No. 13-551

In The Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), this Court unanimously stated the standards which control analysis of a police officer's assertion of qualified immunity. The doctrine of qualified immunity protects police officers acting under color of law, provided their conduct does not violate clearly established rights of which a reasonable officer would have known. Evaluation of immunity requires the determination of whether a plaintiff has shown: (1) any violation of a constitutional right; and (2) that the right at issue was clearly established at the time of the officer's alleged misconduct. While a plaintiff must satisfy both prongs of this test to overcome an officer's immunity, only the second prong is actually a question of immunity. The first prong of the test answers the question of whether the evidence shows a constitutional deprivation occurred at all. The second prong of the test, which is the actual immunity inquiry, is a determination of the objective legal reasonableness of the challenged action, analyzed in light of the legal principles that were clearly established at the time it was undertaken. Judges have discretion to decide the order in which to evaluate the two prongs of the analysis.

Even though this Court has specifically held the protection of qualified immunity applies regardless of whether an officer makes a mistake of law, mistake of fact, or mistake based on a mixture of law and

QUESTION PRESENTED FOR REVIEW
– Continued

fact, Tolan nonetheless seeks review based upon the contention that factual issues pertaining to the reasonableness of an officer's conduct may only be evaluated when determining whether a constitutional deprivation occurred and asserts that a reviewing court errs when it considers mistakes of fact during evaluation of immunity. No circuit court has adopted the position Tolan urges this Court to apply which would unreasonably narrow the immunity analysis. Tolan bases his argument on nothing more than a mischaracterization of most circuit courts' decisions to evaluate immunity in two steps which comprehensively address the standard this Court has established. While this Court has not added a third numeral to the test for immunity, it nonetheless demands that analysis of the objective legal reasonableness of an officer's conduct be evaluated even though it has no numeral of its own in the stated test. Thus, Tolan's claimed circuit conflict is illusory. This Court has previously held, regardless of whether a court evaluates immunity in a one or two step analysis, the result nonetheless is that analysis of the facts regarding objective legal reasonableness is necessary to evaluate immunity. Accordingly, this Court and the circuit courts have already answered the question Tolan presents. Courts deciding qualified immunity must consider the relevant facts to address the objective legal reasonableness of a police officer's conduct when deciding qualified immunity.

PARTIES

Petitioner is Robert R. “Robbie” Tolan.

Respondent is Jeffrey Wayne Cotton.

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JURISDICTIONAL STATEMENT

Respondent does not dispute this Court's jurisdiction over this case under 28 U.S.C. § 1254(1) but denies the case satisfies the standard of Supreme Court Rule 10. Tolan filed a petition for writ of certiorari on October 29, 2013. The Fifth Circuit Court of Appeals had jurisdiction over Tolan's appeal from the District Court's final judgment under 28 U.S.C. § 1291 and it affirmed the District Court's judgment in favor of Sergeant Cotton under FED.R.CIV.P. 54(b) on April 25, 2013. [ROA. 2712, 2716]. The District Court had original jurisdiction over Tolans' claims under 28 U.S.C. § 1331 and it granted final summary judgment on April 30, 2012. [ROA. 2570, 2627, 2715].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tolan correctly stated the Fourth Amendment and provisions of 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. The procedural history of the case shows that Tolan's claims have been thoroughly evaluated.

Petitioner, Robert (Robbie) Tolan[1] filed suit against Respondent Bellaire police Sergeant Jeffrey Cotton claiming Cotton used unreasonable force by shooting Tolan in the course of an investigative stop. [ROA. 4]. Sergeant Cotton timely answered and asserted defenses, including qualified immunity. [ROA. 92]. After discovery, Sergeant Cotton filed a motion for summary based upon qualified immunity and objections to exhibits Tolan filed in opposition to Sergeant Cotton's summary judgment motion. [ROA. 908, 2212, 2261, 2375, 2387, 2395]. Tolan filed responses in opposition to summary judgment and responses to Sergeant Cotton's objections. [ROA. 1830, 2336, 2350].

The District Court entered a well-reasoned order that showed a thorough analysis of the evidence and sustained Sergeant Cotton's objections to inadmissible items Tolan submitted in opposition to the motion for summary judgment. Unfortunately, Tolan persists in citing and relying upon the inadmissible items as support for his argument in this Court, as he also did in the Fifth Circuit Court. [ROA. 2570, Tolan brief at

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[1] Robert R. Tolan will be referred to as "Robbie Tolan" in some portions of the brief to avoid any confusion between him and his father Robert "Bobby" Tolan.

page 7, citing App. 96]. The inadmissible items are identified as ROA. 2088-2093, 2107-2109, 2119-2135, 2144-2183, 2184-2207, 2570.

The District Court entered a memorandum and order in which it granted Sergeant Cotton's motion for summary judgment finding no violation of the Fourth Amendment [ROA. 2627], and entered final summary judgment in Sergeant Cotton's favor. [ROA. 2626]. Tolan filed a motion for clarification of the final judgment [ROA. 2705] and the District Court entered an amended final summary judgment in favor of Sergeant Cotton [ROA. 2715]. Tolan filed an initial notice of appeal [ROA. 2712], and subsequent amended notice of appeal [ROA. 2716].

The Fifth Circuit Court of Appeals affirmed the judgment in Sergeant Cotton's favor based upon his qualified immunity, characterizing the District Court's decision as based upon "an extremely detailed and well-reasoned opinion." *Tolan v. Cotton*, 713 F.3d 299, 303 (5th Cir. 2013). However, the Court chose, as it may under Supreme Court authority, to evaluate Sergeant Cotton's claim to immunity under the "clearly established law" portion of the immunity test. *Id*. at 306-309. The Circuit Court found that Tolan failed "to show a genuine dispute of material fact for whether Sergeant Cotton's conduct was objectively reasonable in the light of clearly established law." *Id*. at 306 (internal citation omitted).

Tolan petitioned the Fifth Circuit Court of Appeals for rehearing en banc but that request was denied.

Tolan v. Cotton, ___ Fed.Appx. ___, 2013 WL 3948950 * 1 (5th Cir. 2013) (not designated for publication). Fifth Circuit Judges James L. Dennis, joined by Circuit Judge James E. Graves, Jr., filed an opinion dissenting from the Fifth Circuit's denial of rehearing en banc. *Id*. In his dissenting opinion, Judge Dennis credits inadmissible evidence [ROA. 2107-2109] that was specifically identified and appropriately stricken by the District Court [ROA. 2570-2571]; a ruling that was never properly challenged on appeal. Before this Court, Tolan continues to utilize inadmissible evidence by relying on the dissent's impermissible references to excluded evidence. [Tolan brief App. 96-99].

B. The District Court and the Fifth Circuit thoroughly analyzed and recited the factual record that underlies their decisions.

While investigating a reported stolen vehicle, Officer John Edwards had four people to watch so he notified the dispatcher to hurry back-up officers to the scene. [ROA. 2628, 1114, 1115, 1013, 1019, 1025, 1110]. When back-up officer Sergeant Cotton arrived, Robbie Tolan was lying prone on the porch; Anthony Cooper was on the ground, not necessarily prone; Bobby Tolan was standing next to a vehicle parked in the driveway [ROA. 992, 1031-1032]; and Marian Tolan was walking around in the front yard. [ROA. 992, 1032, 1114-1115, 2628]. When he arrived, Sergeant Cotton understood he was investigating a stolen vehicle, with two suspects. Thirty-two seconds after

he arrived, and before the scene was secure, Sergeant Cotton shot Robbie Tolan in self-defense.

Robbie Tolan's Testimony

Robbie Tolan saw Sergeant Cotton near Cooper and observed Cotton "grab [Robbie's] mother." [ROA. 1240-1243]. Sergeant Cotton grasped Marian Tolan's arm and guided her parallel to the front of the house and toward the garage door. While Sergeant Cotton moved toward the garage door, he held Marian Tolan's arm, "kind of pushing her a little bit, kind of directing her." "There was no tussle. . . . but she wasn't exactly running over there either." [ROA. 1244-1246]. When Sergeant Cotton and Marian Tolan reached the garage door, they were "pretty much directly behind [Robbie Tolan]." [ROA. 1248]. Still prone on the porch, facing toward Sergeant Cotton, Robbie Tolan turned only his head to the left and looked backwards to follow Sergeant Cotton and Marian Tolan's movement. Robbie Tolan "saw and heard Sergeant Cotton push [Tolan's] mom against the garage door. . . . And it made a loud noise." [ROA. 1249]. The sight and sound of his mother being pushed against a metal garage door "caused [Robbie Tolan] to want to get up from the position that [he was] laying in. . . . because [he was] upset about seeing [his] mother being pushed into a garage door." [ROA. 1250].

> Question: [A]m I correct in saying that not only did you want to get up from the position of 'RT' [the position in which he was lying on his

stomach on the porch], but you wanted to turned [sic] around to where your mother and Sergeant Cotton were?

Answer: That I wanted to, yes, sir.

Question: In fact, that's what you were doing at the time you were shot, right?

Answer: True.

Question: You were getting up and turning around toward your mother and Sergeant Cotton?

Answer: True.

[ROA. 1250].

While he was lying prone on the porch, Robbie Tolan had his arms outstretched in front of him. In order to get up he had "to pull [his] arms back towards kind of [his] chest area and push up. . . ." He "used kind of like a push up maneuver to get [himself] up." [ROA. 1259]. He was "turning, . . . pushing up with [his] hands, and turning towards [his] left." [ROA. 1260].

Question: [Y]ou've been asked to talk about kind of the mechanics of getting up that night. Right?

Answer: Yes.

Question: Just like we're doing here, we're talking about pulling your hands back, push up with both hands, and at the same time that you're turning around, right?

Answer: Yes, sir.

Question: Okay. But, would it be right for me to say, Mr. Tolan, that at the time that you were getting up that morning, would it be right for me to say you really weren't thinking about how you were doing it, right?

Answer: Sure.

Question: In other words, people have asked you, how were you doing it, and you have tried to kind of recreate it in your mind and describe it, right?

Answer: Yes, sir.

Question: But in terms of each thing that you were doing at the moment you were doing it, would it be right for me to say it's not something you were thinking about at the moment that you were doing it?

Answer: Sure.

Question: So when you give us a recreation of it, it is your best guess of how you were doing it, right?

Answer: Sure.

[ROA. 1260, 2018, 2495, 2496].

Question: Now, so as you're getting up and I think you told me you're turning to your left as you're getting up?

Answer: Yes, sir.

Question: Okay. And is Sergeant Cotton – as you're turning towards Sergeant Cotton, and getting up, is Sergeant Cotton still holding your mother by the arm?

Answer: To my knowledge, yes.

Question: Okay. And as you're getting up and turning to your left – by the way, did you get up quickly or slowly?

Answer: Pretty quickly, I suppose.

Question: All right. And as you're getting up, did you scream or raise your voice and say, "Get your fucking hands off my mom?"

Answer: Yes, sir.

Question: You were angry by then, right?

Answer: Yes, sir.

Question: And, so, if somebody said they saw an angry look on your face, you would say, well, that would probably be right, right?

Answer: Sure.

Question: And you would agree with me, wouldn't you, that saying something like "get your fucking hands off my mom" is an aggressive statement? You would agree with that, wouldn't you?

Answer: Sure.

[ROA. 2499-2500].

Question: And in turning, are you – were you able to see Sergeant Cotton's face as you are turning towards him?

Answer: Yes, sir.

[ROA. 2500].

Question: Did you see Sergeant Cotton actually unholster his weapon?

Answer: Yes, sir.

Question: And would it be right for me to say that you did not see Sergeant Cotton unholster his weapon until you were beginning to get up and turning [sic] toward him?

Answer: Yes, sir.

Question: In other words, from what you observed, Sergeant Cotton's weapon was holstered up until the time that you hollered to him and began getting up and turning toward him.

Answer: Sure.

Question: And then he unholsters his weapon, right?

Answer: Yes, sir.

Question: Points it at you, and at the same time, practically immediately, is shooting, right?

Answer: Yes, sir.

[ROA. 2501].

Question: The first thing that Sergeant Cotton did after he fired his weapon was to come over to [Robbie Tolan] and check [Tolan] for weapons . . . And when he didn't find a weapon, he said to [Tolan], what were you reaching for, right?

Answer: True.

[ROA. 2508].

Marian Tolan's Testimony

Marian Tolan's testimony generally supported her son's account. She was asked, "Robb[ie] had gotten up from lying down on the ground, . . . without anybody giving him permission to do it or telling him it was okay to do it, when Sergeant Cotton shot him, right?" She answered "Yes." [ROA. 1449]. She was asked, "[h]e was going from laying on the ground to not laying on the ground?" She answered, "Yes." She was

asked "[h]e was in the process of getting up when he got shot, wasn't he?" She answered "Yes." [ROA. 1449]. Later in her deposition she was asked, "At the time that Sergeant Cotton fired at Robb[ie], as Robb[ie] was getting off the ground, had anyone checked yet to see whether Mr. Cooper or Robb[ie] Tolan had a weapon?" She answered "No." The next question posed to her was "[w]hether either of those gentlemen had a weapon at the time that Sergeant Cotton responded to Robb[ie] getting up off the ground, can we agree was uncertain?" She answered "It was uncertain." [ROA. 1463]. Marian Tolan also testified that, after Sergeant Cotton pushed her against the garage door, Robbie Tolan immediately started to get up from the ground. He hollered to Sergeant Cotton "to get his hands off of his mom." [ROA. 1489]. When asked if he actually said "[g]et your fucking hands off my mom," and she answered, "I don't recall him using that word, but he says he did." [ROA. 1490]. Marian Tolan agreed it was only after Robbie rose from the porch, began turning toward Sgt. Cotton and screamed an aggressive verbal exclamation that Sergeant Cotton shot Robbie Tolan. [ROA. 1490]. She was asked if Sergeant Cotton withdrew his weapon from its holster before firing. She responded, "I didn't see it until then." [ROA. 1490]. The three gunshots came immediately after each other, with no delay, and it sounded like one gunshot to her. [ROA. 1490]. After the shooting, Sergeant Cotton called paramedics first and then asked Marian Tolan, "Is there anyone else in the house?" When Marian Tolan said, "No," Sergeant Cotton went over to Robbie, "Turned him over and

emptied his pockets and said, 'What were you reaching for?'" [ROA. 1491]. Marian Tolan agreed that, from the moment Sergeant Cotton arrived on the scene until the time he fired his weapon was just 32 seconds, all of the time, by her own admission as things were tense and uncertain. [ROA. 1493].

Sergeant Cotton's Testimony

As Sergeant Cotton responded to assist Officer Edwards around 2:00 a.m. he heard information the vehicle was stolen. [ROA. 1012, 1020, 1022]. Sergeant Cotton heard Officer Edwards broadcast that the felony suspects were moving, and "that he was going to have to take them, meaning he was going to have to address the suspects right now before backup was going to be able to get there." [ROA. 1022]. Officer Edwards later transmitted that back-up needed to hurry. [ROA. 1026]. Sergeant Cotton noticed tension in Officer Edwards's voice and Sergeant Cotton "perceived [Officer Edwards] was in a dangerous situation." [ROA. 1027]. Upon arriving on the scene, Sergeant Cotton saw Officer Edwards standing in the front yard with his gun drawn. Sergeant Cotton saw Bobby Tolan standing to his left in the yard and Marian Tolan "moving around the front yard." Sergeant Cotton saw "at least" Anthony Cooper lying on the sidewalk. He did not see Robbie Tolan at first. Marian Tolan "was in dynamic movement, so [Sergeant Cotton] doesn't remember the specific spot that she was in. She was moving around from Officer Edwards' left to in front of him to his right, kind of all

in that area in front of him." Officer Edwards was pointing his gun toward Cooper and Robbie Tolan. [ROA. 1028-1030].

Sergeant Cotton drew his handgun and moved to Officer Edwards. Officer Edwards told Cotton "the two on the ground had gotten out of the stolen vehicle." By then, Sergeant Cotton could see a part of Robbie Tolan's hands or head sticking out past the planter on the porch. [ROA. 1031-1032]. Sergeant Cotton believed it necessary to search and handcuff the suspects but Marian Tolan was in front of Officer Edwards's pointed gun, "so [Sergeant Cotton] needed to get her controlled before [he] could move onto the suspects." Although Marian Tolan was "putting herself between [Officer Edwards's] weapon and Anthony Cooper and Robbie Tolan," Sergeant Cotton did not interpret her actions as trying to block a shot from Officer Edwards's gun. Rather, "she was just moving around kind of not really paying attention to the gun, just very agitated and – and upset and moving kind of all over the scene." [ROA. 1032]. She was also talking as she moved. Sergeant Cotton paraphrased her comments, "What are you doing here, we live here, you shouldn't be here, those kinds of things." [ROA. 1032-1033]. The exterior lighting consisted of a gas lamp "out front," which shed "some, but not a lot" of light, "more decorative than – than illuminating" and two spotlights on the driveway. The area in which Cooper was situated was better lit than the porch, which was "fairly dark." Robbie Tolan was lying "with his feet toward the driveway and his head toward the front door," with his arms stretched out in front of him,

"more like Superman" than an airplane, and his fingertips "pointing towards the front door." [ROA. 1034-1035].

After speaking to Officer Edwards, Sergeant Cotton's attention focused on Marian Tolan, whose behavior "heightened [his] tension." [ROA. 1035-1036]. "I identified her as being part of a scene that was out of control that was going to have to be controlled before we could move forward." [ROA. 1036]. "What needed further control was that both the felony suspects needed to be cuffed and searched," and at that point Marian Tolan was "hindering [his] ability to cuff and search the two felony suspects." [ROA. 1036]. Sergeant Cotton asked Marian Tolan "several times" to move to the garage door. Her response was "noncompliant, kind of argumentative. She was upset and continuing to protest." [ROA. 1036-1037]. Marian Tolan said, "[w]e live here, what are you doing here, you shouldn't be here, and that's our car." Sergeant Cotton's only response "was to tell her to calm down, to let us do our investigation, we'll work everything out," yet she was still noncompliant. Marian Tolan "maybe took one or two steps towards the garage door, and then stopped and began protesting again." They were not close to the garage door, but "still on the driveway or kind of on the edge of the driveway to Officer Edwards' right." [ROA. 1040]. "As soon as [he] addressed her, [Sergeant Cotton] holstered [his] weapon and then was trying to gain her compliance. When Marian Tolan would not comply, Sergeant Cotton "grabbed her right arm, [he] believe with [his]

right hand, and put [his] left hand at the small of her back to start escorting her over to the garage door." [ROA. 1042]. Marian Tolan was talking as Sergeant Cotton was escorting her, and soon after he first touched her, "she flipped her arm up trying to flip my hand off of her and said, 'Get your hands off of me.'" [ROA. 1042].

While he was walking her in the direction of and getting closer to the garage door [ROA. 1043], Sergeant Cotton was gripping her arm, "not as hard as I could, but enough to – to gain control of another person." As he and Marian Tolan moved toward the garage door Sergeant Cotton passed the planter on the porch and got a clearer view of Robbie Tolan lying on the porch. [ROA. 1044]. Officer Edwards was still attempting to "cover" Robbie Tolan and Anthony Cooper until they could be secured. [ROA. 1044-1045]. When Sergeant Cotton and Marian Tolan were almost to the garage door, Sergeant Cotton glanced at Robbie Tolan on the porch and then turned his attention back to Marian Tolan at which point he heard Robbie Tolan yell, "Get your fucking hands off her." When Sergeant Cotton heard Robbie Tolan yell, he also observed Robbie Tolan abruptly getting up and turning toward him. Sergeant Cotton pushed Marian Tolan away from him in order to respond to Robbie Tolan's aggressive movements and to get Marian Tolan out of the way. [ROA. 1045-1046]. Robbie Tolan had been lying down on the porch, hands outstretched toward the front door, but when Sergeant Cotton looked at Robbie Tolan after Robbie hollered "Get your fucking

hands off her," Robbie Tolan "was already partially up" and, by Robbie Tolan's own admission, angrily turning toward Sergeant Cotton. When Sergeant Cotton looked again after hearing him, Robbie Tolan was already getting up, probably halfway up or so, and was turning to his right rotating with his face toward the window. [ROA. 1047]. "When [Sergeant Cotton] first looked, he was – still had his back, for the most part, to [Sergeant Cotton] in the process of rotating" to confront Sergeant Cotton. [ROA. 1047-1048]. After hearing Robbie Tolan yell, Sergeant Cotton turned and saw Robbie Tolan "was up in a crouch kind of in the process of getting up with his feet under him facing kind of away from [Sergeant Cotton] while – as he was rotating to his right." [ROA. 1048-1049]. Sergeant Cotton observed Robbie Tolan's right hand at his waistband as Robbie Tolan was rotating and getting to his feet, but he could not determine where Tolan's left hand was. By "at his waistband," Sergeant Cotton meant "in the middle of his waist," "in the center of his body," "where his belt buckle would be." [ROA. 1049]. Robbie Tolan was wearing a dark, zippered hoodie sweatshirt that was not tucked into his pants. [ROA. 1049]. Sergeant Cotton believed Robbie Tolan was drawing a weapon from his waistband. Sergeant Cotton could not see Robbie Tolan's hand, but could see where Tolan's hand was. The dim lighting allowed Cotton to "see [Tolan's] total movement, which is what made [Sergeant Cotton] believe that [the threat] wasn't necessarily just [based on] where his hand was, for instance." Sergeant Cotton believed Robbie Tolan "was drawing a weapon to shoot [Sergeant

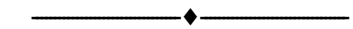
Cotton].” Sergeant Cotton was in fear of his life. As Sergeant Cotton explained it, it was not any one thing that made him afraid, but the “totality of everything that was happening that put [him] in fear, which included the way Robbie Tolan was getting up and where his hand was and – while he was getting up.” [ROA. 1052-1053].

SUMMARY OF THE ARGUMENT

The Fifth Circuit did not err in affirming the District Court’s dismissal of Tolans’ claims and this Court should not exercise its judicial discretion by granting Tolan’s petition. The Fifth Circuit decision does not conflict with any decision of another United States court of appeals or this Court. Nor has the Fifth Circuit, in this case, decided an important question of federal law that has not been settled by this Court. The record establishes instead that the Fifth Circuit’s well-reasoned decision in favor of Sergeant Cotton is based upon application of the jurisprudence of this Court, as both the District Court and Fifth Circuit opinions plainly reveal.

This Court has long held that analysis of qualified immunity requires examination of those facts necessary to provide the particular context of the case so that evaluation of objective legal reasonableness can reliably be determined and this is the standard the Fifth Circuit applied. The mistake of fact identified by the Fifth Circuit is the type of circumstance

that supports a finding of immunity under this Court's decisions. Contrary to Tolan's argument, the decisions of other circuit courts do not suggest any confusion regarding the proper immunity standard. Some circuits identify the standard for immunity they apply as having two parts and others three but regardless of which elements of the defense are assigned numbers, the analysis each circuit performs is consistent with the dictates of this Court and no circuit has held that qualified immunity must be evaluated without considering relevant facts. The impractical exercise Tolan urges the Court to undertake cannot disprove Sergeant Cotton's qualified immunity. Accordingly, for all these reasons, this Court should deny Tolan's petition.



REASONS FOR DENYING THE WRIT

Although Tolan cites 28 U.S.C. § 1254(1) as a jurisdictional basis for this Court's review, his challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule which sets forth the character of reasons considered in determining whether to grant a petition. Rule 10 provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

SUP. CT. R. 10.

Neither criterion is met here. This case simply presents a circuit court's correct application of well-established legal principles to specific summary judgment evidence in a single case so this Court should deny Tolan's insupportable petition.

I. This Court has long held analysis of qualified immunity requires examination of facts necessary to identify the particular context of the case so that objective legal reasonableness can reliably be evaluated.

Regardless of the procedure used, determination of whether a police officer's action violated clearly established law necessarily requires examination of

the facts that provide the particular context of the case. *See Messerschmidt v. Millender*, ___ U.S. ___, 132 S.Ct. 1235, 1250 (2012). Approximately thirty years ago this Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as **their conduct** does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) (emphasis added).

In *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987), after a court of appeals erroneously refused to consider a police officers' contention **his conduct** did not violate a clearly established right, this Court reaffirmed *Harlow*'s dictate that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2739, assessed in light of the legal rules that were 'clearly established' at the time it was taken, *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738." In *Anderson*, this Court "recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct is lawful], and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Anderson*, 484 U.S. at 641, 107 S.Ct. at 3039-3040. "It follows from what [this Court has] said that the determination whether it

was objectively legally reasonable to conclude that a [particular seizure was lawful] will often require examination of the information possessed by the [police officers]. *Id*. "The relevant question in this case, for example, is the objective **(albeit fact-specific)** question whether a reasonable officer could have believed [an officer's seizure] to be lawful, in light of clearly established law and the information the [ ] officers possessed." *Id*. (emphasis added).

In *Saucier v. Katz*, 533 U.S. 194, 197, 121 S.Ct. 2151, 2154 (2001), this Court considered whether, in use of force cases, the determination of qualified immunity is so intertwined with the question of whether a Fourth Amendment violation occurred as to warrant merging the analysis into a single question, as Tolan asks the Court to do. Relying upon firmly established jurisprudence, this Court held "that the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." *Id*. In *Anderson* and *Saucier*, this Court has considered the "surface appeal" of the merger approach but "rejected the argument [Tolan again makes in this case] that there is no distinction between the reasonableness standard [for the underlying constitutional claim] and the qualified immunity inquiry." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2157.

The basic Fourth Amendment test of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989), "does not always give a clear answer as to whether a particular application of force will be deemed excessive

by the courts. This is the nature of a test which **must accommodate limitless factual circumstances**." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158 (emphasis added). "The qualified immunity inquiry, on the other hand, has a further dimension." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. "[I]n excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the **mistaken belief** was reasonable." *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2159 (emphasis added). Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force." *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000), and to ensure that before they are subjected to suit, officers are on notice **their conduct** is unlawful. *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2158 (emphasis added).

Moreover, in *Saucier* this Court re-affirmed the vitality of its holding in *Anderson supra* and restated the criteria for evaluating a claim of immunity. Analysis of immunity requires evaluation of whether the facts show an officer's conduct violated a constitutional right because "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity," and if the facts show a constitutional deprivation, whether the facts show the right violated was clearly established. *Saucier*, 533 U.S. at 200-201, 121 S.Ct. at 2155-2156.

In *Saucier*, this Court elaborated on the relevant criteria for determining if police conduct violates clearly established law.[2] "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier*, 533 U.S. at 201, 121 S.Ct. at 2156. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that **his conduct was unlawful in the situation he confronted**." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156 (emphasis added).

Thereafter, in *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), this Court directly answered, what was implicit in its prior decisions, the specific question Tolan poses in this case. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231, 129 S.Ct. at 815 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567, 124

[2] This mere reaffirmation of *Anderson supra*, however, did not invoke any substantive change in this Court's jurisprudence regarding appropriately analyzing the merits of a claim to immunity. *Saucier* did for a time, before this Court decided *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808 (2009), invoke a mere procedural change requiring evaluation of whether a constitutional violation occurred before addressing the substance of the immunity defense.

S.Ct. 1284 (2004) (KENNEDY, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894 (1978), for the proposition qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")). Thus, "'[q]ualified immunity gives government officials breathing room to make reasonable but **mistaken judgments**,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2085 (2011) also quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986)) (emphasis added).

In order to deny a police officer's claim to qualified immunity, a court must find that a plaintiff has shown facts which evidence violation of a constitutionally protected right, and additionally shown an officer's conduct violated a clearly established constitutional right. *Pearson*, 555 U.S. at 232, 129 S.Ct. at 816. Determination of whether an officer violated clearly established law "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson*, 555 U.S. at 243-244, 129 S.Ct. at 822.

Tolan argues the Fifth Circuit erred in its analysis of this case by labeling its evaluation of the objective legal reasonableness of Sergeant Cotton's action as a separate step in the immunity analysis that allegedly caused an impermissible consideration of facts. *See Tolan*, 713 F.3d at 305. While this Court

has not chosen to identify by separate numeral the required evaluation of objective legal reasonableness of police action assessed in light of the legal rules that were clearly established at the time it was taken, this analysis is nonetheless required under the precedential decisions of this Court. Therefore, whether or not, analysis of objective legal reasonableness is demarcated with its own numbered "step," it must be evaluated to reach an accurate determination of immunity.

Furthermore, the question of immunity is not resolved as Tolan argues by merely *identifying* a constitutionally protected right that could potentially be clearly established, the appropriate standard is whether an accused police officer's actions constituted objectively unreasonable conduct in light of clearly established law at the time of the conduct in question. *See Pearson*, 555 U.S. at 243-244, 129 S.Ct. at 822. This is the standard of this Court the Fifth Circuit applied in this case so the Court should deny Tolan's petition.

II. The Fifth Circuit appropriately evaluated the record in accordance with this Court's standard.

Because this Court has deemed that substantive law identifies the facts that are material in resolving a motion for summary judgment, and only disputes over facts that might affect the outcome of the suit under governing law preclude entry of judgment, *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248,

106 S.Ct. 2505, 2512 (1986) and *Krueger v. Fuhr*, 991 F.2d 435, 438 (8th Cir. 1993), "[t]he first step in assessing the constitutionality of [Sergeant Cotton's] actions is to determine the relevant facts," *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007). This is so regardless of whether the reviewing court chooses to first evaluate the underlying constitutional question or immunity through the application of clearly established law. The substantive law in this case is qualified immunity and immunity cannot be evaluated without consideration of the material factual evidence Tolan asks the Court to disregard. *See Pearson*, 555 U.S. at 243-244, 129 S.Ct. at 822.

Significantly, this case does not involve an interlocutory appeal of denial of summary judgment that would implicate the collateral order doctrine but, instead, this case comes to this Court after a final judgment in which the District Court found no genuine issues of material fact that precluded entry of judgment in favor of Sergeant Cotton on either prong of the qualified immunity analysis. *See Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151 (1995). As such, the District Court's evaluation of the record and identification of the relevant evidence, which the Fifth Circuit Court of Appeals accepted, must not be summarily rejected as Tolan argues.

Oddly, Tolan mischaracterizes his argument as a plea to correct several circuit courts' faulty application of Supreme Court *legal principles*, and argues facts that support immunity are irrelevant, all the while Tolan also argues *facts* that are not supported

by the record and asks this Court to base its decision on his facts. A large portion of Tolan's brief is his argument of the facts when he claims facts cannot appropriately be considered. Tolan is not raising any legitimate legal argument; he is simply asking this Court to view the facts differently than did the District Court and Fifth Circuit.

Assuming *arguendo*, that Tolan actually urges a legal argument; this Court must fundamentally change the qualified immunity standard and adopt a procedure which unreasonably places form over substance, and such an approach is not reconcilable with the manner immunity has ever been evaluated by this Court. While Tolan's claimed theory of liability has taken many forms throughout this litigation, his current petition before this Court rests upon a view allegedly expressed by Justice Sotomayor in *Walczyk v. Rio*, 496 F.3d 139, 165 (2d Cir. 2007), but Tolan's purported reliance is misplaced, not only because Justice Sotomayor's opinion in that case is a minority position, but even more importantly because Tolan ignores the real substance of the Justice's viewpoint, as explained in that decision, that would likely support judgment in Sergeant Cotton's favor.

Notably, the immunity standard used in the Second Circuit is comparable to that which the Fifth Circuit applied and is derived from jurisprudence of this Court. *See Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013). The First Circuit, *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009) (merely changing articulation of the test but retaining the

substance of it); Third Circuit,[3] *Schneider v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011); Fourth Circuit, *Gould v. Davis*, 165 F.3d 265, 269 (4th Cir. 1998); Sixth Circuit, *Hensley v. Gassman*, 693 F.3d 681, 687 n.5 (6th Cir. 2012); Seventh Circuit, *Findlay v. Lendermon*, 722 F.3d 895, 900 (7th Cir. 2013); Eighth Circuit, *Bernini v. City of St. Paul*, 665 F.3d 697, 1002 (8th Cir. 2012); and 11th Circuit, *Wilkerson v. Seymour*, ___ F.3d ___, 2013 WL 6153874 * 2 (2013) join the Second and Fifth Circuits in similarly evaluating claims to qualified immunity in a manner that is consistent with the Supreme Court jurisprudence. Analyses of the decisions of this Court demonstrate that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits are not misinterpreting the legal standard. These circuits are utilizing the standard of clearly established law this Court has set out and they are simply enunciating the multipart standard with greater specificity that provides additional guidance for determining the *relevant particular context* of cases by articulating, what this Court's decisions show relevant to determining *objective legal reasonableness*; application of the

[3] Notably, the *Schneider* Court specifically acknowledged the fallacy of the premise of Tolan's argument that the test applied favors police defendants by specifically acknowledging that a plaintiff "can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants' conduct was unconstitutional or by presenting evidence that the Defendant's conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court." *Schneider*, 653 F.3d at 330.

governing standard consisting of both legal and factual analysis. *See Pierce v. Smith*, 117 F.3d 866, 871-872 (5th Cir. 1997) (applying *Anderson v. Creighton*, 483 U.S. 635, 637-642, 107 S.Ct. 3034, 3038-3040 (1987)). The Fifth Circuit plainly states "[t]he second prong of the qualified immunity analysis is **better understood as** two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998) (emphasis added).

This Court's decisions demonstrate that the clearly-established-law question involves consideration of not only legal concepts but also the factual information necessary to apply those legal concepts in relevant context. The "concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158 (emphasis added). "It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the **factual situation the officer confronts**." *Id*. (emphasis added). Notably, this Court often uses the phrase "specific context of the case" when addressing the *factual* component of an immunity analysis. *Cf.*, *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 599 (2004). As such, the standard the Fifth Circuit Court applied when evaluating Tolan's appeal comports with this

Court's articulation of the immunity standard and the analysis thereof.

Tolan's petition to this Court essentially stems from two sentences in the Fifth Circuit opinion that followed the thorough, well-reasoned decision of the Court:

> It goes without saying that this occurrence was tragic. But, **the Officer's mistake of fact** and Robbie Tolan's injury do not permit deviating from controlling law.

Tolan, 713 F.3d at 308 (emphasis added).

Notably, the alleged "mistake of fact" cited in the Fifth Circuit's decision was that Robbie Tolan turned out to be unarmed. Other facts the District and Circuit Courts found the record proves are that no reasonable police officer on the scene could have known Tolan was unarmed at the moment Sergeant Cotton fired in self-defense. Prominently, this case does not involve a "mistake" of perception or decision by Sergeant Cotton. The evidentiary record proves Sergeant Cotton made a reasonable decision to fire after observing Tolan's actions that any reasonable police officer could have evaluated as posing an imminent threat of serious injury or death. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383 n.1 (5th Cir. 2009). The Circuit Court based its decision on unrefuted expert testimony of Dr. William Lewinski and Lt. Albert Rodriguez that police "officers cannot be trained to positively identify a weapon before resorting to deadly force" in the fraction of a second required to respond

to Tolan's admittedly angry and aggressive action, and also the established principle that a police officer does not forfeit his qualified immunity when an officer could have reasonably interpreted the perceived threat posed by a suspect sufficient to justify the use of deadly force. *See Ontiveros supra, Thompson v. Hubbard*, 257 F.3d 896, 898-899 (8th Cir. 2001); *Krueger*, 991 F.2d at 439-440; *Ryder v. City of Topeka*, 814 F.2d 1412 n.16 (10th Cir. 1987).

In evaluating circumstances when an officer can reasonably interpret such a threat, the courts have consistently held that when a suspect resists, like the record establishes Robbie Tolan did here, by defying a police officer's commands for reasonable compliance during a police investigation, undertakes action that causes the suspect's hands to be concealed from the investigating officer's view, and thereafter the suspect causes his body, and particularly his hands, to move quickly from a position outside an officer's line of sight toward a police officer, a reasonable police officer may regard such action as posing a potential threat of serious harm to the officer or to others which justifies an officer firing in self-defense, consistent with the practical necessity of defensive action and police training, as the Fifth Circuit found in this case and the Eighth and Tenth Circuits have found in similar circumstances. It is not by happenstance that reasonable police officers fire in response to such threats. The evidence admitted in this case, and similar evidence discussed in prior judicial decisions, demonstrate that an officer who fails to respond decisively

to such threatening actions is leaving his fate to mere chance. *See Ontiveros supra*.

Qualified immunity thus additionally serves to reconcile the practical requirements of a police officer's necessary defensive action and determination of civil liability for reasonable conduct undertaken in uncertain circumstances like those Sergeant Cotton encountered here. This Court has consistently applied the Fourth Amendment and immunity in a manner that is consistent with the needs of a reasonable policeman on the scene. This is the clearly established legal standard the decisions of this Court and the Fifth Circuit embody. *See Brosseau* and *Ontiveros supra*. The "mistake" in this case is, therefore, precisely the type of circumstance that demands a finding of immunity under this Court's decisions as well as those of the circuit courts.

III. Decisions of other circuits do not suggest confusion regarding the immunity standard.

Indeed, even Justice Sotomayor's concurring opinion in *Walczyk* would not suggest otherwise. Although Justice Sotomayor criticized the standard applied in the Second Circuit by drawing an admitted "fine distinction" between it and the approach she endorsed, Justice Sotomayor nonetheless concurred with the majority's grant of summary judgment in favor of police officers who asserted qualified immunity in *Walczyk* based upon the reasonableness of their conduct under the facts presented to them. The Justice

acknowledged in *Walczyk* that "'*Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.'" *Walczyk*, 496 F.3d at 168 (quoting *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2151). It is clear Justice Sotomayor agrees that determining whether a right is clearly established requires an analysis of "whether a reasonable officer would have known that the conduct in question was unlawful," and that undoubtedly would have had to consider the factual information known to the officers in *Walczyk* to arrive at her decision regarding immunity in that case. *See Walczyk*, 496 F.3d at 166. The Justice simply opined the Second Circuit erred by allegedly failing to properly articulate the appropriate standard. Regardless of the terms the courts choose to use, a proper evaluation of the qualified immunity defense demands consideration of both legal and factual constituents in all circuit courts.

Tolan, as did Justice Sotomayor in *Walczyk*, also challenges the continued vitality of this Court's holding in *Malley supra* for purposes of evaluating qualified immunity. In *Walczyk*, Justice Sotomayor observed *Malley*'s recitation of the immunity standard had not been repeated by this Court since *Malley* was decided. However, since *Walczyk* was decided, this Court has specifically reaffirmed *Malley*'s pronouncement of immunity for "all but the plainly incompetent or those who knowingly violate the law." *See Morse v. Frederick*, 551 U.S. 393, 429, 127 S.Ct. 2618, 2640 (2009); *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S.Ct. 2074, 2085 (2011); *Messerschmidt v. Millender*, ___ U.S. ___,

132 S.Ct. 1235, 1245 (2012); and *Stanton v. Sims*, ___ U.S. ___, 134 S.Ct. 3 (2013). As such, that criticism raised in 2007 by Justice Sotomayor has been superceded and Tolan's blind response to it is curious, at best.

As Circuit Judge Raggi explained on behalf of the majority in *Walczyk* in response to Justice Sotomayor's criticisms of the Court's evaluation of clearly established law;

> [b]y instructing courts to focus on whether "officers of reasonable competence could disagree" about the illegality of the challenged conduct, *Malley* sounds a useful reminder: because law enforcement work relies on probabilities and reasonable suspicions in an almost infinite variety of circumstances, many requiring prompt action, there can frequently be a *range* of responses to given situations that competent officers may *reasonably* think are lawful. Within this range, an officer enjoys qualified immunity for "reasonable mistakes."

Walczyk, 496 F.3d at 154 n.16 (quoting *Saucier*, 533 U.S. at 205-206, 121 S.Ct. at 2151). This Court subsequently confirmed Judge Raggi's observation in its later opinions. As such, Tolan's contention the Circuit Court erred by relying on *Malley* is misplaced as well.

Contrary to Tolan's argument, the circuit courts are not divided on the issues he identifies in his petition. Some circuits identify the standard they apply as having two prongs and some three prongs but

regardless of the number of "prongs," the multifaceted analysis each circuit court performs is consistent with that dictated by this Court. Certainly, the Fifth Circuit Court does so as discussed at length *supra*. No circuit has held, as Tolan argues, that qualified immunity must be evaluated without consideration of facts relevant to the immunity analysis.

IV. Any police officer could reasonably have believed Sergeant Cotton's response to Tolan's actions would be permitted under clearly established law.

The District Court and Fifth Circuit have evaluated the evidence admitted into the summary judgment record and determined that Sergeant Cotton is entitled to judgment in his favor because a reasonable police officer could have believed Sergeant Cotton's action was lawful. Although the District Court actually went further and found Sergeant Cotton's *conduct was reasonable*, in light of that finding, an officer certainly could have *reasonably believed* Sergeant Cotton's action was reasonable so immunity is nonetheless appropriate.

Peculiarly, Tolan faults the Fifth Circuit Court for allegedly "inject[ing] merits-related factual reasonableness into the purely legal, second prong immunity analysis," claiming that doing so is prohibited by the decisions of this Court. Contrary to Tolan's argument, however, the decisions of this Court plainly demonstrate the immunity analysis cannot be

competently performed without consideration of those unique facts relevant to the questions underlying the immunity analysis. No discernible authority supports Tolan's assertion that a valid analysis of clearly established law can be undertaken without consideration of the factual circumstances of a claim and this odd argument runs afoul of this Court's holding in every qualified immunity case since *Harlow*.

Prominently, Tolan's novel suggestion would effectively preclude any court's ability to resolve a motion for summary judgment based upon immunity under the second prong of the immunity analysis without first evaluating the facts in the first prong of the immunity analysis, which would undeniably force a conflict with this Court's decision in *Pearson supra*.[4]

Moreover, even if Tolan's argument is accepted and this Court changes the legal standard pertaining to immunity in accordance with Tolan's request, the initial prong of the immunity analysis must still be performed and Sergeant Cotton's conduct evaluated under the facts the District Court found supported by the summary judgment record. Since the District Court and Circuit Court have already found Sergeant Cotton's conduct resulted from a reasonable mistake

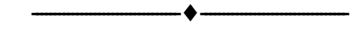
[4] Presumably, Tolan is also asking the Court to overrule *Pearson* because he makes the same arguments in his petition that lead to the initial decision in *Saucier* to require evaluation of the underlying constitutional issue before any consideration of the effect of clearly established law.

of fact, no doubt he would be granted judgment upon analysis of the first prong test.

But even if not, Sergeant Cotton could not have been on notice that this Court would fundamentally change the immunity standard so his immunity will remain intact. *See Pearson supra*. Even if, as Tolan argues, at least nine circuit courts – including the circuit in which Sergeant Cotton polices – use an invalid test to evaluate immunity, Sergeant Cotton could not reasonably have been on notice through clearly established legal standards that all these circuits incorrectly construed the law applicable to his conduct. *See Pearson*, 555 U.S. at 244-245, 129 S.Ct. at 823. As a matter of equally well-settled clearly established law, Sergeant Cotton would be entitled to judgment in his favor because "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Lane*, 526 U.S. 603, 618, 119 S.Ct. 1692, 1701 (1999). Certainly, Sergeant Cotton could reasonably have believed his conduct was lawful when the District Judge who meticulously scrutinized all the record evidence and the Circuit Court that considered the appeal challenging the District Court's judgment, both ruled in favor of Sergeant Cotton after concluding an officer could reasonably have believed Sergeant Cotton's action lawful. Tolan, thus, urges the Court to substantively change the law to a less efficient procedure that does not preserve the protection of the immunity defense in a manner

consistent with its purpose and will not even likely change the result in this litigation.

The Fifth Circuit Court's decision, as well as its method of analysis, does not conflict with the relevant standard of any other federal circuit or this Court and, to the contrary, it is consistent with the decisions of this Court. While posed as a plea to preserve consistency in judicial decisions, even a cursory analysis reveals, Tolan actually seeks review of the Fifth Circuit decision based upon insupportable argument consisting of self-serving mischaracterizations of the evidence under a claimed legal standard which would ignore the evidence. Such an approach conflicts with the well-reasoned decisions of circuit courts, this Court, and established qualified immunity standards.



CONCLUSION

The District Court correctly determined, and the Fifth Circuit Court of Appeals correctly affirmed, that Sergeant Cotton is entitled to judgment in his favor. Discretionary review is, thus, unwarranted in this case because the Fifth Circuit has not entered a decision which conflicts with any decision of this Court or any other United States court of appeals on the same important matter. To the contrary, Tolan urges this Court to accept the unprecedented notion that qualified immunity must be determined without consideration of the relevant facts. This Court has never

suggested such a standard. For these reasons, this Court should deny Tolan's petition.

Respectfully submitted,

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