No. 16-515

IN THE

Supreme Court of the United States

RICARDO SALAZAR-LIMON,

Petitioner,

v.

CITY OF HOUSTON, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the undisputed facts show that a suspect, who is stopped for speeding on a major city freeway at midnight, appears to be driving while intoxicated and resists being searched or tested for DWI, is accompanied by three other men who have not been searched for weapons, in a vehicle that has not been searched for weapons, resists arrest and struggles with the officer, trying to push the officer first into oncoming traffic and then over the retaining wall of an overpass into traffic below, refuses commands to stop, continues walking toward his companions in his truck, and then moves his hand toward his waistband, is it objectively reasonable in the totality of the circumstances for an officer to believe that the suspect could be reaching for a weapon and presents an immediate threat, entitling the officer to qualified immunity for using deadly force to stop that threat?

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INTRODUCTION

There is no split of authorities in the courts of appeals on the issue of an officer's entitlement to qualified immunity for using deadly force to protect himself when he reasonably, even if incorrectly, believes that a suspect presents an immediate threat to his safety. The circuit courts uniformly rely on and apply the criteria this Court has established to analyze when an officer is entitled to qualified immunity. Following this Court's precedents, the circuit courts consider the totality of the circumstances in analyzing if it was reasonable for the officer to use deadly force, regardless of whether the suspect was later found to be armed or unarmed. The circuit courts also follow this Court's precedents in applying the standard for granting summary judgment in a case where the plaintiff has the burden to overcome the defense of qualified immunity.

Instead of following that established framework, and in an attempt to show a circuit split, petitioner characterizes the opinion below as though it authorizes officers to shoot a suspect in the back even though the suspect is unarmed and poses no threat, disregarding the totality of the circumstances, and disregarding what a reasonable officer on the scene would objectively perceive. Petitioner attempts to apply the summary judgment

standard to allow inference to be stacked upon inference as a way of overcoming his own admissions of using force again the officer, and despite his having the opportunity to directly contradict the officer's testimony but not doing so.

The decisions on which petitioner relies apply settled law to a variety of different factual settings. Nothing in those cases suggests that any of the circuit courts would reach a result different from what the Fifth Circuit did based on the facts of this case.

STATEMENT OF THE CASE

Statutory and legal context

Petitioner, Ricardo Salazar-Limon, brought this suit under 42 U.S.C. § 1983 asserting that Officer Thompson and the City of Houston violated his rights against unreasonable search and seizure under the Fourth Amendment to the U.S. Constitution. Petitioner contends that Officer Thompson's use of deadly force to stop a perceived threat was excessive because petitioner was later found to be unarmed. Both courts below held that Thompson was entitled to qualified immunity.

"Qualified immunity promotes the necessary, effective, and efficient performance of governmental duties by shielding from suit all but the plainly incompetent or those who knowingly violate the law." *Tolan v. Cotton*, 713 F.3d 299, 304 (5th Cir. 2013), rev'd on other grounds, 134 S.Ct. 1861 (2014). Qualified immunity involves a two-prong test to determine whether an official is entitled to a qualified immunity defense. *Thompson v. Johnson*, 348 Fed.Appx. 919, 922 (5th Cir. 2009) (citing *Saucier v. Katz*,

533 U.S. 194, 201 (2001)). First, the court must determine if the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right. *Id.* Second, if a constitutional right has been violated, the court must ask whether the right was clearly established. *Id.* The inquiry into whether the individual officers are entitled to qualified immunity turns on the objective reasonableness of their actions in light of the legal rules clearly established at the time. *Pearson v. Callahan*, 555 U.S. 223, 243 (2009). If the conduct did not violate a constitutional right, there is no need to address the second prong of the qualified immunity analysis. *Id.* at 922. Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to rebut its applicability. *Tolan*, 713 F.3d at 304.

This Court has held that when resolving the questions of qualified immunity at the summary judgment stage, the District Court need not view facts favorable to the plaintiff when the record as a whole cannot lead a rational trier of fact to find for the non-moving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When 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.* at 380.

Petitioner alleged that Thompson deprived him of rights guaranteed by the Fourth Amendment when Thompson allegedly used excessive force by shooting him. In an excessive force case, a plaintiff must first show that he has an injury that resulted from the use of force that was clearly excessive to the need and excessiveness was clearly

unreasonable. *Tolan*, 713 F.3d at 304. Second, the plaintiff must show that the allegedly violated constitutional rights were clearly established at the time of the incident, and, if so, whether the defendant's conduct was objectively unreasonable in light of the clearly established law at the time. *Id*. at 305.

The proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness of an officer's use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight. *Id*. The analysis of reasonableness must consider allowances for the fact that police officers are often forced to make split second decisions about the amount of force that is necessary in situations that are tense, uncertain and rapidly evolving. *Id*. at 396-97.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Where the burden of proof at trial is on the non-moving party, the movant satisfies its initial burden by "'showing'— that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmovant must then identify specific evidence in the record and articulate how that

evidence supports the party's claim. *Baranowski v. Hart,* 486 F.3d 112, 119 (5th Cir. 2007).

Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments are not an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.,* 276 F.3d 754, 759 (5th Cir. 2002); *Little v. Liquid Air Corp,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Although factual controversies are to be resolved in the nonmovant's favor, that is "only when . . . both parties have submitted evidence of contradictory facts." *Little,* 37 F.3d at 1075. The plaintiff is not entitled to go to trial on allegations, and must come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex,* 477 U.S. at 323.

Factual Context

The district court accurately recited the undisputed material facts of this case, some of which will be repeated here.

The Traffic Stop

Around midnight in late October 2010, Houston Police Officer Chris Thompson stopped Ricardo Salazar-Limon for speeding. ROA.344, 348. Thompson got out of his police car and approached Salazar's vehicle. ROA.346. Salazar rolled his window down, and Thompson could smell alcohol. ROA.346, 362. Salazar admitted that he was driving above the speed limit and that this was a violation of the law. ROA.366.

Thompson asked Salazar for his driver's license and insurance. ROA.346, 362. Salazar displayed a Mexican ID and his insurance. ROA.346, 367. Salazar appeared to understand what Thompson was saying. ROA.346, 367.

Thompson returned to his vehicle and ran Salazar's name and it was clear. ROA.346, 367. Thompson walked back to Salazar's vehicle and asked him to get out of the truck, and Salazar complied with that request. ROA.347, 363. They both walked back toward Thompson's police car and ended up between the police car and Salazar's truck. ROA.366. When they stopped, Thompson's back was to the freeway and Salazar was facing Thompson in the direction of traffic. ROA.347. Salazar could not see what his passengers Rogelio, Ivan and Jose were doing in the truck at this point and could not see their hands. ROA.366.

In a slightly raised voice, to speak over the noise of traffic, Thompson told Salazar that he needed to do an investigation of a DWI. ROA.347. Thompson told him to turn around and put his hands behind his back. ROA.347. Thompson was not placing Salazar under arrest at that time, but was detaining him for a DWI investigation. ROA.347. Salazar's expert acknowledged that Thompson was authorized to detain Salazar in order to investigate the possibility that Salazar was driving while intoxicated. ROA.372-373. The expert further acknowledged that, given that Thompson was alone and there were still three other male passengers still inside the pickup, a reasonable peace officer would find it prudent to attempt to handcuff Salazar as part of a temporary detention and subsequent criminal investigation to ensure officer safety. ROA.373. But the ensuing struggle prevented Thompson from being able to perform any field sobriety test or to arrest Salazar. ROA.348.

The Struggle

Thompson had not yet searched Salazar or his truck. ROA.349, 365. Salazar was wearing an untucked button-down shirt that stopped at the top of his thighs. ROA.366-367. When Thompson attempted to take Salazar's hand to place handcuffs on him, Salazar pulled his hand away from Thompson, turned his back to Thompson and began to walk away. ROA.363-364. Thompson ordered Salazar to "stop" and "stop right there." ROA.364. Salazar did not comply; instead, he took one or two more steps. ROA.364-365.

When Thompson attempted to handcuff Salazar to detain him for a DWI investigation, Salazar pulled his hand away from Thompson. ROA.348-349. While the two men were in the narrow emergency lane on an overpass of a busy expressway, Salazar attempted to push Thompson into the lanes of traffic. ROA.349, 2354, 2356-2357. The struggle eventually moved away from the lanes of traffic and ended up near the retaining wall where Thompson felt that Salazar was attempting to push him over the wall. ROA.351. Thompson had to brace himself to keep from toppling over the wall. ROA.351. During the struggle, Thompson was able to see cars passing on Wesleyan Street below. ROA.351. Salazar's own expert, Howse, opined that Thompson had the legal right to detain Salazar and that Thompson attempted to regain control of him by trying to use reasonable force to grab him. ROA.374. Howse interpreted the facts to suggest that a pushing and pulling match occurred between Thompson and Salazar. ROA.374. Salazar's expert further stated that Salazar resisted arrest and that alone is illegal. ROA.374. Indeed, Salazar pled nolo contendere to resisting arrest and DWI. ROA.266, 367, 2354. 2356-2357, 2359, 2362.

The Shooting

Salazar broke from the struggle with Thompson and turned to walk back toward his truck along the passenger side of the truck. ROA.349. Thompson immediately pulled his weapon. ROA.349. Thompson stated that he pulled his weapon because he was thinking, "this guy tried to push me in traffic, he tried to push me over the bridge, I need my gun. I haven't searched him. He has a long shirt. He's pushing away for a reason." ROA.349. Thompson twice ordered Salazar to stop and show his hand. ROA.349. Salazar did not comply but took another step or two. ROA.364-365. Thompson saw Salazar make a motion toward his waistband and turn and look at Thompson. ROA.349. Salazar made a motion toward his waistband that is similar to a person reaching for a cell phone on his waistband. ROA.349. Salazar made the same motion as a suspect drawing a weapon, and Thompson fired. ROA.349-350. Salazar himself testified that everything happened fast—"four, five seconds." ROA.365, 367.

Not much time passed between the time Salazar was initially stopped by Thompson and when he was shot—less than 10 minutes. ROA.365. If the events had not occurred as above, Thompson had planned to handcuff Salazar and place him in the patrol car. ROA.347-348. Because he noted the three other passengers in the truck and no one else had a driver's license, Thompson was going to need to get another unit to come out and place the passengers in their police vehicles and call a tow truck so that they could go to a gas station at the next exit. ROA.348.

The Investigation

Lieutenant Timothy Allen ("Allen") was a lieutenant in the Internal Affairs Department at the time the investigation into the events which form the basis of this lawsuit occurred. ROA.404. Allen began with HPD in 1981. ROA.403. The two years Allen was in IAD he investigated no fewer than 20 officer involved shootings. ROA.407. In reviewing officer-involved shootings, Allen was looking for whether or not the officer followed HPD's policy regarding the use of deadly force. ROA.407. He was trying to determine if the officer used force for the protection of his life or that of another and that there was a reasonable belief that serious bodily injury or death was imminent. ROA.407. He used HPD policy to make that determination. ROA.407. He also relied on his training that he received in the academy as a cadet and in-service training received throughout his over 25 years in the department. ROA.407.

In reviewing the investigation into this shooting, Allen found no evidence that Thompson had violated any HPD policies. ROA.411. Allen suspected that Salazar was turning towards the right at or near the time he was shot based on the medical records in the investigation. ROA.413-414. The entry wound of the bullet was located in Salazar's lower right back and the bullet lodged in his L1 spine, which led Allen to conclude that the bullet entering Salazar's side was consistent with a turn. ROA.413-414.

The Criminal Case

Salazar entered a plea of nolo contendere for resisting arrest and DWI. ROA.367. (In his deposition

he acknowledged that he pleaded "guilty" to the charges. ROA.367.) He was told he could not drive for a year. ROA.367. Salazar just paid fines. ROA.367.

Procedural history

Salazar sued the City of Houston and Officer Thompson, claiming that the shooting was a violation of his constitutionally protected rights. The district court granted summary judgment for Officer Thompson and for the City of Houston, holding that Salazar did not meet his burden to show any genuine issues of material fact regarding Officer Thompson's entitlement to qualified immunity, nor regarding municipal liability. The Fifth Circuit affirmed.

Reasons for Denying the Writ

First, there is no triable fact issue regarding Officer Thompson's entitlement to summary judgment on grounds of qualified immunity. And second, there is no split of authority on any issue in this case, and no indication that any other circuit would decide the question of qualified immunity differently on these facts.

I. There is no triable material fact issue regarding Officer Thompson's entitlement to summary judgment on grounds of qualified immunity.

The courts below recognized that any facts that might have been disputed here were not material to Officer Thompson's entitlement to qualified immunity. Because there are no disputed material facts, there is nothing for a jury to decide. Fed. R. Civ. P. 56(c). "Whether summary

judgment violates a litigant's right to a jury trial is a question of law the court reviews de novo." *Florence v. Frontier Airlines, Inc.*, 149 F. App'x 237, 240 (5th Cir. 2005). "A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. This right exists only with respect to disputed issues of fact." *Harris v. Interstate Brands Corp.*, 348 F.3d 761, 762 (8th Cir. 2003), citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902).

Thompson is entitled to qualified immunity on Salazar's Fourth Amendment excessive force claims because Officer Thompson's use of force was reasonable. Salazar's Seventh Amendment jury trial claim has no merit because there is no material fact issue for a jury. Petitioner contends that a reasonable officer in Thompson's position would understand that the use of lethal or deadly in apprehending petitioner, an unarmed person, would violate petitioner's clearly established constitutional rights under the Fourth Amendment. Petitioner alleges that at no time during the events described above did Thompson possess justification or excuse to use deadly force. The undisputed evidence listed below, however, shows that Thompson is entitled to summary judgment on grounds of qualified immunity:

(1) Salazar had been drinking prior to operating his vehicle;

(2) Salazar was stopped because he was driving above the speed limit;

(3) Thompson smelled alcohol in Salazar's vehicle;

(4) Salazar had an open case of beer in his vehicle;

(5) the traffic stop occurred in a narrow emergency lane on a busy freeway, around midnight;

(6) Thompson believed that Salazar had attempted to push him first into the lanes of traffic and then over the wall of the overpass (and Salazar later admitted to pushing Thompson);

(7) there was very limited lighting on the overpass;

(8) Thompson was the only officer on the scene;

(9) Thompson encountered a vehicle that held four men;

(10) Thompson did not have an opportunity to search Salazar, his truck or his passengers;

(11) Salazar wore a long shirt that hid his waistband;

(12) Salazar actively resisted Thompson's attempts to detain him by pulling away, pushing Thompson, and walking away from Thompson;

(13) Thompson ordered Salazar to stop, but Salazar kept walking;

(14) Salazar moved his hand in the direction of his waistband, which was covered by his shirt, and began to turn;

(15) Thompson, fearing that Salazar was reaching for a weapon, fired at Salazar, striking him in the right side of his back;

(16) the entry wound of the bullet struck Salazar in his lower, right back and lodged in his L1 spine, suggesting that, at or near the time, Salazar was struck by the bullet, his body was turning towards the right and back in the direction of Thompson; and

(17) Salazar later pled nolo contendere to resisting arrest—the charging information stated that he did so "by using force against" Officer Thompson—and DWI.

There was no evidence to controvert the material facts of Officer Thompson's testimony. Officer Thompson's decision to fire at petitioner was reasonable in light of the totality of circumstances, and was consistent with established jurisprudence. Even viewing the summary judgment evidence in a light most favorable to petitioner, the undisputed evidence in the record establishes that any reasonable officer facing the same circumstances and with the same information as Thompson would have fired.

Given all those undisputed facts, it was objectively reasonable for Officer Thompson to fear for his safety, and he was legally entitled to use deadly force. *Graham*, 490 U.S. at 396-97. *See also Mullenix v. Luna*, 136 S.Ct. 305, 311-12 (2015) (holding that state trooper who killed fleeing motorist did not violate clearly established law and was entitled to qualified immunity); *Brosseau v. Haugen*, 543 U.S. 194, 198, 200-01 (2004) (holding that officer who

shot fleeing suspect in the back was entitled to qualified immunity, and noting that "qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force" (internal quotation marks omitted)). Where there is no material fact in dispute, there is nothing for the jury to decide and summary judgment is proper. Fed. R. Civ. P. 56(c); *Florence*, 149 F. App'x at 240; *Harris*, 348 F.3d at 762; *Fidelity & Deposit Co.*, 187 U.S. at 319-20.

II. There is no split of authority.

The opinion below stands for the proposition that where an officer reasonably believes, in light of the totality of the circumstances, that a suspect presents an immediate threat to his safety, it is not "clearly excessive" or "unreasonable" to use deadly force to protect himself from that perceived threat.[1] That proposition is consistent with this Court's precedents in *Mullenix*, 136 S.Ct. at 311-12; *Graham*, 490 U.S. at 396-97 ("The 'reasonableness' of a particular use of force must be judged from the

1. "Thus, based on our precedent and the undisputed facts, considering the totality of the circumstances—which include Salazar's resistance, intoxication, his disregard for Officer Thompson's orders, the threat he and the other three men in his truck posed while unrestrained, and Salazar's actions leading up to the shooting (including suddenly *reaching towards his waistband*)—it seems clear that it was not unreasonable for an officer in Officer Thompson's position to perceive Salazar's actions to be an *immediate* threat to his safety. And, it follows that it was not "clearly excessive" or "unreasonable" for Officer Thompson to use deadly force in the manner he did to protect himself in such circumstances." *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 (5th Cir. 2016).

perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . 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."); *Brosseau*, 543 U.S. at 198, 200-01; and *White v. Pauly*, __ S.Ct. ___, ___, 2017 WL 69170 at * 3 (2017) (considering only the facts knowable to defendant officer asserting qualified immunity). Petitioner has shown no conflict with any authority from this Court.

Petitioner lists cases from every other federal circuit in an attempt to show the Fifth Circuit's opinion here as an outlier. That effort, however, requires that the Court first accept petitioner's characterization of the opinion as though it stands for the proposition that a police officer can be entitled to qualified immunity for shooting an unarmed person in the back when the person was merely walking away. (Pet. at i—Question Presented.) That is not what the Fifth Circuit's opinion holds, and the record belies such a characterization of the facts.

A. This case is not in conflict with *Cruz*.

Petitioner rests his argument primarily upon *Cruz v. City of Anaheim*, 765 F.3d 1076, 1078-79 (9th Cir. 2014). For the following reasons, however, *Cruz* does not apply here and does not present a conflict. In *Cruz*, five officers followed a tip that one of them received from a confidential informant that Cruz was a gang member who sold methamphetamine, carried a gun in his waistband, and had declared that "he was not going back to prison."

Id. at 1077-78. The officers converged on Cruz's location and found him in his vehicle with a broken tail light, for which they executed a traffic stop and "surrounded him with their vehicles" in a parking lot. *Id.* at 1078. "But Cruz attempted to escape, backing his SUV into one of the marked patrol cars in the process. Cruz eventually stopped, and the officers got out of their vehicles with weapons drawn." *Id.*

"Cruz opened his door, and the police shouted at him to get on the ground as he was emerging from the vehicle." *Id.* Four of the five officers testified that Cruz ignored that command and reached for his waistband. "Fearing that he was reaching for a gun, all five officers opened fire. They fired about twenty shots in two to three seconds[,]" killing Cruz. *Id.*

1. Unlike Cruz, petitioner is alive to contradict the officer's testimony, but he did not do so.

The most important distinction between *Cruz* and the present case is that Cruz was no longer available to testify because he had been killed by the officers, whereas petitioner in this case was seriously injured but lived to testify and did so. Petitioner had the opportunity to directly contradict Officer Thompson's testimony that petitioner moved his hand toward his waistband, giving Officer Thompson the reasonable belief that petitioner was reaching for a weapon. But petitioner did not contradict that statement.

2. Officer Thompson did not infer that petitioner reached for his waistband; he observed it.

Petitioner attempts to change the evidence, suggesting that Officer Thompson's observation of petitioner's hand movement is nothing more than an inference. As petitioner puts it: "As Judge Kozinski has stated, it is not a justifiable inference that a person reached for a waistband with nothing in it." (Pet. at 13, sub-heading "B".) That argument flies in the fact of the record. Officer Thompson did not infer that petitioner reached for his waistband; he observed it. The inference involved would have been that there was a weapon in petitioner's waistband. And that inference of a weapon could be incorrect yet still be reasonable.

Moreover, the *Cruz* opinion itself acknowledges that a hand movement toward the waistband—even if there is no weapon there—can be just grounds (in the totality of the circumstances) for an officer to open fire: "It would be unquestionably reasonable for police to shoot a suspect in Cruz's position if he reaches for a gun in his waistband, or *even if he reaches there for some other reason*." *Cruz*, 765 F.3d at1078. Even though it later turned out that petitioner had no weapon in his waistband, Officer Thompson could not have known that when he observed petitioner reaching there. Where an officer reasonably believes that a suspect is armed, the fact that the suspect is later found to be unarmed is not material to the officer's entitlement to qualified immunity. *See, e.g.*, __ S.Ct. ___, *White v. Pauly*, 2017 WL 69170 at * 3 (2017) (considering only the facts knowable to defendant officer asserting qualified immunity).

3. Petitioner's testimony that he was walking away does not imply that petitioner did not reach for his waistband.

Petitioner also attempts to put Officer Thompson's credibility at issue in this summary judgment context by stretching the bounds of what can count as a reasonable inference for the nonmovant. Starting with his Question Presented, petitioner repeatedly asserts that he was "merely walking away" or "simply walking away" when Officer Thompson fired. (Pet. at i, 7, 9, 11, 22.) Petitioner characterizes his deposition testimony as though he had said that he was 'merely walking away,' and then he asserts that 'merely' or 'simply' walking away leads to the reasonable inference that he did not reach for his waistband. (Pet. at 17.) That is wrong for several reasons.

First, petitioner's own expert stated that he was trying to escape: "And because it was a mobile kind of struggle, it appears that Salazar-Limon was attempting to break away or get away. Officer Thompson did not want him to get away. He was trying to bring him into custody. So you have this opposites [sic], you know, one going one way, one going the other, trying to break away. One trying to break away, one trying to hold on." ROA.374. That is not the picture of petitioner "merely walking away."

Second, even if petitioner had stated that he was "simply" or "merely" walking away, that would not preclude his having moved his hand toward his waistband for some reason, or even without thinking about it. If petitioner's hand moved toward his waistband while he was simply or merely walking away, that movement could reasonably be viewed as reaching for a weapon.

Third, even in the excerpts he provides for this Court, petitioner never used the word "simply" or the word "merely" to describe his walking away. (Pet. at 4, 5; Pet. App. at 47.) It is not inconsistent for someone to be walking away from a police officer (and defying the officer's commands to stop) and be reaching for a weapon at the same time. Thus, it is not reasonable to infer that he was not reaching for his waistband while walking away. In fact, petitioner only used the word "walking" once in the excerpts he provides to this Court, and he does not even say "walking away," although it might be reasonable to infer the word "away" in that context. (Pet. at 6; Pet. App. at 48) To accept petitioner's argument at this stage would require inference upon inference: first to infer that his testimony that he was "walking" (Pet. at 6; Pet. App. at 48) really meant "simply or merely walking away" even though that was not what he said; and second to infer that "simply or merely walking away" meant that he could not have been reaching for his waistband for any reason at all. Even though all reasonable inferences are to be drawn for the nonmovant, that standard does not permit stacking inferences upon inferences or indulging inferences that are unreasonable. *See, e.g.*, *Church of Scientology of California v. Cazares,* 638 F.2d 1272, 1288 (5th Cir. 1981) (courts cannot "build inference upon inference" to defeat summary judgment [defamation case]); *Brockie v. AmeriPath, Inc.*, 273 F. App'x 375, 378 (5th Cir. 2008) (affirming summary judgment and noting that nonmovants are not entitled to inferences that are unreasonable "even at the summary judgment stage.")

Fourth, despite ample opportunity petitioner did not directly contradict Officer Thompson's testimony that petitioner reached for his waistband. Thus, Officer Thompson's testimony on that remains an undisputed fact.

4. The totality of the circumstances further distinguishes this case from *Cruz*.

In addition, there were five officers in *Cruz* and a lone suspect. In the present case, Officer Thompson was alone, and petitioner had three companions, none of whom had been searched. It is undisputed that petitioner was intoxicated, which Officer Thompson could have perceived at the time, giving the officer reason to believe that petitioner's judgment and self-restraint would be impaired. Indeed, petitioner showed bad judgment and a lack of self-restraint just moments before by driving while intoxicated and by resisting arrest, to both of which he pleaded nolo contendere. ROA.367, 2354, 2356-57, 2359, 2362.

It is also undisputed that in the physical struggle with Officer Thompson, petitioner appeared to have attempted to push the officer into the oncoming freeway traffic and over the wall to the street below. ROA.349, 351. In the excerpts provided to this Court, petitioner claims that he did not engage in a struggle with Officer Thompson. (Pet. at 5, Pet. App. at 47.) Yet in subsequent questioning in his deposition, he acknowledges that he engaged in a "struggle close to the retaining wall[.]" (Pet. App. at 48.) Furthermore, petitioner conceded the struggle when he pleaded nolo contendere to the charge of resisting arrest, which stated that he had used force against Officer Thompson and pushed the officer with his hand. ROA.2354, 2356-57. Petitioner further conceded his physical struggle by way of his own expert's testimony that petitioner had "shove[d]" Officer Thompson and engaged in a "pushing-and-pulling match" with him. ROA.374.

For the several foregoing reasons, *Cruz* does not apply to this case and does not present any conflict in the statement or application of the law.

B. None of petitioner's other cases shows a circuit split.

None of the other cases upon which petitioner relies shows a circuit split. Each is distinguishable, and nothing suggests that those circuits would decide this case differently from the Fifth Circuit.

First Circuit

Whitfield v. Melendez-Rivera, 431 F.3d 1, 7-8 (1st Cir. 2005): In an appeal following jury trial, the First Circuit noted that the pre-trial invocation of qualified immunity had been denied because "the district court found that there were material factual disputes bearing on . . . whether Whitfield posed a threat to the officers at the time that they shot him." *Id.* In the present case, the district court made no such finding of a material factual dispute. On the contrary, Judge Lee Rosenthal held that there were no material factual disputes and that Officer Thompson was entitled to qualified immunity.

Second Circuit

Aczel v. Labonia, 92 F. App'x 17, 19 (2d Cir. 2004): Petitioner's own parenthetical characterization of this case—i.e., "plaintiff testified that he offered no resistance"—belies any claim that the case applies here. Petitioner did not so testify here. Instead, he pled nolo

contendere to resisting arrest and DWI. ROA.266, 367, 381. And his own expert acknowledged that Salazar had resisted arrest. ROA.374.

Third Circuit

Lamont v. New Jersey, 637 F.3d 177, 184 (3d Cir. 2011): Petitioner omits the part of the *Lamont* opinion where the Third Circuit held "that the troopers reasonably believed that [the deceased suspect] was drawing a gun, not complying with their command that he show his hands." *Id.* The court reversed because "the troopers continued to fire for roughly 10 seconds, shooting a total of 39 rounds." *Id*. There were several (five or six) officers in that situation, whereas in this case Officer Thompson was alone, and he fired only once.

Fourth Circuit

Cooper v. Sheehan, 735 F.3d 153, 159 (4th Cir. 2013): In that case, the Fourth Circuit noted that "[Plaintiff Cooper] made no sudden moves. He made no threats. He ignored no commands. The Officers had no other information suggesting that Cooper might harm them. Thus, the facts fail to support the proposition that a reasonable officer would have had probable cause to feel threatened by Cooper's actions." *Id*.

In the present case, however, petitioner was intoxicated and had resisted arrest, struggling in a manner that threatened to push Officer Thompson into the freeway traffic or over the wall to the traffic below. Petitioner was noncompliant and walked toward the cab of his truck, where he had three companions, any of whom could have

been armed. Then petitioner moved his hand toward his waistband in what looked to Officer Thompson like petitioner was reaching for a weapon. ROA.349, 350. Unlike *Cooper*, the totality of the circumstances here shows that Officer Thompson could reasonably believe that petitioner posed an imminent threat.

Sixth Circuit

Bing v. City of Whitehall, 456 F.3d 555, 571-72 (6th Cir. 2006): The Sixth Circuit noted that the district court "made several observations related to the evidence . . . [namely] that Bing's gun, recovered from the burned-down house, did not bear Bing's fingerprints[,] . . . that the coroner's report and the autopsy report reflected that Bing had been shot in the back[,] . . . and a purported expert's opinion that the police version of events—in which Bing fired first and the police fired back defensively—was inconsistent with the physical evidence in this case." *Id.*

Bing is such a different set of facts that it does not even touch on the reasonableness of Officer Thompson's firing on petitioner here. The totality of the circumstances in this case—petitioner being intoxicated, resisting arrest, refusing commands to stop, and moving toward the cab of his truck where his three companions were waiting, and then reaching for his waistband, among all the other circumstances listed above—shows that it was reasonable to believe petitioner posed an immediate threat. *Bing* does not apply, and shows no circuit split.

Seventh Circuit

Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993): Suspect Ellis "tossed a mesh bag weighing four or five pounds toward [Officer] Wynalda in an arc, to distract the officer while he ran." *Id.* The mesh bag struck Wynald's shoulder with no injury and then fell to the ground. *Id*. at 245, 247. After that, the officer fired at the fleeing felon and hit him in the back. *Id*. The majority of the three-judge panel held that by the time the officer fired, the fleeing felon posed no threat to him. *Id*. at 247.

They did, however, reason that the officer would have been justified if he had fired sooner: "If Wynalda feared that the bag might be heavy and might knock the gun from his hand or provide an opportunity for Ellis to draw a concealed weapon, he would have been justified in firing *at that moment*, but not after the lightweight bag fell to the ground without injuring him and Ellis had turned and run. In other words, if Wynalda had shot Ellis while Ellis was throwing the bag at him, that would have been permissible as the action of a reasonable officer facing a dangerous felon. Even if he shot Ellis after the bag had hit him but while he was still disoriented and off-balance, his action could be reasonable, because he would not know, for example, if Ellis was going to attack him or was reaching for a weapon." *Id*. The totality of the circumstances would have entitled Officer Wynalda to qualified immunity if he had fired at Ellis sooner.

The suspect in that case was alone, while petitioner here had three companions. And the *Ellis* encounter occurred "in clear morning light" whereas the events of the present case occurred at midnight. ROA.344, 348.

The totality of the circumstances in that case were so different from the present case that it does not suggest a split in the circuits. The facts were different; the law is the same.

Eighth Circuit

Capps v. Olson, 780 F.3d 879, 885 (8th Cir. 2015): Sheriff's Deputy Olson fatally shot suspect Capps, claiming that "Capps was charging towards him with a weapon at the time of the shooting." *Id.* at 882. The first of the five shots Olson fired at Capps was from a distance that Olson estimated at about 20 to 25 feet. *Id.* Olson asserted that the remaining four shots were fired when Capps was about 15 to 18 feet away. *Id.*

Capps's expert testified that the first shot hit Capps in the back and that the Capps "was struck four additional times with four rounds entering the anterior of his chest cavity and traveling downward left to right; which indicates that Olson was standing to the left of and above Capps." *Id.* at 884. The district court denied qualified immunity, determining that there were two material factual disputes: "(1) whether Capps was moving towards Deputy Olson during the shooting and (2) whether a reasonable officer could have believed Capps was armed." *Id.*

The present case differs in several respects. Officer Thompson fired only once at petitioner, not five times. Petitioner here was walking toward his three companions, who could have been armed, whereas Capps was alone. It was undisputed that petitioner was intoxicated, resisted arrest, and had just struggled with Officer Thompson, attempting to push Officer Thompson into freeway traffic

and then over the overpass wall to the street below. ROA.349, 351. It is also undisputed that petitioner moved his hand toward his waistband, a motion which Officer Thompson could reasonably—even if inaccurately—have believed to be petitioner reaching for a weapon. ROA.349, 350. This case applies the same rules of law that *Capps* does, but to different facts; there is no split.

Tenth Circuit

Carr v. Castle, 337 F.3d 1221, 1227-28 (10th Cir 2003): Two officers, Castle and Bowen, testified that they fired at the fleeing suspect, Carr, when Carr raised his arm to throw a piece of concrete at them. *Id.* at 1225. The officers fired at Carr 11 times, and all 11 shots hit Carr in his back side. *Id.* The medical examiner testified that the fatal shot entered Carr's buttocks, traveled through his stomach and lungs to his heart. *Id.* Carr's experts testified that this could have happened only if Carr "had his head near the ground with his buttocks slightly elevated." *Id.* In *Carr*, there was conflicting material testimony that precluded summary judgment on qualified immunity, and the Tenth Circuit affirmed that denial. In the present case, the material facts were undisputed, and it was reasonable for Officer Thompson to believe that petitioner was reaching for a weapon.

Eleventh Circuit

Perez v. Suszczynski, 809 F.3d 1213, 1216 (11th Cir. 2016): Even petitioner's own parenthetical characterization of *Perez*—"evidence indicated person was not resisting"—shows that it does not apply here. Evidence in that case showed that suspect Arango was "on the ground . . . made

no attempt to get up or resist police restraint; instead, he remained compliant and prostrate on his stomach, with his hands behind his back. . . . Suszczynski then shot Arango twice in the back, in a manner one witness described as 'execution-style,' from approximately twelve to eighteen inches away." *Id.* at 1217. In the present case, petitioner was repeatedly non-compliant and had moments before engaged in a physical struggle with Officer Thompson. Petitioner continued to approach the cab of his truck where his companions were, refusing Officer Thompson's orders to stop, and then reached for his waistband. ROA.349, 350. *Perez* is so different it offers no guidance here.

D.C. Circuit

Flythe v. Dist. of Columbia, 791 F.3d 13, 22 (D.C. Cir. 2015): After a report that a liquor store was vandalized, Officer Vazquez encountered Tremayne Flythe, who fit the description of the suspect. *Id.* at 15. Upon questioning, Flythe stated that he had a knife, and Officer Vazquez claimed that Flythe pulled out the knife and attempted to stab him. *Id.* at 15-16. Officer Vazquez fired multiple shots at Flythe, who then ran away. *Id.* at 16. Over the police radio, Officer Eagan heard Officer Vazquez ordering a suspect to drop the knife, then heard the shot, and then heard Officer Vazquez telling the dispatcher that the suspect had just tried to stab him. *Id.* Officer Eagan then came upon Flythe running with Vazquez in pursuit on foot. *Id.* Eagan testified that he ordered Flythe to get on the ground, that Flythe refused and continued running past Eagan a few feet, and then Flythe turned, yelled, and pulled a knife from his waistband and advanced toward Eagan. At that time, Eagan fired at Flythe, striking him in the leg and abdomen; Eagan died at the hospital. *Id.*

The D.C. Circuit noted that in a case where the officer kills the only other witness who could contradict him, courts must carefully examine all evidence in the record, including circumstantial evidence, to determine whether the officer acted reasonably. *Id*. at 19. The Circuit noted the record "abounds" with evidence to cast doubt on Officer Eagan's testimony. *Id*. at 19-20.

The present case, however, does not fall into that group of cases where the officer killed the only other witness who can contradict him. Unlike *Flythe*, petitioner here was seriously injured but not killed. Petitioner pleaded nolo contendere to resisting arrest and to DWI. ROA.367, 2354, 2356-2357, 2359, 2362. Petitioner testified and had the opportunity to directly contradict Officer Thompson's testimony, but he did not do so. *Flythe* does not apply.

None of the cases upon which petitioner relies involves comparable facts, and none shows any different principle of law or any different application of settled law.

PRAYER FOR RELIEF

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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