutter handle without any razorblade in it. Regardless, Studdard never made any type of movement towards Shepherd, Reed or anyone else on the scene of Big Orange Road at or before the time that Studdard was shot. Studdard never threatened anyone verbally or physically.

Respondent submits that there is clearly established law with adequate controlling precedent cited in Sova v. City of Mt. Pleasant, 142 F.3d 898 (6th Cir. 1998) that complies with this Honorable Court's requirements stated in Kisela v. Hughes, 138 S.Ct. 1148 (2018) (per curiam) Sova v. City of Mt. Pleasant is published opinion and controlling precedent from the Sixth Circuit, Thomas Sova was suffering from depression and who was armed with two butcher knives and was harming only himself with the knives. In this case, Sova wanted the police to shoot him. Sova was in his parents' home and claims that the police officers shot him before he ever walked out of the kitchen door towards the officers. The Sixth Circuit reaffirmed the precedent of the Court and ruled that taking the facts in the light most favorable to Sova, that if the jury determines that the police officer shot Sova without an objective reasonable belief that he posed a significant threat of death or serious bodily injury to the officer or others, then the police officers'

actions of shooting Sova were legally unreasonable under the Fourth Amendment and therefore a violation of Sova's clearly established constitutional rights. Again, the facts in this case are very similar in that Sova, like Studdard, possessed a bladed weapon, with some type of mental issue but was not advancing toward the officers when he was shot. This precedent from the Sixth Circuit is analogous to the facts and law concerning the Studdard appeal and again reaffirms that a person has a right not to be shot unless perceived to be an immediate threat of death or serious bodily injury in this factually similar case.

Other 6th Circuit Cases:

Zulock v. Shures, 441 Fed.Appx, 294 (6th Cir. 2010) (Unpublished)

Scozzari v. Miedzianowski, 454 Fed.Appx. 455 (6th Cir. 2012)(Unpublished)

Lopez v. City of Cleveland, 625 F. App'x 742 (6th Cir. 2015) (Unpublished)

Other Circuits:

Pitzer v. Tenorio 802 F.3d 1160 (10th Cir. 2015) cert. denied by U. S. Supreme Court April 18, 2016;

See Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989);

Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006)

See Williams v. Indiana State Police Department, (No. 142523) Consolidated with

Brown v Wayne Blanchard and Walworth County Wisconsin, (No. 14-2808)

(7th Cir. 2015) cert. denied to U.S. Supreme Court April 25, 2016.

Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011)

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005)

All cases cited predate the shooting of Eddie Studdard in this cause and clearly establish and place Defendant Shepherd and Defendant Reed on notice that the shooting of Eddie Studdard when he was not moving toward or advancing towards either and he was at a distance of at least thirty-four (34) feet when he was shot that he could not have constituted an imminent threat to cause death or serious bodily injury to anyone nor was there any reasonable or probable cause that Eddie Studdard was an immediate threat to cause serious bodily injury or death to either Shepherd or Reed or anyone else. Respondent respectfully states that the Sixth Circuit properly applied in the law and specifically stated the notice required to put Petitioners on notice that shooting Edmund Studdard would be a violation of his constitutional rights. Kisela v. Hughes, 138 S.Ct. 1148, 1152-53 (2018) (per curiam) Petitioner's first issue is without merit.

Petitioners refuse to accept facts and/or inferences in favor of Respondent as required by Rule 56 of the Federal Rules of Civil Procedure but continue to argue their position of facts which are clearly in dispute. There is no jurisdiction for this Honorable Court to review Petitioners' claims that the District Court and/or Court of Appeals erred in constructing its view of the facts in the light most favorable to the Respondent.

Further, just because the Courts must look at the circumstances through the eyes of a reasonable officer does not mean that the Courts must accept the officer's subjective view of the facts when making the assessment. Rather, the Courts must conduct an **objective** reasonable officer

analysis using the facts in the in the light most favorable to the plaintiff. Bougress v. Mattingly, 482 F.3d 886, pages 887-889 (6th Cir. 2007). The Sixth Circuit properly found that Petitioners were not entitled to qualified immunity in this cause.

The availability of interlocutory appeal from the denial of qualified immunity is an exception to the general rule that an appeal can be taken only from a final judgment. But that exception is a limited one. Johnson v. Jones, 515 U.S. 304, 319-20 (1995) Thus we have jurisdiction to consider a defendant's claim that the facts alleged by the plaintiff, if proven, would not show a violation of clearly established law... but not to consider a defendant's claim that the district court erred in constructing its view of the facts in the light most favorable to the plaintiff, ... to retain our jurisdiction under Johnson, we consider only the legal issues and interpret Mattingly's appeal as conceding, for these purposes only. The facts as given by Bougress. ... Because this case comes to us on summary judgment, we construe the facts in the light most favorable to Bougress. Fed. R. Civ. P. 56(c) If Bougress can prevail under those facts, the case is inappropriate for resolution on interlocutory appeal and must be remanded. As we have held, when the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of (a) claim of immunity. Branadensburg v. Careton, 882 F.2d 211, 215-16 (6th Cir. 1989)

Bougress v. Mattingly, 482 F.3d 886, 887 (6th Cir. 2007)

As a result, Petitioner's Second issue is without merit.

Again, the Respondent has presented the accepted law regarding Petitioners' third issue that an officer's actions must be **objectively reasonable** in light of the totality of the circumstances.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit properly denied qualified immunity to Shepherd and Reed because their conduct in shooting a man holding a boxcutter without a razor and/or what appeared to be a bladed weapon was not objectively reasonable under the totality of the circumstances facing the Petitioners on July 7, 2016. Shepherd and Reed were on notice that shooting Eddie Studdard was a violation of his established constitutional rights when Studdard was shot when he was not moving towards Shepherd and Reed or anyone else, holding the bladed weapon to his own throat, not threatening anyone except himself, made no verbal or physical threats to anyone, was passively resisting at best, was not a fleeing felon and was at least 34 feet away from Shepherd and Reed and not within a distance to anyone that Studdard would constitute a threat of serious bodily injury to anybody. The totality of the circumstances in this appeal presents an obvious case involving the violation of Eddie Studdard's clearly established rights. Regardless, existing precedent in the Sixth Circuit placed the constitutional question beyond debate and the precedent cited by Respondent squarely governs the issue in this appeal. Respondent has further provided authority from other Circuits that establishes a consensus of cases of persuasive authority which clearly established Eddie Studdard's constitutional right to not be shot by Shepherd and Reed. As a result, Respondent respectfully request that this Honorable Court deny Shepherd and Reed's Petition in this cause and to remand this matter to the District Court for jury trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Daniel A. Seward, Attorney for Plaintiff, do hereby certify that I have served a true and correct copy of the foregoing Response via Federal Express on Mr. John Marshall Jones and Mr. E. Lee Whitwell, Attorneys for Defendants on this the 27th day of December, 2019.

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/s/Daniel A. Seward

A handwritten signature in blue ink that reads "Daniel A. Seward" with a stylized flourish at the end.