No. _____

In The
Supreme Court of the United States

CITY OF BAKERSFIELD, AARON STRINGER,
Petitioners,

v.

LESLIE LARAY CRAWFORD,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

1. Did the Ninth Circuit err when it held that evidence of prior incidents which indicate that an individual may be mentally ill could be introduced for the purpose of determining whether an officer used excessive force and/or was negligent even though neither the officer nor his department had any prior knowledge of such incidents.

This Court has carefully defined the analysis to be undertaken when considering whether the use of force, whether deadly or not, was "objectively reasonable" under the Fourth Amendment. *See e.g., Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985); *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Scott v. Harris,* 550 U.S. 372, 381-85 (2007). Whether force is "objectively reasonable" is based on the facts and circumstances confronting the involved officer, without regard to the officer's underlying intent or motivation and must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

Based upon the framework that this Court created, an appropriate analysis into the reasonableness of the use of force included factors such as (1) the nature of the crime or other circumstances known to the officer at the time force was applied; (2) whether the plaintiff/decedent posed an immediate threat to the safety of the officer or to others; (3)

whether the plaintiff/decedent was actively resisting arrest or attempting to evade arrest; (4) the amount of time the officer had to determine the type and amount of force that reasonably appeared necessary; (5) the type and amount of force used; (6) the availability of alternative methods; (7) the number of lives at risk and the parties' relative culpability; (8) whether it as practical for the officer to give warnings; and (9) whether it should have been apparent to the officer that the person he or she used force against was emotionally disturbed. *See e.g.,* Ninth Circuit Model Jury Instruction No. 9.25; Third Circuit Model Jury Instruction No. 4.9; Eighth Circuit Model Jury Instruction No. 4.40.

In this case, the district court concluded that the plaintiff could not testify about her observations of her son on prior occasions during which her son had displayed signs of mental illness because the involved officer did not have any knowledge of her son's conduct on these occasions and as such, it was not relevant to the issue of whether the force used by the defendant officer was unreasonable and/or whether the defendant officer was negligent. This holding is entirely consistent with the analysis that this Court established in analyzing the use of force under the Fourth Amendment.

In complete contravention to the parameters that have been defined by the likes of *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989), and its progeny, the Ninth Circuit in this case concluded that evidence about an individual's behavior on other

previous occasions was relevant to a jury's analysis of whether the officer knew or should have known that the individual was purportedly mentally ill even though the officer had no knowledge of these incidents.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth circuit, whose judgment is sought to be reviewed are:

- Leslie Laray Crawford ("Crawford"), individually and as successor in interest to decedent Michael Laray Dozer, plaintiff and appellant below, and respondent here.

- The City of Bakersfield ("City") and Aaron Stringer ("Stringer"), defendants and appellees below, and petitioners here.

Michael Dozer, the decedent's father, was named as a nominal defendant but was not a party in either the appeal to the Ninth Circuit or in regard to this Petition.

RULE 29.6 STATEMENT

There are no corporations involved in this proceeding.

RELATED PROCEEDINGS

Petitioners are unaware of any proceedings relating to the litigation giving rise to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Bakersfield and Police Officer Aaron Stringer respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit's memorandum opinion at issue in this petition appears at 944 F.3d 1070 (9th Cir. 2019) and in Petitioners' Appendix ("Appendix") at page 1a.

The district court's order on the subject motion in limine appears at 2016 U.S. Dist. Lexis 139398 (E.D. CA Oct. 6, 2016) in the Appendix at page 26a.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit Opinion was filed on December 16, 2019 (Appendix at p. App. 1). This Petition is timely within 90 days of that date. This Court has jurisdiction to review the Ninth Circuit's December 16, 2019 decision on writ of certiorari under under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> 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.

Respondent alleges petitioners violated her rights secured by the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

> cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. INTRODUCTION

The issue in this case is whether it is appropriate to consider evidence which was completely unknown to a police officer and/or his police department in analyzing whether an officer's use of force was unreasonable under the Fourth Amendment and/or negligent.

In defining the test for whether the use of force was "objectively reasonable", this Court has made it clear that the relevant inquiry is whether the use of force, regardless of whether it is deadly or non-deadly, is "objectively reasonable" *based on the facts and circumstances confronting them*, without regard to their underlying intent or motivation and must be judged from the perspective of a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight.

In flagrant disregard of the parameters this Court established in *Graham v. Connor* and its progeny, the Ninth Circuit has now ruled that a plaintiff can introduce evidence of behavior from other prior occasions, about which the involved officer knew nothing, to show that the police officer knew or should

have known that the involved individual was mentally ill.

This decision is entirely incompatible with the previous decisions of this Court and even with previous decisions in both the Ninth Circuit and others which hold that information that is not known to the involved officer is not relevant to this analysis.

The Ninth Circuit has been previously admonished by this Court in its overly broad analysis when it comes to the issue of whether a police officer is entitled to qualified immunity. *See e.g. Sheehan v. City & Cnty of S.F.,* 135 S. Ct. 1765 (2015); *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

The Ninth Circuit's decision is this case is just a further effort to dilute an officer's ability to defend himself in these Fourth Amendment cases.

The Court should grant certiorari to re-examine the Ninth Circuit's decision and to limit the scope of evidence that can be considered to that which was originally envisioned by the framework this Court set forth in *Graham v. Connor*. The relevant inquiry is what a reasonable officer would do based on the facts and circumstances confronting him or her at the scene and should not be expanded to include information which was completely unknown to him or her.

B. CONFRONTED WITH A MAN WHO WAS TRYING TO KILL HIM OR CAUSE HIM GREAT BODILY INJURY, OFFICER AARON STRINGER HAD NO CHOICE BUT TO USE DEADLY FORCE TO PROTECT HIMSELF AND MEMBERS OF THE PUBLIC

On August 6, 2014, Elsa Torres went to get gas at a TMP gas station located on Brundage Lane in Bakersfield, California. Ms. Torres's nephew, her two children, her little brother, and her mother were with her. [Ninth Circuit Opinion, Appendix at pp. 4a-6a.]

When Ms. Torres arrived, she asked her oldest son to go pay for the gas and she then began to put the gas pump into the gas tank of her car. A man, later identified as Michael Dozer, approached Ms. Torres, removed the gas pump from her gas tank, and sprayed gas on both Ms. Torres and on himself. Mr. Dozer proceeded to use a lighter to ignite the gasoline. [Ninth Circuit Opinion, Appendix at pp. 4a-6a.]

Ms. Torres immediately got in her car and fled to an area where she could safely call 911. She told the operator that there was a man trying to burn them. [Ninth Circuit Opinion, Appendix at pp. 5a-6a.]

At approximately 12:30 p.m., Bakersfield Police Officer Aaron Stringer heard the dispatch that a subject at a TMP gas station had poured gasoline on a woman and tried to light her on fire. The dispatch also indicated that there were children in the car. A second

dispatch indicated that the woman had been lit on fire. [Ninth Circuit Opinion, Appendix at pp. 5a-6a.]

Officer Stringer activated his siren and lights and proceeded to the gas station as quickly as he could. Officer Stringer was wearing a Bakersfield Police uniform. His shirt had an embroidered badge on the front, said "Police Officer" and Officer Stringer's name on the right side and had large gold letters saying "POLICE" on the back. [Ninth Circuit Opinion, Appendix at pp. 5a-6a; Supplemental Excerpt of Record filed in the United States Court of Appeals for the Ninth Circuit ("SER") p. 66; Reporter's Transcript of Proceedings filed in the United States Court of Appeals for the Ninth Circuit ("RT") Vol. I, 285:15-21; SER p. 107; RT Vol. II, p. 37:5-13.]

Upon his arrival, Officer Stringer was flagged down by a frantic witness, ultimately identified as Angel Mora, who was saying that a woman had been set on fire. [SER p. 66; RT Vol. I, pp. 225:10-14, 226:2-6, 277:3-20, 280:2-19.] At that point, Elsa Torres and her young son came over to where Officer Stringer was. Ms. Torres was hysterical and crying. Ms. Torres told Officer Stringer that Mr. Dozer had tried to light her on fire. Ms. Torres and Mr. Mora urgently pointed at Mr. Dozer as the individual who was responsible for pouring gas on Ms. Torres and for lighting the fire. [Ninth Circuit Opinion, Appendix pp. 5a-6a.]

Given the information Officer Stringer had been provided, Officer Stringer proceeded toward the area

where Mr. Dozer was to investigate what had occurred. Officer Stringer felt that Mr. Dozer was still a threat because there were people and a business in the near vicinity. [Ninth Circuit Opinion, Appendix at pp. 5a-7a; SER, p. 66; RT Vol. I, pp. 233:19-234:7, 234:10-14, 235:1-5, 235:6-9, 277:3-20; SER p. 107, RT Vol. II, pp. 19:1-13, 20:20-21:7.]

Officer Stringer began to walk toward the area where Mr. Dozer was. When Officer Stringer was within approximately 20 feet of where Mr. Dozer was, he stopped and that is when *Mr. Dozer* began to approach Officer Stringer. Officer Stringer had no intention of using force at that time and had no weapon in his hand when he initially proceeded toward Mr. Dozer. Officer Stringer just wanted to talk to Mr. Dozer. [Ninth Circuit Opinion, Appendix at pp. 5a-7a; SER, pp. 66, 107; RT Vol. I, pp. 276:5-12, 275:25-276:12; RT Vol. II, pp. 22:23-23:6, 35:3-7.]

Officer Stringer could see that Mr. Dozer was very agitated, pacing, and appeared to be under the influence of a narcotic. Mr. Dozer said to Officer Stringer , "You want to do this. Let's go." In response, Officer Stringer said "No. Let's not do this. I just want to talk to you." Mr. Dozer appeared very angry and made it obvious to Officer Stringer that Mr. Dozer intended to challenge him. [Ninth Circuit Opinion, Appendix at pp. 5a-7a.]

Mr. Dozer proceeded to pick up a u-shaped bike lock which had a metal handle and rapidly advanced toward Officer Stringer. Mr. Dozer charged at Officer

Stringer with the bike lock over his head and in a manner which demonstrated an intent to harm or kill Officer Stringer. [Ninth Circuit Opinion, Appendix at pp. 6a-9a; SER pp. 66, 107; RT Vol. I, pp. 254:12-16, 288:10-15; RT Vol. II, pp. 2:44:19-21, 44:25-45:45, 46:16-19, 187:18-21, 189:3-19, 199:2-4, 295:16-22.]

Officer Stringer backed up and told Mr. Dozer to "stop" and to "put it down." However, Mr. Dozer continued to advance toward Officer Stringer. Officer Stringer continued his efforts to back up but Mr. Dozer was advancing faster than Officer Stringer could back up. [Ninth Circuit Opinion, Appendix at pp. 6a-9a; SER pp. 66, 107; RT Vol. I, pp. 276:13-22, 287:12-20; RT Vol. II, pp. 60:1-6, 62:1-9, 193:21-22.]

At that point, when Mr. Dozer was extremely close, Officer Stringer had no choice but to discharge his firearm one time because Mr. Dozer would not stop and he was attempting to kill or inflict serious bodily injury on Officer Stringer. [SER p. 66, 107; RT Vol. I, pp. 254:21-22, 276:16-22, 285:22-286:1; SER p. 107, RT Vol. II, pp. 23:16-24:1, 24:9-12, 27:17-20, 35:8-11; 193:23-25.]

Because of how quickly Mr. Dozer was moving toward Officer Stringer and how quickly everything transpired, there was no opportunity to use any lesser force such as a taser, a baton, or pepperspray, all of which had a high likelihood of being ineffective at stopping the immediate and imminent threat that Mr. Dozer posed to Officer Stringer's life. [Ninth Circuit Opinion, Appendix at pp. 6a-9a.]

Mr. Dozer was transported to the hospital but died from his wound.

C. THE DISTRICT COURT CORRECTLY PRECLUDED THE DECEDENT'S MOTHER FROM TESTIFYING ABOUT HOW MR. DOZER HAD BEHAVED ON OTHER OCCASIONS, THOUGH THERE WAS A PLETHORA OF EVIDENCE FROM POLICE PROCEDURES EXPERTS ABOUT THE SIGNS OF MENTAL ILLNESS AND WHAT A WELL TRAINED POLICE OFFICER SHOULD DO

The Decedent's mother, Plaintiff Leslie Laray Crawford, sued the City of Bakersfield and Bakersfield Police Officer Aaron Stringer alleging the following claims for relief:

1. Violation of Civil Rights (42 U.S.C. § 1983) (Based on Unreasonable Use of Deadly Force);

2. Wrongful Death (Cal. Government Code §§ 815.2(a), 820(a); Cal .Civil Code § 43)(Based on Battery);

3. Wrongful Death (Cal. Government Code §§ 815.2(a), 820(a))(Based on Negligence).

While not specifically set forth in the Complaint, during the course of discovery, the Plaintiff testified that the decedent suffered from schizophrenia and

would often talk to himself. The Plaintiff also testified in her deposition that Mr. Dozer had received counseling and been given various medications. [Ninth Circuit Opinion, Appendix at pp. 10a-12a.]

In advance of trial, Defendants filed a Motion in Limine seeking to Exclude Any Reference to Decedent Michael Dozer Being Mentally Ill because the Plaintiff did not designate a medical expert who could testify that Michael Dozer was allegedly schizophrenic and the Plaintiff was not qualified to offer such testimony. The Defendants argued that the evidence should be excluded because: (1) whether or not Mr. Dozer was schizophrenic was not information that Officer Stringer had at the time of the incident; and (2) the Plaintiff did not designate any expert to testify that Mr. Dozer allegedly suffered from such condition and the Plaintiff was not qualified on her own to testify about it. [Ninth Circuit Opinion, Appendix at pp. 11a-14a; Appellant's Excerpt of Record filed in the United States Court of Appeals for the Ninth Circuit ("ER") Vol. II, pp. 237-266.]

In ruling on the Defendants' Supplemental Motion, the Court rejected the Defendants' first argument finding that the issue of Mr. Dozer's alleged mental illness would be relevant to determining whether the use of force was reasonable, even if Officer Stringer did not know Mr. Dozer was so afflicted.

The Court then proceeded to analyze the issue of whether the Plaintiff was competent to testify regarding Mr. Dozer's alleged mental illness. The

Court concluded in relevant part that:

> "[L]ay witnesses have been held incompetent to testify as to the existence or treatment of physical illnesses" and mental condition. *Frisone v. United States*, 270 F.2d 401, 403 (9th Cir. 1959). While a witness may testify to her own observations and opinions that are rationally based on the perception of the witness, the existence or treatment of a mental illness "falls clearly outside the area of common knowledge and within the area where expert testimony is required." *Frisone*, 270 F.2d at 403.
>
> While the Plaintiff may present lay witness testimony regarding factual matters and opinions within her personal knowledge regarding Decedent's mental condition, the issue is that Plaintiff is not testifying as to her observations on the date of the incident but as to her prior knowledge of Defendant's mental condition....Although Plaintiff may present expert testimony in the liability phase of trial regarding indicators of mental illness and the training officers receive, Plaintiff's testimony regarding her observations of Decedent on other occasions is not relevant to the issue of whether Defendant Stringer should have known that Decedent's behavior could

> have been caused by mental illness.
>
> [United States District Court, Eastern District of California's Order Re Defendants' Motions in Limine No. 1 and 9, Appendix at pp. 44a-45a.]

Despite the District Court's decision to preclude the Plaintiff from testifying about her observations of Michael Dozer on *other* occasions, the District Court did permit the introduction of an abundant amount of evidence identifying the indicators of mental illness and the training police officers receive pertaining to mentally ill people. [Ninth Circuit Opinion, Appendix at pp. 9a-11a.]

This enabled Plaintiff's counsel to argue in closing statements that Officer Stringer knew or should have known that Mr. Dozer was mentally ill. [Ninth Circuit Opinion, Appendix at pp. 12a-13a; SER, p. 183; RT Vol. III, pp. 26:6-29:11, 36:13-23, 39:24-40:5, 58:24-59:11.]

D. THE NINTH CIRCUIT REVERSED THE LOWER COURT'S DECISION

On December 16, 2019, the Ninth Circuit reversed the District Court's ruling on the Defendant's Motion In Limine finding that the District Court had "abused its discretion" in excluding the Plaintiff's proposed testimony about Decedent Michael Dozer's behavior on other occasions because:

> Crawford's testimony regarding Dozer's past behavior and treatment was relevant to whether he was in fact mentally ill at the time. Evidence that Dozer had *previously* behaved in ways consistent with mental illness and had been taken to mental health providers for treatment, makes it more likely that he *continued* to suffer from mental illness on the day of the shooting. In turn, whether Dozer was *in fact* mentally ill that day is relevant to whether he would have *appeared* to be mentally ill, and thus to whether Stringer knew or should have known that Dozer was mentally ill...
>
> [Ninth Circuit Opinion, Appendix at pp. 19a-21a.]

REASONS THE PETITION SHOULD BE GRANTED

A. THE NINTH CIRCUIT'S DECISION IS IN COMPLETE DISREGARD OF *GRAHAM V. CONNOR* AND ITS PROGENY AND IMPROPERLY EXPANDS THE SCOPE OF EVIDENCE THAT SHOULD BE CONSIDERED WHEN DETERMINING IF THE USE OF FORCE BY A POLICE OFFICER WAS EXCESSIVE OR EVEN NEGLIGENT

The Ninth Circuit's decision in this case is in

total disregard of long established precedent that sets forth the framework upon which the use of force is to be analyzed. Nothing contained in this framework permits the introduction of evidence of prior incidents, which the involved officer knew nothing about, to demonstrate that the involved individual suffered from mental illness.

There is a plethora of case authority which defines how Fourth Amendment claims are to be analyzed and none of them provide that it would be appropriate to introduce evidence of prior incidents when evaluating "whether the officers' actions are 'objectively reasonable' **in light of the facts and circumstances confronting them**, without regard to their underlying intent or motivation" and **from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight**. *Graham v. Connor*, 490 U.S. 386, 397 (U.S. 1989) [emphasis added]; *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

The Ninth Circuit's decision in this case is in complete disregard of the *Graham* holding in that the Ninth Circuit is expressly allowing evidence which goes far afield from the situation the Officer was confronted with and which exemplifies the type of 20/20 hindsight this Court has specifically and repeatedly cautioned against.

In reaching its decision, the Ninth Circuit relied on a single Ninth Circuit case from 1999 which did not even involve the use of force by a police officer.

See United States v. James, 169 F.3d 1210, 1214-15 (9th Cir. 1999) [holding that documents corroborating the stories that the defendant claimed the decedent told her about the decedent's past acts of violence were relevant to her self-defense argument].

By relying on this case, the Ninth Circuit is suggesting that Mr. Dozer's mother should have been permitted to testify as to her observations of Mr. Dozer on other occasions such that it would make it more likely to a jury that Mr. Dozer suffered from some sort of mental illness. However, the Ninth Circuit's analogy to the *James* case misses the mark in terms of the analysis the jury is supposed to conduct in an excessive force case. It makes sense that a criminal defendant like in *James* would be permitted to testify as to the horrifying information she knew about the decedent's past acts which played a part in her decision to commit a violent act in self defense. However, this is completely inapposite to the situation presented in this case because Officer Stringer knew nothing about Mr. Dozer's past behavior and it clearly did not play a part in Officer Stringer's decision to use force.

The Ninth Circuit's Model Jury Instruction 9.25 specifically sets forth relevant factors the jury must consider in analyzing the use of force. These factors include but are not limited to: (1) the severity of the crime; (2) whether the individual posed an immediate threat to the safety of the officer or to others; (3) whether the individual was actively resisting arrest or attempting to evade arrest; (4) the type and amount of

force used; and (5) whether or not it should have been apparent to the police officer that the individual against whom he used force was emotionally disturbed.

These factors all track the spirit and intent of this Court's holding in *Graham v. Connor*, *supra*. However, the Ninth Circuit's effort to now expand the element dealing with whether the individual was emotionally disturbed by allowing testimony of the individual's behavior on other occasions essentially invites the jury to conduct a 20/20 hindsight analysis and to consider this factor based on information which was not available to the police officer at the time the force was used.

This Court should grant certiorari to prevent the Ninth Circuit from creating an avenue for Fourth Amendment liability that was clearly not envisioned by the analysis that this Court has defined through *Graham v. Connor*, and its progeny.

B. THE NINTH CIRCUIT HAS CREATED AN IRRECONCILABLE STANDARD WHEREIN A POLICE OFFICER CANNOT INTRODUCE EVIDENCE HE WAS UNAWARE OF TO JUSTIFY HIS USE OF FORCE BUT THE PLAINTIFF CAN USE SUCH INFORMATION TO SHOW THE FORCE WAS UNREASONABLE

In addition to being in complete contravention to *Graham v. Connor* and its progeny, the Ninth

Circuit's decision creates a substantial conflict in regard to the scope of admissible evidence in Fourth Amendment cases.

The Ninth Circuit has long held that evidence an officer had no knowledge of is not admissible in determining whether the use of force was reasonable under the Fourth Amendment. This includes evidence of being emotionally disturbed/mentally ill and other evidence such as being in a gang or being under the influence of narcotics. *See Ting v. United States*, 927 F.2d 1504, 1508 (9th Cir. 1991) [holding that whether a suspect was emotionally disturbed or mentally ill is only relevant to a *Graham* analysis if the officers on scene knew that to be the case); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003); *Santos v. Gates*, 287 F.3d 846, 851 (9th Cir. 2002); *Rubalcava v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995); *Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997) ["[W]hen considering a charge of excessive force under the Fourth Amendment, evidence outside the time frame of the [incident] is irrelevant and prejudicial."]; *Witt v. West Virginia State Police, Troop 2,* 633 F.3d 272, 275 n. * (4th Cir. 2011) [noting that the plaintiff's "criminal history and possession of illegal narcotics…are irrelevant to the excessive force analysis because, as the troopers themselves acknowledge, they 'did not know' these facts 'at the time' they allegedly beat [the plaintiff]"– even though the facts of the incident were disputed].

Under this authority, a police officer is not permitted to introduce evidence such as gang

affiliation or drug use where he had no knowledge of such information prior to the use of force. Certainly, evidence that an individual had a violent history or was in a violent gang would corroborate a police officer's version of events, yet the Ninth Circuit has repeatedly refused to introduce such evidence because it would be inappropriate in the framework set forth in *Graham v. Connor*.

In complete contradiction to this rationale, the Ninth Circuit's decision in this case permits a plaintiff to introduce evidence of a plaintiff or decedent's conduct on other occasions despite the fact that the involved officer had no knowledge of such conduct to support a claim of mental illness.

The Ninth Circuit's decision in this case cannot be reconciled with the holdings that prevent a police officer from introducing evidence of gang affiliation or drug use.

While the Ninth Circuit claims to disavow a "two track" approach when it comes to excessive force analysis in regard to ordinary use of force cases and those involving someone with mental illness, *see e.g., Vos v. City of Newport Beach*, 892 F.3d 1024, 1030 (9th Cir. 2018); *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), the Ninth Circuit's decision in this case is exactly that. The Ninth Circuit has now created a separate analysis for those cases involving an individual who is mentally ill by allowing lay witnesses to testify about his or her observations of an individual on other previous occasions even though the involved officer would not have had any knowledge of

such incidents. This is an exception that is being made for mentally ill plaintiffs or decedents which is not made for any other plaintiff and which is certainly not being made for any police officer who would undoubtedly benefit from a jury learning that a particular individual was in a gang or was under the influence of narcotics.

Given the Ninth Circuit's extensive history of attempting to avoid giving a police officer the benefit of qualified immunity, it is difficult to view this latest decision by the Ninth Circuit as anything other than a further effort to make it more difficult for police officers in these Fourth Amendment cases.

There should be no legal distinction between the rules prohibiting the introduction of evidence such as gang affiliation or drug consumption which was not known to the involved police officer and the *admission* of evidence of being mentally disturbed on other occasions which the officer knew nothing about. Yet, that is exactly what the Ninth Circuit has done in contravention to case authority within the Ninth Circuit and in other circuits. This Court should grant certiorari to correct the conflict that the Ninth Circuit's decision has created.

C. THERE IS A CONFLICT AMONGST CIRCUITS AS TO THE ADMISSIBILITY OF EVIDENCE PERTAINING TO AN INDIVIDUAL'S MENTAL HEALTH

Review of the Ninth Circuit's decision is also

necessary to resolve a split among the circuit courts on the admissibility of "pre-incident" events wherein an individual demonstrated signs of mental illness. This Court has never addressed this issue.

The Ninth Circuit's decision in this case, which was not based on supportive legal precedent, allows the introduction of evidence that an individual demonstrated signs of mental illness on other occasions and so the police officer knew or should have known that he was mentally ill at the time of this encounter.

By contrast, the Seventh Circuit has repeatedly rejected such a holding finding that evidence outside the time frame of the shooting is irrelevant and prejudicial.

In *Wallace v. Mulholland*, 957 F.2d 333, 336 (7th Cir. 1992), the Seventh Circuit specifically excluded evidence of decedent's mental health condition finding that evidence about the general nature of a mental condition was irrelevant and prejudicial and that the subject of the case was the decedent's *actual* behavior on the date in question and the way the officers responded to it. The *Wallace* Court correctly maintained this Court's previous holdings when it concluded that the issue was not how the individual conducted himself on other occasions but how he conducted himself on *this* occasion. *See also Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986); *Sherrod v. Berry*, 856 F.2d 802, 803 (7th Cir. 1988) [Evidence outside the time frame of the shooting is irrelevant

and prejudicial].

At least one district court in the Second Circuit has adopted similar holdings to those set forth in *Wallace*. *See e.g., Colter v. Reyes*, 2017 U.S. Dist. LEXIS 103617 (E.D. NY July 4, 2017) [Excluding evidence of mental health condition since the involved officer did not have any knowledge of such condition].

The Seventh Circuit and the district court in the Second Circuit aligns itself with the framework that this Court established in *Graham v. Connor* and its progeny. That is, the relevant inquiry remains what occurred at the time of the incident and should not be based on information that was unavailable to the involved police officer. The Ninth Circuit's rule, by contrast, runs afoul of this Court's analytical framework giving a plaintiff yet another advantage in these Fourth Amendment cases.

Absent this Court's intervention, the Ninth Circuit's decision in this case will continue to drive decisions within the Ninth Circuit and expand the breadth of evidence that a police officer has to confront even when he had no knowledge of it before the incident took place.

Review is necessary to resolve the split between the Ninth Circuit and the Seventh Circuit and to provide all circuits with this Court's guidance and direction on this issue.

D. THIS QUESTION PRESENTED IN THIS CASE IS RECURRING AND IMPORTANT

The issue of police encounters with individuals who purport to suffer from mental illness is obviously an issue that has been a "hot topic" as of late in regard to a police officer's use of force and will undoubtedly arise again.

Police Officers regularly encounter individuals who display symptoms of mental illness and are faced with the question of whether to use force to defend themselves and/or members of the public. A 2015 report from the Treatment Advocacy Center concluded that one in four of all fatal police encounters involve individuals with severe mental illness. Doris A. Fuller, H. Richard Lamb, M.D., Michael Biasotti and John Snook*, Overlooked In the Undercounted*: *The Role of Mental Illness in Fatal Law Enforcement Encounters* (available at http:www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf (last visited October 24, 2018).)

A 2013 joint report by the Treatment Advocacy Center and the National Sheriffs' Association concluded that at least half of the people shot and killed by police each year in the United States have mental health problems. E. Fuller Torrey, M.D., Sheriff Aaron D. Kennard (ret.), M.PA., Donald F. Eslinger, Michael C. Biasotti, Doris Fuller, *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness?* (Available at http:www.treatmentadvocacycenter.org/storage/docu

ment s/2013-justifiable-homicides.pdf (last visited October 24, 2018).

This Court has confronted cases which involve a police officer's use of deadly force against individuals with mental illness but they have all been in the context of whether or not a police officer was entitled to qualified immunity. *See e.g., Kisela v. Hughes*, 138 S.Ct. 1148 (2018); *City & Cty. of S.F. v. Sheehan,* 575 U.S. 600 (2015).

However, no prior holding by this Court has addressed whether or not a jury should be presented with evidence which was unknown to the responding police officer, or even his police department, which demonstrates that the individual was mentally ill and as such, the use of force was unreasonable and/or the police officer was negligent.

The Ninth Circuit's holding in this case will open a flood gate of evidence which circumvents this Court's very holding in *Graham v. Connor* and its progeny. That is, as it stands based on the Ninth Circuit's decision, a plaintiff can introduce evidence which the police officer knew nothing about to show that the individual involved was mentally ill and that the use of force by the officer was therefore unreasonable which is completely contrary to the analysis that is supposed to be done.

Given the significant number of cases involving police officers and mentally ill individuals, these types of issues are going to come up in circuits across the

Country and it is incumbent upon this Court to issue a clear decision to guide circuits and police officers.

CONCLUSION

The Ninth Circuit continues to defy decades of clearly established jurisprudence as set forth in *Graham v. Connor* and continues to make it more and more difficult for police officers to do their jobs. Accordingly, Petitioners City of Bakersfield and Officer Aaron Stringer ask the Court to grant their petition for writ of certiorari of the Ninth Circuit's decision in this case.

Respectfully submitted,

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