No. 17-249

In The Supreme Court of the United States

AMY YOUNG and JOHN SCOTT, as Co-Personal Representatives of the Estate of Andrew Lee Scott, Deceased, and MIRANDA MAUCK, individually,

Petitioners,

v.

GARY S. BORDERS, in his official capacity as Sheriff of Lake County, Florida, and RICHARD SYLVESTER, in his individual capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

LINDA L. WINCHENBACH
Counsel of Record
JOHN M. GREEN, JR.
JOHN M. GREEN, JR., P.A.
125 Northeast First Avenue, Suite 2
Ocala, Florida 34470
(352) 732-9252
lwinchenbach@me.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit was correct to affirm the district court's grant of qualified immunity to Deputy Sylvester and the summary judgments to him and the Sheriff of Lake County.

2. Whether the Eleventh Circuit was correct to affirm the district court's holding that the knock-and-talk procedure used by the deputies in this case was constitutional.

3. Whether the Eleventh Circuit was correct to affirm the district court's holding that the knock-and-talk procedure used by the deputies in this case was not unconstitutional antecedent conduct which proximately caused Scott to bring his firearm when he answered the door and proximately caused his injury.

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. Factual Background

A comprehensive account of the events of July 14-15, 2012, with record citations, is provided in the district court order granting the Defendants summary judgment, and it is incorporated herein by reference. (Pet. App. 7-19.) The court noted that where the facts conflict, it interpreted them in the light most favorable to the nonmoving party. (Pet. App. 7 n.2.) Essentially, the facts are undisputed until Richard Sylvester and three other Lake County deputies arrived at the Blueberry Hill Apartments where Andrew Scott and Miranda Mauck lived in Apartment 114.

The deputies were investigating the whereabouts of a motorcyclist who had fled from Sylvester earlier in the evening and who they thought might also be the suspect in a Leesburg Florida Police Department dispatch that stated the motorcyclist the police department was seeking had been involved in an assault and battery with a loaded firearm and was possibly armed. Deputy David McDaniel had spotted a motorcycle at the Blueberry Hill Apartments and its motor was still hot – the deputy could hear it popping and it was warm to the touch. Sylvester identified it as the motorcycle which had fled from him. The deputies ran a vehicle record search and learned that the motorcycle and a white Chevy SUV parked next to it were registered to the same person, with an address in another town: Mount Dora, Florida.

The vehicles were both parked in front of Apartment 114 and the apartment's inside lights were on. Sylvester also observed a footprint in the sand behind the motorcycle that was pointed towards the apartment. It was about 1:30 a.m. Sylvester decided to knock on Apartment 114's door and ask about the motorcyclist. The deputies had no search or arrest warrant, and Sylvester's unrebutted testimony is that he did not intend to enter the apartment, but just to speak with the occupants if they answered the door. However, because of the information that the motorcyclist might be armed, he did not stand in front of the door, but on the ground to the left of it, which placed him about 16" below the threshold. He unholstered his firearm, but held it down behind his leg in his right hand. He was positioned so that a person who opened the door could see him and he could see them. The other deputies also took up positions near the apartment with their guns drawn as a tactical precaution.

Sylvester knocked on the door three times, waited a few seconds, then knocked three more times. He did not call out and announce that he was law enforcement because he was following the procedure for a knock-and-talk. This procedure has been found constitutional when the officer does not intend to make a forcible entry into the residence, unlike when he is executing a warrant and is required to announce his identity to the occupants when he knocks. Deputy Lisa Dorrier spoke briefly with a person in the apartment next door, who came to his door when he heard the knocking. Gesturing with his hand in a direction away from Apartment

114, he told her the person owning the motorcycle lived "over there." Sylvester did not see the gesture or hear the conversation except for the last statement. Simultaneously, Scott opened the door holding a gun in his left hand. Sylvester shouted, "Gun!" Scott began moving to his right, behind the door, and Sylvester, fearing the man was going to shoot him, fired six rounds. Three bullets struck Scott.

Sylvester followed Scott into the apartment and saw him laying backwards on the couch. Sylvester checked the small apartment for other possible threats and then began administering first aid to Scott. Mauck was in the apartment screaming and Dorrier led her outside. Scott died from his wounds.

2. Procedural Background

The Plaintiff Co-Personal Representatives ("the Plaintiffs") sued Deputy Richard Sylvester in his individual capacity, under 42 U.S.C. § 1983 for violations of the Fourth Amendment rights of Andrew Scott: an alleged illegal search and seizure and the alleged use of excessive force. (Doc. 18, Count I, p. 8-11.)[1] The illegal search and seizure claim was based on Sylvester's not announcing himself as a deputy when he knocked on Scott's apartment door. The Sheriff of Lake County was sued in his official capacity by the Plaintiffs for an

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[1] References to the record and the appendices are: District Court docket, "(Doc. #)"; Petition Appendix, "(Pet. App. #)"; and Brief in Opposition Appendix, "(BIO App. #)". References to the Petition for Writ of Certiorari are "(Pet. #)".

alleged policy or practice of deputies "not announcing or identifying themselves . . . when searching with the intent of entry and/or entering . . . " which caused the violation of Scott's rights.[2] (Doc. 18, Count II, p. 11-13.) The Plaintiffs also brought state law wrongful death claims against Sylvester and the Sheriff. (Doc. 18, Counts III and IV, p. 14-18.) Scott's live-in girlfriend, Miranda Mauck, also brought claims, but she subsequently conceded that summary judgment in favor of Sylvester on all her claims against him was appropriate, leaving only her § 1983 claim against the Sheriff for the alleged unconstitutional policy. (Doc. 18, Count VI, p. 20-22; Doc. 52, p. 1-2.) The Plaintiffs filed a Motion for Partial Summary Judgment on Count II, which Mauck "adopted." (Doc. 35; Doc. 52, p. 8 n.2.) The Defendants filed a Motion for Summary Judgment on all claims. (Doc. 50.)

The district court, in an unpublished opinion, stating Sylvester had qualified immunity, granted the Defendants' motion and denied the motion of the Plaintiffs and Mauck. (Pet. App. 4-62.) *Young v. Borders*, 2014 WL 11444072 (M.D. Fla. Sept. 18, 2014). The Plaintiffs appealed and the Eleventh Circuit Court of Appeals affirmed the rulings in an unpublished per curiam opinion. (Doc. 78; Doc. 85; Doc. 86; Pet. App. 1-3.) *Young v. Borders*, 620 Fed. Appx. 889 (11th Cir. Oct. 21, 2015). The Plaintiffs filed a Petition for Rehearing En Banc on October 29, 2015, (BIO App.), which was denied on March 16, 2017, (Pet. App. 63-125). *Young v.*

[2] Gary S. Borders, the former Sheriff of Lake County, Florida, sued in his official capacity, was in office on the incident date.

Borders, 850 F.3d 1274 (11th Cir. 2017). That opinion had a concurrence with the denial decision joined by two of the original panel members (the third panel member was a district court judge, sitting by designation), and two dissents which were each joined by four members of the court. The concurrence noted several times that unpublished cases, such as the court's affirmance of the district court decision, are not precedential nor is the order denying the petition for a rehearing en banc. (Pet. App. 66, 85, 93.)

MISSTATEMENTS OF FACT

The Respondents disagree with most of the Petition's characterizations of the deputies' actions, which are intended to sensationalize the events. In addition, pursuant to Supreme Court Rule 15.2, the Respondents hereby provide the Court with misstatements of fact in the Petition for Writ of Certiorari.

1. In the Parties to the Proceedings, there is a misnomer regarding the decedent Andrew Lee Scott. He is named as "Andrew Scott Young." (Pet. iii.)

2. In an attempt to make the deputies' actions at Apartment 114 appear egregious, the Petition states that the short privacy fence in front of the apartment "surround[s] Apartment 114's one door and front windows." (Pet. 7.) A review of the photograph of the apartment's front, which incidentally shows where the motorcycle and SUV were parked, demonstrates the statement's falsity. (Pet. App. 70.) Clear photographs

taken at the scene were also provided with the Defendants' Motion for Summary Judgment. (Doc. 50-10.)

3. Again attempting to cast aspersions on the deputies' actions for the Court, the Petitioners intentionally and repeatedly restate the falsehood that the officers looked in the window of Apartment 114. (Pet. i, 7, 16, 17, 18, 27.) For example, in the Petition, the first misstatement is that they "look[ed] into the windows of the citizens' home," (Pet. i) and others are similar. The most glaring example is the only one with a record citation, where the Petition says the officers "looked in the window's corner." (Pet. 7.) The reference is to Sylvester's interview with the Florida Department of Law Enforcement ("FDLE") after the incident, at Doc. 49, p. 16. That excerpt, which does not say any deputy looked in the window, reads:

> Sylvester: . . . as we're approaching Dave [McDaniel] says he can see lights inside the house and I glance at the window from up close and I can see through the blinds there is light in the house.
>
> Interviewer: OK.
>
> Sylvester: But I can't see anything.
>
> Interviewer: OK.
>
> Sylvester: Uh and Dave said he couldn't see anything in the house, he just knew the lights were on.

It is correct that all the deputies could see light emanating from the apartment window; that is one

reason they decided to knock on its door to seek information. (Doc. 39, p. 74; Doc. 43, p. 104; Doc. 49, p. 12; Doc. 50-1, p. 2, 5; Doc. 50-2, p. 94, 97; Doc. 50-4, p. 2, 6; Doc. 50-5, p. 2, 8; Doc. 50-6, p. 3.) In fact, an independent witness in the parking lot, who was about 100 yards away, said he recalled the lights being on in the apartment. (Doc. 50-9, p. 19, 22.) A dissent in the order denying rehearing en banc, characterizing that judge's opinion of the officers' actions, says nothing about looking in the windows, and the concurring opinion flatly says they "did not . . . peer into the windows." (Pet. App. 88, 112.)

This was not an allegation the Petitioners ever made in the district or circuit courts in *any* of their pleadings, until they filed their October 29, 2015, Petition for Rehearing En Banc with the Eleventh Circuit. In that petition they expanded their false claim in even more detail than they have in the pending Petition. Referring to Sylvester's FDLE interview, Doc. 49, p. 12, they said,

> "Sylvester stated . . . that he could not see lights on in Apartment 114 because the blinds were drawn, and that he had to walk through Apartment 114's privacy fence (invading the curtilage) and look *inside the window* from the left side of the front door to see *inside* (textbook search)." (BIO App. 19.) (Emphasis in original.)

The interview excerpt actually states:

Interviewer: Ok what happens next?

> Sylvester: Uh McDaniels [*sic*] asked me what, we need to do, I said well the footprints go in there, let's knock on the door. Uh . . .
>
> Interviewer: Lights on or anything?
>
> Sylvester: I could not see lights through the initially as I approached the house. [*sic*] It, it looked blacked out to me, all the blinds were drawn. I moved up, if you're facing the house, I moved to the left of the door as you're facing it. Uh the door hinges were on the left side as you face it . . . and it opened inward. . . . I wanted to be when, be where if that door cracked open I could see what was in that house.
>
> Interviewer: Were you on the concrete or were you on the grass? (Doc. 49, p. 11-12.)

In her deposition, Mauck described the windows. (Doc. 50-3, p. 50-53.) She said there was a queen-sized bed sheet draped over a rod which served as a curtain over the living room window. She said the light in the living room was on when they heard the first knock and you would be able to see from outside that there was a light on in the apartment. (Doc. 50-3, p. 72-73.)

4. Throughout the Petition it is falsely stated that the deputies made a "warrantless entry" or a "warrantless raid" and that was their intention. (For example, Pet. 11, 16-17, 22, 24.) Sylvester testified that without a warrant, his intention was only to speak with the apartment's occupants as part of the investigation into the motorcyclist's whereabouts, and if that was unsuccessful, he would have to leave. (Doc. 50-1, p. 5.) No

testimony or record evidence contradicts his statements. Nor did he enter the apartment until exigent circumstances existed: he had fired at Scott and needed to follow Scott to address the ongoing risk of harm to himself or others, and then Scott needed emergency aid. (Doc. 50-1, p. 4, 6.) *See Kentucky v. King*, 563 U.S. 452, 460 (2011); *U.S. v. Holloway*, 290 F.3d 1331, 1334, 1337 (11th Cir. 2002). Viewed objectively, the evidence supports that his entry was justified. *See Brigham City, UT v. Stuart*, 547 U.S. 398, 404 (2006).

REASONS THE PETITION SHOULD BE DENIED

I. The Petitioners failed to raise below the Second Amendment argument now asserted for the first time in their Petition for Writ of Certiorari.

Possible violation of the Second Amendment to the United States Constitution is not properly an issue in the Petition. The amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In their pleadings in the district court, the Petitioners frequently refer to Scott's "lawfully-owned firearm" and his right to bring it with him when he answered the door. Some examples are found in the Amended Complaint (Doc. 18, ¶ 63); the Motion for Partial Summary Judgment (Doc. 35, p. 2, 15); and the Response to the Defendants' Motion for Summary Judgment (Doc. 52, p. 6). None of the district

court pleadings mention the Second Amendment or suggest a claim based on its violation is being made, and the district court's order granting the Defendants summary judgment does not address such a claim. (Pet. App. 4-60.)

Not until their Initial Brief in Eleventh Circuit Case No. 14-14673 ("IB"), is the Second Amendment mentioned. (IB, p. i, iii.) Even then the statement is only that the officer shot "the citizen who answers [the door] while holding his lawfully owned, and as is his right protected under the Second Amendment, firearm . . . ", and it is only included in the statement of the issue. As in the court below, there are references to his "lawfully-owned" firearm. (IB, p. 22, 24, 42, 48, 72.) No argument is presented regarding the Second Amendment, and the amendment is not mentioned in the Reply Brief. In short, no Second Amendment arguments were raised at the trial level or in the circuit court appellate pleadings on the merits. *See Old W. Annuity & Life Ins. Co. v. Apollo Grp.*, 605 F.3d 856, 860 n.1 (11th Cir. 2010) (issue presented in passing without "substantive argument" in appellate brief is waived); *Gipson v. Jefferson Cty. Sheriff's Office*, 613 F.3d 1054, 1056 n.3 (11th Cir. 2010) (argument not presented to district court is waived on appeal), *vacated on other grounds*, 649 F.3d 1274 (11th Cir. 2011); *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) (issues not clearly raised in the briefs are considered abandoned), *cert. denied*, 519 U.S. 838 (1996). The issue was not raised and if it had been, it was abandoned. It should not now be considered on a Petition for Writ of

Certiorari. Brief mentions of the amendment are in the Petition for Rehearing En Banc, but it is not a basis of the Petitioners' request for rehearing. (BIO App. 21-22, 26-27.) One of the dissents to the Eleventh Circuit's denial of rehearing en banc also mentions it. (Pet. App. 109-110.)

Furthermore, Scott's right to own a gun and to bring it with him when he answered the door was not a disputed issue in the case. Sheriff Borders, in his deposition, agreed that citizens are entitled to possess firearms in their homes and to carry a firearm to the door with them if they wish. (Doc. 37, p. 48.) The Plaintiffs understood this was the Defendants' position and confirmed that understanding in their Motion for Partial Summary Judgment. (Doc. 35, p. 10 – citing the deposition of Defendant Expert Steve Ijames, Doc. 40, deposition p. 7.) The issues in the case were whether Sylvester used excessive force and whether he was entitled to qualified immunity. Whether Sylvester violated Scott's Second Amendment rights when, because he feared for his life, he shot Scott when the man brought a pistol to the door was not an issue.

In an attempt to insert Second Amendment issues, the Petition (and the Second Amendment Foundation's proposed amicus brief) conflate the case's Fourth Amendment issues with their newly-proposed Second Amendment issues. This case does not stretch so far. No Second Amendment issues were argued, and none are present. *See Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 n.* (2017) (the Court declined to grant certiorari on a question not addressed below and

declined to address it in its opinion) (*citing McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017) ("We are a court of review, not of first view.")). Review by the Court is not warranted for a new issue interjected by the Petition, making the case a poor vehicle for review, and the Petition should be denied.

II. The Eleventh Circuit was correct to affirm the district court's grant of qualified immunity to Deputy Sylvester and the summary judgments to him and the Sheriff of Lake County.

A. The district court properly applied the law regarding qualified immunity and summary judgment.

One Petition premise that this case warrants review by the Court is that the district court and the Eleventh Circuit misapplied the Court's procedure for determining if Sylvester was entitled to qualified immunity on summary judgment regarding their Count I claim against him alleging excessive force. First, the Petitioners claim the court below failed to resolve factual disputes in their favor as the non-movants and second, they state the court viewed Sylvester's decision to fire his gun subjectively instead of objectively. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1868-69 (2014).

There were several disputed facts in the case and a few were considered material by the Petitioners. (Doc. 52, p. 4.) One was how loudly Sylvester knocked on the door of Apartment 114. Mauck testified the

knocks sounded like, "bang, bang, bang; wait; and then bang, bang, bang." She said the attention of her and Scott was first focused on the front door when there was a "really loud bang." (Doc. 42, deposition p. 70-71.) The district court opinion recognized the requirement to view the facts favorably to the non-movants. (Pet. App. 20.) It reviewed Mauck's testimony and credited the Petitioners' allegation that Sylvester knocked loudly. (Pet. App. 16, 31, 43-44.) Another disputed fact was the manner in which Scott opened the door. (Doc. 52, p. 4.) Sylvester stated the door was "flung open," while Mauck stated in her FDLE interview that Scott opened it "like medium speed, I don't know it wasn't like slow but he didn't sling it open." (Doc. 48, p. 19; Doc. 50-2, p. 108.) Again, the court credited Mauck's description of Scott's action. (Pet. App. 43-44.) Finally, a truly material fact in dispute was the position of Scott's gun when he opened the door. (Doc. 52, p. 4.) Sylvester said the gun was pointed at his face and Mauck stated that Scott's left arm, which held the gun, was "straight down" and she never saw him raise the gun. (Doc. 50-1, p. 3-4; Doc. 50-2, deposition p. 80-81.) The court analyzed the case based on Mauck's testimony. (Pet. App. 43-44.)

Objective reasonableness is the standard to evaluate the necessity of the use of force. *Graham v. Connor*, 490 U.S. 386, 395-97 (1989). Attention must be paid to the facts and circumstances of the case and the officer's actions judged objectively from the perspective of a reasonable officer on the scene. *Id.* One reason an officer may use a level of deadly force is if he has

probable cause to believe the suspect poses a threat of serious physical harm to himself or others. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Considering the totality of the circumstances, as *Graham* orders, Sylvester's action was objectively reasonable. The deputies were seeking a man who had run from a pursuing officer, a felony, and was believed to possibly have a firearm. (Doc. 50-1, p. 3; Doc. 50-5, p. 2-3; Doc. 50-6, p. 3.) Because of the location of the motorcycle he had been riding, it seemed likely that he might be in Apartment 114, and the apartment's lights were on. (Doc. 50-1, p. 2-3.) The events unfolded quickly, and Deputy Sylvester had to make a split-second decision about what to do. An officer in a dangerous situation is not required to wait and hope for the best. *See Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 821 (11th Cir. 2010) (*citing Scott v. Harris*, 550 U.S. 372, 385 (2007)).

The district court correctly evaluated Sylvester's use of force objectively, finding that his perception of an imminent threat of death or serious bodily injury was reasonable under the circumstances. (Pet. App. 46-47.) This led to the court's proper conclusion that he did not violate Scott's constitutional rights and is entitled to qualified immunity. (Pet. App. 51.) The court further found that, even if the force had been excessive, Sylvester's action would have violated no clearly established law. (Pet. App. 52.) *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("clearly established law" should not be

defined "at a high level of generality," but must be particularized to the facts of the case) (citations omitted).[3]

The district court and the Eleventh Circuit correctly applied the law to this case's facts, and there is no basis provided for the Court's review. Furthermore, misapplication of the law or erroneous factual findings are not favored as compelling reasons for granting a petition for writ of certiorari. Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Tolan*, 134 S. Ct. at 1868-69 (Alito, J., concurring).

B. Other circuit courts' cases denying qualified immunity because of competing factual allegations dissimilar to those in this case do not provide an intercircuit conflict warranting the Court's review.

The Petitioners cite seven cases, representing six circuits, with which they assert the Eleventh Circuit's decision conflicts.[4] (Pet. 33-34.) They claim the district

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[3] For clearly established law, the Eleventh Circuit looks to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state. *Vinyard v. Wilson*, 311 F.3d 1340, 1351 n.22 (11th Cir. 2002).

[4] *Curry v. City of Syracuse*, 316 F.3d 324 (2d Cir. 2003); *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013); *Jefferson v. Lewis*, 594 F.3d 454 (6th Cir. 2010); *White v. Gerardot*, 509 F.3d 829 (7th Cir. 2007) (appeal dismissed for lack of jurisdiction); *Ribbey v. Cox*, 222 F.3d 1040 (8th Cir. 2000); *Wilson v. City of Des Moines*, 293

court and the Eleventh Circuit "disregarded there were disputed facts," a matter already refuted above. Notably, five of the seven cases are appeals of a *denial* of qualified immunity, which is only appealable to the extent the denial turns on an issue of law rather than competing factual assertions. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *see*, *e.g.*, *Wilson*, 293 F.3d at 449-50; *White*, 509 F.3d at 833-34.

In all the cases, including the two in which a district court's grant of qualified immunity was reversed (*Curry* and *Cruz*), the appellate court emphasized that it could not make credibility determinations between conflicting versions of the facts, with one adding it could not rely on the officers' "self-serving account" where there were no witnesses. *See Cruz*, 765 F.3d at 1079. One of the opinions, in which the issue was whether the suspect was reaching for a gun and posed a threat to the trooper who shot him, noted the case was "readily distinguishable from cases in which the officer actually observed the decedent with a weapon." *Ribbey*, 222 F.3d at 1042.

The only case discussed to any extent is *Cooper v. Sheehan*, which the Petition states declined to grant the officers qualified immunity "merely because a gun was involved in the encounter." (Pet. 22.) In *Cooper*, the Fourth Circuit, due to its limited jurisdiction over orders denying claims of qualified immunity, had to accept the facts as the district court viewed them. *Cooper*,

F.3d 447 (8th Cir. 2002); and *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014).

735 F.3d at 155 n.1. In the underlying case, *Cooper v. Brunswick Cty. Sheriff's Office*, 896 F. Supp. 2d 432 (E.D.N.C. 2012), *aff'd*, 735 F.3d 153 (4th Cir. 2013), the facts were viewed favorably to the plaintiff and it was accepted that the officers responding to a dispatch to his address arrived about 11:30 p.m. and knocked on his mobile home's window to get his attention without identifying themselves. *Id.* at 155. He called out the back door for the person to identify himself, but the officers did not. He picked up his shotgun and walked out on the porch. One officer, who had tripped on a concrete block in the dark backyard and made a noise, said the plaintiff raised the shotgun to his hip and fired at the officer. The officer fired back and the other officer did also, wounding the plaintiff. The plaintiff claimed the gun was not loaded and he did not shoot it. *Id.* at 155-56.

In affirming the summary judgment denial, the Fourth Circuit recognized that an officer may use deadly force where he has probable cause to believe a suspect poses a threat of serous physical harm, but mere possession of a firearm is not enough; there must be a reasonable assessment that a person is threatened with the weapon. *Id.* at 159 (*citing Garner*, 471 U.S. at 11-12). The court also noted that *Garner* does not mean a suspect has to engage in a specific action – such as pointing, aiming, or firing his weapon – to pose a threat; there are many circumstances under which an officer could reasonably feel threatened. *Id.* at 159 n.9.

There are important qualitative differences between *Cooper* and the facts of the present case. The *Cooper* officers, after knocking on the home's window instead of a door, did not identify themselves when asked, while Scott and Mauck made no such request. And significantly, an officer seeing from a distance a person holding a shotgun is a very different situation from someone opening a door right in front of an officer while holding a pistol, which may be raised and pointed very quickly.

In the present case, Scott brought his gun to the door; that is not disputed. Mauck was a witness to the events and her testimony regarding the disputed facts of how loudly Sylvester knocked on the door, the manner in which Scott opened the door, and most important, where Scott was holding the gun, was accepted by the district court in making its determination that a reasonable officer possessing the same knowledge as Sylvester could fear for his life under the case's circumstances. Thus, the court held that Sylvester was entitled to qualified immunity, a ruling affirmed by the court of appeals.

The Petition's cited cases are not stating or applying the federal law differently than the Eleventh Circuit; each is just applying it to the facts of its own case. Rule 10(a)'s indication is that a circuit court split occurs when a court has "entered a decision in conflict with the decision of another [circuit court] on the same important matter. . . ." There is no intercircuit conflict between the Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits and the Eleventh Circuit meriting

review by the Court. In addition, both the district court and Eleventh Circuit opinions are unpublished and have no precedential value.

III. The Eleventh Circuit was correct to affirm the district court's holding that the knock-and-talk procedure used by the deputies in this case was constitutional.

A. The district court correctly ruled the knock-and-talk procedure employed was constitutional.

The Petition asserts as a basis for the Court's review that the district court and Eleventh Circuit's decisions to accept as constitutional the knock-and-talk performed by Sylvester conflicted with the decisions of other circuits and the procedure constituted a "warrantless entry and raid."[5] (Pet. 15-16.) In Counts II (the Plaintiffs) and VI (Mauck) against the Sheriff, the claim was that the deputies' actions constituted a constructive entry of Apartment 114 in violation of the Fourth Amendment. (Doc. 18.)

The knock-and-talk procedure was discussed extensively by the court below and salient facts were pointed out: Scott and Mauck only heard loud knocking at 1:30 a.m.; they did not know who was at the door, how many people were at the door, or that the deputies had drawn firearms. (Pet. App. 31-32.) The deputies

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[5] A "raid" is "a sudden attack or invasion by law-enforcement officers, usually to make an arrest or to search for evidence of a crime." *Black's Law Dictionary*, 8th ed., 2004.

had unholstered their guns as a reasonable safety precaution because their information was that the motorcyclist they sought might be armed. (Doc. 50-1, p. 3; Doc. 50-2, p. 101-102; Doc. 50-5, p. 3; Doc. 50-6, p. 3.) Sylvester held his firearm down behind his leg when he knocked. (Doc. 49, p. 19; Doc. 50-1, p. 3.) Scott and Mauck were still up and they had been playing a video game only twenty minutes before Sylvester knocked. (Doc. 50-3, p. 62.) No circumstances existed for them to feel coerced to answer the door. Loud knocking would be insufficient for them to feel compelled to exit their home. Mauck's testimony confirmed Sylvester's account that he knocked only three times, paused, and knocked three more times. (Doc. 50-3, p. 71.) They did not look out the window or call out to see who was at the door. (Doc. 50-3, p. 76.) Sylvester and the other deputies' unrebutted testimony was that they had no search or arrest warrant and they did not intend to enter the apartment, only to talk to whomever answered the door. An objective review of the circumstances supports that assertion.

The Petition points out that Scott was not a suspect and says if he was, then "the officers were not there just to chat." (Pet. 24.) While Sylvester suspected the motorcyclist being sought might be in the apartment, the deputies did not know who was in the apartment and had no reason to suspect Scott of anything. The knock-and-talk was a reasonable procedure for them to obtain more information.

The Petition repeatedly refers to the deputies as "intruders" and asserts that they improperly invaded

the curtilage of Apartment 114. (For example, Pet. 16.) The photographs in the record show the apartment had a concrete walkway from the parking lot to the front door. (Doc. 50-10.) There is a small space just to the left of the stoop where Sylvester stood when he knocked, and a wooden fence came out a short way from the right side of the apartment, then about halfway across the front. There was no gate or "no trespassing" sign, nor was the property completely enclosed. No affirmative steps had been taken to exclude visitors. It was not unconstitutional for Sylvester to enter the curtilage of the apartment. The knock-and-talk rule permits a law enforcement officer to enter private land and knock on a citizen's door for legitimate police purposes, such as gathering information as in this case. *See Florida v. Jardines*, 569 U.S. 1, 21 (2013). While the Petitioners value the negative connotation of the label "intruder" (one who enters, remains on, uses, or touches land in another's possession without the possessor's consent[6]), the term is inapplicable to Sylvester's use of the knock-and-talk in this case.

The deputies' actions were in accord with Supreme Court and Eleventh Circuit law regarding the knock-and-talk procedure. *See Kentucky v. King*, 563 U.S. 452, 469-70 (2011) (officer without a warrant may knock on a door just as any private citizen and the occupant has no obligation to open the door or to speak to the officer); *see also Jardines*, 569 U.S. at 21 (officer may knock on the door seeking to speak to an occupant for the

[6] *Black's Law Dictionary*, 8th ed., 2004.

purpose of gathering evidence, even damning evidence) (Alito, J., dissenting); *U.S. v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006); *U.S. v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991), *cert. denied*, 502 U.S. 907 (1991). In contrast, the knock-and-announce procedure, in which the officer identifies himself as such when he knocks, is required by the Fourth Amendment if the officer intends to *enter* the dwelling, forcibly if necessary. *See Hudson v. Michigan*, 547 U.S. 586, 589 (2006); 18 U.S.C. § 3109.[7] One purpose of the announcement is to give the occupant an opportunity to open the door himself. *Hudson*, 547 U.S. at 589. All three interests protected by the rule according to *Hudson* contemplate the officer making entry into the house. *Id.* at 594. The deputies in this case did not intend to enter the apartment, and their actions did not violate the Fourth Amendment.

B. Other circuit courts' cases finding that officers' improper seizures of criminal defendants under facts different from those of this case required suppression of evidence do not provide an intercircuit conflict warranting the Court's review.

The Petition asserts that the finding of the district court and the Eleventh Circuit that the knock-and-talk

[7] Florida Statutes 901.19 and 933.09 mandate an identity and purpose announcement if the officer is executing a search or arrest warrant, as in that situation he intends to enter the dwelling, forcibly if necessary. (Doc. 50-7, p. 3.)

procedure was constitutional in this case conflicts with the case law of five other circuits: the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, which hold that "the government violates the Fourth Amendment where conduct branded as a knock-and-talk displays the attributes of an illegal knock-and-raid with show of force."[8] (Pet. 15-16.) The Petition provides little discussion of the cited cases, and they do not warrant extended discussion, as a ruling in each case would be fact-specific and the facts regarding the deputies' actions in the present case are not comparable.

In *U.S. v. Gomez-Moreno*, 479 F.3d 350 (5th Cir. 2007), the armed officers, without a warrant, but with a helicopter overhead, knocked, then checked the doorknob. (Pet. 16, 20.) They then announced themselves and demanded entry. When an occupant ran out of the house, then back in, they followed him in. The court, suppressing the evidence, stated they "made a show of force, demanded entrance, and raided the residence." *Id.* at 356. Sylvester only knocked; that was the sole action known to Scott. No one tried the doorknob to see if it opened or demanded entry into the apartment and there was no helicopter hovering. No actions in the present case coerced Scott to answer the door.

The case of *U.S. v. Saari*, 272 F.3d 804 (6th Cir. 2001), was distinguished by the district court in its summary judgment opinion. (Pet. 16, 20; Pet. App. 32-24.) The officers, who were investigating a report of

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[8] All the cited cases are criminal cases dealing with motions to suppress evidence.

"shots fired," and believed the suspect might have a gun, positioned themselves at his apartment door with their guns drawn. They knocked forcefully and announced who they were. When the occupant opened the door, he was ordered to come out, which he did. The officers then entered and searched the apartment. *Id.* at 806. The case does not discuss a knock-and-talk. The court granted the motion to suppress, describing the coercive police conduct as "such a show of authority that [the] defendant reasonably believed he had no choice but to comply." *Id.* at 809. In this case, Scott only knew that someone knocked loudly on the door; he was not ordered to come out nor was there any evidence that he would not have been allowed to leave.

In *U.S. v. Jerez*, 108 F.3d 684 (7th Cir. 1997), the officers, suspecting that a man was smuggling drugs, went to his hotel room at 11:00 p.m. hoping to get a "consent search" by knocking on the door. (Pet. 16, 20.) They then announced who they were and said to open the door. When they got no response, an officer went outside and knocked on the room's window. He shined his flashlight through a crack in the drapes and could see the suspect in bed under the covers. The suspect then stirred, got up, and opened the drapes to see the officer. He opened the room's door and let the officers in. *Id.* at 686-88. The phrase "knock-and-talk" does not appear in the opinion and these circumstances bear no resemblance to those of the present case. The court stated that the totality of the circumstances must be considered in determining if the suspect would feel free to refuse to open the door or whether he was seized

within the meaning of the Fourth Amendment. *Id.* at 690. Two factors considered in granting the motion to suppress were the place and the lateness of the encounter. *Id.* Of special concern was "the vulnerability of the individual awakened at the privacy of his place of repose during the nighttime hours to face a nocturnal confrontation with the police." *Id.* In the present case, although the Petition frequently mentions that Sylvester knocked on the door at 1:30 a.m., Scott and Mauck were not "awakened in the night." The light was on in the apartment and they were still in the living room where, in fact, they had just finished playing video games.

In *U.S. v. Lundin*, 817 F.3d 1151 (9th Cir. 2016), the officers knocked loudly on the suspect's front door at 4:00 a.m. (the lights were on in the house) with the full intention to arrest him based on an "arrest request" from dispatch. (Pet. 16, 20.) When he did not come to the door, but they heard a noise from the backyard, they ran back there, identified themselves, and told him to come out of the fenced-in area. When he did, they arrested him and searched his house. *Id.* at 1154-56. Again, the circumstances are different from those in the present case. In granting the motion to suppress, the court recognized that the knock-and-talk exception to the warrant requirement permits officers to encroach upon the curtilage of a home for the purpose of asking the occupants questions. *Id.* at 1158. However, it said these officers exceeded the bounds of that procedure because they knocked in the early morning and the procedure is limited to the purpose of

asking the occupants questions, and their intention was to arrest. *Id.* at 1158-60.

It is unrebutted that Sylvester's intention was just to speak with the Apartment 114 occupants. Regarding the time, the *Lundin* court stated that "unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours." *Id.* at 1159. However, that did not mean that an early morning knock always precludes the procedure, as it may be consistent with an attempt to initiate consensual contact with the occupants. *Id.* In the present case, the occupants had not gone to bed by 1:30 a.m. on July 15, 2012. Mauck testified that, on July 14, 2012, they did not get up until noon because they stay up late most nights. Scott went to work at the Hungry Howie's pizza business about 4:45 p.m. and got home from work about 8:00 or 9:00 p.m. They ate, showered, watched TV, and played video games on an Xbox. She said they typically went to bed around 3:00 a.m. When the knock came, they were trying to decide what they wanted to watch on TV. (Doc. 50-3, p. 55-57, 60-62, 68.) While Sylvester's knock was unexpected, it did not roust Scott and Mauck from slumber. It was not even close to their usual bedtime. Knocking on their door during the daytime morning hours would have been more likely to wake them up.

Finally, another cited case discussing the time of the officers' encounter is *U.S. v. Reeves*, 524 F.3d 1161 (10th Cir. 2008). (Pet. 16, 20.) The suspect was arrested without a warrant when he answered his motel room door at 3:30 a.m. after the officers had made phone

calls to his room, knocked on his door and window with flashlights, and loudly identified themselves as police officers for at least twenty minutes. His room and his person were then searched. *Id.* at 1163. In granting the suppression motion, the court stated this conduct would lead a reasonable person to believe he could not ignore the officers, the suspect answered his door in response to a show of authority, and he was seized inside his home. *Id.* at 1169. Again, the conduct in *Reeves* bears no resemblance to that of the deputies in this case, and Scott and Mauck were on the couch watching TV. One reason the deputies decided to knock on Apartment 114's door was that a light was on, indicating the occupants were likely still up – which they were. (Doc. 50-2, p. 104.)

None of the Petitioners' cited cases have applied the law to a fact pattern of officers' actions similar to those in the present case. They all feature aggressively coercive shows of authority to gain a warrantless entry, not a knock on the door just to speak to the occupants with no plans for a forced entry. Although the Petitioners attempt to paint for the Court a picture of similar actions by Sylvester and the other deputies, no record evidence supports these false assertions. The Petition states that because the deputies thought the motorcyclist might be in the apartment despite having done no investigation, had their guns drawn and "sneak[ed] through the curtilage," knocking on the door was "a warrantless entry and seizure of Apartment 114." (Pet. 24.) As for investigation, the record shows the deputies had checked the vehicle database for the tag numbers

of the two vehicles parked in front of the lighted apartment. Both of them, including the still-hot motorcycle Sylvester had identified as the one that fled from him, belonged to the same person. Sylvester did not sneak anywhere, but walked up to the front door of the apartment as he may do, which is not an invasion of the curtilage. Standing to the side of the door to knock and holding a gun hidden from view as a precaution is not "a warrantless entry" with a "display of firearms." (Pet. 24.) Having his weapon drawn and held behind his leg in case a threat materialized does not mean that talking was not Sylvester's intent, and he has testified that talking with the occupants was his intention.

This is not a matter of the Eleventh Circuit applying a conflicting statement of federal law or reaching a different holding on the same facts as the other circuits. The district court correctly decided this case based on its facts. Furthermore, its order and that of the circuit court's affirmance are unpublished cases establishing no precedent, and the order denying a rehearing en banc likewise has no precedential value. *See Riley v. Camp*, 130 F.3d 958, 983 n.7 (11th Cir. 1997) (Birch, J., concurring in the denial of rehearing en banc), *cert. denied*, 524 U.S. 915 (1998). Certiorari should be denied: there is no conflict between the Eleventh Circuit decision and those cited by the Petition that warrants the Court's attention.

IV. The Eleventh Circuit was correct to affirm the district court's holding that the knock-and-talk procedure used by the deputies in this case was not unconstitutional antecedent conduct which proximately caused Scott to bring his firearm when he answered the door and proximately caused his injury.

In the Complaint, the Petitioners contended that the deputies' knock-and-talk procedure violated the Fourth Amendment. (Doc. 18.) In their Motion for Partial Summary Judgment on Count II, the claim was expanded to state that "Scott's death was the proximate result of the constitutionally unreasonable employment of LCSO's 'knock-and-talk' custom or practice which conspicuously failed to consider the foreseeable and unacceptable risks of such custom or practice." (Doc. 35, p. 14.) The Petition presents the proximate cause theory and states "it was reasonably foreseeable their illegal Fourth Amendment conduct would proximately cause the harm that occurred here." (Pet. 24-27.)[9] Judging the knock-and-talk procedure constitutional, the district court addressed the proximate cause assertion, saying, " . . . absent a constitutional violation, Plaintiffs' theory – that the LCSO officers' constructive entry is the constitutional violation which, in turn,

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[9] As discussed, the Petition also impermissibly makes argument regarding the Second Amendment, notwithstanding that the argument was not raised below in the district court or on appeal. (Pet. 29-31.) No violation of Scott's Second Amendment rights is implicated in this case.

proximately caused Scott to be shot and Mauck to be injured – must fail."[10] (Pet. App. 34-37.)

The essence of the Petition's argument is that by knocking loudly on the apartment door at 1:30 a.m. without identifying themselves as law enforcement, the deputies created a foreseeable situation where "any reasonable person . . . would have acted in fear and opened the door to unannounced nocturnal intruders with his/her firearm in hand ready to protect home, family, and self." (Pet. 26.) The Petitioners add other circumstances they want to represent to the Court as the officers' antecedent "aggressive, swat-like conduct" (Pet. 24, 27), but, of course, Scott's knowledge was limited to the knocking and the time. The constitutionality of the knock-and-talk procedure has already been discussed, with the district court considering, in its September 18, 2014, opinion, the total circumstances of this particular incident and applying *King* and *Jardines*. (Pet. App. 27-28, 31-32.)

In the *Mendez* case, on May 30, 2017, the Court disapproved of the Ninth Circuit's "provocation rule," which held that an officer could still be liable for a reasonable use of force if he had intentionally and recklessly brought about the shooting by an independent Fourth Amendment violation. *Mendez*, 137 S. Ct. at 1545-46. The Court stated, "A different Fourth Amendment violation cannot transform a later, reasonable

[10] Mauck's injuries were cuts on the soles of her feet from broken glass, which did not require medical treatment. (Pet. App. 35; Doc. 50-3, p. 82.)

use of force into an unreasonable seizure." *Id.* at 1544. In that case, deputies searching for a parolee-at-large for whom they had an arrest warrant, who was believed to be armed and dangerous, received a tip that he was at a certain residential address. At the house, two officers, with drawn guns, searched some backyard sheds and then approached a shack in the yard with a blanket covering the doorway. Unbeknownst to them, a young couple were living in the shed and were asleep on a futon. The man, Mendez, kept a BB gun which closely resembled a small caliber rifle in the shack for use on rats. Without a search warrant, and without knocking and announcing, a deputy pulled aside the blanket. Thinking it was an occupant of the main house, Mendez got up to pick up the BB gun so he could place it on the floor. When the deputies entered, he was holding the gun, which was pointing somewhat towards them. A deputy yelled, "Gun!" and they immediately opened fire, causing severe injuries to Mendez and also injuring his wife.

The Ninth Circuit affirmed the district court ruling that the force used was reasonable under *Graham*, but said the deputies were still liable for the use of force because they had intentionally and recklessly brought about the shooting by entering the shack without a search warrant. Rejecting this provocation rule, the Court mentioned an alternative rationale of the circuit court that the deputies had liability because it was "reasonably foreseeable" they would meet with an armed homeowner when they "barged into the shack unannounced." *Id.* at 1546 (quoting the circuit court

opinion). The Court had not granted certiorari on that question – whether liability could attach for unreasonable police conduct prior to the use of force that foreseeably created the need to use it – and said it could be addressed on remand. *Id.* at 1547 n.*.

The Court noted there could be two claims: the Fourth Amendment excessive force claim and a claim that the shooting was proximately caused by the deputies' "warrantless entry" of the house. *Id.* at 1548-49. In considering the second claim, the proximate cause analysis would require the court (1) to consider the foreseeability or scope of the risk the predicate conduct created and (2) to conclude there was a direct relation between the injury asserted and the injurious conduct alleged. *Id.* at 1549 (*citing Paroline v. U.S.*, 134 S. Ct. 1710, 1719 (2014)). The Ninth Circuit failed to make a proper analysis because it concentrated on the failure to knock and announce as the antecedent conduct after it had found that the deputies had qualified immunity for that. The Court said the warrantless entry was the "relevant" constitutional violation, and the circuit court had not identified the foreseeable risks associated with that nor how Mendez' injuries were proximately caused by it. *Id.* The circuit court's order was vacated and the case was remanded. *Id.*

Mendez does not provide a rationale for deputy liability based on proximate cause that would require the Court's review in this case. As discussed, Sylvester's use of force was objectively reasonable under the totality of the circumstances, including the knowledge he had about the possibility that the person about

whom they were seeking information might be armed. The knock-and-talk procedure followed by the Lake County deputies was in accordance with law and constitutional, and the Eleventh Circuit was correct to affirm the district court's opinion. As in *Mendez*, that antecedent conduct does not provide a basis for the theory that it proximately caused Scott to be shot. Furthermore, in *Mendez*, the officers had an arrest warrant and were actively seeking the suspect; in this case, they were seeking information. There was no warrantless entry into Apartment 114 and none was planned. The orders in this case do not conflict with *Mendez*.

The Petitioners' argument would lead to the conclusion that every time a law enforcement officer knocks on a citizen's door for information, as allowed by law, he must assume that the occupant is going to bring a gun to the door and then assume that the occupant poses no danger. This may be reasonable under most circumstances, but would be foolhardy when the officer has a reasonable belief that the person is not benign. Sylvester knocked at 1:30 a.m., but nothing prevents a homeowner from answering the door in the middle of the day with a firearm in hand. The totality of the circumstances is what counts, not the time of day. Essentially, the knock-and-talk procedure, which the Court has found constitutional, would be eliminated if an officer who used reasonable force still had liability because his knock prompted the homeowner to bring a firearm to the door. The impractical alternative would be for the Court to set parameters on a

"legal" knock-and-talk – for example, the permissible time of day when an officer may knock and how loud his knock may be. This would fail to take into account the variety of factual situations officers face and would limit use of a valuable investigative technique, besides placing on a court the determination of when a threshold had been passed. *Cf. King*, 563 U.S. at 468-69 (ability of officers to respond to exigency cannot turn on such subtleties as their tone of voice in announcing their presence or the forcefulness of their knocks).

Sylvester testified regarding his experiences with knock-and-talks, and he has had people come to the door with a gun before. (Doc. 50-1, p. 5; Doc. 50-2, p. 111-112, 114-115.) No shootings occurred in those encounters. In this case, considering the totality of the circumstances, including his knowledge of the suspect motorcyclist and his reasonable perception of Scott's threatening movements as Scott began moving behind the door, the knock-and-talk procedure did not proximately cause the shooting. There are no "incendiary actions" by the deputies that were "certain to proximately cause the foreseeable fatal shooting here," as the Petition claims. (Pet. 27.) Knocking loudly on the door at 1:30 a.m. is hardly incendiary behavior and even if it was likely to result in Scott bringing his gun to the door as the Petition claims, there is no direct causal relationship between Sylvester's knocks on the door and the shooting. *See id.* at 1549.

The law provides for the knock-and-talk procedure and for a deputy to use deadly force when he reasonably believes there is a threat of harm to himself or

others. The district court's thorough analysis found that Scott and Mauck's constitutional rights were not violated in this case and the Eleventh Circuit was correct to affirm the opinion and to deny rehearing en banc. The result of the encounter between Sylvester and Scott was tragic. However, the correct law was applied to the facts taken in the light most favorable to the Plaintiffs, and there is no basis for the Court's review. *See Tolan*, 134 S. Ct. at 1868-69.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LINDA L. WINCHENBACH
Counsel of Record
JOHN M. GREEN, JR.
JOHN M. GREEN, JR., P.A.
125 Northeast First Avenue,
Suite 2
Ocala, Florida 34470
(352) 732-9252
lwinchenbach@me.com

Counsel for Respondents