No. 10- 10-434 SEP 27 2010

IN THE

Supreme Court of the United States

CITY OF SANTA ROSA; RICHARD CELLI, Police Officer; TRAVIS MENKE, Police Officer; and PATRICIA MANN, Police Officer of the SANTA ROSA POLICE DEPARTMENT,

Petitioners,

v.

PATRICIA DESANTIS, Guardian Ad Litem; RICHARD DESANTIS, deceased, and as Guardian Ad Litem; DANI DESANTIS, a minor, TIMOTHY FARRELL, a minor; ADRIANNE DESANTIS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CAROLINE L. FOWLER, CITY ATTORNEY
Counsel of Record
City of Santa Rosa
100 Santa Rosa Avenue, Room 8
Santa Rosa, CA 95404
(707) 543-3040
cfowler@srcity.org

Attorneys for Petitioners

232443

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Should qualified immunity be denied to an officer forced to make a split-second decision to shoot a deranged man, believed to be armed, who continued to charge directly at the officer after a less lethal projectile failed to deter his progress because alternative force options were available to other officers at the scene but not to the individual officer?

2. Can the conduct of officers in making a split-second decision to shoot a deranged man, believed to be armed who charged at the officers after a warning shot from a less lethal weapon failed to deter his progress, evidence a purpose to harm without legitimate law enforcement purpose sufficient to support a Fourteenth Amendment claim against the officer?

3. Should a court deny qualified immunity based only on a portion of the testimony of the plaintiff that is taken out of context without consideration of the totality of her testimony when six police officers and an independent eye witness all testify to the fact such that no reasonable trier of fact based on the entire record would find in the plaintiff's favor?

LIST OF PARTIES

Petitioners and Defendants in this action are three individual police officers employed by the City of Santa Rosa – Rich Celli, Patricia Mann and Travis Menke and the City of Santa Rosa. Respondents and Plaintiffs are Patricia DeSantis individually and as guardian of Dani DeSantis and Plaintiff and Respondent Adrianne DeSantis.

The claim of plaintiff Timothy Farrell was dismissed and that decision has become final. Defendant Jerry Soares was voluntarily dismissed by the Plaintiffs prior to the underlying decisions at issue.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Blank Page

OPINION BELOW

The 2-1 Memorandum opinion in this case, filed on April 28, 2010, was deemed not appropriate for publication. The Memorandum is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

Petitioners were appellants in this case in the United States Court of Appeals for the Ninth Circuit. The 2-1 opinion was entered on April 28, 2010. A timely Petition for Rehearing and Rehearing *En Banc* was filed in the Ninth Circuit Court of Appeal on May 12, 2010. The Petition for Rehearing was denied by a 2-1 decision of the court entered June 29, 2010. Mandate was issued on July 6, 2010. Petitioners applied for a Recall of the issuance of mandate to file this Petition for Writ of Certiorari which was denied on July 23, 2010. *See* Appendices A-D.

This petition is timely filed within 90 days of the date of the order denying rehearing. Rule 13, Rules of the U.S. Supreme Court. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
42 U.S.C. § 1983

> "Every person who, under color of statute, ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia, subjects or caused to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to any party injured in an action at law, suit in equity or other proper proceeding for redress..."

Fed.Rule Civ.Proc. Rule 56(b), 28 U.S.C.

> "A Party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim"

STATEMENT OF THE CASE

The trial court below denied summary judgment to the police officers and the City on the issue of qualified immunity on both the Fourth and Fourteenth Amendment causes of action asserted by the Respondents below. In a 2-1 decision in the Ninth Circuit Court of Appeal, the court affirmed the denial.

The dissenting opinion of Justice O'Scannlain aptly states that the majority's holding in this case denying qualified immunity "would paralyze police officers' ability to make split-second judgments to protect themselves and the public and would eliminate the purpose of qualified immunity." (See Appendix A, Memorandum Opinion, Dissent, page 5)

The majority opinion ignores the precedent both of its own circuit and this court in denying the officers

qualified immunity and improperly considers force alternatives that were not available to individual officers in determining whether the use of deadly force was reasonable. The majority opinion further fails to consider the higher standard by which the officers conduct should be judged under the Fourteenth Amendment contrary to the clear authority of this court.

Santa Rosa Police Officers Travis Menke, Patricia Mann, Daniel Jones, and Jerry Ellsworth were dispatched to the DeSantis residence in response to a 911 call placed by Patricia DeSantis. She told the dispatcher that her husband was firing shots into the ceiling of their residence. Sergeants Rich Celli and Jerry Soares also responded to the residence. It is undisputed that within two minutes after arriving at the residence, three of the officers fired their weapons at Mr. DeSantis when he unexpectedly charged at the officers who were standing in the driveway of the residence. Those officers, who had not had a chance to search Mr. DeSantis, reasonably believed that he was armed based on the facts they received from dispatch. In fear for their own safety and the safety of their fellow officers, these three officers each fired one shot from their weapons after Mr. DeSantis continued to charge at them after he was already hit by a less lethal round fired from a SAGE rifle by Sgt. Soares. That less-than-lethal round did not stop Mr. DeSantis's advance.

While en route to the residence, the officers were advised that a man was firing a gun in the residence, that his wife and children were in the house and were also advised that additional shots were fired. Officer Ellsworth heard the additional shots as he arrived on scene.

The DeSantis residence was part of a duplex located at the end of a driveway. The officers positioned themselves on the opposing sides of the driveway with three officers on each side. Officers Menke and Mann were on the west side of the driveway and had their handguns drawn. Officer Ellsworth had his K-9 dog with him and was also on the west side of the driveway positioned behind Officers Menke and Mann. Sgt. Celli was on the east side of the driveway along with Sgt Soares and Officer Jones. Sgt. Celli was armed with a rifle; Sgt. Soares had a less-than-lethal impact weapon known as a "SAGE" which fired plastic projectiles. Officer Jones had a rifle.

Mr. DeSantis was outside the residence when the officers arrived. He was wearing baggy jeans and no shirt. There is no genuine dispute that Mr. DeSantis, unexpectedly, jumped up from a prone position and charged at Officers Menke and Mann in what the officers have described as "a sprinter taking off from the blocks." The incident was witnessed by Joseph Silny, a neighbor whose duplex shared the driveway with the DeSantis residence. Mr. Silny corroborates the statements of the officers as to how the incident occurred.

Although at one point Patricia DeSantis described Mr. DeSantis as "walking" towards the officers, her own testimony contradicts this statement and fails to establish a genuine issue as to this fact. She acknowledged in other parts of her testimony that Mr. DeSantis got up off the ground and started **running** towards the officers. She testified that she was unable to estimate the pace at which he was moving since

"it is all in slow motion in my mind," although she indicated at one point in her testimony that "it looked like he was running."

The officers have all testified that they believed, based upon the information provided to them by dispatch, that it was likely Mr. DeSantis was armed. Although none of the officers saw a gun in his hand, none of them had an unobstructed and complete view of his hands at all times. They believed he could have had a gun in his pocket or the back of his pants. There is no dispute that prior to the shooting, the officers did not have a chance to search Mr. DeSantis for lethal weapons. The officers also reasonably believed when he charged at them that he could also seize one of their weapons or otherwise cause them serious injury.

REASONS FOR GRANTING THE PETITION

Qualified immunity is an entitlement not to stand trial or face other burdens of litigation which is effectively lost if the case is erroneously permitted to go to trial. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). As this court has repeatedly stressed, it is important to resolve the issue of qualified immunity at the earliest possible state in litigation. *Saucier*, 533 U.S. at 201; *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Here, the Ninth Circuit has set an impossible bar for an officer to establish qualified immunity in conflict with decisions of this court and imposed liability under the Fourteenth Amendment when there was clearly no evidence in the record of "a purpose to harm" to justify a finding of liability.

As Justice O'Scannlain, the dissenting justice in this case stated, denying qualified immunity in this case "would paralyze police officers' ability to make split-second judgments to protect themselves and the public." (Dissent, page 5). It is important for this court to set forth a clear standard for judging an officer's conduct in rapidly evolving situations in which they are forced to make split-second decisions and to what extent, if any, the court should consider the availability of other force options at the scene.

I. CERTIORARI IS WARRANTED TO RESOLVE CONFLICTS BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS AS WELL AS SUPREME COURT AUTHORITIES WITH RESPECT TO THE APPROPRIATE STANDARD TO JUDGE WHETHER AN OFFICER'S CONDUCT IS REASONABLE WHEN FACED WITH A SPLIT-SECOND DECISION

This court established the reasonableness standard in the seminal case of *Graham v. Conner,* 490 U.S. 386, 394 (1989) and stated that the 'reasonableness' of a particular use of force must be judged "from the perspective of a reasonable officer on the scene" rather than with the "20/20 vision of hindsight." The court recognized the fact that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.,* at 396.

However, in direct conflict to that recognition, the Ninth Circuit has given undue significance in evaluating

an officer's use of force to whether there were other "force alternatives" available to the officer. In the circumstances of this case, the court considered force options that were in fact not available to the individual officers who used deadly force. Although there were officers on scene who had tasers in their possession, two of the officers who fired their guns did not even have tasers on them; and the third officer who had to respond in a matter of split seconds would have had to drop her weapon, grab the taser and discharge it hoping to do so before the suspect reached her.

The uncontradicted testimony of the officers established that they feared for their own lives or the lives of other officers when the suspect, who they reasonably believed was armed, jumped up "like a sprinter leaving the blocks" and charged at the officers who had their weapons drawn. This court recognized in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) that the use of deadly force is objectively reasonable where the officer has probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others. Even the Ninth Circuit has recognized that the most import single element of the factors set forth in *Graham* is whether the suspect poses an immediate threat to the safety of the officers or others. *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994).

Other circuits have recognized that the court must not second guess the conduct of officers forced to make split-second decisions when they believe their lives are at risk. The court in *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) stated:

> "Thus under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer on the scene. **We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policeman face everyday.** What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant then to someone analyzing the question at leisure."

The Fourth Circuit similarly recognized that all that is required to justify deadly force is a "sound reason to believe that the suspect poses a serious threat [to an officer's safety] or safety of others. Officers ***need not be absolutely sure,*** however, of the nature of threat or the suspect's intent to cause them harm–the constitution does not require that certitude precede the act of self-protection." *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996).

In fact, many decisions of the Ninth Circuit, including this case, refuse to give weight to their own precedent in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994) which stated that:

> **"the text of the Fourth Amendment indicates the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them, [citations omitted] Requiring officers to find and choose the least intrusive alternative would require them to exercise**

> **superhuman judgment.** In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. **Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.**" (*Id.*, at page 915, emphasis added)

Instead, the majority in this court's opinion relied upon *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) and stated that the availability of other force alternatives was "a factor" to be considered in analyzing the reasonableness of Petitioners' use of force. The court then inappropriately made it the determining factor in combination with an isolated section of the plaintiff's deposition taken completely out of context and with total disregard for the ***entire record*** as discussed below. Moreover, the majority considered force options which were not even available to the individual officers who used deadly force.

Justice O'Scannlain aptly stated "if this is how the police must operate to avoid trial for excessive force, I question whether the qualified immunity doctrine serves any purpose at all." (Dissent, page 6, Appendix A)

II. CERTIORARI IS WARRANTED TO ENSURE THAT THE APPROPRIATE STANDARD IS APPLIED IN FOURTEENTH AMENDMENT CASES WHERE OFFICERS ARE FORCED TO MAKE SPLIT-SECOND DECISIONS

Even more troubling is the court's finding under the circumstances of this case that the officers' conduct could constitute a "purpose to harm" sufficient to support a Fourteenth Amendment claim by the wife, child and mother of the suspect. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

There is no dispute that the incident in question evolved in a matter of minutes and the decision to fire, even less. Yet, the majority decision below failed to find that the officers were entitled to qualified immunity even under the more stringent standard required in a Fourteenth Amendment claim.

As articulated by the dissent, "not only do the DeSantises'conclusionary allegations of improper motive fall short of the mark, but the record amply supports the officers' testimony that they "did not intend to commit any harm unrelated to the legitimate use of force necessary to protect the public and themselves." Citing to *Moreland v. Las Vegas Metro. Police Dept.*, 159 F.3d 365, 373 (9th Cir. 1998).

The recent Ninth Circuit opinion in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), contrary to the holding in this case, properly distinguished the difference in the appropriate standard to be used in analyzing a Fourteenth Amendment claim "when the

circumstances are such that actual deliberation [by the officer] is practical" or on the other hand where a law enforcement officer "makes a snap judgment because of an escalating situation." In the later case, the court held that the "purpose to harm" standard is clearly more appropriate. *Porter v. Osborn*, 546 F.3d 1131, 1140 (9th Cir. 2008)

In *Porter*, the court held that where the undisputed evidence showed that the encounter "took very little time–probably no more that five minutes" that there was not time for the officer to deliberate since the officer was required to make "split-second decisions." Here, the amount of time involved was less than half the time in *Porter*, and the officers obviously did not have the time to deliberate and form an intent to harm the suspect.

Under these circumstances, denial of qualified immunity completely undermines the fundamental nature of this protection for police officers.

III. CERTIORARI IS WARRANTED TO UPHOLD REASONABLE STANDARDS SET BY THIS COURT REGARDING SUMMARY JUDGMENT MOTIONS

This court has held that where the record on a motion for summary judgment ***taken as a whole*** could not lead a rational trier of fact to find for the non moving party, there is no genuine issue of fact for trial. *Matsushita Electrical Industrial Co v. Zenith Radio Corporation*, 475 U.S. 547 (1986).

As noted by the dissent, the majority's analysis falls into the trap which the Supreme Court warned against in *Scott v. Harris*, 550 U.S. 372, 380 (2007). In *Scott,* the court cautioned that when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury would believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Here, the majority credited and based its decision on the testimony of Patricia DeSantis that her husband "walked" as opposed to "charged" at the officers before they shot. This alleged "fact" is discredited not only by her own testimony (in which she states that everything in her mind occurred in "slow motion;" that she was unable to gauge the speed at which her husband moved towards the officers, and that he was running) but also by the testimony of seven eyewitnesses – one of which was an independent bystander.

A single, arguably ambiguous statement should not raise a triable issue of fact. *Hart v. Parks*, 450 F.3d 1059, 1068 (9th Cir. 2006).

More importantly, the appropriate standard for the court to apply in ruling on the officers' motion for summary judgment on qualified immunity is the perspective of the officer not of the wife of the suspect. *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010).

The record in this case is such that no reasonable court should have denied the officers qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the court grant review to resolve these important public safety issues so that police officers are "not paralyzed" in their ability to make life saving, split-second decisions.

Respectfully submitted,

CAROLINE L. FOWLER, CITY ATTORNEY
Counsel of Record
City of Santa Rosa
100 Santa Rosa Avenue
Room 8
Santa Rosa, CA 95404
(707) 543-3040
cfowler@srcity.org

Attorney for Petitioners City of Santa Rosa; Sgt. Rich Celli; Officer Travis Menke and Officer Patricia Mann

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