

No. 19-753

IN THE
Supreme Court of the United States

MICHAEL HUNTER;
MARTIN CASSIDY; CARL CARSON,

Petitioners,

v.

RANDY COLE; KAREN COLE; RYAN COLE,

Respondents.

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

REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Lieutenant Cassidy, Officer Hunter, and Officer Carson present the same legal issues and rely on the same evidentiary record this Court exercised jurisdiction over in the Officers' prior Petition for Writ of Certiorari in Case No. 16-351, *Hunter v. Cole*, 137 S. Ct. 497 (2016). The District Court and the first Fifth Circuit panel that analyzed the facts expressly recognized that the Officers accepted the District Court's factual findings and the Officers urged immunity within factual findings the District Court made when it identified evidence in the light most favorable to the Respondents. This is the method this Court has set out for appropriately analyzing immunity, so the Court still has jurisdiction to apply immunity.

The central undisputed material facts are that Ryan Cole held a gun in his hand with his finger on the trigger while turning his body toward Officer Hunter who stood exposed to risk of serious injury without any available cover only a few feet from Cole. Respondents urge the Court not to analyze this undisputed evidence under this Court's controlling legal standards. Instead, Respondents ask the Court to substitute essentially all the undisputed facts with their self-serving *characterizations of and arguments about* mere tidbits of the evidence. Little analysis is necessary to discover that Respondents' characterizations and arguments regarding the few facts they mention is woefully void of necessary contextual information. This Court should analyze the material facts Petitioners correctly present under this Court's relevant legal standards, and grant qualified immunity to Lieutenant Cassidy and Officer Hunter because they did not violate clearly established law.

This Court should also correct the Fifth Circuit's blatant refusal to apply *Manuel v City of Joliet*, 137 S. Ct. 911, 921 (2017), which precludes the Fourteenth Amendment claim asserted against Officer Carson.

REASONS FOR GRANTING THE PETITION

- I. Assuming the barrel of a gun was not yet pointed directly at Officer Hunter when he or Lieutenant Cassidy shot Ryan Cole, clearly established federal law did not obviously prohibit either officer from firing to stop Cole from continuing to move his firearm toward Officer Hunter even if an officer had not shouted a warning and waited to determine whether the imminent threat to Officer Hunter's life that Cole's actions presented had subsided after the warning.**
 - A. The Court has jurisdiction to analyze and apply clearly established law in this case under the undisputed facts in the summary judgment evidence and even disputed facts, since the contested facts are presented in the light most favorable to the Respondents.**
 - 1. The Officers have presented an accurate and complete record for the Court's analysis of qualified immunity.**

The legal standards that govern qualified immunity in this case were clearly established by October 24, 2010 when Lieutenant Cassidy and Officer Hunter encountered Ryan Cole, and the facts under which those legal standards must be applied were documented in the District Court

record by December 22, 2014 when that court issued its summary judgment opinion. On that record, in 2016 this Court exercised jurisdiction over those facts and the clearly established law that applied to them, when this Court granted the Officers' petition for a writ of certiorari and vacated the Fifth Circuit judgment that was based on the rationale the circuit court lacked jurisdiction to apply immunity in this case. (App. 173a).

This Court remanded the case to the Fifth Circuit for its further consideration under this Court's decision in *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (*per curiam*), wherein this Court had exercised jurisdiction to decide qualified immunity on a summary judgment record. The facts in this case, and the law that governed those facts when Lieutenant Cassidy and Officer Hunter faced Cole, have not changed so the Court should reject Respondents' efforts to avoid this Court applying its precedent to the material facts in this case. This Court provided the Fifth Circuit a second opportunity to properly decide immunity, but the Fifth Circuit did not do so. This Court still has jurisdiction to analyze and apply clearly established law under all the undisputed facts in the summary judgment record and even disputed facts, provided the contested facts are viewed in the light most favorable to the Respondents. Compare *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); with *Johnson v. Jones*, 515 U.S. 304, 314 (1995). Lieutenant Cassidy and Officer Hunter implore the Court to decide immunity.

From the outset of this litigation, Lieutenant Cassidy and Officer Hunter have supported their immunity claims with undisputed facts and, when facts are disputed in any way, viewing those facts in the light most favorable

to Respondents in accordance with *Johnson* and *Behrens supra*. While the Officers disputed some of Respondents' factual contentions including: that Cole never pointed his gun at Officer Hunter; and Cole always pointed his gun toward his own head; and Cole was not aware of Officer Hunter's presence; and various opinions Respondents' experts reached. While genuine factual disputes could be resolved at trial by a jury, *Johnson*, 515 U.S. at 314, resolution of immaterial disputes is simply not necessary for this Court to decide immunity. Therefore, the Officers have asked the courts to assume all disputed facts in the light most favorable to the Respondents, and simply apply the relevant clearly established legal authorities to facts that support Plaintiffs' contentions.

To that end, the Officers adopted, solely for the purpose of applying immunity, the *facts* Respondents' experts provided because the District Court stated in its opinion, "the [District] Court relies largely upon the expert testimonies of [Tom] Bevel and [Timothy] Braaten," for the purpose of determining the evidence most favorable to Respondents. (App. 206a, 7a). Throughout the District Court opinion, that Court expressly cited testimony from Respondents' experts as the Court's source of facts. (App. 197a, 202a-207a, 215a).

Throughout their brief, Respondents constantly accuse Lieutenant Cassidy, Officer Hunter, and Officer Carson of being liars who have allegedly changed their stories about the facts, but the record refutes those accusations. The Officers' contentions are simply that even if a factfinder concluded that Cole never pointed his gun at Officer Hunter, Cole always pointed his gun toward his own head, Cole was not aware of Officer Hunter's

presence, and believed all of the opinions Respondents' experts reached, nonetheless, an objective officer still could have reasonably believed Officer Hunter's life was in imminent danger if Cole continued to move while holding his gun as he indisputably did.

The District Court opinion well-demonstrates the Officers' adherence to the *Behrens* procedure:

“Defendants argue that even accepting all of Plaintiffs’ facts, they are entitled to qualified immunity... Defendants contend that the officers’ decision to shoot Cole would still be objectively reasonable on Plaintiffs’ facts because Cole posed an immediate danger to the officers.... ‘Cole was holding a loaded gun, with his finger on the trigger, while he was turning toward and then facing Officer Hunter. Cole could have shot Officer Hunter before Hunter could react and take action to defend himself.’ Defendants argue that a reasonable officer could have feared for his life in such a situation and would not have to wait until fired upon to defend himself.” (App. 204a).

The initial Fifth Circuit panel analyzing this case similarly acknowledged the Officers presented their appeal in the form required by this Court.

“Accepting the Cole’s best version of the evidence, as they must, Officers Cassidy and Hunter argue that shooting Ryan was not objectively unreasonable – that he presented an immediate threat of serious harm when they fired.” (App. 128a).

The initial Fifth Circuit panel, likewise, determined the evidence shows the following facts Respondents also accuse the Officers of lying about:

- “At the time they fired, the officers were aware that Ryan had been walking around the neighborhood holding a gun to his head, and that he had not surrendered to other officers who came in contact with him.”
- “Both officers were aware that Ryan had brought guns to Eric Reed, Jr.’s house, and Officer Cassidy knew that there had been a disturbance at the Cole house the night before.
- “The officers were aware that Ryan had told Eric not to try to take his remaining gun, and that he did not ‘wanna use it on’ him.”

(App. 129a-130a, 81a-82a).

Lieutenant Cassidy, Officer Hunter, and Officer Carson simply present the disputed facts in the light most favorable to Respondents for purpose of applying clearly established law.

2. The record, viewed in the light most favorable to the Respondents, supports immunity.

In a similar attempt to avoid appropriate analysis of the facts under controlling law, Respondents’ brief demonstrates that they ask the Court to substitute record facts with their naked *characterizations of and arguments*

about mere tidbits of the evidence, and ignore all the other evidence that provides context for proper evaluation of the facts. Little analysis is necessary to discover that Respondents' characterizations and arguments regarding the few facts they mention is woefully incomplete and entirely void of relevant contextual information. In contrast to the accurate and complete factual record Lieutenant Cassidy and Officer Hunter have presented, Respondents urge the Court to accept their characterization of the events which suggests the dangerous, uncertain, rapidly evolving events that occurred over a 3-5 second span of time must be unreasonably construed through a few, *but not all*, snapshots of time that would be indiscernible to a reasonable officer at the scene.

Most prominently, however, Respondents seek to avoid the evidence their own experts have provided, even though the District Court unequivocally identified Respondents' experts as the source of facts construed in the light most favorable to the Respondents. (App. 7a, 206a). The District Court found the following facts, in the light most favorable to Cole. "Cole kept the handgun aimed at his own head **as he turned to face the Officers**, never pointing the handgun at Officer Hunter." (App. 202a) (emphasis added). "Cole was initially facing away from the Officers **at a 90-degree angle**, holding a gun directed toward his own head, when he was first shot by the Officers." (App. 203a) (emphasis added). "[O]ne bullet entered [Cole's] left arm above the elbow and continued into his body." (App. 203a). "**As [Cole] was turning toward the Officers, one of the Officers shot [Cole]** with the second bullet, which grazed his left arm." (App 203a). The District Court stated these facts, in the light most favorable to Respondents based on the testimony of Respondents' experts. However,

Respondents ask this Court to assume these facts don't exist.

The Officers ask the Court to “slosh [its] way through the factbound morass of ‘reasonableness,’” this Court’s precedent requires, and apply those facts to the established legal standards. *See Scott v. Harris*, 550 U.S. 372 (2007). Respondents instead advocate the Court make no real analysis of the facts, but “this area [of the law] is one in which the result depends very much on the facts of each case.” *See Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). The facts of this case support immunity.

B. No body of well-established legal authority in October 2010 informed Lieutenant Cassidy, Officer Hunter, or any other reasonable officer that settled law prohibited every officer from firing to stop an armed, mentally unstable, person from moving a firearm in the direction of a nearby officer.

The only things that have changed since this Court last exercised jurisdiction over this case are the mutating legal theories Respondents and the Fifth Circuit claim Lieutenant Cassidy and Officer Hunter were required to discern and apply in 2010, even though the Fifth Circuit and Respondents apparently did not recognize the current legal theory until *en banc* rehearing in the Fifth Circuit. (Judge Jones’ dissent App. 31a-34a). To deny immunity, this Court’s authorities require that every reasonable officer would have understood in October 2010 that a mentally disturbed man with his finger on the trigger of a gun who is turning his body toward an officer standing in an open area a few feet away would pose **no threat** to

the nearby officer's life, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). It is not difficult to understand why Petitioners failed to make that connection years sooner.

Despite providing no analysis supporting their conclusion there was no threat, Respondents and the Fifth Circuit rely on *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Baker v. Putnal*, 75 F.3d 190, 193 (5th Cir. 1996) as clearly establishing the law applicable to what they characterize as this "obvious case." (App. 18a). The basis of this "obvious case" conclusion is the opinion of judges, reached in the safety of their chambers, that Officer Hunter was not exposed to any threat from Cole. The absurdity of the conclusion Cole was not engaging in potentially deadly conduct is evidenced by the fact that when Cole's own gun discharged, he nearly killed himself. (App. 9a).

Evaluating any use of force requires the Court to consider the controlling facts from the perspective of an objectively reasonable officer at the scene. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Coles ignore the Amici Curiae contribution which demonstrates the perspective of an officer at the scene by providing links to a video of an actual shooting (Amici Brief pp. 9-10). The Amici's example demonstrates that during the final 3-5 second encounter between Cole and the Officers, a trained police officer would know that even if Cole held his gun pointed at his own head, Cole could have immediately moved the gun from pointing at his own head to open fire on Officer Hunter before the officers could react to stop that lethal threat. (Amici Brief pp. 9-10, citing the April 13, 2019 incident in Volusia County, Florida).

The suspect in the Volusia County incident fired a gunshot while running away. While running, the suspect then slightly turned and fired, wounding the Deputy in the head. Immediately prior to firing, the suspect had held his handgun against his own head while running. Against the factual background of this case and the similar Volusia County incident, neither *Garner* nor *Baker* provide any notice to Officer Hunter or Lieutenant Cassidy that their actions were prohibited because Cole posed no threat.

The suspect in *Garner* was a non-dangerous unarmed teenager shot while fleeing away from the officer. *Garner*, 471 U.S. at 21-22. **In *Garner* this Court specifically stated that if the suspect had been armed, that fact “would present a different situation.”** *Garner*, 471 U.S. at 21.

In *Baker*, Sergeant Putnal fired a shot into a car when Baker began to turn toward the officer, but three eyewitnesses testified Baker was not holding a gun when he was shot, and the gun recovered after the shooting was under the car seat. *Baker*, 75 F.3d at 198.

Unlike the facts in *Garner* and *Baker*, it is undisputed that when Cole was shot, he visibly held a gun in his hand with his finger on the trigger as he turned toward Hunter. That fact alone “present[s] a different situation.” *Garner* at 21.

This Court has repeatedly rejected the notion that *Garner* provides clearly established law. *Brosseau*, 543 U.S. at 205; *Mullenix supra*; *White v. Pauly*, 137 S. Ct. 548, 552 (2017). This Court should consider the conflict between the Fifth Circuit’s application of *Garner* and *Mullenix* and the Tenth Circuit’s application of those

cases after this Court's remand in *White*. See *Pauly v. White*, 874 F.3d 1197, 1222 (10th Cir. 2017) recognizing that *Garner* is not specific enough guidance to comply with the *Mullenix* requirements.

C. Unless this Court exercises its authority, the Fifth Circuit will not likely comply with this Court's caselaw.

Judge Smith's dissent explains that the headcount of nine active judges joining the majority in this case demonstrates the Fifth Circuit *will not* comply with this Court's settled caselaw unless this Court exercises its authority. (App. 54a n. 1). Tellingly, eight of the nine active judges joining the majority opinion herein were in the group of nine active judges who also voted to deny *en banc* review in *Luna v. Mullenix*, 777 F.3d 221, 222 (5th Cir. 2014).¹ Judge Jones' dissent carefully explains the majority's opinion commits the same *Luna* errors this Court corrected in *Mullenix*, despite this Court's remand to reconsider the case in light of *Mullenix*. (App. 32a-35a). This Court should again require the Fifth Circuit to adhere to this Court's caselaw by reversing the judgment.

1. The eight active judges voting to deny *en banc* review in *Luna*, who also joined the *Cole III* majority, are Judges Stewart, Dennis, Elrod, Southwick, Haynes, Graves, Higginson, and Costa. *Cole III*, 935 F.3d at 445. (App. 2a).

II. The Fifth Circuit also failed to adhere to this Court's precedent which has expressly rejected prosecuting claims under the Fourteenth Amendment that are governed by the Fourth Amendment.

This Court held in *Manuel v. City of Joliet*, 137 S. Ct. 911, 918 (2017), discussing that as far back as 1994, five Justices agreed, the Fourth Amendment governs any claim based on an alleged unlawful pretrial deprivation of liberty. (Citing *Albright v. Oliver*, 510 U.S. 266, 271-73 (1994)). Despite this Court's controlling precedent from *Albright* and *Manuel supra*, the Fifth Circuit denied immunity to Officer Carson on a claimed unlawful pretrial deprivation of liberty, prosecuted under the Fourteenth Amendment. (App. 12a, 105a). Not only has this Court expressly rejected such claims, Officer Carson certainly did not violate clearly established law by relying on this Court's precedent in that regard because this Court determines clearly established law and decides when the law is established. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018).

CONCLUSION

For these reasons, Petitioners ask this Court to grant the Petition for Writ of Certiorari, apply this Court's legal authorities to the facts evidenced in the record, and enter judgment in favor of all three Petitioners.

Respectfully submitted,

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