

App No. _____

In The
Supreme Court of the United States

TIDERA HARRIS,

Applicant,

v.

GREGORY HARVEY,

Respondent.

On Application for an Extension of Time to File Petition for a Writ of
Certiorari to the United States Court of Appeals for the
Eleventh Circuit

K. DAVID SAWYER
McPhillips Shinbaum, LLP
516 S. Perry Street
Montgomery, AL 36104
Telephone: (334) 262-1911
(334) 239-7382
Facsimile: (334) 263-2321
kdsawyer64@outlook.com
Counsel for Applicant

AUGUST 1, 2024

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6, Applicant states that it has no parent corporation and that no publicly held company owns 10% or more of Applicant's stock.

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant Tidera Harris respectfully requests that the time to file its petition for a writ of certiorari be extended for 45 days, up to and including September 27, 2024. The Court of Appeals issued its opinion on March 13, 2024 (Exhibit A); denied rehearing en banc on May 7, 2024 (Exhibit B); and entered judgment on May 15, 2024. Absent an extension of time, the petition would be due on August 13, 2024. The jurisdiction of this Court is based on 28 U.S.C. 1254.

Background

This case presents an important question on the application of the qualified immunity doctrine: Whether an official who exceeds the scope of authority granted under state law at the time of the alleged constitutional violation can assert qualified immunity. As stated by the District Court, "the right Officer Harvey may have violated *was clearly established at the time of the shooting,*" and the reasonableness of Officer Harvey's use of deadly force is left for trial.

The District Court properly considered the evidence, videos and transcripts and before the Court, and denied Officer Harvey's motion for summary judgment as to Mr. Harris's excessive force claim and state law claims. The District Court's decision is well articulated and based specifically upon the evidence before the Court. In fact, nearly each sentence of the District Court's Memorandum Opinion and Order makes reference to the video evidence and transcript evidence of what occurred when Officer

Harvey shot Mr. Harris in the back on October 17, 2021. Initially, this Appellate Court lacked jurisdiction because Officer Harvey's interlocutory appeal presented only questions of fact and not law. *English v. City of Gainesville*, 75 F.4th 1151 (11th Cir. 2023). The clearly established law in October 2021 cannot be disputed, and, in the interlocutory appeal, Officer Harvey disputed questions of fact including whether Mr. Harris posed a serious danger when speaking to him on the morning of October 17, 2021. Even though the Eleventh Circuit accepted jurisdiction, material disputed facts existed which should have precluded summary judgment. Fed.R.Civ.P. 56(c).

Moreover, when addressing the *Graham* factors, it is clear the amount of force used by officer Harvey was unnecessary and excessive. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court explicitly addressed "the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspect. *Id.* at 3. The Court clearly established that an officer cannot, without the requisite threat of immediate harm, use deadly force against an unarmed suspect fleeing from law enforcement solely to prevent flight. *Id.* at 11. In this case, it would have been clear to any reasonable officer in Officer Harvey's position that deadly force was not an available or reasonable option and therefore, and qualified immunity is not applicable.

Likewise, applying applicable law to Mr. Harris's state law claims, including exceptions to immunity, the District Court properly denied Officer Harvey's Motion for Summary Judgment with regards to Mr. Harris's state tort claims brought against Officer Harvey. Similar to Plaintiff's excessive force claim, a reasonable jury could find that Officer Harvey's use of deadly force against Mr. Harris satisfied the elements of assault, battery, negligence, or wantonness—under Alabama law. (Doc 89).

The majority of facts of what occurred on October 17, 2021 (addressing the “Six Factors”) were well illustrated and documented by the body-cam video and transcript evidence and established how Officer Harvey’s use of excessive force was both unlawful and a clear violation of Mr. Harris’s Fourth Amendment Constitutional right, and violations of Alabama state law.

Reasons For Granting an Extension of Time

There is a press of business on numerous other legal matters. Substantial commitments have occurred during the relevant time period, including lengthy depositions, hearings before multiple courts, and meetings with many new and existing clients. In addition, the counsel for Appellant applied for admission to the United States Supreme Court on July 16, 2024, and has yet to receive his Certificate of Admission.

Conclusion

Applicant requests that the time to file a petition for writ of certiorari in the above-captioned matter be extended 45 days to and including September 27, 2024.

Dated this 1st day of August, 2024.

Respectfully submitted,



K. David Sawyer
McPhillips Shinbaum, LLP
516 S. Perry Street
Montgomery, AL 36104
Telephone: (334) 262-1911
(334) 239-7382
Facsimile: (334) 263-2321
kdsawyer64@outlook.com
Counsel for Applicant

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11816

Non-Argument Calendar

TIDERA HARRIS,

Plaintiff-Appellee,

versus

THE CITY OF MONTGOMERY,

Defendant,

GREGORY HARVEY,

In his individual capacity,

Defendant-Appellant.

Exhibit A

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:21-cv-00799-WKW-SMD

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

This case arises from an ill-fated series of events that began with a domestic violence report and ended with Tidera Harris being shot by an officer of the Montgomery Police Department. Though Harris’s injuries are unfortunate, the record shows that the officer did not use constitutionally excessive force. The district court therefore erred when it denied qualified immunity because the evidence in the record established that Harris’s Fourth Amendment rights were not violated in this encounter.

I.

The events leading to this appeal began when Chimeka Minefield, the fiancé of Tidera Harris and mother of several of his children, snuck out of her own home to seek her neighbor’s assistance in calling the police. Minefield was scared because Harris was, as she said, “acting up”—throwing furniture and “acting crazy.” Though her neighbor warned her not to go back, Minefield could not stand to leave her children alone in the house with Harris, so she returned home. Minefield’s neighbor informed the 911 operator that Harris had several warrants against him, that he had

been beating Minefield, and that she did not know if Harris had a weapon. The neighbor was so concerned about Minefield's wellbeing that she called back two more times, concerned that the police were taking too long to arrive.

As a result of these calls, Officer Gregory Harvey was dispatched to Minefield's home, along with Officer Helton as backup. From the dispatch, Harvey knew that this was a domestic violence call, which raised a sense of urgency and the possibility of a physical altercation. Harvey was also told that there were warrants out against Harris. Upon arrival, Harvey could hear a verbal altercation inside the home, so he entered the residence without knocking to intervene before things escalated.

Minefield invited Harvey further into the home, telling him that Harvey needed to "get him"—referring to Harris. Attempting to de-escalate the situation, Harvey asked Harris to step outside with him. But despite Harvey's repeated commands, Harris refused to follow orders. Instead, Harris began rummaging through the dimly lit house, requiring Harvey to utilize his flashlight so that the officers could see Harris's hands and actions. Harris continued to pat his pockets, walk around the house, and dig through clothing and furniture. He also kept acting as though he was receiving phone calls—lifting the phone to his ear and walking away from the officers—but they did not hear the phone ring, vibrate, or otherwise indicate that he was receiving any calls. Officer Harvey was concerned that Harris might have been looking for a weapon.

Finally, Harris stepped outside. He willingly gave Harvey his name and date of birth. Meanwhile, though, Harris kept glancing toward the Dodge Charger with dark tinted windows that was parked in the driveway. Harris then picked up his phone again as if to answer an imaginary phone call. He began walking toward the vehicle, and once he was around to the driver's side, Harris abruptly took off in a sprint toward the driver's door. Harvey gave chase and shouted "No." Upon rounding the back of the vehicle, he saw Harris reaching into the car and could not see his hands. Fearing that Harris was reaching for a weapon and forced to make a split-second decision, Harvey fired three shots. One bullet struck Harris's shoulder and one hit him in the back. An outside investigation by the State Bureau of Investigations determined that Harvey's actions were a reasonable exercise of his official duties under the totality of the circumstances.

Harris's operative complaint sets out four claims for relief: (1) assault and battery under Alabama state law against Harvey; (2) § 1983 excessive force in violation of the Fourth Amendment against Harvey; (3) *Monell* liability against the City of Montgomery and the Montgomery Police Department; and (4) Negligence and/or Wantonness under Alabama state law against Harvey. The defendants moved for summary judgment on all counts. As relevant to this appeal, Harvey argued that he was entitled to summary judgment because he was entitled to immunity—qualified immunity for the Fourth Amendment claims, and state agent immunity for the state law claims. After argument, the district court granted the motion with respect to the *Monell* claim

23-11816

Opinion of the Court

5

against the City but denied summary judgment to Harvey on all the claims against him. This appeal followed.

II.

This court reviews the grant of summary judgment based on qualified immunity *de novo*. *Powell v. Snook*, 25 F.4th 912, 920 (11th Cir. 2022). Under this standard, we construe all facts and draw all inferences in the light most favorable to the nonmoving party. *Id.*

III.

To demonstrate that qualified immunity does not apply in this case, Harris must show that Harvey (1) violated one of his constitutional rights, and (2) that it was clearly established at the time of the conduct that Harvey's specific actions did so. *Id.* Because "an objectively reasonable officer in the same situation could have believed the use of force was not excessive," Harris failed to show that Harvey violated a constitutional right and Harvey is therefore entitled to qualified immunity. *Brown v. City of Huntsville, Alabama*, 608 F.3d 724, 738 (11th Cir. 2010).

The Fourth Amendment's protection against unreasonable searches and seizures includes the right to be free from the excessive use of force. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). To determine whether a use of force was "reasonable," courts must engage in a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (quotation omitted). This is an objective inquiry:

“the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” *Id.* at 397. Critically, however, this inquiry must be judged from the perspective of a “reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and allow for consideration of the fact that officers must often make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Id.* at 396–97.

For better or for worse, this test is fact specific, and requires courts to “slosh our way through the factbound morass of ‘reasonableness.’” *Scott v. Harris*, 550 U.S. 372, 383 (2007). There are, however, several factors that can help guide the analysis. These include (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.” *Crenshaw v. Lister*, 556 F.3d 1283, 1290 (11th Cir. 2009) (quoting *Graham*, 490 U.S. at 396).

First, Harvey had been discharged to Minefield’s home on a domestic violence call and warned that Harris had warrants outstanding—these are some of the most dangerous calls for officers. *Second*, though Harris did not pose an immediate threat when the officers arrived at the scene, his progressive noncompliance and dash to the vehicle—a common place to store weapons—created a threatening situation in which both officers feared for their lives. His sudden, unprovoked movement, coupled with the pattern of evasive behavior, could alert an objectively

23-11816

Opinion of the Court

7

reasonable officer of an imminent threat to his safety and the safety of the others standing nearby. See *Oakes v. Anderson*, 494 F. App'x 35 (11th Cir. 2012) (unpublished). *Third*, Harris repeatedly and blatantly ignored Harvey's commands and resisted Harvey's efforts to de-escalate and investigate the alleged domestic violence incident.

Under these circumstances, the balance of the evidence shows that a reasonable officer at the scene could have found that shooting Harris as he reached in the car was not an excessive use of force. Accordingly, Officer Harvey is entitled to qualified immunity for his § 1983 claim.

That means Harvey is also entitled to state agent immunity on Harris's state law claims. "The Alabama Supreme Court has largely equated qualified immunity with state agent immunity." *Cantu v. City of Dothan, Alabama*, 974 F.3d 1217, 1236 (11th Cir. 2020) (quotation omitted) (alteration adopted). Thus, for the same reasons that Harvey is entitled to qualified immunity on the § 1983 claim, he is also entitled to state agent immunity on the state law claims.

* * *

It is regrettable when a person is shot and hindsight shows that it could have been avoided. But "tragedy does not equate with unreasonableness." *Powell*, 25 F.4th at 925 (quotation omitted). Because Officer Harvey's use of force was not objectively unreasonable under the circumstances of this case, there was no Fourth Amendment violation. The district court's decision

8

Opinion of the Court

23-11816

denying qualified and state agent immunity is therefore
REVERSED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 07, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11816-AA
Case Style: Tidera Harris v. Gregory Harvey
District Court Docket No: 2:21-cv-00799-WKW-SMD

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

Exhibit B

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11816

TIDERA HARRIS,

Plaintiff-Appellee,

versus

THE CITY OF MONTGOMERY,

Defendant,

GREGORY HARVEY,

In his individual capacity,

Defendant-Appellant.

2

Order of the Court

23-11816

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:21-cv-00799-WKW-SMD

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR
REHEARING EN BANC

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 15, 2024

Clerk - Middle District of Alabama
U.S. District Court
1 CHURCH ST
MONTGOMERY, AL 36104

Appeal Number: 23-11816-AA
Case Style: Tidera Harris v. Gregory Harvey
District Court Docket No: 2:21-cv-00799-WKW-SMD

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

MDT-1 Letter Issuing Mandate

Exhibit C

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11816

TIDERA HARRIS,

Plaintiff-Appellee,

versus

THE CITY OF MONTGOMERY,

Defendant,

GREGORY HARVEY,

In his individual capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

2

23-11816

D.C. Docket No. 2:21-cv-00799-WKW-SMD

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 13, 2024

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: May 15, 2024