No. ____

In The
Supreme Court of the United States

ERIK SAMMIS, INDIVIDUALLY AND JIMMY EVANS, INDIVIDUALLY,
Petitioners,

v.

UNSELD NANCE, SR., INDIVIDUALLY AND AS THE NATURAL FATHER AND NEXT FRIEND OF UNSELD NANCE, JR., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTIAN C. MICHAELS
Counsel of Record
CATLETT LAW FIRM, PLC
323 CENTER STREET
SUITE 1800
LITTLE ROCK, AR 72201
(501) 372-2121
cmichaels@catlaw.com

Counsel for Petitioner

March 15, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTIONS PRESENTED

Whether the Eighth Circuit departed from established principles of qualified immunity in holding that a police officer may be held liable on a claim under 42 U.S.C. § 1983 for failing to act to prevent another officer's use of force where the use of force occurred within a short interval of time such that a reasonable officer faced with the same circumstances would not have had a realistic opportunity to intervene.

Whether the commands "get on the ground, drop the gun" are sufficient to satisfy the warning required to be given prior to the use of deadly force.

Whether a party's self-serving testimony that contradicts his or her prior statement is sufficient to create a fact question and thereby avoid an adverse summary judgment ruling on the defense of qualified immunity.

LIST OF PARTIES

Petitioners: Erik Sammis ("Sammis") and Jimmy Evans ("Evans")

Respondents: Unseld Nance, Sr. individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow; and Debra Farrow and Robin Perkins, individually and as co-administrators of the Estate of DeAunta Farrow.

Defendants and Respondents Below: City of West Memphis, Arkansas; Robert Paudert; and William Johnson.

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The decision of the court of appeals is reported at 586 F.3d 604 and is reproduced in the Appendix herein at 1a-19a. The decision of the U.S. District Court for the Eastern District of Arkansas is not officially reported but is available at 2009 U.S. Dist. LEXIS 13009 and is reproduced in the Appendix herein at 20a-96a.

JURISDICTION

The judgment of the Eighth Circuit was issued on November 10, 2009. Appendix to Petition ("Pet. App.") 1a. Petitioners timely filed a petition for rehearing and rehearing *en banc* was denied on December 15, 2009. Pet. App. 97a. Jurisdiction for the Eight Circuit's consideration of interlocutory appeal of the District Court's denial of qualified immunity is pursuant to 28 U.S.C. § 1291. Jurisdiction before this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

Rule 56(c)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

INTRODUCTION

This case originates out of the State of Arkansas where, like other states facing similar issues, the legislature has struggled with the prevalence of imitation firearms and the difficulties they can create for public safety and for law enforcement operations. See, ARK. CODE ANN. § 20-27-2302, *et seq*. ("The Arkansas Children's Imitation Firearms Act.") (Lexis 2009). The proliferation of so called "imitation firearms" creates safety issues not only for those who carry them, but for law enforcement officers who often must make split second decisions in the field when

faced with persons carrying these guns. The unfortunate result of the use of force at issue in this case was the death of a twelve year old boy who had in his possession a toy pistol that was mistakenly identified by a police officer as a real handgun. Although this case presents one set of troubling facts, the converse is also a likely potential scenario; that is, where an officer is faced with a real gun that resembles a toy and is killed because he or she does not recognize the threat.

This case involves two officers who encountered an individual with a toy pistol that closely resembled a semi-automatic handgun. During a confrontation that lasted only a few seconds, one of the officers fired his weapon, the other did not. After a lawsuit ensued, both officers sought qualified immunity for their actions. In a decision that defies this Court's precedents, the Eighth Circuit has now held that an officer may be found liable under 42 U.S.C. § 1983 for failing to intervene to prevent another officer from committing an unconstitutional use of force, even though based on the short duration of the event, no reasonable officer would have had a realistic opportunity to intervene.

The Eighth Circuit's opinion also deviates from accepted precedent of this Court inasmuch as it denies qualified immunity to the officers involved, in part, because it determined that no warnings were given prior to the use of force at issue. Assuming *arguendo* that a warning was required in this case, even though it is undisputed that the words "get on the ground, drop the gun" were spoken by the officers at the scene, the Eighth Circuit nevertheless held that no "warnings" were given." Because there is no clearly

established law that would put reasonable officers on notice that they have a constitutional duty to identify themselves as police prior to utilizing deadly force when faced with an apparent imminent danger, the Eighth Circuit deviates from this Court's precedents in denying these officers qualified immunity. The resolution of this issue is important to provide clarity in the law necessary for orderly and effective law enforcement.

Another important issue raised by the Eighth Circuit's opinion concerns a procedural issue that is at the heart of this Court's jurisprudence on pretrial qualified immunity practice. The general rule is that when an appellate court reviews the denial of qualified immunity at the summary judgment stage, the court should view all facts in the light most favorable to the non-moving party. See *Johnson v. Jones*, 515 U.S. 304, 311-312 (1995). The Eighth's Circuit ruling here broadens the application of this rule and holds that a party opposing an officer's assertion of qualified immunity may simply take one position on the facts early in a case, only to later contradict himself and thereby avoid summary judgment. Lower courts considering qualified immunity issues at the summary judgment stage should not be so constrained in analyzing the record before them that they are forced not only to construe the facts in favor of the non-moving party, but also to choose the most favorable version of a party's contradictory testimony. This Court should grant *certiorari* and hear this issue in order to ensure that the doctrine of qualified immunity is not reduced simply to a defense that for practical purposes is only applicable at trial.

STATEMENT OF THE CASE

A. Factual Background

On June 22, 2007 Officers Sammis and Evans were on duty as police officers conducting surveillance from an unmarked vehicle in an apartment complex parking lot. The officers were part of a special response team that had received a tip that a nearby convenience store would be robbed that night by two or three black males. Pet. App. 3a. At approximately 10:00 p.m. the officers saw two black males walking in the direction of the officers' vehicle, one of whom was apparently armed. It was later learned that the two individuals walking toward the officers were DeAunta Farrow, who was 12 years old, and Unseld Nance, Jr., who was 14 years old. Farrow was on the officers' left; Nance was on the officers' right. Pet. App. 4a.

As Farrow walked toward them, both officers observed what they believed was a handgun. Both officers exited their vehicle to confront Farrow and Nance. With Sammis on the left and Evans on the right, the officers approached Farrow and Nance. The officers, confronting at least one apparently armed individual, had their weapons drawn for their protection and the protection of any other person who might be in the vicinity. Pet. App. 4a.

Sammis moved toward Farrow, who was on his side. Evans moved toward Nance, who was on his side. As the officers approached, Sammis gave the commands "drop the gun, get on the ground." At that point Nance immediately got to the ground but Farrow did not. Sammis repeated the warning, but Farrow

remained standing despite Sammis' repeated commands and Nance's compliance.

Farrow then began raising the hand in which the officers believed he was holding a handgun. Because Farrow failed to comply with Sammis' orders and was in the possession of what the officers reasonably believed was a handgun, at that point Sammis felt threatened and in fear for his life. Sammis then yelled "no" and fired two rounds in rapid succession toward Farrow. At the time Farrow was shot, Nance was not looking at Farrow but was lying face down and looking forward. Both shots hit Farrow, ultimately proving to be fatal. The toy gun recovered from the scene is a replica of a semi-automatic handgun that the Plaintiffs have conceded resembles a real handgun. The time period from the point the final warning was given to the final shot being fired was only a few seconds.

Later that night Nance, accompanied by his father, was interviewed by Mike Middleton of the Arkansas State Police. A video recording of the interview was made. After the interview Nance and his father voluntarily reviewed and signed a statement regarding the shooting. Both the video of the interview and the written statement signed by Unseld Nance and his father unequivocally confirm that at the time of the shooting, Farrow had the toy pistol in his right hand. During the interview, Nance demonstrated this fact by standing and positioning his arms and hands in a manner that demonstrated to the investigator how Farrow was standing and indicating that Farrow had a toy gun in his right hand, and that his right hand was partially raised when he was shot. Although the interview and statement were not sworn, during his deposition taken some months later Nance reviewed

his statement, watched the video, and confirmed under oath that he gave the statements contained therein.

Nance and his father also confirmed in their depositions that they were not threatened or coerced into giving the statement the night of the shooting and that the interview and written statements were given voluntarily. Nevertheless, in an apparent effort to manufacture a fact issue so that their case would not be dismissed prior to trial, Unseld Nance answered a final, leading question from his attorney at the close of his deposition wherein he stated that at the time of the shooting the gun was in Farrow's waistband. It is this piece of evidence alone that prevented both the District Court and the Circuit Court from finding that both officers were entitled to qualified immunity. Pet. App. 12a and 45a-46a.

B. Procedural History

The case at bar is a consolidated case that began when Plaintiffs Unseld Nance, Sr. and Pamela Farrow, individually and on behalf of their minor son, Unseld Nance, Jr. ("Nance"), filed a complaint in the district court on September 4, 2007 alleging, *inter alia*, violations of First, Fourth, Eighth and Fourteenth Amendment Rights, pursuant to 42 U.S.C. §1983. Thereafter, Plaintiffs Debra Farrow and Robin Perkins filed a complaint in the district court on December 10, 2007 on similar bases, individually, and in a representative capacity on behalf of estate of their deceased son, DeAunta Farrow ("Farrow"). On August 28, 2008 Appellants filed Motions for Summary Judgment asserting qualified immunity with regard to the Nance claims and on December 19, 2008 Appellants filed similar motions with regard to the

Farrow claims. On February 5, 2009 the district court entered an order denying the qualified immunity motions filed relative to both the Farrow and Nance claims. An interlocutory appeal was taken to the Eighth Circuit Court of Appeals with regard to the denial of the motions for summary judgment based on the defense of qualified immunity. The judgment of the court of appeals affirming the district court was issued on November 10, 2009. Pet. App. 1a. Petitioners' timely filed petition for rehearing and rehearing *en banc* was denied on December 15, 2009. Pet. App. 97a. The instant Petition is filed on behalf of defendants Jimmy Evans and Erik Sammis.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW REGARDING THE FAILURE TO INTERVENE CLAIM CONFLICTS WITH *GRAHAM V. CONNOR* AND THE DECISIONS OF OTHER CIRCUIT COURTS.

The first question presented here pertains to the analysis of the qualified immunity defense asserted by Evans in response to the failure to intervene claim under 42 U.S.C. § 1983. The Eighth Circuit's opinion deviates from this Court's holding in *Graham v. Connor*, 490 U.S. 386 (1989) and creates a new rule of law whereby an officer can be held liable simply for witnessing the unconstitutional behavior of another officer. The rule announced by the Eighth Circuit will greatly hamper the ability of law enforcement to effectively function. Indeed, the decision below burdens officers engaged in a rapidly developing situation with analyzing not only whether their actions

are constitutionally justifiable, but also whether the actions of other officers on the scene are likewise constitutional. A rule requiring an officer to intercede in the context of an incident that lasted no more than a few seconds is wholly unworkable for officers in the field. The Eighth Circuit's decision likewise departs from the decisions of other federal circuits that have held that in similar situations where the use of force in this case was over in a matter of seconds and there was no realistic opportunity to intercede, the officer witnessing the use of force owes not duty to intervene.

The material facts stated most favorably to the plaintiffs, as they pertain specifically to a consideration of whether the defendant Evans is entitled to qualified immunity on the failure to intercede claim, are as follows: Evans and Sammis were sitting in an unmarked police vehicle at approximately 10:00 p.m. and saw Farrow and Nance walking toward them. According to plaintiff Nance's most recent account of the events, which the Eighth Circuit assumed for purposes of addressing the qualified immunity issue, Farrow had a toy gun, that closely resembled a real gun, tucked in his waistband.[1] The officers then exited the vehicle. Sammis shouted "get on the ground, drop the gun." Nance got on the ground, Farrow remained standing. Sammis repeated the commands "get on the ground, drop the gun." Farrow remained standing, Sammis yelled "no" and then fired his weapon two times in rapid succession. Based on this version of the facts, it is without

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[1] As discussed at length later in the Petition, Nance's statement given the night of the shooting plainly states that at the time of the shooting Farrow was holding the gun in his right hand.

question that Evans did not have a realistic opportunity to stop Sammis from shooting.

It should be noted that the Eighth Circuit correctly held that the officers in this case committed no constitutional violation in initially confronting Farrow and Nance and for the initial detention prior to the shooting. As such neither officer can be liable for what took place prior to the first shot being fired. Therefore, with regard to Sammis, the only constitutionally suspect conduct to be addressed concerns the actual shooting because that is when the constitutional deprivation, if any, occurred. Sammis fired shots in this case, and as it relates to him, the Eighth Circuit has correctly ruled that this was the only potential constitutional violation committed by him. Sammis' potential violation resulted from two rapidly fired bullets.

With regard to Officer Evans, the Eighth Circuit held that the only possible constitutional violation is his failure to intervene to prevent the use of force by Sammis. Stated differently, the only conceivable question left for trial pertaining to Evans is whether can be held liable for failing to take action to prevent Sammis from firing the shots. The Eighth Circuit should have then analyzed whether Evans, who was present but did not directly participate in the shooting, acted in an objectively reasonable manner and was therefore entitled to qualified immunity. That is, assuming *arguendo* that Sammis' actions were unconstitutional, were Evans' actions at the time of the shooting objectively reasonable? Instead, the Eighth Circuit held that "[t]he claims against Evans are based not on the use of excessive force but also [sic] the failure to prevent its use" but did so without

engaging in any analysis whatsoever of whether Evans' actions were objectively reasonable. Pet. App. 14a.

The Eighth Circuit opinion deviates from rulings by other circuit courts that have held that a failure to intercede claim cannot lie where due to the short period of time between the commencement on the unconstitutional use of force and the cessation thereof does not allow a realistic opportunity to intervene. The Second Circuit has recognized that in a case involving an officer facing a claim for failing to intervene to prevent the unconstitutional beating of an arrestee, the episode must have been of such a duration that the non-intervening office could be viewed as a "tacit collaborator":

> Even when the evidence is viewed in the light most favorable to the plaintiff, there is insufficient evidence to permit a jury reasonably to conclude that Conners failure to intercede was a proximate cause of the beating. The three blows were struck in such rapid succession that Conners had no realistic opportunity to attempt to prevent them. This was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator.

O'Neill v. Krzeminski, 839 F.2d 9, 11 (2nd Cir. 1988). Although *O'Neill* predates *Graham v. Connor*, the analysis set forth therein is nevertheless in accord the constitutional standard of objective reasonableness.

Circuit courts addressing qualified immunity in the context of a failure to intercede claim have required

that before such a claim can go forward, there must have been sufficient time to allow the officer a realistic opportunity to take action. The rationale is that without a sufficient interval of time, the officer owes the subject no duty to protect. *Krout v. Goemmer*, 583 F.3d 557, 565 (8th Cir. 2009) ("This duty of a police officer to intervene to prevent the excessive use of force -- where the officer is aware of the abuse and the duration of the episode is sufficient to permit an inference of tacit collaboration") (citing *Torres-Rivera v. ONeill-Cancel*, 406 F.3d 43, 51-52 (1st Cir. 2005)); *Priester v. City of Riviera Beach*, 208 F.3d 919, 924-25 (11th Cir. 2000); *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998); *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996); *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990) (*per curiam*); *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982)(per curiam). The Eighth Circuit opinion ignores this element as it pertains to Evans' assertion of qualified immunity inasmuch as it is true that given the undisputed short interval of time involved, Evans simply did not have a realistic opportunity to intervene and his conduct was therefore objectively reasonable. Indeed, just as the officer in *Krzeminski* did not have a realistic opportunity to intervene between the three punches thrown, Evans did not have a realistic opportunity to intervene between the two shots that were fired.

Time is a key element for establishing a duty to act on the part of the officer. As the First Circuit in *Torres-Rivera v. ONeill-Cancel* explained what it viewed to be the "classic paradigm" for a failure to intervene claim:

> the classic paradigm of police failure to stop the excessive use of force by a fellow officer, which we addressed in *Gaudreault v. Municipality of Salem*, 923 F.2d 203 (1st Cir. 1990). The plaintiff there sued four police officers who did not actively participate in another unidentified officers assault on the plaintiff under detention. *Id.* at 207. The court explained that "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officers excessive force can be held liable under section 1983 for his nonfeasance." *Id.* at 207 n.3. No liability for the non-participating bystander officers existed there because "the attack came quickly and was over in a matter of seconds," giving the officers no "realistic opportunity to prevent an attack." *Id.* (citing *ONeill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988)).

Torres-Rivera, 406 F.3d at 52 (emphasis added). Similarly, the test adopted by the Sixth Circuit and relied upon by the Eighth Circuit in this case imposes liability only "where '(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.'" *Floyd v. City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008) (quoting *Turner v. Scott*, 119 F.3d 425 (6th Cir. 1997). Although the Eighth Circuit panel relied on *Floyd*, its ruling eviscerates the second prong of the *Floyd* analysis. The two part analysis in *Floyd* is merely shorthand for the ultimate analysis of whether the Fourth Amendment reasonableness analysis set forth in *Graham v. Conner* has been satisfied. *Floyd*, 518 F.3d at 406 (citing *Graham*, 490 U.S. at 395). As

such, in abandoning the second prong of the *Floyd* test, the Eighth Circuit likewise abandons the objective reasonableness standard set forth in *Graham*.

Applying the rule of law relied upon in *Floyd* against the background of the objective reasonableness standard set forth in *Graham* to the undisputed facts here clearly demonstrates that no reasonable juror could find the Plaintiffs' constitutional rights were violated by Officer Evans due to a failure to intervene. Even assuming *arguendo* there were facts showing Evans knew or should have known that it was likely that excessive force was going to be employed, thereby satisfying the first prong of the *Floyd* test, given that the shots were fired in rapid succession a reasonable officer in Evans' position would not have had the opportunity or the means to prevent the use of force by Sammis and the second prong cannot be satisfied. Because it is without dispute that the interval of time between the two shots fired was so short that no reasonable jury could find that Evans had a realistic opportunity to intervene, Evans should be granted qualified immunity and dismissed from this case.

II. CERTIORARI IS WARRANTED BECAUSE THE EIGHTH CIRCUIT'S DETERMINATION THAT THE COMMANDS "GET ON THE GROUND, DROP THE GUN" WERE NOT SUFFICIENT TO SATISFY THE CONSTITUTIONAL STANDARD FOR A WARNING GIVEN PRIOR TO THE USE OF DEADLY FORCE IS IN DIRECT CONFLICT IN *TENNESSEE V. GARNER* AND CREATES A SPLIT OF AUTHORITY IN THE CIRCUIT COURTS.

Although the Eighth Circuit acknowledged that there was no dispute that the words "get on the ground, drop the gun" were uttered by Sammis, App. 4a, it nevertheless held that a genuine issue of material fact existed as to whether a "warning" was given. Pet. App. 11a. The Eighth Circuit panel also held that whether the officers announced their identity as "police" was a material fact in dispute and therefore a necessary element of the warning that prevents a ruling in their favor on qualified immunity. In so holding, the Eighth Circuit created a new constitutional standard whereby a police officer faced with a perceived threat is required to give a warning, which must include announcing his or her identity as a police officer, before utilizing deadly force to protect himself or those around him.

As recognized by the Seventh Circuit, although "the Supreme Court has held that police officers usually must announce their identity before carrying out an arrest in a private dwelling," there is no clearly established law that establishes a constitutional duty to identify themselves as police during a public arrest. *Catlin v. City of Wheaton, et al.*, 574 F.3d 361, 369 (7th

Cir. 2009) ("we are aware of no court of appeals decision that has recognized a constitutional obligation on the part of the police to announce their identity when they carry out an arrest in a public place") (citing *Wilson v. Arkansas*, 514 U.S. 927, 934, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995) (holding that the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry)). Because it is either not constitutionally required, or because such a requirement was not clearly established at the time of the incident, the issue of whether the officers in the present case said "police" is immaterial to the analysis of whether the officers are entitled to qualified immunity. Accordingly, the fact that this issue is disputed by the parties has no bearing on whether Sammis' actions were unconstitutional, and even if we assume for purposes of this analysis that officers did not identify themselves as police during this event, the officers actions were nevertheless met the standard of objective reasonableness. See *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (petitioner may claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the standard of objective legal reasonableness).

Moreover, even if a warning were required, which Petitioners dispute, Nance's statement the night of the shooting was that "[t]hey told us to get on the ground. They told him to put the gun down." Such words are sufficient to convey a warning inasmuch as a panel of the Eighth Circuit has found that a warning simply to "freeze" is sufficient to satisfy the *Tennessee v. Garner,* 471 U.S. 1 (1985), requirement, even where such warning was not given in the moments immediately

preceding the use of force. *Krueger v. Fuhr*, 991 F.2d 435, 440 (8th Cir. 1993) ("the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable"). Indeed, the Eighth Circuit acknowledged as much in that it recently denied qualified immunity to an officer on an excessive force claim because the "[p]laintiff never resisted [the officer's] commands and had no opportunity to comply . . . ." *Wilson Smith v. Kansas City, Missouri, et al.*, No. 09-1484, 586 F.3d 576, 2009 U.S. App. LEXIS 24591, *10 (8th Cir. Nov. 9, 2009). Indeed, although not a deadly force case, *Wilson Smith* is notable in that it is premised on the fact that there was no warning whatsoever prior to the use of force at issue in that case. *Id.* In the case at bar, it is without question that commands were given, that Farrow did not comply, and that Farrow had the opportunity to comply—as evidenced by the fact that Nance, who was standing next to him and received the identical commands, did in fact comply. As such, because in the present case warnings were given and Farrow had the opportunity to comply but indisputably did not, Sammis and Evans are entitled to qualified immunity.

III. THE EIGHTH CIRCUIT'S ERRONEOUS RULING THAT THE PLAINTIFF'S DEPOSITION TESTIMONY, WHICH CONTRADICTS HIS OWN EARLIER VIDEOTAPED AND WRITTEN STATEMENT, WAS SUFFICIENT TO CREATE A FACT QUESTION AND PREVENT A SUMMARY JUDGMENT RULING IN FAVOR OF THE DEFENDANTS ON THE BASIS OF QUALIFIED IMMUNITY VIOLATES THIS COURT'S HOLDING IN *SCOTT V. HARRIS*.

It is indeed a bedrock principal in pretrial qualified immunity practice that a court may not grant qualified immunity where there are disputed issues of facts that are material to the determination of whether the officers' actions were objectively reasonable. This case tests the limits of this principal. Notwithstanding this prohibition against fact finding by a court considering a motion for summary judgment, a trial judge hearing a qualified immunity motion need not dispense with a common sense assessment of the testimony, indeed, "judges are not required to exhibit a naivete' from which ordinary citizens are free." *Pennsylvania v. Nathan Dunlap*, 555 U.S. ___ (2008) (Justice Roberts dissenting from a denial of a petition for writ of certiorari, quoting Justice Friendly in *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977)). Likewise Rule 56 of the Federal Rules of Civil Procedure requires that any issue of fact that may preclude summary likewise be "genuine." FED. R. CIV. P. 56. As such, the trial judge has some ability to determine the veracity of the competing proof and is not held to reject out of hand any motion for summary judgment merely because there is some variance in the

parties' account of the material facts. See *Johnson v. Jones*, 515 U.S. 304, 308 (1995). The reviewing court need accept a party's obvious attempt to assert a manufactured issued of fact. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007); see, *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1984) (a genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiffs testimony is correct). This Court has stated that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* Indeed, the very purpose of summary judgment under Rule 56 is to prevent "the assertion of unfounded claims or the interposition of specious denials or sham defenses." *Martin v. Merrell Dow Pharms., Inc.*, 851 F.2d 703 (3rd Cir. 1998) (citing 10 C. Wright, A. Miller & M. Kane, *Federal Practice* and *Procedure* § 2712 (1983)). A party should not be permitted avoid summary judgment simply by contradicting his own earlier testimony.

A review of the record in this case reveals that there is no *genuine* dispute regarding the *material* facts with respect to the qualified immunity analysis. Indeed, the case at bar, the facts demonstrating an effort to manufacture a fact issue are even more egregious than in *Scott* —here the plaintiff's testimony not only contradicts the overwhelming record before the Court, but more strikingly contradicts his own testimony. Unseld Nance, Jr. is a plaintiff in this consolidated case by virtue of his appearance in this case via his parents as his legal guardians. The night of the shooting Nance repeatedly and consistently told

the state police that Farrow had a toy gun in his right hand at the time of the shooting. Nance states that although Farrow was carrying the gun under his shirt as they walked, prior to the shooting, the gun was in Farrow's hand, facing down:

> Officer #1: But when these – these men gave you all a command to get on the ground and they also gave a command for [Farrow] to do what with the gun?
>
> Nance: Put it on the ground. And he had his hands up like this and the gun was pointed down.
>
> Officer #1: So he had the gun in his right hand?
>
> Nance: Right hand.

Court of Appeals Appendix ("A") 804-80. On the night of the shooting and following the interview, Nance and his father also signed a written statement prepared by the Arkansas State Police investigator during the interview. Nance's deposition was taken eleven months later. Although this written statement given the night of the shooting was not sworn, Nance confirmed its accuracy under oath during his deposition. A. 804-805.

Under questioning by defense counsel in his deposition, Nance confirms under oath that the statement accurately reflects what he told the state police the night of the shooting. During the deposition Nance also viewed the video footage of his state police interview and further confirms the statement he made therein. Nance likewise professed to his lawyer and defense counsel in his deposition that he told the state

police investigator that Farrow held the gun in his right hand. At this point, the statements of Sammis and Evans regarding the location of the toy pistol at the time of the shooting (i.e. in Farrow's right hand) were in complete agreement with Nance's version of events. Had Nance's attorney declined to question his own client and the deposition ended at that moment, there would be absolutely no dispute on this fact. Only when Nance is fed a leading question by his attorney at the end of his deposition does he give any testimony contrary to this assertion.

Given the circumstances of Nance's prior statement, which given to the Arkansas State Police freely and without coercion, with his father present, and considering that Nance's later deposition testimony contradicting the prior statement was made under his own lawyer's questioning, it is apparent that the later story was created to avoid a dismissal of the case. The only possible question as to whether Farrow held a toy gun in his hand and raised it toward Sammis is the statement made by Nance, blatantly contradicting his own previous testimony. The Court should view the facts in the light depicted by the video recording of Nance's interview. *Scott v. Harris*, 127 S. Ct. at 1776. As seen and heard in the video, Nance confirms that Farrow had the toy gun in his right hand at the time of the shooting and Nance likewise demonstrates to the investigators how Farrow was standing at the time he was shot – with his right hand partially raised, holding the toy pistol. A. 411-412.

Despite the references made in its opinion that it is restrained from considering any disputed fact or engaging in any fact-finding, the Eighth Circuit itself engages in its own version of fact finding in this case

inasmuch as the statement of the facts in its opinion completely disregards and fails to even mention the earlier statement of Nance. Indeed, the Eighth Circuit panel, operating under the apparent justification of considering the matter in a light most favorable to the non-moving party, chose between the two versions of Nance's account of the event. The opinion states that "according to Nance . . . . Farrow had a toy gun tucked into the waistband of his pants" and simply ignores the undisputed fact that Unseld Nance, Jr. had previously given a statement, confirmed under oath at his deposition, that Farrow had the toy gun in his right hand, partially raised, at the time of the shooting. App. 4a. Even though the appellate court must make qualified immunity determinations at the summary judgment stage taking the record in the light most favorable to the party asserting the injury, such a rule of law does not suggest that the court must choose between one of several versions of the party's story over another.

Moreover, regardless of whether there is a genuine dispute as to the location of the gun at the moment of the shooting (i.e. in Farrow's hand or his waistband), the officers had an objectively reasonable fear for their safety, given that a reasonable officer confronted with the same circumstances would have believed that Farrow was armed and that Farrow posed an immediate threat, given that Farrow did not comply with their commands. This Court has explicitly declared that the use of deadly force is permissible when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (quoted by *Hernandez v. Jarman*, 340 F.3d 617, 622 (2003)). Although there

may be some factual wrinkles present, as any similar case would have, "the core fact pattern is the same": experienced police officers confronted with an armed subject who is ignoring their commands. See, *Dunlap*, 555 U.S. ___ (*Roberts dissenting*).

The Eighth Circuit opinion suggests that for the officers here to be entitled to qualified immunity the weapon in question needed to have been in Farrow's hand pointed at the officers. Conversely, other circuits have rejected the requirement that in order for an officer to use deadly force, the suspect had to be pointing the gun at the officer. *Wilson, et al. v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995). The Fifth Circuit has found reasonable the use of deadly force where officers had not even seen a weapon. *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985)). Indeed, the Eighth Circuit has indicated that even a perception that the suspect is reaching for a weapon may justify the use of deadly force. *Ngo v. Storlie*, 495 F.3d 597, 605 (8th Cir. 2007).

Finally, in an apparent attempt to bolster the finding that a material issue of fact exists, the Eighth Circuit opinion also references a report by the deputy coroner wherein he found it "unlikely that Farrow was raising both arms at the time he was shot, based on the trajectory of the bullet wounds on his body." Pet. App. 12a. This fact is completely irrelevant to the analysis of whether the gun was in Farrow's right hand at the time of the shooting. Konzelman's report only puts in dispute the relative position of Farrow's right arm at the time of the shooting and does nothing to dispute whether the gun was in his right hand at the time of the shooting. Indeed, both parties agree

that Farrow's arm was somewhere between at his side and raised at the time of the shooting. In either event, both the District Court and the Circuit Court have held that should it be determined that the gun was in Farrow's hand at the time of the shooting, the officers would be entitled to qualified immunity. Furthermore, it is clear that when considering the uncontroverted facts before the Court, without the benefit of hindsight (i.e. without the benefit of knowing that it was a toy gun), both officers' actions were objectively reasonable. As often quoted from *Graham v. Connor*, "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." *Graham*, at 396. "The calculus of reasonableness must embody allowance for 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 397-397.

This case, which involves the mistaken belief that Farrow was carrying a weapon, as opposed to a toy gun, vividly demonstrates the importance of the rule prohibiting hindsight analysis. Only with the benefit of hindsight would be reasonable to conclude that the officers here were never in apparent danger and therefore no use of force could ever be deemed objectively reasonable. The obvious flaw in such an analysis is that the gun here indisputably appeared to be real and therefore an *apparent* danger existed; as such, there is no question that the officers were reasonable in assuming that it was real. Indeed, given that it is patently clear that the toy pistol in this case could quite reasonably been mistaken for a real gun, in

order to ensure that the analysis does not include the benefit of hindsight, the Eighth Circuit should have analyzed the qualified immunity issues the assumption that the officers faced a suspect armed with a real gun.

CONCLUSION

Based upon the arguments and authorities set forth herein, the petition for writ of certiorari should be granted.

Respectfully Submitted,

ERIK SAMMIS, Individually; and
JIMMY EVANS, Individually

By:

Christian C. Michaels
Ark. Bar No. 98013
CATLETT LAW FIRM, PLC
323 Center Street, Suite 1800
Little Rock, AR 72201-2607
Phone: (501) 372-2121
Fax: (501) 372-5566

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