No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

CASH JEROME FERGUSON-CASSIDY,

PETITIONER

vs.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; and JACOB MAYNARD, Police Officer II, LAPD Serial No. 34820, in his official capacity and in his individual capacity,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

Question 1.

Is a police officer who fires a rifle (uses deadly force) to effect a detention while in fear for his life nevertheless "automatically"-civilly liable for excessive force (under the federal civil rights statute) to the person he shoots if the officer shoots without first audibly announcing his presence or audibly warning the person he shoots in advance that the officer will use deadly force – unless it is "impracticable" for the officer to so announce or warn?

Question 1a.

In a federal civil lawsuit involving such a shooting must the jury be specifically instructed to consider whether the officer audibly pre-announced his presence or audibly advance-warned the person he shot that the officer would use deadly force – and the practicability or impracticability of such an announcement or warning – as part of the jury's civil liability determination?

Preface to Question 2.

Here, it was undisputed that the police officer being sued for excessive force volitionally shot at Plaintiff 6 times with a M-16 rifle, striking Plaintiff once, badly injuring but not killing him. Notwithstanding that, the district judge included in the jury instructions a (fragmentary, jerry-rigged and misleading) so-called "negligence instruction" that read (in full):

> "Although the plaintiff does not need to prove the defendant intended to violate the plaintiff's Fourth Amendment rights, it is not enough if the plaintiff only proves the defendant acted negligently, accidentally or inadvertently."

Question 2.

In a federal civil lawsuit involving a shooting of the type described in Question 1 (in the absence of any contention that the officer pulled the trigger of his weapon involuntarily such as, for example, in the throes of a seizure), must the district judge deem such a police shooting (by definition) an intentional act?

Question 2a.

If the answer to Question 2 is Yes, must the district judge refrain from instructing the jury that in order to impose civil liability on the officer the jury must find that the shooting was an intentional act, as opposed to a "negligent, accidental or inadvertent" act?

Question 2b.

Did the District Judge reversibly err in instructing Plaintiff's counsel at sidebar just before oral argument (upon finalizing the so-called "negligence instruction" set forth in the Preface to Question 2) NOT to discuss Officer Maynard's breaking cover and moving to within 15 feet of Plaintiff as a grounds upon which the jury could find Officer Maynard liable to Plaintiff Ferguson-Cassidy (because, as deputy City Attorney Brente argued, such breaking of cover was a form of "negligence" not cognizable under the federal civil rights statute, 42 USC §1983)?

Question 3.

Does a police officer's unreasonable conduct prior to the use of deadly force that foreseeably creates the need to use it, ever give rise to civil liability (under the federal civil rights statute) on the part of that officer to the person shot, for employing excessive force?

Question 3a.

If the answer to Question 3 is Yes, should the jury here have been specifically instructed to consider whether the officer's pre-seizure conduct in doing one or more of the following acts, alleged by Plaintiff to be unreasonable pre-seizure conduct, gave rise to civil liability on the officer's part notwithstanding the fact that the officer fired a rifle (used deadly force) to effect a detention while in fear for his life:

- considering (*inter alia* in light of Plaintiff's rights under the Second Amendment) the mere presence in- or handling of a firearm in a private residence and its backyard, to be a mortal threat to the officer, his fellow officers or anyone else;
- remaining silent upon seeing the Plaintiff walk towards- and out the sliding glass door in the back of a residence the officer was observing from a position of cover;
- breaking cover and moving to within 15 feet of Plaintiff knowing that Plaintiff may be holding the gun the officer (Jacob Maynard) previously observed (unassembled); and/or
- not announcing his presence or issuing an audible warning (such as "Police. Freeze or I'll shoot you") and according time for Plaintiff to comply, before shooting at Plaintiff?

Preface to Question 4.

Here the District Court denied Plaintiff's first attempt (via a noticed motion) to file a First Amended Complaint that, *inter alia,* added a California state claim for Negligence, which in turn would have clearly permitted Plaintiff to argue to the jury that the officer's pre-seizure conduct as described in Question 1 and Question 3a. constituted negligence giving rise to civil liability under California law. *See Hayes v. County of San Diego*, 736 F. 3d 1223 (9th Cir. 2013) discussing the California Supreme Court's construction of state negligence law relative to police

actions.

Question 4.

Given its likely outcome-determinative substantive consequence. and in view of: Federal Rule of Civil Procedure 15 which calls for lower courts to "freely give" leave to amend. and Supreme Court and Ninth Circuit precedents construing same (*Foman v. Davis,* 371 U.S. 178, 182 (1962) that mandate that leave to amend complaints to be granted with "extreme liberality" (*Desertrain v. City of Los Angeles,* 754 F.3d 1147,1154 (9th Cir. 2014)), did the District Court abuse its discretion in denying Plaintiff's first motion for leave to amend his complaint?

Question 4a.

More broadly: Did the District Court's denial of Plaintiff's first motion for leave to so amend his Complaint violate Plaintiff's First and Fourteenth Amendment rights to petition government for redress of grievances and right to have pendent state claims heard in federal court under 28 U.S.C. §1367?

Question 5.

Here, the Los Angeles Board of Police Commissioners, after careful investigation and scrutiny, issued an authoritative Report that found the Defendant police officer's use of deadly force "objectively unreasonable" – the EXACT standard of civil liability found in *Graham v. Connor*, the landmark 1989 case that so defined excessive force and distinguished it from lawful force. Did the trial judge abuse his discretion when he *granted* defendants' counsels' *in limine* motion to exclude the authoritative self-damning BOPC Report from evidence?

Question 5a.

Put inversely: Was the BOPC Report plainly admissible evidence as either or both a classic admission-against-interest and/or as a governmental investigative report subject to its own hearsay exception under the Federal Rules of Evidence, and one that is self-authenticating by virtue of being posted on the City's own website?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page. They are re-listed below.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

PLAINTIFF:

CASH JEROME FERGUSON-CASSIDY.

DEFENDANTS:

CITY OF LOS ANGELES;
LOS ANGELES POLICE DEPARTMENT; and
JACOB MAYNARD, Police Officer II, LAPD Serial No. 34820, in his official capacity and in his individual capacity.

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IN THE U.S. SUPREME COURT – PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] **For cases from federal courts:**

The opinion of the United States court of appeals appears at Appendix to the petition and is

[X] is unpublished.

The final opinion of the United States district court appears at Appendix to the petition and is

[X] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was December 5, 2017.

[X] A petition for rehearing was timely filed in the United States Court of Appeals on December 19, 2017. It was denied on January 16, 2018.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. First Amendment, Second Amendment, Fourth Amendment, Fourteenth Amendment; 42 USC §1983.

STATEMENT OF THE CASE

Petitioner confidently and comfortably *ASSURES* the Supreme Court that the *Ferguson-Cassidy* case and the Ninth Circuit's memorandum disposal of Plaintiff's appeal *UNEQUIVOCALLY* meet the following criteria for Supreme Court review set forth in Rule 10

of Rules of the Supreme Court of the United States:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... ; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and

(c) ... a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Here, the affirmed lower court and issued Ninth Circuit decisions conflict with decisions of: the U.S. Supreme Court, the Ninth Circuit, and other circuits, and a ruling by the Supreme court is also therefore necessary to secure and maintain uniformity of the federal courts' decisions; *and* the proceeding involves one or more questions of exceptional and national importance affecting the Fourth Amendment and Second Amendment rights of victims of police shootings that occur within private residences.

By failing to warn Ferguson-Cassidy (or even pre-announce his presence in a backyard curtilage at ~2:50 am) when it was patently practicable so to do, prior to shooting-to-kill Plaintiff, Officer Maynard violated Plaintiff's right to be free from objectively unreasonable excessive force by law enforcement officers, and that violation was redoubled in the district court. However Ferguson-Cassidy's appeal was to no avail whatsoever. The adverse effect on the interests of justice as well as the economic and sociological impact of the District and Ninth Circuit courts' cumulative rulings herein is considerable. Naturally Petitioner Ferguson-Cassidy

and his counsel now seek the intervention of this honorable Court of last resort.

For the reasons the undersigned highlighted in written and oral argument in the Ninth Circuit[1/], key portions of which are restated in synthesized form in this instant *certiorari* petition, the undersigned entreats this honorable Supreme Court in the name of legal justice, social peace and racial comity to vacate the jury verdict and Ninth Circuit's Memorandum opinion and either:

- remand to the Ninth Circuit for reconsideration with guidance supplied by this Court;
- enter judgment for Plaintiff on liability as a matter of law, and remand the case (strongly preferably to a different district court judge) for a trial on damages; or alternatively
- so remand the case for a new trial on both liability and damages.

Factual Background, Issues that Arise out of the Facts and Legal Analysis of Same. On the night of June 29th, 2013 until 2:54 am on June 30th, Plaintiff Cash Ferguson-Cassidy (hereinafter "Ferguson-Cassidy" or "Plaintiff") – an employed African-American San Pedro, California resident from a middle class family in his mid-20s, who was not on probation or parole – was socializing with his white friend Thomas Dunmire and Dunmire's girlfriend at Dunmire's San Pedro house (where the couple lived along with Dunmire's mother). It's a typical suburban single-family residence in the predominantly-white harbor community.

Defendant LAPD Officer Jacob Maynard abruptly ended the gathering and almost Plaintiff's life at 2:54 am by shooting at Mr. Ferguson-Cassidy at close range (15 feet) 6 times with a M-16 rifle, striking him once in the upper-right front chest. The shots came without any advance warning "LIKE A BOLT OUT OF THE BLUE" as District Judge Stephen Wilson

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1. *See* https://www.youtube.com/watch?v=mjkdQLlCi7Y (Ninth Circuit oral argument video).

described it in a pre-trial colloquy. *See* CFC_EOR_076[line21].[2/] (Emphasis added.)

In a proverbial nutshell, the "totality of the circumstances" were as follows:

After 2 am that night Dunmire's neighbor, one Jean Beghin, called 911 and reported he had heard either a firecracker going off or a gunshot into the air from the Dunmire house's vicinity. The caller wasn't sure which.

Several LAPD officers responded, peaked through a side window, saw a disassembled gun, decided they wished to question the occupants, and called for back-up.

Their "plan" (a "half-baked" one) was to summon a LAPD helicopter that would hover above the house and issue orders from the chopper's loudspeaker to the occupants, to come outside one-by-one. While the helicopter was en route Officer Maynard and other officers were to conceal their presence and observe the occupants of the house including through its side window until the chopper arrived. The officers were **not** ordered to keep the residents "pinned-down" inside the house (that is, to prevent them from exiting).

But before the chopper's arrival Officer Maynard saw Ferguson-Cassidy starting to walk unbidden over to- and out the sliding glass door at the back of the house.

At this point Officer Maynard could have easily detained the Plaintiff by loudly identifying himself as a LAPD officer, warning Ferguson-Cassidy he would shoot him if necessary, and ordering Plaintiff to come outside with his hands up, or words to similar effect.

Instead, Maynard broke cover, confronted and ambushed Plaintiff: Shooting at Ferguson-

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2. The full pretrial colloquy including Judge Wilson's telling phrase is found at CFC_EOR_073[line10]-079[lines18-19] and is attached for the high Court's convenience as Appendix D.

Cassidy 6 times, badly wounding and traumatizing him! See CFC_EOR_595 (expert's report).

According to Officer Maynard's trial testimony quoted in his Answering Brief at p. 12, Maynard broke cover and confronted Ferguson-Cassidy to preempt the POSSIBILITY Maynard IMAGINED that Plaintiff would walk to the officers' location at the eastern edge of the house and shoot at them. *See* CFC_EOR_281[lines 16-23].

During Officer Maynard's direct examination trial testimony, Judge Wilson asked Maynard whether he "would have waited for the helicopter" if "the plaintiff hadn't come out of the house"? Maynard replied: "Absolutely" [he would have waited]. *See* CFC_EOR_303[lines 20-22]. (Brief colloquy reproduced at Plaintiff's Ninth Circuit Petition for Rehearing p. 1.)

In sum, Maynard unreasonably rashly so acted (as if he had been ordered to stop the occupants from exiting the house), committing an ambush or (alas) worse: an assassination attempt motivated by conscious- or unconscious racial bias against an African-American young man wearing dreadlocks.

Alas (for Plaintiff): Maynard and his fellow Defendants obtained an ill-gotten jury verdict in this case through their counsels' sharp practice, a litany of judicial errors and bias. (*See* AOB *passim* and Reply Brief pp. 3-7.) And although the jury verdict cannot stand as a matter of law, Plaintiff has accepted for purposes of his appeal one important factual finding that common sense dictates the jury had to have reached in order to return a defense verdict: Namely that, as Officer Maynard testified, Maynard shot Mr. Ferguson-Cassidy while Maynard was in fear for his life.

Perhaps the most glaring error that makes the jury's verdict nonetheless unsustainable is that the jury instructions EXCLUDED the BLACK LETTER LAW that required the jury to focus on "WHETHER THE COMMUNICATION OF A WARNING IN ADVANCE OF USING

DEADLY FORCE WAS PRACTICAL AND WHETHER SUCH A WARNING WAS GIVEN" (per Ninth Circuit Model JI 9.25[8]) as an important part of their deliberation on the "ultimate fact" in the case: Whether Officer Maynard's shooting of Plaintiff was "objectively reasonable".

Ferguson-Cassidy's trial attorneys specifically requested that the jury be instructed to consider Officer Maynard's and his fellow officers' failure to ANNOUNCE THEIR PRESENCE PRIOR TO THE SHOOTING (which in this instance would have been the functional equivalent of issuing a warning).[3/] Judge Wilson PLAINLY ERRONEOUSLY refused to give this instruction – and similarly failed to give the Ninth Circuit's Model warning instruction (9.25[8]) – despite Judge Wilson having earlier made crystal clear his understanding that THE ABSENCE OF AN ADVANCE WARNING was the KEY ISSUE IN THE CASE. Further from the pretrial colloquy:

"THE COURT: And so, as I remember when the case was initially described to me, the central issue is the – essentially, the warning that the – that the officers gave, isn't it? In other words, isn't part of the plaintiff's contention that there – there was either no warning or that the officer shot as they were announcing their presence, giving the plaintiff no chance to respond?

MR. BRENTE: I think –

THE COURT: I thought that was sort of a big part of the case.

MR. BRENTE: Well, it is and it isn't. ... ...

3.

Obviously, had Officer Maynard shouted-out that police were present Ferguson-Cassidy would either not have walked out the glass door with a gun in his hand or dropped it instantly upon hearing such a police announcement while exiting- or seconds after exiting the back door. Instead Maynard remained silent, moved and confronted Plaintiff–a man police merely wanted to question–and fired 6 bullets, nearly killing him and imperiling all the residents and neighbors.

THE COURT: It sounds to me like they're around there for several minutes, accepting that Maynard sees the plaintiff with the gun. And in the middle of the night he says, you know, "F'ing stop," boom, shoots.

MR. BRENTE: Well, but –

THE COURT: I mean, how did the guy have any time to respond to that?"

(Underscored emphasis added.) Pre-trial hearing CFC_EOR_073[line10]-079[lines18-19].

Judge Wilson's original assessment was spot-on: Since 1985, when the Supreme Court made its landmark ruling in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), law enforcement officers throughout our country have been legally prohibited from using DEADLY force to detain someone suspected of a crime (there a fleeing burglary suspect) without issuing a PRIOR warning to the person they are seeking to detain that the person is about to be met with such death-penalty-level force. There is but ONE exception: If issuing such a warning is not "feasible", as Justice White wrote in the *Garner* majority opinion. This honorable Court's landmark ruling so held in the course of stating that Tennessee's statute authorizing deadly force against suspected felons was not facially unconstitutional:

> "[I]F the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, AND IF, WHERE FEASIBLE, SOME WARNING HAS BEEN GIVEN."

(Emphases added.) There the officer "called out 'police, halt'" to burglary suspect Garner, who fled. *Id.* at 3-4; *held* (regarding statute as applied in *Garner*): Seizure by deadly force merely for criminal investigative purposes (as with Ferguson-Cassidy!) still not justified. *Id.* at fn.8 at p.9:

> "The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The

use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.*

In 1997 the Ninth Circuit restated this requirement in *Harris v. Roderick,* 126 F.3d 1189, 1201 & 1203 (9th Cir. 1997) (the Ruby Ridge case) as follows: "...WHENEVER PRACTICABLE, A WARNING MUST BE GIVEN BEFORE DEADLY FORCE IS EMPLOYED..." (Emphasis added.) *See also Hulstedt v. City of Scottsdale*, 884 F. Supp. 2d 972, 991-992 (USDC, Ariz. 2012) (collecting cases); ..."). *Cf.* (consistently): *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir.1994) (holding that use of force was not unreasonable, in part because protesters were given warning and instructions on how to comply before force was applied). (Emphasis added.)

During the trial in the instant case an audiotape of the shooting at issue was played for the jury. *See* https://drive.google.com/file/d/0B4bV6b2RHqRHN2ZhYUd5c0F2Zjg/view at 4:49. It made crystal clear that Officer Maynard shouted at Ferguson-Cassidy: "Don't fucking move" and started shooting at Plaintiff SIMULTANEOUSLY. Officer Maynard testified during direct examination that the exclamation and shooting had been "SIMULTANEOUS". Plaintiff reproduced at AOB p.18, lines 4-5 and at pp. 14-15 of the Ninth Circuit Reply Brief the transcript of the part of the trial where the audiotape recording was played and Officer Maynard so testified. *See* CFC_EOR_294[line20]-295[line12].

Moreover and dispositively on this point: "Don't fucking move..." is plainly NOT an advance warning that DEADLY force is about to be employed absent compliance with the officer's directive. Nor is it an announcement that the speaker is a police officer.

It is therefore factually UNDISPUTED that the deadly repeated M-16 assault weapon rifle-fire Officer Maynard directed at Ferguson-Cassidy occurred WITHOUT the legally-

mandated advance warning. Honorable Justices: Under *Scott v. Harris* footnote 8[4/] you can and should so find AS A MATTER OF LAW. No reasonable judge or jury could decide otherwise.

Nor was issuing such advance warning in any way "infeasible" or "impracticable". This is also UNDISPUTED. According to Officer Maynard's Answering Brief at pp.11-12, citing 2 ER at 267 [lines 13-15] and 2 ER at 278 [lines 22-24] (Maynard used Plaintiff's EOR): While "tacked up" and watching through the house's side-window with his M-16 rifle at-the-ready: "Officer Maynard observed the Plaintiff for 30 seconds to a minute, and then the Plaintiff began to exit the residence." Appellant's Opening Brief ("AOB") at pp.13-18 quotes from Officer Maynard's own detailed trial testimony describing Maynard's physical position, observations of Ferguson-Cassidy, dialogue with his fellow officer, and Maynard's movement before the shooting. *See eg.* CFC_EOR_238[lines21-24], CFC_EOR_280-284 and CFC_EOR_242[lines5-7].

Honorable Justices: As stated in Plaintiff's Ninth Circuit Opening Brief at p. 28 this constitutes adequate time to warn – and makes such a warning "practicable" – AS A MATTER OF LAW.[5/] Here too, no reasonable judge or jury could decide otherwise.

4.

Scott v. Harris, 550 U.S. 372, 381 n.8 (2007) [videotape evidence positioned Justices to rule as a matter of law]; *accord*: *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

5.

Plaintiff's Ninth Circuit AOB at p. 28 states:

> Importantly: Officer Maynard could have issued the just mentioned command ["Police: Come out with your hands up!"] and/or the aforementioned warning ("Police": "freeze" and/or "Put your hands up", and/or "Stop or we'll shoot!") in the same time it took Maynard to tell his fellow officer who was standing behind him that someone was "coming outside". CFC_EOR_238 [lines21-24]. Instead Officer Maynard took further time to change his position (stepping off a step and making a wide-angle "pie" move around the corner of the house that had been providing him secluded cover) and confronted Ferguson-Cassidy, and immediately shot his M-16 rifle at the Plaintiff 6 times

Moreover and dispositively: Officer Maynard does NOT even CONTEND that it was INFEASIBLE or IMPRACTICABLE for him to have announced his presence and/or explicitly warned Ferguson-Cassidy prior to using deadly force that he was about to do so. Officer Maynard's Ninth Circuit Answering Brief is DEVOID of this contention.

In his Ninth Circuit Opening Brief (and again in his Reply Brief) Ferguson-Cassidy argued that **no reasonable jury could have failed to find that the shooting constituted excessive force.** Plaintiff's contention was- and continues in this Petition to be based upon:

- the undisputed absence of: an advance warning or (in this circumstance equivalent) pre-announcement of the officer's presence, and
- the equally undisputed and indisputable assertion that Officer Maynard making such a pre-announcement or advance warning **was practicable**.

By not even responsively arguing on appeal (either in his Answering Brief or during Oral Argument) that it was **impracticable** for Officer Maynard to warn Plaintiff or announce his presence before shooting, Maynard evidently conceded and waived the issue. Further in light of the undisputed absence of an advance warning, this honorable Court can fully comfortably invoke its prerogative under *Scott v. Harris* footnote 8 to enter judgment for Plaintiff as a matter of law and remand the case to the district court solely for a determination of damages.

Honorable Justices: As the undersigned referenced in the Ninth Circuit oral argument, San Pedro is NOT Iraq. It's the home-front. Officer Maynard is NOT a U.S. Army infantryman.

> while exclaiming "Don't fucking move...". ¶This case then is plainly in the category of those where no force whatsoever was required but deadly force was gratuitously employed instead.

He's a City of Los Angeles policeman sworn to protect and serve its residents. Mr. Ferguson-Cassidy is NOT an enemy combatant. He's an American citizen with full civil rights including the rights to hold a handgun in the privacy of a friend's house or its backyard – per the Second Amendment[6/] – and to socialize with a white friend in a predominantly white neighborhood without being shot-at without warning and severely wounded by a City government employee.

Significantly honorable Justices: TWO components of LA City government DID admit Officer Maynard's OBVIOUS culpability! LAPD Chief Charlie Beck examined Officer Maynard's shooting of Plaintiff and deemed it to have been wrongful. The Los Angeles Board of Police Commissioners ("BOPC") likewise so found after careful investigation and scrutiny. Their authoritative Report found Officer Maynard's use of deadly force "was not objectively reasonable" – the EXACT standard of civil liability found in *Graham v. Connor*, 490 U.S. 386, 396

6.

See Plaintiff's AOB pp. 29-30: "[P]ossession of a hand-gun...is not illegal in America (for a non-felon, non-parolee or non-probationer) within a private residence; on the contrary it is a constitutionally guaranteed right under the Second Amendment" citing *District of Columbia v. Heller*, 554 U.S. 570, 592, 635, 128 S.Ct. 2783, 2797, 2821-22, 171 L.Ed.2d 637 (2008). "And even if...Ferguson-Cassidy did begin to raise the gun, that is likewise an innocent (self-defensive) act when the person who has suddenly confronted you does not announce his authority as a police officer." Therefore, *Ferguson-Cassidy* is an equally if not more compelling case than the appalling unwarned-shooting at issue in *Young v. Borders*, about which Judge Martin so eloquently dissented from the 11th Circuit's denial of *en banc* review at 850 F.3d 1274, 1295 (11th Cir. 2017):

> In addition to these Fourth Amendment concerns, the District Court's conclusion that deadly force was reasonable here also plainly infringes on the Second Amendment right to "keep and bear arms."...If Mr. Scott was subject to being shot and killed, simply because (as the District Court put it) he made the "fateful decision" to answer a late-night disturbance at the door to his house, and did so while holding his firearm pointed safely at the ground, then the Second Amendment (and *Heller*) had little effect. [Emphasis added by Plaintiff's undersigned counsel.]

(1989), the landmark 1989 case that so defined excessive force and distinguished it from lawful force! See BOPC Report CFC_EOR_855-868 at 868 (penultimate paragraph re "Officer C").

When the Defendants' counsel brought an *in limine* motion excluding the authoritative self-damning BOPC Report from evidence Judge Wilson grossly abusively and without any written explanation GRANTED the Defendants' motion! *See* CFC_EOR_80-84[recited ruling]& 958(Doc. 97). But, as detailed in Plaintiff's AOB at §VIII.C (pp. 41-51) the BOPC Report (http://assets.lapdonline.org/assets/pdf/053-13_Harbor-OIS.pdf) is plainly admissible evidence as either or both a classic admission-against-interest and/or a trustworthy governmental investigative report, one that is self-authenticating by dint of being posted on the City's own website!

Honorable Justices: Space constraints permit mention of but one more sin from the gamut of cardinal and venial sins committed in the district court in this case: Judge Wilson's PLAINLY ERRONEOUS jury instruction that directed jurors (in sum) to EXONERATE Officer Maynard of civil liability if they found Maynard acted "negligently, accidentally or inadvertently." In fact, these are assessments (as these words are understood by lay jurors) that militate in FAVOR of a jury finding of "objective unreasonableness". So this inapposite, unintelligible, deliberately misleading so-called "negligence instruction"–a jerry-rigged fragment–was designed by Los Angeles Deputy City Attorney Cory Brente to put the fix into the jury verdict. And did!

Due to the "court engineered" defense verdict Plaintiff now owes $13,785.54 in costs to the very Defendants that L.A. Police Chief Charlie Beck and the Los Angeles Board of Police Commissioners BOTH say are culpable for shooting Mr. Ferguson-Cassidy! CFC_EOR_47&52. It's KAFKAESQUE!

"Justice is not mocked" wrote Søren Kierkegaard, the Danish philosopher, theologian, poet and social critic, in 1851 (alluding to a New Testament passage).

The at-least tortious (and at-most criminal) police shooting at issue in this case, AND the ensuing miscarriage of justice that has befallen Plaintiff, were- and are forceful blows struck against Mr. Ferguson-Cassidy, and they HAVE laid him low. But he is NOT a "party of one" in this matter. For he is a member a caring nuclear family, and a member of the larger African-American community that is aghast at the alarming epidemic of deaths and serious injuries police officers have highly-unjustly brutally inflicted upon African-Americans in recent years.

The trial court and appellate court debacles now presented for your review tests the efficacy of our sacred federal judicial system's self-correction mechanism. And much GOOD can now come of this to-date sad judicial chapter.

Honorable Justices: A "bright line" ruling by this honorable Court affirming and enforcing the precedents of the Supreme Court and Ninth Circuit that WARNINGS MUST PRECEDE THE USE OF DEADLY FORCE[7/] would not only do justice for Cash Ferguson-Cassidy:

In the years and decades to come tens, hundreds or thousands of African-Americans who will otherwise be ambushed by law enforcement officers will instead be given- and heed vocal advance warnings (as Mr. Ferguson-Cassidy would have heeded, had Officer Maynard given one) and not be maliciously, unjustly, unnecessarily and outrageously injured or killed. *See* Abraham

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7. Plaintiff suggests the rule should be: Using deadly force without such a warning, if such a warning was practicable, should create automatic civil liability. During Ninth Circuit oral argument (at 8.30) Judge Eaton's asked the undersigned counsel for Plaintiff: "Are there magic words that constitute a warning?" Plaintiff asserts the warning MUST be specific ("I'll shoot you") because nothing less puts the person of interest on notice they are facing execution.

N. Tennenbaum, The Influence of the *Garner* Decision on Police Use of Deadly Force, 85 J. Crim. L. & Criminology 241 (1994-1995) at §IV p.267 [Police homicides fell 16% post-*Garner* ruling]. THESE BLACK LIVES MATTER![8] Sternly restating the *Garner* rule will save lives!

Case in point: On March 19, 2018 in Sacramento, California, police officers pursuing Stephon Clark, an unarmed African-American young man suspected of breaking car windows, shot the 22 year old Clark 20 times in the backyard of Clark's grandmother's house. The video and audio of the shooting discloses that the officers shot Clark without first identifying themselves as police officers and WITHOUT FIRST WARNING Clark that deadly force would be used: Rather the officers used (legally deficient) rote phrases (that now appear to be the norm) before using deadly force. There: "Stop." "Show me your hands." "Gun". The police homicide caused widespread protests by African-Americans in Sacramento in the ensuing days.[9]

Note: When police officers precede a shooting with a warning lethal force is imminent that is not by itself an index of a lawful act as opposed to a wrongful- or even criminal shooting.

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8. *See also*: https://www.washingtonpost.com/outlook/police-are-still-killing-black-people-why-isnt-it-news-anymore/2018/03/12/df004124-22ef-11e8-badd-7c9f29a55815_story.html?utm_term=.2a61e13dd2ef and http://www.latimes.com/local/lanow/la-me-police-commission-shootings-20170314-story.html

9. *See* https://www.voxbeck.com/identities/2018/3/22/17151960/stephon-clark-sacramento-police-shooting-video ; https://www.cbsnews.com/news/stephon-clark-police-shooting-protesters-stevonte-clark-sacramento-city-council-meeting-today-2018-03-27/?ftag=CNM-00-10aab6a&linkId=49794532 ; and https://www.nbcnews.com/news/us-news/sacramento-protests-over-fatal-police-shooting-stephon-clark-enter-second-n861731 (3/31/2018 video of Clark's relative: "It's time for things to change!").

Eg. the officer who killed Baton Rouge resident Alton Sterling, after warning him, was fired. It is a police shooting not preceded by a warning when such a warning was practicable, as happened to Ferguson-Cassidy, that Plaintiff asserts does- and must result in automatic civil liability.

REASONS FOR GRANTING THE PETITION

Plaintiff will now discuss seriatim the reasons supporting the Supreme Court acceptance and resolution in Plaintiff's favor of the five questions and sub-questions presented herein:

Questions 1 and 1a.

Short Answer: **This Honorable Court Should Address the Circuit Split Regarding Unreasonable Pre-seizure Conduct in at Least One Crucial Life-saving Respect and Rule That Non-Pre-warned Shootings (When Warnings Were Practicable) "Automatically" Give Rise to Civil Liability Even When an Officer Shoots a Suspect While in Fear for His Life.**

Discussion. Police seizures by means of deadly force require the strictest protocols in a free society. As the undersigned stated during Ninth Circuit oral argument (at 4:45): "Deadly force is different." It is different because ALL Americans respect the sanctity of human life[10], have abhorrence for police ambushes and for the application of military combat tactics of the foreign battlefield to domestic policing – a value expressed in Supreme Court[11] and Ninth

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10. Unnecessary police homicides disrespect the "sanctity of human life," in Vice-President Mike Pence's phrase, no less than elective late-term abortions. *See:* U.S. Department of Justice, "Principles of Good Policing: Avoiding Violence Between Police and Citizens," (2003), 19.

11. *Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985).

Circuit[12/] precedents that proscribe a police officer using deadly force without prior announcement of his presence or advance warning. Plaintiff contends that these values and holdings have created a longstanding (but to date not widely understood or enforced) rule of *strict civil liability* whenever such deadly force is used (as here) *unless* the circumstances make such a pre-announcement or advance warning impracticable. In police shootings where a pre-announcement or warning was practicable but not given, it is irrelevant for civil liability purposes that the officer was in fear for his life at the very moment of the shooting (as Plaintiff concedes the jury impliedly found was the case here).

This Supreme Court rule of strict civil liability derives from the very origin of modern policing, from a principle set forth by Britain's Home Secretary Sir Robert Peel who introduced the Metropolitan Police Act of 1829. Peel stated, *inter alia*:

> 6. The police should use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of *persuasion, advice and warning* is found to be insufficient to achieve police objectives;[13/] and police should use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.

The Police in a Free Society: Safeguarding Rights While Enforcing the Law, By Todd Douglas, pp. 29-30 (2017 ABC-CLIO) (Emphasis in original.)

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12. *Harris v. Roderick,* 126 F.3d 1189, 1201 and 1203 (9th Cir. 1997) (aka "Ruby Ridge case").

13. [Footnote added by Plaintiff's undersigned counsel – NOT in original:] An obvious corollary is that when an officer fails to first use *persuasion, advice and warning* an encounter will frequently escalate and cause an officer to "have to" resort to the use of force where same could have easily been avoided. Indeed such escalation is virtually inevitable and patently foreseeable. *See* detailed discussion of Question 3 *infra*.

Here the police objective of questioning the San Pedro house's occupants including Plaintiff required merely a verbal request to submit to such questions. That objective required no use of force whatsoever. Yet (astonishingly) a police officer instead employed deadly force without any advance announcement or warning! And a jury validated the wanton folly![14/]

This happened in part because the salutary "hard and fast" Ninth Circuit rule (where deadly force has been used) restated in *Harris v. Roderick,* 126 F.3d 1189, 1201&1203 (9th Cir. 1997) (aka "the Ruby Ridge case") ["Moreover, whenever practicable, a warning must be given before deadly force is employed..." (emphasis added) and "[FBI Agent] Horiuchi gave him no warning"] has unfortunately been entirely displaced in the Ninth Circuit by *Graham* (a non-deadly force case) and jury instructions drawn from same. Both the title to Ninth Circuit Jury Instruction in excessive force cases and the Comment accompanying same dishonor the sanctity of life by entirely merging the rules governing deadly- and nondeadly force. *See* Title: "9.25 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PERSON—EXCESSIVE (DEADLY AND NONDEADLY) FORCE. (Emphases added here and in block quote below.) The Comment likewise erroneously conflates the two, stating:

> In general, all claims of excessive force, whether deadly or not, should be analyzed under the objective reasonableness standard of the Fourth Amendment as applied in *Scott v. Harris*, 550U.S. 372, 381-85 (2007)[15/], *Graham v. Connor*, 490

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14. As discussed in the Statement of Case section *supra*, Plaintiff contends that **no reasonable jury could have failed to find that the shooting constituted excessive force.**

15. [Footnote added by Plaintiff's undersigned counsel – NOT in original:] This is a misread of vague *dicta* in *Scott v. Harris* (to be further explained in briefing upon grant of *certiorari*): Nothing in that car chase case ruling intended to- or did obliterate the unique legal rules applicable to police use of **deadly force** such as the police shooting involved here.

U.S. 386, 397 (1989), *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985), and *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007).

These Model instructions improperly abolish the *Garner*-derived *Harris v. Roderick* hard-and-fast rule and substitute a balancing test which makes the police issuance of an advance warning or lack thereof merely **one factor among others** for a jury to consider in determining whether a shooting involved excessive or lawful force. **And here (outlandishly!) the jury in Plaintiff Ferguson-Cassidy's case wasn't even instructed to consider the existence and practicability of a warning at all! Standard jury instruction 9.25(8) was not given!** And its functional equivalent (in this circumstance) requested by Plaintiff – requesting the jury to consider Maynard's not announcing his presence in advance of the shooting – was also not given!

This was plain error because under clearly established applicable law (*Tennessee v. Garner* and *Harris v. Roderick*): Where (as here) an officer uses deadly force without any pre-announcement of his presence or advance warning, the only remaining issue is whether such an announcement or warning was practicable.

In other words: Given the undisputed absence of an advance warning or pre-announcement of the officer's presence herein, Judge Wilson should have either

- directed a verdict for Plaintiff on liability (due to the indisputable practicability of Officer Maynard having issued an advance warning), or
- the jurors should have been specially instructed to FIRST consider the practicability of Officer Maynard having announced his presence and/or otherwise advance-warned Ferguson-Cassidy prior to using deadly force to detain Plaintiff.

Had the jury determined that such an announcement and/or advance warning was practicable, (since it was not given) that should have been conclusive of civil liability and the jury should have proceeded to an assessment of damages. If the jury concluded that an announcement or warning was not practicable, the jury should have proceeded to evaluate the shooting under the rest of the totality of the circumstances employing the *Graham v. Connor* objective reasonableness test.

Here the jury instructions totally muddled the issues for the jury in a three-hold manner:

1) by giving the standard *Graham* objective reasonableness jury instruction instead of a strict liability instruction regarding the warning issue patterned on *Harris v. Roderick*;

2) then did not even isolate the jury's focus by directing the jurors to consider as a **factor** the existence and practicability of a pre-announcement or advance warning (the District Judge omitted Ninth Cir. JI 9.25(8)); and

3) then further hopelessly muddled the jurors' task by asking them to evaluate whether Maynard's shooting of Ferguson-Cassidy was an intentional act as opposed to a not-consciously-intended act – a ludicrously off-point exercise. *See* Discussion of Question 2, 2a. and 2b. just *infra*.

The Circuit Split. Hovering in the background of Judge Wilson's clearly erroneous rulings and decisions on jury instructions and the resultant defense jury verdict, and the Ninth Circuit panel's affirmance of same, was the Ninth Circuit's quirky (now abolished) "provocation rule" regime whereby district judges felt compelled to focus the jurors' excessive force inquiry solely on the circumstances extant at the *very moment* of the shooting UNLESS officers' had committed a separate Fourth Amendment violation preceding the use of deadly force.

This (now thankfully defunct) "provocation rule" regime not only muddled the *Graham v. Connor* objective reasonable test, but discriminated against litigants such as Ferguson-Cassidy who were met with extremely unreasonable pre-shooting conduct which happened NOT to involve any independent Constitutional rights violation. Here:

- The LAPD arrived on the premises lawfully and their action after an unavailing front-door-knock in walking the perimeter of the house seeking to make contact with the house's occupants, was legal under applicable law. *See U.S. v. Hammett*, 236 F. 3d 1054 (Ninth Cir. 2001). And
- The officers' actions in staying on the premises to observe the occupants and call them outside for questioning was justified by the concert of the topic of the 911 call (during which a neighbor reported hearing either gunfire-into-the-air or a firecracker, he wasn't sure which, from the vicinity of the Dunmire house) and the officers' observation through the house's window of a disassembled handgun.

In the instant case, the extremely unreasonable conduct was Officer Maynard's failure to announce his presence or advance-warn Ferguson-Cassidy that deadly force would be used (when there was ample time to do so and no reason not-to) before suddenly confronting Plaintiff and shooting him "like a bolt out of the blue" (in the words of District Judge Wilson)!

Perhaps mindful that the "provocation rule" did NOT apply and (mistakenly) believing that this meant that the excessive force issue could ONLY be evaluated relative to the very moment of the shooting, it was possibly (if not probably) on this basis that Judge Wilson refused to instruct jurors to specifically consider during their civil liability jury deliberation Officer Maynard's:

- non-advance-warning he would use deadly force,
- non-pre-announcement of his presence,
- or any other unreasonable pre-shooting conduct by the officer, including breaking cover, as further discussed in the Question 3 section *infra*.

Indeed, Judge Wilson went to great lengths to ensure that the jury did NOT focus on Maynard's egregious pre-shooting conduct as part of their deliberation on the "objective reasonableness" of Maynard's use of force. Again: Wilson did so, *inter alia*, by omitting to give *both*:

- Ninth Circuit Manual of Model Civil Jury Instructions ("JI") 9.25[8] governing warnings, and
- the functional equivalent instruction requested by Ferguson-Cassidy, directing jurors to consider Maynard's non-announcement of his presence prior to the ambush,

one or both of which omissions constituted a patent abuse of discretion and plain error.

Judge Wilson's (and the Ninth Circuit panel's) apparent reasoning in this regard was in accord with the plurality of federal circuits that isolate the jury's focus to the extant circumstances at the **very moment of the shooting**. *See* Lee, Cynthia, Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense (2017), 2018 U.ILL. L. Rev., Forthcoming; GWU Law School Public Law Research Paper No. 2017-65; GWU Legal Studies Research Paper No. 2017-65. Available at SSRN: https://ssrn.com/abstract=3036934 [Last revised: 12 Feb 2018] at footnote 249:

> The Second, Fourth, Sixth, and Seventh Circuits do not allow consideration of preseizure conduct, finding such conduct irrelevant to the reasonableness of an officer's use of deadly force. *Terebesi v. Torreso,* 764 F.3d 217, 235 (2d Cir. 2014) ("In cases [where the officer's prior conduct may have contributed to later need to use force], courts in this Circuit and others have discarded evidence of prior

> negligence or procedural violations, focusing instead on 'the split-second decision to employ deadly force.'") [Other listed cases omitted.]

(Emphases added.) Then *see* and *compare id.* footnote 254:

> The First, Third, and Eighth Circuits permit consideration of preseizure conduct. *See, e.g.*, *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) ("[T]he [trial] court did not abuse its discretion in instructing the jury that 'events leading up to the shooting' could be considered by it in determining the excessive force question."); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e want to express our disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'") [Other listed cases omitted.]

(Emphases added.) And *see also id.* footnote 250, describing a two-circuit middle ground (one of which, the Ninth Circuit's, was invalidated in *Mendez*).[16/]

However, the four-circuit plurality view (disallowing any consideration of pre-seizure conduct) is obviously grossly erroneous! As the discussion throughout this Petition *supra* demonstrates, this honorable Court's ruling in *Tennessee v. Garner*, which the Ninth Circuit ramified in *Harris v. Roderick*, clearly established that at least an officer's pre-shooting

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16. Cynthia Lee article footnote 250 (written prior to the *Mendez* ruling) states:

> The Ninth and Tenth Circuits permit consideration of preseizure conduct under limited circumstances. *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (allowing consideration of an officer's intentional or reckless conduct that provokes a violent response in assessing the reasonableness of an officer's defensive use of force only if the officer's preseizure conduct constitutes an independent constitutional violation); *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (limiting consideration of preseizure conduct of the officer to reckless or deliberate conduct immediately connected with the use of force); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) ("The reasonableness of [the officers'] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force."). (Emphases added here and in text accompanying in block quotes on pp. 21-22 by undersigned counsel for Plaintiff Ferguson-Cassidy.)

conduct consisting of a failure to warn or announce one's presence – which by definition occurs prior to the very moment of the shooting – is at a minimum a factor the jurors MUST consider in evaluating civil liability in such excessive force cases; and in Plaintiff's view it is in fact dispositive of civil liability if a judge (eg. by way of directing a verdict as a matter of law) or jury deems an advance warning to have been practicable. If such non-pre-warned shootings (when warnings were practicable) did not "automatically" give rise to civil liability, then the Supreme Court's and Ninth Circuit's edicts calling for advance warnings whenever practicable, would be dead-letters (or in the nature of "advisory opinions" of the sort federal courts do not issue).

For the exact same reason the (non-disputed) fact that Officer Maynard "feared for his life" at the moment he used deadly force cannot possibly exempt him from civil liability for shooting Plaintiff wholly unnecessarily. If the national epidemic of unwarranted police-perpetrated homicides of African-Americans[17/] is ever to be stopped, such objectively grossly unreasonable pre-shooting police officer conduct (ie. non-pre-announcement or warning) that results in a grievous injury to a person who is doing nothing wrong (Ferguson-Cassidy) MUST yield civil liability! And that's ALL we're discussing here, as Justice Sotomayor wisely points out at the very outset of oral argument in the *Mendez* case: Civil liability/AKA risk management.[18/]

Question 1, then, if answered in the robust manner suggested by Plaintiff, presents the Supreme Court with an excellent vehicle by which to impose a uniform nationwide hard-and-fast

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17. *See* https://news.vice.com/en_us/article/xwvv3a/shot-by-cops 12/11/2017.

18. *See* https://www.supremecourt.gov/oral_arguments/audio/2016/16-369 at 34 sec. mark.

rule that will oblige police officers to pre-announce their presence and advance warn individuals before resorting to deadly force, on penalty of incurring "automatic" findings of civil liability absent circumstances that make such pre-announcements or warnings impracticable. This would save countless lives and comprise a stern, long overdue and highly fitting response to one aspect of the epidemic of (in sum) homicidal "police wilding" towards African-Americans (and others) abroad in the land. *See* Tennenbaum, op.cit. p.267 [Police homicides fell 16% post-*Garner* ruling].

Alternatively, a Supreme Court ruling that requires judges to at least instruct jurors to specifically consider as a factor whether a police officer issued a warning and whether doing so was practicable, will give Plaintiff his "day in court" under proper ground-rules. And will have also have a (limited) salutary effect on police practices nationwide.

Questions 2, 2a, and 2b.

> *Short Answer:* **This Honorable Court Should Correct a Manifest Injustice and Rule That in the Absence of Any Contention That the Officer Pulled the Trigger of His Weapon Involuntarily (Such As, for Example, in the Throes of a Seizure) District Judges must Deem Such Police Shootings (By Definition) Intentional Acts, and must Refrain from Instructing the Jury That in Order to Impose Civil Liability on the Officer the Jury must Find That the Shooting Was an Intentional Act, as Opposed to a "Negligent, Accidental or Inadvertent" Act.**

Discussion. The jury instructions further muddled the issues for the jury by (outlandishly) adding a superfluous and totally inapposite (fragmentary) instruction directing the jury to characterize the officer's use of deadly force as between an intentional, negligent, accidental or inadvertent act. The actual Model Instruction itself (from which the jerry-rigged and misleading version of same was derived), was designed for situations wherein the fact pattern raises some doubt about whether a police seizure of property (in the 9.18 version) or

seizure of a person (in the 9.20 version) was or is intentional (rather than **not**-consciously-intended). It reads:

> [A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Therefore, the plaintiff must prove that the defendant intended to [insert the factual basis for the plaintiff's claim]. It is not enough to prove that the defendant negligently or accidentally engaged in that action. But while the plaintiff must prove that the defendant intended to act, the plaintiff need not prove that the defendant intended to violate the plaintiff's Fourth Amendment rights.].]

(Emphasis added.) This instruction is obviously designed for situations such as when a police officer absent-mindedly fails to put a squad car in park on an incline and exits it, whereupon it rolls and accidentally injures someone. §1983 provides no redress in that instance; rather a state claim for negligence does. Officer Maynard's *deliberate unreasonable conduct* relative to the shooting herein is clearly NOT a species of absent-minded negligence!

But when it reached the Jury Instructions in the instant case, the so-called "negligence" jury instruction had morphed into this *beauty*:

> "Although the plaintiff does not need to prove the defendant intended to violate the plaintiff's Fourth Amendment rights, it is not enough if the plaintiff only proves the defendant acted negligently, accidentally or inadvertently."

It is now a rearranged free-floating fragment totally unmoored from the purpose of the optional Jury Instruction, which is to focus jurors attention (in cases where the fact pattern warrants – which would be extremely rare to non-existent in police shooting cases[19]) on the issue of

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19. An officer having an epileptic seizure would be an example. Another highly far-fetched scenario might be an officer holding a firearm with a finger on the trigger during a thunderstorm, who is struck by lighting causing his finger to involuntarily contract and fire the shots.

whether the officer's conduct was intentional (as opposed to not-consciously-intended).

As stated at AOB p.34 ¶2, police shootings are (essentially without exception) inherently intentional acts, so the bracketed instruction reprinted above is TOTALLY inapposite! Again: nothing in the instant case's fact pattern remotely supports the idea that Maynard did not intentionally shoot Ferguson-Cassidy. That is: It is undisputed that Maynard pulled the trigger of his M-16 with the "conscious objective" to strike Plaintiff with a volley of bullets. So, directly contrary to defendant Maynard's contention in his Answering Brief and during Ninth Circuit oral argument (which attempted to classify Maynard's objectively unreasonable choices and actions as mere "negligence" not cognizable in §1983 cases) the jerry-rigged misleading instruction (AKA Negligence Instruction) is a blatantly incorrect statement of law.

"Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F. 3d 292,294 (9th Cir. 1996). Emphases added. The diabolical-trick nature of this instruction is that it directed the jury to exonerate Officer Maynard if they concluded Maynard didn't intend to shoot Plaintiff, that is if the jurors believed Maynard shot Plaintiff "negligently, accidentally or inadvertently." But far from exonerative, to the extent the jury considered any part of his sequence of pre-shooting- and shooting events unreasonable (or in layman's terms: "negligent, accidental or inadvertent", reckless and/or just plain daft) on the part of Maynard and/or his fellow officers, that militated **in favor** of a finding that the shooting was objectively unreasonable.[20/]

20.

Civil liability in federal excessive force cases cannot pivot solely on whether the officer feared for his life at the moment he fired his weapon. A rule validating all such shootings would make a mockery of Peel's aforementioned first principles of policing and civil and social justice.

This highly aberrant plainly erroneous instruction put the fix in the jury verdict because it invited jurors to classify Officer Maynard's remiss actions as worthy of exoneration instead of a finding of liability for excessive force! The instruction was designed to cause lay jurors to CONFLATE unreasonable pre-seizure actions such as Maynard's failing to announce or warn, breaking cover, confronting and shooting Plaintiff or this entire rash sequence of actions by Maynard, with a form of "negligence, accident or inadvertence" insufficient for a liability finding.

Not only was this trick jury instruction NOT "a correct statement of law" as the panel below held (**?!**): While insisting on it, the LA City Defendants' counsel Cory Brente (along with Judge Wilson) euchred promises from Ferguson-Cassidy's counsel that they would refrain from asserting during closing argument that Officer Maynard's action in moving from a position of secluded cover into face-to-face proximity to Ferguson-Cassidy (ie. the ambush itself!) was part of what made Maynard's shooting of Ferguson-Cassidy unreasonable. *See* CFC_EOR_164[last line]-172[line9], and Plaintiff's Rule 28j letter, both attached as an Appendix E herewith. But Plaintiff's counsel should have been permitted to characterize Maynard's actions as "objectively unreasonable" during closing argument in any way he saw fit! It was (after all) closing argument!

In no way can this strange jury instruction and just-mentioned muzzling that occurred relative to it, be considered less than obvious justice-miscarrying plain error. Much less is it harmless error. This instructional fiasco alone merits a remand in the interests of justice.

Questions 3 and 3a.

> *Short Answer*: **This Honorable Court Should Answer the Question Raised in the Asterisked Footnote in** *Mendez*, **and Hold That the** *Graham v. Connor* **"Objective Reasonableness" Test "Tak[es] into Account Unreasonable Police Conduct Prior to the Use of Force That Foreseeably Created the Need to Use It," and Further Hold That the** *Ferguson-*

Cassidy **Jury Should Have Been Specifically Instructed to Consider Whether Officer Maynard's Pre-seizure Conduct in Doing One or More of the Following Acts (or Inactions) Alleged by Plaintiff to Be Unreasonable Pre-seizure Conduct, Gave Rise to Civil Liability on the Officer's Part Notwithstanding the Fact That the Officer Fired a Rifle (Used Deadly Force) to Effect a Detention While in Fear for His Life:**

- **Considering (*Inter Alia* in Light of Plaintiff's Rights under the Second Amendment) the Mere Presence In- or Handling of a Firearm in a Private Residence and its Backyard, to Be a Mortal Threat to the Officer, His Fellow Officers or Anyone Else;**
- **Remaining Silent upon Seeing the Plaintiff Walk Towards- and out the Sliding Glass Door in the Back of a Residence Officer Maynard Was Observing from a Position of Cover;**
- **Breaking Cover and Moving to Within 15 Feet of Plaintiff Knowing That Plaintiff May Be Holding the Gun Maynard Previously Observed (Unassembled); And/or**
- **Not Announcing His Presence or Issuing an Audible Warning (Such as "Police. Freeze or I'll Shoot You") and According Time for Plaintiff to Comply, Before Shooting at Plaintiff.**

Alternatively, this Honorable Court Should Direct the Ninth Circuit to Address the Above-framed Issues on Remand.

Discussion. "*Graham* commands that an officer's use of force be assessed for reasonableness under the 'totality of the circumstances.'" *Mendez,* 137 S. Ct. 1539 at 1547 n.* (quoting *Graham v. Connor,* 490 U.S. 386, 396 (1989)). And in this important asterisked footnote in *Mendez,* this honorable Court stated that it did not grant *certiorari* in the *Mendez* case to decide the question (and prudentially declined to do so in that ruling) of:

- whether the *Graham v. Connor* "objective reasonableness" test "tak[es] into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it."

Rather this high Court specifically directed the parties in *Mendez* to address that issue to the Ninth Circuit on remand. (Emphasis added.). *Id.* ["Any argument regarding the District Court's

application of *Graham* in this case should be addressed to the Ninth Circuit on remand."]

Made sense: Both the letter and spirit of the asterisked *Mendez* footnote made clear that it was NOT limited to the parties in *Mendez* (and the ACLU which has been recognized as an amicus filer in the *Mendez* case), but applied to ANY appropriately similarly situated litigant, of which Mr. Ferguson-Cassidy was distinctly one. However when Mr. Ferguson-Cassidy asked his Ninth Circuit panel (with great rigor in a carefully wrought rehearing petition) to apply the spirit and letter of the Supreme Court's asterisked footnote to Plaintiff's case, the panel declined to do so.[21/] This Ninth Circuit panel declination to so rule in *Ferguson-Cassidy* should not stand:

Indeed, Officer Maynard's unreasonable pre-shooting conduct in *Ferguson-Cassidy* was far more egregious and perfidious than that of the sheriff deputies in *Mendez*, and directly and proximately caused Maynard's shooting of Ferguson-Cassidy. There, in *Mendez*:

- the officers were conducting a warrantless search of a backyard shed they believed to be uninhabited in which (the officers' surmised) a parolee they wished to detain might be hiding. Without any knock or announcement one of the officers pulled back a curtain and immediately saw Mr. Mendez on a bed holding a gun (what turned out to be a BB gun Mendez used to kill rodents) and immediately shot Mendez and his

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21. The Ninth Circuit *Mendez* panel IS currently addressing the parties' contentions with respect to two theories raised in the *Mendez* case. *See* Case No. 13-56686 DktEntry 125 and responsive letter briefs. However there is no assurance that the *Mendez* case will ever return to the Supreme Court: The parties in *Mendez* availed themselves of the Ninth Circuit mediation program following this honorable Court's ruling in *Mendez* and may well do so again after the Ninth Circuit issues its next ruling in that case, and this time succeed in reaching a settlement.

wife and wounded them very badly.

Here, in *Ferguson-Cassidy*:

- Officer Maynard, by his own account, watched Ferguson-Cassidy from a side window of a conventional suburban house for at least 30 seconds to a minute before he saw Ferguson-Cassidy walk towards and out the back sliding glass door; Officer Maynard further knew that Plaintiff and the other occupants of the house socializing with one another were unaware of the officers' presence; and Officer Maynard also knew that a disassembled gun had been seen inside the residence and that the neighbor's 911 call had reported hearing either a firecracker going off or a gunshot fired into the air from the vicinity of the Dunmire house, from which Ferguson-Cassidy was exiting when he was shot. And, according to Maynard's trial testimony quoted in his Answering Brief at p. 12 Officer Maynard broke cover and confronted Ferguson-Cassidy to preempt Ferguson-Cassidy from walking to the officers' location at the eastern edge of the house and shooting at them.

In sum, Officer Maynard had to have known prior to the moment he broke cover unannounced and abruptly confronted Ferguson-Cassidy from the curtilage at the edge of the backyard of the San Pedro residence – at a 15 foot distance – that Ferguson-Cassidy might well be carrying the formerly disassembled gun in his hand and that Maynard would have to immediately shoot Ferguson-Cassidy for his (Maynard's) own protection.

Yet Maynard stayed silent and so ambushed Ferguson-Cassidy without any pre-announcement of his presence or advance warning! It was **totally foreseeable** that Ferguson-Cassidy (who had the perfect right under the Second Amendment to possess a gun in the

residence and its backyard) would – in response to being confronted by surprise in the middle of the night by an aggressive stranger (Maynard) he (Plaintiff) didn't know was there, and who didn't identify himself as a police officer – turn toward Maynard and move his gun upwards; and it was further **totally foreseeable** that this would require Maynard to shoot Ferguson-Cassidy for Maynard's own protection. Clearly then, Maynard's unreasonable pre-shooting actions directly and proximately caused (AKA "provoked") Maynard's shooting of Ferguson-Cassidy.

Alas (for Plaintiff): the Ninth Circuit panel did not recognize the legal landscape change surrounding excessive force cases wrought by this honorable Court in *Mendez* (explicitly making unreasonable pre-shooting conduct an "open question"). As a result the Ninth Circuit panel simply ignored their DUTY post-*Mendez* to evaluate Ferguson-Cassidy's contention that Maynard's unreasonable pre-shooting conduct rendered the shooting excessively forceful as a matter of law and/or at a minimum that the jury had not been provided the legally pertinent instructions they needed to properly and fairly evaluate the objective reasonableness of Officer Maynard's use of force under the totality of circumstances, including: Maynard's unreasonable pre-shooting conduct in ignoring Plaintiff's Second Amendment right to possess a handgun at the house, failing to announce and warn, breaking cover and conducting an ambush.

In a breath-taking act of judicial insouciance, the panel members' Memorandum *per curiam* ruling simply brushed off the gravamen of Ferguson-Cassidy's appeal as if it were lint on the shoulders of their robes, with the following sentences:

> 3. Ferguson-Cassidy also argues that the jury's verdict should be overturned because Maynard's use of force was objectively unreasonable. "A jury's verdict must be upheld if it is supported by

> substantial evidence." *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001) (citation omitted). Here, a reasonable jury crediting as true Maynard's testimony could have concluded that Maynard's use of force was an objectively reasonable response to an immediate threat to his own safety. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (describing the factors to be considered in light of the totality of the circumstances).

In so ruling the panel willfully ignored the entire import of both of the two theories of liability upon which Ferguson-Cassidy based his appeal, one of which was- and is that Officer Maynard had engaged in "unreasonable police conduct prior to the use of force that foreseeably created the need to use it":

- Namely Maynard's unreasonable failure to announce his presence or advance warn when it was practicable to do so–requiring only a loud verbal announcement from his position of cover, which would have rung-out with stunning clarity in the dead of night (2:54 am) and certainly been heeded, and enabled Maynard and his fellow officers to detain Plaintiff for questioning without incident. And Maynard's further unreasonable decision to break cover and confront Plaintiff at a distance of 15 feet knowing Plaintiff might well be carrying a hand-gun and that Maynard would have to ambush Ferguson-Cassidy for Maynard's own protection.

Plaintiff also asserted this conduct gave rise to Maynard's **civil strict liability** for the shooting irrespective of the (conceded) fact that he had shot Ferguson-Cassidy while in fear for his life.

But considering "the moment of the shooting" dispositive, the Ninth Circuit panel simply ignored ALL of Ferguson-Cassidy's pre-shooting conduct and "totality of the circumstances" supportive facts and reasoning! This was dubious pre-*Mendez* (as discussed in Question 1) and

totally contrary to the letter and spirit of the Supreme Court's asterisked footnote in *Mendez*.

Accordingly, this Honorable High Court should either remand to the Ninth Circuit to address Plaintiff's pre- and post-*Mendez* contentions or itself opine on both of Ferguson-Cassidy's central contentions that he is entitled to a liability finding in his favor as a matter of law (or alternatively entitled to a new trial) due to Officer Maynard's factually undisputed patently unreasonable pre-shooting conduct, including: disregarding Plaintiff's Second Amendment rights in a private home, failing to pre-announce and warn (when doing so was clearly practicable) and accord Plaintiff time to comply, breaking cover and ambushing Plaintiff.

Legal Guidance: Now that the Supreme Court has abolished the Ninth Circuit provocation rule, this honorable high Court (or if remanded, the Ninth Circuit) should address whether Maynard's shooting of Ferguson-Cassidy was objectively unreasonable based on a "totality of the circumstances" assessment that is **NOT** artificially cabined to the precise "moment of the shooting" (or at least rule that a jury on remand *could* so decide).[22/] Ferguson-Cassidy has summarized in this section *supra* the manner in which the unreasonable pre-shooting conduct in this case outstrips that in *Mendez* as a factual matter.

22.

The preceding sentence as well as the following discussion in the balance of this *Legal Guidance* section is mostly adapted (and in many but not all passages draws verbatim or nearly-so) from:

- the ACLU's excellent amicus letter brief directed to the *Mendez* panel (*Mendez* appeal Doc. 132-2), written by Adrienna Wong and Peter Bibring;
- the excellent letter brief of Mendezes' Supreme Court counsel directed to the *Mendez* panel (*Mendez* appeal Doc. 138), written by Leonard J. Feldman;

the accurate and apposite content of which the undersigned has verified; and further includes

- passages from the undersigned's own original legal research.

The undersigned hereby attributes this "borrowed" content to these civil rights bar colleagues.

The high Court may find legal guidance for its inquiry:

- in the seminal Ninth Circuit case of *Harris v. Roderick,* 126 F.3d 1189, 1201&1203 (9th Cir. 1997). *Accord: Daniels v. Cty. of Ventura* (9th Cir. 2007) 228 Fed.Appx. 669, 670 (holding that a shooting violated the Fourth Amendment when officers ordered a man armed with a knife to drop it and he did not, because the officer "did not warn [the victim] that he would shoot"). *See also: Hulstedt v. City of Scottsdale*, 884 F. Supp. 2d 972, 991-992 (USDC, Ariz. 2012) (collecting cases);
- in cases arising from analogous Fourth Amendment contexts, *see, e.g., U.S. v. Driver*, 776 F.2d 807, 810 (9th Cir. 1985) (considering whether officer's own actions precipitated exigency to determine reasonableness of warrantless entry); and
- in persuasive authorities from other circuits, which take into account pre-shooting events as part of a holistic analysis of excessive force claims.[23] *See, e.g., Young v. Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005); *Sevier v. Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995).

Guided by *Graham*'s mandate to consider the "totality of the circumstances," other courts have considered officers' conduct preceding the moment of force as a factor relevant to whether the force was objectively reasonable. *See, e.g.,*

- *Williams v. Indiana State Police Dep't*, 797 F.3d 468, 483 (7th Cir. 2015) ("the circumstances. . .created by [the officer] inform the determination as to whether the

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23. Justice Breyer well articulated this holistic approach during the *Mendez* oral argument. *See* https://www.supremecourt.gov/oral_arguments/audio/2016/16-369 at 13:49.

lethal response was an objectively reasonable one");

- *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) ("Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.");
- *Sevier*, 60 F.3d at 699 (internal footnote omitted) (reasonableness of force "depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate conduct . . .unreasonably created the need to use such force").

Courts have specifically held that an excessive force claim may lie against an officer who shoots in response to a perceived risk brought about by the officer's own unreasonable conduct. *See, e.g.,*

- *Weinmann v. McClone*, 787 F.3d 444, 451 (7th Cir. 2015) (officer broke into a garage and immediately opened fire on resident holding gun);
- *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (officer "unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him" by leaping into the path of a car);
- *Yates v. Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) (officer entered residence and shot occupant of home who perceived him to be an intruder); and
- *see also Sample v. Bailey*, 409 F.3d 689, 700-701 (6th Cir. 2005).

The holistic approach reflected in the cases above is far more consistent with Supreme Court precedent than a time-limited approach that considers only the moment of force. *See, e.g.,*

- *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e do not see how [we] can reconcile the Supreme Court's rule requiring examination of the 'totality of the

circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished.").

The Supreme Court has repeatedly affirmed that the excessive force inquiry must consider *all* surrounding circumstances. And it has consistently considered events preceding the moment of force in the excessive force cases that have come before it. *See, e.g.,*

- *Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985) (officer's failure to give a warning, when feasible, before shooting is [at least] a factor relevant to reasonableness);
- *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2021-22 (2014) (analyzing minutes before officers fired shots to determine the reasonableness of their use of force);
- *Tolan v. Cotton*, 134 S.Ct. 1861 (2014) (considering officer's conduct prior to use of force and plaintiff's reaction to determine whether force was warranted); and
- *see also Brower v. Inyo*, 489 U.S. 593 (1989) (unreasonableness of a seizure may be established by the dangerous manner in which it is "set[] up" or "set in motion" by officers).

The "holistic approach" is also consistent with Ninth Circuit cases decided *after* the Supreme Court decided *Mendez*, which have applied *Mendez* thoughtfully, particularly with reference to shootings featuring a failure to warn. *See*

- *Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998, 1006 (9th Cir. 2017); and
- *Chien Van Bui v. City & Cty. of San Francisco*, No. 14-16585, 2017 WL 2814388, *1 (9th Cir. June 28, 2017).

Numerous post-*Mendez* district courts agree. *See* cases collected in *Mendez* Ninth Circuit Doc.138 pp.13-14, letter brief of Leonard Feldman.

Questions 4. and 4a.

Short Answer. **Federal Rule of Civil Procedure 15 and *Foman v. Davis,* 371 U.S. 178, 182 (1962) Mandate that Leave to Amend Pleadings Shall be "Freely Given". Seemingly Due to Embroilment, Judge Wilson Grossly Abused His Discretion and Denied Ferguson-Cassidy's First Motion to File an Amended Complaint ("the First Proposed FAC") That, *Inter Alia*, Would Have Positioned Plaintiff with a Pendent California State Claim for Negligence (CFC_EOR_578-580). This Negligence State Claim, in Turn, Would Have Furnished Plaintiff with a Legal Safety Net[24/] Against Worst-Case-Scenarios in a Federal Legal Environment Increasingly Inhospitable to Civil Rights Claimants. Accordingly, Plaintiff Respectfully Requests this Honorable Court to Remand the Case to a Different District Judge with Instructions to File the First Proposed FAC.**

Discussion. Plaintiff's fuller treatment of the fact pattern and claims therein within the first proposed FAC improved upon the original complaint, *inter alia*, by:

- better meeting federal court pleading requirements surrounding supervisory liability and *Monell* liability against the City of Los Angeles and its Police Department Defendants;
- fortifying Plaintiff's request for punitive as well as compensatory damages; and
- better articulating the state claims, including providing a claim for negligence under California law, which would have positioned Plaintiff with an alternative theory of liability related to Officer Maynard's unreasonable, remiss pre-seizure actions. *Hayes*.

The FAC, then, would have stood Plaintiff in far better stead than he ultimately was when he was forced by Judge Wilson to proceed under the original complaint. Because of that and because it was well-drawn, leave to file Plaintiff's first proposed FAC should have been "freely

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24. *See Hayes v. County of San Diego*, 736 F. 3d 1223 (9th Cir. 2013).

given". FRCP 15. Judge Wilson nevertheless rejected Plaintiff's proposed FAC. Judge Wilson produced a written ruling attempting to justify his denial of leave to amend: CFC_EOR_618et.seq. The Court opined (in sum) that the FAC restructured the case and therefore exceeded the limits of applicable law liberally allowing amended pleadings. Bluntly stated, Judge Wilson's ruling is hostile and (seemingly) the product of "embroilment", as follows:

The first proposed FAC adverts to the "big picture" in which the shooting at issue arose. *See* the first FAC's text at CFC_EOR_550et.seq. In so doing the first proposed FAC refers (at ¶56.b CFC_EOR_563) to the Reggie Doucet, Jr. excessive force incident. That was the horrific event in which a LAPD officer elected to shoot to death a mentally agitated naked African-American man in the transom of the shooting victim's own apartment front door to which Doucet had fled in fear. Because Judge Wilson had presided at the trial of the Los Angeles defendants and LAPD officers sued by Mr. Doucet's heirs for civil rights violations (which produced a defense verdict), Judge Wilson took umbrage at the inclusion of Doucet's case in a list within the text of the FAC that sought to recite facts establishing a "pattern and practice" of serial excessive force by the LAPD. *See* Judge Wilson's caustic rebuke of Plaintiff's counsel for purportedly "inexcusably" characterizing the case at CFC_EOR_620[lines15-18].

The fatal flaw in Judge Wilson's ruling refusing to authorize the filing of same is that even if (*arguendo*) the proposed FAC suffered from most of the infirmities Judge Wilson ascribed to it, under applicable law emphasizing:

- that "Plaintiff is the master of his complaint"[25/];

25.

Caterpillar Inc. et al. v. Williams et al., 482 U.S. 386 (1987) at 392 & fn. 7 ["See *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is

- that FRCP 15(a) should be applied with "extreme liberality"[26]; and
- an orderly procedure for challenging flawed pleadings (per FRCP 12),

Judge Wilson was compelled to allow the filing of the FAC. THEREAFTER in turn:

- the Defendants would have had the option to attack the FAC's alleged stylistic or substantive defects via a motion to strike and/or dismiss and/or to request a more definite statement, etc.;
- Plaintiff would have defended the amended Complaint against such motion(s); and
- the court would have ruled on such motion(s).

Instead, Judge Wilson simply discarded the Federal Rules of Civil Procedure and "did the defendants' dirty-work" for them. Such judicial fiat obliterated Plaintiff's First and Fourteenth Amendment rights to petition government for redress of grievances and rights to have pendent state claims heard in federal court trials of federal claims.

Question 5 and 5a.

Short Answer: **As a Highly Trustworthy Public Record the BOPC Report Is Self-authenticating, the Subject of its Own Statutory Hearsay Exception (Fed. R. Evid. 803(8)), and is Clearly Admissible Evidence the Jury Was Entitled to Consider (And Give Such Weight as They Saw Fit). This Is Black Letter Law!** *Shorter v. Baca,* **101 F. Supp. 3d 876 (USDC Cent. Dist. Cal. (2015)). Yet the Defendants Successfully Shielded from the Jury's Knowledge the Self-damning BOPC Report: As AOB (at pp.50-51) Notes this Sight of the City of Los Angeles (Where Parenthetically the Undersigned Counsel Was Born 63 Years Ago and Raised) Reprehensibly "Talking out of Both Ends of its Civic/Institutional Mouth" on a Matter of this Magnitude Created a Damnable Shameful Mockery and Spectacle, One Plaintiff Implores this Honorable Court to Undo.**

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master to decide what law he will rely upon." (Holmes, J.)"], and 399-400.

26. *Desertrain v. City of Los Angeles,* 754 F.3d 1147,1154 (9th Cir. 2014).

Discussion. Without referencing the BOPC Report's trustworthiness Judge Wilson granted the Defendants officers' in limine motion to exclude it from evidence. *See* AOB §VIIIC. pp.41-51. Nor did Judge Wilson find that the BOPC Report's prejudicial impact would outweigh its probative value. If he had so found, any such ruling would constitute a misuse of FRE 403 to nullify the presumed admissibility of governmental investigative reports. *See Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201 (5th Cir. 1992) text accompanying FN 4, citing *Moss v. Ole South Real Estate, Inc.*, 933 F.2d at 1308-09 (5th Cir. 1991). Nor did the Court classify the BOPC Report as a disciplinary report and/or in the nature of a subsequent remedial measure (which it clearly isn't – it's a wrongdoing-admission-and-transparency/public-accountability measure).

CONCLUSION

Reasonable people can often differ about whether a police officer's use of deadly force was excessive or lawful. *See eg.* Justice Sotomayor's dissent in *Kisela v. Hughes*, 584 U. S. ___ (2018). That is **not** the case here: Maynard's own police chief and L.A.'s own Board of Police Commissioners found the officer culpable!

An epidemic of racially-disproportionate police homicides of African-Americans is now roiling the nation. By the grace of God Plaintiff Ferguson-Cassidy survived Officer Maynard's fusillade of totally inappropriate rifle fire on June 30, 2013. But Plaintiff is damaged and his civil trial and appeal were error-filled travesties. An Order granting *certiorari* is in the overwhelming interests of justice and social peace. Honorable Justices: *Please do the right thing!*

Respectfully submitted,

April 16, 2018 SIGNED: s/ Eric C. Jacobson

Eric C. Jacobson, Supreme Court Bar Member.
Attorney for Petitioner Cash Ferguson-Cassidy

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

CASH JEROME FERGUSON-CASSIDY,

PETITIONER

vs.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; and JACOB MAYNARD, Police Officer II, LAPD Serial No. 34820, in his official capacity and in his individual capacity,

RESPONDENTS

PROOF OF SERVICE

I, ERIC C. JACOBSON, ESQ., do swear or declare that on this date, April 16, 2018, as required by Supreme Court Rule 29, I have served a copy of the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

POS: Writ of Certiorari to 9th Circuit-1

The name and address of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2018.

SIGNED: s/ Eric C. Jacobson
Eric C. Jacobson