No. 23-

In the

Supreme Court of the United States

JOYCE DANIELS, AS THE ADMINISTRATOR OF THE ESTATE OF MARK DANIELS, DECEASED,

Petitioner,

v.

THE CITY OF PITTSBURGH AND GINO MACIOCE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A police officer, Gino Macioce, shot and killed Mark Daniels. Shortly after the shooting, Officer Macioce was interviewed by other police officers. Officer Macioce did not take an oath to tell the truth during the interview and the interview was not made subject to the penalties of perjury.

In the ensuing wrongful death case brought by the Estate of Mark Daniels under 42 U.S.C. § 1983, Officer Macioce and the City of Pittsburgh moved for summary judgment claiming qualified immunity. Their motion relied heavily on Officer Macioce's police interview. The District Court granted summary judgment and the Third Circuit affirmed.

The question presented is whether the trial court should have relied on the officer's unsworn interview in a wrongful death action brough under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS

Petitioner, Joyce Daniels, as the administrator of the Estate of Mark Daniels, Deceased. Respondents are the City of Pittsburgh and Gino Macioce.

RELATED PROCEEDINGS

- *Daniels v. City of Pittsburgh, et al.*, No. 2:18-cv-01019-CB, United States Court for the Western District of Pennsylvania. Judgment entered March 30, 2022.

- *Daniels v. City of Pittsburgh, et al.*, No. 22-1790, United States Court of Appeals for the Third Circuit. Judgment entered March 30, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Joyce Daniels, as Administrator of the Estate of Mark Daniels, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Third Circuit is unreported but is reproduced in the Appendix ("App.") at 1a. The Opinion and Order of the District Court for the Western District of Pennsylvania Granting Summary Judgment is unreported but is reproduced at App. 11a. The Order of the Third Circuit denying Appellant's Petition for Rehearing and Hearing *en banc* in the United States Court of Appeals for the Third Circuit is unreported but is reproduced at App. 24a.

JURISDICTION

The judgment of the Third Circuit was entered on March 30, 2023. The timely filed Petition for Rehearing was denied on June 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter concerns alleged violations of 42 U.S.C. § 1983. Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. In the dark hours of February 11, 2018, around 1:20 a.m., Pittsburgh Police Officer Gino Macioce shot Mark Daniels ("Daniels"), a black male and father, in the backside, killing him. Officer Macioce fatally shot Daniels after Officer Macioce was part of an altercation a few minutes earlier. At the time Officer Macioce shot Daniels, nobody at the scene observed a gun in Daniels's possession. App. at 2a-3a.

2. On February 23, 2018 Officer Macioce was interviewed by the Allegheny County Police Department. No oath was administered before this interview and it was not made subject to the penalty of perjury. Officer Macioce was not subject to cross-examination during this interview. App. at 12a.

3. On May 8, 2018, the Estate of Mark Daniels ("Estate") sued Officer Macioce and the City of

Pittsburgh and the case was then removed to the District Court of Western Pennsylvania. App. at 4a.

4. On June 10, 2021, Officer Macioce and the City of Pittsburgh moved for summary judgment. Officer Macioce claimed that Daniels had been involved in an earlier altercation with Officer Macioce. The only evidence presented in the summary judgment motion that directly linked Daniels to the earlier altercation was the interview of Officer Macioce by the Allegheny County Police Department. App. at 11a-12a.

5. The Estate objected to the District Court considering the interview of Officer Macioce because it was impermissible under Rule 56 of the Federal Rules of Civil Procedure. The Estate also requested the chance for additional discovery because her prior lawyer failed to depose Officer Macioce. The District Court denied the Estate's request for additional discovery. App. at 12a.

6. The District Court dismissed the objection because Officer Macioce had supplied an affidavit over three years later swearing to the statements he made in the past. The District Court granted summary judgment on March 30, 2022 without hearing oral argument. App. at 12a.

7. The Estate appealed, raising the impropriety of relying on Officer Macioce's interview. The Third Circuit affirmed the District Court on March 30, 2023 and did not discuss the propriety of relying on Officer Macioce's interview. The Third Circuit denied the Estate's Petition for Rehearing and Hearing *en banc* on June 22, 2023. App. at 1a, 24a.

The sufficiency of evidence to be considered in a motion for summary judgment is an important and recurring issue in almost every civil lawsuit. It is especially important in a wrongful death use-of-force case, whether the victim of the use of force is unavailable to contradict statements made by the defendant officer. Thus, the Estate now asks this Court to grant review to resolve this important and recurring issue.

REASONS FOR GRANTING THE WRIT

I. The Question Presented is Important and Recurring and Warrants the Court's Review in this Case

The question presented here is an often overlooked and neglected part of the summary judgment standard of review: What evidence qualifies as proper for a motion for summary judgment?

Judges and litigants commonly cite the following passage from this Court, "Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal quotations omitted). What gets overlooked from this passage is the first required condition – that the motion for summary judgment be "properly supported."

The Federal Rules of Civil Procedure detail the types of material sufficient for a summary judgment motion. This includes "depositions, documents, electronically stored information, affidavits or

declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). This Court has noted that an unsworn statement "does not meet the requirements" to support a summary judgment motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158 n. 17 (1970) (applying former Rule 56(e). The Circuit Courts have routinely referred to *Adickes* to confirm that unsworn statements are not permissible on summary judgment. *See Woloszyn v. County of Lawrence*, 396 F.3d 314, 323 (3rd Cir. 2005); *In re French*, 499 F.3d 345, 358 (4th Cir. 2007); *Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980); *Dole v. Elliot Travel & Tourts*, 942 F.2d 962 (6th Cir. 1991); *Banks v. Deere*, 829 F.3d 661, 667 (8th Cir. 2016); *Carr v. Tatangelo*, 338 F.3d 1259, 1273 n. 26 (11th Cir. 2003). The lower courts failed to follow this well-established precedent by relying on Officer Macioce's unsworn interview.

This question carries particular importance in cases brought under 42 U.S.C. § 1983 because of the judicially created "qualified immunity" doctrine. The qualified immunity doctrine has no textual basis in § 1983, but stems from immunities preexisting when § 1983 was enacted in 1871 and which this Court determined Congress implicitly incorporated into the statute. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Pierson v. Ray*, 386 U.S. 547, 554–555 (1967) ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them.") Considering the volume of cases across the nation giving rise to qualified immunity defenses, it is important to define the

quality of evidence sufficient for a government entity claiming this defense.

Courts "must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)[1]. The reliability issues in this unsworn interview are insurmountable. A party should not be permitted to rely on their own unsworn statements as affirmative evidence to obtain a summary judgment. This is all the more true in cases involving the deadly use of force by a police officer.

This case is a good vehicle for reviewing the standard required on summary judgment because summary judgment was granted based on facts stemming almost entirely from the unsworn, self-serving interview of police officer Gino Macioce. The interview was conducted by the Allegheny County Police Department. Officer Macioce did not take an oath to tell the truth before the interview. Officer Macioce was not subject to the penalties of perjury when he was interviewed. And Officer Macioce was not subject to cross-examination during the interview. Had the District Court and the Third Circuit not relied on Officer Macioce's interview, there would not have been sufficient factual basis to grant summary judgment because there would be no way to directly

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[1] *See also*, the following cases citing *Scott*, *O'Bert ex rel. Est. of O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003); *Flythe v. D.C.*, 791 F.3d 13, 19 (D.C. Cir. 2015); *Stanton v. Elliott*, 25 F.4th 227, 234 (4th Cir. 2022); *Maravilla v. United States*, 60 F.3d 1230, 1233 (7th Cir. 1995); *Hinson v. Bias*, 927 F.3d 1103, 1118 (11th Cir. 2019).

link Daniels to the earlier altercation Officer Macioce was involved in.

Finally, Petitioner knows that many petitions for writ of certiorari over the last several years have been filed in this Court seeking to challenge in some way certain aspects of how § 1983 and the judicially created qualified immunity doctrine apply.[2] To Petitioner's knowledge, past petitions have not requested review on this precise issue. And unlike those past petitions, Petitioner is not seeking widespread review of the qualified immunity doctrine. Rather, Petitioner merely seeks to have this Court review an important procedural question about the baseline level of credible evidence that a movant must present in a motion for summary judgment. This is an important and recurring question throughout civil litigation, but particularly in qualified immunity cases, such that it warrants this Court's review.

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[2] An incomplete list includes the following cases, *Cope v. Cogdill*, No. 21-783; *Braun v. Burke*, No. 21-10; *Frasier v. Evans*, No. 21-57; *James v. Bartelt*, No. 20-997; *Taylor v. Riojas*, No. 19-1261; *Ramirez v. Guadarrama*, No. 21-778; *Dawson v. Brennan*, No. 18-913; *Baxter v. Bracey*, 18-1287; *Anderson v. City of Minneapolis, Minnesota*, 19-656; *Zadeh v. Robinson*, 19-676; *Corbitt v. Vickers*, No. 19-679; *Hunter v. Cole*, 19-753; *West v. Winfield*, 19-899; *Mason v. Faul*, No. 19-7790;

CONCLUSION

For these reasons, Petitioner respectfully submits that her Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MARCH 30, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1790

JOYCE DANIELS, AS ADMINISTRATOR FOR THE ESTATE OF MARK S. DANIELS,

Appellant,

v.

CITY OF PITTSBURGH; GINO MACIOCE, IN HIS CAPACITY AS A PITTSBURGH POLICE OFFICER AND HIS INDIVIDUAL CAPACITY

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No.: 2-18-cv-01019)
District Judge: Hon. Cathy Bissoon

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 7, 2023

Before: CHAGARES, Chief Judge, SCIRICA
and RENDELL, Circuit Judges

(Filed March 30, 2023)

OPINION*

RENDELL, *Circuit Judge*.

Appellant, Joyce Daniels, appeals the District Court's orders (1) granting summary judgment in favor of Appellees, the City of Pittsburgh and Pittsburgh Police Officer Gino Macioce, in her § 1983 action for the fatal shooting of her son, Mark Daniels ("Daniels"), and (2) denying Appellant's motion for additional discovery. Because we discern no error in the District Court's reasoning, we will affirm.

I.

As we write for the parties who are well-acquainted with the facts of this case, we set forth the following background only as necessary to resolve this appeal. At the outset, we note that the relevant factual background in this case is founded upon evidence adduced by Appellees. Indeed, as we explain below, Appellant's failure to offer affirmative evidence to refute the facts as established by Appellees' evidence is fatal to her case.

On February 11, 2018, City of Pittsburgh Officer Gino Macioce and field training Officer Kevin Kisow were on duty in Pittsburgh's Homewood neighborhood. While patrolling a parking lot, Officer Macioce became alarmed because, by his account, he observed a man, later

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

identified as Daniels, acting suspiciously upon exiting a nearby convenience store. Both officers followed Daniels as he walked down the street and turned a corner.

Officer Macioce described following Daniels around the corner and encountering him "with a gun in his hand." App. at 302. Daniels raised his gun, and Officer Macioce followed suit by raising his own gun. App. at 303-04. The men fired at one another "pretty simultaneous[ly]" but neither were hit. App. at. 27. Daniels fled. Officer Macioce placed a "shots fired" call over the police radio, and he and Officer Kisow pursued Daniels. They spotted Daniels standing on a nearby street talking to a woman. Officer Macioce characterized this behavior as Daniels attempting to "blend in" or "play off" his having shot at the officers.

Officer Macioce repeatedly commanded Daniels to "get on the ground." App. at 27, 286-87. Daniels, with his hands stretched out in front of him, began saying, "It wasn't me. It wasn't me." App. at 27, 287. Officer Macioce continued to command Daniels to "get on the ground." App. at 287. Daniels did not comply, but instead turned, dropped his hands in front of him, and began to flee down an alley. Officer Macioce fired four shots at Daniels, one of which hit his left arm and fatally severed an artery.

In the course of an investigation, police recovered a gun in the path of Daniels's flight, as well as bullet fragments and cartridge casings matching that gun near the location of Officer Macioce and Daniels's exchange of gunfire. Officers also interviewed the firearm's registered

owner who told them that she had purchased the gun for Daniels.

Appellant, as the administrator of Daniels's estate, sued Appellees under 42 U.S.C. § 1983 for using excessive force against Daniels in violation of his Fourth Amendment rights. About two months after the close of discovery, Appellant filed a motion seeking additional discovery, which the District Court denied. Appellees moved for summary judgment, which the District Court granted. The District Court concluded that Officer Macioce's use of force was reasonable under the circumstances and that he was also entitled to qualified immunity because his conduct did not violate clearly established law. This timely appeal followed.

II.

A. Summary Judgment[1]

This Court may affirm a grant of summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When assessing a summary judgment ruling, this Court must view all facts "in the light most favorable to the non-moving party, who is 'entitled to every reasonable inference that can be drawn from the

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1. The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. This Court exercises plenary review over a district court's grant of summary judgment. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 156 (3d Cir. 2013).

record.'" *Reedy v. Evanson*, 615 F.3d 197, 209 (3d Cir. 2010) (quoting *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000)). To defeat a properly supported summary judgment motion, the nonmovant must show a genuine dispute of material fact that requires trial by "present[ing] affirmative evidence . . . from which a jury might return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The standard also applies for cases involving deadly force: "Just as in a run-of-the-mill civil action, the party opposing summary judgment in a deadly-force case *must point to evidence* . . . that creates a genuine issue of material fact . . . ." *Lamont v. New Jersey*, 637 F.3d 177, 182 (3d Cir. 2011) (emphasis added). Because Appellant failed to meet this burden, the District Court properly granted summary judgment for Appellees.

To prevail on her § 1983 claim, Appellant must show that Officer Macioce's fatal shooting of Daniels was an unreasonable seizure proscribed by the Fourth Amendment. *Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999). Because "apprehension by the use of deadly force is a seizure," the heart of the issue is whether Officer Macioce acted reasonably. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). The Supreme Court has held that the use of deadly force is reasonable where an officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3. We must judge the reasonableness of Officer Macioce's actions from the perspective "of a reasonable officer on the scene," cognizant of the "split-second judgments"

officers must make in the face of "tense, uncertain, and rapidly evolving" circumstances. *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). We must also "avoid simply accepting what may be a selfserving [sic] account by the officer[s]." *Lamont*, 637 F.3d at 182 (internal quotation marks omitted). Instead, we look to "the circumstantial evidence that, if believed, would tend to discredit the police officer[s'] story, and consider whether this evidence could convince a rational fact finder that the officer[s] acted unreasonably." *Id.* (internal quotation marks omitted).

Appellant urges that a reasonable jury could doubt the veracity of the evidence Appellees put forth to support the proposition that Officer Macioce acted reasonably. But those urgings fall short of affirmative evidence sufficient to meet Appellant's burden in opposing Appellees' summary judgment motion. *Lamont*, 637 F.3d at 182 (providing that the summary judgment standard is not relaxed in cases involving deadly force); *Estate of Smith v. Marasco*, 318 F.3d 497, 517 (3d Cir. 2003) ("[A] party opposing summary judgment must present *affirmative* evidence—whether direct or circumstantial—to defeat summary judgment, and may not rely simply on the assertion that a reasonable jury could discredit the opponent's account."). The evidence Appellant challenges includes a pole camera video showing Daniels's movements after exiting the convenience store, data showing the timing and location of gunshots fired, Officers Macioce and Kisow's sworn statements recounting what happened, and ballistic evidence tying the firearm found at the scene to Daniels.

Appellant first urges that the pole camera video shows another man headed in the same direction as Daniels after he exited the convenience store and that this man *may* have been the individual who shot at Officer Macioce. But Appellant points to no evidence in the record to corroborate this assertion. Such "[s]peculation and conjecture may not defeat a motion for summary judgment." *Jackson v. Danberg*, 594 F.3d 210, 227 (3d Cir. 2010) (quoting *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 228 (3d. Cir. 2009)). By contrast, the video serves to corroborate Officers Macioce and Kisow's accounts in that it puts Daniels at the scene and shows his movements matched the officers' descriptions from the moment Daniels exited the convenience store to when Officer Macioce confronted him. *See Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (reasoning that a court on summary judgment should view the facts "in the light depicted" by an unaltered videotape).

The gunshot location data similarly corroborates the officers' accounts rather than undermines them. Appellant urges that data showing Officer Macioce fired first creates a genuine issue of material fact over whether Officer Macioce's use of deadly force was reasonable. But this data shows, instead, that Officer Macioce was, indeed, shot at before he fatally shot Daniels. That is, it establishes that there was an exchange of gunfire in which six shots were fired within two to three seconds. The first three shots were fired within milliseconds of each other. This evidence not only comports with Officer Maccioce's account that he and Daniels exchanged gunfire "pretty simultaneous[ly]," App. at 27, it establishes a "significant

threat of death or serious physical harm to the officers." *Garner*, 471 U.S. at 3.

The Supreme Court in *Garner* explained that "if [a] suspect threatens [an] officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12. Additionally, "[a]n officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who . . . moves as though to draw a gun." *Lamont*, 637 F.3d at 183 (quoting *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001)). Under these precedents, Officer Macioce's conduct was reasonable as he had been shot at by Daniels earlier in the encounter, he commanded Daniels to surrender before firing, and he had no reason to believe that Daniels had discarded his weapon before Daniels turned to flee.

Appellant put forth no affirmative evidence to raise a genuine issue of material fact as to these events. Indeed, both parties' trial counsels stipulated that the woman with whom Daniels was talking before the fatal shooting was neither a reliable witness nor able to be located despite Daniels's counsel having purportedly interviewed this witness earlier in the litigation. Thus, there is no contradictory testimony from this fact witness that would serve to challenge Officers Macioce and Kisow's accounts.

It is also undisputed that bullet fragments and cartridge cases found at the location of the exchange of gunfire matched a firearm found in the path of Daniels's

flight. The Allegheny County Police Department interviewed the gun's registered owner who admitted she bought the gun for Daniels. Appellant's only countervailing argument is to question the veracity of the woman's account. But again, that argument is not buttressed by affirmative evidence that would, when viewed in the light most favorable to Appellant, give any credence to Appellant's "other shooter" theory and create a genuine issue of material fact. *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998) ("[I]f a moving party has demonstrated the absence of a genuine issue of material fact—meaning that no reasonable jury could find in the nonmoving party's favor based on the record as a whole—concerns regarding the credibility of witnesses cannot defeat summary judgment.").

No rational juror could find that a reasonable officer on the scene lacked probable cause to believe Daniels—who had shot at the officer moments before and turned to evade apprehension—posed "a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. Because Appellant failed to put forth evidence showing a genuine dispute of material fact bearing on that conclusion, the District Court properly granted summary judgment for Appellees. Therefore, we need not reach the District Court's qualified immunity analysis, which formed an alternative basis for granting summary judgment.

B. Motion for Additional Discovery[2]

The District Court did not abuse its discretion in denying Appellant's motion to extend case management deadlines to allow additional discovery. We "will not upset a district court's conduct of discovery procedures absent a demonstration that the court's action made it impossible to obtain crucial evidence." *Gallas v. Supreme Ct. of Pa.*, 211 F.3d 760, 778 (3d Cir. 2000) (quoting *In re Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982)). Appellant moved the District Court for additional discovery in January 2021, two months after the close of discovery and after the District Court had already allowed an additional 185 days of discovery. In its last order granting a discovery extension, the District Court cautioned that "no further extensions will be granted." App. at 23. We cannot say the District Court abused its discretion in failing to grant this latest extension request where it gave Appellant sufficient opportunities to seek discovery and Appellant failed to point to specific evidence discovery might uncover. *See ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 297 (3d Cir. 2012) (stating that a "District Court has considerable discretion in matters regarding . . . case management, and a party challenging the district court's conduct of discovery procedures bears a 'heavy burden'").

III.

For these reasons, we will affirm the District Court's orders.

2. We review a district court's denial of discovery for abuse of discretion. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 235 (3d Cir. 2007).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, FILED MARCH 30, 2022

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 18-1019

Judge Cathy Bissoon

JOYCE DANIELS,

Plaintiff,

v.

CITY OF PITTSBURGH, *et al.*,

Defendants.

MEMORANDUM AND ORDER

I. MEMORANDUM

Plaintiff, the administrator of the estate Mark Daniels ("the Decedent"), indicates that "[t]his case concerns one of the most fundamental and pressing questions facing urban policing and our society, namely: Why do the police continue to kill unarmed African-American males?" Doc. 98. In light of numerous reported high-profile incidents, involving problematical cases of excessive and disproportionate force, many citizens in this Country have been asking similar questions.

This does not mean, however, that the question arises every time law enforcement uses deadly force. Officers, when faced with conduct posing a serious, immediate threat to themselves and to public safety, must be allowed to respond commensurately. Such is often the case when an individual wields a firearm against police officers and then flees.

In the early morning hours of February 11, 2018, City of Pittsburgh Officers Gino Macioce and Kevin Kisow observed an individual leaving Betts Market who appeared, according to the officers, to be acting suspiciously. The officers pursued the individual, and encountered him on a nearby street. Officer Macioce saw that the individual had a gun in his hand, raised to fire. *See* Doc. 92-3 at ECF banner pgs. 7-8 of 37; *see also* Doc. 116-5 (sworn affidavit of Officer Macioce, confirming the veracity of his statements in a videotaped interview recorded shortly after the incident).[1] The two exchanged gunfire, "pretty simultaneous[ly]," neither were hit and the individual fled. *See* Doc. 92-3 at pg. 8 & 26 of 37.[2]

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1. Plaintiff's objection to Defendants' reliance on Officer Macioce's videotaped statement, and to later witness statements, is unfounded. Contrary to Plaintiff's indication, the statements in question are supported by confirmatory sworn affidavits. *See* citation *supra*, in body of text; *see also, e.g.*, Doc. 116-2 (affidavit of Detective Steven Hutchins, swearing to the veracity of his report regarding the purchaser of the firearm found on the scene).

2. Officer Kisow was not involved in the exchange of gunfire, having — during the shooting — fallen to the ground. Doc. 100 at ¶ 40 (Plaintiff's response to Defendants' facts).

The officers again went in pursuit, and they encountered the individual who shot at them standing on a corner, speaking with a female. *See* Doc. 99-2 at pgs. 52-53 of 92. Officer Macioce pointed his gun at the individual, and repeatedly commanded that he get on the ground. Doc. 100 at ¶ 53 (Plaintiff's response to Defendants' facts). The individual did not comply and, in response to the verbal commands, said, "It wasn't me. It wasn't me." *Id.* Then, he "turn[ed] to run." *Id.* at ¶ 66.

Officer Macioce shot four times, striking the fleeing individual once in the arm. *See generally id.* at ¶ 83. The bullet hit an artery, and the individual died. As might be deduced from the narrative above, the individual was Decedent, Mark Daniels.

The police recovered a firearm from the crime scene, and the firearm was traceable to Decedent. The purchaser of the firearm later was identified, and she stated that she bought it for Decedent because "he could not purchase firearms" for himself. Doc. 116-2. Also recovered from the crime scene were bullet fragments and cartridge cases matching the firearm. Doc. 116-6; *see* Doc. 100 at ¶¶ 87-90 (stating only general objections to Defendants' evidence, rejected above in fn. 1, and otherwise, offering only conclusory denials, without reference to contrary evidence).

Defendants have put forth evidence, essentially unrefuted, that Officer Macioce identified Decedent as the individual who exchanged gunfire with him only minutes earlier. Other evidence (albeit discovered after

the fact), corroborates Officer Macioce's account, tying the recovered firearm to Decedent, and bullet fragments to the firearm. While Plaintiff's counsel flirt with — if not outright advance — the notion that the officers had "the wrong man," a jury could not *reasonably* so-conclude based on the record in its entirety.[3]

In sum, Plaintiff has not successfully refuted Defendants' evidence that Decedent was the individual who engaged in a contemporaneous exchange of gunfire with Officer Macioce.[4] Even placing aside the forensic evidence confirming the Officer's account, the Court nevertheless would conclude that Plaintiff has failed to sufficiently refute Defendants' evidence that Officer

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3. Plaintiff's counsel also suggests that Officer Macioce essentially "ambushed" the heretofore unknown individual, having not announced that he was a police officer, and having fired first. *See, e.g.*, Doc. 99 at ¶¶ 55-56 ("Defendant Macioce fired two unprovoked shots"). In addition to straining credulity, counsel's "evidence" in support is, in fact, consistent with Officer Macioce's account. The Officer's sworn statement was that the individual with whom he exchanged gunshots had a firearm in his hand, raised to fire. *See* discussion *supra*; *see also id.* (describing gunfire as "simultaneous"). Whether Officer Macioce, or the assailant, fired first is immaterial for the purposes of the discussions herein.

4. The Court finds curious Plaintiff counsel's reliance on, and/or admission that, Decedent's first response to Officer Macioce's commands was to say, "It wasn't me. It wasn't me." *See* discussion *supra* in text. Such a statement begs the question: if Decedent was not involved in the prior incident, in what context would such a reaction be logical? Although the Court need not, and does not, rely on this evidence in granting summary judgment, it does serve to emphasize the seeming implausibility of counsel's narrative.

Macioce had an objective, reasonable belief that Decedent had threatened him with deadly force.

The questions that remain are legal ones, namely: was Officer Macioce's use of force not excessive as a matter of law? And, in any event, is the Officer protected by qualified immunity? The answers both are in the affirmative.

The Court of Appeals for the Third Circuit recently reiterated the governing standards:

> [T]he 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. . . . [T]he question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . [T]he Supreme Court [has] held that deadly force is not justified in circumstances where a fleeing suspect poses no immediate threat to the officer and no threat to others. . . .
>
> [A]dditional factors . . . include 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 actively is resisting arrest or attempting to evade arrest by flight. . . . Other relevant factors are the physical injury to the plaintiff, the possibility that the persons subject to the police action are

> themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

Jefferson v. Lias, 21 F.4th 74, 78-79 (3d Cir. 2021) (citations, quotations and internal punctuation and alterations omitted).[5]

> Many of the listed factors go hand-in-hand with the considerations in this case. The Supreme Court's recognition that deadly force is not justified where a fleeing suspect poses no immediate threat to the officer, or others, is inapplicable. Irrespective of whether Decedent still had a weapon at the time of the final confrontation, Officer Macioce believed him to have fired shots on officers minutes before. Contrary to Plaintiff counsel's suggestion, the law did not require the Officer to "see the gun"

5. To be sure, the *Jefferson* Court noted that reasonableness normally is an issue for the jury, and it reversed the district court's grant of summary judgment. *See generally id. Jefferson's* ultimate rulings are facially distinguishable, however, as is obvious based on the Circuit Court's central premise: "[A] suspect fleeing in a vehicle, who has not otherwise displayed threatening behavior, has the constitutional right to be free from the use of deadly force when it is no longer reasonable for an officer to believe his or others' lives are in immediate peril from the suspect's flight." *Id.* at 81. That scenario is a far cry from this one, where Officer Macioce had an objectively reasonably belief that Decedent had fired on him minutes prior.

> one more time, before he could return force in kind. *Lamont v. New Jersey*, 637 F.3d 177, 183 (3d Cir. 2011) ("An officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who . . . moves as though to draw a gun. Waiting in such circumstances could well prove fatal[, and p]olice officers do not enter into a suicide pact when they take an oath to uphold the Constitution.").[6]

The other factors likewise compel a finding of reasonableness:

- The severity of the crime at issue, shooting at police officers, cannot be much greater.

- Whether the suspect poses an immediate threat to the safety of the officers or others, the same.

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6. Officer Macioce's sworn statements are that, at the time of Decedent's noncompliance, and before he turned to run, his fleece jacket was bulged, there appeared to be something in the front and "it looked like he was either grabbing or reaching or grabbing something in front of him." Doc. 92-3 at pgs. 10-11 of 37. Given the Officer's belief that Decedent already fired on him, the Court does not believe such testimony is necessary. *See, e.g.*, *Embaye v. Minneapolis Police Dep't*, 2016 U.S. Dist. LEXIS 96119, 2016 WL 3960374, *9-10 (D. Minn. Jun. 22, 2016) (the plaintiff's claim that he discarded his weapon was not "a material fact affecting the determination of reasonableness," because the officer employing deadly force had knowledge that the plaintiff had "previously fired his weapon" at a *different* officer).

• Whether he actively is resisting arrest or attempting to evade arrest by flight, the latter is true in this case.

• Physical injury to the plaintiff is a non-factor, as Officer Macioce's having hit Decedent in the arm is, in the Court's view, happenstance (as was the significant misfortune of an arm wound proving fatal).

• The possibility that the person subject to the police action was violent or dangerous, again is a given.

• The duration of the action, it is undisputed that the exchange of fire and the subsequent encounter transpired exigently, within a matter of minutes.

• Whether the action takes place in the context of effecting an arrest, Decedent's arrest was imminent had he complied with the officers' commands. *See* Doc. 99-2 at pgs. 50-51 of 92 (indicating that Officer Kisow also issued verbal commands).

• The possibility that the suspect may be armed, also favors reasonableness. Although Plaintiff's counsel urge that the officers were required to "see the gun" one more time, in light of the prior shooting, the Court cannot agree.

• The number of persons with whom the police officers must contend at one time, is a non factor.

A balance of the relevant factors firmly establishes a lack of excessive force, as a matter of law. This is consistent with the precedent. *See, e.g.*, *Blair v. City of Pgh.*, 711 Fed. Appx. 98, 100-101 (3d Cir. Sept. 28, 2017) (reaching same conclusion, albeit within the context of qualified immunity, where the officers heard gunshots nearby and pursued the shots, only to see an SUV driving at their marked police van; one of the officers saw the vehicle's driver continuing fire, and the officers fired even after the fleeing vehicle sped away); *Gravely v. Speranza*, 219 Fed. Appx. 213, 215 (3d Cir. Mar. 5, 2007) (affirming grant of summary judgment where, among other things, the plaintiff "had car-jacked a vehicle and placed a machine gun to the head of the driver moments before he was shot and arrested"); *Gallardo v. County of San Luis Obispo*, 2021 U.S. App. LEXIS 30680, 2021 WL 4796538, *3 (9th Cir. Oct. 14, 2021) (same, where the plaintiff drew a gun from his pocket and pointed it toward the officer and ignored commands to cease; when "a suspect threatens an officer with a weapon such as a gun, the officer generally is justified in using deadly force") (internal quotations and citation to quoted source omitted); *Siler v. City of Kenosha*, 957 F.3d 751, 759-60 (7th Cir. Apr. 29, 2020) (same, where the plaintiff defied the officer's command, dared the officer to shoot him and then, while holding something in his hand not visible to the officer, stepped in his direction; the "temporal focus must remain on what [the o]fficer knew at the time he shot," and the officer "had the right to protect himself and . . . bystanders through the use of deadly force"); *Williams v. City of Chattanooga*, 772 Fed. Appx. 277, 280-82 (6th Cir. May 15, 2019) (officer acted reasonably when firing a second volley, in a "tense [and] uncertain" situation, and where the officers "could have reasonably

believed that [the plaintiff] posed a threat to their safety or the safety of others"); *Garrett v. Ruiz*, 2013 U.S. Dist. LEXIS 48518, 2013 WL 1342850, *14 (S.D. Cal. Apr. 3, 2013) (granting summary judgment, and analogizing to a case finding that the officers acted reasonably where "they shot a residential burglary suspect who had previously shot a hostage, who eluded capture for almost an hour by running across yards and streets, and jumping fences, but was unarmed when apprehended"), *aff'd*, 585 Fed. Appx. 348 (9th Cir. Oct. 7, 2014) (deadly force was reasonable because the plaintiff "was apprehended during the course of a night-time burglary, [he] admitted he was armed with a knife and was attempting to evade arrest by flight, and the events happened very quickly"); *Long v. Honolulu*, 511 F.3d 901, 906-907 (9th Cir. Dec. 21, 2007) (same, where officer "heard [the plaintiff] threaten to shoot the police, observed him carrying a .22 caliber rifle and knew that he had previously shot at a car full of people") *Embaye*, 2016 U.S. Dist. LEXIS 96119, 2016 WL 3960374 at * 9-10 (cited *supra*); *Wood v. Farmington*, 910 F.Supp.2d 1315, 1326 (D. Utah 2012) (same, where the plaintiff, among other things, refused repeated commands to drop his weapon, made hostile motions with his gun and previously had fired it).[7]

7. Plaintiff's reliance on *Curley v. Klem* is misplaced. *Id.*, 499 F.3d 199 (3d Cir. 2007). *Curley* involved a case of blatant, if not reckless, misidentification, where the police officer shot at the plaintiff merely because he matched the description of the perpetrator being a "tall, black male." *Id.* at 201-202. The plaintiff was a port authority police officer, wearing his uniform, who was investigating the scene when the defendant state trooper shot him. *See id.* It is unsurprising that a grant of summary judgment would be reversed on those facts. Here, Officer Macioce had an objectively reasonably belief that Decedent was the same person who fired at him

In light of the aforementioned legal authority,[8] it is unsurprising that Officer Macioce also enjoys qualified immunity. As already seen, Defendants have shown that there was no violation of a constitutional right. Plaintiff also cannot show a violation of clearly established law. As long has been the case, "[w]here [an] officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

The Court rejects Plaintiff's counter-formulation of the right(s) in question. Counsel posits that the specific right violated was "Decedent's right to be free from the use of deadly force while running away from a police officer, when he did not pose any articulable threat, was not visibly armed, and there was no probable cause to believe he was involved in an earlier shooting." *See* Doc. 98 at 7.

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minutes earlier. And, of course, there is the unrefuted, corroborating evidence tying a firearm to Decedent, and bullet fragments to the firearm. In any event, *Curley* is distinguishable.

8. The Court acknowledges, and has accounted for, legal precedent recognizing that summary judgment should be applied cautiously in deadly-force cases, because the victim is unable to testify. *See Lamont*, 637 F.3d at 181-82. The Court of Appeals for the Third Circuit has made clear, however, that heightened summary judgment standards do *not* apply; and it certainly has affirmed summary judgment in appropriate circumstances. *See id.* (affirming grant of summary judgment regarding the initial use of deadly force in the case before it).

Obviously, Plaintiff's formulation bears little resemblance to the facts and determinations above. Most of the arguments "baked in" already have been rejected, either directly or by implication. A point warranting further comment, however, is Plaintiff's suggestion that "probable cause" is relevant. Along the same lines, counsel flirts with the no+tion that the officers lacked reasonable suspicion to pursue and intercept the presumably unknown subject exiting Betts Market. *See id.* at 4-5.

As to the first point, it is important to note that the Supreme Court in *Garner* stated: *"[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape." *Id.*, 471 U.S. at 11-12 (emphases supplied). Officer Macioce already has been determined to have had an objectively reasonable belief that Decedent fired on him; and his belief has been corroborated by crime-scene and other evidence. Of course, firing on police officers is grounds for probable cause, but framing the issue as such is distracting and unnecessary.

As to reasonable suspicion, Plaintiff's counsel understandably tread carefully in this area, given their insinuation that the officers, at all times, had "the wrong man." To claim that the person exiting Betts Market was not Decedent — and that the officers lacked reasonable suspicion to pursue *any* individual who did — raises the specter not only of standing, but concerns against talking out of both sides of one's mouth.

In the end, such ruminations are neither helpful nor necessary. The unrefuted evidence establishes that the officers pursued an individual, and that an individual fired a weapon at them shortly thereafter. There is no competent evidence refuting Officer Macioce's belief, later corroborated, that the individual who shot at him was Decedent. By the time of the firefight, any causal link between the officers' surveillance near Betts Market and the final, unfortunate incident had long been severed.

For all of the reasons stated above, Officer Macioce is entitled to summary judgment. Given the lack of underlying liability, the *Monell* claims against the City likewise fail. *Johnson v. City of Philadelphia*, 837 F.3d 343, 354 n.58 (3d Cir. 2016) (citation omitted).

Consistent with the foregoing, the Court hereby enters the following:

II. ORDER

Defendants' Motion for Summary Judgment (**Doc. 90**) is **GRANTED**, and this case will be marked closed.

IT IS SO ORDERED.

March 30, 2022

/s/ Cathy Bissoon
Cathy Bissoon
United States District Judge

APPENDIX C — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1790

JOYCE DANIELS, AS ADMINISTRATOR
FOR THE ESTATE OF MARK S. DANIELS,

Appellant,

v.

CITY OF PITTSBURGH;
GINO MACIOCE, IN HIS CAPACITY AS A
PITTSBURGH POLICE OFFICER AND HIS
INDIVIDUAL CAPACITY.

(D.C. Civil Action No. 2-18-cv-01019)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, Jr.*, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS,

* The Honorable Joseph A. Greenaway, Jr. retired from the Court on June 15, 2023, after the voting period expired for this petition for rehearing, but before the Clerk's Office filed the order.

FREEMAN, MONTGOMERY-REEVES, CHUNG, SCIRICA and RENDELL†, *Circuit Judges*

The Petition for Rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

s/ Marjorie O. Rendell
Circuit Judge

Dated: June 22, 2023

Sb/cc: All Counsel of Record

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† Pursuant to Third Circuit I.O.P. 9.5.3., the votes of Judges Scirica and Rendell are limited to panel rehearing only.