No. _____

IN THE

Supreme Court of the United States

GLADIS CALLWOOD, AS ADMINISTRATRIX OF THE ESTATE OF KHARI NEVILLE ILLIDGE,

Petitioner,

v.

JAY JONES, *et al.,*

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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May 18, 2018

(Continued on inside cover)

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QUESTION PRESENTED

Tennessee v. Garner, 471 U.S. 1, 8 (1985), and *Graham v. Connor*, 490 U.S. 386, 395 (1989), held that in evaluating a Fourth Amendment excessive force claim, there must be a "governmental interest" in how an arrest is "carried out." *Garner* and *Graham* clearly establish that police cannot use force that serves no purpose. And applying this established rule, most circuits have held that police officers are not entitled to summary judgment on excessive force claims if there is evidence that they used force for no legitimate reason.

Khari Illidge—who police believed was suffering a mental health crisis—was naked, unarmed, face-down on the ground, with two officers on him. As the two officers were trying to handcuff Mr. Illidge, another tased him thirteen times. He died. One of the officers testified that by the time Mr. Illidge was on the ground, the additional tases served no purpose other than to "inflict pain" and "shut down [Mr. Illidge's] nervous system." Without acknowledging that testimony, the Eleventh Circuit held the officers were entitled to summary judgment on a claim of excessive force because their conduct did not violate clearly established law. The Fourth, Sixth, and Seventh Circuits reached the opposite conclusion when denying/reversing summary judgment under closely analogous facts.

The question presented is:

Were police officers entitled to summary judgment on a claim of excessive force when there was evidence in the record—which the Eleventh Circuit overlooked—establishing that the deadly tases police

administered against Mr. Illidge served no purpose other than to inflict pain?

PARTIES TO THE PROCEEDINGS

Petitioner Gladis Callwood, as Administratrix of the Estate of Khari Neville Illidge, was plaintiff-appellant in the court of appeals.

Respondents, who were defendant-appellees in the court of appeals, are

Jay Jones, Sheriff for Lee County, Alabama;

Charles H. Jenkins, Deputy Sherriff for Lee County, Alabama;

Steven M. Mills, Deputy Sherriff for Lee County, Alabama;

Ray Smith, Deputy Sherriff for Lee County, Alabama;

Joey Williams, Phenix City, Alabama, Police Officer;

David Butler, Phenix City, Alabama, Police Officer;

Shawn Sheely, Phenix City, Alabama, Police Officer;

Phenix City, Alabama, a municipal corporation.[1]

[1] Before this Court, Ms. Callwood challenges the dismissal of her claims against Ray Smith, Steven Mills, and David Butler.

CORPORATE DISCLOSURE STATEMENT

Counsel for Gladis Callwood, the NAACP Legal Defense and Educational Fund, Inc., is a non-profit organization that has not issued shares of stock or debt securities to the public and has no parent corporation, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Gladis Callwood, as Administratrix of the Estate of Khari Neville Illidge, respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the district court is reproduced at App. 1a-18a. The opinion of the United States District Court for the Middle District of Alabama granting summary judgment is reproduced at App. 19a-72a.

JURISDICTION

The court of appeals entered its judgment on February 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

U.S. Const. amend. IV.

Title 42 U.S.C. § 1983 provides:

> 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.

42 U.S.C. § 1983.

INTRODUCTION

Police repeatedly tased unarmed Khari Illidge. He died. His death was needless. An officer involved in the incident testified that there was no reason for Deputy Ray Smith to tase Mr. Illidge—a young man believed to be suffering a mental health crisis—thirteen times while he was naked and unarmed, on the ground, with two officers over him. Indeed, the officer testified that the only reason for Deputy Smith to tase Mr. Illidge all those times was to inflict pain and shut down Mr. Illidge's nervous system.

The Eleventh Circuit did not even mention this testimony when it held that the officers were entitled to summary judgment on a claim of excessive force because, in its view, the officers did not violate clearly established law and were therefore entitled to qualified immunity. This ruling was contrary to this Court's cases, which clearly establish that when police use force during arrest, it must serve *some* legitimate law enforcement purpose. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Scott v. Harris*, 550 U.S. 372, 383 (2007). Force is clearly "unreasonable" under the Fourth Amendment when it has no reason.

The Eleven Circuit failed to apply the "governing legal rule" that police cannot use unreasonable force when effecting an arrest. *Salazar-Limon v. City of Houston,* 137 S. Ct. 1277, 1278 (2017) (Alito, J., joined by Thomas, J., concurring in denial of cert.). As a result, its decision is inconsistent with the decisions of most circuits, which have dutifully followed *Garner* and *Graham* and denied summary judgment when faced with evidence that police used unreasonable force. More to the point, the Eleventh Circuit's

decision directly conflicts with decisions from the Fourth, Sixth, and Seventh Circuits, which denied or reversed summary judgment under closely analogous facts.

Furthermore, by ignoring evidence that the tases were gratuitous, the Eleventh Circuit flouted the fundamental rule that all evidence must be viewed in the non-movant's favor at summary judgment. This Court has summarily reversed a court of appeals for doing the same thing. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (reversing because the court of appeals "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case").

Certiorari is warranted. *See* Sup. Ct. R. 10(a) & (c). And this Court should reverse the judgment of the Eleventh Circuit. *See Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (this Court uses its "summary reversal procedure . . . to correct a clear misapprehension of the qualified immunity standard").

STATEMENT OF THE CASE

The summary judgment record concerning the events that resulted in Mr. Illidge's death stems largely from the testimony of the respondent officers. Despite having dashboard cameras in their cars, the officers recorded only their initial interaction with Mr. Illidge, not the later encounter that resulted in his death. The officers also submitted the affidavit of a bystander, but it was stricken from the record after the affiant testified that it contained materially false information that attorneys for the officers included in the affidavit and police department agents promised, but failed, to correct before submitting it to the court.

Even so, this is the rare case in which, relying on evidence gleaned almost entirely from the officers' vantage point, material facts strongly support Ms. Callwood's excessive force claim. In fact, evidence before the court showed that although a taser's sole purpose is to bring a suspect to the ground, officers continued to tase Mr. Illidge thirteen additional times not to "benefit" or "help" the officers restrain him, but for no purpose other than to cause Mr. Illidge pain.

A. Police First Encounter Mr. Illidge.

The evidence presented at summary judgment showed that, on March 24, 2013, Lee County Deputy Sheriffs Steven Mills and Ray Smith were separately on patrol when they "received dispatch calls about a report of a naked, black man running down" the road. App. 22a. Deputy Mills received a second dispatch—that the man "had been in or at someone's home," but Deputy Mills stated that he "didn't have any details on that." *Id.* at 22a-23a (quotation marks omitted).

Deputy Mills found the man first; that man was Khari Illidge. *Id.* at 23a. Mr. Illidge was a 25-year-old Black man who stood 5' 2" tall and weighed 201 pounds. *See* ECF No. 144-2 at 3 (Autopsy Report).[2] He was visibly unarmed. ECF 144-13 at 117-18 (Dep. of Steven Mills).[3] Deputy Mills called out to Mr. Illidge, but Mr. Illidge walked in the opposite direction, "zombie-like," "appear[ing] not to recognize that Mills was a deputy sheriff." ECF No. 81-1 at 3 (Aff. of Steven Mills); App. 3a (brackets omitted). No one else was around. *See* ECF No. 85 (dashboard footage).

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[2] "ECF" citations are to the record as reflected on the district court's public docket.

[3] Deputy Mills's dashboard camera recorded his initial interaction with Mr. Illidge. *See* App. 23a.

Deputy Mills "radioed for backup, telling dispatch that [Mr.] Illidge was mentally ill and possibly under the influence." App. 3a.[4]

Deputy Mills again called out for Mr. Illidge to stop, when, according to Deputy Mills, Mr. Illidge turned around and began walking in his direction. *Id.* Mr. Illidge did not threaten Deputy Mills. ECF No. 144-13 at 134. Instead, he said "excuse me, out of the way," as he tried to walk past the deputy. App. 23a. Deputy Mills felt that Mr. Illidge entered his "zone of safety," so he shot Mr. Illidge with his taser. *Id.* Mr. Illidge kept walking, so Deputy Mills tased him again, this time poking Mr. Illidge in his side with the taser in "stun mode." *Id.* at 24a.[5] This brought Mr. Illidge to the ground. *Id.*

Deputy Mills tried to pin Mr. Illidge, but Mr. "Illidge overpowered him and was able to lift up off the ground with Mills on him." *Id.* Deputy Mills, who was 5' 9" and weighed 230 pounds, *see* ECF No. 144-13 at 30-31, claimed Mr. Illidge "slung him at least 10 feet." App. 24a.[6] Mr. Illidge then walked away toward a house down the road. *See id.* Deputy Mills again radioed for assistance. *Id.*

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[4] Mr. Illidge had a blood content consistent with having had two beers and marijuana. EFC No. 81-37 at 17 (Report of Stacy Hall).
[5] "Tasers can be used in two modes, one is dart or prong mode in which a barbed point makes contact with the skin and the other is drive or dry stun mode in which the electrified tips of the taser are touched to the skin directly." App. 24a n.3 (citation omitted).
[6] Respondents introduced no evidence about whether such a feat of strength was physically possible. They *did* repeatedly allege Mr. Illidge was in an LSD-fueled state, even though Mr. Illidge's autopsy found there was no LSD or hard drugs of any sort in his system. EFC No. 81-37 at 18.

Deputy Smith, who had been in law enforcement for close to twenty years and was a certified "Taser instructor," next arrived on the scene. *Id.* at 3a; ECF No. 81-2 at 2 (Aff. of Ray Smith). Deputies Smith and Mills followed Mr. Illidge as he climbed a fence and walked to the back of a house that belonged to Gloria Warr. App. 3a. Once Deputy Smith saw Mr. Illidge, he too believed that Mr. Illidge was mentally ill and thought he may have been suffering from "excited delirium." *Id.* at 4a. The deputies watched Mr. Illidge walk up to Ms. Warr's backdoor and try to open it, but it was locked. *Id.* They then flanked Mr. Illidge and told him to "stop right there." *Id.* at 25a.

B. Mr. Illidge's Arrest and Death.

By then, Phenix City Police Officer David Butler arrived on scene to provide additional back up. *Id.* at 3a-4a. In a near-contemporaneous report,[7] Officer Butler described what happened next.

After the deputies told Mr. Illidge to "stop right there," Mr. Illidge "started walking away." ECF No. 134-4 at 46 (Dep. of David Butler). Mr. Illidge then "made a rapid movement towards Deputy Smith," who "deployed his taser," striking Mr. Illidge in the chest. *Id.* at 46-47. Mr. Illidge fell, landing face-forward on the ground with his arms under his body. App. 4a; ECF No. 134-2 at 68 (Dep. of Ray Smith). By bringing Mr. Illidge to the ground, Officer Butler said the taser "did its job." ECF No. 134-4 at 47. Deputy Smith confirmed that "when [he] deployed the taser and [Mr. Illidge] dropped, that it had been an effective deployment." ECF No. 134-2 at 63.

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[7] Officer Butler was interviewed the day after the incident for an internal investigation. He adopted this report as part of his sworn deposition. ECF No. 134-4 at 69-70.

Officer Butler's testimony that the taser "did its job" by bringing Mr. Illidge to the ground was consistent with law enforcement training and taser guidelines. Retired police officer Michael Leonesio, a "use of force and police practices subject matter expert," submitted an affidavit explaining that a taser "is designed to be a temporary control device." ECF No. 144-24 at 1, 8 (Decl. of Michael Leonesio). The goal of tasing a suspect is to create "a window of opportunity" to take a suspect to the ground so police can "physically" restrain the suspect and take him "into custody." *Id.*; *see also* ECF No. 144-29 (Taser® Handheld CEW Warnings). Officer Leonesio made clear that a taser is *not* to be used as a "compliance" or "restraining" device. ECF No. at 144-24 at 8.

After Deputy Smith tased Mr. Illidge to the ground, Officer Butler and Deputy Mills "got on top" of him and tried to secure his arms. ECF No. 134-4 at 47-48. Mr. Illidge was "t[h]rashing" on the ground. ECF No. 144-36 at 13 (Audio Tr. of Ray Smith). Officer Butler was wrestling to get "control" of Mr. Illidge's right arm while Deputy Mills was wrestling to get ahold of his left to handcuff him. ECF No. 134-4 at 48.

The officers characterized Mr. Illidge's "thrashing" on the ground as him resisting arrest. *See* App. 4a. Ms. Callwood, however, noted that a reasonable juror could infer that Mr. Illidge's "thrashing" did not mean he was resisting arrest. *See, e.g.*, Pl.'s Mem. Br. in Opp'n to Summ. J. at 70; Appellant's Reply Br. at 4-5. A reasonable juror could have instead found that Mr. Illidge's movement was the physiological result of being repeatedly tased, or that his thrashing was a sign of mental illness. As noted, Deputy Mills testified that Mr. Illidge did not

appear to recognize that he was a police officer; if true, Mr. Illidge would not have even understood that he was being arrested. Further, a reasonable juror could have simply found the officers' accounts not credible given that some of the officers submitted a fabricated affidavit from a bystander to try to bolster their version of events.[8] In sum, that Mr. Illidge was resisting arrest was not a fact beyond triable dispute.

Then, while Officer Butler and Deputy Mills were trying to handcuff Mr. Illidge, Deputy Smith tased Mr. Illidge *thirteen* more times in the highest voltage mode, sending an electrical current coursing through Mr. Illidge's body for 37 seconds. *See* App. 25a; ECF No. 144-9 at 26-27 (Taser Log). Each additional tase would have "inflict[ed] a painful and frightening blow," *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993), and felt like Deputy Smith "reached into [Mr. Illidge's] body to rip [his] muscles apart with a fork."[9]

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[8] An attorney for the Lee County officers prepared a Declaration for bystander Gloria Warr that purported to memorialize what she saw. *See* ECF No. 116-1 at 2-3 (Aff. of James Randall McNeil). It included several alleged observations favorable to the officers, including that Ms. Warr saw: Mr. Illidge approach the officers with clenched fists before he was tased; Mr. Illidge strike and kick the officers; and Deputy Smith use the taser only once. *See* ECF No. 77-12 (Decl. of Gloria Warr); *see also* App. 31a-32a. But during Ms. Warr's deposition, "she testified that [these] several passages in the Declaration were false and that she signed the Declaration only because she had been told that those passages would be removed before the Declaration was filed." App. 31a. The district court therefore struck the Declaration from the record. *Id.* at 32a.

[9] Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1353 (2012) (quotation marks omitted) (recounting people's experiences with being tased).

Officer Butler testified that these additional tases were "not consistent" with "law enforcement training." App. 25a. He also said that the repeated tasing "didn't help" the officers handcuff Mr. Illidge or "benefit [them] any." ECF No. 134-4 at 81. Indeed, taser guidelines warn against recurrent tasings because of the risk of serious injury and death. *See* ECF No. 144-4 at 7-8 (Aff. of Michael Brave, Taser International, Inc.). And Lee County taser training materials specifically warn against repeatedly tasing "persons in a health crisis." ECF No. 144-11 at 2 (Lee County Training Materials).

Given Officer Butler's testimony that the thirteen additional tases were contrary to law enforcement training and did not "benefit" or "help" the police, Ms. Callwood's counsel asked Officer Butler why Deputy Smith (a 20-year veteran officer and certified Taser instructor) would tase Mr. Illidge so many times. Officer Butler had this to say:

> Counsel: And after [Deputy Smith] created a window of opportunity [by tasing Mr. Illidge the first time], [Mr. Illidge] fell down and you guys got on top of him to try to restrain him. The window of opportunity had been created and you took advantage of it; isn't that right?
>
> Butler: Yes, sir.
>
> Counsel: Okay. And so, if the window of opportunity has been created by the Taser use, and [Mr. Illidge is] on the ground, and you're on top of him trying to apply the secondary restraints, and there was a good connection with the Taser prongs, then the only real[ ] effect

> [for the additional tases] would be to inflict pain, wouldn't it; isn't that right?
>
> Butler: Yes, sir.
>
> Counsel: Yes. I mean, it had no other real purpose or effect, did it?
>
> Butler: It would have shut down his nervous system, but that's five seconds.
>
> Counsel: Right. But that's not necessary, is it?
>
> Butler: No.

ECF No. 134-4 at 110-11.

Officer Butler's testimony that the continued tasing would have "shut down" Mr. Illidge's "nervous system," is consistent with the Taser Manual's recognition that the taser would "affect the sensory and motor functions of the nervous system." Taser® X26E™ ECD User Manual at 5.[10] The taser sends "electrical impulses to cause stimulation of the sensory and motor nerves." *Id.* at 6. This would have "incapacitat[ed]" Mr. Illidge, causing him to have "involuntary strong muscle contractions." *Id.* Because tasing does not immobilize a person, but instead causes involuntary and sporadic movements, as Officer Butler explained, tasing someone who is on the ground would not help, and in fact would hinder, officers' attempts at handcuffing.

After the many tases, nineteen in all, the officers handcuffed Mr. Illidge and put him in a "hogtie"[11]

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[10] *See* Axon, *Taser® X26E™ ECD User Manual* (2011), https://help.axon.com/hc/article_attachments/115008437288/x26-user-manual.pdf (last visited May 16, 2018).

[11] "The hogtie position is one where the hands and feet are strapped relatively closely together behind the back, rendering

because he was still "thrashing" and "uttering stuff that w[as] unintelligible." *See* App. 4a-5a; ECF No. 134-2 at 66. Three more officers had arrived by then. App. 5a. One of the officers, Joey Williams, who weighed 385 pounds, knelt on Mr. Illidge's back to stop him from moving. *Id.*

Then, Mr. Illidge "suddenly went limp." *Id.* "[T]he officers turned [Mr. Illidge] over and saw a white, frothy substance and blood coming from his mouth." *Id.* They called the paramedics, who arrived to find Mr. Illidge laying "supine" in Ms. Warr's backyard. ECF No. 144-31 at 5 (Patient Care Report). He was still "handcuffed [with his] feet shackled." *Id.* There was a factual dispute about whether the officers were providing meaningful life-saving treatment to Mr. Illidge when the paramedics arrived. *See* App. 7a-8a.

The paramedics drove Mr. Illidge to the hospital, where he was pronounced dead. App. 5a. The cause of death was fatal arrhythmia—a known risk of repeated tases. *See* ECF No. 144-30 at 2 (Death Certificate); ECF No. 144-28.[12]

C. Proceedings Below

1. District Court Proceedings

Ms. Callwood sued under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Alabama, alleging that the officers violated Mr. Illidge's Fourth Amendment right to be free from excessive force. *See* ECF No. 2 (Am. Compl.); App. 5a-

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the subject immobile." App. 5a n.3 (brackets, quotation marks, and citation omitted).

[12] Douglas P. Zipes, M.D., *Sudden Cardiac Arrest and Death Following Application of Shocks from a Taser*, 125 CARDIAC 2417 (2012).

6a.[13] Jurisdiction was proper under 28 U.S.C. §§ 1331, 1343. Ms. Callwood argued "that the use of the Taser by Ray Smith while [Mr.] Illidge was being placed in handcuffs was so excessive that it constituted unreasonable use of force in violation of clearly-established law." App. 49a.

The district court rejected this argument and granted summary judgment in the officers' favor. The court acknowledged that there was "evidence in this case that a Taser [was] not designed to be used as many times as Smith used" it. *Id.* at 53a. Even so, it concluded that "[u]nder Eleventh Circuit precedent, the repeated use of a Taser after an initial reasonable use is unconstitutional [only] if it occurs after a suspect is fully-secured and has ceased resisting arrest." *Id.* Here, because officers had characterized Mr. Illidge's "thrashing" while on the ground as evidence he was "resisting," and because Mr. Illidge was not yet handcuffed, the court found that "the facts of this case [did] not fall within that existing case law." *Id.*

The court did not address Ms. Callwood's argument that a reasonable juror could find that Mr. Illidge was not in fact "resisting" arrest when Deputy Smith repeatedly tased him while he was on the ground. The district court dismissed outright the evidence showing that Deputy Smith's repeatedly tasing Mr. Illidge while he was on the ground did not

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[13] Ms. Callwood also brought related state law claims and failure to train and supervise claims against Phenix City, the Phenix City Police Chief, and the Lee County Sheriff. *See* ECF No. 2; App. 6a & n.4. She moved for leave to add claims of deliberate indifference, but the district court denied the motion and the Eleventh Circuit affirmed that ruling. App. 7a-10a.

help the police restrain Mr. Illidge and served only to hurt him. The court thought such evidence about law enforcement "training" irrelevant to the qualified immunity inquiry. *See id.* at 50a.

2. Eleventh Circuit Proceedings

The Eleventh Circuit affirmed the district court's decision, finding summary judgment warranted on qualified immunity grounds because the officers did not violate clearly established law. *See* App. 13a-15a. Much like the district court, the Eleventh Circuit reasoned that the "dividing point between excessive and non-excessive force . . . turns on whether the suspect is completely restrained or otherwise resisting arrest." *Id.* at 14a. Then, adopting the officers' version and characterization of events—i.e., that Mr. Illidge's "thrashing" meant he was "resisting arrest"—the court held that Deputy "Smith's use of force was [not] so utterly disproportionate that any reasonable officer would have recognized that his actions were unlawful." *Id.* (quotation marks omitted).

The Eleventh Circuit did not discuss the principle established by *Garner* and *Graham* that force used during arrest must further a legitimate governmental interest. Indeed, the court of appeals did not mention *Garner* or *Graham* at all. Nor did the Eleventh Circuit consider the evidence showing that Deputy Smith's repeatedly tasing Mr. Illidge after he had been brought to the ground served no legitimate purpose *even if* Mr. Illidge was not "completely restrained," including Officer Butler's testimony that the purpose of tasing a suspect is to bring him to the ground, and there was no reason for Deputy Smith to continually

tase Mr. Illidge after he was already on the ground other than to hurt him.

REASONS FOR GRANTING THE PETITION

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. It is axiomatic, therefore, that when police effect an arrest—a seizure—it must be reasonable. This reasonableness requirement applies not only to whether an arrest is justified, but also to "how it is carried out." *Garner*, 471 U.S. at 8. When assessing an excessive force claim, this Court has instructed the lower courts to balance the level of force used during arrest against the governmental interests that purportedly justified the force. *Id.*; *see also Graham*, 490 U.S. at 396; *Scott*, 550 U.S. at 383. When *no* governmental interest justifies a particular use of force, no balancing is necessary; the force is by definition "excessive" or "unreasonable."

The Eleventh Circuit failed to apply this clearly established "governing legal rule." *Salazar-Limon*, 137 S. Ct. at 1278 (Alito, J., joined by Thomas, J., concurring in denial of cert.). In so doing, the Eleventh Circuit splintered from most circuits, which have faithfully applied this Court's precedents by denying summary judgment when faced with evidence that police used forced unreasonably.

The Eleventh Circuit also "failed to view the evidence at summary judgment in the light most favorable to [Ms. Callwood] with respect to the central facts of th[is] case." *Tolan*, 134 S. Ct. at 1866. Here, an officer who was on the scene testified that the thirteen tases Deputy Smith administered against Mr. Illidge while he was naked, unarmed, and on the ground with two officers on him, served no purpose

other than to inflict pain and shut down his nervous system. There was also evidence that tasers should be used only to bring a suspect to the ground, and that once a suspect is down, police should use hands-on restraint because tasers are not "compliance" or "restraint" devices.

The Eleventh Circuit had to consider this vital evidence when deciding whether the officers were entitled to summary judgment. *See id.* ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."). If it had, the Eleventh Circuit would have also had to reverse the district court's grant of summary judgment. Indeed, the Eleventh Circuit's decision conflicts with the decisions from the Fourth, Sixth, and Seventh Circuits, which denied/reversed summary judgment under very similar facts.

Certiorari is warranted for three reasons. First, the Eleventh Circuit did not recognize or apply the "governing legal rule," *Salazar-Limon*, 137 S. Ct. at 1278 (Alito, J., joined by Thomas, J., concurring in denial of cert.), set forth by this Court—that police violate clearly established law when they use force that serves no legitimate purpose. *See* Sup. Ct. R. 10(c). Second, the Eleventh Circuit's decision conflicts with the decisions of three circuits. *See* Sup. Ct. R. 10(a). And third, the Eleventh Circuit impermissibly disregarded at summary judgment evidence both favorable and central to Ms. Callwood's excessive force claim.

I. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH *GARNER* AND *GRAHAM*.

A. *Garner* and *Graham* Cleary Establish that It Is Unreasonable for Police to Use Force that Serves No Purpose.

In *Garner*, this Court instructed that when deciding whether police use of force was unconstitutionally excessive, courts must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)) (quotation marks omitted). The *Garner* Court also explained that "[b]ecause one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." *Id.*

Graham reiterated that deciding whether police force is "reasonable" under the Fourth Amendment requires a "careful balancing" of the "nature and quality of the intrusion . . . against the countervailing governmental interests at stake." 490 U.S. at 396 (quotation marks omitted). The Court said that this inquiry must be judged from the perspective of a "reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* And the Court listed factors to consider when deciding whether force was excessive, "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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Since *Garner* and *Graham*, the Court has reaffirmed that an excessive force analysis must begin by balancing the level of force used by police against the governmental interest that supposedly justified the force. *See, e.g.*, *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017); *Tolan*, 134 S. Ct. at 1865; *Scott*, 550 U.S. at 383.

And while there can sometimes be a "hazy border between excessive and acceptable force," the "obvious" lesson from this Court's cases is this: when police use force to effect an arrest, the force must be justified by *some* legitimate governmental interest. *Brosseau*, 543 U.S. at 199 (explaining that while the "general tests set out in *Graham* and *Garner*" are usually insufficient to "clearly establish" when force is excessive, in the "obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law"). When no legitimate "governmental interest" for the force exists, there is nothing to balance against the "intrusion on the individual's Fourth Amendment interests." *Garner*, 471 U.S. at 8. In those circumstances, *Garner* and *Graham* clearly establish such force is "unreasonable" or "excessive" in violation of the Fourth Amendment.

Following *Garner* and *Graham*, most courts of appeals have explicitly held that police violate clearly established Fourth Amendment law when they use force that serves no legitimate governmental purpose or use force solely to inflict pain.[14] As the Tenth

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[14] *See, e.g.*, *Asociacion de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 61 (1st. Cir. 2008); *Burden v. Carroll*, 108 F. App'x 291, 293-94 (6th Cir. 2004) (unpublished); *Mayard v. Hopwood*, 105 F.3d 1226, 1228 (8th Cir. 1997); *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002); *Buck*

Circuit plainly stated the rule: "an officer's violation of the *Graham* reasonableness test is a violation of clearly established law if there are no substantial grounds for a reasonable officer to conclude that there was a legitimate justification for acting as she did." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007) (quotation marks omitted).

B. The Eleventh Circuit Failed to Heed the Lessons of *Garner* and *Graham*.

The Eleventh Circuit did not need a "body of relevant case law," *Brousseau*, 543 U.S. at 199, to recognize that there is a triable dispute as to whether Deputy Smith violated clearly established law by tasing Mr. Illidge thirteen times while Mr. Illidge was unarmed, on the ground, and being handcuffed. This case does not require the Court to judge Deputy Smith's actions "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Officer Butler—"a reasonable officer on the scene," *id.*—testified that the tases did not "benefit" or "help" the police effectuate Mr. Illidge's arrest, and that the only reason to tase Mr. Illidge after he had been brought to the ground was to inflict pain and shut down his nervous system. And Officer Butler's testimony was corroborated by objective training standards, tasing manuals, and expert testimony. This evidence was particularly significant because Deputy Smith was a certified taser instructor; he would have been aware of this

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v. City of Albuquerque, 549 F.3d 1269, 1290-91 (10th Cir. 2008) (all denying qualified immunity on claims of excessive force when presented with evidence that police used unnecessary force). *Cf. Amnesty America v. Town of West Hartford*, 361 F.3d 113, 124 (2d Cir. 2004) (Sotomayor, J.) (reversing summary judgment when there was evidence of unnecessary force).

information. This evidence should have been more than enough to survive summary judgment.

Even without Officer Butler's remarkably frank testimony that there was no legitimate governmental interest supporting the thirteen tases inflicted upon Mr. Illidge, a straightforward application of the three *Graham* factors shows that summary judgment should have been denied. *See id.* at 396-97. First, the crimes Mr. Illidge was suspected of before police confronted him were nonviolent: public nudity, trespassing, and perhaps burglary. Second, the threat posed by Mr. Illidge when Deputy Smith tased him thirteen times was minimal: he was unarmed, face down on the ground, with two officers on top of him. Third, even if Mr. Illidge were "thrashing" on the ground as Deputy Mills and Officer Butler attempted to handcuff him, by the time Deputy Smith tased him thirteen times, Mr. Illidge had been effectively restrained by the two officers holding on to him. On the other side of the balance, Deputy Smith, as a certified taser instructor, *see* ECF No. 144-7 (taser certifications), knew the danger of tasing someone several times in short succession, especially someone suffering a mental health crisis. *See* ECF No. 144-11 (Lee County Training Materials). And he knew or should have known that tasing someone repeatedly after they have been brought to the ground serves no benefit. Under these circumstances, a factfinder could conclude that a reasonable officer would have known that tasing Mr. Illidge was excessive and that Deputy Smith was on "fair notice that [his] conduct was unlawful." *Brosseau*, 543 U.S. at 198.

Without engaging in any analysis of the *Graham* factors, the Eleventh Circuit held that because Mr. Illidge was not "fully restrained" while he was naked

and on the ground with two other officers over him, it was not clearly unreasonable for Deputy Smith to tase Mr. Illidge thirteen times. App. 14a-15a. This is a novel and incredibly broad rule that effectively immunizes officers from claims of excessive force—no matter how extreme the force used—so long as an arrestee is not yet handcuffed. This rule has no basis in this Court's precedent.

This Court has never endorsed the "dividing point" adopted by the Eleventh Circuit, which would allow police to use extreme force such as Deputy Smith used here so long as a suspect is not yet handcuffed, and no other circuit has adopted this "dividing point" either. This Court has not even suggested that police can use serious force that serves no purpose just because a suspect has not yet been "fully restrained," especially when he has not committed a violent crime, is unarmed and effectively restrained, and thus is not a serious risk to the public or police. Indeed, in every case in which this Court has held police were entitled to summary judgment on a claim of excessive force, that force has been justified by *some* governmental interest in protecting the officers or the public.[15]

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[15] *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (officer entitled to qualified immunity where he shot a woman holding a knife because "he believed she was a threat to [a person nearby]"); *Mullenix v. Luna*, 136 S. Ct. 305, 307, 312 (2015) (per curiam) (officer entitled to qualified immunity where he shot a fleeing motorist during a high-speed chase given the "immediacy of the risk" and the perception of "grave danger"); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1771 (2015) (officers entitled to qualified immunity where they shot a woman after she threatened to kill her social worker and had a knife because the officers were in a situation that "required their immediate attention" and were "faced with a violent woman"

At bottom, this Court's cases clearly established that it was unconstitutional for Deputy Smith to continually tase Mr. Illidge for no purpose other than to hurt him even if he were not yet handcuffed, because causing pain is not a legitimate governmental interest and the force was not justified by the facts. Only the "plainly incompetent" officer would think it reasonable to use force in this way. *White v. Pauly*, 137 S. Ct. 548, 551 (2017). *Garner* and *Graham* "apply with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Accepting as true the evidence and inferences in Ms. Callwood's favor, this Court's cases clearly established the illegality of Deputy Smith's conduct. Summary judgment should have been denied.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THE FOURTH, SIXTH, AND SEVENTH CIRCUITS.

The Fourth, Sixth, and Seventh Circuits have denied police officers summary judgment or reversed grants of summary judgment when faced with similar facts. *See Meyers v. Baltimore County*, 713 F.3d 723 (4th Cir. 2013); *Cyrus v. Town of Mukwonago*, 624 F.3d 856 (7th Cir. 2010); *Landis v. Baker*, 297 F. App'x 453 (6th Cir. 2008) (unpublished). And those courts did so even though the suspects in those cases were not "fully restrained" at the time of the repeated tasing, making clear that they would reject the "fully restrained" "dividing point" adopted by the Eleventh

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(quotation marks and brackets omitted)); *Scott*, 550 U.S. at 386 (officer entitled to qualified immunity where he rammed a fleeing car from behind because the car chase "posed a substantial and immediate risk of physical injury to others").

Circuit here when it granted the officers' qualified immunity. The Fourth, Sixth, and Seventh Circuits' holdings make sense and are consistent with *Garner* and *Graham*—a taser is designed to drop a suspect; once that is done, further tasing serves no legitimate purpose and is clearly unreasonable under the Fourth Amendment.

In *Meyers*, the Fourth Circuit held that "the use of any unnecessary, gratuitous, and disproportionate force, whether arising from a gun, a baton, a taser, or other weapon, precludes an officer from receiving qualified immunity if the subject is unarmed and secured." 713 F.3d at 734 (quotation marks omitted). There, police responded to a call of a fight between Meyers and his brother. *Id.* at 727. After Meyers grabbed a baseball bat and refused to comply with police commands, an officer tased him so he would "fall to the ground." *Id.* at 727-28. Once on the ground, three officers sat on Meyers' back and tried to handcuff him; Meyers was "stiffening up and keeping his body rigid and keeping his hands underneath his body." *Id.* at 728-29 (brackets omitted). This prompted an officer to tase Meyers seven more times. *Id.* at 728. Meyers died from cardiac arrest. *Id.* at 729.

The Fourth Circuit ruled that the officers were not entitled to summary judgment on qualified immunity grounds. It reasoned that the justification for additional tasing "had been eliminated after [Meyers] relinquished the baseball bat and fell to the floor." *Id.* at 733. At that point, because "several officers sat on [his] back," Meyers could not "actively" resist "and "did not pose a continuing threat to the officers' safety"—he was "effectively secured." *Id.* at 733, 735. Under these circumstances, the court concluded that the additional tases were "clearly

unnecessary, gratuitous, and disproportionate." *Id.* at 735 (quotation marks omitted). Summary judgment was therefore inappropriate because a reasonable officer "would have understood that his delivery of some, if not all, of the seven additional taser shocks violated [Meyers'] Fourth Amendment right to be free from the use of excessive and unreasonable force." *Id.*

In *Landis*, the Sixth Circuit held that reasonable officers should know "that the gratuitous or excessive use of a taser [ ] violate[s] a clearly established constitutional right." 297 F. App'x at 463. In that case, police received a report that a man abandoned a bulldozer in the middle of a highway. *Id.* at 455. The police found Keiser running away from the scene. *Id.* Two officers gave chase and tackled Keiser to the ground, but Keiser managed to escape. *Id.* More officers arrived and surrounded Keiser. *Id.* at 456. When Keiser would not respond to the officers' orders, an officer tased him; Keiser was eventually brought to the ground. *Id.* at 457. Officers moved in and tried to grab Keiser's arms and knelt on his back. *Id.* When Keiser would not give the officers his arm to be handcuffed, an officer tased Keiser five more times. *Id.*

The Sixth Circuit held that these tases violated Keiser's clearly established Fourth Amendment rights, thus the officers were not entitled to summary judgment on qualified immunity grounds. *Id.* at 463. The court reasoned that the "officers should have known that the use of a taser . . . in rapid succession on a suspect who is surrounded by officers, in a prone position [and] who has only one arm beneath him . . . would be a violation of a constitutional right." *Id.* at 464. Said the court, "The right to be free from excessive force is a clearly established right." *Id.* at

462 (quotation marks omitted). The police violated this right when they "shocked Keiser with a taser more times than was necessary [ ] in an unreasonably dangerous manner." *Id.* at 462

The Seventh Circuit in *Cyrus* reversed a grant of summary judgment where there was similar evidence of gratuitous tasing. There, police found Cyrus after responding to a trespassing call. *Cyrus*, 624 F.3d at 858. When Cyrus tried to walk away, an officer tased him, causing Cyrus to fall. *Id.* When Cyrus tried to stand back up, the officer tased him again. *Id.* Cyrus "ended up lying face down." *Id.* By then, a second officer had arrived, and the two officers tried to handcuff Cyrus but couldn't, because "Cyrus's hands were tucked underneath his stomach and he did not comply with the officers' commands to produce them for handcuffing." *Id.* The officer tased Cyrus four to ten more times. Cyrus died as a result. *Id.*

In reversing the district court's grant of summary judgment, the Seventh Circuit explained that "[f]orce is reasonable only when exercised in proportion to the threat posed, and as the threat changes so too should the degree of force," especially because force "becomes increasingly severe the more often it is used." *Id.* at 863 (citation omitted). The court ruled that "a jury might reasonably conclude that the circumstances of the encounter here reduced the need for force as the situation progressed"; the officer "knew that Cyrus was unarmed and there was little risk Cyrus could access a weapon while face down . . . with his hands underneath him and having already been shocked twice with the Taser." *Id.* On remand, the district court denied the officer qualified immunity because "a jury could reasonably interpret the disputed facts as indicating that at some time during the continuum of

the event[s] . . . [the officer] clearly violated Cyrus' established Fourth Amendment right to be free from the use of excessive force during his arrest." *Cyrus v. Town of Mukwonago*, No. 07-C-1035, 2012 WL 3776924, at *8 (E.D. Wis. Aug. 29, 2012).

In *Meyers*, *Landis*, and *Cyrus*, the courts correctly considered the purpose of a taser—bringing a suspect to the ground so that the police can effect an arrest—and found that repeated tasing after this critical point precludes summary judgment on a claim of excessive force because it serves no legitimate purpose. This is consistent with *Garner* and *Graham*'s clear pronouncement that police can only use force that furthers a legitimate governmental interest. As Officer Butler testified in this case, repeatedly tasing a suspect on the ground who is in the process of being handcuffed serves only to cause pain.

And the facts of *Meyers*, *Landis*, and *Cyrus* are closely analogous to those here. As in those cases, Mr. Illidge was unarmed and had been brought to the ground after being tased. As in those cases, several officers got on top of Mr. Illidge and sought to handcuff him. As in those cases, the officers were struggling to handcuff Mr. Illidge. So, like in those cases, an officer tased Mr. Illidge repeatedly. If anything, the use of force was even more clearly excessive here. The suspects in *Meyers*, *Landis*, and *Cyrus* were tased seven, five, and at most ten times after being brought to the ground. Mr. Illidge was tased thirteen additional times.

The Eleventh Circuit broke from *Meyers*, *Landis*, and *Cyrus*, however, by reading its precedent to establish a rule allowing police to repeatedly tase a person who is unarmed, on the ground, and physically

restrained by officers, so long as he is not yet fully secured. But as explained, this rule finds no support in any of this Court's cases, and is clearly contrary to the rule that the Fourth, Sixth, and Seventh Circuits adopted when reversing/denying summary judgment under strikingly similar facts.

III. THE ELEVENTH CIRCUIT CLEARLY MISAPPREHENDED THE SUMMARY JUDGMENT STANDARD.

Federal Rule of Civil Procedure 56 provides that courts can grant 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). This Court has explained that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It has also made clear that courts must view the evidence "'in the light most favorable to the opposing party'"—here, Ms. Callwood (and Mr. Illidge). *Tolan*, 134 S. Ct. at 1866 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)) (quotation marks omitted).

The same standard applies when deciding whether officers are entitled to qualified immunity. As the Court stressed in *Tolan*, "[o]ur qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard." 134 S. Ct. at 1866. This Court has therefore instructed courts to define the "clearly established" prong based on the "specific context of the case." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

And it has cautioned courts to "take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan*, 134 S. Ct. at 1866. In other words, courts should deny summary judgment on qualified immunity grounds if deciding whether police violated clearly established law requires the court to resolve a disputed material fact in the officer's favor. *See id.*

Applying these principles in *Tolan*, this Court summarily reversed a Fifth Circuit decision granting qualified immunity to an officer on a claim of excessive force. The Court did so because the "Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of th[at] case." *Id.* After reviewing the record, the Court came to "the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed to properly acknowledge key evidence offered by the party opposing that motion." *Id.* at 1867-68. It reversed "because the opinion below reflect[ed] a clear misapprehension of summary judgment standards in light of [the Court's] precedents." *Id.* at 1868.

The Eleventh Circuit "clearly misapprehend[ed]" the summary judgment standard here. *Id.* As in *Tolan*, "[i]n holding that [Deputy Smith]'s actions did not violate clearly established law, the [Eleventh Circuit] failed to view the evidence at summary judgment in the light most favorable to [Ms. Callwood] with respect to the central facts of this case." *Id.* at 1866. The Eleventh Circuit both resolved disputes of material fact against Ms. Callwood and disregarded evidence that supported sending her excessive force claim to trial.

First, the Eleventh Circuit adopted the officers' characterization of Mr. Illidge's "thrashing" on the ground as conclusive evidence that he was "resisting" arrest. Yet a reasonable juror could have drawn a different inference as to the meaning of Mr. Illidge's thrashing, or even found the officers' account not fully credible in light of their presenting a false affidavit from a bystander. *See supra* at 8-9 & n.8. In resolving the officers' summary judgment motion, the courts below had to draw such reasonable inferences in Ms. Callwood's favor. *See Tolan*, 134 S. Ct. at 1866.

Second, the Eleventh Circuit did not consider any of the evidence about taser use, including that tasers are properly used only to bring a suspect to the ground, and at that point, other means of physical restraint should be used because tasering is not a compliance technique. *See supra* at 10-11. This evidence was relevant to whether Deputy Smith repeatedly tased Mr. Illidge to further a legitimate "governmental interest." *Garner*, 475 U.S. at 8.

Third, and perhaps most important, the Eleventh Circuit completely ignored Officer Butler's testimony that the taser already "did its job" when Mr. Illidge was brought to the ground, and Deputy Smith's repeatedly tasing Mr. Illidge after that point did not "benefit" or "help" the police restrain Mr. Illidge, but rather served only to cause him pain and shut down his nervous system. *See supra* at 10-11. This testimony bore directly on whether it was "objectively reasonable" for Deputy Smith to tase Mr. Illidge all those times while he was unarmed on the ground. *Graham*, 490 U.S. at 397.

Simply, "the court below credited the evidence of the party seeking summary judgment and failed

properly to acknowledge key evidence offered by the party opposing that motion." *Tolan* 137 S. Ct. at 1867-68. As a result, the Eleventh Circuit's decision finding that the officers were entitled to summary judgment is fundamentally flawed. This Court should reverse. *See Brosseau*, 543 U.S. at 198 n.3.

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In recent years, this Court has repeatedly intervened when lower courts denied officers qualified immunity in excessive force cases. *See Salazar–Limon*, 137 S. Ct. at 1282 (Sotomayor, J., joined by Ginsburg, J., dissenting from denial of cert.) (collecting cases). This has prompted some members of this Court to express concern about the perils and public perception of a "shoot first and think later" approach to law enforcement. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., joined by Ginsburg, J., dissenting). It has also spurred other Justices to assure the public that the "Court applies uniform standards" to police misconduct cases and that it "may grant review if the lower court conspicuously failed to apply a governing legal rule." *Salazar-Limon*, 137 S. Ct. at 1278 (Alito, J., joined by Thomas, J., concurring in denial of cert.).

This is such a case. The Eleventh Circuit failed to apply the basic rule that police cannot use force purposelessly and that any force used during arrest must further a legitimate governmental purpose. Not only has this Court held this, *see Garner*, 471 U.S. at 8; *Graham*, 490 U.S. at 396, in requiring any seizure to be reasonable, the Fourth Amendment declares it. *See* U.S. Const. amend. IV.

But beyond the Eleventh Circuit's failing to apply this "governing legal rule," it also failed to view the

evidence in Ms. Callwood's favor. This violated basic summary judgment tenets and makes this case ripe for summary reversal. *Tolan*, 134 S. Ct. at 1866-68.

In the end, in most of the country, had Deputy Smith tased Mr. Illidge thirteen times while he was on the ground, unarmed, and being handcuffed by two officers, summary judgment would have been denied. That is because in most of the country, it is clearly established that police violate the Fourth Amendment when they use serious force for no reason. This is true whether the instrument of force is a gun, fist, baton, pepper spray, or taser. But because the Eleventh Circuit failed to acknowledge evidence "central" to this case, *id.* at 1866, it "conspicuously failed to apply [this] governing legal rule." *Salazar-Limon*, 137 S. Ct. at 1278 (Alito, J., joined by Thomas, J., concurring in denial of cert).

Certiorari is warranted. So is reversal.

CONCLUSION

The petition for writ of certiorari should be granted and the Eleventh Circuit's judgment should be reversed.

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