No. _____

In the
Supreme Court of the United States

ERIN SHEPHERD AND TERRY REED,
Petitioners,

v.

ANGELA STUDDARD,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Police officers are entitled to qualified immunity unless they violate constitutional rights in factual situations squarely governed by controlling case precedent that clearly establishes their conduct as unconstitutional. The Sixth Circuit found that Sheriff's Deputies Erin Shepherd and Terry Reed are not entitled to qualified immunity for shooting Edmond Studdard—armed with a knife and approaching them over ***open ground***—based solely on a Sixth Circuit case in which officers shot a suspect ***inside a building***. Did the Sixth Circuit err in finding that a case involving a shooting-through-doorway tactical scenario squarely governed a situation in which deputies faced a knife-wielding suspect on open ground?

2. Defendants are entitled to summary judgment unless the nonmoving party can produce probative evidence demonstrating a triable issue of fact. Prior to shooting Edmond Studdard in self-defense, all of the deputies on the scene who could see Studdard testified that Studdard was walking toward them with a knife except Deputy Kyle Lane, who testified that he did not see Studdard walking and "didn't see him ***not*** walking either. I was too busy focused on that knife that he had in his hand. I saw he was moving." (emphasis added). Did this deputy's lack of knowledge create a triable issue of fact as to whether Studdard was walking?

3. Qualified immunity protects officers who make mistakes of either fact or law. During a 30-second encounter, Deputies Reed and Shepherd perceived

Edmond Studdard as approaching them with a knife at a distance of 10 feet or less, although hindsight reveals that Studdard may have been as far as 34 feet away for summary judgment purposes. Does Reed and Shepherd's mistaken perception of the distance between themselves and a knife-wielding suspect during a 30-second encounter strip them of qualified immunity?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

The Petitioners are Erin Shepherd and Terry Reed, both Shelby County, Tennessee Sheriff's Deputies at the time of the events at issue, and Defendants below. The Respondent is Angela Studdard, wife, administrator *ad litem*, and personal representative of Edmond Studdard (deceased), and Plaintiff below, who filed the underlying action under 42 U.S.C. § 1983.

No corporations are involved in this proceeding.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Angela Studdard v. Shelby County, et al., Case No. 2:17-cv-02517-JPM-tmp (W.D. Tenn.). The Western District of Tennessee entered an order denying Petitioners' motion for summary judgment based on qualified immunity on January 22, 2019.

Studdard v. Shelby County, et al., Case No. 19-5084 (6th Cir.). The Sixth Circuit Court of Appeals affirmed the ruling of the District Court on August 12, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Erin Shepherd and Terry Reed respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit Court of Appeals' opinion appears at 934 F.3d 478 (6th Cir. 2019) and is included as Appendix A. The district court's decision is unreported, but included as Appendix B.

JURISDICTIONAL STATEMENT

The district court's jurisdiction was invoked under 28 U.S.C. § 1331. The judgment of the Court of Appeals was entered on August 12, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Deputies Erin Shepherd and Terry Reed came face to face with a man covered in blood, holding a knife up to his neck and refusing to drop it, and yelling at them to shoot him. That man, Edmond Studdard, had cut his own wrists minutes earlier. The deputies pleaded with him to drop the knife; instead, he began moving toward them, the knife raised in the air or to his own neck. Three of the four deputies who could see Studdard perceived Studdard as being no more than ten or fifteen feet from them, and the fourth deputy could not estimate how far he perceived Studdard as being from those officers. At a perceived distance of ten feet or less, Deputies Shepherd and Reed shot a total of five times, striking Studdard twice and ceasing fire as soon as he fell. They immediately rushed to him to secure the knife and to render medical aid. Mr. Studdard did not die on the scene, likely due to their quick actions in rendering aid. Tragically, however, he died two months later at the hospital. Nonetheless, the facts in the record make it clear that Shepherd and Reed acted reasonably, even if based on a mistaken perception.

That day (July 7, 2016) began with a 911 call that was made at around 1:00 p.m. from A & H Iron Works, a business located in Shelby County, Tennessee. (Lane Dep., RE 89-5, PageID# 551). Shelby County

Motorcycle Deputy Kyle Lane responded to the call, believing at the time he was responding to a hit-and-run incident. Lane knew only that "a male white . . . had a wreck and then he left the scene." (Lane Dep., RE 89-5, PageID# 550). But in fact, before Lane's arrival, Studdard had gotten into an altercation with his father at A & H Iron Works. As a result, Studdard crashed his vehicle into his father's parked vehicle, slit his wrists with a blade, and left the building on foot.

Deputy Lane pulled into a parking lot and a group of people ran out to him yelling, "There he is. Go get him. He slit his wrists." (Lane Dep., RE 89-5, PageID# 552). Lane caught up to Studdard on his motorcycle, trying to talk to him. (Lane Dep., RE 89-5, PageID# 555). Once Lane got close enough, Studdard turned around, looked at Lane, and as Lane put it, "show[ed] me a knife." (Lane Dep., RE 89-5, PageID# 555). "When [Studdard] reached around or turned around to show me his knife, he wanted me to see that knife. And I interpreted that as a threat that if I get close to [him] . . . he's going to use it." (Lane Dep., RE 89-5, PageID# 559). Once Lane saw the knife and Studdard's bloody wrists, he "backed up and started calling all the information in[ ]" on the radio. (Lane Dep., RE 89-5, PageID# 558). The blade appeared to be "2 to 5 inches" and the weapon, altogether, appeared to be "6 to 8" inches long. (Lane Dep., RE 89-5, PageID# 557).

Studdard continued walking (and at times running) down the road, (Lane Dep., RE 89-5, PageID# 553; Shepherd Dep., RE 89-3, PageID# 477-78), and Lane continued to follow. (Lane Dep., RE 89-5, PageID# 560). As Lane followed Studdard, there was a tall wooden

fence to Studdard's right, on the east side of the road. (Lane Dep., RE 89-5, PageID# 561). The fence was over four feet tall, running north to south. (Lane Dep., RE 89-5, PageID# 562, 576, 587).

Shelby County Sheriff's Deputies Erin Shepherd, Samuel Pair, and Terry Reed—all members of the Patrol Crime Response Unit—responded to Lane's call for assistance in their vehicles.[1] (Pair Supplemental Dep., RE 91-2, PageID# 853). Shepherd, Reed, and Pair wore plainclothes under black vests with the yellow lettering "sheriff" on the front and back in bold print.[2] (Pair Supp. Dep., RE 91-2, PageID# 849-50; Reed Dep., RE 89-4, PageID# 514, 522). All deputies that day carried Sig Sauer .40 caliber service handguns. (Reed Dep., RE 89-4, PageID# 515).

Reed testified that the call to assist Lane "started off as a hit-and-run call that came out. And then it turned into an armed party" call. (Reed Dep., RE 89-4,

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[1] Deputy Inbrahim Abdullah also testified that he arrived near the scene, but stayed a good distance away. The other deputies testified that they did not see Abdullah in the immediate vicinity of the shooting. In any event, it is undisputed that Abdullah did not actually see Studdard when the shots were fired. (Abdullah Dep., RE 89-7, PageID# 647, 649).

[2] Shepherd, Reed, and Pair were also all Critical Incident Team (CIT) certified. (Reed Dep., RE 89-4, PageID# 507; Shepherd Dep., RE 89-3, PageID# 475; Pair Dep., RE 89-6, PageID# 631). CIT training includes advanced training on how to respond to suspects suffering from mental illness or a mental disability. (Pair Dep., RE 89-6, PageID# 596). When possible, CIT officers go to scenes where a deputy is dealing with a suspect who is unstable or experiencing a mental health crisis. (Reed Dep., RE 89-4, PageID# 509).

PageID# 518). Radio traffic reflected that an "individual that was walking had a knife or an edged weapon in his hand, he was walking, and the other officer on a motor bike was behind him." (Abdullah Dep., RE 89-7, PageID# 640). While it is unclear what radio traffic information each deputy heard, they all knew Lane was dealing with an armed subject. "Deputy Lane had already put over the radio that he has a knife in his hand. You know he's cut his wrists . . . He obviously, at some point, had a blade because he slit his wrists." (Pair Supp. Dep., RE 91-2, PageID# 867; *see generally* Reed Dep., RE 89-4, PageID# 518).

The area Studdard was walking through was not isolated from the public. It is an industrial complex with various businesses throughout. (Lane Dep., RE 89-5, PageID# 553). The businesses included A & H Iron Works, Conway Heating and Air, a golf driving range, and the Memphis Cheer Elite All-Stars cheerleading training camp. (Shepherd Dep., RE 89-3, PageID# 476; Lane Dep., RE 89-5, PageID# 553-54, 556, 560; Reed Dep., RE 89-4, PageID# 523).

When the deputies arrived, Studdard was still walking. (Reed Dep., RE 89-4, PageID# 520). Reed saw "Lane following a male white that appeared to have a knife in his hand." (Reed Dep., RE 89-4, PageID# 519). Pair and Shepherd arrived with Reed right behind them. The two vehicles pulled up "basically simultaneously." (Reed Dep., RE 89-4, PageID# 521). Pair—with Shepherd as his passenger—pulled around in front of Studdard to block him. (Pair Supp. Dep., RE 91-2, PageID# 854). The officers parked their vehicles and got out "in the middle, toward the opposite side of

the street." (Abdullah Dep., RE 91-2, PageID# 644). The officers essentially boxed Studdard in with the fence and their vehicles. (Reed Dep., RE 89-4, PageID# 526). They exited their vehicles and some began approaching Studdard. (Pair Supp. Dep., RE 91-2, PageID# 855; Shepherd Dep., RE 89-3, PageID# 484).

When Pair, Reed, and Shepherd pulled up, Lane testified that Studdard went into the grassy area, "backed up, [and] had his back to the fence." (Lane Dep., RE 89-5, PageID# 564). The other deputies were all "moving in from where [they] had started, but Lane stopped where he was." (Shepherd Dep., RE 89-3, PageID# 489). Studdard "started waving what appeared to be a bladed weapon around." (Shepherd Dep., RE 89-3, PageID# 483-86, 488).

When the deputies came face-to-face with Studdard, he had blood all over him. (Pair Supp. Dep., RE 91-2, PageID# 852). Pair testified Studdard's face, head, and body were "covered in blood. He looked like a zombie." (Pair Supp. Dep., RE 91-2, PageID# 856, 862). Shepherd testified that Studdard "was covered in blood and appeared to have a weapon in his hand." (Shepherd Dep., RE 89-3, PageID# 480). At this point, Shepherd did not know whether Studdard had harmed just himself or others as well. (Shepherd Dep., RE 89-3, PageID# 481). "We knew he was bleeding, or had blood on him, and had a weapon." (Shepherd Dep., RE 89-3, PageID# 482).

All indications were that the weapon Studdard was holding was a knife with a blade.[3] Pair, a former construction worker, called it a "utility folding knife." (Pair Supp. Dep., RE 91-2, PageID# 863, 865). Reed saw what "appeared to be a knife with a pointed tip . . . ." (Reed Dep., RE 89-4, PageID# 534). Shepherd testified that the object was "shiny" and "appeared to be some kind of folding knife that was open. There was so much blood it was hard to tell exactly color or size." (Shepherd Dep., RE 89-3, PageID# 491).

Shepherd, Reed, Pair, and Lane all had their service pistols drawn and ordered Studdard to drop the weapon. (Lane Dep., RE 89-5, PageID# 567-68, 570; Pair Dep., RE 89-6, PageID# 618; Shepherd Dep., RE 89-3, PageID# 493). The deputies continued to say "Put the knife down." (Lane Dep., RE 89-5, PageID# 570). Shepherd specifically said "Stop it's okay. Don't do it. Let's not do this. Put the knife down." (Shepherd Declaration with attached BPSI Statement, RE 89-12, PageID# 822). One of the deputies yelled "If you do not put the knife down, we are going to shoot you." (Lane Dep., RE 89-5, PageID# 570, 577). In response, Studdard said "That's what I want." (Lane Dep., RE 89-5, PageID# 570).

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[3] It now appears Studdard may have removed or dropped the razor blade that was in the knife sometime between cutting his wrist and the deputies' arrival. Regardless, there is no dispute that the object Studdard was holding looked like a knife and that it was reasonable to believe Studdard possessed a bladed weapon capable of causing serious bodily injury or death. (*See* Order, RE 153, PageID# 2552-53; *see also* Defendants' Expert Report, RE 89-10, PageID# 740, 742; Plaintiff's Expert Report, RE 89-11, PageID# 809).

As the deputies continued to order Studdard to drop the weapon, Studdard continued moving and waving the knife. "[H]e's obviously not stationary. So he's moving back and forth, and he's swinging his arms, and his legs are moving. I mean, his whole body is moving." (Pair Supp. Dep., RE 91-2, PageID# 857-58). At some point Studdard pointed the knife at the deputies. (Pair Supp. Dep., RE 91-2, PageID# 858, 864; Shepherd Dep., RE 89-3, PageID# 492; Reed Dep., RE 89-4, PageID# 530). At other times he had the knife to his own neck. (Lane Dep., RE 89-5, PageID# 571).[4] Even still, Studdard was "moving towards [them] at all times, almost." (Pair Dep., RE 89-6, PageID# 617).

Lane testified that Studdard "started to panic. Like he started – looked like he was starting to pace, look around, see what his next option was going to be." (Lane Dep., RE 89-5, PageID# 564). Lane is not sure if he saw Studdard walking or swaying, but "[h]e was moving." (Lane Dep., RE 89-5, PageID# 565). Lane specifically testified, among other things, that he did

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[4] It is unclear from the testimony when Studdard had the knife to his neck, (s*ee, e.g.*, Pair Supp. Dep., RE 91-2, PageID# 868); therefore, for purposes of summary judgment, Defendants assume he had it to his neck when the shots were fired as that seems to be the light most favorable to the Plaintiff. In any event, both parties' experts agreed that an individual with a knife up to his own neck still poses a deadly threat to others. (Defendants' Expert Report, RE 89-10, PageID# 740, 742; Plaintiff's Expert Report, RE 89-11, PageID# 809). As Plaintiff's expert put it, "a person could quickly move a knife from their throat to a stabbing position" and, thus, it would be reasonable to believe Studdard's stance, even with the knife to his neck, posed an immediate threat of death or serious bodily injury to them. (Plaintiff's Expert Report, RE 89-11, PageID# 809).

not see Studdard walking, but "I didn't see him ***not*** walking either. I was too busy focused on that knife that he had in his hand. I saw he was moving." (Lane Dep., RE 89-5, PageID# 565) (emphasis added). Reed testified Studdard was "frantic" and had a knife "in his hands, waving in the air." (Reed Dep., RE 89-4, PageID# 525).

As Pair described it, "He's moving constantly. It's fast. You know, he's moving fast. You know, we told him to drop the knife. God, I know I yelled it I can't tell you how many times; it was just over and over and over." (Pair Supp. Dep., RE 91-2, PageID# 860). "No response from him except, shoot me, kill me, shoot me, kill me, and then screaming." (Pair Supp. Dep., RE 91-2, PageID# 860). Studdard was "moving forward, backwards, side to side, all inside this box. He's swinging arms, moving legs, head bobbing, covered in blood, you know, from head to toe it seemed like." (Pair Supp. Dep., RE 91-2, PageID# 861). Reed testified that Studdard "yelled 'Shoot me. Shoot me.' I don't remember how many times he said it . . . ." (Reed Dep., RE 89-4, PageID# 529). At some point, Studdard began moving toward Deputy Lane. (Shepherd Dep., RE 89-3, PageID# 490). Studdard then turned and began walking back toward Reed and Shepherd. (Shepherd Dep., RE 89-3, PageID# 493).

Although measurements of the road, when taken in the light most favorable to the Plaintiff, suggest that Studdard was 27 to 34 feet from the deputies when they fired, Reed, Shepherd, and Pair perceived him as being much closer to them. At the time Reed and Shepherd fired, they perceived him as coming within 7

to 10 feet. (Reed Dep., RE 89-4, PageID# 531-532; Shepherd Dep., RE 89-3, PageID# 493; Shepherd Declaration with attached BPSI Statement, RE 89-12, PageID# 821). Pair perceived him as coming within 15 feet. (Pair Dep., RE 89-6, PageID# 618-619).[5] Lane testified that he did not know how far away Studdard was from the other three deputies. (Lane Dep., RE 89-5, PageID# 569).

As Studdard approached them, Pair prepared to fire and was "pulling back on the trigger." (Pair Supp. Dep., RE 91-2, PageID# 876). Before Pair could pull his trigger, Reed and Shepherd fired. Reed testified, "When he came at me with the knife, yeah, that's when I decided to fire my pistol." (Reed Dep., RE 89-4, PageID# 532). "I saw the blade and I saw him coming toward me." (Reed Dep., RE 89-4, PageID# 538). Shepherd testified, "We let him get about seven to [ten] feet before we opened fire." (Shepherd Dep., RE 89-3, PageID# 493). Pair did not fire because, as he testified, "as soon as I heard them shoot, I let go" of the trigger. (Pair Supp. Dep., RE 91-2, PageID# 877). He explained that "his reaction time was a little bit slower than theirs." (Pair Supp. Dep., RE 91-2, PageID# 878). Although Lane testified that Studdard had originally had his back to the fence, (Lane Dep., RE 89-5, PageID# 564), he testified that, at the time he was

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[5] Shepherd also testified that she and the other deputies were trained on a 25-foot-rule. The deputies were trained "not to let someone in that 25 foot threshold who has a weapon, [whether] it's to their throat, out at us, or anything like that." (Shepherd Supp. Dep., RE 91-1, PageID# 848).

shot, Studdard was almost in the road or 3 to 5 feet away from it. (Lane Dep., RE 89-5, PageID# 572-73).

The whole encounter "happened fast." (Pair Supp. Dep., RE 91-2, PageID# 869). Shepherd estimated that the entire incident happened "in 30 seconds." (Shepherd Dep., RE 89-3, PageID# 498). Pair estimated that the volley of shots was fired in roughly one second. (Pair. Supp. Dep., RE 91-2, PageID# 877).

Reed fired first; then Shepherd fired. Studdard did not go down with the first shot. (Shepherd Dep., RE 89-3, PageID# 494). The deputies ceased fire when Studdard fell to the ground. (Lane Dep., RE 89-5, PageID# 585; Reed Dep., RE 89-4, PageID# 537). Reed testified that he "shot until the threat was over." (Reed Dep., RE 89-4, PageID# 536). "As soon as Mr. Studdard went to the ground, we stopped firing and holstered our weapons." (Shepherd Dep., RE 89-3, PageID# 495).

As soon as Studdard went down, Shepherd ran up to him and reached down to touch him; Reed stopped her and kicked the blade out of Studdard's hand first. (Shepherd Dep., RE 89-3, PageID# 496; Reed Dep., RE 89-4, PageID# 533). They then started giving Studdard medical aid. (Pair Supp. Dep., RE 91-2, PageID# 871). "I saw the blade; kicked it. And that's when we tried to – that's when we tried to rescue him." (Reed Dep., RE 89-4, PageID# 542). Shepherd was "talking to [Studdard] trying to get him to stay positive." (Shepherd Dep., RE 89-3, PageID# 497).

Lane called for an ambulance and Shepherd used a tampon to plug one of Studdard's wounds. (Lane Dep., RE 89-5, PageID# 574-75; Pair Supp. Dep., RE 91-2,

PageID# 873). Pair ran to his truck and got a t-shirt and a towel to stop the bleeding on Studdard's wrists. (Pair Supp. Dep., RE 91-2, PageID# 872-73). The deputies put pressure on the wounds to try to stop the bleeding until the ambulance arrived. (Lane Dep., RE 89-5, PageID# 575; Pair Supp. Dep., RE 91-2, PageID# 873). The ambulance took Studdard to the hospital while the deputies remained on the scene. Tragically, Mr. Studdard died on September 4, 2016. (*See* Amended Complaint, RE 33).

Procedural History

Plaintiff Angela Studdard brought suit as Edmond Studdard's next of kin, administrator *ad litem*, and personal representative against Shelby County, Erin Shepherd, and Terry Reed in state court, alleging violations of Mr. Studdard's Fourth Amendment rights under 42 U.S.C. § 1983. (*See* RE 1). The Defendants removed the case to the District Court, after which Plaintiff filed an Amended Complaint. (RE 33). Defendants filed an Answer, in which Reed and Shepherd asserted qualified immunity. (RE 38, PageID # 145). After the conclusion of discovery, Shelby County filed a Motion for Summary Judgment, as did Reed and Shepherd. (RE 89, 90). Reed and Shepherd again asserted that they were entitled to qualified immunity.

The District Court found that Reed and Shepherd were not entitled to qualified immunity.[6] (Order, RE 153). On the first prong (objective reasonableness), the

[6] The District Court granted summary judgment in favor of Shelby County on all of Plaintiff's claims against it, including failure to train. (Order, RE 153).

Court found that deputy Kyle Lane's uncertainty as to whether Studdard was walking created a dispute of fact. On the second prong (clearly established law), the District Court relied on a 2-to-1 out-of-circuit opinion, an unpublished Sixth Circuit decision, and two decisions with plainly distinguishable facts, (*Russo v. City of Cincinnati*, 953 F.2d 1036, 1040 (6th Cir. 1992) (establishing that officers may not shoot suspect who fell down and did not get back up), and *Robinson v. City of Memphis*, 340 F. Supp. 2d 864 (W.D. Tenn. 2004) (establishing that officer may not shoot suspect who is "naked and unarmed")), in ruling that Reed and Shepherd's actions were governed by clearly established law.

On appeal, in a five-page opinion, the Sixth Circuit affirmed the ruling of the District Court, but did not rely on any of the cases the District Court cited. Instead, the Sixth Circuit relied on a single opinion—*Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998)—to hold both that Reed and Shepherd's actions were objectively unreasonable and that their purported violation was clearly established. Reed and Shepherd timely submit this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Applied Fourth Amendment Law Too Broadly.

This case gives the Court the much-needed opportunity to again remind appellate courts not to define clearly established law too broadly in qualified immunity cases. To determine whether a right was clearly established at the time of an alleged violation, courts "look first to decisions of the Supreme Court, then to [their] own precedents, and then to decisions of other courts of appeal, and [ ] ask whether these precedents placed the constitutional question ***beyond debate***." *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013) (citation omitted, emphasis added). In this case, the Sixth Circuit relied on a single case—*Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998)—that governed a factual scenario distinct from the one Reed and Shepherd faced. *Sova* does not squarely govern the limits of acceptable force when officers are confronted with a knife-wielding suspect on open ground.

A plaintiff cannot satisfy his burden by alleging a violation of "extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *see City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures."). Instead, case precedent must make the "contours of the right . . . sufficiently clear that a reasonable official would understand that ***what he is doing*** violates that right." *Anderson*, 483 U.S. at 640

(emphasis added); *see White v. Pauly*, 137 S. Ct. 548, 552 (2017).

The Court recently elaborated once again on the clearly-established-right prong of qualified immunity in *D.C. v. Wesby*, 138 S. Ct. 577 (2018), where it reiterated: "It is not enough that the rule is ***suggested*** by then-existing precedent. The precedent must be clear enough that ***every reasonable official*** would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 589-90 (internal citations and quotation marks omitted, emphasis added). If the controlling case law does not meet this threshold at the time of the alleged violation, then the officer is entitled to qualified immunity. *See id.*

Here, the Sixth Circuit relied on a single case—*Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998)—to find that Reed and Shepherd's conduct made out a clearly-established violation. *Sova*, however, involved an entirely distinct factual situation in which the knife-wielding suspect was on the other side of a door frame, not out on open ground. At first glance, this distinction might seem minor, but in a life-and-death scenario, it is a significant variable.

Courts have repeatedly recognized that a person in the midst of a violent altercation is at a severe tactical disadvantage if they are on the other side of a doorway through which they must pass. *See, e.g.*, *Estate of Escobedo v. Martin*, 702 F.3d 388, 408 (7th Cir. 2012) ("[T]he doorway itself created a 'fatal funnel' through which each officer would have to pass while Escobedo could have shot them."); *accord. United States v. Roberts*, 824 F.3d 1145 (8th Cir. 2016) ("Rather than

stand in the open doorway as easy targets, the officers entered the apartment."). Courts have most often discussed this "fatal funnel" concept as it pertains to the danger doorways create to officers, *see Carroll v. Cty. of Monroe*, 712 F.3d 649, 652 (2d Cir. 2013), but the principle applies equally to suspects.

In *Sova* it was the ***suspect*** who was at the disadvantage, as he had to clear a doorway through which officers could cleanly direct their fire. The suspect could not pose as severe a danger to the officers unless and until he cleared that bottleneck. Thus, those defendant officers faced a less-volatile situation than if the suspect had been on open ground.

A suspect out on open ground presents a different scenario. He can move forward in much-less-predictable, hard-to-hit patterns (i.e. zig-zag). Moreover, with no objects between him and the officers, judging distance becomes that much more difficult. And perhaps most problematically, the suspect can position himself between the officers, at which point they may not be able to shoot at all for fear of striking each other, no matter how close he gets to them. Although *Sova* may seem superficially similar to the facts of this case, it is "***not enough*** that the rule is ***suggested*** by then-existing precedent." *Wesby*, 138 S. Ct. at 589-90 (emphasis added). Under this Court's qualified immunity framework, the scenario in *Sova* was not so on-point as to squarely govern the open-ground scenario Reed and Shepherd faced. Thus, Reed and Shepherd are entitled to qualified immunity.

The Sixth Circuit's unpublished opinion in *Stevens-Rucker v. City of Columbus, OH*, 739 F. App'x 834, 836

(6th Cir. 2018) (decided after the facts of this case), *cert. denied sub nom. Stevens-Rucker v. Frenz*, 139 S. Ct. 1291 (2019) supports Reed and Shepherd's qualified immunity defense. In *Stevens-Rucker*, the Court found that an officer was entitled to qualified immunity after shooting a suspect at 15 feet away, twice while the suspect was standing and twice after he fell to the ground. In the case at bar, the Sixth Circuit acknowledged *Stevens-Rucker* but attempted to distinguish the facts, stating that Reed and Shepherd "had better control over the surroundings here" than did the officers in *Stevens-Rucker*. *Studdard v. Shelby Cty., Tennessee*, 934 F.3d 478, 483 (6th Cir. 2019). With due respect to the court below, it is unclear how they had better control because Studdard was never on the ground prior to any shots being fired.

In essence, in light of *Stevens-Rucker*, the Sixth Circuit's holding here means that shooting a knife-wielding suspect lying on the ground at 15 feet is reasonable, but shooting a knife-wielding suspect who is standing and moving erratically at 34 feet is not. This ignores the different levels of danger a suspect presents in different physical postures and settings—standing versus lying down and out in the open versus behind a door frame. Reed and Shepherd faced a suspect who was standing and out in the open. *Sova* does not squarely govern the danger Studdard presented to Reed and Shepherd, and *Stevens-Rucker*, if anything, suggests that the shooting was reasonable and that Reed and Shepherd are entitled to qualified immunity.

2. A Witness's Lack of Knowledge, Alone, Does Not Create a Triable Issue of Fact.

Three deputies testified that Studdard was walking toward them when Reed and Shepherd fired; a fourth deputy testified that he did not know whether Studdard was walking. Lane consistently testified that he did not know or see whether Studdard was walking. Lane's testimony is best summarized by this exchange:

> Plaintiff's Attorney: You didn't see [Studdard] walking, did you?
>
> Lane: No, sir. ***I didn't see him <u>not</u> walking either.*** I was too busy focused on that knife that he had in his hand. I saw he was moving. ***I can't say for sure if he was walking or if he was swaying. He was moving.*** (Lane Dep., RE 89-5, PageID# 565) (emphasis added).

The District Court erred in ruling that a genuine dispute of material fact existed as to whether Studdard was walking based on Lane's uncertainty. (Order, RE 153, PageID# 2556).[7]

Although the Supreme Court has not squarely addressed the issue, circuit courts have recognized that lack of knowledge, alone, is insufficient to create a

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[7] At oral argument to the Sixth Circuit, there was questioning as to whether the Sixth Circuit had jurisdiction on interlocutory appeal over this question. Reed and Shepherd asserted that, under *Scott v. Harris*, 550 U.S. 372 (2007), review of this issue was proper. The Sixth Circuit effectively agreed it had jurisdiction, given that it decided the qualified immunity issue. *See Studdard*, 934 F.3d at 482.

genuine dispute of material fact. *See Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 263 (3d Cir. 2012) (noting that a lack of knowledge cannot create a genuine dispute of material fact where it is contradicted by reliable evidence); *Fed. Election Comm'n. v. Toledano*, 317 F.3d 939, 950 (9th Cir. 2002), *as amended on denial of reh'g* (Jan. 30, 2003) ("But failure to remember and lack of knowledge are not sufficient to create a genuine dispute."); *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 772-73 (6th Cir. 2004).

Deputy Lane's statements as to whether Studdard was walking do not create a genuine dispute of material fact. Lane testified that he did not see Studdard walking, that he does not know whether Studdard was walking because he was focused on Studdard's upper-body and the knife, and that Studdard may have been walking and was definitely moving. (Lane Declaration, RE 89-13, PageID# 826-32; Lane Dep., RE 89-5, PageID# 564-65, 580-81, 586). None of this is inconsistent with Pair, Shepherd, and Reed's unequivocal testimony that Studdard was walking toward them. (*See* Pair Dep., RE 89-6, PageID# 617; Shepherd Dep., RE 89-3, PageID# 493; Reed Dep., RE 89-4, PageID# 532, 538). Under *Scott*, this sort of misperception is not sufficient to create a genuine dispute of material fact. Finding that Lane's lack of knowledge created a genuine dispute of material fact was legal error.

3. Misperception of Distance is the Kind of Mistake of Fact Qualified Immunity Protects.

Reed and Shepherd perceived Studdard as coming at them with a knife at a distance of no more than 10 feet. Pair, who did not fire, perceived the distance as 15 feet. No witnesses on the scene testified that Studdard appeared to be farther away from Reed and Shepherd than that during the 30-second encounter. With the aid of 20/20 hindsight and a measuring tape, the Plaintiff's evidence suggests that Studdard may have actually been 34 feet away—9 feet greater than the 25-foot rule on which the deputies were trained. In other words, Reed and Shepherd (and Pair) made a mistake of fact as to the distance. Though the Court has not squarely resolved this issue, this was exactly the kind of mistake of fact qualified immunity is designed to protect.

Qualified immunity gives officers "ample room for mistaken judgments . . . ." *Malley v. Briggs*, 475 U.S. 335, 343 (1986). This is true whether the mistake is a mistake "of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). This 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, 743 (2011) (quoting *Malley*, 475 U.S. at 341).[8]

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[8] The qualified immunity doctrine is judicially created and, as this Court has described it, is "the best attainable accommodation of [the] competing values" of deterring the abuse of power by government officials and preventing suits against those officials which would have a distinct chilling effect on the ability of the

Courts analyze an officer's decision to use force "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, 396 (1989).

This case gives the Court the opportunity to clarify that an officer does not lose qualified immunity for failing to accurately perceive the facts before him. As the Court has already recognized, officers "can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution." *Saucier v. Katz*, 533 U.S. 194, 206 (2001); *see Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 365 (6th Cir. 2017) (the Fourth Amendment "does not require [officers] to perceive a situation accurately."). Lower courts have recognized that an officer does not lose qualified immunity by failing to distinguish between a suspect armed with a real gun rather than a bb gun or toy gun, *see Munroe v. City of Austin*, 300 F. Supp. 3d 915, 931 (W.D. Tex. 2018), or even by failing to perceive immediately that a suspect who was once armed has discarded his weapon. *See Mullins v. Cyranek*, 805 F.3d 760, 767-68 (6th Cir. 2015) ("While hindsight reveals that Mullins was no longer a threat when he was shot, we do not think it is

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officials to actually serve the public. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). Thus, an officer is entitled to qualified immunity even "if he made an objectively reasonable mistake as to the amount of force that was necessary under the circumstances with which he was faced." *Khother v. DeEulis*, 527 F. App'x 461, 465 (6th Cir. 2013) (citation omitted).

prudent to deny police officers qualified immunity in situations where they are faced with a threat of severe physical injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat.").

The Court has not resolved the question of whether an officer's misperception of distance between himself and an armed suspect can constitute a reasonable mistake of fact for qualified immunity purposes. However, members of the Court have recognized that such a mistake-of-fact defense should exist in other Fourth Amendment contexts. In *Groh v. Ramirez*, 540 U.S. 551 (2004), two dissenting justices analyzed the Fourth Amendment qualified immunity inquiry as follows:

> The central question is whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment. An officer might reach such a mistaken conclusion for several reasons. He may be unaware of existing law and how it should be applied. Alternatively, ***he may misunderstand important facts about the search and assess the legality of his conduct based on that misunderstanding.*** Finally, an officer may misunderstand elements of both the facts and the law. Our qualified immunity doctrine applies regardless of whether the officer's error is a mistake of law, a mistake of

> fact, or a mistake based on mixed questions of law and fact.

Id. at 566-67 (Kennedy, J. dissenting) (emphasis added, internal citations omitted).[9]

This approach should apply equally to situations in which officers in fast-paced, rapidly-evolving scenarios misjudge the distance between themselves and a suspect armed with a knife. Few courts have squarely addressed this scenario. One of the decisions most factually similar to this case is *Samuel v. City of Broken Arrow, Okla.*, No. 10-CV-683-GKF-TLW, 2011 WL 6029677, at *9 (N.D. Okla. Dec. 5, 2011), *aff'd*, 506

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[9] Fourth Circuit Judge Shedd's dissent in *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) is particularly on-point with regard to the Sixth Circuit's ruling here:

> Deputy Purnell attempted to do the right thing under the rapidly evolving and potentially dangerous circumstances he was in. However, because he made a mistake in his execution of an otherwise proper action, he . . . is potentially personally liable for monetary damages under § 1983. This does not accord with the practical construction which must be given to the Fourth Amendment. . . . Nonetheless, I believe that law enforcement officers should pay close attention to how today's opinion appears to change the law in this circuit. Henceforth, law enforcement officers are on notice that apparently . . . when an officer has made an honest mistake in the otherwise proper execution of his duties, this Court is content to equate that mistake with intentional misconduct of the worst sort and to permit a jury to do the same. For these reasons, I believe that the decision today represents a significant departure from the precedent of this Court and the Supreme Court. *Id.* at 552-53 (Shedd, J., dissenting) (citations omitted).

F. App'x 751 (10th Cir. 2012). Addressing the situation in which an officer subjectively mistook the distance between himself and the suspect, the Court reasoned:

> [The suspect] had the knife raised and pointed toward the officer, and he refused to drop the weapon despite two commands from the officer. Officer Garrett shot Mr. Samuel from what he perceived to be a distance of 10–15 feet but which for purposes of this motion was just under 28 feet. Distance alone does not establish as a matter of law that an officer's action in the use of deadly force is clearly prohibited. In short, the plaintiff has not demonstrated a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited. Even if the officer made a mistake as to what the law requires, the mistake was reasonable, and this court concludes the officer is entitled to qualified immunity on alternative grounds.

Id. at *9 (internal citations and quotation marks omitted). Officers should be entitled to qualified immunity if, during a fast-paced altercation with an armed suspect, they mistakenly (but honestly) perceive the distance between the suspect and themselves.

Here, Reed and Shepherd correctly perceived that Studdard was armed with a knife and covered in blood. However, with the benefit of 20/20 hindsight and a measuring tape, the evidence taken in the light most favorable to the Plaintiff suggests that they (and Pair) incorrectly perceived how far away Studdard was and that, based on that mistake of fact, they opened fire in

fear for their own lives. There is little dispute that, had the facts been as Reed and Shepherd perceived them, their actions would have been warranted. *See Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009). Thus, the only distinction is that they failed to accurately perceive the facts as known now. This is the kind of mistake that qualified immunity is designed to protect. Shepherd and Reed exercised reasonable, even if mistaken, judgment.

The Sixth Circuit also found that Studdard only threatened himself and not the deputies. *Studdard v. Shelby Cty., Tennessee*, 934 F.3d 478, 481 (6th Cir. 2019). This determination is exactly the kind of 20/20 hindsight analysis that qualified immunity protects against, and assumes that the deputies knew (as we know now) that the blood on Studdard was only his own, and not that of a victim. Further, it incorrectly assumes that a person can only threaten to harm himself or others, but not both simultaneously. And finally, it incorrectly suggests that a threat to the deputies had to be clear and verbal, and that implied physical threats (or perceived implied threats) were inconsequential. Reed and Shepherd perceived a rapidly-evolving, life-threating situation that unfolded in a matter of seconds. Despite their pleas with Studdard to drop the knife and their subsequent attempts to save his life, they were forced to make an on-the-spot decision. Their actions were reasonable, and for that reason they are entitled to qualified immunity.

CONCLUSION

The Court has previously issued summary reversals in qualified immunity cases like this one. *See Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017). This case warrants such action. Alternatively, Shepherd and Reed request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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