NO. 18-5584

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE L. THOMPSON,
Petitioner,

v.

PETE COPELAND, *et al.*,
Respondents.

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

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was excessive force under 42 U.S.C. § 1983 for Sheriff's Deputy Pete Copeland to point his handgun at Lawrence Thompson during a felony arrest when Thompson was unrestrained and had access to a handgun nearby.

2. Whether Thompson's claimed right to be taken into custody for a felony without having a gun pointed at him was clearly established at the time of the arrest.

3. Whether Deputy Copeland violated the Fourth Amendment by conducting an inventory search of the passenger compartment of Thompson's car after impounding it and following Sheriff's Office policy.

4. Whether Thompson properly pleaded a failure-to-train and supervise claim against King County where he alleged only his personal opinion that Copeland needed more training and failed to plead specific facts showing a known pattern of similar problems with other deputies.

LIST OF PARTIES

1. Lawrence Thompson, Petitioner.

2. Pete Copeland and King County, Respondents.

Respondents disagree that the King County Sheriff's Office is a legal entity separate from King County for purposes of this lawsuit. In addition, former Sheriff Sue Rahr was previously dismissed from this case and that dismissal was not challenged on appeal. As a result, she should not be listed as a party at this stage of the proceedings.

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INTRODUCTION

It is largely undisputed that on December 10, 2011, King County Sheriff's Deputy Pete Copeland stopped the car Lawrence Thompson was driving, after observing several civil infractions. Copeland soon determined that Thompson had a suspended license, and he arrested him for the applicable misdemeanor. Copeland believed that a municipal ordinance required him to impound the car, so he did, and then he conducted an inventory search in accordance with his agency's policy. During that search he discovered a loaded revolver and he knew that Thompson was a convicted felon, so he re-arrested Thompson for felony gun possession. A state judge later granted a search warrant and drugs were also discovered in the car.

Thompson was charged with felonies in state court, but a different judge later suppressed the contraband on state-constitutional grounds. Thompson filed suit under 42 U.S.C § 1983 and, after two dispositive motions, the district court dismissed his claims. He then appealed to the Ninth Circuit, which affirmed. This petition followed.

JURISDICTION

Respondents agree with Petitioner's jurisdictional statement, although he mistakenly served the U.S. Solicitor General's Office, instead of the undersigned counsel.

STATUTES OR OTHER PROVISIONS INVOLVED

U.S. Constitution amendment IV:

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

42 U.S.C. § 1983:

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

STATEMENT OF CASE

This case began as a traffic stop. On December 10, 2011, King County Sheriff's Deputy Samuel "Pete" Copeland was assigned to uniformed patrol in the City of Burien, Washington, in a marked Burien Police car. ER 260.[1] Around 11:05 PM, in Burien, Deputy Copeland observed Thompson commit several driving infractions, including stopping past the limit line twice and failing to sufficiently signal a turn. ER 260. Thompson has never disputed that these infractions occurred. ER 265.

[1] Citations are to the Excerpts of Record ("ER") before the Ninth Circuit.

Copeland decided to stop the car because he thought the driver might be impaired or trying to avoid him. ER 260. Thompson was slow to stop, which Copeland found unusual. ER 260-61. He made contact with Thompson, who apologized for the violations, but failed to provide a driver's license. ER 261. He did provide some mail with his name on it, so Copeland ran his name through his computer and discovered that Thompson had a suspended license for an unpaid ticket and had a conviction for unlawful possession of a firearm. ER 261.

Misdemeanor arrest: Copeland decided to arrest Thompson for the crime of driving while license suspended third degree (DWLS 3°) and impound his car. ER 261. He believed that he was required by a Burien municipal ordinance to impound the car, when making such an arrest. ER 242, 258.

Inventory search and felony arrest: Sheriff's Office policy required an inventory search of the passenger compartment after an impound, so Copeland called for back-up, and Deputy Fitchett came to assist. ER 130-33, 258, 261.

Copeland had Thompson get out of his car, patted him down, and sat him on his police-car bumper, but did not handcuff Thompson. ER 261. Deputy Fitchett watched Thompson while Copeland started the inventory search of the car. ER 262.

When Deputy Copeland opened the rear-passenger door, he immediately saw an open white plastic grocery bag on the rear passenger floorboard, containing a revolver with a loaded cylinder with bullets visible and the barrel pointing up at his

head. ER 262.[2] Knowing that Thompson was a convicted felon, Copeland then re-arrested him for the felony of felon in possession of a firearm. ER 260, 262.

At the moment Copeland discovered the revolver, Thompson was still sitting on the bumper, unrestrained, about 10 to 15 feet away from the open car door. ER 127. What happened next is partly disputed.

Copeland asserts that he signaled Deputy Fitchett, unholstered his pistol, and went to what is called the low-ready position, with the firearm clearly displayed, but not pointed at Thompson. ER 127. He then calmly, but firmly told Thompson to get face-down on the ground for hand-cuffing. ER 127.

Thompson has a different version of events, alleging that Copeland pointed his pistol directly at Thompson and threatened to shoot him if he moved wrong. ER 269.

All parties agree that Copeland never shot his pistol and that, otherwise, Thompson was taken into custody without incident. ER 127-28, 262.

Search warrant: Thompson's car was towed to the police precinct and sealed, pending issuance of a search warrant. ER 262. Two days later, Sheriff's Detective Wheeler completed an affidavit of search warrant and submitted it to Judge Susan Mahoney of the Burien Municipal Court for approval. ER 252-56, 260, 262. She reviewed and signed the warrant. ER 256, 262. Detective Wheeler served the warrant and located the loaded revolver, as previously described by Copeland. ER

[2] King County disagrees with Thompson's characterization of the discovery of the revolver as having occurred "after general rummaging through the back[.]" *See* Pet. at 6.

263. He also found evidence of what appeared to be identity theft and a large chunk of black tar heroin, which field-tested positive. ER 263.

Criminal case: On December 7, 2011, King County District Court Judge Victoria Seitz found probable cause to hold Thompson for the state crime of violation of the uniform firearms act (VUFA) and set bail. ER 223-28.

On December 11, 2011, the King County Prosecutor's Office charged Thompson with the felonies of Unlawful Possession of a Firearm in the First Degree and Violation of the Uniform Control Substances Act, and King County Superior Court Judge Ronald Kessler found probable cause to support the charges and set bail. ER 231-33.

On July, 24, 2012, King County Superior Judge Susan Craighead suppressed the gun and drugs, finding that traffic stop was pretextual, violating Art. 1, Sec. 7 of the Washington State Constitution. ER 237. She also found that the inventory search was pretextual because Deputy Copeland allegedly did not seriously consider alternatives to impoundment and had an investigatory motive. ER 237-38. This ruling effectively ended the state prosecution. ER 235.

Civil case: Mr. Thompson eventually lodged a pro se prisoner[3] complaint under § 1983, alleging a variety of civil rights violations arising out of this incident, including an unlawful seizure, false arrest and prosecution, unlawful search, and excessive force, against Deputy Copeland, and failure-to-train and supervise, against King County. ER 267-71.

[3] Thompson is currently in federal custody on a conviction unrelated to this incident.

Copeland and King County filed two motions to dismiss, which were effectively motions for summary judgment, except for the claim against King County. The first resulted in the dismissal of the claims related to the initial traffic stop, the false arrest and prosecution and the *Monell* claim against King County. ER 16-20, 29-30, 34-36. The second motion resulted in dismissal of the unlawful search and excessive force claims. ER 2-4, 7-14. The district court entered judgment against Thompson and he appealed. ER 1, 290.

Thompson's appeal was limited to his claims against Copeland on the inventory search and use of force and against King County for the claim of failure-to-train and supervise. Thompson's Opening Br. at 2-3.

A divided panel of the Ninth Circuit affirmed the dismissal of the excessive force claim in a published opinion, finding that the force used was excessive, but that Thompson's right was not clearly established at the time of the incident. Dkt. #45-1 at 1-28 (Pet. App.). The panel also upheld dismissal of the search and the *Monell* claims in a concurrently filed memorandum disposition. Dkt. #46 at 1-5 (Pet. App.).

SUMMARY OF ARGUMENT

A. Deputy Copeland's decision to briefly point his firearm at Thompson did not amount to excessive force because Thompson was unrestrained, had access to a loaded revolver, and was being arrested for a gun-related felony. In addition, this Court should overrule *Espinosa v. City & Cty. of San Francisco,* 598 F.3d 528 (9th Cir. 2010), *cert. denied,* 565 U.S. 1156 (2012).

B. Copeland was also entitled to qualified immunity because Thompson did not show that he had a clearly established right to be arrested without having a gun pointed at him.

C. Deputy Copeland's search of the passenger compartment of Thompson's car was constitutional because Sheriff's Office policy required an inventory search of impounded vehicles. In addition, this Court should decline Thompson's invitation to reverse-incorporate state law and instead overrule the Ninth Circuit's contrary holding in *United States v. Wanless,* 882 F.2d 1459 (9th Cir. 1989).

D. Copeland was also entitled to qualified immunity because Thompson has not shown that he had a clearly established right to be free from an inventory search of the passenger compartment of his car.

E. Thompson failed to plead plausible facts supporting a failure-to-train and supervise claim against King County because he made vague and conclusory allegations, which did not establish a known pattern of similar incidents with other officers.

ARGUMENT

1. The qualified immunity standard

Qualified immunity protects government officials from civil liability when their conduct does not violate clearly established statutory or constitutional rights, which a reasonable official would have known. *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2085 (2011).

Whether an official may be held civilly liable for unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken. *Anderson v. Creighton,* 483 U.S. 635, 639 (1987); *Messerschmidt v. Millender,* 565 U.S. 535, 132 S. Ct. 1235, 1244-45 (2012).

Under *Saucier v. Katz,* this Court formerly mandated a rigid two-step process for resolving qualified immunity claims. 533 U.S. 194, 201 (2001). First, a court was required to decide whether the plaintiff had alleged or shown facts sufficient to make out a violation of a constitutional right. *Id.* Second, if the first step was satisfied, the court had to decide whether the right was clearly established at that time. *Id.*

Subsequently, in *Pearson,* this Court recognized that *Saucier*'s rigid protocol came with a price, sometimes in the form of a court unnecessarily reaching constitutional issues. 555 U.S. at 236–37, 240-41. Thus, district and appellate courts are now free to determine the order of decision making that best fits the case at bar. *Id.,* at 242.

Here, the district court held that both the use of force[4] and the inventory search and where constitutional and never reached the question of whether Thompson had proven a clearly established right. ER 10, 14. A divided panel of the Ninth Circuit affirmed the judgment, but held that pointing a handgun at a suspect during a felony arrest with a handgun nearby amounted to excessive force. Dkt. #45-1 at 9-10 (Pet. App.). But it also held that Deputy Copeland was entitled to qualified immunity because this right was not clearly established at the time. *Id.*

Respondent Copeland of course supports the judgment in his favor, but disagrees with the Ninth Circuit's holding that a non-actualized, threatened use of force amounted to excessive force, during a felony arrest for a gun crime where the suspect was unrestrained and had access to a loaded revolver nearby.

[4] Since the weapon was only displayed and pointed, it was really a threatened use of force. *See Robinson v. Solano Cty.,* 278 F.3d 1007, 1017 (9th Cir. 2002) ("I do not believe that an officer who points a gun while making an otherwise proper seizure of a suspect can be found to have violated the Fourth Amendment by using excessive force upon the suspect, when no force whatsoever has been applied.") (Fernandez, J., concurring).

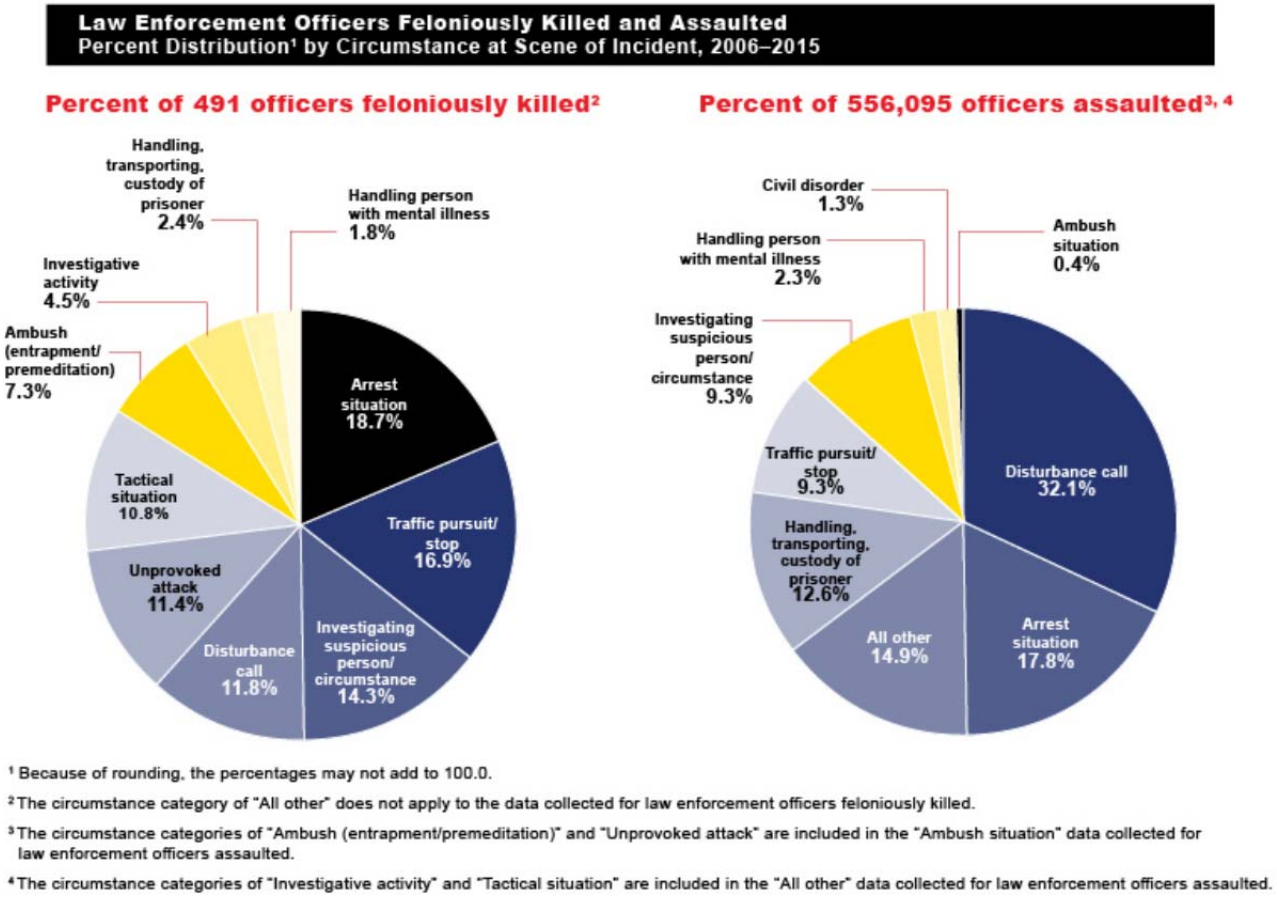
2. Copeland was entitled to qualified immunity for briefly pointing his duty weapon to complete the felony arrest of a potentially dangerous person with access to a loaded revolver.

Excessive force claims are analyzed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)). Objective reasonableness is the touchstone of this inquiry and subjective motivation plays no role in it. *Graham,* 490 U.S. at 396-97. A court must look at the totality of the circumstances. *Garner,* 471 U.S. at 8-9.

Here, Deputy Copeland should have been entitled to qualified immunity because he briefly pointed his handgun in what had escalated to a felony arrest situation involving a potentially dangerous individual who had access to a loaded handgun. Copeland's threatened use of force did not amount to excessive force. Moreover, the Ninth Circuit's holding that a police officer pointing a handgun at a suspect amounts to a "high level of force," is mistaken and should be overruled.

2.1 Traffic stops and arrests represent high-risk situations for police officers.

The charts below are sourced from the FBI's Uniform Crime Report – Law Enforcement Officers Killed and Assaulted (LEOKA) data, 2015.



See https://ucr.fbi.gov/leoka/2015/figures/figure_4_2015.pdf (last visited April 12, 2017); *see also* Dkt. #25-1 at 13-14 (Pet. App.) (citing same statistics).

The LEOKA data show that traffic stops and arrest situations are among the most dangerous for police officers, amounting to a combined total of 27.1% of assaults against officers from 2006-2015, and a combined total 35.6% of situations

leading to an officer's felonious death, from 2006-2015. *Id.* In fact, arrest situations led to the highest proportion of officer deaths. *Id.*

Furthermore, in 2015, the Western and Pacific states led the nation in the rate of assault against officers and the rate of assaults with injuries:

Table 70

Law Enforcement Officers Assaulted

Region and Geographic Division, 2015

Area	Total[1]	Rate per 100 officers	Assaults with injury	Rate per 100 officers	Number of reporting agencies	Population covered	Number of officers employed
Number of victim officers	**50,212**	**9.9**	**14,281**	**2.8**	**11,961**	**241,382,351**	**507,852**
NORTHEAST	**7,767**	7.7	2,534	2.5	2,892	44,823,303	101,011
New England	**3,521**	11.9	894	3.0	910	14,166,413	29,678
Middle Atlantic	**4,246**	6.0	1,640	2.3	1,982	30,656,890	71,333
MIDWEST	**6,722**	8.9	2,114	2.8	2,933	38,767,397	75,757
East North Central	**2,784**	7.6	989	2.7	1,218	19,474,830	36,409
West North Central	**3,938**	10.0	1,125	2.9	1,715	19,292,567	39,348
SOUTH	**18,963**	9.6	4,638	2.3	4,291	86,938,822	198,151
South Atlantic	**12,520**	10.3	2,601	2.1	2,076	51,053,258	121,678
East South Central	**2,539**	8.7	857	3.0	848	12,907,198	29,019
West South Central	**3,904**	8.2	1,180	2.5	1,367	22,978,366	47,454
WEST	**16,760**	12.6	4,995	3.8	1,845	70,852,829	132,933
Mountain	**4,973**	12.0	1,463	3.5	770	21,408,662	41,278
Pacific	**11,787**	12.9	3,532	3.9	1,075	49,444,167	91,655

[1]Regional and divisional totals do not include data for Alaska which were not available for inclusion in this table.

See https://ucr.fbi.gov/leoka/2015/tables/table_70_leos_asltd_region_and_geographic_division_2015.xls (last visited on April 12, 2017)).

The incident here was both a traffic stop and an arrest and it occurred in a Pacific state. Thus, it was statistically, and objectively, among the more dangerous encounters Deputy Copeland could find himself in.

2.2 The quantum of force used was minor relative to the potential danger and the seriousness of the offense for which Thompson was being arrested.

Up until the point that a loaded revolver was discovered on the rear-passenger floorboard, Mr. Thompson was being arrested for the misdemeanor of driving with a suspended license. *See* RCW 46.20.342(1)(c). It is undisputed that he sat un-handcuffed, on the front bumper of the police car, parked near Thompson's car, with the loaded gun in it. ER 127. Thompson was only 10 to 15 feet away from the gun and was taller and heavier than Deputy Copeland. ER 127. Mr. Thompson could have charged past Deputy Copeland and grabbed the revolver in a matter of seconds. ER 127.[5]

Moreover, Deputy Copeland was already aware that Mr. Thompson had a prior felony conviction for unlawfully possessing a firearm and suspected that he might have been trying to hide the firearm, prior to the stop, indicating that Thompson knew where the gun was. ER 127. At that point, only Thompson knew if he was willing to escalate once the stakes were higher.

The force used here was actually a threat of force, placing it on the lower-end of the force spectrum. The arrest was for a serious, weapons-related crime and the evidence that a crime had occurred, and a firearm was present, was concrete and perceived directly by Deputy Copeland. In light of the undisputed context, the

[5] For example, at a full clip, sprinter Usain Bolt could cover two to three times that distance in a single second. *How Fast Can Humans Run?* Elite Feet, https://elitefeet.com/how-fast-can-humans-run (last visited September 10, 2018).

quantum of force used here was appropriate and, in fact, achieved the desired effect – Mr. Thompson's compliance and a safe, routine felony-handcuffing process. ER 127.

There was a factual disagreement between Copeland and Thompson about where the weapon was pointed, but even if we accept Mr. Thompson's assertion that Copeland pointed the gun at his head, the deputy was still entitled to qualified immunity under the first prong of *Saucier*.

It is undisputed that Deputy Copeland did not discharge his firearm or physically injure Thompson. ER 127-28. In fact, the point of displaying the weapon was to deter resistance and ensure that both the suspect and officer were able to safely complete the arrest process. *Id.*

In his appeal below, Thompson attempted to make much of the Ninth Circuit's opinion in *Espinosa v. City & Cty. of San Francisco,* which remarked that "pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force." 598 F.3d 528, 537–38 (9th Cir. 2010), *cert. denied,* 565 U.S. 1156 (2012); *see also Thompson v. Rahr,* 885 F.3d 582, 586 (9th Cir. 2018) (following *Espinoza).*

But to submit that a police officer pointing a firearm at a suspect, without more, is a high level of force, goes too far, and defies common sense. If true, that would mean that a police officer striking a suspect with a baton, using pepper spray, or deploying a Taser in the Ninth Circuit would be using *less* force than an officer who merely points her weapon at a suspect. *See Young v. Cty. of Los Angeles*, 655 F.3d 1156, 1162–63 (9th Cir. 2011) (defining pepper spray and baton strikes as

intermediate force); *see also Espinoza,* 598 F.3d at 545-46 (Wu, J., dissenting) (pointing their weapons at suspect in dark attic was objectively reasonable where he was non-compliant and they could not see if he was armed). Most suspects would no doubt prefer the judicious display of a police firearm over the type of contact involving intermediate force. As a result, if it grants Thompson's petition, this Court should overrule *Espinoza.*

2.3 Copeland was entitled to qualified immunity because Thompson has not shown that he had a clearly established right to be taken into custody for a gun-related felony without having an officer point a handgun at him.

Even if this Court would be inclined to agree that it was unconstitutional for Copeland to threaten force during a felony arrest, Thompson was unable to prove that he had a clearly established right to be arrested for a felony gun crime without having a gun briefly pointed at him. In the Ninth Circuit in particular there have been several dissents on this very issue, indicating that these matters are not "beyond debate."

Indeed, the fact that the Ninth Circuit panel in this case was divided on this same issue, shows that the right was not clearly established. *See Thompson,* 885 F.3d at 590-91 (Cristen, J., dissenting). If federal judges can continue to debate these matters, then the matter cannot be considered settled for the police officer out on the street.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'

" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 2093 (2012)). The existing precedent must have placed the statutory or constitutional question beyond debate. *Id.; Plumhoff v. Rickard,* 134 S. Ct. 2012, 2023 (2014). Without fair notice, a police officer is entitled to qualified immunity. *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015).

As this Court recently re-affirmed:

> The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.' This inquiry 'must be undertaken in light of the specific context of the case, not as a general broad proposition.

Mullenix, 136 S. Ct. at 308 (citations omitted, emphasis in original).

Here Thompson failed to establish that legal precedent clearly established, beyond debate, that Thompson had a right to be arrested for a felony gun crime without the officer pointing his firearm at him, while a loaded revolver was accessible nearby.

As a result, his petition on this ground is not well founded and amounts to a claim of the misapplication of a properly stated rule of law.

3. Copeland was entitled to summary judgment on the inventory search claim because he followed a standardized policy and Thompson lacked a clearly established right not to have his vehicle searched.

Deputy Copeland was properly entitled to qualified immunity for the inventory search of Thompson's car because: (1) the Fourth Amendment did not require Copeland to consider alternatives to impoundment, (2) Sheriff's Office policy required an inventory search, and (3) Thompson has not established that he had a clearly established right to be free from an inventory search. Moreover, this Court should reject Mr. Thompson's continued invitation to reverse-incorporate state constitutional law and instead overrule *United States v. Wanless,* 882 F.2d 1459, 1464 (9th Cir. 1989) (reverse-incorporating state law to evaluate constitutionality of inventory search in federal prosecution).

3.1 The Fourth Amendment did not require Copeland to consider alternatives to impoundment.

Thompson alleges that Copeland should have considered alternatives to impoundment, but it is well-established that the Fourth Amendment does not require police officers to exhaust all alternatives before impounding a vehicle. *Colorado v. Bertine*, 479 U.S. 367, 373-74 (1987) (upholding an inventory search even if it would have been possible to make other arrangements for the property).

3.2 This Court should reject Thompson's reverse-incorporation-of-state-law theory because this matter arises under the U.S. Constitution.

§ 1983 civil rights claims must rely on the deprivation of any rights secured by the Constitution or laws of the United States, therefore, a violation of a right arising only under a state constitution does not provide the basis for a § 1983 lawsuit. *See Armstrong v. Asselin*, 734 F.3d 984, 989 (9th Cir. 2013). But Mr. Thompson is asking this Court to graft additional rights onto the Fourth Amendment, by reverse-incorporating state law. Pet. at 15.

His vessel for this proposition is footnote 7 of *United States v. Wanless,* 882 F.2d 1459, 1464 n.7 (9th Cir. 1989) ("We think it fair to presume that Washington State Troopers, as a matter of course, follow Washington law as set forth by the state's highest court.")

In *Wanless,* a divided panel of the Ninth Circuit suppressed contraband recovered from an inventory search, because the police did not inform the owner of the vehicle that he did not have to consent to the inventory search. 882 F.2d at 1460. In reaching this conclusion, the panel majority relied on dicta in *State v. Williams,* 102 Wn.2d 733, 689 P.2d 1065, 1071 (1984), for the proposition that Washington courts required this step before conducting an inventory. *See* 882 F.2d and 1463-64.

The dissent chided the panel majority for relying on dicta in one case and reading into police department policy a non-exist requirement to comply with all state court search-and-seizure rulings. 882 F.2d at 1467-68 (Wright, J., dissenting).

"The majority thereby reaches a result indirectly that *Chavez–Vernaza* does not allow the court to reach directly…There is no basis on which to conclude that failure to request such consent violates the standard procedures of the Washington State Patrol." *Id.; see also United States v. Chavez–Vernaza*, 844 F.2d 1368, 1374 (9th Cir.1987) (evidence seized by state officials in compliance with federal law is admissible in federal court without regard to state law).

It turns out that the dissent was correct: Washington law does not require a request to consent prior to conducting an inventory search. *State v. Tyler*, 177 Wn.2d 690, 711 (2013) ("We decline to add a consent requirement to the inventory search exception."). Indeed, the Washington Supreme Court similarly observed that any language to the contrary in *State v. Williams* was dicta and not supported by the authority cited. As a result, *Wanless* rests on a mistaken reading of Washington law, but the decision remains on the books.

Moreover, *Wanless* materially departed from this Court's precedent. Nowhere in *South Dakota v. Opperman* did this Court hold, or even imply, that a police department's policy must incorporate all state court search-and-seizure law. 428 U.S. 364 (1975). To do so, was simply a reflection of a personal policy preference, and an attempt to do an end-run on Supreme Court and other Ninth Circuit precedent. *See Chavez–Vernaza,* 844 F.2d at 1374. The dissent all but noted this state of affairs.

Other circuits have similarly rejected this reverse-incorporation theory. *Gordon v. Degelmann*, 29 F.3d 295, 300-301 (7th Cir. 1994) (noting that "[s]carcely a month

goes by that the Supreme Court does not reject another permutation on the theme that, by violating state law, state employees violated the Constitution."); *United States v. Le,* 173 F.3d 1258, 1265 (10th Cir. 1999) (state law standards do not apply to determine legality of search under the federal constitution).

Wanless is an outlier opinion which conflicts with other circuits and binding precedent. If this Court grants Thompson's petition, it should overrule *Wanless.*

3.3 Copeland searched Thompson's car in accordance with an objectively reasonable and standardized inventory search policy.

The search here passed constitutional muster because Deputy Copeland impounded Mr. Thompson's car under a mandatory impound ordinance, and Copeland was required to conduct an inventory search under Sheriff's Office policy. Moreover, Thompson's continued reliance on the state court's suppression findings is misplaced because that court applied state law and the findings lack collateral estoppel effect.

This Court first established the inventory-search exception in *Opperman*, 428 U.S. at 369-372 (inventory searches pursuant to standard police procedures are reasonable).

It was undisputed that the King County's Sheriff's Office General Orders Manual provided for the search of unlocked containers in the passenger compartment of an impounded vehicle. ER 132-133.

Thompson's reliance on *Florida v. Wells,* is misplaced. 495 U.S. 1 (1990). The concern in *Wells* was that the Florida Highway Patrol had no policy regarding the

opening of locked containers found during an inventory search. 495 U.S. at 4–5. As a result, this Court affirmed the Florida Supreme Court's holding that the search was insufficiently standardized to survive Fourth Amendment scrutiny. *Id.*

Those concerns are not present here, because this is not a locked-container case. The gun was found in plain view, in an open bag on the rear floorboard of the passenger cabin. ER 262. And it was found in accordance with a standardized, mandatory-search-on-impound policy. As a result, Copeland's discretion was limited and his inventory search was objectively reasonable.

Because this is an objective inquiry, Mr. Thompson's speculative assertions that Copeland also had a subjective-investigative motive do not compel a different result. Also, since the state court's findings do not have preclusive effect against Copeland, Thompson must point to some other, admissible evidence of pretext here.[6] Even if he had such evidence, that would not change the objective reasonableness of this search.

3.4 Thompson has not shown that he had a clearly established right to be free from an inventory search.

Even if this Court questions the constitutionality of the inventory search, Deputy Copeland was still entitled to qualified immunity under step two of *Saucier,* because a competent police officer would not have known on December 5, 2011, that

[6] State law governs the application of collateral estoppel in federal civil rights cases and Thompson's reliance on the state court's suppression findings is unavailing because the legal issues were different and Copeland was neither a party nor in privity with a party in the state criminal law prosecution. *See Allen v. McCurry,* 449 U.S. 90, 96 (1980); *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561-62 (1993).

Mr. Thompson had a clearly established right not have his vehicle subjected to an inventory search after being arrested for DWLS 3°. Furthermore, the fact that a municipal court judge later issued a search warrant based on Copeland's predicate search, is a strong indication that it should not have been obvious to Copeland that his search was improper.

It is undisputed that Copeland believed he was required to impound the car and that belief was supported by the text of the ordinance. ER 258, 242. Perhaps the ordinance went too far for some, but that would not have been obvious to a line police officer in 2011. He thought he was following both the city ordinance and the Sheriff's Office inventory search policy.

Moreover, the fact that Judge Mahoney later granted a warrant to search Mr. Thompon's car, is a strong factor weighing in support of qualified immunity. ER 252-58. If an independent municipal court judge lends her imprimatur to a search of Thompson's car, based largely upon Deputy Copeland's predicate search, then it is very difficult to maintain that Deputy Copeland acted unreasonably. *Messerschmidt,* 132 S. Ct. at 1245; *United States v. Leon,* 468 U.S. 897, 913-14 (1984). "Under *Messerschmidt,* approval by superiors, prosecutors, and a judge almost guarantees the honest police officer's claim to qualified immunity." *Armstrong,* 734 F.3d at 994. Even more so where charges were filed and there where at least two judicial findings of probable cause. ER 226, 231-33.

Similarly, the fact that Judge Mahoney and Judge Craighead apparently disagreed about the validity of the predicate search only highlights that qualified

immunity is appropriate here. *See Wilson v. Layne,* 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). It certainly was not an issue that was "beyond debate."

A denial of qualified immunity here would have been tantamount to a finding that Judge Mahoney was "plainly incompetent" for issuing the warrant. *See Messerschmidt,* 132 S. Ct. at 1248. It was the neutral magistrate's responsibility to determine whether the requirements of the Fourth Amendment were met, and a lay police officer should not ordinarily be expected to question that judgment. *Messerschmidt,* 132 S. Ct. at 1245. As a result, Copeland was entitled to qualified immunity.

4. Thompson failed to plead plausible facts to support a failure-to-train and supervise claim against King County.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. Threadbare recitals of the elements of a cause of action and conclusory statements are not enough. *Id.* Nor are alleged facts that merely raise the possibility that a defendant acted unlawfully. *Id.*

To establish a *Monell* claim for failure-to-train under § 1983, Thompson had to demonstrate that the county's failure-to-train reflected deliberate indifference to the constitutional rights of its inhabitants *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-92 (1989).

Here Thompson's complaint failed to allege plausible facts to support his claim. First, Thompson focused only on Deputy Copeland. ER 271. Second, he made factually unsupported and conclusory allegations. *Id.*

As a result, his petition on this question presents at most a misapplication of a properly stated rule of law and certiorari should be denied. In the event that this Court grants certiorari on this question, it should overrule *Jackson v. Barnes,* because the Ninth Circuit's holding in that case deviates from this Court's plausibility standard. 749 F.3d 755, 764 (9th Cir. 2014), *cert. denied,* 135 S. Ct. 980 (2015).

CONCLUSION

Deputy Samuel Copeland and King County respectfully request that this Court deny certiorari.

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RESPECTFULLY submitted,

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